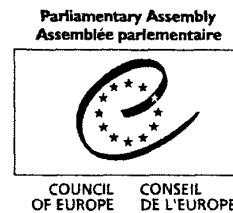


Parliamentary Assembly Assemblée parlementaire



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Enforced disappearances

Report
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Christos Pourgourides, Cyprus, Group of the European People's Party

Summary

The draft resolution unequivocally condemns enforced disappearance as a very serious human rights violation on par with torture and murder and it is concerned that this humanitarian scourge is still not eradicated, even in Europe.

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.

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.

The draft resolution therefore welcomes the progress made by the United Nations Intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance at its 4th session in January/February 2005 and urges it to agree on a draft convention in good time for the United Nations' Commission on Human Rights to adopt it at its 62nd session in the spring of 2006.

As regards the content of the future binding instrument, the draft resolution lays down a number of points pertaining to the definition of enforced disappearance, safeguards against impunity, preventive measures, the victims' right to reparation and the monitoring mechanism which it considers essential.

It proposes 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.

I. Draft resolution

§ 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 par with torture and murder and it is concerned that this humanitarian scourge is still not eradicated, even in Europe.

§ 3. The Assembly, recalling in particular its Resolution 1403 (2004) and Recommendation 1679 (2004) on the human rights situation in Chechnya, as well as Resolution 1371 (2004) and Recommendation 1657 (2004) on disappearances in Belarus and Recommendation 1056 (1987) on missing persons in Cyprus, considers the fight against enforced disappearances to be first and foremost a 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 1980's 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 UN 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 disappearance. 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, though 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 4th session in January/February 2005 and urges it to agree on 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.

§ 10. As regards the content of the future binding instrument, the Assembly considers the following points 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 and 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 should be recognised as independent victims of the enforced disappearance and be granted a "right to the truth", i.e. a right to be informed of the fate of their 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 as a defence 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. trial of perpetrators of enforced disappearances 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 be an independent crime with an appropriate punishment. The Minister and/or the Head of Department responsible for the investigations should be made criminally responsible 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, i.e. 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, i.e. an apology by the authorities, guarantees of non-repetition, 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 lost 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 State obligations following from items 10.1. to 10.5. above which should also foresee a mechanism for urgent interventions in individual cases.

§ 11. The Assembly urges all member states of the Council of Europe to play a constructive role in the working group formulating the draft binding instrument and in the UN Commission on Human Rights and to support the essential points listed in paragraph 10 above in order to help in the adoption of a satisfactory, binding instrument to combat enforced disappearances at the level of the United Nations.

§ 12. It 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.

II. Draft recommendation

§ 1. The Parliamentary Assembly, referring to its Resolution ... (2005), invites the Committee of Ministers to express its support for the adoption, by the United Nations' Commission on Human Rights, of a binding international instrument for the protection of all persons from enforced disappearance.

§ 2. The Committee of Ministers is invited to stress, in particular, the need for the future instrument to provide for :

§ 2.1. a clear definition of enforced disappearances wide enough to cover also non-State actors;

§ 2.2. the recognition of close relatives as victims in their own right and to grant them a "right to the truth";

§ 2.3. effective measures against impunity;

§ 2.4. appropriate preventive measures;

§ 2.5. a comprehensive right to reparation including restitution, rehabilitation, satisfaction and compensation;

§ 2.6. a strong international monitoring mechanism, including an urgent intervention procedure.

§ 3. It further invites the Committee of Ministers to examine the future UN instrument in due course with a view to ascertaining whether the essential elements presented in paragraph 2 have been duly taken into account, and if need be, to envisage appropriate action in the framework of the Council of Europe in order to fill any remaining gaps.

§ 4. Finally, it urges the Committee of Ministers to revert to the issue of the disappearances in Belarus and decide on stronger and more effective measures than those referred to in its reply to Recommendation 1657 (2004).

III. Explanatory memorandum by Mr Pourgourides

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A. Introduction

1. The motion for a resolution (Doc 10243 dated 30 June 2004, see Appendix I) was transmitted to the Committee on Legal Affairs and Human Rights, for report, on 8 October 2004. The Committee, at its meeting on 18 November 2004, appointed Christos Pourgourides (Cyprus/EPP) as Rapporteur. At its meeting on 23-24 May 2005 in Limassol, the Committee approved an outline report and held a Hearing with international experts and witnesses (see programme in Appendix II).
2. "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.
3. Often, the disappeared persons are killed immediately, but their spouses, children or parents continue to live for many years in a situation of extreme anguish and stress, torn between hope and despair. They must therefore also to be considered as victims of the crime of enforced disappearance.
4. Sometimes, the lives of disappeared persons can still be saved by immediate intervention challenging the perpetrators, reminding them that they are being watched and that they will be held accountable. A rapid reaction mechanism is needed to use every opportunity for such life-saving action.
5. The perpetrators of such crimes, which still occur also in Council of Europe member states, often enjoy impunity, for two reasons: national laws are incomplete and not properly enforced in an effort to protect perpetrators; international instruments in the human rights field do not fully cover the problem of enforced disappearance, and, in particular, do not allow for international or transnational prosecution of perpetrators and of those who cover-up their actions. Possibilities for preventive action

in favour of endangered persons is at best rudimentary. The Belarusian and Ukrainian experience has shown that impunity is due to the inability of the investigators to conduct full and proper investigations due to express or implied pressure from the head of state and/or his close associates. As the police and the judiciary are not independent, the pressure from above is always effective.

6. It is therefore urgent to analyse the existing legal framework to fight enforced disappearances, pinpoint its shortcomings, and propose concrete remedial action.

7. Such remedial action in the form of a new convention against enforced disappearances is currently in the final stages of examination in the framework of the United Nations.

8. In light of the results of the hearing, I propose the following approach, which is reflected in the draft resolution and recommendation: in a first stage, the Assembly should support the United Nations in its work aimed at bringing about a world-wide solution, in particular by urging the member states of the Council of Europe to play a constructive role in the UN arena; in a second stage, the Assembly should evaluate the convention that the UN will have adopted, to determine whether additional measures are needed within the Council of Europe, making concrete proposals if need be.

B. Enforced disappearances: serious human rights violations on par with murder and torture: the suffering of the victims and their family members

1. Definition of enforced disappearance

9. In the process of elaboration of the draft UN Convention, a number of definitions has been discussed. The most recent is that in Article 1 of the draft convention as presented in a document of the UN Commission on Human Rights dated 7 March 2005¹:

"[...] enforced disappearance is considered to be arrest, detention, abduction or any other form of deprivation of liberty committed 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 be concealment of the fate or whereabouts of the disappeared person, which places such a person outside the protection of the law."

10. The main features of the definition (*inter alia*, modalities of the "disappearance", inclusion of non-state actors, absence of a subjective element of intent to place a person outside the protection of the law) have been hotly disputed in the negotiations leading up to this text. A broad definition along the lines of that cited above is necessary in order to cover all cases. We must remain vigilant during the process of finalising the UN Convention that this definition shall not be watered down.

