



A long road towards universal protection against enforced disappearance

An Vranckx *

Abstract

The approval of the International Convention for the Protection of all Persons from Enforced Disappearance, by the United Nations General Assembly in late December 2006, has been presented as a major achievement. This article explores roots and specifics of this Convention, and highlights its relevance and the impact it can be anticipated to have on the ground.

* An Vranckx is a researcher at the International Peace Information Service (IPIS) and teaches at the Universiteit Antwerpen and the Universiteit Gent. Sasha Radin from the Asser Institute commented and edited.

Introductory note

Natural disasters and armed conflict tend to trigger humanitarian action, to trace missing persons, re-establish contact and reunite families whose flight for safety tore them apart. Humanitarian organisations also help identify victims, and register and visit those taken prisoner, to avoid their disappearance.¹

Humanitarian action has been more difficult for a specific category of missing persons, that is, people who in situations of internal political tension and conflict, fall victim to practices described as follows: ‘Some men arrive. They force their way into a family’s house, rich or poor, house, hovel or hut, in a city or a village, anywhere. They come at any time of the day or night, usually in plain clothes, sometimes in uniform, always carrying weapons. Giving no reasons, producing no arrest warrant, frequently without saying who they are or on whose authority they are acting, they drag off one or more members of the family towards a car, using violence in the process if necessary’.²

Technically speaking, an enforced or involuntary disappearance occurs when ‘persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups, or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law’.³ Less formally speaking, enforced disappearances are detentions for which authorities deny responsibility and occult all information that could serve families to begin legal proceedings. Restriction of that information and the anonymity of the captors guarantee that enforced disappearances proceed in impunity.

International instruments to address ‘the issue of persons missing in connection with armed conflict or other situations of armed violence [...] and assistance to their families’ have been called for repeatedly in the past, and ultimately in the Agenda for Humanitarian Action, to which States committed themselves at the 2003 International Red Cross and Red Crescent Conference.⁴ These calls, in turn, were taken into account in the drafting of an International Convention for the Protection of all Persons from Enforced Disappearance, which reached completion under the chairpersonship of French ambassador Kessedjian in September 2005.⁵ In June 2006, this draft International Convention, consisting of 45 articles, was adopted by consensus at the

¹ ICRC, *The Missing – end the silence*, Geneva, ICRC, January 2003, 24 p.

² OFFICE OF THE HIGH COMMISSIONER OF HUMAN RIGHTS, *Fact Sheet N° 6 (Rev.2), Enforced or Involuntary Disappearances*.

³ As defined in the *Declaration on the Protection of All Persons from Enforced Disappearance*, proclaimed by the General Assembly in its Resolution 47/133 of 18 December 1992.

⁴ *Protecting Human Dignity – 28th International Conference of the Red Cross and Red Crescent. Geneva, 2-6 December 2003, Declaration - Agenda for Humanitarian Action – Resolution*.

⁵ The drafting process was completed in September 2005, cf. E/CN.4/2005/WG.22/WP.1.REV.4, 23/9/2005.

first session of the Human Rights Council. The Council then recommended that the General Assembly of the United Nations adopt the treaty.⁶

On 20 December 2006, the General Assembly's 61st session eventually and formally adopted the International Convention for the Protection of all Persons from Enforced Disappearance, and opened the way for signature, ratification and accession.⁷ This act was termed 'a major achievement.'⁸ France, the main sponsor of the draft of the treaty, hosts the ceremony where the Convention is opened for signature, on 6 February 2007.⁹

Parties can thereby pledge in all circumstances to protect all their subjects against enforced disappearance, take action to guarantee the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and provide compensation for (families of) victims. Each State Party should take appropriate measures to ensure that enforced disappearance constitutes a criminal offence under its criminal law, make the offence of enforced disappearance punishable by appropriate penalties that take into account its extreme seriousness, and effectively prosecute those found guilty of committing such a crime. Parties to the Convention, moreover, are to assist one another in investigating and prosecuting cross-border cases of enforced disappearance. Some cases can also be brought before international tribunals: 'The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law'.¹⁰

Trajectory of the offence

Modern history ascribes the invention of enforced disappearance to Adolph Hitler. Whereas Stalin and dictators before him locked away nationals in far-off camps without much of a law, Hitler's 1941 *Nacht und Nebel Erlass* provided quite openly for deportation of inhabitants of territories occupied by the Reich believed to endanger German security. The *Erlass*, moreover, explicitly restricted information about the deported. The remains of those who were deported would only be found after the end of the Second World War in, and around, concentration camps.

In the following decades, the Cold War had several Latin American regimes install extraordinary measures to contain political friction and insurgencies on their home fronts. Such measures tended to include unjustifiable excesses for removing political opponents. Large numbers of Latin American citizens were arrested and deported to clandestine centres of detention, where the detainees could not be visited, were likely

⁶ A/HRC/1/L.2, UNOG, *Human Rights Council Adopts Texts for Protection From Enforced Disappearance, Rights of Indigenous Peoples*. Geneva, 29/6/2006.

⁷ GA/SHC/3872, discussion at the 3rd Committee's 45th meeting (13/11/2006), final approval on 20/12/2006 at the plenary, 82nd meeting.

⁸ ICRC, *Enforced disappearance: UN convention "a major achievement" that brings new hope*. 20/12/2006, ICRC website.

⁹ 103 United Nations member states co-sponsored the text of the draft International Convention for the Protection of all Persons from Enforced Disappearance.

¹⁰ A/C.3/61/L.17.

to get tortured and unlikely to get out alive and tell. Their families and friends could only guess and fear the reason why, and the place where, they were being kept, and began to perceive their situation as one in which members of one's family, friends, or virtually everyone could disappear from society. The victims' families and friends, furthermore, could not fail to be aware that they too were threatened, that they might suffer the same fate themselves and that their search for the truth might expose them to even greater danger. Enforced disappearance of a limited number of individuals thus came to constitute an instrument to control society at large and repress all political opposition.

