Parliamentary Assembly
Assemblée parlementaire
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COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Doc. 12880
23 February 2012

The International Convention for the Protection of all Persons from Enforced Disappearance

Report[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Christos POURGOURIDES, Cyprus

Summary

The problem of enforced disappearances and missing persons is far from resolved, even in Europe. Some 14 000 people are still missing in the Western Balkans alone, 2 300 in the North Caucasus region of the Russian Federation, and close to 2 000 in Cyprus. Countless persons are also missing after the conflicts in the South Caucasus region. The continuing suffering of relatives and friends of missing persons, recognised by the European Court of Human Rights as amounting to torture and inhuman and degrading treatment, remains a formidable obstacle to lasting peace and reconciliation.

Therefore the entry into force, in December 2010, of the United Nations International Convention for the Protection of All Persons from Enforced Disappearance is to be warmly welcomed.

The member States of the Council of Europe should fully and expeditiously investigate all cases in which there is a reasonable suspicion that an enforced disappearance may have occurred within their jurisdiction, and avail themselves of all legal means at their disposal to assume jurisdiction over cases that occurred in other countries whose authorities have failed to take appropriate action.

Those member States that have not yet done so should be invited to sign and ratify the United Nations convention and those member States that have ratified the convention should contribute actively to the functioning of this instrument. The member States should consider launching the process of elaborating a European convention for the protection of all persons from enforced disappearance, based on and enhancing the achievements of the United Nations convention.

1. Reference to committee: Doc. 11830, Reference 3540 of 29 May 2009.

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A. Draft resolution[2]

1. The Parliamentary Assembly recalls that the problem of enforced disappearances and missing persons is far from resolved, also in Europe. Some 14 000 persons are still missing in the Western Balkans alone, 2 300 in the North Caucasus region of the Russian Federation, and close to 2 000 in Cyprus. Countless persons are also missing after the conflicts in the South Caucasus region.

2. The continuing suffering of relatives and friends of missing persons, recognised by the European Court of Human Rights as amounting to torture and inhuman and degrading treatment, remains a formidable obstacle to lasting peace and reconciliation.

3. The Assembly therefore welcomes the considerable efforts already made by the international community to elucidate the fate of missing persons, notably in the Western Balkans region, where the International Commission on Missing Persons (ICMP) has been able to account for 26 000 of the 40 000 persons who went missing after the conflicts in the region, and in Cyprus, where the bi-communal Commission on Missing Persons, under the aegis of the United Nations, resumed work in 2006 and has so far identified and returned to their families the bodies of 300 individuals.

4. The Assembly stresses the importance of genuine political will on all sides of the conflict to uncover the truth, regardless of the ethnic, religious or political backgrounds of the victims and of the suspected perpetrators. In particular, the search for burial sites by duly mandated experts must be allowed everywhere, even in military or otherwise restricted areas, on the basis of reasonable indications.

5. The international community as a whole must demonstrate political will by providing sufficient resources for search and identification efforts, taking into account their long-term nature, and by developing an appropriate international legal framework for protection from enforced disappearances.

6. The Assembly therefore warmly welcomes the entry into force, in December 2010, of the United Nations International Convention for the Protection of all Persons from Enforced Disappearance (hereafter «the UN Convention»), which the Assembly called for in its Resolution 1463 (2005) on enforced disappearances.

6.1. The Assembly welcomes in particular that the UN Convention:

6.1.1. explicitly recognises a new human right not to be subjected to enforced disappearance;

6.1.2. imposes specific obligations on States to prevent enforced disappearances and to combat impunity;

6.1.3. provides for a broad definition of the term of “victim” of an enforced disappearance;

6.1.4. enshrines new rights, such as the right to the truth and to appropriate measures to search for, locate and release disappeared persons;

6.1.5. establishes a new type of international monitoring mechanism: the Committee on Enforced Disappearances;

6.2. The Assembly, recognising that the UN Convention is necessarily a compromise, nevertheless regrets that some of its recommendations in Resolution 1463 (2005) were not taken into account in the UN Convention, in particular the convention:

6.2.1. fails to fully include in the definition of enforced disappearances the responsibility of non-State actors;

6.2.2. remains silent on the need to establish a subjective element of intent as part of the crime of enforced disappearance;

6.2.3. refrains from placing limits on amnesties or jurisdictional and other immunities;

6.2.4. severely limits the temporal jurisdiction of the Committee on Enforced Disappearances;

6.3. The Assembly also notes with regret that only 35 member States of the Council of Europe have so far signed the UN Convention and that only nine of those States have ratified it.

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2. Draft resolution adopted unanimously by the committee on 16 November 2011.

7. The Assembly welcomes recent developments in the Council of Europe that are favourable to the fight against enforced disappearances, including:

7.1. the case law of the European Court of Human Rights extending its temporal jurisdiction over enforced disappearances by stressing the ongoing nature of the procedural obligation to investigate a disappearance;

7.2. the adoption by the Committee of Ministers of the Guidelines on Eradicating Impunity for Serious Human Rights Violations.

8. The Assembly recalls its Resolution 1371 (2004) on disappeared persons in Belarus, which has still not been acted upon by the Belarusian authorities, and notes that recent legal developments may permit the authorities of other countries to prosecute the suspects named in its report.

9. In view of the above considerations, the Assembly invites:

9.1. the competent authorities of the member States of the Council of Europe to fully and expeditiously investigate all cases in which there is a reasonable suspicion that an enforced disappearance may have occurred within their jurisdiction, and to avail themselves of all legal means at their disposal to take jurisdiction over cases that occurred in other countries whose authorities have failed to take appropriate action;

9.2. the member States of the Council of Europe which have not yet done so to sign and ratify the United Nations International Convention for the Protection of all Persons from Enforced Disappearance and invites those member States which have ratified the convention to contribute actively to the functioning of this instrument, in particular by making declarations under Articles 31 and 32 of the convention recognising the competence of the Committee on Enforced Disappearances to consider communications from individuals claiming to be victims of violations of this convention, following the example of Belgium, France, Montenegro, the Netherlands, Serbia and Spain;

9.3. the member States of the Council of Europe to:

9.3.1. consider launching the process of drawing up a European convention for the protection of all persons from enforced disappearance, based on the achievements of the UN Convention;

9.3.2. give their unrelenting political support and make available the necessary human, technical and financial resources to existing and new national and international efforts aimed at resolving the grave humanitarian crises caused by the numerous unresolved cases of missing persons throughout Europe.

10. The Assembly calls on the Committee on Enforced Disappearances elected in May 2011 to make full use of its competences under the UN Convention in order to play an active role in the prevention and elucidation of enforced disappearances, in close co-operation and co-ordination with the United Nations Human Rights Council and its Working Group on Enforced and Involuntary Disappearances (WGEID), whose humanitarian action without geographical limits deserves continued support.

11. Finally, the Assembly encourages the European Court of Human Rights and the member States to continue making determined use of all instruments available under the European Convention on Human Rights in order to protect against enforced disappearances and ensure that perpetrators are held to account.

B. Draft recommendation[3]

1. The Parliamentary Assembly refers to its Resolution … (2012) and, in particular, congratulates the Committee of Ministers on the adoption of the Guidelines on Eradicating Impunity for Serious Human Rights Violations.

2. The Assembly reiterates its support for the United Nations International Convention for the Protection of all Persons from Enforced Disappearances and invites the Committee of Ministers to urge all the Council of Europe member States which have not yet done so to sign, ratify and implement this convention.

3. The Assembly nevertheless recalls that the United Nations Convention notably:

3.1. fails to fully include in the definition of enforced disappearances the responsibility of non-State actors;

3.2. remains silent on the need to establish a subjective element (intent) as part of the crime of enforced disappearance;

3.3. refrains from placing limits on amnesties or jurisdictional and other immunities;

3.4. severely limits the temporal jurisdiction of the Committee on Enforced Disappearances.

4. The Assembly therefore invites the Committee of Ministers to consider launching the process of preparing the negotiation, in the framework of the Council of Europe, of a European convention for the protection of all persons from enforced disappearance.

3. Draft recommendation adopted unanimously by the committee on 16 November 2011.

C. Explanatory memorandum by Mr Pourgourides, rapporteur

1. Introduction

1. The motion for a recommendation on the International Convention for the Protection of All Persons from Enforced Disappearance (Doc. 11830) was referred to the Committee on Legal Affairs and Human Rights for report on 29 May 2009. At its meeting on 23 June 2009, the committee appointed Mr Christos Pourgourides (Cyprus, EPP/CD) as rapporteur. This motion is part of the follow-up to the Parliamentary Assembly's Resolution 1463 (2005) and Recommendation 1719 (2005) on enforced disappearances.[4] On 6 October 2011, the committee held a hearing with the following experts:

– Ms Kathryne Bomberger, Head of the International Commission on Missing Persons (ICMP), Sarajevo;

– Ms Anne-Marie La Rosa, Legal Adviser at the Advisory Service, International Committee of the Red Cross Legal Division, Geneva;

– Ms Suela Janina, member of the United Nations Committee on Enforced Disappearances (CED), Ministry of Foreign Affairs, Albania.