2. Enforced disappearances: origins and cases in Council of Europe countries

11. To properly measure the gravity of enforced disappearances, I consider it useful to recall the historical development of this phenomenon which was first "officialised" in a Nazi decree in 1941. Hitler's *Nacht-und-Nebel-Erlass* ("Night and fog decree") of 7 December 1941 foresaw that persons in occupied territories "endangering German security" would be transported secretly to Germany, where they disappeared without trace. In order to maximise the desired intimidating effect, officials were prohibited to provide any information on their fate.

12. The same method was widely used by right-wing military regimes during the repression in Latin America in the 1960 and 1970s, where the term of "enforced disappearance" (a translation of *desaparicion forzada*) was first used by Latin American NGO's. The Inter-American Commission on Human Rights and the UN Commission on Human Rights were the first international human rights bodies to respond to this phenomenon in the 1970s, with regard to cases in Chile after the military putsch of 11 September 1973²

¹ E/CN.4/2005/CRP.4, Commission on Human Rights, 61st session (14 March-22 April 2005), Working Paper prepared by the Chairman of the Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance, at the end of its 4th session (31 January – 11 February 2005).

² Cf. "Report submitted by Mr Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to paragraph 11 of Commission resolution 2001/46", UN Economic and Social Council (E/CN.4/2002/71) dated 8 January 2002 (hereafter: Nowak report), para. 8-9.

13. Unfortunately, the scourge of enforced disappearances has not spared the member countries of the Council of Europe. In chronological order, the following countries were hit:

14. In Cyprus, close to 500 Turkish Cypriots and some Greek Cypriots disappeared during the troubles in 1963-1964, and about 1500 Greek Cypriots, but also a number of Turkish Cypriots went missing during the Turkish 1974 invasion of Northern Cyprus. The problem of the missing persons and the lack of progress in elucidating the victims' fate, despite the ongoing efforts of a special commission to investigate the fate of missing persons in Cyprus set up by the United Nations General Assembly in 1977 has poisoned the relations between the Greek and Turkish Cypriot communities and has given rise to an interstate complaint before the European Court of Human Rights (*Cyprus v. Turkey*)³.

15. In Turkey, the military campaign against Kurdish secessionists in Eastern Anatolia has been accompanied by numerous enforced disappearances, which also gave rise to judgments of the European Court of Human Rights⁴.

16. The Chechen Republic of the Russian Federation is the region in any Council of Europe member state which is most affected by the scourge of enforced disappearances. Assembly Resolution 1403 (2004) and Recommendation 1679 (2004) based on the last report prepared by our colleague Rudolf Bindig⁵ document the extent of the problem, and of the perpetrators' impunity. During our hearing in Limassol, Alexander Cherkassov, of the Russian human rights centre "Memorial" presented the most recent developments. According to Memorial's figures based on their monitoring of only about 30% of the territory of the Chechen Republic in a situation where many victims' relatives are too terrified even to lodge complaints with law enforcement agencies or human rights monitors, 415 abductions occurred in Chechnya, a region with less than one million inhabitants, during 2004 and another 52 in the first 3 months of 2005⁶. The climate of impunity denounced by Rudolf Bindig is a key problem of enforced disappearances that must be solved in order to deter such acts in future, and to break the vicious circle of crime and vengeance which is particularly prevalent in this region.

17. In Belarus, I conducted an investigation into four high-profile disappearances⁷ leading to PACE Resolution 1371 (2004) and Recommendation 1657 (2004). I collected strong evidence, which convinced the Assembly "[...] to believe that steps were taken at the highest level of the state to actively cover up the true circumstances of the disappearances, and to suspect that senior officials of the state may themselves be involved in these disappearances." The Assembly even took the unprecedented step of naming the officials concerned⁸, who were subsequently subjected to travel restrictions by the European Union and the United States of America⁹. But my subsequent attempts to initiate the prosecution of these persons by the competent authorities in other countries have revealed a weakness in the international legal framework of the fight against enforced disappearances: whilst the International Criminal Court, subject to other restrictive conditions, could deal with enforced disappearances on a massive scale, and courts in some countries such as Belgium, Spain, and the United Kingdom are in a position to accept extraterritorial jurisdiction in cases of genocide or torture, this is not the case for enforced disappearances on a scale not amounting to genocide. I am also very

³ No 25781/94, judgment of 10 May 2001; see also Assembly Recommendation 1056 (1987) and the written declaration of 1 October 2003 (Assembly Doc 9952).

⁴ E.g. *Kurt v. Turkey*, no 24276/94, judgment of 25 May 1998; *Kaya v. Turkey*, no 22535/93, judgment of 28 March 2000; *Tas v. Turkey*, no 24396/94, judgment of 14 November 2000; *Cakici v. Turkey*, no 23657/94.

⁵ Doc 10283.

⁶ Of the 415 abducted persons in 2004, the whereabouts of 191 remain unknown; of the 52 abducted in early 2005, 28 are considered as "disappeared". Whilst Memorial considers that its figures still underreport reality, Alu Alkhanov, the President of the Chechen Republic, declared at the Assembly's "Round Table" on Chechnya in Strasbourg in March 2005 that the number of disappearances is "only" half of the figure given by Memorial.

RFE (20 June 2005) quotes a leading human rights official in the Russian-backed administration in Chechnya, who says tens of thousands of Chechen civilians have disappeared since 1999. Nurdy Nukhazhiev, chairman of the Chechen government's committee for civil rights, said that many of the accusations made by human rights groups against the Russian armed forces -- among them that they have targeted civilians -- were true, and that the Chechen authorities were aware of the existence of 52 mass graves, which, he said, had to be properly exhumed.

⁷ Yuri Zakharenko, former Minister of the Interior (disappeared on 7 May 1999), Victor Gonchar, former Vice-President of the Parliament of Belarus (disappeared on 16 September 1999), Anatoly Krasovski, businessman (disappeared with Mr Gonchar) and Dmitri Zavadski, cameraman for the Russian TV channel ORT (disappeared on 7 July 2000); cf. Assembly document 10062 dated 4 February 2004.

⁸ The General Prosecutor and former head of presidential security, Mr Sheyman, the Minister for Sports and Tourism and previous Minister of the Interior, Mr Sivakov, and a high-ranking officer of the special forces, Mr Pavlichenko.

⁹ But not by the Council of Europe, as the Committee of Ministers did not reach a consensus to follow the Assembly's recommendations on sanctions against the Lukashenko regime.

dissatisfied with the lukewarm reply of the Committee of Ministers to Assembly recommendation 1657 (2004), which is why I am proposing, in the preliminary draft recommendation, to urge the Committee of Ministers to revert to the issue and decide on a more appropriate reaction. This frustrating experience has prompted me to support the present motion aimed at strengthening the legal framework in the fight against enforced disappearances in general.