Haiti, Brazil and Guatemala pioneered the use of this repression instrument in the 1960s. Less than a decade later, enforced disappearance had spread out to the hemisphere's Southern cone. In Uruguay, Paraguay, Chile and Argentina, evidence accumulated that systematic use was being made of what local organisations called '*desaparición forzada*'. To accurately describe what was happening, the Spanish language had to conceive of an active interpretation of the verb to disappear as well, as in '*desaparecer a alguien*': to cause (someone) to disappear. This became a Latin American euphemism for 'arrest, deport, torture in clandestine detention centres and dump in a location where tortured remains are unlikely to ever to be found'. Since the mid 1960s, over 90,000 cases of enforced disappearance have been reported from Latin America, half of which were reported from Guatemala.¹¹

In the aftermath of Pinochet's take-over on 11 September 1973, more than 7000 people were rounded up and brought to the Chilean National Stadium.¹² Many were killed there right away. Their bodies were buried in unmarked graves, thrown in the Mapocho River, dropped in the ocean or dumped on the streets by night.¹³ More than a thousand people remain disappeared today. There is evidence that the Chilean Directorate of National Intelligence (DINA) tortured people at places such as the Villa Grimaldi and detention camp Tejas Verde, before disappearing them.¹⁴

The vast majority of the 3,453 reported cases of disappearance in Argentina occurred between 1975 and 1978 in the context of its campaign against left-wing guerrillas and their sympathizers.¹⁵ Enforced disappearance thus began even before the installation of the military junta government that ruled Argentina from 1976 to 1983. This regime arrested more than 30,000 people suspected of belonging to opposition groups, and tortured many of them in places such as the *Escuela de Mecánica de la Armada* (ESMA), in the centre of Buenos Aires.

¹¹ ASOCIACION DE FAMILIARES DETENIDOS-DESAPARECIDOS, *La práctica de la desaparición forzada de personas en Guatemala*, San José, 1988, 307p; Carlos FIGUEROA IBARRA, *Los que siempre estarán en ninguna parte : la desaparición forzada en Guatemala*. México D.F.: Grupo de Apoyo Mutuo – Centro Internacional para Investigaciones en Derechos Humanos, 1999, 228 p.

¹² *Report on the National Commission on Truth and Reconciliation* (a.k.a. Rettig Commission Report), 1990. English edition Indiana: University of Notre Dame Press, 1993.

¹³ Peter KORNBLUH, *The Pinochet File – A Declassified Dossier on Atrocity and Accountability*. New York & London, The New Press, 2003, 551 p.

¹⁴ *Ibid.*

¹⁵ Human Rights Internet (HRI), *For the Record 1998, Volume 4: Latin America and the Caribbean. Argentina: Thematic Report*. Other official sources take more than 13,000 people to have disappeared in Argentina during the last military junta era. Human rights groups maintain the number of disappeared is over 30,000.

Military juntas of extreme right-wing signature were not the only regimes to commit such excesses. Cases of enforced disappearance have also been reported from Latin American countries where the rule of law remained in place and politics went on to be played by the rules of the democratic game. In a different political category still is Sandinista Nicaragua, the regime that caused members of the Miskito ethnic minority to disappear.¹⁶

This last case set apart, enforced disappearance was practised in a generalized way by regimes that the United States at that Cold War time considered allies in its attempt to sanitize the hemisphere of communism. The extent to which United States authorities and agencies were aware of the crimes committed by the Guatemalan armed forces, can be surmised from declassified U.S. government documents and is evident in comprehensive studies that the National Security Archive has made available.¹⁷ It is no longer a secret, either, what information the United States disposed of about the atrocities committed by the Pinochet dictatorship that it helped install and consolidate. A large collection of declassified documents on US-Chile relations is presently available to the public and has been thoroughly analysed.¹⁸ These documents reveal that the Directorate General of Intelligence (DINA), which the Chilean junta created in all secrecy, was quite “known to U.S. intelligence. The CIA began collaborating with DINA soon after it was covertly created”.¹⁹ Lt. Col. Juan Manuel Contreras Sepúlveda, whom Pinochet handpicked as DINA-director even figured on the CIA payroll.²⁰

However close the correlation between Cold War reasoning and U.S. tolerance for human rights violations committed by ‘friendly regimes’ in its backyard, the American hemisphere does not hold the sad monopoly on enforced disappearances. To date, the largest number of unresolved cases of disappearance are from India, Iraq and Sri Lanka, followed by Argentina, Guatemala, Peru, El Salvador, Algeria, Colombia, Chile, Indonesia, Iran, the Philippines, Lebanon, Sudan, Mexico,²¹ the Russian Federation, Yemen, Honduras, Morocco, Ethiopia, Nicaragua and Turkey. Since the beginning of the new millennium, new cases of enforced disappearance have already been reported from Cameroon, Colombia, Nepal,²² Sri Lanka and Pakistan.²³

¹⁶ These acts were denounced in a case brought to the Fiscalía General de la República by the Comisión Permanente de Derechos Humanos, cf. *Ortega acusado de genocidio contra miskitos*, in El nuevo diario, 8/6/2006. Daniel Ortega publicly admitted these excesses in his campaign to get (re)elected president in 2006, when he asked the Miskito population’s pardon for his former government’s 1983 ‘operación Navidad Roja’ and promised larger autonomy for their communities.

¹⁷ E.g. the declassified document collection grouped as *El Ejército Guatemalteco: Lo que revelan los archivos de los Estados Unidos*, at www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB32/vol2.html.

¹⁸ Peter KORNBLUH, *The Pinochet File – A Declassified Dossier on Atrocity and Accountability*. New York & London, The New Press, 2003. Over 24,000 declassified U.S. government documents that are discussed in this study, are available from www.nsarchive.org.

¹⁹ *Ibid.*, p. 160.

²⁰ Evidence of these transactions are among the declassified documents that the National Security Archive made available on www.nsarchive.org.

²¹ The involvement of the Mexican state in the cases of enforced disappearance, that occurred from the mid 1960s to mid 1980s, was attested in the 800-page *Informe Histórico a la Sociedad Mexicana 2006* that special prosecutor Ignacio CARILLO PRIETO published on 18/11/2006 at the site of the Mexican Procuraduría General de la República, www.pgr.gob.mx. Additional information on that investigation has been made available in e.g. *Draft Report Documents 18 Years of 'Dirty War' in Mexico*, at www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB180/index.htm

²² HUMAN RIGHTS WATCH, *Disappearances by security forced in Nepal*. HRW Reports, 2005.