1.1. Enforced disappearances and combating impunity

2. The fight against enforced disappearances is a key aspect of combating impunity, which was the main subject of the Assembly debate on the state of human rights in Europe in June 2009, since enforced disappearances are often accompanied by the impunity of their perpetrators. This aspect was addressed in the guidelines adopted by the Committee of Ministers in March 2011 on eradicating impunity for serious human rights violations (see paragraph 4.1.5 below). At the same time, enforced disappearances generate a serious humanitarian problem. The terrible, never-ending suffering of the families and friends of missing persons, who cannot come to terms with the loss of their loved ones until they know their fate and, in many cultures, until they have had the opportunity to bury their bodies, is a formidable obstacle to peace and reconciliation. But we should not allow the need to alleviate the suffering of the relatives of the missing to be used as an argument to restrict the mandate of those tasked with finding burial sites and identifying the human remains found by excluding the identification of the perpetrators of the killings. Such restrictions, which exist for example in Cyprus in the framework of the Committee on Missing Persons (CMP), objectively favour impunity – but for what purpose? I fully subscribe to the statement Ms Bomberger, Head of the ICMP, made during our hearing, namely that efforts to solve the problem of disappearances must be anchored in the rule of law and human rights; and I note with satisfaction that the ICMP has had no difficulties in co-operating with the International Tribunal for the former Yugoslavia (ICTY) by providing testimony, statements and depositions, and with assisting the prosecution in domestic war crimes trials.

1.2. Enforced disappearances: a persistent criminal phenomenon

3. Enforced disappearances remain a common criminal practice in many regions of the world. As the above-mentioned motion for a recommendation states, they are also a phenomenon that still persists in the geographical territory covered by the Council of Europe, whether it be the territory of its member States or that of the observer States.[5] The up-to-date figures given by the experts at the hearing shocked many colleagues: of the 40 000 persons that went missing during the conflicts in the territory of the former Yugoslavia, 14 000 are still unaccounted for (2 000 from the Croatia conflict, 2 000 from the Kosovo conflict, and 10 000 from the conflict in Bosnia and Herzegovina). Thousands are still missing in the North Caucasus region of the Russian Federation,[6] but also in the South Caucasus region from the conflicts involving Azerbaijan and Armenia, and, more recently, Georgia.

4. In its Resolution 1463 (2005), the Assembly decided to monitor on a regular basis the progress made by member States in providing protection against enforced disappearances and to assess after five years whether there has been sufficient progress in the framework of the United Nations or whether it would be advisable for the Council of Europe to consider developing an instrument of its own. The aim of this report, presented six years after Resolution 1463 (2005) is: (i) to provide an update on the extent of the problem in

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4. See also Doc. 10679, report of the Committee on Legal Affairs and Human Rights.

5. See, as far as an observer State is concerned, Resolution 1454 (2005) and Recommendation 1709 (2005) on the disappearance and murder of a great number of women and girls in Mexico, and Doc. 10551, report by the Committee on Equal Opportunities for Women and Men (rapporteur: Ms Ruth-Gaby Vermot-Mangold).

6. See report by Mr Dick Marty on legal remedies for human rights violations in the North Caucasus Region of the Russian Federation, Doc. 12276, paragraphs 35-38.

certain member States that are particularly vulnerable to enforced disappearances; (ii) to analyse the purpose and scope of the 2006 United Nations International Convention for the Protection of All Persons from Enforced Disappearance ("the UN convention"); and (iii) to look into whether it is appropriate for the Council of Europe to draw up a binding European legal instrument on enforced disappearances in the light of the recent work carried out within the Organisation, and of the progress made in the framework of the United Nations.

2. Enforced disappearances: a continuing concern in some Council of Europe member States and regions that are particularly vulnerable to the phenomenon

5. Since the presentation of the above-mentioned 2005 report, it is disturbing to note the persistence of this humanitarian scourge in Europe and even a trend towards a worsening of the situation in some regions.

2.1. Cyprus

6. Since the aforementioned report, there have been several developments regarding the situation in Cyprus.[7]

2.1.1. Activities of the Parliamentary Assembly and of the Committee on Missing Persons

7. For its part, the Assembly adopted, on 1 October 2008, Resolution 1628 (2008) on the situation in Cyprus, in which it particularly welcomed the recent progress in the work of the Committee on Missing Persons (CMP). The CMP is a bi-communal body that was set up by the United Nations in 1981 and whose terms of reference are limited to the exhumation, identification and return of the remains of missing persons. After a long period of inactivity, the CMP was reactivated at the end of August 2004. Under the Exhumation and Identification programme, launched under the auspices of the CMP, exhumations have been carried out over the entire island and anthropological analyses of the remains have been conducted in an anthropological laboratory set up in the buffer zone for the purpose of identifying these remains.[8] It also emerges from the relevant parts of the progress reports regularly drawn up on the United Nations operation in Cyprus, and submitted by the United Nations Secretary General to the Security Council, that the work carried out by this body within the limits of its terms of reference is regarded as positive.[9] In its latest progress report dated 31 August 2011, the CMP indicates that it has so far visited and opened 546 burial sites, analysed 474 sets of remains at its anthropological laboratory, performed 1 369 DNA analyses and identified 300 missing individuals and returned them to their families: 239 Greek Cypriots and 61 Turkish Cypriots (out of a total of 1 464 Greek Cypriot and 494 Turkish Cypriot missing persons). One obstacle to further progress is the fact that the Turkish military stationed in the north of the island still refuse to allow the search for and opening of possible burial sites located in "military zones", as well as Turkey's refusal to allow the search for persons who went missing in 1974 in its own territory, or to allow access to its relevant military archives.

2.1.2. Recent case law of the European Court of Human Rights

8. At the judicial level, the execution of the *Cyprus v. Turkey* judgment of 10 May 2001 on, *inter alia*, the thorny issue of enforced disappearances is still being examined by the Committee of Ministers.[10] In a new Grand Chamber judgment of 18 September 2009 in the case of *Varnava and Others v. Turkey*, concerning disappearances of Greek Cypriots during the Turkish invasion and occupation of the northern part of Cyprus, the European Court of Human Rights ("the Court") found violations of Articles 2 (right to life), 3 (prohibition of torture) and 5 (right to liberty and security) of the European Convention on Human Rights (ETS No. 5, "the Convention") and clarified various aspects of its case law relating to its jurisdiction *ratione temporis*, compliance with the six-month rule for filing an application and the continuing obligation on the part of the Turkish State to conduct an investigation in order to locate missing persons and clarify their fate. On this last point, while the Court fully recognises the importance of the exhumation and identification work and pays tribute to the CMP's humanitarian efforts, it considers these measures as insufficient to meet the obligation

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7. As regards the situation in Cyprus prior to the 2005 report, see Recommendation 1056 (1987) on national refugees and missing persons in Cyprus, the interstate case of *Cyprus v. Turkey*, Grand Chamber judgment of 10 May 2001, and the Written Declaration by the members of the Parliamentary Assembly of the Council of Europe of 1 October 2003 (Doc. 9952).
8. See Interim Resolution CM/ResDH(2007)25 concerning the European Court of Human Rights judgment of 10 May 2001 in the case of *Cyprus v. Turkey* (adopted by the Committee of Ministers on 4 April 2007).
9. See the Secretary General's last report, dated 28 May 2010, S/2010/164, paragraphs 28 and 40.
10. See footnote 7.

under Article 2 of the Convention[11] to conduct an effective investigation aimed at determining the cause of death and identifying and punishing those guilty. It should be noted that the CMP's mandate does not include criminal investigations and prosecutions.

2.2. The Balkans

9. As a consequence of the armed conflicts in the Western Balkans, it is estimated that 40 000 persons went missing. This number includes the conflicts relevant to Croatia, Bosnia and Herzegovina and Kosovo.[12] Today, two thirds of those missing, or approximately 26 000 persons, have been accounted for in the region. This number includes approximately 1 800 persons missing from the Croatia conflict (out of 6 000 reported missing), approximately 2 000 persons from the Kosovo conflict (out of approximately 4 500) and approximately 10 000 persons missing from the Bosnia and Herzegovina conflict out of an estimated 30 000 persons missing. The progress made by the governments of the Western Balkans represents an unprecedented achievement when compared to other countries in the world affected by large numbers of missing persons from armed conflicts, crimes against humanity and violations of human rights. In the region of the Western Balkans, the ICMP has made over 16 000 DNA-led identifications, of which over 13 300 are relevant to the Bosnia and Herzegovina conflict and over 2 360 relevant to the Kosovo conflict and over 350 regarding the Croatia conflict. The ICMP's use of DNA has yielded remarkable success in the context of the 1995 fall of Srebrenica, where the ICMP has been able to use DNA to identify 6 600 persons and to ascertain that the total number of missing persons is about 8 100; and in Serbia, where the ICMP was able to assist Serbia in accounting for 820 persons missing from the Kosovo conflict who were executed and buried in Serbia in 1999.