18. In Ukraine, the disappearance of the journalist Georgiy Gongadze in 2000, and the botched criminal investigation in the presence of serious allegations of the involvement of senior representatives of the state was one of the detonators of the "Orange Revolution". Our colleague Sabine Leutheusser-Schnarrenberger is mandated to look into this matter in a separate report.¹⁰

19. In Azerbaijan, as we were told during the Hearing in Limassol, a large number of persons has gone missing, in particular during the conflict in Nagorno-Karabakh. During a visit in Baku in July 2005, I met with the Azerbaijani authorities, who handed me lists of close to 5000 missing persons, both members of the military and civilians. Whilst the investigation of these cases is outside the scope of the present report, I consider that the plight of the missing persons in Azerbaijan and of their relatives needs urgent international attention.

3. The suffering of the relatives: witness statements by participants of the Hearing in Limassol

20. The three witnesses who testified during the Limassol hearing, though from totally different cultural backgrounds, were in full agreement on all the main points: relatives of persons who have "disappeared" suffer severe psychological harm over many years, and as the Turkish Cypriot's statement shows, even over several generations. The Chechen witness gave us a vivid account of the terrifying effect of the traumatic circumstances of the abduction of her son on her other children, and on herself. The Greek Cypriot's statement was a demonstration, in particular, of the devastating effect of the authorities' lack of cooperation in clarifying the fate of missing persons. All three statements show that reconciliation passes via the establishment of the truth.

21. In legal terms, the witness statements support the following conclusions:

- Enforced disappearances are indeed most serious human rights violations on par with murder and torture.
- The disappeared person's close relatives are victims of the crime of enforced disappearance and should be recognised as such in terms of procedural and compensation rights.
- The crime of enforced disappearance does not cease until the fate of the disappeared persons is established – also concerning prescription and competence *rationae temporis*.

¹⁰ Cf. her introductory memorandum, document AS/Jur (2005) 23 of 25 April 2005.

C. The existing legal framework in the fight against enforced disappearances: sketchy rules leaving room for impunity

1. Evolution of legal rules to date

a. United Nations¹¹

22. The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights do not deal explicitly with protection against enforced disappearance. But relevant articles have been interpreted in such a way as to encompass certain aspects. This concerns Article 3 of the Universal Declaration of Human Rights (right to life, liberty and security of the person) and Articles 2 (3) (right to an effective domestic remedy), 6 (right to life), 7 (prohibition of torture, cruel, inhuman or degrading treatment or punishment), 9 (right to liberty and security of the person), and 16 (right to recognition as a person before the law) of the International Covenant.

23. The UN General Assembly has taken up this subject in a number of resolutions¹² culminating in its Declaration on the Protection of all Persons from Enforced Disappearances (Resolution 47/133 of 18 December 1992), in which key principles were laid down for the first time in a consolidated form. These include recognition that

- any act of enforced disappearance constitutes a violation of the rules of international law guaranteeing, *inter alia*, the right to recognition as a persons before the law, the right to liberty and security of the person and the right not to be subjected to torture, and other cruel, inhuman or degrading treatment or punishment, finally that it also violates or constitutes a grave threat to the right to life (Article 1);
- States must not practise, permit or tolerate enforced disappearances (Article 2);
- States must make such acts criminal offences under national law (Article 4);
- orders or instructions cannot be used as defences (Article 6);
- States must institute prompt and effective judicial remedies to determine the whereabouts and state of health of persons deprived of their liberty (Article 9),
- States must keep an official up-to-date register of all persons deprived of their liberty (Article 10 para. 3),
- States must ensure thorough and impartial investigation of allegations of enforced disappearance, and must appropriately punish reprisals on the occasion of the lodging of a complaint (Article 13 para. 1 and 5);
- acts constituting enforced disappearance shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared (Article 17);
- victims and their family shall have a right to adequate compensation (Article 19).

24. The UN Commission on Human Rights set up a Working group on enforced or involuntary disappearances (WGEID) in 1980¹³, which acts as a channel of communication between families of disappeared persons and the Governments concerned, with a view to ensuring that sufficiently documented and clearly identified individual cases are investigated. Its practical experience was taken into account in the formulation of the above-mentioned 1992 Declaration, and the WGEID took up the task to monitor States' compliance with the obligations deriving from the 1992 Declaration. Besides

¹¹ For an overview of the different UN bodies dealing with human rights issues, see the research guide of the United Nations Dag Hammarskjöld Library (www.un.org/Depts/dhl/resguide/spechr.htm); to sum up, there are **Charter-based bodies**, including the **UN High Commissioner for Human Rights** and the **Commission on Human Rights** and its Sub-Commission on the Promotion and Protection of Human Rights (until 27 July 1999: Subcommission on Prevention of Discrimination and Protection of Minorities). The Commission reports to the Economic and Social Council (ECOSOC); it has set up a **Working Group on Enforced or Involuntary Disappearances (WGEID)**. The Commission on Human Rights has also set up an **Intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance**.

Treaty-based bodies include the Committee against Torture, and the **Human Rights Committee**, the monitoring body of the International Covenant on Civil and Political Rights established according to Article 28 of the Covenant.

¹² Resolution 33/173 of 20 December 1978 on "disappeared persons", Resolutions 35/193 of 15 December 1980 and 36/163 of 16 December 1981 on "involuntary or enforced disappearances"; Resolution 49/193 of 23 December 1994 on "question of enforced or involuntary disappearances".

¹³ Resolution 20 (XXXVI) of 29 February 1980; mandate extended by three years in Resolution 2004/40; current composition, mandate, and other documentation to be found in the WGEID Fact sheet No 6 (rev.) posted at <http://www.ohchr.org/english/about/publications/docs/fs6.htm>.

adopting a number of general comments interpreting provisions of the Declaration and drawing Governments' attention to general problems, the WGEID registered about 50 000 individual cases and transmitted them to Governments, and succeeded in clarifying about 15% of them¹⁴.

25. The Commission on Human Rights follows and supports the work of the WGEID and other activities on enforced disappearances in the framework of the United Nations in resolutions dedicated to this topic in regular intervals, which – albeit in diplomatic terms – reflect the frustration of the Commission in the face of slow progress and lacklustre cooperation of States with the Working Group¹⁵.

26. The UN Human Rights Committee¹⁶ adopted a General Comment on the right to life in 1982¹⁷, in which the Committee stated that

"States parties should also take specific and effective measures to prevent the disappearance of individuals, something which unfortunately has become all too frequent and leads too often to arbitrary deprivation of life. Furthermore, States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life."

27. The Human Rights Committee has contributed to the development of case law on the basis of the Covenant following communications received from Uruguay, Columbia, Peru, Argentina and Algeria.¹⁸ The Committee has taken position in particular on the question of what constitutes an effective remedy, and on the victim status of family members of the disappeared person.

28. The Sub-Commission on Prevention of Discrimination and Protection of Minorities¹⁹ of the Commission on Human Rights, in its resolution 1998/25, adopted a draft international convention on the protection of all persons from enforced disappearances, which was based on work begun in 1981 under the leadership of Louis Joinet, French member of the Sub-Commission and Chairman-Rapporteur of its working group on the administration of justice, who had prepared an important report on the topic of enforced disappearances as Rapporteur of the 1981 Paris Colloquium on the issue²⁰. The draft Convention was widely disseminated for comments to Governments, international organisations and NGO's.

