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### ***Los Desaparecidos: The Latin American Experience as a Narrative Framework for the International Norm against Enforced Disappearances***

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#### **An International Norm with its Roots in Latin America**

In December 2006, the United Nations General Assembly adopted the International Convention for the Protection of all Persons from Enforced Disappearances (Disappearances Convention),<sup>1</sup> a legally binding treaty that requires States Parties to prevent enforced disappearances and to investigate, prosecute and punish those responsible for carrying them out. In the thirty years that have passed since the United Nations first began to consider enforced disappearances on its human rights agenda, it has dealt with more than 51,000 cases from more than 80 countries.<sup>2</sup> While governments in all regions of the world still abduct and eliminate their perceived opponents, the human rights violation named “disappearance” that emerged in international discourse and, ultimately, in international law was profoundly shaped by the narrative of the violations that were carried out by Latin America military dictatorships in the 1960s and 1970s.

The need to frame a distinct legal norm, and the content of that normative prohibition against enforced disappearances were deeply connected to the narrative that emerged from Latin America. In fact, I would suggest that the international norm outlawing, preventing and punishing the use of enforced disappearances might never have existed but for the Latin American experience. The elements of the violation are virtually covered by other rights already guaranteed in international human rights law—freedom from arbitrary arrest, freedom from torture and execution, the right to legal recognition and due process. Despite these guarantees, the Latin American narrative provided the urgency for the international community to address the violation through its own distinct frame, as a separate violation that was more than the sum of its criminal parts. It was the human stories that emanated from Latin America that demanded an international call for action, stories epitomized by the bang on the door in the night, the heavily armed

men, the unidentified vehicles and the seemingly impenetrable wall of silence and impunity facing families left bereft at the sudden and unexplained loss of their loved ones.

The international community's recognition of enforced disappearance as a separate human rights violation was crystallized most directly by international outrage at the politically-motivated violence in Argentina and Chile, characterized by arrests, torture, execution and disappearances of political opponents of the military governments in those countries. Without that outrage, channeled by NGOs into pressure for international action, there may have never been the necessary consensus for a distinct norm against this insidious practice.

This essay will first consider three brief narratives of disappearance from Latin America and the impact of each of those narratives on the international legal norm that was created to prohibit the international crime of enforced disappearance. I will then review the international legal response to the crimes that were being committed in Latin America, especially in Argentina and Chile. Finally, I will review the evolution of the legal definition of enforced disappearance, from its emergence in 1978, contiguous with the violations being committed by the Latin American generals, until the 2006 adoption of the Disappearances Convention, which finally sets forth a legal definition of the human rights violation of enforced disappearance.

### **The Latin American Narrative: Guatemala, Chile and Argentina**

The following disappearance narratives are presented in chronological sequence, beginning with the experience of Guatemala, which started in the 1960s. The Chilean military adopted the anti-insurgency tactic of enforced disappearances after the 1973 coup d'état, as did the Argentine generals, after their 1976 military coup. Each case study considers the context for the violations, the general pattern, examples of individual cases and the futility of the habeas corpus petitions brought by family members and nongovernmental organizations (NGOs).

**Guatemala.** The first use of the term “disappearance,” a translation of the Spanish word *desaparecido*, is attributed to the State-sponsored abductions and secret executions in Guatemala that were a characteristic tactic used by “death squads” against anti-government forces in the internal armed conflict that extended there from the 1960s until the peace agreement in 1996. The number of persons killed or disappeared as a result of more than thirty years of internal armed conflict was estimated by the Commission for Historical

Clarification in Guatemala to be more than 200,000. The Commission suggested that approximately 45,000 of that total were “disappeared.”<sup>3</sup> Systematic disappearances began in the mid-1960s as a means of targeting persons identified by the Guatemalan authorities as “communists and terrorists,” including union leaders, the rural indigenous population and student organizers.<sup>4</sup> With no domestic space for dissent in Guatemala and no international human rights mechanisms in existence to document or contest the violence, there was little international reaction to the early era of disappearances being carried out by Guatemalan security forces. On the contrary, throughout the 1960s, the United States Government supplied military aid and counter-insurgency training in Guatemala in full knowledge of the extent of the violations.<sup>5</sup>

The practice of disappearance in Guatemala took place over a period of more than thirty years with some of the greatest excesses occurring in the 1980s during unstable military regimes. Many of the disappeared were killed and buried in clandestine mass graves in rural areas.<sup>6</sup> Since the peace accords in the mid-1990s, forensic anthropologists have exhumed more than 400 such graves, primarily in Mayan communities that were identified by the Guatemalan military as supporting guerilla insurgents and therefore targeted for destruction during the 1980s. The exhumed graves included more than 3,000 skeletal remains of men, women and children.<sup>7</sup>

The practice of “disappearance” in Guatemala was just one tool of repression used by the security forces to impose total control. Security forces and death squads operating in a culture of complete impunity carried out extrajudicial killings in plain sight, or detained and tortured persons brutally, dropping highly mutilated corpses in public places to impose terror on communities. One observer noted that “[m]utilated corpses, with their ‘sentences’ inscribed on their bodies, spread the message that resistance to the State’s national project is futile and that the price for such resistance is high” (Afflitto 188). The Inter-American Commission on Human Rights described the extreme state of violence experienced in Guatemala in the late 1960s and early 1970s as “a reign of terror”—extremely strong words for an international diplomatic organization (General Secretariat 1).