10. The approximately 14 000 persons who remain missing will be more difficult to account for. The ICMP believes that the process has reached a virtual impasse in Kosovo for both technical and political reasons. In Kosovo, there is no accurate determination of the total number missing at the end of the conflict. The ICMP estimates a total of 4 500 persons, of which almost 2 000 remain missing. A total of 2 360 have been identified using DNA, but with well over 95% of blood references collected and with a declining annual number of missing persons located in the last six years it is clear that there is an urgent need for parties involved in the process to review all open cases, especially considering the probability of misidentifications. The ICMP also maintains that further progress on identifications is virtually impossible without the active involvement of policy makers from Kosovo and Serbia.

11. The issue of missing persons in the Balkans, especially Kosovo, still has serious consequences for the maintenance of peace in the region and for reconciliation between ethnic groups.[13] The situation in Kosovo was debated very recently in the Assembly:[14] the authorities in Pristina and Belgrade were urged to continue their co-operation with the Working Group on Missing Persons.[15] In his report on inhuman treatment and illicit trafficking in human organs in Kosovo,[16] Mr Dick Marty refers to the fate of numerous ethnic Albanians and ethnic Serbs who disappeared in Kosovo after the official end of the hostilities, and who may have been victims of a campaign of revenge, including against real or imaginary "collaborators" with the Milosevic regime. The elucidation of their fate is often blocked by a taboo covering possible crimes committed by members of the "Kosovo Liberation Army" (KLA) and the reluctance of the Albanian authorities to allow searches for burial sites on Albanian territory, which they consider as not having been part of the conflict zone, whilst Mr Marty's report has established that KLA fighters moved freely across the Albanian border and maintained camps on Albanian territory where they also held prisoners.

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11. *Varnava and Others v. Turkey*, judgment of 18 September 2001 (Grand Chamber), Applications Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, paragraphs 187-89.
12. All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.
13. See Resolution 1414 (2004) and Recommendation 1685 (2004) on persons unaccounted for as a result of armed conflicts or internal violence in the Balkans, and the report by the Committee on Migration, Refugees and Population (rapporteur: Mr Mevlüt Çavuşoğlu), Doc. 10251.
14. See Resolution 1739 (2010) and Recommendation 1923 (2010) on the situation in Kosovo and the role of the Council of Europe.
15. Chaired by the International Committee of the Red Cross (ICRC), which acts as a neutral intermediary. The group meets under the auspices of the Special Representative of the United Nations Secretary-General for Kosovo, Mr Søren Jessen-Petersen. Bringing to the table both Belgrade and Pristina authorities, the group's task is purely humanitarian and aims to shed light on what has become of the nearly 1 800 persons who are still missing since the events there.
16. Doc. 12462 dated 7 January 2011.

12. In Bosnia and Herzegovina, the identification process is now slowing down as the majority of missing persons have been accounted for. It is estimated that 1 400 persons remain missing from Srebrenica; however, owing to the existence of hundreds of secondary mass grave sites, the recovery of disarticulated body parts of already identified and buried persons may continue for years. The creation of central records by the Missing Persons Institute of Bosnia and Herzegovina will be of enormous help in understanding how to strategically address the remaining missing persons' cases in Bosnia and Herzegovina. In addition, the decision of the State Prosecutor's Office in Bosnia and Herzegovina to take over control from local prosecutors to conduct excavations should have a positive impact in expediting the recovery of the bodies of missing persons from mass and clandestine graves.

13. The ICMP, which has pioneered since 2000 the process of DNA-led identifications to address the issue of persons missing from war and mass violations of human rights, deserves to be congratulated on its achievements to date, and supported by all States in its still daunting task to clarify the fate of the 14 000 persons still missing in the region. The ICMP's success also shows that co-operation with efforts to hold to account the perpetrators of enforced disappearances does not hinder progress in the humanitarian task of clarifying the fate of as many missing persons as possible.

2.3. The North Caucasus region of the Russian Federation (especially the Chechen Republic)

14. Already in the 2005 Assembly report on enforced disappearances it was stressed that the Chechen Republic was affected by the scourge of enforced disappearances more than any other region of the member States.[17] Unfortunately, this dramatic situation has scarcely improved since then. Resolution 1738 (2010) and Recommendation 1922 (2010) on legal remedies for human rights violations in the North Caucasus region, both based on a report drawn up by Mr Dick Marty,[18] reveal the extent of the problem: disappearances of government opponents, journalists and human rights defenders largely go unpunished, especially in the Chechen Republic, despite the very large number of judgments of the European Court of Human Rights finding against the Russian Federation.[19] The suffering of the relatives of thousands of missing persons in the region and the fact that it is impossible for them to find closure constitute a major obstacle to genuine reconciliation and lasting peace. In the light of the ICMP's success in the Western Balkans region using DNA analysis for identification, it is unacceptable that, as Mr Marty was told in Grozny in 2010, there is still no functioning DNA laboratory in the whole of the Chechen Republic.

2.4. The South Caucasus (Armenia, Azerbaijan and Georgia)

15. The issue of missing persons in Armenia, Azerbaijan and Georgia after the conflicts in Nagorno-Karabakh, Abkhazia and South Ossetia has not been resolved and is still causing the missing persons' families considerable suffering, while at the same time adding to the tensions in the region. Resolution 1553 (2007) and Recommendation 1797 (2007) on missing persons in Armenia, Azerbaijan and Georgia from the conflicts over the Nagorno-Karabakh, Abkhazia and South Ossetia regions are important documents since they put the total number of missing persons at close to 8 000 and draw up concrete recommendations to the various players in the region, based in part on the aforementioned Resolution 1463 (2005).[20]

16. Furthermore, the recent armed conflict in August 2008 between Georgia and the Russian Federation sparked a humanitarian crisis, the consequences (including more missing persons) of which are still being monitored by the Assembly.[21]

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17. See Doc. 10679 (rapporteur: Mr Christos Pourgourides) in which disappearances in the North Caucasus are referred to.
18. See Doc. 12276, report by the Committee on Legal Affairs and Human Rights, and Doc. 12301, opinion of the Political Affairs Committee (rapporteur: Ms Anne Brasseur).
19. For a case in point not mentioned in Mr Marty's report, see *Khutsayev and Others v. Russia*, judgment of 27 May 2010, in which the Court found a double violation of Article 2 of the Convention, a triple violation of Article 3 and a violation of Articles 5 and 8, Article 1 of Protocol No. 1 and Article 13.
20. See Doc. 11196, report by the Committee on Migration, Refugees and Population (rapporteur: Mr Leo Platvoet).
21. See Resolution 1664 (2009) and Recommendation 1869 (2009) on the humanitarian consequences of the war between Georgia and Russia: follow-up given to Resolution 1648 (2009).

2.5. Belarus and Ukraine

2.5.1. Belarus

17. In Belarus, the investigation I conducted on four high-profile disappearances in 1999/2000 – an investigation that led to the adoption of Resolution 1371 (2004) and Recommendation 1667 (2004) on the situation of refugees and displaced persons in the Russian Federation and some other CIS countries, directly implicating senior officials of the regime of Mr Lukashenka – has still not resulted in the Belarusian authorities launching a serious investigation into the fate of the missing persons, despite the Assembly's repeated calls for them to do so.[22] The persistent refusal to investigate these disappearances was subsequently assessed as an abuse of the criminal justice system in Belarus.[23] The Commissioner for Human Rights, Mr Thomas Hammarberg, recently recalled in this context that these crimes are by no means prescribed.[24] In the light of the recognition of the suffering of the relatives of missing persons as a form of torture and inhuman and degrading treatment[25] and of changes in national law in the wake of the implementation of the Rome Statute of the International Criminal Court, it may be possible for the judicial authorities in some jurisdictions to prosecute – even *in absentia* – the high officials which I named as suspects. We should encourage the judicial authorities of all the member States to avail themselves of all legal opportunities to hold these persons to account. Let us not forget, however, that the normal way to proceed would simply be for the Belarusian authorities themselves to finally prosecute those whose continued impunity is a permanent stain on the reputation of the country as a whole and an obstacle to political normalisation.