29. In April 2001, the Commission on Human Rights decided to establish an "inter-sessional, open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance", with Bernard Kessedjian (France) as Chairperson-Rapporteur. The Report of this working group dated 23 February 2004²¹ presents the different proposals on the issues that need to be covered by the future convention, including the definition of enforced disappearance, offences and penalties, protection against impunity, international cooperation, prevention of enforced disappearances, the status of victims, and the need for a monitoring body. At its 4th session in January/February 2005, the working group discussed a working paper prepared by the Chair in the form of a draft convention, based on the 1998 draft convention²², presented with alternative formulations on issues that were still disputed. In view of the progress made during the 3rd and 4th sessions of the working group, the UN Commission on Human Rights, in its Resolution 2005/27, requested the intersessional working group to meet once again at before the end of 2005 with a view to the completion of its work, and to report to the Commission at its 62nd session in the spring of 2006.

¹⁴ Cf. Annual reports of the WGEID, the most recent E/CN.4/2005/65 dated 23 December 2004.

¹⁵ E.g. resolution 2005/27, 2004/40, 2003/38, 2002/41, 2001/46, 1996/30.

¹⁶ The treaty-based body established in 1977 pursuant to Article 28 of the International Covenant on Civil and Political Rights with the task of monitoring the compliance of States parties with their obligations under the Covenant by examining State reports, inter-State communications and individual communications submitted in accordance with the first Optional Protocol to the Covenant.

¹⁷ General Comment 6/16 of 27 July 1982.

¹⁸ Cf. Nowak report (footnote 2 above), para. 19-25.

¹⁹ Name changed to « Subcommission on the Promotion and Protection of Human Rights » by ECOSOC decision 1999/256 of 27 July 1999.

²⁰ Le refus de l'oubli : la politique de disparition forcée, Colloque de Paris, janvier/février 1981.

²¹ E/CN.4/2004/59, presented to the Commission on Human Rights at its 60th session.

²² Para. 28 above.

30. Work on the draft "legally binding normative instrument for the protection of all persons from enforced disappearance", which began with the Joinet report in 1981, has thus reached a critical stage at which it would be most timely for the Council of Europe to provide its backing in order for such a text to be adopted in good time, and most importantly, with a satisfactory content.

b. Council of Europe

31. The European Convention on Human Rights (ECHR) has no provision dealing explicitly with protection against enforced disappearance, but relevant articles are interpreted in such a way as to encompass certain aspects, in particular Article 2 – Right to life; Article 3 – Prohibition of torture; Article 5 – Right to liberty and security; Article 6 para. 1 – Right to a fair trial; Article 13 – Right to an effective remedy.

32. The leading case of the European Court of Human Rights concerning enforced disappearances is that of Kurt against Turkey²³. The applicant's son disappeared after being taken into custody by Turkish forces in the Kurdish village of Agilli in November 2003. The Court found a violation of Article 5 in respect of the disappeared person, but did not find it necessary to decide on the alleged violation of Article 2. It further found the applicant (the disappeared person's mother) to be a victim of a violation of Article 3, and also saw in the lack of any meaningful investigation by the State a violation of Article 13.

33. In the case of Kaya against Turkey²⁴, the Court also found a violation of Article 2 ECHR (right to life) in the disappearance of a medical doctor, Dr Kaya, who was known to have treated PKK members and who had received death threats before his disappearance. Whilst there was insufficient evidence for a finding beyond reasonable doubt that State officials had killed Dr Kaya, the Court held that the Turkish authorities had failed to take reasonable measures available to them to prevent a real risk to the life of Dr Kaya.

34. In the case of Tas against Turkey²⁵, the Court found violations of Articles 2, 5 and 13 ECHR. Mr Tas, a PKK member, disappeared after he was shot in the knee and taken into custody by Turkish forces. The Court did not find the explanation of the Turkish authorities plausible that he had escaped from the security forces a few days later while assisting them in an operation in the mountains to find PKK shelters. The Court also found a violation of Article 3 ECHR (prohibition of torture) in respect of the suffering of Tas's father because of the investigation into his son's disappearance, which was "neither prompt, adequate or effective". But the Court also stated that the Kurt case did not establish any general principle that a family member of a disappeared person was thereby a victim of treatment contrary to Article 3 ECHR.

35. In the case of Cyprus against Turkey²⁶, one of the complaints of the Cypriot Government was that "about 1 491 Greek-Cypriots were still missing 20 years after the cessation of hostilities, these persons were last seen alive in Turkish custody and their fate has never been accounted for by the respondent State." The Court found that "there has been a continuing violation of Article 2 of the Convention on account of the failure of the authorities of the respondent State to conduct an effective investigation into the whereabouts and fate of Greek-Cypriot missing persons who disappeared in life-threatening circumstances." The Court also found a continuing violation of Article 5. With regard to the relatives, the Court found a violation of Article 3, considering that "the silence of the authorities of the respondent State in the face of the real concerns of the relatives attained a level of severity that could only be categorized as inhuman treatment".

36. In the cases of Shanagan against the United Kingdom²⁷ and Kelly and others against the United Kingdom²⁸ and McCann and Others v. the United Kingdom²⁹ the Court restated its case law on the States' obligation under Article 2 to protect the right to life, which also "requires by implication that there should be some sort of effective official investigation when individuals have been killed as a result of the use of force", in order to "ensure the effective implementation of the domestic laws which

²³ Judgment of 25 May 1998, application no 24276/94.

²⁴ Judgment of 28 March 2000, application no 22535/93.

²⁵ Judgment of 14 November 2000, application no 24396/94; similar findings were made in the case of Hamsa Cicek against Turkey, who submitted an application following the disappearance of two sons and a grandson after having been detained by Turkish soldiers (judgment of 27 February 2001, application no 25704/94), and in the case of Orhan against Turkey (judgment of 18 June 2002, application no 25656/94).

²⁶ Grand Chamber judgment of 10 May 2001, application no 25781/94.

²⁷ Judgment of 4 August 2001, application no 37715/97.

²⁸ Judgment of 4 May 2001, application no 30054/96.

²⁹ Judgment of 27 September 1995, case no 17/1994/464/545.

protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility." The Court held in *Kelly* that "the investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified [...] and to the identification and punishment of those responsible. [...] A requirement of promptness and reasonable expedition is implicit in this context. [...] For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. [...] In all cases, however, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests." In the three cases, the Court found violations of Article 2 because of severe shortcomings in the investigations. In the first case, Mr Shanagan, a Shinn Fein activist, was allegedly killed by loyalist paramilitaries with the active collusion of the police. In the second case, nine men were killed during a security force operation at Loughgall on 8 May 1987. The shortcomings of the investigations found by the Court in the first two cases include the lack of independence of the police officers investigating the incident from the security forces personnel alleged to have been implicated in collusion with the paramilitaries who carried out the shooting, and the fact that the inquests did not commence promptly and were not pursued with reasonable expedition. In the third case, which concerns a special operation by UK forces against suspected IRA terrorists in Gibraltar, a satisfactory public inquest into the killings took place³⁰.

