



Survivors and the Origin of the Convention for the Protection of All Persons from Enforced Disappearance

Patricio Rice^{*}

Originally from Ireland, the late Patricio Rice worked as a priest among the poor in Buenos Aires, Argentina, where he was abducted and tortured by the military regime in 1976. After his release, he continued his pastoral mission among the poor, and also became an active voice against human rights violations and an advocate for the disappeared in Latin America. As Executive Secretary of the Executive Latin American Federation of Families of the Disappeared (FEDEFAM) between 1981 and 1987, he was instrumental in helping to craft the United Nations (UN) International Convention for the Protection of All Persons from Enforced Disappearance (CED). In this chapter, Rice reflects on the process of drafting the Convention and shepherding it through the UN to its adoption in 2006. He offers the extraordinary perspective of a “rare survivor” of the disappearances in Argentina’s Dirty War, detailing not only his own story, but also how survivors and their families helped to define the core terms and scope of this international legal instrument. His narrative is at once personal and collective in documenting not only his own motivations, but, even more crucially for this book, how witnessing by a collectivity that, significantly, includes survivors can shape the international legal terrain.

^{*} Deceased

P. Rice (✉)

FEDEFAM, Ciudad De Buenos Aires, Argentina

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Rice describes how a network comprising international human rights bodies, religious organizations, and coalitions of survivors and their families worked to demonstrate to the international community the need for a legal response to the increasing use of enforced disappearance as a tactic of abusive government. The process required survivors and their families to become knowledgeable about international law and to be willing to share their stories and their losses in order to lobby diplomats, lawyers, and civil servants; and it required those already empowered to effect international law to recognize survivors and their families as experts on the scope and effects of enforced disappearance.

The impact of survivors and their families is evident in the Convention's robust definition of enforced disappearance as an avowedly political crime that sought to remove those targeted from all legal protection. Moreover, in response to the demands of groups such as the Abuelas de Plaza de Mayo, the final Convention recognized family members as victims who, along with any direct survivors, were entitled to reparations and to their genetic identity. Rice's contribution to this volume provides an important reminder of how the law functions not as a set of abstract principles, but as a generative tool to respond to the legal, political, economic, affective, and corporeal suffering of its claimants; and, how, in our current moment, a law may be used to respond vigorously to conditions beyond those from which it sprang. Finally, Rice's work underscores the central role of survivors in shaping and wielding that instrument.

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Considered first an anomalous practice of so-called third world dictators, the practice of “vanishing” political opponents, subversives, or alleged terrorists has since emerged from the darkness of the night as a favorite way to operate repression with minimum cost—even in democratic countries. The outlook for human rights is indeed grim, as this mutating practice seems to have become a tool in the ongoing murky war against global terrorism. But what is this most cruel form of human rights violation?

Enforced disappearance literally means that armed thugs, recruited from security forces, not only get the green light to operate by kidnapping or detaining people, but are provided with secret bases in which to hold and brutally ill-treat their unfortunate victims, who may be men, women, or children, in order to extract data from them to continue the macabre hunt for “subversives,” “communists,” “terrorists,” or whatever label

suits state power at the moment. In most cases, when the disappeared person is no longer considered useful, an anonymous perpetrator decrees death. Care is taken that the victim is deceitfully and “humanely” erased with the secret disposal of his or her body. Meanwhile, their properties are plundered and families blackmailed into silence. To public opinion, that person has simply “gone missing,” but of course the next of kin know otherwise.

The true stories of the disappeared only slowly emerge from behind the smokescreen of deceit, and then the titanic struggle for the *desaparecidos* begins to play out its inevitable sequence. As in Argentina or Chile, it may take a generation or more for the truth to be revealed and the prosecution of perpetrators to be initiated. Although many will still argue that it was good riddance to “undesirable elements,” the majority who turned a blind eye at the time will likely feel remorse and shame at such a deep social wound, a wound that encompasses victims, their loved ones, and the “bystanders” of society at large.

Enforced disappearance was first practiced in the mid-twentieth century by the Nazis in Germany, and was then utilized by Latin American dictatorships starting in the 1970s. Families led by the Madres de Plaza de Mayo in Buenos Aires and friends standing in international solidarity with the *desaparecidos* then organized to demand accountability from governments and from the larger world community.

