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Enforced disappearances

Recommendation 1719 (2005)

Reply from the Committee of Ministers
adopted at the 969th meeting of the Ministers' Deputies (21 June 2006)

1. The Committee of Ministers welcomes Parliamentary Assembly Recommendation 1719 (2005) and Resolution 1463 (2005) on Enforced disappearances, which deal with a serious human rights violation that regrettably still occurs in Europe. The Committee has communicated these texts to the governments of member states and has requested and received opinions from the Steering Committee for Human Rights (CDDH) and the Steering Committee on Crime Problems (CDPC) (see Appendices 1 and 2).
2. The Committee of Ministers expresses its strong support for the adoption by the United Nations of a binding international instrument for the protection of all persons from enforced disappearance and welcomes the progress made by the United Nations towards the finalisation of a draft instrument, which will now be on the agenda of the new Human Rights Council.
3. As regards the content of such an instrument, the Committee of Ministers shares the view of the Assembly that it is essential for its effectiveness that it provides for (i) a clear definition of enforced disappearances, (ii) the recognition of close relatives as victims in their own right, (iii) effective measures against impunity, (iv) appropriate preventive measures, (v) a right to reparation, and (vi) a strong international monitoring mechanism. For these reasons, it is pleased to note that the draft convention largely fulfils these criteria. The Committee refers in this respect to the enclosed opinion of the CDDH (Appendix 1, paragraph 4). In this context, it also draws attention to the Recommendation Rec(2006)8 on assistance to crime victims according to which the families of disappeared persons will be recognised as "victims" and consequently benefit from the types of assistance, protection, information and access to justice as well as compensation to be provided for in that text.
4. The Committee of Ministers will follow closely the developments of the ongoing work within the United Nations on an international legally binding instrument on enforced disappearances and examine in due course any legal or policy instruments which the Council of Europe might pursue, including with regard to possible co-operation and synergies between the mechanism to be set up at the UN level and relevant Council of Europe mechanisms. In particular, it agrees with the CDDH that the monitoring mechanism of the Convention should be examined after its entry into force and in the light of experience of its application in order to assess whether there are gaps that should be filled at the European level. Meanwhile, the Committee of Ministers would like to highlight that existing human rights mechanisms of the Council of Europe, notably the European Court of Human Rights, already offer some protection in relation to enforced disappearances (see Appendix 1, paragraph 6).
5. The Committee of Ministers observes that according to Rule A1 of the Rules of Court, the Court is empowered to carry out of its own motion on-site investigations when examining applications lodged with it. Furthermore, Rule 39 allows the Court, at the request of a party or of any person concerned, or of its own

motion, to indicate any interim measures which it considers should be adopted in the interests of the parties. The Court may request information regarding the implementation of the interim measures it has indicated. Recourse to interim measures may thus prove useful in cases of enforced disappearances as it could enable the Court to request urgently information from the authorities of a state as to the whereabouts of a person who has allegedly disappeared in troubled circumstances and whose fate is unknown.

6. The Committee of Ministers recalls its Declaration on the protection of human rights during armed conflict, internal disturbances and tensions adopted on 21 January 2004 and as well as the CDDH's Final Activity Report on this matter, in which it was suggested that the Council of Europe Commissioner for Human Rights undertake fact-finding missions in such situations and formulate appropriate targeted recommendations. The Committee of Ministers also recognises the role the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) can play through its visits to places where persons are deprived of their liberty by public authorities. It recalls that State Parties to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment must provide the Committee with full information on all places where persons deprived of their liberty are held.¹ The Committee of Ministers also recalls the Secretary General's report under Article 52 of the European Convention on Human Rights of 28 February 2006 (SG/Inf(2006)5) and the report of the European Commission for Democracy through Law (Venice Commission) of 17 March 2006 on the international legal obligations of Council of Europe member states in respect of secret detention facilities and interstate transport of prisoners.

7. As part of the follow-up to the Action Plan adopted by the Heads of State and Government of the Council of Europe at the Third Summit of the Council of Europe (Warsaw, 16-17 May 2005), a colloquy will be organised in 2006 on the protection and promotion of the right of individuals to defend human rights. Besides human rights defenders, journalists are another category of individuals which are more likely to be the victims of enforced disappearances. The Committee of Ministers recalls the recent case of the Court, *Gongadze v. Ukraine*, as well as the Declaration on the protection of journalists in situations of conflict and tension, adopted by the Committee of Ministers on 3 May 1996, which condemns the growing number of killings and disappearances of journalists and foresees that, in urgent cases, the Secretary General "could take speedily all appropriate action".

8. Finally, the Committee of Ministers takes note of the Assembly's opinion that the situation in Belarus gives rise to serious concern and refers to its reply to Parliamentary Assembly Recommendations 1657 et 1658 (2004) on disappeared persons and on the persecution of the press in the Republic of Belarus, adopted on 30 September 2004.

