The Committee on Enforced Disappearances

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Introduction: The new Convention for the protection of all persons from enforced disappearances

Someone knocks at your door in early morning: plain clothes police forces come to arrest you, without any warrant. They do it openly, they do not hide to the eyes of your family or of the neighbours. You are brought to the police station, beaten or even tortured. And then transferred to another detention facility, preferably unofficial. You are not allowed to contact anyone, neither your family nor your lawyer. You have disappeared, you have been “placed outside the protection of the law”. As your detention is hidden, your family and your friends are looking after you. But the only answer they can get, when asking to the police, the army, the government, the “independent Commission on Human Rights” about your whereabouts, is: we don’t have him, we don’t know him. Or: we know him as a suspected criminal or terrorist… This is grossly the “pattern” of enforced disappearance, since it was codified by Marchal Keitel’s Decree “Nacht und Nebel” with the aim of terrorizing and repressing the Nazi’s opponents. After the War, the technique was used during colonial conflicts, especially in Algeria, along with torture and summary executions. These various tools elaborated to fight against “subversion” were very appreciated by the militaries who took power in Latin America from the beginning of the 70s, in order to preserve “national security”. And then it spread onto the other continents, to be used in the course of many other conflicts: Middle-East, with Lebanon or Iraq; Africa, with Algeria; Asia, with Sri Lanka, the Philippines and now Nepal…; Europe, with Former Yugoslavia and Chechenya. And now, the plague contaminated even the oldest democracy, as we discover with discontent the US program of “extraordinary renditions” and the complicity of some European democracies.

Enforced disappearances (ED) have been on the agenda of the international community since 1974, when the phenomenon was “discovered” in Chile. Initially, the problem was to find the right legal category to qualify this practice, as there were no specific crime or definition in either domestic or international law.

Four bodies played a fundamental role in this respect: the Working Group on Enforced Disappearances of the Commission on Human Rights, the UN Committee on Human Rights, and the Interamerican Commission and Court of Human Rights. Those bodies, among other accomplishments, showed that ED could be analysed as a complex violation of several human rights: the right not to be arbitrarily detained, the right to recognition as a person before the law, the right not to be subjected to torture or inhuman or degrading treatment and the right to

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1 The author was the representative of the International Federation of Human Rights (F.I.D.H.), an international NGO, within the UN Working Group in charge of drafting the text of the future Convention. However, this study only reflects his personal view.

2 The case law of the European Court of Human Rights was, at the beginning at least, much more limited. It only developed at the beginning of the 90’s, with the Kurdish cases. See Emmanuel DECAUX, « La problématique des disparitions forcées à la lumière des articles 2 et 3 de la CEDH », in Catherine-Amélie CHASSIN (ed.), La portée de l’article 3 de la Convention européenne des droits de l’homme, Bruylant, 2006.
life. It was thus possible to find a state liable for enforced disappearances, on the basis of general conventions in the field of human rights such as the ICCPR or the Interamerican Convention on Human Rights.

But this approach was limited. There was something specific about ED which made it difficult to cover all its aspects with human rights categories, or even with certain crimes, such as “abduction”. The idea thus emerged that specific treaties should be drafted. As early as 1988, the Interamerican Commission of Human Rights tabled a draft convention before the OAS General Assembly. The text was eventually adopted in 1994.

At the universal level however, it was decided to go step by step, following the method that had previously led to the Convention against Torture: first a declaration, second a convention. In 1992, the “Declaration for the protection of all persons from enforced or involuntary disappearances was adopted”. On this basis, a new process was started, first through informal meetings, and then within the UN bodies: a draft was tabled by the French expert of the Sub-Commission on Human Rights, Louis Joinet; it was reviewed during two years by the Working Group on the Administration of Justice of the Sub-Commission and then transmitted to the Commission after adoption by the plenary in August 1998. This draft convention was an innovative text, providing for the setting up of a new Committee against enforced disappearances.

During two years, the text was circulated among the States for comments. Then, in 2001, France took the initiative to table a draft resolution providing for the creation of an intergovernmental working group in charge of reviewing the draft text and reporting to the Commission. Several States objected for essentially two reasons. Some argued that a text on this topic would be useless, as international law already covered the phenomenon of EDs. They also argued that the Commission should put an end to its standard setting activities and concentrate on implementation. They found support for this argument in several recent standard setting processes, that had lasted for years and represented, in their view, very negative precedents. Other States were not opposed to such a drafting exercise, on the condition that no new supervision body would be created: according to those states, it would have been unreasonable to create a new committee at a time when the whole system was under review, with the prospect, maybe, of the creation of a single committee, in place of the existing ones.