NGOs were even more frank in their characterization of the violence. A representative of a domestic NGO, *Frente Democrático Contra la Represión* testified in 1980 at a United Nations hearing on the phenomenon of disappearances:

Guatemala has no political prisoners, only dead people [. . .] the growing number of disappearances in recent months has been matched by the number of unidentified bodies found on roads, in ravines and in secret graveyards. These unidentified bodies are buried under the designation ‘XX’ [. . .]. Generally the people who disappear have been abducted or are arrested by heavily armed groups, sometimes in uniform

and frequently showing national police force identification. These groups move about in government vehicles with dirty license plates, no plates at all or foreign plates. They operate with complete impunity.<sup>8</sup>

The same descriptive elements from stories of *los desaparecidos* in Guatemala were repeated over and over, and bore many similarities to the stories emerging simultaneously in other Latin American countries. The practice of enforced disappearance as conducted by the Guatemalan security forces in the late 1970s and early 1980s was described in an investigative report by the Inter-American Commission on Human Rights as:

generally carried out by groups of heavily armed individuals, who identify themselves as belonging to one of the several investigative or security units, but no one is informed of the reasons for their arrest or to what centers they may be taken. [. . .] These groups operated openly in public and generally travel in vehicles with darkened windows and no identification plates. (General Secretariat 76)

A specific case investigated by the Inter-American Commission during their on-site visit to Guatemala from September 21–25, 1982, was that of Mrs. Francisca Graciela Morales de Samayoa and her children Jose Ramiro (age 20), Gloria Iris (age 18) and Astrid Maritza (age 16), as well as her domestic employee and the employee's son, age 4. The disappearances were carried out by heavily armed men on September 11, 1982. The arrested persons were taken away from their home in a truck with no identification plates. The domestic worker and her son were set free after a few days, but the whereabouts of Mrs. Samayoa and her three children were never determined. When asked about the case by members of the Inter-American Commission, the Guatemalan Minister of Defense noted that Mrs. Samayoa was the wife of a "known subversive."<sup>9</sup>

With few tools at their disposal, families of disappeared persons in Guatemala sought to use the writ of habeas corpus to establish the whereabouts of their loved ones.<sup>10</sup> Thousands of habeas corpus petitions were filed by domestic NGOs, most prominently by *El Grupo de Apoyo Mutuo* (GAM).<sup>11</sup> Habeas corpus was suspended at times during the Guatemalan violence due to a state of siege imposed by the government.<sup>12</sup> Even when the writ was in force, it was of little use to the families in search of the missing. International NGOs, such as Minnesota Lawyers International Human Rights Committee, were also permitted to file habeas corpus petitions under Guatemala's expansive laws, but their appeals also fell on deaf ears. In its 1983 report, the Inter-American Commission on Human Rights noted that it was aware of "no single case" in which a disappeared person was identified through the writ of habeas corpus (MLIHRC 74). In May 1986 the Guatemalan Supreme Court appointed an

Executor Judge with special jurisdiction in habeas corpus cases who, despite significant personal effort, had no success in breaking the military's barrier of silence to find any helpful information about the fate of the disappeared (MLIHRC, n9 33).

During the heaviest years of the repression, there was almost no political space in which Guatemalan NGOs could operate. Those who spoke up were at grave personal risk. The most prominent NGO protesting disappearances and other government-sponsored violence in Guatemala was GAM (*Grupo de Apoyo Mutuo*), formed in 1984 to work to end illegal detention and disappearance. Composed primarily of rural peasant women whose family members had been detained or disappeared, the organization faced serious threats and intimidation for speaking out against repressive government practices. On March 30, 1985, GAM leader Hector Gomez Calito was seized, tortured, disfigured and murdered. A year later, another leader of GAM, Maria Rosario Godoy de Cuevas, her 21-year-old brother, and her 2-year-old son were picked up, tortured, and murdered. Godoy de Cuevas had joined GAM in the search for her husband, Carlos Cuevas, *desaparecido*.

**Chile.** Unlike the disappearances in Guatemala that were carried out with minimal international backlash, human rights violations in Chile attracted immediate international condemnation after the public spectacle of the September 11, 1973 coup d'état and the subsequent political violence in the country.

The term *detenidos desaparecidos*, or disappeared prisoners, was used to describe the practices of Chile's military junta to eliminate political opposition. The numbers of disappeared in Chile were much smaller than in Guatemala, but their impact was larger. The Report of the Chilean National Commission on Truth and Reconciliation (Rettig Commission) documented 957 such cases in Chile from 1973 until 1990. The Commission defined disappeared prisoner somewhat narrowly as:

those who were arrested by government agents or by persons in their service and about whom the last information is that they were apprehended or that they were seen later in a secret prison. Officials deny having arrested them, claim to have freed them after a certain period of time, offer other unsatisfactory explanations, or simply say nothing.<sup>13</sup>

This definition was based on the Rettig Commission's identification of two types of disappearances used by the junta. The first, prevalent in the immediate aftermath of the September 11, 1973, coup d'état, was characterized by "summary execution or murder of the victim and the disposal of the body (generally by throwing it into a river or burying it secretly) followed by a denial or false stories."<sup>14</sup> These disappearances were

at their base, executions without explanations. An example of this type of disappearance can be seen in the cases of Guillermo del Carmen Bustamante Sotelo, age thirty-nine, a farm worker and union leader, and Juan de Dios Salinas Salinas, age twenty-nine, a farm worker, who were arrested by police officers in Isla de Maipo on September 14, 1973. According to the Rettig Commission report, they were seen by witnesses in police custody at the Isla de Maipo station and their relatives were informed that they had been transferred to the National Stadium in Santiago. The two farm workers were never seen again.<sup>15</sup>