National and international community action against enforced disappearance

Seen from a global and longer-term perspective, the people who disappeared in Chile and Argentina in the mid 1970s represent but a small proportion of those who disappeared worldwide. The cases from Chile and Argentina, however, best known to the international community, through these victims' families' actions throughout the 1980s and 1990s and international advocacy work undertaken by a considerable number of their compatriots who were granted political asylum elsewhere. The disappearance of 18 Chileans in the course of the 1973 'Caravan of Death' is one of the few crimes of state that eventually gave rise to Supreme Court rulings against former dictator Augusto Pinochet and his enforcer in that particular operation, General Sergio Arellano Stark.²⁴ In the heart of Buenos Aires, the *Madres de la Plaza de Mayo* mounted protest marches every Thursday morning from 1979 until recently, demanding information about their children, husbands and grandchildren who disappeared during the junta era. Their organisation networks in federations that unite relatives of victims.²⁵ These federations have been demanding that states and intergovernmental organisations to provide international protection against enforced disappearances. The draft International Convention for the Protection of all Persons from Enforced Disappearance is a milestone in that advocacy process. Several human rights and humanitarian organizations actively advocated adoption of the draft at the last session of the Commission of Human Rights and the first of the Human Rights Council,²⁶ while a special salute was given to one of the Argentine *Madres de la Plaza de Mayo* attending the Human Rights Council session when it eventually adopted that instrument.²⁷

The Commission for Human Rights was the first United Nations organization to denounce cases of enforced disappearance. Such cases began to be reported after 11 September 1973, date of the military coup in Chile. At the time, the international community could but stand by and watch passively how people in Chile, and later in Argentina and elsewhere, fell victim to power abuse at the hands of their own state. It would take until 1979 for the General Assembly to devote attention to this

²³ AMNESTY INTERNATIONAL, 'War on terror' spawns new patterns of enforced disappearance, Press Release, 30/8/2006, AI Index: ASA 04/001/2006 (Public).

²⁴ The mutilated corpses of 75 other victims of that Caravan were discovered, and as such do not present cases of enforced disappearance.

²⁵ E.g. Federación Latinoamericana de Asociaciones de Familiares de Detenidos-Desaparecidos (FEDEFAM), www.desaparecidos.org/fedefam/eng.html

²⁶ As evidenced by Fédération internationale des ligues des droits de l'Homme (FIDH), *Position Paper for the United Nations Commission on Human Rights' 62th (and last) Session*, February 2006; FIDH, *NGOS call on Member States to adopt the Draft Convention of Enforced Disappearance*, 22/3/2006; *Statement by the International Committee of the Red Cross to the United Nations Human Rights Council, 27 June 2006, concerning the draft International Convention for the Protection of all Persons from Enforced Disappearance.*

²⁷ UNOG, *Human Rights Council Adopts Texts for Protection From Enforced Disappearance, Rights of Indigenous Peoples*. Genève, 29/6/2006.

phenomenon,²⁸ after which the Commission on Human Rights established a five-expert Working Group on Enforced or Involuntary Disappearances.²⁹

This Working Group was the first thematic mechanism set up within the framework of the United Nations Human Rights Programme to deal with specific violations of human rights of a particularly serious nature occurring on a global scale.³⁰ Its basic humanitarian mandate became defined as to assist the relatives of disappeared persons to ascertain the fate and whereabouts of their missing family members. For this purpose, it receives and examines reports of disappearances submitted by relatives of missing persons or human rights organizations acting on their behalf, and transmits these reports to the Governments concerned, requesting them to carry out investigations and inform the Working Group of the results. In this way, the Group has acted as a channel of communication between the families of missing persons and Governments, and has successfully developed a dialogue with the majority of these Governments. Since its inception, the Working Group has dealt with some 50,000 individual cases pertaining to more than 70 countries and contributed to the clarification of some of these cases.

The mechanism of the Working Group has also been recognized as a reflection of international concern and action and therefore has been seen as forming part of a long-term process leading to the elimination of major human rights violations.³¹ Its analysis established how the practice of enforced disappearance of persons infringes upon an entire range of human rights embodied in the Universal Declaration of Human Rights and set out in both International Covenants on Human Rights as well as in other major international human rights instruments. It also clarified how disappearances can involve serious violations of the Standard Minimum rules for the Treatment of Prisoners,³² as well as the Code of Conduct for Law Enforcement Officials and the Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment.³³ Last but not least, in the course of a disappearance, individual rights may be infringed upon such as the right to recognition as a person before the law, the right to liberty and security of the person, the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment, and the right to life.

The Working Group's analyses also brought into the spotlight the multiple rights that enforced disappearances violate in an indirect way, such as the right to a family life as well as various economic, social and cultural rights. As the persons subjected to enforced disappearances have tended to be the economic mainstay of their family, the latter have been left in socio-economic distress, preventing most rights enumerated in the International Covenant on Economic, social and Cultural rights to be realized. In cases where women become victim of an enforced disappearance, they have been seen to be particularly vulnerable to sexual and other forms of

²⁸ GA resolution 33/173 entitled "Disappeared persons".

²⁹ The Working Group was created by Commission resolution 20 (XXXVI) of 29/2/1980. Its mandate and terms of reference have been renewed by the Commission and approved by the Economic and Social Council each year (since 1986 done biennially and since 1992 on a three-yearly basis).

³⁰ OFFICE OF THE HIGH COMMISSIONER OF HUMAN RIGHTS, *Fact Sheet N° 6 (Rev.2), Enforced or Involuntary Disappearances*.

³¹ *Ibid.* Most of the next paragraph paraphrases this document.

³² These rules were approved by the United Nations Economic and Social Council in 1957.

³³ The instruments were adopted by the General Assembly in 1979 and 1988 respectively.

violence. Women, moreover, tend to be at the forefront of the struggle to resolve the disappearance of members of their family. In this capacity, they were often seen to suffer intimidation, persecution and reprisals. In its annual reports to the Commission of Human Rights, the Working Group consequently recommended that the Commission urge the Governments concerned to take steps to protect the families of disappeared persons against any intimidation to which they might be subjected. On concluding its July 2006 session in Geneva, nevertheless, the Working Group declared itself 'very disturbed' to learn of continuing difficulties faced by human rights defenders and relatives of the disappeared.³⁴

The multiplicity of individual rights that enforced disappearances violate are recognized in existing international law, as is the right of families to be informed about the fate of their missed relatives.³⁵ What makes enforced disappearances specific and notorious is the difficulty in ascertaining these violations. Material traces of torture and of the violated right to freedom are as difficult to produce as is the disappeared victim whose rights were violated. The anonymity of the orders to disappear people, moreover, makes it difficult to formally accuse and condemn those responsible. As such, legal protection against enforced disappearance was seen to require the recognition of a specific human right, 'not to be subjected to enforced disappearance'.