At first, the response of the international community was inadequate. Denial and incredulity were followed by the exhortation to renew confidence in the available human rights system. “The phenomenon will surely go away,” we were told, as if it were a natural, not a human-made, disaster. As we predicted, however, the cruel epidemic continued to spread to regions such as Africa, Asia, and Europe (particularly in the wars in the former Yugoslavia in the 1990s), until people began to stand up and say: “No, this cannot go on any more!” Studies were undertaken at the UN and gaps discovered in human rights law that rendered enforced disappearance difficult to address and to redress. Finally, in 2002 it was unanimously agreed by the UN Commission on Human Rights that a new treaty dedicated exclusively to enforced disappearance was necessary to overcome shortcomings found in the international system. The process culminated with the approval in 2006 of the Convention for the Protection of all Persons from Enforced Disappearance.

This essay is intended to examine the Convention and its origins and content, and the fundamental challenge of making it a fully operative tool for the prevention of enforced disappearances in our world today. I write from the perspective and on behalf of the Latin American Federation of Associations of Families of Disappeared Detainees (FEDEFAM), for which I served as a founding member and as Executive Secretary. As life circumstances would have it, my personal history became tied up with FEDEFAM from its beginnings in the late 1970s, and so I begin there.

THE EXPERIENCE OF ENFORCED DISAPPEARANCE

I am a rare survivor of enforced disappearance in Argentina. On October 11, 1976, I was literally picked up from the street together with a young church worker—Fatima Cabrera—by armed security agents who had fired shots to intimidate us. We were first taken to the local police station, and were then abducted and delivered to a secret detention center. I was transported in the boot of a car to a torture place in the city of Buenos Aires whose exact locale I do not know to this very day, despite living in that city since 1988. Beyond the evident trauma of torture and suffering, the experience was one of utter hopelessness, of not knowing anything about where I was, about what I was being charged with, or about the final outcome. Would it be life, or would it be death? Fortunately, due to the prompt intervention of Irish Ambassador Wilfred Lennon, I “surfaced” in official custody a few days later, and after almost two months of political imprisonment, in December 1976 I was deported from Argentina. Fatima spent several years in prison, but she too is a survivor, thanks to international solidarity.

FEDEFAM

After this experience, I became absolutely convinced that international solidarity can save lives in the case of disappearances. For that reason, I campaigned for the cause of the Argentine *desaparecidos* in Britain (1977) and the United States (1978–80), where support was readily forthcoming due to the human rights policies of the Carter administration. My own case got to the Inter-American Commission on Human Rights and, after the hearings, the Commission resolved in 1978 that I had been a victim of torture and illegal detention in Argentina. As that decision was to be

debated at the General Assembly of the Organization of American States (OAS) in La Paz, Bolivia in October 1979, I then traveled there. Unexpectedly, that venue proved to be a most important occasion for the creation of FEDEFAM: families of the “disappeared” from Argentina, Uruguay, El Salvador, Chile, and of course Bolivia had gathered to lobby the OAS General Assembly; it was there that we met and began to exchange experiences. The need was expressed to deepen bonding links through a more formal meeting, and it was only a year later when a Venezuelan non-governmental organization (NGO), the Foundation for the Social Development of Latin America (FUNDALATIN), led by Reverend Juan Vives Suria, took up the initiative. Together we organized the First Latin American Congress of Families of the Disappeared in San Jose, Costa Rica in January 1981.

THE NEED FOR A CONVENTION

In Costa Rica, families from all over the continent shared their shock and powerlessness at dealing with this repressive practice. Their loved ones had been disappeared and no remedy was working, as habeas corpus recourses were routinely dismissed by the courts. In this way, an impenetrable wall had been constructed, hiding the fate of their loved one behind it. While society was kept in the dark behind the appearance of normality, people were terrorized by “disappearances” happening around them. From this groundswell of shared experiences of social paralysis, indignation, and struggle surged a clear demand for international action. And so, the debate crystallized into the idea of a new international law against enforced disappearance. Of course, the families had to learn about international law; for example, that a convention in this context was not a *meeting* but rather a *treaty*, obliging states to determine practices and observances. But the families of the *desaparecidos* had already learned much about legal matters in their search for truth and justice. They thereby endorsed the need for a convention, but also brought forth the idea of creating a federation of families of the disappeared. The founding FEDEFAM Congress was held in Caracas, Venezuela in November 1981, and the objective of achieving the UN Convention against Enforced Disappearance became its absolute priority.

