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Volume 31, Number 2, 2018

URI: <https://id.erudit.org/iderudit/1068669ar>

DOI: <https://doi.org/10.7202/1068669ar>

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Publisher(s)

Société québécoise de droit international

ISSN

0828-9999 (print)

2561-6994 (digital)

[Explore this journal](#)

Cite this document

Duhaime, B. (2018). Multilateral Human Rights in a Shifting World Order: Perspectives From a UN Special Procedure Mandate. *Revue québécoise de droit international / Quebec Journal of International Law / Revista quebequense de derecho internacional*, 31(2), 213–218. <https://doi.org/10.7202/1068669ar>

MULTILATERAL HUMAN RIGHTS IN A SHIFTING ORDER: PERSPECTIVES FROM A UN SPECIAL PROCEDURE MANDATE

*Bernard Duhaime**

In 1980, the United Nations established the Working Group on Enforced or Involuntary Disappearances (WGEID), the first special thematic procedure of the United Nations Human Rights System (UN HR System).¹ Enforced disappearances occur when

persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law.²

The WGEID is composed of five independent experts. Its main mandate is to assist the relatives of the disappeared in establishing a fluid and transparent communication with the competent national authorities in order to determine the faith or whereabouts of the disappeared. It deals with reports of disappearances in accordance with its *Methods of Work*, which regulate its proceedings.³ Since its creation, the group has received more than 57,000 cases, of which more than 45,000 have not yet been clarified.⁴

In addition, following the General Assembly's adoption of the *Declaration on the Protection of All Persons from Enforced Disappearance* in 1992, the group is also responsible for overseeing the progress made by States in implementing their obligations under the *Declaration* and in providing assistance to governments for this purpose. For example, the WGEID undertakes country visits, makes recommendations to governments, prepares general comments and thematic reports, and so on. It reports

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¹ UN Human Rights Commission, *Question of enforced or involuntary disappearances*, Res 20 (XXXVI), 36th Sess, HRC Doc E/CN.4/RES/1980/20 (1980).

² UNGA, *Declaration on the Protection of All Persons from Enforced Disappearance*, GA Res 47/133, 47th Sess, UN Doc A/RES/47/133 (1993), preamble.

³ UNHRC, *Methods of work of the Working Group on Enforced or Involuntary Disappearances*, 102th Sess, HRC Doc A/HRC/WGEID/102/2 (2014).

⁴ UNHRC, *Report of the Working Group on Enforced or Involuntary Disappearances*, 39th Sess, HRC Doc A/HRC/39/46 (2018) [UNHRC].

annually to the UN Human Rights Council and presents observations to the General Assembly.

For the purpose of our discussion, it is suggested to address multilateral human rights in a shifting world order from three angles: first from the perspective of universal and regional human rights institutions, from the perspective of UN Special Procedures and lastly from the perspective of the Working Group's specific thematic mandate.

I. International Human Rights Institutions

As former UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, indicated on 6 May 2019 in the *New York Times*: "Abuses used to be called out and stopped, and human rights offenders had something to fear. Today, they are met with silence instead."⁵

Indeed, one could say that, in recent years, certain important States have progressively or drastically disengaged from the multilateral human rights regime, a phenomenon, of course, illustrated by the United States pulling out of the Human Rights Council in June 2018. Sometime, this has allowed other important players to occupy the empty chair, thereby setting the agenda and the tone of certain debates – not necessarily for the better.⁶ At the regional level, the US' disengagement in the Inter-American Human Rights System is well-illustrated by the fact that, for the second time in its sixty-year history, no American sits on the Commission. This atmosphere allows for coordinated attacks against Inter-American institutions, in particular since Venezuela's denunciation of the *American Convention*, followed by the vocal criticism of the System by its traditional allies, including Bolivia and Nicaragua.⁷

Some will rightly say that this form of disengagement from the regime, both at the universal and regional levels, has also allowed for States to adopt policies, which are at odds with human rights. This is particularly the case in the so-called fight against terrorism, often invoked to restrict civil liberties, public debate and unfortunately oppress minorities, religious groups or political opponents. As indicated in the Working Group's 2018 annual report,⁸ enforced disappearances have, for example, been alleged to occur in China, Egypt and Turkey against such groups, in the context of the fight against terrorism. Similarly, security-oriented policies adopted in the context of recent increased migration have also resulted in human rights violations on a large scale, as analyzed in the Working Group's recent thematic Report on enforced disappearances

⁵ Zeid Ra'ad Al Hussein, "I Will Not Stay Silent. Our Leaders Are Failing Human Rights", *The New York Times* (6 May 2019), online: <www.nytimes.com/2019/05/06/opinion/united-nations-human-rights.html>.