The second type of disappearance, prevalent from 1974–77, was centrally organized by the DINA, as a “systematically implemented effort to exterminate particular categories of persons.”<sup>16</sup> For example, as part of a DINA directed action against the central committee of the Socialist Party, on June 25, 1975, Ricardo Lagos Salinas was detained by two armed men in civilian clothes who drove him and another victim in a white Chevrolet to Villa Grimaldi, a secret detention center.<sup>17</sup> Fellow detainees at Villa Grimaldi attested to the fact that Lagos was tortured and he had expressed to them an expectation that he would be killed. Nothing further is known about his whereabouts. There were no results from a petition of amparo submitted on Lagos’ behalf on 3 September 1975, to the Santiago Appeals Court. The request for amparo was denied and the case was sent along a circuitous path to nowhere, through the criminal court system. Ultimately, in May 1983, a military court closed the case without explanation.<sup>18</sup>

In Chile, as in Guatemala, requests for amparo or habeas corpus were completely ineffective. The Rettig Commission concluded that the courts systematically failed to use their judicial authority to investigate the cases of detention or disappearance brought on behalf of the victims.<sup>19</sup> Despite receiving petition after petition complaining of illegal detentions at notorious sites including the National Stadium, the Air Force Academy and Villa Grimaldi, where torture and execution were common practices, the courts did nothing to address the situation of the detainees there. The courts accepted the official version of the facts from the security forces, often without even interviewing the agents who were identified as responsible.<sup>20</sup>

The repressive tactics directed by the junta of General Augusto Pinochet beginning in September 1973, were targeted at Chile’s elites including lawyers and other professionals, academics and political leaders, many of whom had personal relationships with international colleagues. By the time of the coup, the United Nations human rights bodies had just begun to develop nascent mechanisms for investigation and monitoring alleged violations. International NGOs were prepared to react immediately to the pattern of violations in Chile, led by Amnesty International and the International Commission of Jurists, who documented the cases and reported them diligently to the international community.

International condemnation of the violations being carried out in Chile gave a push to a more engaged approach by the United Nations, which broadened its capacity to address human rights crises. In 1975, the UN Commission on Human Rights, the legislative body mandated to address human rights issues, created an Ad Hoc Working Group on Human Rights in Chile. This represented the first time that the Commission had used a “problem country” approach to its work. The issue of disappearances was discussed within the mandate of the Working Group, as a part of Chile’s overall human rights situation, but the practice of disappearances in other countries was not significantly addressed by the United Nations human rights machinery until the case of Argentina was examined.

**Argentina.** The military coup in Argentina in 1976 brought the most focused attention in the international community to the systematic practice of disappearances in the Latin American context. Similar to the pattern of violations in Chile, the military junta in Argentina focused its repression, including disappearances, against perceived leftist political opponents, many of whom were intellectual elites—teachers, labor leaders and university students—with ties to international networks.

Kidnappings and disappearances were used in Argentina on a much wider basis than in neighboring Chile. The military’s unchecked powers and its decision to evade accountability for its actions resulted in the creation of structured “command units,” to implement its National Security Doctrine by taking steps to eliminate large numbers of suspected “subversives” (Berman and Clark 536). The National Commission of Disappeared Persons documented 8,961 disappearances in Argentina, most in the first two years of the junta—more than nine times as many as in Chile (Clark n5 75). The kidnappings were largely carried out by Argentine security forces, who gained clearance from local police. Abductees were typically tortured in secret detention centers before being executed and disposed of in oceans, lakes, reservoirs or anonymous graves (Clark 76).

The story of Mónica Mignone’s abduction described in Iain Guest’s book, *Behind the Disappearances*, is typical. Mignone, 24-year-old daughter of Peronist and lawyer Emilio Mignone, had been an educational psychologist at a local hospital and teaching assistant at a local university. She lived with her family in a middle class neighborhood, apartment on *Avenida Sante Fe* in Buenos Aires. In May 1976, at 5:00 in the morning, five men wearing military trousers and boots with civilian shirts entered the Mignone family home, carrying grenades and automatic weapons. The men searched the apartment, pushing past Mónica’s father. They entered Mónica’s room, and searched her bookbag. They ordered her to dress and accompany them. The men acknowledged to Mónica’s father that they were from the First Army Corps in Palermo, and told him “We want to take your daughter and talk to her about a friend. She’ll be back in a few hours.”

(Guest 9–11). Mónica had been one of seven friends picked up in an operation carried out against a group identified as anti-government sympathizers. She was taken to the *Escuela Superior de Mecánica de la Armada* (ESMA) a secret detention center and “navy’s nerve center in the war against subversion” (Guest 37).

A year after Mónica’s disappearance, in April 1977, Emilio Mignone and a group of lawyers filed habeas corpus petitions requesting the court to investigate the whereabouts of 1,541 *desaparecidos*. The test case on the disappeared went to the Argentine Supreme Court three times. After a year and a half in process, the Court explained it had no jurisdiction because the authorities refused to acknowledge any information about the disappeared persons in question.<sup>21</sup>

Several groups formed in Argentina to investigate and protest the repressive tactics imposed by the military junta, with a special focus on disappearances. Failing to get any response from the authorities on the fate of their loved ones, relatives of the disappeared, most notably the women in the family, organized networks to press for answers. The “Mothers of the Plaza de Mayo” was formed by fourteen middle-aged women looking for their children, including Mónica Mignone’s mother. In May 1977, the women began their weekly gatherings outside the President’s residence in the Plaza de Mayo in the middle of Buenos Aires. The Mothers, recognizable in their white headscarves, grew in number and stood in stark contrast as humble housewives speaking out against the powerful forces of the State. The Mothers proved to be an internationally recognized symbol of the fight against disappearances in Argentina and a visible embarrassment for the Argentine junta.