Appendix 1 to the reply

Opinion of the Steering Committee for Human Rights (CDDH) on Parliamentary Assembly Recommendation 1719 (2005) on enforced disappearances

1. The Steering Committee for Human Rights (CDDH) agrees with the Parliamentary Assembly that the Committee of Ministers should express its support for the adoption by the United Nations of a binding international instrument for the protection of all persons from enforced disappearance. It stresses that enforced disappearances constitute a serious and flagrant human rights violation and that such violations still occur in Europe.

2. As regards the content of such an instrument, the CDDH shares the view of the Assembly that it is essential for its effectiveness that such an instrument provides for (i) a clear definition of enforced disappearances, (ii) the recognition of close relatives as victims in their own right, (iii) effective measures against impunity, (iv) appropriate preventive measures, (v) a right to reparation, and (vi) a strong international monitoring mechanism.

3. The CDDH welcomes the progress made by the United Nations Intersessional open-ended working group on the elaboration of a draft legally binding normative instrument for the protection of all persons from enforced disappearance.²

¹ Article 8(2) of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

² Completion on 23 September 2005 of a draft instrument at the 5th session of the UN intersessional open-ended working group.

4. The CDDH welcomes the current draft of the convention, which, in its opinion, provides for a clear and sufficiently wide definition of enforced disappearance. This definition provides that enforced disappearance can be committed by agents of the state or by persons acting with state authorisation, support or acquiescence, while a distinct provision requires States Parties to investigate acts committed by non-state actors without state authorisation, support or acquiescence, and to bring those responsible to justice. The CDDH also welcomes the inclusion in the definition of victims of any individual who has suffered harm as a direct result of an enforced disappearance, which could include close relatives, and that such victims have the right to know the truth, as well as a right to obtain reparation and compensation. This builds on the case law of the European Court of Human Rights ("the Court", see para. 6). Furthermore, it notes that the current draft instrument sufficiently clarifies state obligations in the field of prevention, investigation on, and repression of enforced disappearances, notably through the prescription of a comprehensive set of measures against impunity. Concerning the monitoring mechanism to be set up by the future instrument, the CDDH is of the opinion that this should be examined after entry into force of the Convention and in the light of experience of its application in order to assess whether there are gaps that should be filled at the European level.

5. The CDDH would also like to highlight that existing human rights mechanisms of the Council of Europe, notably the European Court of Human Rights, already offer some protection in relation to enforced disappearances.

6. In this respect, the CDDH recalls that the existing case law of the Court sets out a number of guarantees for both disappeared persons and their family, notably under Articles 2, 3 and 5 of the European Convention on Human Rights. The Court, for instance, has found a violation of Article 2 on the ground that the authorities had not taken reasonable measures to prevent the disappearance of a person who was at that time at particular risk of falling victim to an unlawful attack.³ It has considered there had been a violation of Articles 2 and 13 by reason of the failure of the authorities to carry out an effective investigation into the fate of persons who have disappeared in life-threatening circumstances.⁴ It has found relatives of a disappeared person to be the victims of a treatment contrary to Article 3 as a result of the silence of the authorities or the inadequate character of the investigations led by them into the disappearance of their relative.⁵ The Court has also held that Article 5 requires that authorities take effective measures to safeguard against a risk of disappearance and to conduct prompt and effective investigations into arguable claims that an individual has not been seen since being taken into custody.⁶

7. The CDDH also draws attention to the fact that, according to Rule A1 of the Rules of Court, the Court is empowered to carry out of its own motion on-site investigations when examining applications lodged with it. Furthermore, Rule 39 of the Rules of Court allows the Court, at the request of a party or of any person concerned, or of its own motion, to indicate any interim measures which it considers should be adopted in the interests of the parties. The Court may request information regarding the implementation of the interim measures it has indicated. The CDDH considers that recourse to interim measures may prove useful in cases of enforced disappearances as it could enable the Court to request urgently information from the authorities of a State as to the whereabouts of a person who has allegedly disappeared in troubled circumstances and whose fate is unknown.

8. The CDDH recalls the Declaration on the Protection of human rights during armed conflict, internal disturbances and tensions adopted on 21 January 2004 by the Committee of Ministers and its own Final Activity Report on this matter in which it is suggested that the Council of Europe Commissioner for Human Rights should undertake fact-finding missions in such situations and formulate appropriate targeted recommendations. Such a mechanism would be flexible, in view of the Commissioner's mandate, and would allow rapid reaction in cases of repeated enforced disappearances in a particular area. It could therefore prove well-suited for cases of enforced disappearances and could prove a useful complement to the Court's judicial action.

³ *Mahmut Kaya v. Turkey*, judgment of 28 March 2000; *Gongadze v. Ukraine*, judgment of 8 November 2005 (not yet final).