In 1992, the Working Group on Enforced or Involuntary Disappearances inspired the United Nations General Assembly Declaration on the Protection of all Persons for Enforced Disappearance.³⁶ The formulation of that document, in turn, had been inspired by an Organization of American States (OAS) Draft Convention that was eventually adopted at Belem do Para, Brazil, on 9 June 1994.³⁷ This Inter-American Convention on Forced Disappearance of Persons entered into force on 3 March 1996.³⁸ Many of its 22 articles prefigure the universal instrument on enforced disappearance, but the Inter-American Convention on Forced Disappearance of Persons is specific, in that for the purposes of this Convention, 'the processing of petitions or communications presented to the Inter-American Commission on Human Rights alleging the forced disappearance of persons shall be subject to the procedures established in the American Convention on Human rights and the Statute and rules of Procedure of the Inter-American Court of Human Rights, including the provision on precautionary measures'.³⁹

The principle as such, that particular cases of enforced disappearance can be brought before an international tribunal, has been maintained in the wording of the International Convention that the Human Rights Council adopted in June 2006: 'The

³⁴ WGEID, *UN Working Group on Forced or Involuntary Disappearances concludes session in Geneva*, United Nations Press Release, 29/7/2006.

³⁵ Recognized in Art. 32 of the *First Additional Protocol* of 1977.

³⁶ *General Assembly Resolution 47/133*, of 19/12/1992.

³⁷ Reed BRODY, *Commentary on the Draft UN "Declaration on the Protection of All Persons from Enforced or Involuntary Disappearances"*, in *Netherlands Quarterly of Human Rights*, Vol 8 (1990), No. 4, pp 381-394 + appendices pp 444-451.

³⁸ Among the American States that have ratified this Inter-American Convention are several where enforced disappearance happened in the past, such as Argentina, Bolivia, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela. Chile signed the Convention as early as 1994 but has failed to ratify it thus far.

³⁹ Article XIII, *Inter-American Convention on Forced Disappearance of Persons*.

widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law'.⁴⁰ The exceptionality of cases where international criminal law applies, however, implies that the large majority of cases be brought before national courts: 'The State Party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution'.⁴¹ Moreover, 'For the purposes of extradition between States Parties, the offence of forced disappearance shall not be regarded as a political offence (...) Accordingly, a request for extradition based on such an offence may not be refused only on these grounds (...) If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the necessary legal basis for extradition in respect of the offence of enforced disappearance'.⁴² Articles 14 and 15 urge Parties to afford one another the greatest measure of mutual legal assistance: in criminal proceedings with respect to an offence of enforced disappearance, to victims of enforced disappearance, in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains, respectively. A 10-expert Committee on Forced Disappearances is established to ensure Parties comply with their obligations under the Convention.⁴³

Non-state perpetrators

The Inter-American Convention on Forced Disappearance of Persons and the General Assembly Declaration on the Protection of all Persons from Enforced Disappearance coincide in the description of perpetrators to be held accountable for the offence. Both instruments explicitly refer to perpetrators as 'officials of different branches or levels of Government, (...) organized groups, or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government'.⁴⁴ Similarly, the Working Group on Enforced or Involuntary Disappearances would not consider cases of abductions that are not directly or indirectly attributable to a state agency. It would therefore not process individual cases of disappearances perpetrated by irregular or insurgent groups fighting a government on its own territory.⁴⁵

In the drafting process of the International Convention, delegations were reported to believe the instrument should, in the first place, refer to agents of the state and

⁴⁰ *International Convention for the Protection of all Persons from Enforced Disappearance*, E/CN.4/WG.1/Rev.4 of 23 September 2005, Article 5.

⁴¹ *Ibid.*, Article 11.

⁴² *International Convention for the Protection of all Persons from Enforced Disappearance*, Article 13.

⁴³ *Ibid.* Articles 26 - 35 specify the Committee's quality, composition and mandate.

⁴⁴ *Declaration on the Protection of All Persons from Enforced Disappearance*, proclaimed by the General Assembly in its Resolution 47/133 of 18 December 1992.

⁴⁵ OFFICE OF THE HIGH COMMISSIONER OF HUMAN RIGHTS, *Fact Sheet N° 6 (Rev.2), Enforced or Involuntary Disappearances*.

related persons, even if some delegations thought it would be worth examining the role and situations of persons commonly called 'non-state actors' as well.⁴⁶ The Russian delegation insisted that non-state actors such as terrorists, insurgent military forces and the like, be treated on an equal footing with state actors within the scheme of the instrument, and that consequently non-state actors with no connection of any kind to the state apparatus be included in the definition of enforced disappearance.⁴⁷ Quite by contrast, states from Central and South America with a particular history of enforced disappearances, and NGOs representing the families of the disappeared, opposed any reference whatsoever to non-state actors in the instrument. They argued that, enforced disappearances carried out by, or with the acquiescence of the state, is a distinct offence requiring specific measures.⁴⁸

The compromise reached in the draft International Convention the Human Rights Council adopted in June 2006, still gave the representative of Sri Lanka reasons to deplore 'a lacuna in the text, as non-state actors that were involved in mass violations of human rights were excluded'.⁴⁹ Similarly, when the General Assembly eventually discussed the text of the Convention, the representative of the Philippines stated that she 'would have preferred the Convention to reflect the reality that a significant portion of enforced disappearances were committed by non-State groups'.⁵⁰

In the adopted text of the Convention, article 2 is explicit in that 'For the purpose of this Convention, forced disappearance is considered to be the arrest, detention, abduction or any form of deprivation of liberty committed by agents of the State or by persons or groups acting with the authorization, support, or acquiescence of the State'.⁵¹ A separate article does recommend action in cases of enforced disappearance that can only be ascribed to non-state actors: 'Each State Party shall take appropriate measures to investigate acts as defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice'.⁵²

Whether a State Party is under the obligation to do more than merely 'investigate' an offence of enforced disappearance, is made contingent on the extent to which the alleged perpetrator operates with the authorization, support, or acquiescence of the state on whose territory it operates. Establishing the link between the state and a perpetrator is notoriously difficult as non-state groups rarely lead a static existence. The relation that such a group maintains with the state tends to evolve over time, as in the case of death squads. Evidence documented, over long periods of time and from many countries, indicates that such non-state organizations tend to begin committing enforced disappearances on the instigation of a regular state security

⁴⁶ COMMISSION ON HUMAN RIGHTS, *Inter-sessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance* – first session, Geneva, 6-17 January 2003.

⁴⁷ UN WORKING GROUP *on a draft legally binding normative instrument for the protection of all persons from forced disappearances*. Fourth Session, 31 January to 11 February 2005, Geneva.

⁴⁸ *Ibid.*

⁴⁹ UNOG, *Human Rights Council Adopts Texts for Protection From Enforced Disappearance, Rights of Indigenous Peoples*. Genève, 29/6/2006.