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4 Resolution 47/133, adopted on the 18 December 1992 by consensus.


8 They referred in particular to the Optional Protocol to the CAT (ten years) and to the Declaration on the right and responsibility of individuals, groups and organs of the society to promote and protect universally recognized human rights and fundamental freedoms (thirteen years !).

9 Those States wanted the new text to be adopted as an optional protocol either to the ICCPR or the Convention against Torture, thus giving jurisdiction either to the Human Rights Committee or to the Committee against Torture.
The Commission’s resolution which was finally adopted in 2001 was a compromise10. A standard-setting working group was created but it had its first session only two years later, in 2003. In the meantime, an independent expert was appointed with the mandate to “examine the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearance” and to identify gaps “in order to ensure full protection from enforced or involuntary disappearance”. The 2002 report of the appointed expert, Professor Manfred Nowak, did cast the light on some important gaps, like the lack of universally agreed definition and the absence of any comprehensive set of obligations designed to prevent EDs11. The same year, the Commission confirmed the creation of the Working group in its resolution 2002/41 of 23 April 2002. However it decided that the Group would have to elaborate a “draft legally binding normative instrument”, a not a “convention” as such, so as to comfort the position of States who favoured an optional protocol to the ICCPR or to the CAT. Furthermore, the Group should not draft its text starting from the text prepared by the Sub-Commission, but “on the basis of the Declaration on the Protection of All Persons from Enforced Disappearance, in the light of the work of the independent expert and taking into account, inter alia, the draft international convention on the protection of all persons from enforced disappearance (…) transmitted by the Sub-Commission (…)”12.

The Working Group held five sessions (including one informal session in September 2003) between January 2003 and September 2005. It thus took only two years and a half to draft the Convention, which makes it one of the fastest process held in the United Nations.

Yet the diplomatic context was not favourable. At the beginning of the negotiation, it appeared that several factors would make it a hard process: the reluctance of many States to engage in a new standard-setting process, as was mentioned earlier; the measures taken in the name of the “fight against terrorism” and the very bad example set by a number of democracies, and in particular by the United States of America, which itself began a practice of enforced disappearances13; but also the very strong opinion shared by a number of States that enforced disappearances was essentially a Latin-American problem, which belonged to the past. Much persuasion was needed to reverse those trends.

The process was essentially led by France and some important states of the Grulac (the Latin America and Caribbean regional Group), and also some European States like Greece, Spain and Switzerland. But the Europeans were divided on some issues, which gave rise to complications. A number of other States also resisted, although they never expressed a will to obstruct the negotiation. Among those were a number of big powers: the United States, Russia and China. From beginning to end, NGOs contributed greatly to the process. The very idea of having international instruments dealing with enforced disappearances had come from associations of families of the disappeared in Latin American. The federation of these associations, called FEDEFAM, initiated the process and was there – together with others, like the AFAD, the Asian Federation – to witness and give its expertise throughout the negotiation. Beside those associations of victims were the principal international human rights NGOs, such as Amnesty International, the International Commission of Jurists, Human Rights Watch, the International Federation of Human Rights (FIDH) or the International Federation of Christians Against Torture (FIACAT).

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12 Paragraph 13 of the resolution.
The working group was chaired by an experienced and skilful French diplomat, late Ambassador Bernard Kessedjian. His politeness and firmness were a central element in order to have the group move rapidly to a final text. Although the Convention was almost lost in the middle of the reforming process of the international system of protection of human rights – with the end of the late Commission on Human Rights, and the creation of a new Council of Human Rights – the text finally went through and, pushed by the active lobbying of NGOs, was adopted by the General Assembly on the 20th of December 2006, in its resolution 61/177. It was eventually signed in Paris by the first 49 States, on the 6th of February 2007. On the 1st of January 2008, 72 States have signed the Convention and two others ratified it (Albania and Argentina). A Coalition against Enforced Disappearances was created by the NGOs who participated in the process, to promote early entry into force and effective implementation of the Convention.14

On the procedural side, the Convention contemplates the setting up of a new Committee, the Committee against Enforced disappearances. In the framework of this study, we will discuss both the structure (I) and the functions (II) of this new Committee.15

I – The structure of the Committee

The new Committee is the result of a battle that took place within the Working group in charge of drafting a “draft legally binding normative instrument”. The relevance of its creation was a central issue. Eventually, the compromise led to an autonomous but limited Committee.

