Parliamentary Assembly
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COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Resolution 1463 (2005)[1]

Enforced disappearances

Parliamentary Assembly

1. "Enforced disappearances" entail a deprivation of liberty, refusal to acknowledge the deprivation of liberty or concealment of the fate and the whereabouts of the disappeared person and the placing of the person outside the protection of the law.

2. The Parliamentary Assembly unequivocally condemns enforced disappearance as a very serious human rights violation on a par with torture and murder, and it is concerned that this humanitarian scourge has not yet been eradicated, even in Europe.

3. The Assembly, recalling in particular its Resolution 1403 (2004) and Recommendation 1679 (2004) on the human rights situation in the Chechen Republic, as well as Resolution 1371 (2004) and Recommendation 1657 (2004) on disappeared persons in Belarus and Recommendation 1056 (1987) on national refugees and missing persons in Cyprus, considers the fight against enforced disappearances to be first and foremost the responsibility of the states concerned.

4. It notes the similarities between the disappearances in Belarus and those in certain Latin American countries in the 1970s and 1980s and demands that justice be done without any further delay.

5. In view of the inability, and in rare cases the unwillingness of some states to provide effective protection, a well-defined international legal framework is also of utmost importance.

6. In this respect, the Assembly pays tribute to international human rights bodies, and in particular the European Court of Human Rights, the United Nations Human Rights Committee and the UN Commission on Human Rights, its working group on enforced or involuntary disappearances, and the Inter-American Court of Human Rights, for their contribution to the nascent international legal framework for the fight against enforced disappearances. Their case law has clarified a number of state obligations in this respect, in particular as regards the duty to investigate.

7. It also welcomes the UN General Assembly's 1992 Declaration on the Protection of all Persons from Enforced Disappearances in which key principles were laid down for the first time in a consolidated, although non-binding form.

8. Unfortunately, a number of important gaps still exist in the international legal framework, regarding, inter alia, the definition of enforced disappearance, the precise extent of states' obligations to prevent, investigate and sanction such crimes, and the status of the victims and their relatives.

9. The Assembly therefore welcomes the progress made by the intersessional open-ended working group to elaborate a draft, legally binding, normative instrument for the protection of all persons from enforced disappearance at its 5th Session in September 2005 leading it to the adoption, on 22 September 2005, of a draft convention in good time for the UN Commission on Human Rights to adopt it at its 62nd Session in the spring of 2006.

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1. Assembly debate on 3 October 2005 (25th Sitting) (see Doc. 10679, report of the Committee on Legal Affairs and Human Rights, rapporteur : Mr Pourgourides). Text adopted by the Assembly on 3 October 2005 (25th Sitting).

10. As regards the content of the future binding instrument, the Assembly considers the following points, most of which are reflected in the draft convention adopted by the UN intersessional working party on 22 September 2005, as essential :

10.1. the definition of enforced disappearance :

10.1.1. should be wide enough to cover such acts also when they are committed by non-state actors, such as paramilitary groups, death squads, rebel fighters or organised criminal groups ;

10.1.2. should not include a subjective element, which would be too difficult to prove in practice. The inherent difficulties in proving an enforced disappearance should be met by the creation of a rebuttable presumption against the responsible state officials involved ;

10.2. family members of the disappeared persons should be recognised as independent victims of the enforced disappearance and be granted a “right to the truth”, that is, a right to be informed of the fate of their disappeared relatives ;

10.3. the instrument should include the following safeguards against impunity :

10.3.1. obligation for states to include the crime of enforced disappearance with an appropriate punishment in their domestic criminal codes ;

10.3.2. extension of the principle of universal jurisdiction to all acts of enforced disappearance ;

10.3.3. recognition of enforced disappearance as a continuing crime, as long as the perpetrators continue to conceal the fate of the disappeared person and the facts remain unclarified ; consequently, non-application of statutory limitation periods to enforced disappearances ;

10.3.4. clarification that no superior order or instruction of any public authority may be invoked to justify an act of enforced disappearance ;