⁵⁰ GENERAL ASSEMBLY, *3rd Committee approves draft resolution concerning Convention for the Protection of all Persons from Enforced Disappearance*, GA/SHC/3872, 13/11/2006.

⁵¹ *International Convention for the Protection of all Persons from Enforced Disappearance*, Article 2.

⁵² *Ibid.*, Article 3.

entity, only to proceed and eventually move entirely out of control of the state that originally authorized, supported or acquiesced that organization.⁵³

Victims of non-state perpetrators suffer in quite the same way as do victims of enforced disappearances in the restrictive definition of the draft International Convention's article 2 and a similar article defining the scope of the Inter-American Convention. Nevertheless, these instruments differentiate substantially between such victims, with respect to the level of assistance that states are obliged to provide. State obligations to assisting and compensating (families of) victims are contingent on the ties that can – at a given time - be established between the state and the perpetrators. Victims of perpetrators that are not or no longer under control of the state, are unlikely to be assisted and compensated by that state in the same way as that state would consider itself obliged to do were the perpetrators to be linked to that state. Non-state perpetrators who reside outside the country where the offences were committed, are less likely to get prosecuted effectively, as the government of the country where these perpetrators reside may not be forthcoming in providing legal assistance. Articles 14 and 15 oblige all states to mutual legal assistance, but only for offences ascribed to perpetrators entirely within the definition of article 2. Foreign governments may even consider the acts perpetrated elsewhere by resident non-state actors as politically inspired offences, which are no ground for extradition. Consequently, victims of exiled non-state perpetrators are less assured that justice can be sought.

Putting the tools to a test

As the Convention is still to enter into force, it is too early to determine whether or not and to what extent it induces state parties to discriminate between victims of a similar suffering. Policies and practices to implement the Convention's provisions can be anticipated nevertheless, on the basis of what is actually being done in countries that already ratified the legally binding Inter-American Convention on Forced Disappearance of Persons.

Colombia presents an interesting case to assess implementation of obligations that the draft International Convention could come to provide if it were to enter into force. Not only has Colombia fully ratified the afore-mentioned Inter-American Convention, the country also has a history of enforced disappearance by both state and non-state perpetrators, and by actors that have considerably shifted their position on the line of state involvement: 'Initially, the Colombian State had undeniably played a significant role in promoting the formation, organization, training and arming of paramilitary or self-defence groups, intending to use them as a counter-force to help in combating armed revolutionary movements. Currently, however, the Government alleges that there exist no links between the State or State authorities and the paramilitary groups; and that the official policy treats both the paramilitaries and guerrillas as "illegal armed groups",⁵⁴ that is, non-state actors.

⁵³ Trajectories of death squads that have operated in the course of time in many different countries have been reconstructed by Bruce CAMPBELL & Arthur BRENNER, (eds.), *Death Squads in Global Perspective. Murder with Deniability*, London: MacMillan Press, 2000, 364p.

⁵⁴ *Report of the Working Group on Enforced and Involuntary Disappearances. Addendum: Mission to Colombia*. E/CN.4.2006/56 Add. 1, 35 p.

In its report of 2006, cited above, the UN Working Group on Enforced and Involuntary Disappearance recorded evidence that disappearances ‘continued, remained constant or may have increased since 1996. In the majority of cases reported to the Working Group it is paramilitaries, acting allegedly with the acquiescence of certain elements within the state military and security forces that have been singled out and held primarily responsible for the occurrences’.⁵⁵ The Working Group also referred to a document of its own making from 2004, in which Colombia is ‘estimated to have a total of 895 or so outstanding cases from over the 1150 cases reported since 1981’.⁵⁶ The Colombian association of families of disappeared people listed a larger number of unresolved cases in its own nation-wide statistics covering that same period.⁵⁷ By the end of 2006, Colombian governmental authorities estimated that almost 3000 registered cases remained unresolved of people assumed to have been killed and disappeared by the paramilitary self-defence groups.⁵⁸ Other sources within the Colombian authorities have been reported as claiming that in the small department of Cundinamarca alone, some 9000 citizens may have disappeared in the relatively short period 1998-2003.⁵⁹

‘Fear of reprisals, illiteracy, submissiveness to fatalism’, and other factors still are assumed to explain why the large majority of the cases remain underreported to the proper authorities and the Working Group.⁶⁰ A second explanation is that the different sources define enforced disappearances differently. Colombian law does not strictly reserve the term ‘enforced disappearance’ to acts ascribed to perpetrators that act with the authorization, support or acquiescence of the state, as defined in the Inter-American Convention on Forced Disappearance of Persons. Colombia signed that Inter-American Convention in 1994. The country only deposited ratification in 2005, after its Congress approved that Inter-American Convention by means of Law 707 of 2001. By that time, the obligations of the Convention had already been incorporated in the national criminal law through *Ley 589* (2000). This Colombian Law 589 of 2000, includes a criminal definition of enforced disappearance in the criminal legal framework of the country, and incorporates that definition and other provisions regarding enforced disappearance into the Criminal Code. The UN Working Group recognized these legal provisions have several positive aspects in light of the Declaration on the Protection of all Persons from Enforced Disappearance. The Working Group, however, deplored that by the time of its visit to the country, Colombia had prosecuted in 179 cases of enforced disappearance relating to ‘perpetrators who are not reported to belong to a government entity’.⁶¹ The Working Group explains its discomfort about this state of affairs as follows: ‘Although the inclusion of non-State actors acting without the support or consent of the government may at first glance look like an advancement of the law [...] it is the opinion of the Working Group that enforced disappearance is a ‘State crime’ (as opposed to

⁵⁵ *Ibid.*, p. 10.

⁵⁶ *The reference document is Report of the Working Group on Enforced and Involuntary Disappearances*. E/CN.4.2005/65, published 23 December 2004.

⁵⁷ ASOCIACION DE FAMILIARES DE DETENIDOS - DESAPARECIDOS, *Cuadro Estadístico de detenciones – desapariciones forzadas por años*, Bogotá, 2004.

⁵⁸ *En el país de las Fosas*, in *El Tiempo*, 21/11/2006 (Editorial).

⁵⁹ *Cifra de desaparecidos en Cundinamarca asciende a 9000 personas, entre 1998 y 2003*, in *El Tiempo*, 3/7/2006.

⁶⁰ *Report of the Working Group on Enforced and Involuntary Disappearances*. *op.cit.*, 2006, p.18.