Other Argentine NGOs also played a prominent role in documenting and publicizing the pattern of violations. Emilio Mignone, Mónica’s father, organized the Center for Legal and Social Studies (CELS), to promote research and publicize State-sponsored violations of human rights. These domestic NGOs had dense international ties with international human rights organizations, including Amnesty International. The international human rights community had learned from its work on the Chilean case how to act quickly to mobilize international attention in the face of military repression against political opponents. NGOs helped mobilize the Inter-American Commission on Human Rights to intervene in the Argentine case, and that Commission’s 1979 fact-finding mission proved to be a turning point in bringing international attention and shame to the tactics of the “Dirty War.”

The domestic and international organizations also worked at the United Nations. Emilio Mignone, representing CELS, was among six Argentine NGO representatives to testify in September 1980 before the newly established UN Working Group on Enforced and Involuntary Disappearances. The presentation by the Argentine NGOs was well documented and persuasive. One group, *Familiares de Desaparecidos y*

*Detenidos por Razones Políticas*, presented statistical data used to paint a vivid narrative of systematic disappearances in Argentina. The group relied on interviews concerning 1000 abductees. Of this sample, 585 abductions took place in homes: “people were snatched from their homes, almost always at night, by heavily armed members of the security forces who gave no kind of explanation, who made searches without any document authorizing them to do so, and who took away the missing persons, and sometimes as many as five people from the same household, without any form of explanation.”<sup>22</sup> This fact pattern, repeated again and again, ultimately became embedded in international law.

### **The International Response to Disappearances: Investigating and Framing a New International Norm**

The work of the international organizations to develop a legal norm outlawing the practice of disappearance was thoroughly motivated by the unfolding violations in Latin America. The normative response to the violations, which was initially stated in a 1978 resolution of the United Nations General Assembly, was a direct reaction to the Latin American narrative especially as exemplified in the Argentine case.

NGOs, in particular Amnesty International, intentionally constructed the narrative of an enforced disappearance, and transmitted this narrative to international policy makers (Guest n5 248). The sheer number of disappearances in Argentina shocked the international community into action and the intentionality and impunity with which the Argentine military carried out enforced disappearances led to support for a call for a more specific legal framing of the practice as “a distinct form of human rights violation” (Guest 79). Amnesty International was a key actor in framing the violation, and in providing a cohesive picture of the pattern of disappearances carried out in Argentina. Amnesty’s report on its fact-finding mission to Argentina became public in March 1977, documenting the killings and disappearances during the first year of the military coup. The careful detailing of the cases stood in contrast to the Argentine government’s protestations of a smear campaign (Korey 179). Despite the Argentine’s efforts to discredit the NGO, the decision to award the Nobel Peace Prize to Amnesty International in October 1977 was an illustration of the organization’s standing in the eyes of the world community.

Pressure built within the United Nations for diplomatic action with regard the violations taking place in Argentina, but the Argentine government wanted to avoid being rebuked as a “problem country” as was the fate of Chile with the establishment of the UN Ad Hoc Working Group on Chile in 1975. Argentina used its international diplomatic connections,

especially its Cold War-inspired relationship with the USSR, to keep its name out of any UN resolution. Despite its success at doing so, in 1978 the General Assembly adopted a resolution focused on the question of disappeared persons that was clearly directed at Argentina. The resolution, 33/173, did not mention Argentina by name, but the disappearances it condemned were straight from the reports of the “Dirty War”:

Deeply concerned by reports from various parts of the world relating to enforced and involuntary disappearances of persons as a result of excesses on the part of law enforcement or security authorities or similar organizations, often while such persons are subject to detention or imprisonment [ . . . ].

Concerned also at reports of difficulties in obtaining reliable information from competent authorities as to the circumstances of such persons, including reports of the persistent refusal of such authorities or organizations to acknowledge that they hold such persons in their custody or otherwise to account for them [ . . . ].

The elements of the violation known as enforced disappearance that is described in this foundational resolution tracked exactly with the cases being documented in Argentina, including:

- the use of the term ‘disappearance,’
- the enforced or involuntary nature of the violation,
- the involvement of law enforcement or State security forces,
- the detention or imprisonment of the disappeared person and
- the refusal to acknowledge or account for the persons whereabouts.

Despite a hesitancy to define the term, these core elements of what constitutes a “disappearance” were to remain central to the discourse surrounding the violation throughout the next three decades of normative development.

The General Assembly’s 1978 resolution did not result in a halt to the violations, of course. Argentina dug in its heels, taking advantage of the hardened diplomatic context of Cold War politics. The 1978 resolution had called on the UN Commission on Human Rights to consider disappearances on its agenda, but the issue was given low priority on at its next meeting, in March 1979, and failed to receive any consideration at all. Still, NGOs in Argentina and elsewhere continued to press their cause, documenting and publicizing cases of disappeared persons. Their efforts were assisted by pressure from the Inter-American Commission on Human Rights which, after a year and a half of negotiations, was permitted by the Argentine Government to carry out a site visit to the country in September 1979. The

internationally-broadcast image of thousands of families lined up in the street in Buenos Aires to offer public testimony to the Commission's delegation provided visible proof of the extent of the junta's violations. Indeed, it has been shown that disappearances in Argentina diminished after the Argentine Government agreed to the Commission's site visit (Weissbrodt et al 490).