37. The above principles on violation of Article 2 ECHR by insufficient investigation of killings were reaffirmed in the recent judgment on the cases of *Khashiev and Akayeva against Russia*³¹, in which the Court decided for the first time on applications resulting from alleged abuses of Russian security forces during the conflict in the Chechen Republic. The Court also applied its earlier case-law following which "[w]here the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in detention, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation"³².

38. In the case of *Ireland against the United Kingdom*³³, the Court found violations of Article 3 (prohibition of torture) with regard to certain practices in the struggle of British security forces against the IRA in the early 1970s, but considered that the application of the legislation providing for extrajudicial deprivation of liberty was covered by derogations under Article 15 in the presence of a public emergency threatening the life of the nation.

39. To sum up, the European Court of Human Rights has developed fairly strict standards as to what is required from States in order to protect the right to life under Article 2, also in terms of the duty to investigate deaths in custody, and in some cases also given close relatives of disappeared persons victim status on the basis of Article 3.

c. Inter-American Convention on Forced Disappearances of Persons of 1994

40. In 1987, the OAS General Assembly asked the Inter-American Commission on Human Rights to prepare a draft convention on enforced disappearances. In June 1994, the Assembly finally adopted the text, which entered into force on 28 March 1996 upon ratification by Argentina, Panama, Uruguay, Costa Rica, Paraguay, Venezuela, Bolivia and Guatemala.

41. The Convention is largely based on the 1992 UN Declaration³⁴. Key provisions include the States' obligation to enact the crime of forced disappearance in national criminal law and to establish jurisdiction over such cases when the crime was committed within its jurisdiction, when the victim is a national of that State, and "when the alleged criminal is within its territory and it does not proceed to extradite him", which can be interpreted as establishing universal jurisdiction among the parties to the Convention³⁵. The Convention also spells out specific state obligations to prevent enforced

³⁰ The Court therefore found no violation of Article 2 on the count of failure to investigate, but it did find such a violation in the circumstances in which the soldiers shot to kill suspected terrorists on the basis of an erroneous assessment of intelligence information.

³¹ Judgment of 24 February 2005, application nos 57942/00 and 57945/00.

³² The Court cites the following precedents: *Salman v. Turkey* [GC], no 21986/93, § 100, ECHR 2000-VII; *Çakıcı v. Turkey* [GC], no 23657/94, § 85, ECHR 1999-IV; *Ertak v. Turkey*, no 20764/92, § 32, ECHR 2000-V, and *Timurtaş v. Turkey*, no 23531/94, § 82, ECHR 2000-VI.

³³ Judgment of 13 December 1977.

³⁴ Cf. para. 23 above.

³⁵ Nowak report, para. 47.

disappearance, to investigate the crime, to trace disappeared persons and to bring perpetrators to justice. Article XIV of the Convention also foresees an urgent confidential tracing procedure similar to that developed by the WGEID. But this procedure has been widely criticised as being too weak, especially in comparison with the far reaching monitoring mechanisms, including urgent action procedures, that the original draft prepared by the Inter-American Commission on Human Rights had prepared³⁶.

d. At the national level

42. Few States have heeded the appeal of Article 4 of the 1992 UN Declaration on the Protection of all Persons from Enforced Disappearances³⁷ to make all acts of enforced disappearance criminal offences under domestic law with appropriate penalties which shall take into account their extreme seriousness. Whilst in most States, kidnappings or abductions are criminal offences, the specific features of such acts when committed or condoned by state actors are not taken into account.

43. The WGEID has adopted a General Comment on article 4 of the Declaration³⁸ defining the three cumulative minimum elements that should be contained in any definition of the crime of enforced disappearance in national law: (a) deprivation of liberty against the will of the person concerned; (b) involvement of governmental officials, at least indirectly by acquiescence, and (c) refusal to disclose the fate and whereabouts of the person concerned.

44. The implementing legislation in the States Parties of the Rome Statute of the International Criminal Court has given rise to a number of national criminal provisions also covering enforced disappearance³⁹. But their practical relevance is limited in line with the restrictive approach taken by the Rome Statute itself, which covers enforced disappearances only insofar as they are defined as "crimes against humanity", i.e. "committed as part of a widespread or systematic attack against any civilian population, with knowledge of the attack."

2. Lacunae in the existing rules and their consequences

a. Absence of a universally recognised definition of enforced disappearance

45. The description of the existing legal framework shows that a universally recognised definition of enforced disappearance is still lacking. The disputed issues include that of the responsibility for non-State actors, the requirement of a subjective element in the definition, and the concept of the right not to be subjected to enforced disappearance in terms of the specific human right(s) violated by such an act.

46. Experience shows that enforced disappearances are committed not only by government officials, but also by indirect state actors such as members of paramilitary groups, death squads, guerrilla movements fighting alongside, or against the Government, as well as by members of organised criminal gangs. As the concealment of all facts surrounding the crime is part of its definition, it is often impossible to know whether the perpetrators acted with or without the acquiescence of the State. In order to ensure full protection from enforced disappearance, a future binding instrument should therefore equally apply to State and organised non-State actors⁴⁰.

47. Some definitions, such as that in the ICC Statute, include a subjective element such as that the perpetrators must have "intended to remove the victims from the protection of the law for a prolonged period of time"⁴¹. This subjective element may be difficult to prove in practice, knowing that often many perpetrators are involved in the abduction and not every one of them knows in advance what the final fate of the victim shall be. Therefore, if criminal law is to be an effective deterrence, the definition of enforced disappearance in a future international instrument should do without such a subjective element.

48. Concerning the specific human rights violated by enforced disappearance, the case law of different human rights bodies is partly contradictory. Whilst the UN Human Rights Committee has taken the view that every prolonged incommunicado detention constitutes inhuman treatment, the

³⁶ Nowak report, para. 48, with further references.

³⁷ Resolution 47/133 of 18 December 1992, para. 23 above.

³⁸ WGEID report 1995 (E/CN.4/1996/38).

³⁹ E.g. article 7 (i) of the UK International Criminal Court Act 2001.

⁴⁰ See Nowak report, para. 73.

⁴¹ ICC Statute, Article 7.2 (l).

European Court of Human Rights and the Inter-American Court of Human Rights have found a violation of Article 3 ECHR only in cases where there was evidence of torture or ill-treatment. By contrast, the Human Rights Chamber for Bosnia and Herzegovina followed the UN Human Rights Committee by declaring every case of enforced disappearance a violation of Article 3 ECHR⁴². The approach followed by the European Court of Human Rights understands enforced disappearance only as an aggravated form of arbitrary detention, which does not reflect the extremely serious nature of this human rights violation⁴³. A future international instrument should therefore either establish a new, independent and non-derogable human right not to be subjected to enforced disappearance, or specify that every such act constitutes inhuman treatment in violation of Article 7 ICCPR and Article 3 ECHR.

b. Unclear legal status of family members

49. Another lacuna of the existing legal framework is the incomplete recognition of family members of the disappeared as victims, whose intense suffering we were confronted with during the hearing in Limassol. The case law of different human rights bodies is still not unanimous in recognising family members as victims of torture or inhuman or degrading treatment (Article 3 ECHR), or a violation of the right to respect for private and family life (Article 8 ECHR)⁴⁴.