⁶¹ *Ibid.*, p. 13, § 40.

kidnapping) [... that] resists accepting the official Colombian attitude to 'disappearances', linking the definition of the phenomenon to or even equating it with 'kidnappings'. To accept this definition would amount to diluting or even ousting State responsibility for acts of 'disappearances'.⁶²

The assumption that in actively prosecuting non-state perpetrators, Colombia lets perpetrators within the Convention's more restrictive definition off the hook was dispelled in August 2006, when the Colombian Prosecutor reopened a case on facts that had occurred 21 years earlier. This court action was motivated by a Truth Commission, which the Colombian *Corte Suprema de Justicia* established in November 2005 to investigate what had really happened on 6 and 7 November 1985.⁶³ On that date, the police and the army stormed the Bogotá Palace of Justice that, in its turn, had been beleaguered by the M-19 guerrilla movement. Over a hundred people died in the crossfire and the flames when the Palace burnt down. Of the approximately 140 others who were rescued from the building, several were taken to military installations, allegedly for interrogation on suspicion of being guerrilla infiltrators. Two students that had been in this group, were tortured and abused at the *Cantón Norte del Ejército*, and lived to tell. At least 10 other people were brought to the army's *Escuela de Caballería*, where they were never registered and from which none of them ever returned. DNA-tested human remains recovered from mass graves south of Bogotá later allowed identification of a few of them. One of the disappeared, Irma Franca, had effectively belonged to the M-19 guerrilla movement. Newspaper photographs clearly showed that she had left the Palace of Justice alive. She was recognized by the authorities, who later disappeared her. For that particular case of enforced disappearance the Colombian state was formally condemned ("La justicia contencioso administrativo condenó a la Nación")⁶⁴ and was even made to compensate the family of guerrillera Irma Franca 'por los prejuicios morales sufridos'.⁶⁵ Paradoxically, the disappearance of the others, all civilians, did not lead to a similar action. Their disappearance was neither admitted nor seriously investigated, until the Truth Commission set out to work. Before the publication of its preliminary report, sufficient evidence had already become available to open proceedings against generals and intelligence officers that were held responsible for the enforced disappearance of at least 10 civilians in the chaotic aftermath of the violent retake of the Palace of Justice.⁶⁶

Even if it took 21 years for this high profile case to get underway, exemplary significance is attributed to the fact that Colombians generals and other high officers are presently being accused for having caused enforced disappearances.⁶⁷ These proceedings add up to at least 84 other cases of enforced disappearance that have been opened since 2001 where prosecuted perpetrators conform entirely to the

⁶² *Ibid.*, p. 14, § 48-49.

⁶³ Comisión de la Verdad sobre el holocausto del Palacio de Justicia de Bogotá del 6 y 7 de noviembre 1985. *Informe preliminar*, Bogotá, 15/11/2006, 57 p.

⁶⁴ *Ibid.*, p. 36.

⁶⁵ *Ibid.*, p. 34.

⁶⁶ *Generales al banquillo - Cúpula militar que ordenó retoma del Palacio de Justicia podría ser acusado por desapariciones de 10 personas*, in *Revista Cambio*, 2/9/2006; *Fiscalía llamó a declarar a 3 generales por el caso de los desaparecidos del Palacio de Justicia*, in *El Tiempo*, 10/10/2006; *Nuevo video impulsó orden para capturar a coronel por desaparición*, in *El Tiempo*, 16/11/2006.

⁶⁷ *Holocaustos y verdades*, in *El Tiempo*, 17/11/2006 (editorial).

definition of the Inter-American and International Conventions, that is perpetrators acting with at the least acquiescence of the state.⁶⁸

The Colombian *Comisión Nacional de Búsqueda de Personas Desaparecidas*, or 'National Commission to Search for Disappeared Persons', meanwhile, has become established as a national and permanent institution that is to trace all disappeared Colombians. It does not distinguish whether these disappeared persons fell victim to non-state actors or to perpetrators that conform to the restrictive definition of the U.N. Declaration and the Inter-American Convention on Enforced disappearance of Persons. Search actions by the *Comisión Nacional de Búsqueda de Personas Desaparecidas* can include victims kidnapped by guerrilla and common organized crime groups as well. Some kidnap situations, after all, can resemble enforced disappearances: Kidnappers do not always manage to establish contact with the families of their victim, and even if these do establish contact, little guarantees that a conclusive ransom agreement is reached that leads to the liberation of the kidnap victim. In such cases, the victim's families remain uninformed of the whereabouts of their beloved, a fate similar to that of families of victims of enforced disappearance. The remains of kidnap victims who die in captivity are not usually returned to their families, and rarely ever without additional payment. In response to such situations, families of deceased kidnap victims have been seen to organize search groups acting upon information on the location of mass graves, as a side-activity of the successful kidnap-related radio programme *Las Voces del Secuestro*.⁶⁹ Searches of that type have now become incorporated in the mandate of the National Search Commission.

All victims can likewise report to and count on the assistance of the Colombian National Reconciliation Commission (CNRR). The mandate of that Commission is to investigate the facts perpetrated in at least 42 years of guerrilla warfare and 26 years of crimes perpetrated by death squads and similar groups claiming to defend themselves against that guerrilla group and thereby further undermined the Colombian state's monopoly on the legal use of violence.⁷⁰ That mandate was given to the Commission in 2005, in the mark of the *Ley de Justicia y Paz*.

This particular Justice and Peace Law, Ley 975 (2005), however, has presented yet another matter of concern to the Working Group on Enforced and Involuntary Disappearances. This concern comes to the fore in the context of legal mechanisms that succeeding Colombian governments have been establishing since 1997 to advance talks and negotiations with illegal armed groups. These mechanisms allowed the government to grant the benefit of pardon to Colombian nationals sentenced for the commission of political offences, or to individuals who voluntarily abandon their activities as members of armed groups and request such benefit having demonstrated, to the satisfaction of the Government, their willingness to be reinserted into civilian life. Such benefits would not be applicable to persons having

⁶⁸ Working Group on Enforced and Involuntary Disappearance, *op.cit*, E/CN.4.2006/56, p. 12.