The debate: Is there a Need for a New Body?

From the very beginning of the process, one of the most contentious issue was whether or not there was a need for a new committee on enforced disappearances. Most states and NGOs were agnostic on this issue, as they said they would favour the most effective mechanism, whatever its form. However, some States took a firm stand from the very beginning against a new Committee. They had two main arguments.

The first one was easily put aside: how would the committee coexist with the existing Working Group of the Commission (and now the Council) on Human Rights dealing with enforced disappearances? To this, Manfred Nowak answered at the first session that if a new Committee were to come to life, the Working Group would still remain in office for a number of reasons. First, the Group had a universal geographic mandate. As long as the convention was not universally ratified, the Group would thus remain useful. Second, the Group had a humanitarian mandate, aiming in priority at localizing the disappeared persons, while the

14 See the website of the Coalition, where information are gathered on the process of ratification : www.icaed.org
Committee would have a very wider mandate of monitoring, controlling and investigating\textsuperscript{16}. Nowak also noted that the same problem had occurred in relation to torture where two mechanisms coexisted in complementary fashion: the Committee against Torture and the Special Rapporteur against torture.

The second argument was more disturbing, as it referred to a quite popular theme among states: the proliferation of supervisory bodies. Switzerland, Turkey, Egypt and some others took up the argument at the first session and bluntly opposed the drafting of a new autonomous convention and the creation of a new committee. Instead they proposed the adoption of an optional protocol either to the CAT or, preferably, to the ICCPR. They underlined the fact that ED were violating a series of rights recognized by the Covenant and that the HRC already had a substantial case-law dealing with it. The argument had some weight as it was put forward in the context of the debate on the reform of the system of the treaty bodies. All states agreed on the fact that there were too many treaty bodies (seven at that time), implying increasingly heavy reporting obligations for State parties. Different solutions were contemplated, the most ambitious being the setting up of a single generalist committee, which would replace the seven specific bodies. This idea was used to oppose the creation of a new Committee, the reasoning being that the situation should be frozen until the reform. Even more restrictive (but also quite isolated) China proposed that the supervision task should be delegated to the assembly of the States parties.

This debate posed a serious risk to the whole negotiation. It risked derailing the focus on substantial issues, and much time could have been spent repeating the same arguments without moving forward. This is why the Chair – using his authority – proposed a precise agenda for the Working Group, according to which substantial issues would be discussed first and then, in second, procedural matters. The latter themselves would be divided into two items: the functions would be contemplated first, and the nature of the body only in the second place. Indeed, it seemed that the nature of the body was inherently linked to the functions it would undertake.

Consequently, no final decision was taken on the nature of the supervision body until the last session. Several things happened between the first and the last session that made it possible to come to an agreement about the final text.

First, the Chair managed to organize several limited debates where the matter could be discussed thoroughly. Arguments in favour of a new Committee progressively emerged and gained support among a growing number of delegations. Conversely, arguments against the new Committee appeared weak and non decisive. Alternative proposals were made, such as the setting up of a “sub-committee”of the HRC (an idea promoted by Switzerland). Second, the debate on the setup required to effectively combat disappearances led to the conclusion that it would be difficult for an existing committee to undertake those new functions. There were practical problems: obviously, the HRC was already overburdened and ran into serious problems in achieving its own limited mandate. If it had to undertake new functions, the number of experts within the Committee should be increased. That would create legal problems, as any modification of the structure of the Committee could only be decided through an amendment of the Covenant, which implied going through a very complicated process. Furthermore, a study of the Secretariat compared the costs of creating a new body and enlarging the composition of the Committee (or creating a sub-committee composed of additional members), and it appeared that there was no substantial advantage in the second solution.