2.5.2. Ukraine

18. The Assembly adopted Resolution 1645 (2009) and Recommendation 1856 (2009), on the investigation of crimes allegedly committed by high officials during the Kuchma rule in Ukraine: the Gongadze case as an emblematic example, on the basis of a report by Ms Sabine Leutheusser-Schnarrenberger.[26] The Assembly drew attention to the gaps in the legal investigation and called for specific measures to identify not only the direct perpetrators but also the instigators and organisers of the crime committed against Georgiy Gongadze, a "disappeared" journalist who later turned out to have been murdered by Interior Ministry officials who had allegedly received their orders from the minister or even from President Kuchma himself. Despite a judgment of the Court finding a violation of Article 2 (right to life) of the Convention, the case is still not fully elucidated. Some progress was made recently when General Pukach (who had allegedly been present at the scene of the murder, commanding the Interior Ministry officials who have already been convicted) was re-apprehended in July 2009[27] and a criminal investigation was opened against former President Kuchma in March 2011.[28] But former Interior Minister Lutsenko, one of the main supporters of the Assembly's rapporteur, who carried out important reforms in his ministry and dismantled the "death squad", is now in prison in rather worrying circumstances.[29]

2.6. Enforced disappearances and the fight against terrorism

19. Mention should also be made of the Assembly's work on secret detentions and unlawful interstate transfers of detainees.[30] Cases of rendition and detention in so-called "black sites", such as those described by Mr Dick Marty in his well-known reports, constitute enforced disappearances when the deprivations of liberty at issue are not officially recognised or the authorities refuse to inform the families of what has

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22. See, for example, Resolution 1482 (2006) on the situation in Belarus on the eve of the presidential election, paragraph 12.8.
23. See Resolution 1606 (2008) on the abuse of the criminal justice system in Belarus.
24. See Council of Europe Commissioner for Human Rights: "Cases of abducted in Belarus have no statutory limitations": http://charter97.org/en/news/2010/10/12/32917.
25. See paragraph 53 below.
26. See Doc. 11686, report by the Committee on Legal Affairs and Human Rights (rapporteur: Ms Sabine Leutheusser-Schnarrenberger).
27. See "Surprise, greet Pukach arrest" (22 July 2009): www.kyivpost.com/news/nation/detail/45714/#ixzz1RtaG8tgT.
28. See "Prosecutor's Office confirms criminal case against Kuchma": www.helsinki.org.ua/en/index.php?id=1300796832.
29. Ms Marieluise Beck, rapporteur on "Threats to the rule of law in Council of Europe member States – Upholding the Assembly's authority" is intending to cover the case of Mr Lutsenko in the report she is currently preparing.
30. See Resolution 1507 (2006) and Recommendation 1754 (2006) on alleged secret detentions and unlawful interstate transfers of detainees involving Council of Europe member states, and Resolution 1562 (2007) and Recommendation 1801 (2007) on secret detentions and illegal transfers of detainees involving Council of Europe member states: second report.

happened to the person in question and where he or she is being held. These cases are particularly difficult to elucidate as they are covered by State secrecy, which is used to block judicial or parliamentary investigations into such abuses.[31]

3. Purpose and scope of the International Convention for the Protection of All Persons from Enforced Disappearance

20. As urgently called for by the Assembly in its report in September 2005, the United Nations General Assembly adopted by consensus, on 20 December 2006, the International Convention for the Protection of All Persons from Enforced Disappearance.[32]

3.1. Background

21. The adoption of the UN convention was the outcome of twenty-five years of efforts within the framework of the United Nations, by associations of families of missing persons, other non-governmental organisations and a number of States following the lead of France, which played a particularly active role.[33]

3.2. Ratification status

22. To date,[34] 91 countries have signed the UN convention and 30 have ratified it (including 35 Council of Europe member States among the signatories and nine among those having ratified it).[35] The 20th ratification necessary for the treaty to enter into force was by Iraq on 23 December 2010. In view of the importance of the issue of enforced disappearances, including in Europe, all Council of Europe member States should become party to the UN convention as soon as possible. This is indeed one of the objectives of the motion underlying this report.

3.3. The achievements of the International Convention for the Protection of All Persons from Enforced Disappearance

23. The UN convention straddles international human rights law, international humanitarian law and international criminal law. Its main achievements are as follows.

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31. This is the topic of a report by Mr Dick Marty adopted by the Assembly on 6 October 2011 (Resolution 1838 (2011) and Recommendation 1983 (2011) on abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations, Doc . 12714).

32. Text of the convention: www.ohchr.org/en/hrbodies/ced/pages/conventionced.aspx.

33. The principal initiatives taken in this connection are as follows:

− 1979: France presents its first resolution (33/173) on enforced disappearances to the United Nations General Assembly.

− 1980: creation of the Working Group on Enforced or Involuntary Disappearances, the Human Rights Committee's first dedicated investigation mechanism (Resolution 20 (XXXVI)).

− 1992: the General Assembly adopts the Declaration on the Protection of All Persons from Enforced Disappearance (Resolution 47/133).

− 1998: the expert Mr Louis Joinet draws up for the Sub-Committee on Human Rights a draft binding instrument on enforced disappearances.

− 2002: Mr Manfred Nowak, an independent expert tasked with examining any gaps in international law regarding protection against enforced disappearances, submits his report to the Human Rights Committee (CDH).

− 2003: the first meeting of the Human Rights Committee's working group set up by Resolution CDH 2001/46 to prepare a draft binding instrument.

− 23 September 2005: adoption of the draft instrument by the working group by consensus.

− 29 June 2006: adoption of the draft convention by the new Human Rights Council.

− 27 October 2006: adoption by the 3rd Committee of the General Assembly (Social, Humanitarian and Cultural).

− 20 December 2006: final adoption by the General Assembly by consensus and with 103 co-sponsoring States.

− 6 February 2007: opening of the convention for signature.

– 23 December 2010: entry into force after the 20th ratification (by Iraq).

34. 13 February 2012 (source: United Nations Treaty Collection website: http://treaties.un.org).

35. Council of Europe member States signatories to the convention (ratifications underlined): Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, Republic of Moldova, Monaco, Montenegro, Netherlands, Norway, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, "the former Yugoslav Republic of Macedonia".

3.3.1. The recognition of a new subjective human right (Article 1)

24. Article 1, paragraph 1, provides: "No one shall be subjected to enforced disappearance". This right is not subject to any limitations or exceptions. Paragraph 2 provides that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance". Before this convention was drafted, only bans on enforced disappearances in certain precisely defined circumstances were enshrined in some international legal instruments with regional application, such as the Inter-American Convention on Forced Disappearances, or in international humanitarian law. International humanitarian law – especially the 1949 Geneva Conventions and their protocols – contains precise rules aimed at preventing disappearances and at addressing them efficiently if they do occur.[36] These rules apply when disappearances take place in armed conflict, even though some of these rules continue to produce their effect long after the armed conflict has ended. These rules do not prohibit disappearances as such, their aim being mainly to prevent persons from going missing and to encourage the resolution of cases of disappearances when they unfortunately occur. Similarly, the Rome Statute setting up the International Criminal Court (ICC) states that enforced disappearances constitute a crime against humanity, but only when committed in the context of a widespread or systematic attack directed against a civilian population.

3.3.2. An autonomous definition (Article 2)

25. The offence of enforced disappearance is expressly defined as "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 authorisation, 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".

26. This definition specifies the constituent elements of the offence, namely: (1) deprivation of liberty; (2) its attributability to agents of the State or persons acting with its authorisation; and (3) a refusal to acknowledge the deprivation of liberty and concealment of the fate of the disappeared person. The question of intent was one of the most difficult aspects to deal with during the negotiation process. The drafters of the UN convention finally decided to opt for "constructive ambiguity", with the result that the text leaves it up to each State to interpret Article 2 as it wishes,[37] thus setting itself somewhat apart from the Rome Statute, whose definition of enforced disappearances expressly includes the element of *mens rea.*[38]

3.3.3. Non-State actors (Article 3)

27. After difficult discussions,[39] a compromise solution was adopted also on this issue: immediately after Article 2, which only mentions the State as the perpetrator (as in the 1992 declaration and the Inter-American convention), an Article 3 with the following wording was inserted: "Each State Party shall take appropriate measures to investigate acts defined in Article 2 committed by persons or groups of persons acting without the authorisation, support or acquiescence of the State and to bring those responsible to justice."

28. It clearly emerges from the sequence of the two articles that enforced disappearance as such is in principle an act that must be attributable to a State. The obligations mentioned are exclusively incumbent upon the State, to the exclusion of any private entity, such as armed groups outside the ambit of State authority. The only obligations are to conduct investigations and "bring those responsible to justice". Unfortunately, impunity often prevails. This issue must be addressed as a matter of priority.

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36. These rules provide in particular that: (1) families have the right to be informed about the fate of their relatives who have disappeared; (2) the parties to a conflict must search for the persons reported missing and facilitate any steps undertaken by members of their families; (3) lists indicating the exact site and marking of graves and providing information on the persons buried there must be exchanged; (4) the parties to an armed international conflict must provide information as quickly as possible on wounded, sick or shipwrecked prisoners of war, on other protected persons who have been deprived of their liberty and on persons who have died; (5) captured combatants and civilians who find themselves under the authority of the other party are entitled to respect for their lives, their dignity, their convictions and their personal rights. They must be protected against all acts of violence or reprisal. They are entitled to exchange news with their families and receive aid.

37. See the statements of China, Egypt, the United Kingdom, the United States, Canada, India and Japan in documents E/CN.4/2006/57, A/HRC/1/SR.21 and A/C.3/61/SR.45 in favour of an intent component.

38. See Article 7, paragraph 2.i, of the Rome Statute.

39. For a full analysis of the process of negotiating and drawing up this convention, see Olivier de Frouville, "La Convention internationale pour la protection de toutes les personnes contre les disparitions forcées: les enjeux juridiques d'une négociation exemplaire", *Droits Fondamentaux*, No. 6, December-January 2006.