⁶ Gardiner Harris, "Trump Administration Withdraws U.S. From UN Human Rights Council", *The New York Times* (19 June 2018), online: <www.nytimes.com/2018/06/19/us/politics/trump-israel-palestinians-human-rights.html>; see Sarah Joseph and Eleanor Jenkin "The United Nations Human Rights Council: Is the United States Right to Leave this Club?" (2019) 33:1 *Am U Intl L Rev* 1.

⁷ See generally James L Cavallaro et al, *Doctrine, Practice, and Advocacy in the Inter-American Human Rights System*, Oxford, Oxford University Press, 2019 at 969.

⁸ UNHRC, *supra* note 4.

in the context of migration.⁹

This shift could also be interpreted as having generated a change in the tone or the official discourse of certain public officials, with respect to human rights' recent achievements. Nationalist and populist political discourses¹⁰ are normalizing harsh criticisms of the human rights movement, attacking its legitimacy and endangering human rights defenders and victims. As indicated by the Working Group recently, the stigmatization of migrants as criminals or enemies of the State for example, exposes them to increased risks of human rights violations including enforced disappearances.¹¹

Similarly, such types of discourses have also prompted public officials to call for a "revisionist" look at past human rights violations, as illustrated by Brazilian authorities calling for another interpretation of the 1964 coup,¹² or by officials *Republika Serbska* calling for a new reading of the 1995 *Srebrenica* genocide.¹³ Attempts by the Guatemalan Congress to adopt a new amnesty law applicable to crimes having occurred during the civil war now seem like a possibility just as criminals are starting to face justice.¹⁴

This new nationalist and populist tone has also accompanied frontal attacks on international human rights institutions, as did for example the US and Burundi with respect to the International Criminal Court,¹⁵ or Nicaragua when it expelled the UN's human rights observation mission,¹⁶ and as Guatemala is trying to do with the International Commission Against Impunity in Guatemala (CICIG).¹⁷ It is doubtful that

⁹ Working Group on Enforced or Involuntary Disappearances, *Report of the Working Group on Enforced or Involuntary Disappearances on enforced disappearances in the context of migration*, 36th sess, HRC Doc A/HRC/36/39/Add.2 (2017) [WGEID]; see also Bernard Duhaime and Andréanne Thibault, "Protection of migrants from enforced disappearance: A human rights perspective" (2018) 99:905 R Intl de la Croix Rouge 1; Bernard Duhaime, "Les disparitions forcées en contexte de migration : responsabilité actuelle et devoir de mémoire" (2019) 41 Sans Frontières 14.

¹⁰ UN OHCHR, "Wherever it occurs, we can counter populist extremism" (21 March 2019), online: *United Nations* <www.ohchr.org/EN/NewsEvents/Pages/Populism.aspx>.

¹¹ WGEID, *supra* note 9.

¹² Anthony Boadle, "Brazil rejects UN appeal not to revise history by denying 1964 military coup", *Reuters* (4 April 2019), online: <www.reuters.com/article/us-brazil-un-coup/brazil-rejects-u-n-appeal-not-to-revise-history-by-denying-1964-military-coup-idUSKCN1RH021>.

¹³ See for ex. Aljazeera Balkans, "UN : Pratić ćemo odluke RS-a o genocidu u Srebrenici", *Aljazeera Balkans* (15 February 2019), online : <balkans.aljazeera.net/vijesti/un-pratic-cemo-odluke-rs-o-genocidu-u-srebrenici>.

¹⁴ OHCHR, "Guatemala Congress must not pass 'amnesty' bill for rights violations, say UN experts" (11 March 2019), online: *United Nations* <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24300&LangID=E>.