⁶⁹ *Kidnapping, Another Terrorist Weapon – The forgotten case of Colombia*. Bogotá, Verdad Colombia & Foundation for Analysis and Social Studies, 2005, 44 p. At the European launch of this report, journalist Herbin Hoyos mentioned these searches being undertaken by groups of volunteers, cf. www.lasvocesdelsecuestro.com

⁷⁰ *Se abre paso Comisión Histórica para esclarecer la verdad del conflicto en Colombia*, in *El Tiempo*, 9/9/2006.

committed 'atrocious acts of ferocity or barbarity, terrorism, kidnapping, genocide, homicide committed outside combat, or placing the victim in a defenceless position. Enforced disappearances would clearly fall within the described exception'.⁷¹

Law 975 of 2005, in its turn, provides for 'mitigation of sentences for persons who might have been indicted, accused or condemned as a result of any criminal offence committed during, and as a result of, their participation in armed illegal groups, and who might not have been eligible to obtain benefits from [the mechanisms discussed] above'.⁷² In the understanding of the Working Group, that the Justice and Peace Law of 2005 'could benefit perpetrators of enforced disappearances, when demobilizing either collectively or individually. [In response to the latter understanding,] the Colombian Minister of the Interior and of Justice adamantly stated that such individuals would not be subject to the benefits provided for in the Justice and Peace Law'.⁷³ The Working Group for its part remained concerned in that 'the reports of every organization of families of victims of enforced disappearance with whom the members of the Working Group held meetings assumed that that several leaders and other members of the paramilitary groups potentially eligible under the relevant [Justice and Peace] Law were liable for enforced disappearance committed with the direct or indirect involvement or acquiescence of governmental officers, particularly members of the police and or the Armed forces'.⁷⁴ Additional concern was formulated about the fact that the Colombian Justice and Peace Law contradicts the requirements of the UN Declaration because it provides for a substantial reduction of penalties. Apparently, and notwithstanding the assurance to the contrary vowed by the Colombian Minister of Justice, the UN Working Group expects this reduction is 'applicable to the commission of enforced disappearances (...) Under the amendments to the Criminal Code introduced under Law 589, the penalty provided for those convicted of enforced disappearance is 25 tot 40 years of imprisonment, while the Justice and Peace Law allows for alternative punishment of 5 to 8 years (...). This reduction of the penalty can only be granted if the eligibility conditions provided for in the case of collective or individual demobilization are met. Article 4.2. of the Declaration provides that 'mitigating circumstances may be established in national legislation for persons who, having participated in enforced disappearances, are instrumental in bringing victims forward alive or in providing voluntarily information which would contribute to clarifying cases of enforced disappearance'. Article 10 of the Justice and Peace Law (...) does not require the supply of information by members of the armed group which would contribute to clarification in cases where the disappeared person might have been executed or otherwise under the control of other groups or persons'.⁷⁵

These concerns make it most relevant to determine the steps that are being taken in Colombia today. It is especially important to assess the effects that are generated by the enactment of the laws that seek to reconcile Colombian society. These laws seek to reconcile mutually incommensurable principles, such as prosecution of all offenders, non-discrimination in assisting and doing justice to all sorts of victims, and

⁷¹ Working Group on Enforced and Involuntary Disappearance, *op.cit.*, E/CN.4.2006/56, p. 18.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*, pp. 18-19.

clarification of the facts – including cases of enforced disappearances, and justice to all groups of victims.

In this endeavour, the much-criticized Peace and Justice Law is actually seen to cause a breakthrough. Its alleged ‘lack of explicitness on the value of information that can clarify cases where disappeared persons might have been executed or otherwise been put under the control of armed groups’, has not failed to give an incentive to confess such crimes. Detained members of several armed groups, as well as members of those groups whose legal situation is presently being clarified under the Justice and Peace regime, are providing new information on burial sites of the victims that their group disappeared. Throughout the year 2006, these confessions brought about an unprecedented amount of macabre discoveries, enabling clarification of hundreds of cases this far.⁷⁶ The amount of clandestine burial sites where Colombian paramilitary death squads buried the remains of the victims they disappeared, and which are presently being unearthed all over the country, leaves no doubt that these victims outnumber those who disappeared in Chile during the entire Pinochet era of state-sponsored atrocities. As summarized in the words of Colombian *Fiscal General* Mario Iguarán, “En número, hemos encontrado más fosas comunes con víctimas de los para que las que hubo en Chile durante la dictadura militar de Augusto Pinochet”.⁷⁷

Paramilitary death squads are not the only type of non-state perpetrators that the Colombian civil population had to endure in the past few decades. Some of the burial sites that were located on information former members of guerrilla organisations provided under the same *Justicia y Paz* incentives, revealed that these guerrilla organisations disappeared more victims than had been assumed thus far. Exhumation of clandestine sites has also revealed that as recently as 2000-2001 at least one *frente* of the FARC-guerrilla filled mass graves with minors and older victims alike.⁷⁸

A coming post-disappearance era?

A long road remains to be covered before all cases of enforced disappearance of the past will be clarified, their victims (and families) assisted and compensated, and all perpetrators prosecuted. The above paragraphs have indicated what progress is being made along that road, where have been established instruments such as the Inter-American Convention that begin to see implementation in Latin America. One would hope for the day these labours can come to an end and an era can begin when enforced disappearance is an offence of the past.

⁷⁶ *Hallan 5 fosas y 40 restos, tras confesiones de ‘paras’ que buscan beneficios de ley*, in *El Tiempo*, 18/6/2006; *Trasteo de cadáveres*, in *Cambio*, 9/7/2006; *14 Bodies found in a Colombian Mass Grave*, in *The Chicago Tribune*, 4/9/2006; *Las víctimas de Antioquia ponen su esperanza en excavación de 114 fosas*, in *El Tiempo*, 10/9/2006; *12 cuerpos fueron hallados en fosas comunes descubiertas en la Sierra Nevada de Santa Marta*, in *El Tiempo*, 23/9/2006; *DAS y CTI encuentran fosas comunes en zona rural de Buenaventura*, in *DAS Boletines de prensa*, 4/9/2006; *DAS hallan fosas comunes en Magdalena*, in *ibid.*, 23/12/2006.

⁷⁷ *Proceso – La estrategia de Mancuso*, in *Semana* 20/12/2006.

⁷⁸ *DAS encuentra fosa común en el municipio de Tibucuy, Cundinamarca*, in *DAS Boletines de prensa*, 25/8/2006.

In spite of the international community's efforts, the expectation to engender universal protection against enforced disappearance is not about to be realised. Its ambition is even belied by practices recently attributed to the nation that has tended to present itself as a beacon of liberties and human rights. In its current War on Terror, the United States have been seen to instigate the disappearance of people believed to endanger 'American lives and values', quite like in the Cold War era, certain friendly regimes were tolerated and possibly encouraged to disappear those who threatened to bring the American hemisphere under communist influence.