⁴ *Cyprus v. Turkey*, judgment of 10 May 2001; *Kurt v. Turkey*, judgment of 25 May 1998.

⁵ *Cyprus v. Turkey*, judgment of 10 May 2001; *Kurt v. Turkey*, judgment of 25 May 1998; *Taş v. Turkey*, judgment of 14 November 2000.

⁶ *Kurt v. Turkey*, judgment of 25 May 1998.

9. The CDDH underlines the relevance to the issue of enforced disappearances of the European Committee for the Prevention of Torture (CPT), which, through its on-site visits to all places where persons are deprived of their liberty by public authorities, can play a useful deterrent role in this context. It recalls that State Parties must provide the Committee with full information on all places where persons deprived of their liberty are held.⁷

10. The CDDH would like to draw attention to certain categories of individuals which are more likely to be the victims of enforced disappearances such as human rights defenders or journalists. With regard to the former, it indicates that a colloquy will be organised in 2006 on the protection and promotion of the right of individuals to defend human rights as part of the follow-up to the Action Plan adopted by the Heads of State and Government of the Council of Europe at the Third Summit (Warsaw, 16-17 May 2005). In respect of the latter, it recalls the recent case of the Court, *Gongadze v. Ukraine*,⁸ as well as the Declaration on the protection of journalists in situations of conflict and tension, adopted by the Committee of Ministers on 3 May 1996, which condemns the growing number of killings and disappearances of journalists and which foresees the intervention of the Secretary General in urgent cases.

11. The CDDH will follow closely the developments of the ongoing work on an international legally binding instrument on enforced disappearances which is taking place in the framework of the United Nations and examine in due course any further legal or policy instruments which the Council of Europe might pursue, including with regard to possible co-operation and synergies between the mechanism to be set up at the UN level and relevant Council of Europe mechanisms.

Appendix 2 to the reply

Opinion of the European Committee on Crime Problems (CDPC) on Parliamentary Assembly Recommendation 1719 (2005) on enforced disappearances

Further to written consultation of the CDPC delegations, the Bureau adopted the following reply at its meeting on 30 and 31 January 2006:

1. The European Committee for Crime Problems (CDPC) has taken note of Parliamentary Assembly Recommendation 1719 (2005) on enforced disappearances. The CDPC can only agree with the concerns expressed in that recommendation and on the need for a binding instrument for the protection of all persons from enforced disappearances which are a fundamental violation of basic human rights guarantees as set forth under the European Convention on Human Rights.

2. In the context of the work of the CDPC, attention may be drawn in particular to:

- the situation of the families of disappeared persons who should be recognised as "victims" and consequently benefit from the types of assistance, protection, information and access to justice as well as compensation which will be provided for in the Recommendation Rec(2006)8 on assistance to victims, drafted by the Group of Specialists on Assistance to Victims (PC-S-AV). This updated Recommendation Rec (87) 21 on assistance to crime victims and the prevention of repeat victimisation and was adopted by the Committee of Ministers on 14 June 2006;
- the situation of public prosecutors, in that the CDPC holds that member states should ensure that public prosecutors will be able to carry out their duties under the principles established in Recommendation Rec(2000)19 (the role of public prosecution in the criminal justice system) and in particular those laid down in paragraphs 4, 8, 16, 24, 33 as well as 34 (text appended).

Appendix

4. States should take effective measures to guarantee that public prosecutors are able to fulfil their professional duties and responsibilities under adequate legal and organisational conditions as well as adequate conditions as to the means, in particular budgetary means, at their disposal. Such conditions should be established in close co-operation with the representatives of public prosecutors.

⁷ Article 8(2) of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

⁸ *Gongadze v. Ukraine*, judgment of 8 November 2005 (not yet final).

8. In order to respond better to developing forms of criminality, in particular organised crime, specialisation should be seen as a priority, in terms of the organisation of public prosecutors, as well as in terms of training and in terms of careers. Recourse to teams of specialists, including multi-disciplinary teams, designed to assist public prosecutors in carrying out their functions should also be developed.

16. Public prosecutors should, in any case, be in a position to prosecute without obstruction public officials for offences committed by them, particularly corruption, unlawful use of power, grave violations of human rights and other crimes recognised by international law.

24. In the performance of their duties, public prosecutors should in particular:

- a. carry out their functions fairly, impartially and objectively;
- b. respect and seek to protect human rights, as laid down in the Convention for the Protection of Human Rights and Fundamental Freedoms;
- c. seek to ensure that the criminal justice system operates as expeditiously as possible.

33. Public prosecutors should take proper account of the views and concerns of victims when their personal interests are affected and take or promote actions to ensure that victims are informed of both their rights and developments in the procedure.

34. Interested parties of recognised or identifiable status, in particular victims, should be able to challenge decisions of public prosecutors not to prosecute; such a challenge may be made, where appropriate after an hierarchical review, either by way of judicial review, or by authorising parties to engage private prosecution.