In September 1979 the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities—a body of independent experts that had more leeway to take positions than the UN bodies composed of political representatives—adopted an aggressive resolution calling for emergency international action to prevent further disappearances. Because of the Sub-Commission's work, the UN Commission on Human Rights was not able to push aside the issue of disappearances at its next session in February-March 1980 as it had in 1979. The Sub-Commission had recommended to its parent body, the Commission, that immediate action was required to address the epidemic of disappearances, and that the international response needed to be designed to allow for emergency intervention in the first few days after a disappearance, which were likely to be the difference between life and death for the victim. The six-week 1980 session of the Commission came to be dominated by negotiations to establish a thematic UN working group to address the problem of disappearances, known more commonly as “the Argentina resolution.” Even though Argentina had avoided being named in the resolution, there was no doubt that the content of the resolution pertained to the practices of its military government. During the final negotiations to reach a consensus on the language of the resolution, Argentina's diplomats tried without success to disrupt the negotiations, cabling governments of the delegations involved in the debates and accusing them of maligning Argentina (Kramer and Weissbrodt 28).

The final compromise language of Commission on Human Rights resolution 20 (XXXVI), adopted 29 February 1980, was to establish a five-person working group “to examine questions relevant to enforced or involuntary disappearances of persons.” Designing the working group as such would allow representation from the five geographic regions within the UN system to consider information about cases from any country in the world. The Working Group on Enforced or Involuntary Disappearances, (WGEID), thus became the first of dozens of thematic mechanisms that have since been established at the United Nations to investigate, report, and recommend action regarding specific human rights issues. These mechanisms, known as “special procedures,” provide for urgent appeals, on-site investigative visits, annual reports to the General Assembly, and general comments interpreting specific normative provisions. The UN Special Procedures are viewed as one of most effective mechanisms for addressing human rights violations across a geographic and political spectrum.

The inaugural members of the WGEID were Luis A. Varel Quiros of Costa Rica, Kwadwo Fak Nyamekye of Ghana, Mohamed Redha Al-Jabiri of Iraq (who was replaced by Waleed M. Sadi, chair of Commission), Viscount Colville of Culross of the United Kingdom, and Ivan Tosevski of Yugoslavia. The WGEID viewed its initial mandate cautiously, but still made a significant impact in identifying the breadth and seriousness of the problem. As called for in the Commission's resolution 20 (XXXVI), the Working Group was mandated "to seek and receive information from Governments, intergovernmental organizations, humanitarian organizations and other reliable sources." To implement that mandate, it held three one-week sessions in 1980, in June, September and December in Geneva. The "humanitarian" nature of the Working Group's mandate allowed it to call upon governments and NGOs for specific information that might assist families looking for information about the whereabouts of their disappeared loved ones. In practice, the ready availability of this information exposed the governments in question to an embarrassing level of scrutiny.<sup>23</sup>

At its first session the WGEID delegated one or two members to establish direct contacts with governments under examination. The Working Group wrote to governments of those countries about which it had received expressions of concern asking if the government would in principle be disposed to invite the group to visit the country in order to establish direct contacts.<sup>24</sup>

At its second session, in September 1980, the WGEID met with representatives of NGOs directly concerned with enforced or involuntary disappearances, including groups from Argentina, Cyprus, Indonesia, Mexico, Nicaragua, Peru and Uruguay. Cases from Chile were not considered by the WGEID because of its decision, made after discussions with the Special Rapporteur on Chile in order to streamline the UN's work, that the Special Rapporteur address as part of his broader mandate the problem of disappeared persons in Chile.<sup>25</sup> This agreement effectively allowed Chile to avoid focused scrutiny on the subject of disappearances, but the Special Representative reported under a separate agenda item to the Commission on Human Rights, offering strong overall scrutiny of all violations.

The WGEID submitted its first report in January 1981, documenting that, in its first year examining questions relevant to enforced disappearances, it received information on between 11,000 and 13,000 cases from Argentina, Bolivia, Brazil, Chile, Cyprus, El Salvador, Ethiopia, Guatemala, Indonesia, Mexico, Nicaragua, Peru, the Philippines, South Africa, Uruguay. Of the fifteen total countries reviewed by the WGEID, ten were in Latin America.<sup>26</sup> The WGEID took special note of a large quantitative survey conducted by Argentine NGOs of approximately 500 cases of disappearances there. The patterns emerging from the survey supported the narrative construction of a "disappearance" that had already

been disseminated by NGOs and reinforced in the preamble of the General Assembly's 1978 resolution: arrests in home or presence of others, by armed security forces, many seen in detention, habeas corpus petitions submitted without success.

In its initial report to the Commission on Human Rights, the Working Group noted that the specific existing human rights that had been denied by enforced or involuntary disappearances were informed by the nature of reports received. The WGEID acknowledged that a wide range of human rights of victims and their families might have been denied by the act of 'disappearing' a person, including the full spectrum of rights—civil and political, economic, social and cultural rights. The Working Group determined that the principal human rights denied by enforced or involuntary disappearance included:

- the right to liberty and security of the person (including arbitrary arrest, right to fair trial, and recognition as a person before the law);
- the right to humane conditions of detention and freedom from torture; and
- the right to life.<sup>27</sup>

The Working Group has continued to operate since its establishment in 1980. From 1981 until 1985, the WGEID mandate was extended on a year-to-year basis. From 1986 to 1991 it was authorized for two-year terms of work. From 1991 until the present, the Working Group has been authorized for three-year terms. The mandate of the group continues to be to help relatives of those who have disappeared to learn the fate of their family members. In 2005, the WGEID reviewed cases from 80 countries, including 16 Latin American countries. The Working Group's concerns at present are on the underreporting of disappearances, especially in African States, due to the weakness of civil society groups, the absence of human rights NGOs, and lack of encouragement and support from transnational NGO partners. The experience in Africa, it seems, is reminiscent of the lack of attention paid to the early Guatemalan disappearances, where NGOs worked under constant threat and the victims had few connections with elite transnational partners.