50. The "right of families to know the fate of their relatives" is only recognised explicitly in Article 32 of Additional Protocol I to the Geneva Conventions, i.e. only in the context of an international armed conflict. As shown above⁴⁵, the case law of different human rights bodies, and in particular that of the European Court of Human Rights relating to Article 2 ECHR, places the Governments concerned under some obligation to provide the victims and their families with an effective remedy, including the duty to investigate, to bring the perpetrators to justice, to make all information and findings relating to the fate of the disappeared person available to the families, and to provide compensation to them. But the relevant case law is by no means unanimous⁴⁶.

51. A future binding instrument on enforced disappearances should therefore lay down and precisely define the legal consequences of the right of family members of disappeared persons to the truth, and to adequate compensation.

c. Lack of safeguards against impunity of perpetrators

52. Impunity of perpetrators of enforced disappearances increases the suffering of the victims' families, whilst successful prosecutions not only satisfy the victims' craving for justice, but more importantly still serve as a deterrent for would-be perpetrators.

d. Absence or lack of enforcement of appropriate national criminal provisions

53. The absence of appropriate provisions in many national criminal codes or their restrictive formulation⁴⁷ makes the prosecution of perpetrators of enforced disappearances very difficult in practice.

54. In addition, even the application of existing provisions is made very difficult by the climate of fear that is spread by enforced disappearances among friends and relatives of the victims. Experience shows that they are often so terrified as to refrain from using available remedies, due to severe pressure from the perpetrators or their colleagues to discourage them from lodging a complaint, threatening that the applicant or other relatives would suffer the same fate. Lawyers acting on behalf of the victims are also exposed to such pressures.

55. A future binding instrument on enforced disappearances should address these issues, by placing an obligation on states to enact relevant criminal legislation, and to take appropriate measures to protect those pressing charges against perpetrators from reprisals.

⁴² Nowak report, para. 75, with references to the case law.

⁴³ Cf. above, para. 34, European Court of Human Rights in Tas against Turkey.

⁴⁴ See para 34 above.

⁴⁵ Para. 32-41 above.

⁴⁶ Cf. Nowak report, para. 80

⁴⁷ See para. 42-44 above.

e. Absence of universal jurisdiction in cases of enforced disappearances

56. As the case of the political disappearances in Belarus⁴⁸ has shown, even known or highly suspect perpetrators cannot be prosecuted successfully as long as they are covered by their own Government. Universal jurisdiction of courts in countries with a functioning legal system would be an excellent remedy. But at present, this possibility is practically non-existent⁴⁹, as extraterritorial jurisdiction is subjected to restrictive conditions that exclude most cases of enforced disappearance - except where a victim is a national of the state wishing to take jurisdiction, or, in countries that have already enacted legislation implementing the Statute of the ICC, where enforced disappearance are committed as part of a widespread or systematic attack against a civilian population, thereby constituting a crime against humanity.

57. A new binding instrument should therefore provide for universal jurisdiction for all cases of enforced disappearances.

f. Other factors favouring impunity

58. Among other factors favouring impunity, and which should be addressed in a future international instrument, is the reliance on 'superior orders' invoked as defence, the existence of short statutory limitation periods, and of amnesty measures covering even such serious human rights violations as enforced disappearances. Finally, it is inappropriate that in some countries, military tribunals that may be biased in favour of members of the military faced with complaints from civilian victims and whose proceedings are often closed to public scrutiny are competent to hear cases against suspected perpetrators belonging to the security forces.

g. Unclear State obligations regarding prevention of enforced disappearance

59. Even in view of the case law deriving certain obligations from the right to life and to an effective remedy⁵⁰, the States' obligations regarding prevention of enforced disappearance are not sufficiently clear and universally recognised. This gap in the international legal framework must be closed by the future binding international instrument. Any form of incommunicado detention and any secret places of detention must be absolutely prohibited. States must be unequivocally obliged to ensure the proper investigation of any *prima facie* well-founded complaint of enforced disappearance. Procedures for the release of detainees must be such that they allow for reliable verification *ex post*, given that it is a regrettable practice for respondent States to deny responsibility of the disappearance of a person that was last seen in custody by claiming that the person had been released. Last but not least, prevention measures must include appropriate training measures for law-enforcement and prison staff.

D. The way forward: preventive action and fight against impunity

1. Necessary improvements in substance

60. The substance of the necessary improvements of the legal framework follows directly from the lacunae described above, which must be filled, including the clarifying of state obligations (definition of enforced disappearance encompassing all relevant cases, recognition of the rights of family members, including right to reparation, measures to fight impunity, preventive measures). Two issues that deserve special attention are the need for an international mechanism for rapid intervention, and the right to adequate compensation.

61. (i) As regards the need for a rapid intervention mechanism, experience has shown that the time factor is crucial. When perpetrators of enforced disappearances are faced with rapid reactions from the family, local community, or central authorities, sometimes prompted to intervene by international bodies, and ideally as long as the "chain of known custody" is not yet interrupted, lives can be saved. Some disappeared persons reappear after the perpetrators have realised, or have been made to understand that the price - in terms of risk of prosecution or loss of respectability - to be paid for definitely "disappearing" the victim is too high⁵¹. But the existing mechanisms are too weak, and in

⁴⁸ See para 17 above and PA Resolution 1371 (2004) and Recommendation 1657 (2004).

⁴⁹ With the possible exception of the states parties to the Inter-American Convention on the protection against forced disappearances, see above para. 40-41.

⁵⁰ See above para. 33.

⁵¹ An example is the case of Magomed Magomadov, a Chechen human rights lawyer, who "disappeared" in January 2005. Prompted by an "urgent action" by the International Helsinki Federation, the Assembly's

particular, too slow, in order to achieve success. A new international instrument on enforced disappearances should therefore foresee such a mechanism, perhaps along the lines of that foreseen in the first draft of the Inter-American Convention⁵².

62. (ii) The right to adequate compensation should include measures of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The concept of victim of an enforced disappearance must include the disappeared person as well as their relatives.

63. Restitution means first of all that the disappeared person, if still alive, must be released at once. If killed, restitution includes exhumation and identification and the restoration of the mortal remains to the family for a decent burial in accordance with their traditions. Survivors and relatives suffering from post-traumatic stress disorder must receive, as a matter of restitution, the necessary medical, psychological and social care and treatment paid for by the Government responsible.

64. Satisfaction starts with an apology by the authorities and the disclosure of all relevant facts at their disposal, obtained by the required investigation by all appropriate means, including criminal investigations against suspected perpetrators. The authorities must be placed under a clear obligation to bring the perpetrators to justice, meaning criminal justice and not merely disciplinary or administrative sanctions⁵³. Perpetrators of enforced disappearances should also not be allowed to benefit from amnesty measures.⁵⁴

65. Guarantees for non-repetition, in addition to holding perpetrators criminally responsible, includes the adoption of appropriate preventive measures.