At the last session, the Chair presented a “package” of substantial and procedural provisions and clearly took a stand in favour of a new Committee as the most “realistic” solution. But the package also included some compromise provisions, to take into account the objections of the countries who insisted on the need to wait for the outcome of the reform process. The package was accepted by all delegations, although a few of them expressed reservations in their statements made at the end of the session. The Convention as it has been adopted, therefore, sets up an autonomous but limited Committee against enforced disappearances.

An autonomous but limited Committee

An independent Committee

Article 26(1) of the Convention provides that “[t]he Committee shall consist of ten experts”. The number of ten experts may at first sight appear low, compared to the eighteen experts of the HRC, the CESR, the CRC or the CERD,17 or the 23 experts of the CEDAW. In fact, it is a very good compromise if one looks at the first proposals tabled in the working group, mentioning only 5 experts (like the WGED), and if one contemplates the fact that the Committee, although in charge of multiple functions, only deals with one precise phenomenon – compared to the multiplicity of issues to which the HRC or the CODESOC have to deal with. As a comparison, the CAT and the CMW (at least until the 41st ratification) are also composed of 10 experts and do not seem understaffed.

The members of the Committee are elected for a four years term and are eligible for re-election only once (art. 26(4)). This term is now standard for the treaty bodies. Still, it is a short term for a body with quasi-judicial functions.18 The limitation on the number of successive mandates, however, is an innovation, shared with the contemporaneous CRPD: in all the other committees, re-election is possible upon re-nomination. It seems that those two new texts reach a balance on this issue: a member can totalize eight years of mandate, allowing a certain continuity of membership and at the same time a regular renewal of the composition of the Committee. The limitation of mandates also strengthens the independence of the members, who do not need (at least during their second mandate) to secure the following election. Furthermore, independence, but also impartiality of the members are explicitly provided for in paragraph 1 of article 26.

Nothing is said in the Convention about any emoluments that the members could receive, as it is the case, for instance, in article 35 of the ICCPR. This will have no consequence, as the General Assembly decided, in its resolution 56/272 of 27 March 2002, that the emoluments of the experts of all the subsidiary bodies and expert committee should be reduced to the symbolic sum of one dollar per year... Still, it is interesting to note that the Convention on the Rights of Persons with Disabilities does provide that the members shall receive emoluments.

Sure, feel free to delete it if you need some space.

Another standard provision concerns privileges and immunities of experts on mission which are conferred to the members, as a guarantee of their independence (art. 26 (8)).

17 Note that the future CRPD will be composed of 12 experts at the entry into force of the Convention and then 18 after « an additional sixty ratifications ».

18 Compare to the terms of the judges of international courts: nine years, for instance, for the judges of the ICJ or the ICC; six years for the judges of the ECHR. At the same time, judges of the ATUN and of the ATILO are elected for three years; members of appellate body of the DSU at the WTO are elected for 4 years.
provisions on the election of the members are also very ordinary. Candidates are to be nominated by their national states and the election takes place at the biennial meetings of the States parties. “At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.” (art. 26 (2)). The election process must respect the standard principle of “equitable geographical distribution”. Moreover, states should take into account the “usefulness of the participation in the work of the Committee of persons having relevant legal experience and of balanced gender representation” (art. 26 (1)). If the “legal experience” requirement can be found almost in all conventions, gender balance is new, and can only be found in the contemporaneous Convention on the Rights of Persons with Disabilities.

As the other comparable bodies, the Committee on enforced disappearances has the right to establish its own rules of procedure (art. 26 (6)), and is to be provided by the Secretary general “with the necessary means, staff and facilities for the effective performance of its functions” (art. 26 (7)).

Finally, the independence of the Committee results from the public character of its activities, except the complaint procedures, which require confidentiality to protect the interests of the parties. Several attempts were made, during the negotiations, to limit this publicity and to keep confidential most of the work of the committee.

All provisions to that end were removed. Article 36 states that the Committee shall submit an annual report to the GA. In an effort to promote “fair trial” standards, paragraph 2 of this article also provides that “[b]efore an observation on a State Party is published in the annual report, the State Party concerned shall be informed in advance and shall be given reasonable time to answer. This State Party may request the publication of its comments or observations in the report.”