The WGEID meetings are held three times a year, typically in New York and Geneva, but it has begun to hold some sessions away from UN headquarters. Symbolically, in July 2008, the Working Group conducted its 85th session in Buenos Aires, Argentina, "as an acknowledgment of the tireless efforts by civil society for truth and justice and to honour the memory of the thousands of people who disappeared in Argentina."<sup>28</sup> Despite the steps taken by post-military governments in Argentina, the WGEID acknowledges in its most recent report that, of the 3,445 cases

submitted by the Working Group to the Argentine Government, more than 3,300 cases remain unresolved.<sup>29</sup>

### **The International Norm against Disappearances: Evolution of the Definitional Framework**

Twenty eight years elapsed between the General Assembly's 1978 preambular non-definition of the norm against enforced disappearances<sup>30</sup> and the adoption of the UN Disappearances Convention in 2006 with its binding definition.<sup>31</sup> Over that period, the elements of the violation we refer to as "enforced disappearance," have shifted slightly but continue to be grounded in the narrative framework elaborated in the stories emanating from Latin American countries such as Guatemala, Chile and Argentina. The most significant normative change from the earliest formation of the violation has been the addition and emphasis on the denial of legal recourse as a constitutive element of an enforced disappearance. When calls for a new legal norm first developed, in 1978-80, the focus of human rights advocates had been on the immediate safety of the victims who were being disappeared. As the victims remained "disappeared" over the course of the next two decades, it became apparent that the lack of access to meaningful legal recourse was central to the violation. As unresolved petitions for habeas corpus and amparo stacked up on the shelves of national court systems, impunity became the daily lived experience of the families of *los desaparecidos*; impunity that extended the State's culpability long after the "heavily armed men" had carried out the initial act of violence. Questions unanswered, truths unknown, have come to define this now-recognized human rights violation.

There have been several legal milestones in the evolution of the definition of the term "enforced disappearance." As described in the previous section, the foundational description of a disappearance was contained in the preamble of the General Assembly's resolution 33/173 in 1978:

Deeply concerned by reports from various parts of the world relating to enforced and involuntary disappearances of persons as a result of excesses on the part of law enforcement or security authorities or similar organizations, often while such persons are subject to detention or imprisonment [ . . . ]

Concerned also at reports of difficulties in obtaining reliable information from competent authorities as to the circumstances of such persons, including reports of the persistent refusal of such authorities or

organizations to acknowledge that they hold such persons in their custody or otherwise to account for them [. . .]<sup>32</sup>

UN resolutions subsequent to the General Assembly's initial statement, including the resolutions regularly authorizing the Working Group on Enforced and Involuntary Disappearances, avoided a definition of enforced disappearance. The decision not to define was based on the concern of the drafters that, in the words of Nigel Rodley, legal counsel for Amnesty International, "It is a characteristic of the horrible phenomenon that it tends to elude precise definition: thus, any attempt at finding a definition risks seriously undermining the drafting process" (Clark n5 91). Caution in drafting definitions is common in international law; controversial words such as 'terrorism' and 'aggression' have long been part of the UN discourse without being defined. With this kind of caution in mind, the next iteration of the norm against enforced disappearance, contained in the 1992 UN Declaration on the Protection of All Persons from Enforced Disappearances,<sup>33</sup> merely expanded the preambular "non-definition" of GA res 33/173 with the following preambular language:

*Deeply concerned* that in many countries, often in a persistent manner, enforced disappearances occur, in the sense that 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.<sup>34</sup>

The 1992 Declaration's preambular framing of enforced disappearance restated the central elements of abduction, involvement of the government, and lack of acknowledgement of the whereabouts of the person, and dropped any reference to the place or manner of detention and imprisonment. Notably, the Declaration added to its description that the act of forcibly "disappearing" the victims places them "outside the protection of the law."

The next significant normative step occurred in 1994, when the regional organization, the Organization of American States adopted a fixed definition of disappearance in a treaty, the Inter-American Convention on Forced Disappearance of Persons:

For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the State or by persons or groups of persons acting with the authorization, support, or acquiescence of the

State, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.<sup>35</sup>

A review of the above language shows that the OAS's 1994 definition contains essentially the same elements as the 1992 UN Declaration, worded slightly differently:

- deprivation of freedom
- by or with the acquiescence of agents of the State
- absence of information
- refusal to acknowledge the whereabouts of the person, and
- denial of recourse to legal remedies.

By the time the OAS adopted this treaty, the definition of enforced disappearance as a human rights violation seems to have been substantially settled.