We moved quickly. In 1982, we approved a “Convention on Enforced Disappearance” drafted under the guidance of renowned

Chilean jurist Eduardo Novoa Monreal for presentation to the UN. That text became our banner for lobbying at the Commission on Human Rights over many years. In hindsight, it must have come as quite a surprise for those professionally involved in international human rights to see an invasion of their sacrosanct precincts in the Palais des Nations, Geneva by despairing mothers, grandmothers, and distraught survivors demanding that something be done, asserting that existing human rights mechanisms were not working and that a new initiative was urgently needed. Eyebrows were raised and foreheads were furrowed, but we had reality on our side. The practice of enforced disappearance was spreading like wildfire, not only in Latin America but around the world.

It took a generation of persuasion, coaxing, and charming of diplomats, lawyers, and international civil servants to make them aware of the complexities of disappearances and of the need for an international Convention. And when the final process began in 2002, FEDEFAM, together with other family federations such as the Asian Federation against Involuntary Disappearances (AFAD), participated actively in its drafting by sending important delegations to Geneva. Out of that crucible of meetings and debates was born the text of the new Convention, but no less important was the achievement of consolidating a consortium of experts—human rights defenders, representatives of international NGOs, and state delegates to the UN—into a group absolutely determined to end enforced disappearances. Not only, then, did the family associations provide the impulse to get the Convention approved, but we can modestly claim that many of its articles have their origin in our movement, as I will demonstrate in what follows, tracing those most important concepts as we see them reflected in the final Convention text.

THE DEFINITION OF ENFORCED DISAPPEARANCE

Families and survivors were involved from the earliest moments in the debate about definitions. FEDEFAM saw enforced disappearance as a new phenomenon that needed to be adequately defined; indeed, that was to be our major concern. The first definition included in our Convention draft of 1982 attempted to define the violation as the action of “forcibly disappearing” someone; that is, it was an active criminal act between those who did the abduction, those running the clandestine detention centers, the perpetrators of torture, and even court officials who did not investi-

gate. It was clearly a state-orchestrated crime that was meticulously and deliberately concealed to guarantee impunity.

We were aware that in attempting this definition we were responding to the traditional position that saw enforced disappearance as simply a form of “privation of liberty.” We claimed it was much more than that, as it involved torture, summary executions, clandestine burials, and other gross violations; “a violation of violations,” as it has rightly been called. Those facing indictment for enforced disappearance had up to then simply been charged with the crime of “privation of liberty,” which in most penal codes was not considered a serious crime, given that the life or integrity of the victim was not viewed as being at risk. The most serious dimensions of the crime of enforced disappearance, then, were conveniently hidden behind the cloak of privation of liberty. That is why we felt so strongly about overcoming the deficiencies of this limited definition.

Our ideas finally came to fruition in the definition of the UN Declaration on Enforced Disappearance (1992) and the Inter-American Convention (1994), which describe the act as a privation of liberty but with the role of the state clearly determined, with an emphasis upon the fact that where no further information is provided on the whereabouts or fate of the victim, that puts them totally beyond the reach of law. A most serious crime indeed!

The clarity of our understanding of the nature of enforced disappearance was a tremendous asset when we began to debate the text for the Convention, but we faced a new challenge from an unexpected quarter: the Rome Statute, which established the International Criminal Court in 1996, had incorporated a definition of enforced disappearance that was totally inadequate from our perspective. It included elements of subjective responsibility; that is, that the perpetrator must have in mind the end result of the crime when he or she participates in some part of it. But above all, it asserted that enforced disappearances are committed equally by both state and non-state actors—the phrase used is “political groups.” Many states wanted that definition to be endorsed in the Convention. FEDEFAM adamantly opposed that position.

It was the inclusion of non-state actors that above all motivated debate in the Draft Working Group, as FEDEFAM understood the introduction of non-state actors into the definition as a “privatization” of the crime of enforced disappearance. If this definition were permitted to stand, enforced disappearance would thereby become a non-political crime, a kind of common crime similar to, if not the same as, kidnapping. Many voices

emphasized that non-state actors were indeed engaging in enforced disappearance in many countries. We did not challenge those facts, but argued that in order to do so, such groups had constituted themselves into “quasi” state entities with the capacity for clandestine detention, central command, and impunity. If we were to use the definition of the Rome Statute, then all enforced disappearances could be blamed on non-state actors, and there would be no way of ever combating the practice, as States would easily be able to escape their responsibilities and ensure deniability by using paramilitary and other surrogates to conduct disappearances.