A precarious and limited body

The Chair’s “package” implied some concessions for the States who opposed the creation of the new Committee. The most visible one is probably the sunset clause of article 27, which makes the Committee a precarious institution:

“A Conference of the States Parties will take place at the earliest four years and at the latest six years following the entry into force of this Convention to evaluate the functioning of the Committee and to decide, in accordance with the procedure described in article 44, paragraph 2, whether it is appropriate to transfer to another body — without excluding any possibility — the monitoring of this Convention, in accordance with the functions defined in articles 28 to 36.”

19 See in particular E/CN.4/2005/66, §§ 144-146. The Chair proposed confidentiality for urgent actions, complaint procedures and on site investigations, provided that this confidentiality could be lifted in case the State would refuse to cooperate – a system inspired from the European Convention on the Prevention of Torture. This proposal was opposed by all NGOs and some States as a grave retrogression in comparison with the public nature of the procedures set up by other conventions. Confidentiality was acceptable for the complaint procedures only during the contradictory phase, but should not be applicable to the « views » adopted by the Committee.

20 In the same spirit, art. 39 of the CRPD states more soberly that the « suggestions and general recommendations [of the Committee] shall be included in [its] report […] together with comments, if any, from States Parties »
The Chair introduced this wording as “a third option which would fit in with the proposal by the United Nations High Commissioner for Human Rights to study the possibility of merging all the treaty-monitoring bodies into one.” This proposal was considered acceptable by all the delegations. It addressed the main concern of the opponents to a new committee, i.e. not anticipating on the future reforms of the treaty bodies or risk adversely affecting them. At the same time, delegations who favoured the creation of the committee had the satisfaction to see it come to life, even for a limited period of time, with the hope that, once in place, it would be difficult to remove it, or only in the context of a reform which would replace all the treaty bodies by a single Committee.

The second provision which was included as a compromise was required, in its principle, by Switzerland and formulated by the Chair. Article 32 is supposed to ensure that the Committee would not duplicate other existing bodies whether Charter (e.g.: the WGEID), or treaty (e.g.: the HRC or the CAT) based:

1. In the framework of the competencies granted by this Convention, the Committee shall cooperate with all relevant organs, offices and specialized agencies and funds of the United Nations, with the treaty bodies instituted by international instruments, with the special procedures of the United Nations and with the relevant regional intergovernmental organizations or bodies, as well as with all relevant State institutions, agencies or offices working towards the protection of all persons against enforced disappearances.
2. As it discharges its mandate, the Committee shall consult other treaty bodies instituted by relevant international human rights instruments, in particular the Human Rights Committee instituted by the International Covenant on Civil and Political Rights, with a view to ensuring the consistency of their respective observations and recommendations.

Thus the Committee has a legal duty both to cooperate with a wide variety of institutions and to consult “other treaty bodies”, with a special mention of the HRC, as the body which already developed a case law on ED on the basis of the Covenant.

Finally, some States also insisted that the Committee should have a limited ratione temporis jurisdiction. They clearly did not want the Committee to handle past cases of ED. This resulted in article 35 which states that:

1. The Committee shall have competence solely in respect of enforced disappearances which commenced after the entry into force of this Convention.
2. If a State becomes a party to this Convention after its entry into force, the obligations of that State vis-a-vis the Committee shall relate only to enforced disappearances which commenced after the entry into force of this Convention for the State concerned.

Was this provision really necessary? Article 28 of the VCLT already stipulates clearly that a treaty should normally apply only to acts and facts which occur after the entry into force of the treaty. However, it should also be recognized that the situation of EDs is quite specific. EDs have been analyzed as a continuous fact up to the moment when the case is “resolved”, i.e. until the disappeared person, or his/her body has been found. The idea that the

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21 E/CN.4/2006/57, § 70.
22 See in particular: Inter-American Court of Human Rights, Blake case, preliminary objections, judgement of July 2, 1996, §§ 29-40. This continuous nature is also the basis for derogation to statute of limitations: see art. 8 (1) of the Convention.
Committee only has jurisdiction when the disappearance occurred after the entry into force of the Convention certainly means that the Committee will find it more difficult than other human rights bodies in the past to find itself competent in certain cases. However, it remains to be seen how one will define the “commencement” of an ED, and how the Committee may use some leeway when the time of that commencement is unknown or unclear. Moreover, it was quite clear that some States wanted to have an explicit ratione temporis clause in the treaty and if they had not succeeded in having it, they would have made a reservation on this aspect. The limited ratione temporis jurisdiction can thus be seen as a measure to entice states to ratify the Convention, who otherwise might have hesitated in doing so. It should also be noted that this is only a jurisdictional limitation. No comparable clause has been adopted in the substantive part of the Convention, so that the obligations apply to an ED which commenced before the entry into of the Convention for the State concerned, as long as this ED continues after the entry into force, i.e. as long as it is “unresolved”.