66. Finally, pecuniary compensation should cover not only legal costs, but also realistically assessed compensation for material damage (including lost income, lost maintenance for dependents), and adequate compensation for the mental and physical suffering of both the disappeared person and his or her relatives. Whilst it is of course impossible to "compensate" the loss of a close relative with money, an appropriate award is also a measure of the seriousness of the violation. In this context, I wish to make the point that the amounts awarded in this respect by the European Court of Human Rights are far too low in my opinion. Sums only in the thousands of euros for the loss of children, husbands or fathers are in my view an insult to the victims and risk undermining the authority of the Court in the eyes of the perpetrators and the Governments responsible for such deeds.

2. Fora for action

a. United Nations: progress at the global level?

67. After more than four years, the "inter-sessional, open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance", with Bernard Kessedjian (France) as Chairperson-Rapporteur has reached a critical phase⁵⁵. It is generally expected that a draft convention will be finalised by the end of this year, for adoption by the UN Commission on Human Rights during its spring 2006 session.

68. I therefore propose that we now send a strong signal to Geneva encouraging the United Nations to come up with a good convention. In the draft resolution, I have presented the requirements that such a text should fulfil in order to be acceptable by Council of Europe standards.

69. If the UN Convention either fails to see the day in good time, or if its contents falls short of our expectations, we should come back to this topic and propose to the Committee of Ministers the adoption of a better text in the framework of the Council of Europe.

Committee on Legal Affairs and Human Rights, on proposal of the Sub-Committee on Human Rights, adopted a public statement demanding Mr Magomadov's immediate release. Mr Magomadov's lawyer subsequently obtained from the European Court of Human Rights a measure under Rule 39 asking the Russian authorities for Mr Magomadov's whereabouts, following which Mr Magomadov reappeared.

⁵² Cf. Nowak report, para. 48 with further references.

⁵³ This was spelt out most clearly by the UN Human Rights Committee in its decision on the case of *Bautista de Arellana against Colombia*, communication no. 563/1993 of 27 October 1995.

⁵⁴ See again the UN Human Rights Committee, which, in its decision on the case of *Hugo Rodriguez against Uruguay* (communication no. 322/188 of 19 July 1994) has held that amnesties for gross violations of human rights are incompatible with State obligations under the ICCPR.

⁵⁵ Cf. para. 29 above.

b. Council of Europe

70. The member countries of the Council of Europe should continue to act as 'driving forces' in the framework of the United Nations and contribute to overcoming the remaining obstacles in the path of the adoption of a legally binding instrument for the protection of all persons against enforced disappearances, applicable world-wide.

71. Once the UN instrument will be finalised, it will be possible to assess the need for a regional legal instrument against enforced disappearances for Europe, in the form of a Council of Europe Convention, similar to (but possibly more effective than) the Inter-American Convention.

72. In my view, the need for a European Convention on Enforced Disappearances depends primarily on the quality of the monitoring and rapid intervention mechanism that will be included in the UN instrument. The question is still open, in light of the alternative texts still under discussion in the UN working group, but as I see it at this stage, the Council of Europe may well be required to produce its own instrument in order to rid the continent once and for all from the terrible humanitarian scourge of enforced disappearance.

E. Conclusion

73. Starting from the realisation - confirmed by the hearing in Limassol in May - that enforced disappearance is a most serious human rights violation on par with torture and murder, which is still prevalent in Council of Europe member countries, I have briefly analysed the existing international legal framework dealing with this humanitarian scourge. I have looked at the case law of the various international human rights bodies, in particular that of the European Court of Human Rights, which has made an important contribution to the development of the legal rules in this field.

74. Having found that important lacunae remain nevertheless in the existing legal framework, I have listed a number of improvements that must urgently be made in order to achieve better protection, for all of us, against enforced disappearance. These include the general recognition of a clear and sufficiently wide definition of enforced disappearance, the establishment of an effective international monitoring mechanism, including a strong emergency procedure, the clarification of State obligations in the field of the prevention and repression of enforced disappearances, and last but not least the proper recognition of the rights of victims and their families, including rights to information, reparation and compensation.

75. Having looked in some detail at the ongoing efforts in the framework of the United Nations to produce a binding international instrument for the fight against enforced disappearances, I am proposing to the Assembly to follow a two-pronged approach:

(i) to adopt a list of substantive points that the Assembly finds essential in order to improve protection against enforced disappearance, and to invite the competent UN bodies as well as the Council of Europe member states represented in those bodies to take these points into account in the formulation of the future UN convention on enforced disappearances;

(ii) if the UN convention either fails to be adopted next year, or falls short of the requirements defined by the Assembly, to propose to the Committee of Ministers, in a new resolution to be prepared after the decision is taken at the United Nations, to elaborate a European instrument in the form of a Council of Europe Convention on enforced disappearances that would complement the gaps left by the UN instrument as required.

76. This is the purpose of the above draft resolution and recommendation, which reaffirm the importance of eradicating enforced disappearances and the need for an international legal instrument for this purpose, lay down a list of essential points that such an instrument should address, and invite the competent UN bodies and the member states of the Council of Europe to adopt such an instrument, respectively do their utmost to facilitate the adoption of such an instrument by next year, failing which the Assembly will come back to the matter and examine appropriate measures to be taken in the framework of the Council of Europe.

APPENDIX I

Doc. 10243
30 June 2004

Enforced disappearances

Motion for a resolution
presented by Mr Pourgourides and others

This motion has not been discussed in the Assembly and commits only the members who have signed it

The Assembly,

1. Deeply worried that enforced disappearances remain a continuing practice in many parts of the world;
2. Gravely concerning that only very few perpetrators are being brought to justice, and that the level of impunity for the crime of enforced disappearance remains very high;

Confirming that an enforced disappearance can be defined by the following constitutive elements: a deprivation of liberty in whatever form, 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;

Well aware that disappearances cause unbearable harm to the direct victims as well as to their friends and families, and in solidarity with the struggle for truth and justice of the families of disappeared persons;

3. Recognising that human dignity entails the right to know the truth about the fate of disappeared relatives;
4. Considering that specificity and particular seriousness of enforced disappearances and aware of the gaps and limitations in the existing protection of persons from the, in particular the absence of legally binding international normative instruments for the protection of all persons from enforced disappearances applying for European, Asian and African countries;
5. Convinced that international co-operation is essential if the atrocious practice of enforced disappearances is to be stopped;
6. Welcoming the humanitarian efforts made since 1980 by the Working Group on Enforced or Involuntary Disappearances of the United Nations Commission on Human Rights to discover the fate of reported disappeared;
7. Taking into account the example of standard setting in international law of the Inter-American Convention on Forced Disappearance of Persons of 1994, and the Draft International Convention on the Protection of All Persons from Forced Disappearance of 1998;
8. Welcoming the confirmation of the crime of enforced disappearance as a crime against humanity in the mandate of the International Criminal Court;
9. Referring to the provisions of the 1992 UN Declaration on the Protection of All Persons from Enforced Disappearances;

10. Recalling the commitment of the World Conference on Human Rights of 1993 to take effective legislative, administrative, judicial and other measures to prevent, terminate and punish acts of enforced disappearances;
11. Referring to its own Resolution 828 (1984) on enforced disappearances in general and to its recent Resolution 1371 (2004) on disappeared persons in Belarus;
12. Calling on all states to co-operate actively with the Working Group on Enforced and Involuntary Disappearances, answer its requests for information and allow it to make on-the-spot visits on request, and to provide it with the resources needed for its proper functioning:
 - a. to support the preparation and adopted by the United Nations of a Convention on the Protection of All Persons from Enforced Disappearances;
 - b. to adapt their legal system in order to incriminate the act of enforced disappearance as a crime *sui generis*.