3.3.4. Specific obligations imposed on States to prevent enforced disappearances and combat impunity

3.3.4.1. Combating impunity

3.4.1.1. Mandatory establishment in domestic law of a new offence combined with appropriate penalties

29. Aware that the absence of an autonomous criminal offence would make it impractical to implement certain provisions of the UN convention, the drafters wanted States to enter into a commitment to make enforced disappearance an offence under their domestic criminal law (Article 4). The parties also undertake to bring the perpetrators of enforced disappearances to justice (Article 3). States must prescribe "appropriate" penalties that take account of the "extreme seriousness" of the "offence of enforced disappearance" (Article 7). Aggravating circumstances may in particular be established in the case of the death of the missing person or the commission of an enforced disappearance in respect of vulnerable persons (pregnant women, people with disabilities, etc.); mitigating circumstances may, however, be established for repentant offenders who assist in establishing the truth.

3.4.1.2. A wide range of persons criminally responsible

30. The States parties undertake to prosecute both those who commit enforced disappearances and anyone who orders or is an accomplice to or participates in such an offence (Article 6, paragraph 1). The convention also emphasises a superior's responsibility by omission (Article 6, paragraph 1.*b*) and states in this connection that "no order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance" (Article 6, paragraph 2) – a principle now well established in international law (see Article 8 of the Statute of the International Military Tribunal of Nuremberg).

3.4.1.3. Statute of limitations (Article 8)

31. The period of limitation with respect to prosecution must be "of long duration and … proportionate to the extreme seriousness" of the offence. It begins to run "from the moment when the offence ceases …, taking into account its continuous nature". The drafters of the convention thus drew the necessary conclusions from the continuous nature of the violation of the right not to be subjected to enforced disappearance which ends in principle only when the fate of the disappeared person is elucidated. They also drew the relevant procedural conclusions from this principle, especially with regard to the jurisdiction *ratione temporis* of the international courts, including the European Court of Human Rights (see paragraph 55 below).

3.4.1.4. Fair trial for offenders (Article 11)

32. *"Any person against whom proceedings are brought in connection with an offence of enforced disappearance shall be guaranteed fair treatment at all stages of the proceedings. Any person tried for an offence of enforced disappearance shall benefit from a fair trial before a competent, independent and impartial court or tribunal established by law."*

3.4.1.5. Establishment of criminal jurisdiction and implementation of the aut dedere aut judicare principle (Articles 9, 10 and 11)

33. After setting out the various traditional bases on which a State can establish its jurisdiction regarding the perpetrator of an enforced disappearance (territorial jurisdiction, active or passive personal jurisdiction), Article 9, paragraph 2, enshrines the principle of universal jurisdiction, that is to say the State has jurisdiction to deal with a crime of enforced disappearance "when the alleged offender is present in any territory under its jurisdiction", whatever his or her nationality, the victim's nationality and the territory in which the crime was committed. In the latter case, the *aut dedere aut judicare* principle applies: the State must either prosecute or extradite the offender (Article 11).

3.4.1.6. In-depth and impartial investigation (Article 12)

34. The competent authorities are required to open an in-depth and impartial investigation as soon as possible after an enforced disappearance has taken place. It may be opened in response to a complaint or *proprio motu* "(w)here there are reasonable grounds for believing that a person has been subjected to enforced disappearance" (Article 12, paragraph 2). Moreover, "any individual who alleges that a person has been subjected to enforced disappearance has the right to report the facts to the competent authorities", which is a form of *actio popularis*. In order to enable this investigation to be conducted, the State undertakes

to ensure that these authorities possess the necessary powers and resources and “have access, if necessary with the prior authorisation of a judicial authority, which shall rule promptly on the matter, to any place of detention or any other place where there are reasonable grounds to believe that the disappeared person may be present”. Furthermore, the convention stipulates that the States parties have an obligation to “ensure that the complainant, witnesses, relatives of the disappeared person and their defence counsel, as well as persons participating in the investigation, are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given”.

3.4.1.7. Enhanced international co-operation: judicial and humanitarian assistance

35. The UN convention states that, for the purposes of extradition, the crime of enforced disappearance shall not be regarded as a political offence. A request for extradition may therefore not be refused on this ground alone (Article 13). In addition, the UN convention establishes the principle of enhanced co-operation between the States parties based on “the greatest measure of mutual assistance” (Article 14). More generally, it aims to provide assistance for victims of enforced disappearance and help “in searching for, locating and releasing disappeared persons and, in the event of their death, in exhuming and identifying them and returning their remains” (Article 15).

3.4.2. Preventing the practice of enforced disappearances (Articles 17 to 22)

36. Apart from the creation of a new substantive human right (“No one shall be held in secret detention”), the UN convention lays down a range of procedural guarantees having a preventive purpose.

3.4.2.1. Guarantees relating to detention

37. The requirement of “officially recognised and supervised places of deprivation of liberty” includes the maintenance of detailed and up-to-date official registers and the judicial supervision of any detention (namely the right to apply for a prompt decision on the lawfulness of the deprivation of liberty to a court which is empowered to order the person's release if such deprivation of liberty is not lawful).

3.4.2.2. Guarantees relating to the right to information on the detention

38. Access by relatives, lawyers or “any person with a legitimate interest” to information on the circumstances of the detention (date, time and place of the detention, any transfers, the identity of the authority which ordered the detention, etc.) and on the persons deprived of their liberty (detainee’s state of health, and, as applicable, the cause of death and the location of the remains, etc.) as well as measures to provide protection against any form of intimidation or retaliation due to the search for this information are also guaranteed (Article 18). Furthermore, the State party must impose sanctions for delaying or obstructing remedies, failing to meet the obligation to record any deprivation of liberty and refusing to provide information.

3.3.5. New rights for the victims of enforced disappearances

3.3.5.1. A broad definition of the term “victim”

39. The UN convention states that “victim means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance” (Article 24, paragraph 1). This is the first international human rights treaty to recognise as victims of enforced disappearance not only the missing persons themselves but also their relatives, who are left in a state of uncertainty and distress and suffer material difficulties caused by the disappearance. It thus adopts the approach already privileged by international humanitarian law.

3.3.5.2. New rights enshrined

3.5.2.1. The right to the truth and appropriate measures to search for, locate and release disappeared persons

40. For the first time, the right to be told the truth about the circumstances of the enforced disappearance, the results of the investigation and the fate of the disappeared person is explicitly laid down in an international human rights convention (Article 24, paragraph 2). Moreover, the UN convention requires States parties to

take all appropriate measures to search for, locate and release disappeared persons. This new right differs from the right to information as a preventive measure (families' right to obtain information about a detainee), which may be subject to restrictions.

3.5.2.2. The right of victims to reparation and compensation

41. Based on Article 14 of the International Convention against Torture,[40] Article 24, paragraph 4, of the UN convention requires States to guarantee a right to compensation that covers "material and moral damages", the grant of which should be "prompt, fair and adequate" and may take on different forms, each of which is explicitly mentioned, although the list is not exhaustive. This leaves it up to the State to determine the most "adequate" damages depending on the case, namely: restitution; rehabilitation; moral satisfaction, including restoration of dignity and reputation; and guarantees of non-repetition. Furthermore, the State is called upon to take the appropriate steps to deal with the complex legal situation brought about by an enforced disappearance, especially in civil (family and property) law and in matters of social welfare.

3.3.6. A new type of monitoring mechanism: the Committee on Enforced Disappearances

42. The UN convention establishes a committee made up of 10 experts "who shall serve in their personal capacity and be independent and impartial" (Article 26) and are "elected by the States Parties according to equitable geographical distribution". The arrangements for electing experts to sit on the committee are specified and their term of office is four years, renewable once. The first election took place on 31 May 2011. The three European members elected are Mr Emmanuel Decaux (France), Mr Rainer Huhle (Germany) and Ms Suela Janina (Albania), who also participated in the hearing on 6 October 2011 before the Committee on Legal Affairs and Human Rights.

3.3.6.1. "Traditional" functions of the CED

43. The committee examines the reports submitted by States parties on the measures taken to give effect to their obligations under the UN convention (Article 29) and can issue comments, observations or recommendations on these reports.

44. The CED can also examine communications from or on behalf of individuals according to certain admissibility criteria[41] if the State concerned expressly recognises its competence by making a declaration to this effect (Article 31). The CED may also be asked to examine interstate communications (Article 32). We must encourage all States parties to make the necessary declarations to recognise the CED's competence in these respects in order to give full effect to the UN convention.[42] Finally, the CED must submit an annual report on its own activities (Article 36). The convention also states that the CED shall closely co-ordinate its work with the various specialised agencies of the United Nations and the treaty bodies instituted by other international instruments, especially the Human Rights Committee (Article 28).

3.3.6.2. A novel function of preventing enforced disappearances

45. The Committee on Enforced Disappearances shall also play an important role in preventing enforced disappearances. For this purpose, it has been given powers to conduct investigations and the right to ask questions.