II – The functions of the Committee

The Committee fulfils the usual functions of a treaty body, but some improvements have to be noted in comparison to other treaties. In addition, a number of functions have been added, to take into account the specificities of ED.

“Ordinary but improved” functions

The relevant traditional functions of treaty bodies are: State party reports, complaints – both individual and interstate – and country visits.

State party reports (art. 29)

This provision does not introduce any substantial new feature compared to other treaties. States are bound to submit to the Committee “a report on the measures taken to give effect to its obligations under this Convention, within two years after the entry into force of this Convention for the State Party concerned.” The Committee, like the HRC and others, “shall issue such comments, observations or recommendations as it may deem appropriate», to which the State party “may respond (…) on its own initiative or at the request of the Committee.” The sole difference is that the Committee cannot request an additional report whenever it chooses, as the HRC, and the State party has no obligation to submit periodic reports within two years, as in the CERD, or four years for the CEDAW. To take into account the criticisms addressed to the reporting system, the text of the Convention confines itself to state that “[t]he Committee may also request States Parties to provide additional information on the implementation of this Convention.” This is probably not a retrogression for the CED: obviously, only a few states among those who have ratified will have to inform periodically the Committee on the implementation of the Convention as a whole. Most of the States will have to respond to the Committee’s concerns on certain aspects only.
Complaints

Complaints were not included in the first chairperson’s drafts of the text. The Chair was clearly focusing his attention on reports and urgent action and was not convinced of the usefulness of complaint procedures which, in his view, could only be optional – and thus probably not accepted by States parties (or at least not accepted by those most likely to have disappearances). Nevertheless NGOs and some States insisted that provisions on individual and interstate procedures be included, as it appeared to be one a central feature in other comparable conventions. Other States firmly opposed, arguing that such procedures already existed in the ICCPR. The principle of an individual complaint procedure was accepted at the third session (October 2004) and a concrete proposal was made by the Chair at the fourth session (January-February 2005). But the interstate complaint procedure was only inserted in the text at the last session, after repeated proposals by an NGO and Canada, who underlined the fact that these procedures, although never used at the universal level, had already been triggered at the regional level (before the ECHR) and in any case could represent a factor of deterrence for potential violators 23.

The individual complaint procedure is quite similar to other comparable procedures, like the one provided for by the optional protocol to the ICCPR. One distinct feature, however, is the mention in the text of the Committee’s power to request a State party to take interim measures. The existing Committees (HRC, CAT, CERD) had attributed themselves this power in their respective rules of procedures. The power is here explicitly conferred to the Committee. In a way, it confirms the practice of the existing committees in this regard. More generally, it is a way to recognize the increasing importance of this procedural instrument in the practice of international tribunals. One can see how it might be particularly useful in the case of EDs, where a “race against time” is often involved and urgent measures may be necessary to locate the disappeared, while guarding the state against further action that might compromise that person’s rights.

One striking novelty with the Committee is a reinforced inter-state procedure. The interstate complaint may also seem very familiar to the “European” practitioner, but someone who is used to UN procedures will be positively surprised. Previous interstate complaint procedures had more to do with conciliation than settlement of international disputes: the States concerned would have to try to solve the problem themselves and only if they failed to do so would the Committee (for instance the HRC) “make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant.” The result of the procedure was a simple mention of the facts and of the solution reached in the report of the Committee. Here, the procedure is a real quasi-judicial interstate complaint procedure as article 32 only states:

A State Party to this Convention may at any time declare that it recognizes the competence of the Committee to receive and consider communications in which a State Party claims that another State Party is not fulfilling its obligations under this Convention.

No other indications are given, which means that the Committee will have to decide upon the allegations contained in the communications, i.e. it will undertake a quasi-judicial function. It thus makes this procedure much closer to the procedure set up by article 33 of the ECHR.