The solution reached in the Convention, whereby non-state actors are not included in the definition itself but rather in a separate article, will permit situations where non-state actors are involved in enforced disappearance to be addressed, as the Convention is authorized to address all forms of enforced disappearance, no matter who the authors are.

The other issue in the definitional debate emerged toward the end of the drafting sessions: was putting a person beyond the reach of law inherent to enforced disappearances, or ought it to constitute a separate element in the definition? Those attempting to set that element apart seemed to FEDEFAM to be engaged in the effort to create some kind of legal formality whereby one could somehow become a victim of enforced disappearance, but yet manage to be within the protection of law. We totally rejected that possibility and were also well aware that some states might attempt to use such a loophole in the Convention definition to legalize a form of enforced disappearance. Indeed, this is currently observable in repressive practices used against terrorism suspects, whereby the victims may appear in official custody but only months or even years afterward and often without charge or trial. We believe there can never be any room for a legal “disappearance” of anyone. Defining enforced disappearance is therefore still a key concern for FEDEFAM.

THE RIGHT TO KNOW THE TRUTH ABOUT THE FATE OF THE PERSON DISAPPEARED AND ALL RELATED CIRCUMSTANCES

The intense and endless searching for news of *desaparecidos* is an experience that does not go away, even with the passage of time. Week after week, year after year, generation after generation, distraught families search for the truth of their loved ones’ fates. I don’t think that anyone could have imagined that this demand would become so overriding as to go from decade to decade and generation to generation, as it has with the

Madres and Abuelas of Plaza de Mayo, and yet it has, forcing change in international human rights policy and law.

From that anguishing search for truth grew the affirmation of the *right to know*, which I believe has become not only a new human right, but the very *leitmotif* for humanitarian movements in the third millennium. If the twentieth century was characterized by successive genocides where anonymity and non-accountability were dominating features, the gigantic effort in the twenty-first century is to pull the curtain aside and discover “who did what, where, why, and how.” It is the right to truth. This right to know what happened to one taken into any form of custody is clearly established in the Convention.

THE RIGHT OF RELATIVES TO RECOVER THE REMAINS OF THEIR LOVED ONES

Relatives naturally wanted their loved ones back alive, but that was seldom possible, as the victims were routinely killed after secret detention and secretly buried, or their remains otherwise disposed of. Families then had to search in all directions. Human remains began to be recovered and identified due to the science of forensic anthropology and innovative medical research making it possible to read DNA identities. With such recovery work, families were given the possibility of organizing a dignified burial for their loved ones. Now it is expressly stipulated in the Convention that families have the right to the remains of their loved ones, which will of necessity revolutionize the way human remains are handled by state authorities—above all when those remains are unidentified.

THE RIGHT TO JUSTICE FOR THE FAMILIES OF THE DISAPPEARED

This is another chapter in the Convention which reflects how the struggle of families and survivors opened up new possibilities. Here we can see the fruits of the struggle against impunity, with the Convention’s affirmation of the practice of enforced disappearances as an ongoing crime and a crime against humanity in certain circumstances. It also endorses some form of universal jurisdiction for its effective prosecution and sanction. While we would have liked to see a total condemnation of any measures of pardon or amnesty in the Convention text, it was not possible to get consensus from governments on that measure. Certainly, we hope to ensure that in

the application of the Convention that gap will never be used, covertly or overtly, to tolerate any form of impunity.

A BROAD CONCEPT OF VICTIM, INCLUDING RELATIVES AND CLOSE ASSOCIATES

In early discussions, many states wished to restrict enforced disappearance to address solely the experience of the person who is the direct victim; however, by the time the issue was taken up on the floor of the UN General Assembly in 1978, the social ramifications of the phenomenon were already recognized. No other human rights violation so thoroughly affects people close to the direct victim as enforced disappearance. Uncertainty about the fate of a loved one is devastating to humanity; thus, we must regard family members and friends of the disappeared not simply as third parties to a violation, but also as victims of the practice itself. Over the years this fact has been increasingly recognized and affirmed, and so we arrive at the text of the Convention, where the concept of victim is as wide as the effects of enforced disappearance itself.