10.3.5. exclusion of perpetrators of enforced disappearances from any amnesty or similar measures, and from any privileges, immunities or special exemptions from prosecution ;

10.3.6. perpetrators of enforced disappearances to be tried only in courts of general jurisdiction, and not in military courts ;

10.3.7. enforced disappearance shall not be considered as a political offence for the purposes of extradition and asylum and the prohibition of refoulement shall also apply to the danger of being subjected to enforced disappearance ;

10.3.8. failure to effectively investigate any alleged enforced disappearance should constitute an independent crime with an appropriate punishment. The minister and/or the head of department responsible for the investigations should be held accountable under criminal law for the said failure ;

10.4. the instrument should include the following preventive measures :

10.4.1. unqualified prohibition of any form of incommunicado detention and of any secret places of detention ;

10.4.2. prompt, simple and effective remedies against arbitrary detention (habeas corpus) ;

10.4.3. duty to effectively investigate any complaint of enforced disappearance ;

10.4.4. establishment of an official and generally accessible up-to-date register of all detainees, and of centralised registers of all places of detention ;

10.4.5. procedures for the release of all detainees in a manner permitting reliable verification ;

10.4.6. appropriate training of law-enforcement and prison staff and lawyers ;

10.5. the instrument should include a well-defined right to reparation covering :

10.5.1. restitution, that is, immediate release of the disappeared person if he or she is still alive, or the exhumation and identification of the body and the return of the mortal remains to the next of kin for a decent burial, as well as rehabilitation, medical, psychological and social care at the expense of the government responsible ;

10.5.2. satisfaction, that is, an apology by the authorities, guarantees of not reoffending, the disclosure of all relevant facts following an in-depth investigation and the prosecution of the perpetrators ;

10.5.3. compensation for material damage (including a realistic assessment of loss of income and maintenance of dependents, as well as legal costs), and an adequate sum for the mental and physical suffering of both the disappeared persons and their relatives ;

10.6. the instrument should finally provide for a strong international mechanism to monitor the respect of the states' obligations outlined in items 10.1 to 10.5 above which should also foresee a mechanism for urgent interventions in some cases.

11. The Assembly urges all member states of the Council of Europe to support the adoption of the draft binding instrument, as agreed by the intersessional working party, in the UN Commission on Human Rights and in the General Assembly.

12. In case the compromise reflected in the draft binding instrument is reopened in the process of its adoption, the member states of the Council of Europe are encouraged to make further improvements to this text, in particular to :

12.1. streamline the procedure for on-site visits by the future committee on enforced disappearances in Article 32 of the draft convention ;

12.2. extend the application of the future convention over time, beyond that foreseen by the current Article 35, to include cases in which the disappearance occurred before the entry into force of the convention and in which the whereabouts of the disappeared person have not been clarified until after its entry into force ;

12.3. improve measures against impunity, in particular by the exclusion of perpetrators of enforced disappearances from any amnesty or similar measures referred to above ;

12.4. lay down a rule following which perpetrators of enforced disappearances shall only be tried in courts of general jurisdiction and not in military courts.

13. In case the draft instrument is adopted unchanged, the member states of the Council of Europe are urged to sign and ratify it without delay, and to make declarations aimed at maximising the protective effect of the instrument, in particular to :

13.1. waive the need for prior agreement to an on-site visit of the committee on enforced disappearances foreseen in Article 32 ;

13.2. recognise the competence of the committee to receive and consider communications on behalf of individuals claiming to be victims of a violation of the convention, as foreseen in Article 31 ; and

13.3. interpret Article 35 in such a way as to allow the convention to cover also cases in which the disappearance occurred before entry into force of the convention and the whereabouts of the disappeared person have not been clarified until after its entry into force.

14. The Assembly resolves to examine, in the second semester of 2006, the results achieved in the framework of the United Nations and any new initiatives that may be required from the Council of Europe in order to achieve the desired level of protection against enforced disappearances.