23 See E/CN.4/2006/57, § 64.
This procedure is less ordinary than the two others, as it can only be found in the CAT and in a quite different setting. It focuses on the on site inspection and, in some respect, it is more intrusive, even if the principle of consent of the State concerned for the visit is respected. The triggering of the procedure is not conditioned on reports of “systematic” practice of ED as required for torture in the CAT; systematic or “gross” violations are dealt with in the following article concerning ED amounting to crimes against humanity (see below). Here, the procedure can be initiated “[i]f the Committee receives reliable information indicating that a State Party is seriously violating the provisions of this Convention”. In such a situation, it may “after consultation with the State Party concerned, request one or more of its members to undertake a visit and report back to it without delay.” (§ 1). The text does not state where exactly the visit should take place. During the negotiation, a text stipulating, like in the CAT, that the visit should take place on the State’s territory was successfully amended into “any territory under the State’s jurisdiction”. The present text does not use this formula, but one can assume that it includes this last possibility: it means that the visit could take place in a territory which is, for instance, under the de facto control of the State (situations of occupation come to mind).

The Committee has to notify in writing its intention to make a visit, and the State should respond “within a reasonable time ». Consent to the visit is undoubtedly required as paragraph 4 stipulates : “If the State Party agrees to the visit...” Still, the language of article 33 makes the refusal of a visit the exception rather than the rule. Paragraph 3 states that : “Upon a substantiated request by the State Party, the Committee may decide to postpone or cancel its visit.” This suggests that the State has to give reasonable grounds to refuse a visit. And certainly, it is for the Committee to evaluate the reasonableness of these grounds. At the same time, it is obvious that a visit on a State’s territory or on a territory under the jurisdiction of the State can practically never happen without the consent and authorization of that same State. But the text gives more weight to the Committee when negotiating the possibility of a visit with a State than article 20 of the CAT does. It takes up the idea previously developed in the practice of the UN special procedures that the actual course of a visit should be negotiated carefully, so that all the guarantees of independence and seriousness of the inquiry are respected : “the Committee and the State Party concerned shall work together to define the modalities of the visit and the State Party shall provide the Committee with all the facilities needed for the successful completion of the visit.”

The outcome of the process is that the Committee communicates “to the State Party concerned its observations and recommendations”. Again, the provision which stipulated that this procedure was entirely confidential was deleted. One can therefore consider that those “observations and recommendations” can be published in the annual report of the Committee and thus made public, without the authorization of the State, as it is the case in article 20 of the CAT.

Last, but not least, the CAT’s article 20 procedure can be opted out by States parties pursuant to a simple declaration made in accordance with article 28. This is not the case for article 33 of the CED.

New mechanisms
These original functions are urgent action and reporting in the case of ED amounting to a crime against humanity.

**Early warning and urgent action (art. 30)**

The experience of the UN Working Group on Enforced Disappearances has shown that urgent action is a key procedure to tackle enforced disappearances and save lives. In the early years of the Working Group, the members calculated that around 25% of the cases transmitted in urgent action could be “resolved”, much more than through the “regular” procedure, i.e. sending communications by letters, when the ED has occurred more than two months before. This experience is shared by NGOs which have also developed early warning and urgent actions procedures. This result is probably related to the fact that, very often, unfortunately, disappeared persons are summarily executed after a few days of secret detention. ED are, in those cases, hidden murders. Urgent action can sometimes stop this process and make the person reappear, so that it recovers the “protection of the law” that disappearance had made him or her lose. This point was very clearly understood by the Chair and by some other governmental delegations, and thus the negotiation very rapidly focussed on this issue.

Reluctant states acted as if they didn’t understand clearly the difference between this urgent procedure and the individual complaint procedure. Their argument was to insist for the inclusion of admissibility conditions. By nature, an “urgent” procedure has to be swiftly implemented, with the consequence that only very “light” conditions of admissibility can be imposed. Article 30 ends up stating five conditions of admissibility, like the communication should not be ill-founded or represent an abuse of right. This is not insignificant, but is still acceptable as those conditions should not delay too much the implementation of the procedure. The worse was avoided, when amendments proposing to include the exhaustion of domestic remedies condition where finally dismissed.

Urgent actions can be initiated by a large number of persons, which is a condition of efficiency. Those persons, which have a “legitimate” interest, are the same that can introduce a habeas corpus before the national tribunals (art. 17 (2) f) , which can have access to some information on the person detained (art. 18 (1)) and/or introduce an habeas data before a tribunal in order to obtain that information when the authorities refuse to provide it (art. 20).