¹⁵ Jina Moore, "Burundi Quits International Criminal Court", *The New York times* (27 October 2017), online: <www.nytimes.com/2017/10/27/world/africa/burundi-international-criminal-court.html>;

Stephanie van den Berg and Leslie Wroughton, "US revokes ICC prosecutor's entry visa over Afghanistan investigation", *Reuters* (4 April 2019), online: <www.reuters.com/article/us-usa-icc-prosecutor/u-s-revokes-icc-prosecutors-entry-visa-over-afghanistan-investigation-dUSKCN1RG2NP>.

¹⁶ Oswald Rivas, "Nicaragua orders expulsion of UN human rights delegation", *Reuters* (31 August 2018), online: <uk.reuters.com/article/uk-nicaragua-protests/nicaragua-orders-expulsion-of-un-human-rights-delegation-idUKKCN1LG2CS>.

¹⁷ The Guardian, "Guatemala: court blocks president's expulsion of UN anti-corruption group", *The Guardian* (9 January 2019), online: <www.theguardian.com/world/2019/jan/09/guatemala-jimmy-morales-un-anti-corruption-cicig-court-blocked>.

these Central American States would have done the same thing a few years ago.

The recent “*Declaration on the Inter-American System*”¹⁸ adopted late April by Chile, Argentina, Brazil, Colombia and Paraguay, strongly discrediting the Commission and Court, are yet another example of concerted efforts by some States to weaken the Inter-American System, a process started a few years ago, which has had significant consequences, in particular severe financial ones, on both entities’ ability to effectively monitor respect for human rights in the region.¹⁹

II. Special Procedures

Similar hurdles are also facing UN Special procedures, such as the Working Group.

Official positions adopted by certain States, such as the Democratic People’s Republic of Korea (DPRK) or Burundi, which openly criticized the UN’ work as part of a global slur campaign, or more subtle polite boycotts from other States, which are constantly passively receiving urgent appeals and other communications by the mandate holders are indeed very telling.²⁰

At the financial level, the High Commissioner is also struggling to keep the boat afloat. Recent cuts in her Office’s budget will have direct consequences on the UN Special procedures’ capacity to undertake country visits and technical assistance missions for example, needless to say, to maintain an already overloaded staff assisting each mandate.²¹

Yet the substantive challenges faced by Special procedures are increasing every day, in particular considering cross-cutting human rights violations resulting from massive migrations, environmental decay, the ever-changing realities brought by new technologies as well as an increasing violence from non-State actors (not only Isis, the Zetas and Boko Aram, but also corporations and radical political entities).²²

¹⁸ Paraguay Ministry of Foreign Affairs, “Gobiernos de Argentina, Brasil, Chile, Colombia y Paraguay se manifiestan sobre el Sistema Interamericano de Derechos Humanos” (23 April 2019), online : *Paraguay Ministerio de Relaciones Exteriores* <www2.mre.gov.py/index.php/noticias-de-embajadas-y-consulados/gobiernos-de-argentina-brasil-chile-colombia-y-paraguay-se-manifiestan-sobre-el-sistema-interamericano-de-derechos-humanos>; on this issue see Daniel Cerqueira, “Impericia jurídica, insolencia histórica e incoherencia diplomática: a propósito del manotazo de cinco países de Sudamérica al Sistema Interamericano de Derechos Humanos” (3 May 2019), online (blog) : *Justicia en las Américas* <<https://dplfblog.com/2019/05/03/impericia-juridica-insolencia-historica-e-incoherencia-diplomatica-a-proposito-del-manotazo-de-cinco-paises-de-sudamerica-al-sistema-interamericano-de-derechos-humanos/>>.

¹⁹ “Chipping at the Foundations: The Regional Justice System Comes Under Attack from the Countries Whose Citizens Need It Most”, *The Economist* (9 June 2012), online: <www.economist.com/the-americas/2012/06/09/chipping-at-the-foundations>; Victoria Amato, “Taking Stock of the Reflection on the Workings of the Inter-American Commission on Human Rights” (2012) 5:16 *Aportes DPLF* 5.

²⁰ UNHRC, *supra* note 4.

²¹ “OHCHR’s Funding and Budget” (30 April 2019), online: *United Nations* <www.ohchr.org/EN/AboutUs/Pages/FundingBudget.aspx>.

²² See OHCHR, “Working Group on enforced or involuntary disappearances concludes its 110th session” (23 September 2016), online: *United Nations*

More worrisome, although rather isolated, are personal attacks fomented by some governments on specific mandates. Recent statements by the Philippines publicly labelling the Special Rapporteur on the rights of Indigenous peoples, Ms. Victoria Tauli-Corpuz, as a communist and a terrorist,²³ is simply uncappable and, again, seems to belong to another century.