A different and important legal statement of the norm against disappearances can be found in the Rome Statute of the International Criminal Court, adopted in 1998.<sup>36</sup> The Rome Statute establishes a permanent International Criminal Court and gives that court jurisdiction to try the most serious international crimes, including genocide, crimes against humanity and war crimes. Significantly, the treaty identifies the enforced disappearance of persons, when committed as part of a widespread and systematic attack against a civilian population, to be a crime against humanity.<sup>37</sup> The crime is defined as follows:

‘Enforced disappearance of persons’ means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.<sup>38</sup>

The language in the Rome Statute definition is directed at the role of individuals responsible for crimes, and does not determine the State's human rights responsibilities, as such. Because it is a crime which must be proven, therefore, the definition includes the element of specific intent. The prosecution must show that the accused individual's actions were motivated by the intent to remove the victim from the protection of the law in order to prove the crime of enforced disappearance. This definition again emphasizes the centrality of denial of legal recourse to the notion of enforced disappearance.

The most recent iteration of the definition of enforced disappearance is found in the newly adopted International Convention for the Protection of all Persons from Enforced Disappearances, 2006. According to a joint statement of several international NGOs involved in decades of normative work concerning disappearances, “The Convention [. . .] responds to a substantial gap in the law—the absence of a treaty to address the multiple violations of human rights and international crime that enforced disappearance represents.”<sup>39</sup>

The Disappearances Convention defines the violation of enforced disappearance as follows:

‘enforced disappearance’ is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

The definition is by now familiar, essentially a restatement of the elements contained in the preambular description contained 1992 UN Declaration and the 1994 OAS Convention: deprivation of liberty, by or with the acquiescence of the agents of the State, refusal to acknowledge the whereabouts of the person, and placement outside of the law.

## Conclusion

The shocking stories of *los desaparecidos* that came out of Latin America starting in the 1960s set off an international legal discussion, a phase of which was recently concluded in the adoption of an international convention against enforced disappearances. The stories, characterized by armed security forces arresting and detaining political opponents who were never to be seen again, formed the narrative framework used to pressure international policy makers to construct a new legal norm. Many of the rights violated by the practice of enforced disappearance already existed, but the sum of the criminal acts was seen by international advocates as more devastating to persons, families and communities than its constituent parts. A separate norm against enforced disappearance was therefore required to address the problem.

The first disappearances were observed in Guatemala, a country which also has the largest documented numbers of disappearances. But it was the events carried out by the Chilean and Argentine militaries against their elite

and well-connected political opponents that finally served as the catalyst for serious international attention. The OAS and the UN both carried out investigative activities that provided documentation to support the development of a new legal norm. Latin American and international NGOs shaped the developing law with their testimony and documentation about loved ones missing at the hands of State-sponsored security forces.

The adoption of the Disappearances Convention caps a thirty-year legal discussion about whether and how to frame a new international norm to respond to the type of human rights violations that gained notoriety in the military dictatorships of Latin America. While eliminating political opponents has long been a strategy of those in power, wherever they may be, the Latin American story and its ability to captivate international attention has forever left its imprint on the international law defining enforced disappearances.

## Notes

1. International Convention for the Protection of All Persons from Enforced Disappearance. G.A. res. 61/177, U.N. Doc. A/RES/61/177 (2006). Adopted Dec. 20, 2006.
2. Office of the High Commissioner for Human Rights. "Disappeared but not forgotten." [www.ohchr.org/EN/NewsEvents/Pages/DisappearedNotForgotten.aspx](http://www.ohchr.org/EN/NewsEvents/Pages/DisappearedNotForgotten.aspx). Accessed July 24, 2008.
3. United Nations, Press Release. "UN Working Group on Disappearances Concludes Visit to Guatemala." September 25 2006. [www.unhcr.ch/hurricane/hurricane.nsf/view01/23DA25EB23F99481C12571FC0045B34C?opendocument](http://www.unhcr.ch/hurricane/hurricane.nsf/view01/23DA25EB23F99481C12571FC0045B34C?opendocument). Accessed June 28 2009.
4. See National Security Archive Electronic Briefing Book No. 11. "U.S. Policy in Guatemala 1966–96." National Security Archives. [www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB11/docs/](http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB11/docs/). Accessed July 29 2008.
5. See Clark, *Diplomacy of Conscience*, 71; National Security Archive Briefing Book No. 11, note 2, documents 2, 3 and 4.
6. Argentine Forensic Anthropology Team. "Cyberspace Graveyard for Disappeared Persons: Guatemala." [www.disappearances.org/news/mainfile.php/doc/68/](http://www.disappearances.org/news/mainfile.php/doc/68/). Accessed July 29 2008.
7. Richard Black, "Guatemala Rights Scientist Honoured." BBC, Feb. 15 2004. [news.bbc.co.uk/2/hi/science/nature/3489743.stm](http://news.bbc.co.uk/2/hi/science/nature/3489743.stm). Accessed July 29 2008.