When those conditions are met, the Committee “shall request the State Party concerned to provide it with information on the situation of the persons sought, within a time limit set by the Committee”. What happens if the State does not respect the time limit or does not respond at all ? In all those kind of procedures, the bodies’ powers are double : blaming and reporting. If the State provides information, the Committee can take a wide range of measures. Paragraph 3 is particularly strongly-worded if we compare it with other comparable procedures : the Committee “may transmit recommendations to the State Party, including a request that the State Party should take all the necessary measures, including interim measures, to locate and protect the person concerned in accordance with this Convention.” The State party also has “to inform the Committee, within a specified period of time, of measures taken, taking into account the urgency of the situation”. In return, the Committee will inform the author of the communication. Paragraph 4 specifies that the Committee “shall continue its efforts to work with the State Party concerned for as long as the fate of the person sought remains unresolved. The person presenting the request shall be kept informed.” There will thus be a contradictory exchange of information until the case is “resolved”.
The interpretation of this last term by the Committee will be very important, as it will determine when the procedure can be closed. According to the “jurisprudence” of the Working Group on Enforced disappearances, a case is said to be “resolved” when the whereabouts of the disappeared persons are clearly established (…) irrespective of whether the person is alive or dead.”\footnote{UN WGEID’s Revised Methods of Work, § 3.} The only exception to this rule is contained in paragraph 17 of the Methods of Work, which states: “The Working Group may consider a case clarified when the competent authority specified in the relevant national law pronounces, with the concurrence of the relatives and other interested parties, on the presumption of death of a person reported missing.” It is very important that the Committee retain this interpretation, so that states cannot pretend that cases have been “resolved” on the sole basis of, for instance, compensation provided to the families, or a judicial declaration of death unilaterally issued by the authorities without the clear consent of the families.

\textit{Action in case of crimes against humanity (art. 34)}

This is the other new feature in the Convention. The idea is from the Chair Bernard Kessedjian himself. At first, he made a proposal that in case of ED amounting to crimes against humanity – according to the Convention’s definition in article 5 – the Committee would have the competence to bring the matter before the UN Secretary General, in order for him to take whatever measures he could adopt within the scope of his powers. Many States were reluctant: some because they opposed all measures of control; others because they doubted that such a procedure was “constitutional” in the UN Charter’s framework. However, it was pointed out that this sort of arrangement was not entirely new. For example, article VIII of the Convention on the Prevention and Punishment of the Crime of Genocide and article VIII of the International Convention on the Suppression and Punishment of the Crime of Apartheid already make it possible to bring matters before some of the UN’s political bodies. Finally, a compromise was that the Committee would “bring the matter to the attention of the General Assembly of the United Nations, through the Secretary-General of the United Nations.” Before, the Committee should try to seek from the state party “all relevant information”\footnote{See E/CN.4/2006/57, §§ 60-63.}.

The idea underlying this provision is that ED amounting to crimes against humanity should be excluded from the scope of the Convention and in particular of the jurisdiction of the Committee. The goal was to avoid a debate of the definition of the crime against humanity, that would have opposed the “pro” and the “cons” Rome Statute. Article 5 of the Convention is thus supposed to be purely declaratory, in the sense that it does not add or retrench anything from the existing “applicable international law”. It was conceived as a reference more than as a substantial provision, to show to that this aspect had not been forgotten, although not treated as such in the text.

What will the General Assembly do once it has been seized by the Committee? Bringing the matter to the Secretary General was an implicit reference to article 99 of the Charter, which allows the SG to refer a situation to the Security Council. And according to the Rome Statute, the Security Council himself has the power to refer a situation to the International Criminal Court… At least, such was the original idea. The compromise version of the text adds a new stage to the procedure. According to article 10 or 11, the GA can, in addition to formulate
recommendation directly to the State(s) concerned, decide to refer the situation to the Security Council.

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In sum, the CED is certainly a “new generation” committee. As the heir to the older committees, it benefits from their past experience and various attempts to enlarge their mandates and powers (interim measures is a striking example). But as a new committee, it also appears innovative, and should be a model if more treaty bodies are ever created or even, in the future, a single body that might replace all the existing ones.