III. Working Group on Enforced or Involuntary Disappearances

The WGEID is, of course, not immune from such attacks, as certain States actively lobby to water down its mandate at every periodic vote—including the coming ones—, as officials not so subtly threaten of mediatic reprisal during closed door meetings with the group and as members receive calls reminding them of their Code of Conduct...

More worrisome are of course threats on the courageous women and men who use our Group's mechanisms. There is no need to recall the electronic surveillance of Mexican human rights defenders,²⁴ or the sadly famous enforced disappearance and torture of M. Ibrahim Metwally, captured by Egyptian officials at Cairo's airport on his way to meet with the WGEID in Geneva in 2017.²⁵

These measures of intimidation come at a time when disappearances are still commonly used as a means of political persecution, as illustrated by the mediated case of Jamal Khashoggi captured by Saudi officials in the Kingdom's consulate in Istanbul.²⁶ Such anachronistic transnational disappearances are unfortunately not isolated cases, as indicated in our last annual report referring to allegations of disappearances of Uyghurs in Central Asia and of Gülen sympathizers in the Arabian Peninsula.²⁷

Of course, there is some encouraging progress in the fight against disappearances. Legislation has recently been passed to criminalize the practice in Peru, Mexico and Lebanon,²⁸ along with the creation of institutions charged with the

<www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20578&LangID=E>.

²³ UN News, "UN rights experts call on Philippines Government to halt 'unacceptable attacks' on Victoria Tauli-Corpuz" (1 May 2019), online: *United Nations* <news.un.org/en/story/2019/05/1037641>.

²⁴ Kirk Semple, "Government Spying Allegations in Mexico Spur Calls for Inquiry", *The New York Times* (20 June 2017), online: <www.nytimes.com/2017/06/20/world/americas/mexico-spyware-surveillance-journalists-activists-investigation.html>.

²⁵ OHCHR, "UN rights experts dismayed by arrest of Egyptian lawyer Ebrahim Metwally en route to meet them" (15 September 2015), online: *United Nations* <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22079&LangID=E>.

²⁶ OHCHR, "UN experts demand probe into disappearance of Saudi journalist in Istanbul" (9 October 2019), online: *United Nations* <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23701&LangID=E> [OHCHR].

²⁷ UN news, "Khashoggi case highlights 'very worrying practice' of overseas abductions, says UN expert" (18 October 2018), online: *United Nations* <news.un.org/en/story/2018/10/1023592>.

²⁸ OHCHR, "UN experts welcome enforced disappearance law in Mexico" (16 January 2018), online: *United Nations*.

<www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22588&LangID=E>.

measures' implementation.²⁹ Important judicial decisions were also recently adopted in Argentina, El Salvador in efforts to fight against impunity for past abuses.³⁰ But so much remains to be done.

Are we witnessing a shift in world order? Nationalism and populism have been the source of attacks on human rights for ages, our southern neighbour and other States have periodically disengaged of the multilateral human rights regime, universal and regional institutions have survived threats in the past and transnational disappearances were carefully coordinated during the famous Operation Condor. Is it more of the same? Perhaps-

This being said, what is extremely worrisome is that some States stay silent, as Zeid said in May. And that cannot be. It is our job, in civil society, in government, and in international organizations, to ensure that human rights violations are denounced and that the international community reacts loud and clear.

As said many times before, Canada has to step up and position itself to champion human rights. This can be done today, by adopting legislation incorporating the *UN Declaration on the Rights on Indigenous Peoples*, by ratifying treaties such as the *American Convention of Human Rights* and the *International Convention for the Protection of All Persons from Enforced Disappearance* and by supporting boldly, politically and financially human rights defenders and institutions.³¹ We can and should act now: abuses need to be called out and stopped, and human rights offenders should have something to fear.

²⁹ *OHCHR*, *supra* note 26.

³⁰ "Court throws out El Salvador civil war amnesty law", *BBC News* (15 July 2016), online: <www.bbc.com/news/world-latin-america-36800699>.

³¹ See for example, Bernard Duhaime, "Ten reasons why Canada should join the American Convention on Human Rights" (2019) 49 *RGD* 187.