46. The CED may be asked by relatives of a missing person or by any other individual who has a legitimate interest to take urgent action to seek and find that person (Article 30). If the complaint complies with the above-mentioned admissibility criteria,[43] the CED will ask the State concerned to supply it with information on the situation of the person sought. On the basis of the details received, it can request the State to take "take all the necessary measures, including interim measures, to locate and protect the person concerned in

40. "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation."

41. A communication is declared inadmissible if it is anonymous, if it constitutes an abuse of the right of submission, if it is being examined under another procedure of international investigation or settlement of the same nature (litispendence) or if all available domestic remedies have not been exhausted.

42. So far, the following Council of Europe member States among the States parties to the UN convention have taken this important step: Albania, Belgium, France, Montenegro, the Netherlands, Serbia and Spain.

43. Apart from the rule concerning the exhaustion of all domestic remedies. However, the request for urgent action may be turned down if it has not "already been duly presented to the competent bodies of the State Party concerned, such as those authorised to undertake investigations, where such a possibility exists" (Article 30, paragraph 2.*c*).

accordance with this Convention". This is reminiscent of the interim measures which can be issued by the European Court of Human Rights (Rule 39 of the Rules of Court). The express mention, in the text of the UN convention, of the power given to the CED to request a State party to take interim measures is a novel feature.[44]. The comparatively strong early warning and urgent action procedure effectively ensures a rapid and contradictory exchange of information until the case is "resolved". It will be important that the CED retains the definition of "resolved" developed by the Working Group on Enforced and Involuntary Disappearances (WGEID, see point 3.4 below), which excludes that States can claim that cases have been "resolved" on the sole basis of compensation paid to families or of a judicial declaration of death issued without the consent of the families. The urgent procedure was introduced in the UN convention in the light of the experience of the WGEID, whose members had calculated that around 25% of the cases transmitted under its "urgent action" procedure could be "resolved", much more than through the normal procedure involving the sending of communications by letters when the disappearance has occurred more than two months before.[45]

47. The CED also exercises a preventive function by carrying out on-the-spot visits in the event of a serious breach of the UN convention (Article 33). The convention provides that the CED must inform the State concerned in writing about its intention to conduct a visit. If the State agrees, the CED will carry out the planned visit and subsequently communicate its observations and recommendations to the State concerned, with no limits related to confidentiality. It should be noted that the triggering of the country visit procedure does not require systematic or gross violations, which are dealt with separately under Article 34 (appeal to the United Nations General Assembly). Also, during the negotiations on the draft convention, the wording of Article 33 was amended to allow a visit to "any territory under the State's jurisdiction" (rather than the State's "territory"). This means that a visit could include a territory that is under the *de facto* control of the State concerned, for example occupied territories.[46]

48. Finally, the Committee on Enforced Disappearances can issue urgent appeals to the United Nations General Assembly if it receives information that enforced disappearances are being carried out on a widespread or systematic basis in the territory of one of the States parties to the convention (Article 34). Such practices are considered as crimes against humanity.

3.4. Relationship with existing UN instruments dealing with enforced disappearances

49. The United Nations Working Group on Enforced or Involuntary Disappearances (WGEID)[47] was established in 1980 by the then Commission on Human Rights (now the Human Rights Council). It also monitors the implementation of the 1992 Declaration on the Protection of All Persons from Enforced Disappearance. It is a channel of communication between the families and the governments concerned aiming to ensure that individual cases are investigated by domestic authorities. It does not directly investigate individual cases or adopt measures of protection against reprisals and it does not establish individual or State responsibility.

50. The WGEID's role is essentially humanitarian, without geographical or temporal limitations. In contrast, the CED, with its stronger, quasi-judicial mandate, can only intervene in countries that have ratified the new UN convention and with regard to disappearance cases which commenced after ratification.

51. Consequently, the CED will be well advised to co-operate closely with the WGEID, which has gained valuable experience, in order to maximise the chances of the families of missing persons of finding their loved ones. Similarly, the CED should take into account in its future work the *acquis* of the United Nations Human Rights Council and of its predecessor, the United Nations Commission on Human Rights, which dealt with enforced disappearance cases within its ("treaty-based") mandate under the International Covenant on Civil and Political Rights (ICCPR).

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44. See Olivier de Frouville, "The Committee on Enforced Disappearances", in P. Alston and F. Megret (eds), "The United Nations and human rights: a critical appraisal", 2nd edn, Oxford University Press (as yet unpublished study made available to the rapporteur by the author), p. 10: other UN committees such as the HRC, CAT and CERD had attributed themselves this power in their respective rules of procedure, as did the European Court of Human Rights.
45. Ibid., pp. 12-13.
46. Ibid., p. 11.
47. See Human Rights Fact Sheet No. 6/Rev.3 on Enforced or Involuntary Disappearances, Office of the United Nations High Commissioner for Human Rights.

4. The need for a European instrument providing protection against enforced disappearances

52. In order to assess the need for a new European convention in this field, it is necessary to review recent developments on the subject of enforced disappearances and possible further steps within the system of the European Convention on Human Rights, in the light of the new UN convention and the remaining issues not yet settled in this convention.

4.1. Recent developments within the European Convention on Human Rights system and possible further steps

4.1.1. The case law of the European Court of Human Rights

4.1.1.1. Enforced disappearance recognised as a violation of Articles 2 and 3 of the European Convention on Human Rights

53. The case law of the European Court of Human Rights concerning enforced disappearances was last described in 2010 in Mr Dick Marty's excellent report on the human rights situation in the North Caucasus.[48] I therefore do not need to present it in detail here. It is clear that enforced disappearance is a violation of Article 2 (as a threat to or an actual violation of the right to life of the direct victim) and of Article 3 (as inhuman and degrading treatment and possibly torture, of the direct victim and of the family members traumatised by long-lasting uncertainty about the fate of their loved ones). The possibility for the Court to find a "procedural" violation of Article 2 or 3 when the applicant cannot prove the authorities' direct responsibility, whilst it can be established that the authorities failed to conduct a prompt and effective investigation adds to the effectiveness of Articles 2 and 3. The Court's case law on factual presumptions and even, in certain cases, on the reversal of the burden of proof, which I have myself described in an earlier report on the member States' duty to co-operate with the European Court of Human Rights,[49] further contributes to making Articles 2 and 3 fairly effective instruments for holding States to account for enforced disappearances.

54. The Court further clarified its case law on enforced disappearances in *Varnava and Others v. Turkey,*[50] a case concerning nine Greek Cypriots, eight soldiers and one civilian, who all disappeared in August 1974 during the Turkish invasion of the northern part of Cyprus. In its judgment finding violations of Article 2 of the European Convention on Human Rights – the right to life – by Turkey, the Court clarified important aspects of its case law, including its temporal jurisdiction and the application of the six-month rule.

4.1.1.2. The extension of the Court's temporal jurisdiction (ratione temporis)

55. Turkey did not accept the right of individual application to the Court until 1987. It raised a preliminary objection calling on the Court to declare that it lacked jurisdiction to hear the complaint concerning the alleged failure to comply with the procedural obligation to carry out an effective investigation after the disappearances in 1974. The Court dismissed this objection, stressing that "the procedural obligation [to conduct an effective investigation to establish the whereabouts of the men who had disappeared and determine what had happened to them] can operate independently from the substantive limb of Article 2 of the Convention" (paragraph 136), and stated that this resulted from a crucial distinction between "the obligation to investigate a suspicious death and the obligation to investigate a suspicious disappearance" as "the procedural obligation will, potentially, persist as long as the fate of the person is unaccounted for; the ongoing failure to provide the requisite investigation will be regarded as a continuing violation" (paragraph 148). It added that "the procedural obligation to investigate can hardly come to an end on discovery of the body or the presumption of death; this merely casts light on one aspect of the fate of the missing person" and that "[a]n obligation to account for the disappearance and death, and to identify and prosecute any perpetrator of unlawful acts in that connection, will generally remain". The Court thus ruled that it had jurisdiction.

4.1.1.3. Compliance with the six-month rule

56. The Court also ruled on the applicability of the usual time limit of six months for making an application to it despite the nature of the disappearances as a continuing violation. "Applicants cannot wait indefinitely before coming to Strasbourg. They must make proof of a certain amount of diligence and initiative and introduce their complaints without undue delay" (paragraph 161). Depending on the circumstances of the case, the time limit may vary by several years.[51]

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48. See Doc. 12276.
49. See Doc. 11183 (rapporteur: Mr Christos Pourgourides).
50. Application No. 16064/90, judgment of 18 September 2009.

4.1.2. The execution of the Court's judgments concerning enforced disappearances

57. The Court's judgments finding violations of Articles 2 and 3 are binding and must be executed under the supervision of the Committee of Ministers (Article 46). In my own earlier report on the execution of the Court's judgments, I already described the difficulties arising in this respect.[52] The Committee of Ministers has rightly established the principle that when the Court has found a procedural violation of Article 2 or Article 3, the individual measures required to redress the violation include the duty to carry out, albeit belatedly, any investigations that were wrongfully omitted earlier. The problem is that the authorities on the ground remain reluctant, even after the Court has found a violation, to carry out effective investigations and to follow the trail of evidence that may lead to establishing an official's responsibility.[53] The Council of Europe Commissioner for Human Rights, following his visit to Russia in May 2011, highlighted the continuing structural and logistical obstacles to effective investigations.[54] The task of the authorities is objectively made more difficult by the passage of time since the events leading to the disappearance of the victim, given the time needed for the exhaustion of internal remedies, for the procedure before the Court in Strasbourg, and for the execution procedure before the Committee of Ministers. "General measures" designed to prevent future disappearances or to improve the institutional set-up in order to favour more effective investigations can also play a positive role and should be pursued in parallel with efforts aimed at elucidating the case at issue.