*Signed*¹:

POURGOURIDES Christos, Cyprus, EPP/CD
BINDIG Rudolf, Germany, SOC
CILEVIČS Boriss, Latvia, SOC
DREYFUS-SCHMIDT Michel, France, SOC
FRUNDA György, Romania, EPP/CD
GROSS Andreas, Switzerland, SOC
JÄÄTTEENMÄKI Anneli, Finland, LDR
JURGENS Erik, Netherlands, SOC
LEUTHEUSSER-SCHNARRENBARGER Sabine, Germany, LDR
MAGNUSSON Göran, Sweden, SOC
McNAMARA Kevin, United Kingdom, SOC
NACHBAR Philippe, France, EPP/CD
ROTH Michael, Germany, SOC
SEVERIN Adrian, Romania, SOC
STEENBLOCK Rainer, Germany, SOC
TRITZ Marianne, Germany, SOC
VERMOT-MANGOLD Ruth-Gaby, Switzerland, SOC
ZAPFL-HELBLING Rosmarie, Switzerland, EPP/CD

¹ SOC: Socialist Group
EPP/CD: Group of the European People's Party
EDG: European Democratic Group
LDR : Liberal, Democratic and Reformers' Group
UEL: Group of the Unified European Left
NR: not registered in a group

APPENDIX II

**Programme of the Hearing
in Limassol (Cyprus) on Tuesday 24 May 2005**

- 9 h 00 Opening of the Hearing by Mr Serhiy Holovaty, Chairperson of the Committee on Legal Affairs and Human Rights
- 9 h 10 Introduction by the Rapporteur, Mr Christos Pourgourides
- 9 h 20 Theme I:
Enforced disappearances as serious human rights violations on par with torture and murder: the plight of victims and their families
- Testimony of relatives of a missing person from the Greek Cypriot Community
 Testimony of relatives of a missing person from the Turkish Cypriot Community
 Testimony of relatives of a missing person from the Chechen Republic
- 10 h 20 Theme II:
Possible responses: regional and world-wide approaches, or both?
- Lacunae in protection with respect to enforced disappearances: world-wide efforts to strengthen legal norms vis-à-vis perpetrators and cover-ups*
 and
 Fight against enforced disappearances in Latin America: an example for a regional approach
- [Exchange of views with] **Professor Manfred Nowak**, Vienna
 UN Special Rapporteur on Torture and UN Expert on Enforced Disappearances
- 10 h 55 Questions and discussion
- [11 h 15 *Break*]
- 11 h 35 *Enforced disappearances in the north Caucasus region – the fight against impunity*
- [Exchange of views with] **Mr Alexander Cherkassov**, Moscow
 Member of the NGO Human Rights Center "Memorial"
- 12 h 05 Questions and discussion
- 12 h 30 Closing of the hearing by the Rapporteur, Mr Christos Pourgourides

Reporting committee: Committee on Legal Affairs and Human Rights

Reference to committee: Doc 10243, Reference No 3010 of 8 October 2004

Draft resolution and recommendation adopted unanimously by the Committee on 16 September 2005

Members of the Committee : Mr Serhiy **Holovaty** (Chairperson), Mr Jerzy **Jaskiernia**, Mr Erik **Jurgens**, Mr Eduard Lintner (Vice-Chairpersons), Mrs Birgitta Almqvist, Mr Athanasios **Aletras**, Mr Gulamhuseyn Alibeyli, Mr Rafis **Aliti**, Mr Alexander **Arabadjiev**, Mr Miguel Arias, Mr José Luis Arnaut, Mr Giorgi Arveladzé, Mr Abdülkadir **Ateş**, Mrs Doris Barnett, Mr Jaume **Bartumeu Cassany**, Mrs Meritxell Batet, Mrs Soledad **Becerril**, Mrs Marie-Louise Bemelmans-Videc, Mr Sali Berisha, Mr Rudolf Bindig, Mr Erol Aslan **Cebeci**, Mrs Pia **Christmas-Møller**, Mr Boriss **Cilevičs**, Mr András Csáky, Mr Marcello Dell'Utri, Mr Martin Engeset, Mrs Lydie **Err**, Mr Jan **Ertsborn**, Mr Václav **Exner**, Mr Valeriy Fedorov, Mr György Frunda, Mr Jean-Charles **Gardetto**, Mr József Gedei, Mr Stef **Goris**, Mr Valery Grebennikov, Ms Gultakin Hajiyeva, Mrs Karin Hakl, Mr Nick Harvey, Mr Michel **Hunault**, Mr Sergei **Ivanov**, Mr Tomáš Jirsa, Mr Antti Kaikkonen, Mr Hans Kaufmann, Mr Nikolay Kovalev (alternate: Mr **Sharandin**), Mr Jean-Pierre Kucheida (alternate: Mr **Pozzo di Borgo**), Mrs Darja Lavtižar-Bebler, Mr Andrzej Lepper, Mrs Sabine Leutheusser-Schnarrenberger, Mr Tony **Lloyd**, Mr Humfrey Malins, Mr Andrea **Manzella**, Mr Dick Marty (alternate: Mr **Gross**), Mr Tito Masi, Lord McIntosh of Haringey, Mr Murat **Mercan**, Mr Philippe **Monfils**, Mr Philippe Nachbar, Mr Tomislav Nikolić (alternate: Mr **Jovašević**), Ms Ann Ormonde, Ms Agnieszka Pasternak, Mr Ivan Pavlov, Mr Piero Pellicini, Mrs Sólveig Pétursdóttir, Mr Rino Piscitello (alternate: Mr **Budin**), Mr Petro Poroshenko, Mrs Maria Postoico, Mr Christos **Pourgourides**, Mr Jeffrey Pullicino Orlando, Mr Martin Raguž, Mr François Rochebloine, Mr Armen Rustamyan, Mr Adrian Severin, Mr Michael Spindelegger, Mrs Rodica Mihaela **Stănoiu**, Mr Petro Symonenko, Mr Vojtech **Tkáč**, Mr Egidijus **Vareikis**, Mr Miltiadis Varvitsiotis, Mr José Vera Jardim, Mrs Renate **Wohlwend**, Mr Vladimir Zhirinovskiy (alternate: Mrs **Narochnitskaya**), Mr Zoran **Žižić**, Mr Miomir Žužul

N.B.: The names of the members who took part in the meeting are printed in **bold**

Secretariat of the Committee: Mr Drzemczewski, Mr Schirmer, Mrs Clamer, Mr Kotliar