Compared to what today is publicly known about that Cold War era, the United States military and especially its Central Intelligence Agency (CIA) are currently more actively involved in placing 'out of harm's way those that threaten American lives'. As of the end of 2001, they have been identifying and locating 'terrorism suspects' in virtually every corner of the globe, where local security forces assisted in arresting these suspects. Some of them have actually been abducted in broad daylight, in cities such as Milan.⁷⁹ Once taken into proper custody, the suspects became subject to a procedure that conforms to the definition of enforced disappearance in the United Nations Declaration and the Conventions.⁸⁰ The detainees were not properly registered, nor were they detained in official prisons. They were not allowed to contact relatives, who in some cases were left entirely without notice of the detainees whereabouts for as long as the American authorities deemed it necessary to keep them 'out of harm's way' and interrogate them on matters crucial for winning the War on Terrorism and/or 'help save American lives'. To that end, these suspects were flown around the globe by way of what is now commonly described as 'extraordinary rendition'.

Analysis of flight data has revealed how private business jets such as a Gulfstream, leased to or owned by the CIA, were used to transport these unregistered detainees.⁸¹ These 'ghost' planes eventually brought the terrorism suspects to clandestine wings of centres of detention in Afghanistan, Iraq, Syria, Jordan, Uzbekistan, Egypt, Morocco, Libya and possibly other countries as well. There, Arab-speaking interrogators were set to work on the detainees, in some cases with lethal outcomes. These interrogation facilities constitute a network of overseas centres of detention, not all of which have remained equally undisclosed to the general public. Guantanamo Bay, for instance, serves as an official centre of detention for terrorism suspects. There is evidence that quite a few of the suspects held at Guantanamo at some time previously 'passed through' the more clandestine overseas centres of detention.

These locations and mode of interrogation would not appear to have been chosen on the ground of the involved regimes' human rights record, as these are among the most notorious for torturing prisoners. As such, however, they have appeared firm in

⁷⁹ Cf. *infra*.

⁸⁰ Reed BRODY, *Prisoners Who Disappear – Ghost Detainees of the United States*, in The International Herald Tribune, 12/10/2004; Reed BRODY, *The US's "disappeared" – The CIA's long term Ghost Detainees*, Human Rights Watch Briefing Paper, October 2004, 46 p; Steven GREY & Sarah BAXTER, *Dozens of terror suspects still being held in unknown locations*, in The Sunday Times, 10/9/2006.

⁸¹ Especially revealing is the book published by British investigative journalist Stephen GREY, *Ghost Plane – The Inside Story of the CIA's Secret Rendition Programme*, C. Hurst & Co & St. Martin's Press, 2006, 306p.

their respective stands against local Muslim terrorist organisations. The United States therefore takes these regimes for allies in today's global War on Terror, to be trusted around suspects that are put into their local custody.

The practice of keeping terror suspects in these overseas clandestine centres of detention, where their harsh interrogation is subcontracted to local security services, has this far avoided liability for United States personnel committing torture. The latter, however, has had reasons to raise doubt on some of the information 'extracted' from these detainees.

While the quality of 'intelligence to win the War on Terror' is not guaranteed, its cost has already proven high. The United States' Administration is being increasingly heavily criticized for tolerating, and even ordering, the abduction and subsequent disappearance of Muslim residents and citizens of Canada and European countries. An exemplary case was recognized in the abduction of Canadian national Maher Arar, who was rushed off to Syria in October 2002, where he was tortured for almost a year.⁸² The legal proceedings that Mr. Arar began after his liberation, gave rise to an in depth investigation by a Canadian commission, which concluded in harsh condemnation in 2006.⁸³ Italian prosecutors, for their part, built a case against 39 people, including 25 CIA operatives and almost as many Italian nationals, for the abduction of Hassan Mustafa Osama Nasr, a.k.a. Abu Omar.⁸⁴ This Egyptian national was abducted in Milan and subsequently 'sent for questioning' to Egypt where he was allegedly tortured for 7 months.⁸⁵ Proceedings have also been launched in a case on German national Khaled el-Masri, who was abducted while on vacation in Macedonia, where he was disappeared and allegedly tortured while in CIA custody in Afghanistan.⁸⁶

These investigations have revealed the American intelligence community effectively transported unregistered detainees through a large number of European airports and possibly also held some detainees in clandestine centres on European territory. The European Parliament set up a temporary committee on the alleged use of European Union countries by the CIA for the transportation and illegal detention of prisoners. These investigations gave rise to the conclusion that several European states failed to prevent violations, and were consequently considered co-offenders in cases of enforced disappearance.⁸⁷ A similar conclusion had already been reached in the Dick Marty report to the Council of Europe.⁸⁸

⁸² *Ibid.*, the Maher Arar case is discussed at length in Chapter 3.

⁸³ Ian AUSTEN et al., *Canadians Fault U.S. for its Role in Torture Case*, in New York Times, 19/9/2006 (Page 1).

⁸⁴ Excerpts from the affidavit given to the Italian prosecutors were published in the Italian newspaper Corriere della Serra of 9/11/2006 and reported on by Elisabetta POVOLEDO as *Egyptian says he was tortured after being kidnapped in Milan*, in The New York Times, 11/11/2006. Italy's secret service chief was forced to resign in the aftermath of these revelations.

⁸⁵ A detailed reconstruction of this 'Italian job' is made in Stephen GREY, *Ghost Plane*, Chapter 9.

⁸⁶ *Man Mistakenly Abducted by CIA Seeks Reinstatement of Suit*. The New York Times, 29/11/2006.

⁸⁷ European Union Parliament decision taken in Strassbourg, 18/1/2006.

EUROPEAN PARLIAMENT, *Interim Report (15/6/2006), on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2027 (INI))*.

⁸⁸ PARLIAMENTARY ASSEMBLY, *Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states*, Doc. 10957, 12/6/2006.

Nervous European reactions to these findings may have contributed to modification of the US Administration's discourse on the treatment of terrorism suspects, even if the latter still strays from multilateral instruments such as the UN Declaration on Forced Disappearance. The United States is one of few American States that failed to sign the Inter-American Convention on Forced Disappearance of Persons. Not even a member of the Human Rights Council, the United States is reported to have prevented that the Council consider the draft International Convention for the Protection of all Persons from Enforced Disappearance. On record is the long list of observations and reservations that the Permanent Mission of the United States of America presented to the secretariat of the Human Rights Council concerning the draft the (then) Draft Convention for the Protection of All Persons from Enforced Disappearance.⁸⁹ These indications make it unrealistic to expect the United States will sign and ratify the treaty in the near future.

⁸⁹ GENERAL ASSEMBLY, *Note verbale dated 20 June 2006 from the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the secretariat of the Human Rights Council*. A/HCR/1/G/1.