4.1.3. Possible interim measures by the Court in cases of enforced disappearances

58. Under Rule 39 of its Rules of Court, the Court can "at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it" and "may request information from the parties on any matter connected with the implementation of any interim measure it has indicated". Under Rule 40, the Court may, "without prejudice to the taking of any other procedural steps and by any available means, inform a contracting party concerned in an application of the introduction of the application and of a summary of its objects" (urgent notification of an application). In my earlier report on member States' duty to co-operate with the Court, I already encouraged the Court to make creative use of these provisions in order to protect applicants threatened with reprisals for having taken their case to Strasbourg, following the example of the Inter-American Court for Human Rights.[55] In the event of an enforced disappearance, valuable time may indeed be saved through interim measures urging the authorities to take certain investigative steps or even just drawing their attention to a dangerous situation. But I am sceptical as to whether it would be wise, in the long run, to place an additional burden on the Court, which is already facing a difficult challenge in terms of numbers of applications.[56] Interim measures in cases of enforced disappearances are a useful, potentially life-saving stop-gap until a dedicated instrument to deal with the issue of enforced disappearances is put in place, but in my view they cannot replace such an instrument indefinitely.

4.1.4. An additional protocol to the European Convention on Human Rights on enforced disappearances?

59. Another possibility to make better use of the Convention system for the fight against enforced disappearances could be a new additional protocol to the Convention, on enforced disappearances. Such a protocol, laying down a new human right not to become a victim of enforced disappearance and recognising the "right to the truth" of relatives of missing persons, would in my view be a false good idea. Besides the practical difficulties of negotiating such an instrument and having it ratified by a sufficient number of States within a reasonable period of time, such a protocol would not really change the fundamentally retrospective

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51. The Court said that "applications can be rejected as out of time in disappearance cases where there has been excessive or unexplained delay on the part of applicants once they have, or should have, become aware that no investigation has been instigated or that the investigation has lapsed into inaction or become ineffective and, in any of those eventualities, there is no immediate, realistic prospect of an effective investigation being provided in the future" (paragraph 165).

52. See, Doc. 12455, for example paragraphs 5, 109 and 126-27 (with respect to the Russian Federation) and Doc. 12455 Addendum, paragraphs 15-17 (with respect to Turkey).

53. See, for example, Russian Justice Initiative, "Reply to the Russian Government's submission of 25 February 2011 regarding the execution of the judgments of the European Court of Human Rights from North Caucuses.

54. Report by the Commissioner for Human Rights following his visit to the Russian Federation from 12 to 21 May 2011, paragraph 63: https://wcd.coe.int/ViewDoc.jsp?id=1825257.

55. See, for example, Doc. 11183, paragraph 48 on the Inter-American Court of Human Rights.

56. See Doc. 12811, report on guaranteeing the authority and effectiveness of the European Convention on Human Rights (rapporteur: Ms Marie-Louise Bemelmans-Videc).

nature of the Convention mechanism. If the protocol were to limit itself to codifying the Court's existing case law, it may well hinder rather than promote its further development, and if it were to go beyond, the advances would only be applicable *inter partes* (namely to the States which have signed and ratified the protocol) and the very existence of the protocol would risk being turned into an *a contrario* argument against further advances of the case law based on the present text of the Convention.

4.1.5. Guidelines of the Committee of Ministers of the Council of Europe on Eradicating Impunity for Serious Human Rights Violations

60. Under the authority of the Steering Committee for Human Rights (CDDH), the Committee of Experts on Impunity drew up guidelines on eradicating impunity for serious human rights violations. These guidelines are mainly drawn from the case law of the European Court of Human Rights and the work of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). They were adopted by the Committee of Ministers Deputies at their 1110th meeting (30-31 March 2011). As combating enforced disappearances is a key aspect of the fight against impunity, and vice versa, these guidelines are relevant particularly in the light of the procedural guarantees designed to protect persons deprived of their liberty (Principle V), the State's duty to investigate (Principle VI), the involvement of victims in the investigations, especially the information given to the missing person's family (Principle X), and command responsibility and the following of orders from a superior (Principle XVI). The adoption of these guidelines by the Committee of Ministers must be warmly welcomed, not least in the perspective of the Assembly's earlier report prepared by Ms Herta Däubler-Gmelin on the need to eradicate impunity.[57] From the perspective of the assessment of whether there is a need for a new Council of Europe convention on enforced disappearances, the guidelines' main weakness is the lack of a dedicated implementation mechanism and the fact that they are not legally binding.

4.1.6. Preliminary conclusions on the possible role of the European Convention on Human Rights system in fighting enforced disappearances

61. The above assessment of the adequacy of the existing and possible additional tools within the Convention system for the fight against enforced disappearances is fairly pessimistic, especially as regards the problem of the passage of time inherent in the remedies under the Convention. Of course, I do not wish to advocate throwing up our hands and accepting the *de facto* impossibility to clarify the fate of so many missing persons and the *de facto* impunity of so many perpetrators of enforced disappearances. But the instruments under the European Convention on Human Rights, even as interpreted and applied dynamically by the Court and the Committee of Ministers and strengthened by the Guidelines on Eradicating Impunity for Serious Human Rights Violations, and even if supplemented by an additional protocol on enforced disappearances, may simply not be the best possible instrument to deal with the scourge of enforced disappearances. The Convention is an excellent instrument to react to enforced disappearances *ex post facto*, but it may well need to be supplemented by a specific legal instrument which lays a stronger emphasis on prevention and rapid reaction. This said, it is indispensable that the Court and the Committee of Ministers avail themselves of all existing legal avenues in order to combat enforced disappearances until a new, dedicated legal instrument can be negotiated and enter into force.

4.2. The key aspects to be taken up in a future European instrument to combat enforced disappearances

62. In Resolution 1463 (2005) and Recommendation 1719 (2005), the Assembly set out the following key aspects that, in its opinion, should to be taken into account in any binding legal instrument on enforced disappearances: (i) a precise definition of enforced disappearance that is sufficiently broad to cover non-State players; (ii) recognition of the relatives of the missing person as independent victims and the affirmation of their "right to the truth"; (iii) effective measures against impunity; (iv) appropriate preventive measures; (v) a full right to reparation, including restitution, rehabilitation, satisfaction and compensation; and (vi) a strong international monitoring mechanism, including a procedure for urgent intervention.

63. At first glance, the 2006 United Nations convention deals with most of the concerns expressed by the Assembly:[58]

i. It provides an autonomous definition of the offence of enforced disappearance and recognises a new substantive human right not to be subjected to enforced disappearance under any circumstances.

57. See Doc. 11934.

ii. It recognises the right of "any individual" (which therefore includes the relatives of the missing person) who has suffered harm as the direct result of an enforced disappearance to claim victim status and expressly enshrines "the right to know the truth".

iii. It provides for a series of effective measures to combat the impunity of offenders: creation of a separate criminal offence in domestic law with appropriate penalties, an extensive list of persons that can be held criminally responsible, a long period of limitation that takes account of the continuing nature of enforced disappearances, recognition of the principle of universal jurisdiction and the *aut dedere aut judicare* principle, the State's obligation to conduct an impartial and in-depth investigation and to provide protection against any reprisals, etc.

iv. It lays down a range of potentially effective preventive measures (ban on secret detention, procedural guarantees associated with detention, right to information on detention, training of law enforcement officials, etc.);

v. It requires States to recognise a right to full reparation and compensation in their domestic law.

vi. It establishes a new type of monitoring mechanism; however, its effectiveness in practice still needs to be verified, as it only started working in November 2011.

4.3. The remaining lacunae of the UN convention

64. Some shortcomings in the UN convention can already be discerned, which could be detrimental to full protection against enforced disappearances.

4.3.1. A narrow definition of enforced disappearance

4.3.1.1. The UN convention does not include in the definition the responsibility of non-State actors

65. Enforced disappearance as such is viewed in the UN convention as an act solely attributable to a State, and the obligations under the convention therefore lie only with the State, excluding any private entity. However, faced with political difficulties,[59] the convention drafters provided in a separate article (Article 3) for obligations to be imposed on States in connection with enforced disappearances committed by non-State actors. This goes some way towards preserving essential objectives, but it does not impose any duties on non-State actors themselves. Enforced disappearances orchestrated by such groups as self-styled rebel forces, private militias or even private business enterprises trying for example to terrorise a local population into abandoning their land are still not covered.