MULTIPLE ASPECTS OF THE RIGHT TO REPARATION ARE AFFIRMED

From the moment of a person's disappearance, a human drama unfolds which is impossible to handle. Where is the loved one? In prison? But where? Dead or alive? Why was she taken? What can we do to obtain his release? This uncertainty demands immediate responses, with families attempting to rationalize an otherwise irrational situation. Generally, there is resistance to consent to any administrative measure that would entail declaring the presumed death of a loved one, but there may be no other solution in order to solve inheritance and other issues in the aftermath of enforced disappearance. In some countries (Sri Lanka, for example), a provisional death certificate has been created in order to facilitate procedural issues even while a family continues to search for a loved one, and in Argentina, the concept of "absence due to enforced disappearance" instead of "absence with the presumption of death" was introduced in order to address the predicament of families with respect to the legal situation of their loved one. Families are saved from the dilemma of having to

sign off on the presumed death of their loved one, thereby closing the case from future investigation.

Of course, reparation covers other aspects of the aftermath, from monetary compensation to prevention and memorial activities, and again, families have been the principal movers in terms of working to meet those demands. For instance, a novel concept for compensation was devised in Argentina whereby the victim was accredited with a salary over a fixed period of time—the number of years of the military dictatorship—and that amount in government bonds was left to the family as his or her inheritance. It is not, strictly speaking, compensation, but rather a way of offsetting some of the hardship endured precisely because of the loss of a breadwinner at home. The Convention includes the right to reparation in all its multiple dimensions.

THE RIGHT TO GENETIC IDENTITY

There is no doubt that the right to identity was the unique contribution of the Abuelas (Grandmothers) de Plaza de Mayo (Argentina) to the Convention and, more broadly, to international human rights law. For over thirty years, the Abuelas have faced the predicament that the babies of their “disappeared” sons and daughters have been disappeared by means of false adoptions. The legal basis for the claim of the Abuelas to restore these children to their biological families is the right of a person to his or her own genetic identity. The falsely adopted children they are looking for are kept totally in the dark with respect to their own true identities. Nevertheless, the Abuelas persevered, and many cases have been unraveled with positive results for all those young people who have had their own identities restored to them (many of whom then organized as the Hijos (Children) de Plaza de Mayo). This proclamation of the right to know one’s genetic identity will, of course, have profound consequences in all future adoption laws where the Convention is ratified.

NEVER AGAIN: THE RIGHT NOT TO BE SUBJECT TO ENFORCED DISAPPEARANCE

When FEDEFAM began, our founding leadership emphasized that it was a Federation that should never have had reason to exist, and that our greatest achievement would be that enforced disappearances would never occur again. Alas, our vision of eradicating enforced disappearance has not

materialized, and over the years we have witnessed the expansion of the practice in Latin America, from military dictatorships to formal democracies like Colombia, Honduras, and Peru, and then to other regions of the world—Africa, Europe, Asia, and the Middle East. And after the terrorist attacks on the United States known as 9/11, forms of “legalized” enforced disappearance—“ghost prisoners,” “extraordinary rendition” of suspected terrorists from one country to another, “undisclosed” detention facilities—have become one of the tools used in the global war on terrorism.

Our dearest ambition has always been to stop all disappearances, and we especially celebrate that the right not to be disappeared has been openly proclaimed in the very first article of the Convention. We enthusiastically support all measures toward that goal, such as ending all clandestine detention, publicizing lists of prisoners, strictly limiting “incommunicado” arrest and detention, and giving immediate information to families on the whereabouts and fate of anyone in custody. The establishment by the Convention of the Committee on Enforced Disappearance to investigate all urgent cases as one of its most noted characteristics plays a fundamental role in this preventive task. The Convention has an importance now, in our post-9/11 world, that we could never have imagined when we began this struggle over twenty-five years ago. It points out that the only way for humanity to progress is to fully and always observe and promote human rights. No form of enforced disappearance can ever be justified, even in the so-called “war on terror.” Clearly establishing and defending the right not to be disappeared must be our obsession for these troubled times.