8. Report of the United Nations Working Group on Enforced or Involuntary Disappearances. U.N. Doc. E/CN.4/1435. Jan. 26 1981, Annex XIV.1.
9. Report of the United Nations Working Group on Enforced or Involuntary Disappearances. U.N. Doc. E/CN.4/1435. Jan. 26 1981, Annex XIV. 76–77.
10. Latin American judicial systems generally employ the writ of habeas corpus to measure the legality of a detention. The amparo procedure is broader, serving as a more general judicial protection of constitutional rights. See Berman and Clark, 531; 543.
11. See (MLIHRC), Minnesota Lawyers International Human Rights Committee, 79–101.
12. The writ was suspended under a state of siege from July 1982 until March 1983 at the height of the violence in Guatemala (MLIHRC 72).
13. Rettig Commission. Part One, Chapter Two, Section B(2). Accessed at United States Institute for Peace, Truth Commissions Digital Collection. [www.usip.org/library/tc/doc/reports/chile/chile\\_1993\\_toc.html](http://www.usip.org/library/tc/doc/reports/chile/chile_1993_toc.html), July 31 2008.
14. Rettig Commission. Part One, Chapter Two, Section B(2). Accessed at United States Institute for Peace, Truth Commissions Digital Collection. [www.usip.org/library/tc/doc/reports/chile/chile\\_1993\\_toc.html](http://www.usip.org/library/tc/doc/reports/chile/chile_1993_toc.html), July 31 2008.
15. Rettig Commission. Part Three, Chapter One, Section A(2)(a). Accessed at United States Institute for Peace, Truth Commissions Digital Collection. [www.usip.org/library/tc/doc/reports/chile/chile\\_1993\\_toc.html](http://www.usip.org/library/tc/doc/reports/chile/chile_1993_toc.html), July 31 2008.
16. Rettig Commission. Part Three, Chapter One, Section A(2)(a). Accessed at United States Institute for Peace, Truth Commissions Digital Collection. [www.usip.org/library/tc/doc/reports/chile/chile\\_1993\\_toc.html](http://www.usip.org/library/tc/doc/reports/chile/chile_1993_toc.html), July 31 2008.
17. *Dirección de Inteligencia Nacional*, (National Intelligence Directorate).
18. “*Memoria Viva*,” *Archivo digital de las Violaciones de los Derechos Humanos de la Dictadura Militar en Chile* (1973–1990). [www.memoriaviva.com/English/victims/lagos-salinas.htm](http://www.memoriaviva.com/English/victims/lagos-salinas.htm), Accessed July 31 2008.
19. Rettig Commission. Part Two, Chapter Four, Section B(2) note 16. Accessed at United States Institute for Peace, Truth Commissions Digital Collection. [www.usip.org/library/tc/doc/reports/chile/chile\\_1993\\_toc.html](http://www.usip.org/library/tc/doc/reports/chile/chile_1993_toc.html), July 31 2008.
20. Rettig Commission. Part Two, Chapter Four, Section B(2)(b). Accessed at United States Institute for Peace, Truth Commissions Digital Collection. [www.usip.org/library/tc/doc/reports/chile/chile\\_1993\\_toc.html](http://www.usip.org/library/tc/doc/reports/chile/chile_1993_toc.html), July 31 2008.

21. See the Inter-American Commission on Human Rights “Report on the Situation of Human Rights in Argentina” OAS Doc. OEA/Ser.L/V/II.49. April 11 1980. 122–24.
22. Report of the United Nations Working Group on Enforced or Involuntary Disappearances. U.N. Doc. E/CN.4/1435. Jan. 26 1981. Note 10, annex XII, 3.
23. The Government of Argentina, for example, moved from an initial expression of cooperation with the Working Group, to a threateningly cautionary note, after NGOs were invited to testify in 1980, cautioning international organizations “not to allow themselves to be used by terrorists as a vehicle for disseminating a distorted image.” Letter dated December 8 1980 from the Permanent Representative of Argentina to the United Nations Office at Geneva addressed to the Chair of the Working Group, E/CN.4/1435, annex VIII.
24. Report of the United Nations Working Group on Enforced or Involuntary Disappearances. U.N. Doc. E/CN.4/1435. Jan. 26 1981. Note 10, 16.
25. Report of the United Nations Working Group on Enforced or Involuntary Disappearances. U.N. Doc. E/CN.4/1435. Jan. 26 1981. 18–19.
26. Report of the United Nations Working Group on Enforced or Involuntary Disappearances. U.N. Doc. E/CN.4/1435. Jan. 26 1981. 21. The Working Group considered 2,100 further disappearances in its second report, based on information from a total of 21 countries, including 10 Latin American countries. Report of the Working Group on Enforced or Involuntary Disappearances. U.N. Doc. E/CN.4/1492 (1982).
27. Report of the Working Group on Enforced or Involuntary Disappearances. U.N. Doc. E/CN.4/1492 (1982): 79.
28. Office of the High Commissioner for Human Rights. “UN Working Group on Enforced or Involuntary Disappearances Concludes 85th Session.” [www2.ohchr.org/english/issues/disappear/index.htm](http://www2.ohchr.org/english/issues/disappear/index.htm). Accessed August 4 2008.
29. Office of the High Commissioner for Human Rights. “Disappeared but not forgotten.” [www.ohchr.org/EN/NewsEvents/Pages/DisappearedNotForgotten.aspx](http://www.ohchr.org/EN/NewsEvents/Pages/DisappearedNotForgotten.aspx). Accessed August 4 2008.
30. GA Res 33/173, 1978.
31. GA Res 33/173, 1978. Note 1, article 2.
32. G.A. res. 33/173, Dec. 1978. 20.
33. G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207. U.N. Doc. A/47/49 (1992), adopted by General Assembly resolution 47/133 of December 18 1992.
34. G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207. U.N. Doc. A/47/49 (1992) preambular para. 3.
35. 33 I.L.M. 1429 (1994), Article II, entered *into force* March 28, 1996.

36. 2187 U.N.T.S. 90, *entered into force* July 1, 2002.
37. 2187 U.N.T.S. article 7(1)(i).
38. 2187 U.N.T.S. article 7(2)(i), *emphasis added*.
39. Human Rights Watch, Amnesty International, International Commission of Jurists, and the International Federation for Human Rights. "Joint written statement to the first session of the Human Rights Council." June 27 2006. [hrw.org/english/docs/2006/06/27/global14095.htm](http://hrw.org/english/docs/2006/06/27/global14095.htm). Accessed August 5 2008.

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