4.3.1.2. The UN convention is silent on the question of intent

66. The "constructive ambiguity" adopted by the convention's drafters on the question of intent raises a serious issue to which a clear response will have to be given: can or must a possible binding European legal instrument avoid introducing in the definition of enforced disappearance a subjective element (that is to say, the element of intent), which is usually part and parcel of any serious criminal offence? Is it possible in practice to facilitate the proof of such a subjective element in such a way that it does not make any effective prosecution illusory? In any event, the threshold for triggering the States' duty to protect and investigate under a human rights treaty such as the UN convention does not need to be, and should not be, set as high as the threshold triggering individual criminal responsibility, as in the case of the Rome Statute of the ICC or in national criminal law.

4.3.2. The absence of a prohibition of amnesties

67. This is one of the principal omissions of the UN convention compared to the Assembly's 2005 "wish list": no provision in the convention prohibits an amnesty or any similar measure for perpetrators of enforced disappearances, which seems to be a retrograde step compared with the present state of international law for

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58. The rapporteur would also refer to the reply from the Committee of Ministers to Recommendation 1719 (2005) (Doc. 10973).

59. Firstly, the enforced disappearances in Latin America in the 1960s and 1970s were undeniably an instrument of State terror. Secondly, there was a risk of playing into the hands of States (at that time Mexico, Peru, Colombia) which wished to absolve themselves of their own responsibility by claiming that the enforced disappearances were being committed by non-State actors.

serious violations of human rights and international humanitarian law.[60] In our opinion, impunity is precisely an obstacle, not a possible condition for lasting reconciliation, which must be based on the establishment of the truth and individual rather than collective responsibility for serious crimes.[61]

4.3.3. The absence of provisions relating to jurisdictional and other immunities

68. It emerges from the debates that, owing to strong opposition from the United States, which argued that such a provision would prevent the granting of certain transactional immunities, the UN convention contains no article on immunities, even though the granting of immunities, just as amnesties, may create obstacles to criminal prosecution, thus contributing to the impunity of perpetrators.

4.3.3.1. The absence of provisions on granting asylum to persons who perpetrate or are involved in enforced disappearances

69. The UN convention is silent on the question of a prohibition on granting asylum or refugee status to perpetrators of enforced disappearances. Moreover, no link is established with the 1951 Geneva Convention on the Status of Refugees, Article 1-F of which contains an exclusion clause for persons "with respect to whom there are serious reasons for considering" that they have committed serious crimes (a crime against peace, a war crime, a crime against humanity, a non-political crime outside the country of refuge) or "acts contrary to the purposes and principles of the United Nations".

4.3.4. Possible use of military tribunals

70. The wording of Article 11 of the UN convention, unlike other relevant international instruments on this subject,[62] fails to rule out the use of military tribunals to try perpetrators.

4.3.5. The limits on the work of the Committee on Enforced Disappearances

71. Whilst we cannot yet judge the effectiveness of this body, which will only begin its work in November 2011, certain limits are already clear:

72. Firstly, the committee has an uncertain future as it has been set up for a trial period of four to six years, after which a conference of the States parties will assess its operation and decide whether it is appropriate to entrust the monitoring of the convention to another body (Article 27). Article 27 is a compromise formula between those States that did not see the need for any new monitoring body at all and others that did. The "sword of Damocles" hanging over the CED may act either as additional motivation for its members, as our expert and CED member Ms Janina believes, or as a freeze on any real deployment of resources until the final decision on the CED's future is taken.

73. Secondly, the committee will have limited jurisdiction *ratione temporis*[63] and therefore cannot deal with serious situations which already exist and which in fact prompted the drawing up of the UN convention. I consider this as a particularly serious weakness; in this respect, the UN convention falls behind the case law of the European Court of Human Rights as developed in *Varnava and Others v. Turkey* (see paragraph 55 above). This handicap makes it difficult for the newly elected CED to reach its cruising speed in time for the review under Article 27. But it remains to be seen how the CED will define the "commencement" of an enforced disappearance, and whether it may have some leeway when the time of the "commencement" is unknown or otherwise unclear. It should also be noted that this is only a jurisdictional limitation, concerning the

60. See Article 18 of the 1992 declaration, the findings on the Human Rights Committee in *Hugo Rodriguez v. Uruguay*, Document CCPR/C/51/D/322/1988, and the Inter-American Court of Human Rights in Barrios Altos (*Chumbipuma Aguirre et al. v. Peru*), judgment of 14 March 2001, and the "general comment" of the UN Working Group on Enforced or Involuntary Disappearances of November 2005, on Article 18 of the 1992 declaration.

61. The European Court of Human Rights has held that amnesty laws were not in conformity with States' obligations to investigate and prosecute perpetrators of torture (*Ould Dah v. France*, Application No. 13113/03, judgment of 17 March 2009; but it went on to suggest that, where amnesty laws formed part of a broader reconciliation process, there might be room for a more flexible approach).

62. See Article 16, paragraph 2, of the 1992 Declaration on Enforced Disappearances, and Article IX of the Inter-American Convention on Enforced Disappearance of Persons.

63. Article 35 of the convention provides: "1. The Committee shall have competence solely in respect of enforced disappearances which commenced after the entry into force of this Convention. 2. If a State becomes a party to this Convention after its entry into force, the obligations of that State vis-à-vis the Committee shall relate only to enforced disappearances which commenced after the entry into force of this Convention for the State concerned."

competences of the CED, and does not affect the substantive part of the UN convention, which means that the States' obligations apply also to disappearances that commenced before the entry into force of the UN convention for the State concerned, as long as it remains unresolved.[64]

5. Conclusion

74. In the light of the above analysis of recent and possible future developments within the Council of Europe, in view of the strengths and weaknesses of the UN convention and of the hearing with experts we had at the meeting of the Committee on Legal Affairs and Human Rights on 6 October 2011, my conclusion is that the Council of Europe should follow a three-pronged approach:

75. Firstly, we must urge all Council of Europe member States that have not yet done so to sign and ratify the United Nations International Convention for the Protection of All Persons from Enforced Disappearance, which at any rate represents a major step forward for the protection of all persons against the scourge of enforced disappearance. The Council of Europe's member States which are also States parties to the UN convention and the members of the CED elected on behalf of these States should also be encouraged to implement the UN convention in such a way as to realise its full potential. This includes passing and implementing legislation which settles the ambiguities left in the text of the UN convention by way of compromise (in particular as regards duties placed on non-State actors and the subjective element of the crime of enforced disappearance) on the side of maximising protection, and making the declarations foreseen in Articles 31 and 32 accepting that the CED deal with individual and interstate applications. The newly elected CED should be encouraged to interpret the UN convention in such a way as to enable the CED to intervene in the most rapid and effective way in order to assist as many victims of enforced disappearance as possible. It should also be encouraged to co-operate closely, from the start, with the existing United Nations treaty-based (Human Rights Council) and non treaty-based mechanisms (in particular, the WGEID, which continues to play an important humanitarian role).

76. Secondly, we must invite the Committee of Ministers to launch the process of negotiating a new European convention against enforced disappearances in the framework of the Council of Europe. I am fully aware of the fact that it may take a certain time, and that it will be an uphill struggle to ensure that the future European convention is stronger than the UN convention. But we owe it to the victims, past and future, of the horrendous crime of enforced disappearance that we at least try. Also, from a more pragmatic point of view, launching the preparation of a new convention is an effective way of placing the issue of enforced disappearance back on the political agenda, and of keeping it there for some time. We heard during the hearing with our experts how the institutions working on disappearances and missing persons issues, such as the ICRC worldwide, the ICMP in the Western Balkans, or the CMP in Cyprus, require constant political support in order to be able to carry out their work – in particular in order to gain unhindered access to all potential burial sites and to obtain the resources needed to carry out exhumation and identification work. In our recommendation to the Committee of Ministers, we should not fail to specify the issues that we expect the future convention to resolve, in line with the Assembly's 2005 recommendation, at least as far as Europe is concerned, namely:

– to include in the definition of enforced disappearances the duties and responsibilities of non-State actors;

– to drop any subjective element (intent) as part of the crime of enforced disappearance which would risk making prosecutions illusory;

– to place limits on amnesties or jurisdictional and other immunities;

– to foresee a strong monitoring mechanism that also includes preventive functions, which would have temporal jurisdiction also over cases of enforced disappearances that are ongoing at the time of entry into force of the new instrument.

77. Thirdly, we must encourage the European Court of Human Rights and the Committee of Ministers to make the best possible use of existing legal avenues under the European Convention on Human Rights system to fight against enforced disappearances. This includes the application and further strengthening of the Court's case law on procedural violations of Articles 2 and 3, on factual presumptions and the reversal of the burden of proof in appropriate cases, and interim measures and the urgent notification of applications (Rules 39 and 40 of the Rules of Court). This also includes continued attention by the Committee of Ministers,

64. See Olivier de Frouville (see footnote 44), p. 9.

in supervising the execution of relevant judgments, to “individual measures”, ensuring that each case of suspected enforced disappearance is effectively investigated, and to “general measures” providing for appropriate preventive action.

78. This three-pronged approach is reflected in the draft resolution and recommendation presented above, for which I solicit your support.