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COMMISSION ON HUMAN RIGHTS

Sub-Commission on Prevention of Discrimination
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Agenda item 9 (a)

THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

QUESTION OF HUMAN RIGHTS OF PERSONS SUBJECTED TO
ANY FORM OF DETENTION OR IMPRISONMENT

Study on unacknowledged detention and its role in the
practice of enforced or involuntary disappearances

Summary (complete study available at FIDH)

Preparation of a first draft declaration against
unacknowledged detention of persons

Written communication submitted by the International Federation
of Human Rights, a non-governmental organization in consultative
status (category II)

The Secretary-General has received the following communication which is circulated in accordance with Economic and Social Council resolution 1296 (XLIV).

[14 August 1985]

Introduction

The request made by the Sub-Commission in resolution 1983/23 to its Working Group on Detention to prepare a first draft of a declaration against unacknowledged detention of persons was clearly motivated by the need to find an effective solution to the problem of enforced or involuntary disappearances by devising measures capable of putting an end to that practice. 1/

1/ See also General Assembly resolution 33/173.

By referring explicitly to the link between disappearances and administrative detention without charge or trial, in its resolution 1985/16, the Commission singles out these two practices and reiterates its priority concern regarding disappearances.

Nowhere in the draft declaration is mention made of "enforced or involuntary disappearances"; no reference is made to emphasize the relationship between unacknowledged detention and the phenomenon of disappearances.

The request made by the international community concerns measures to eliminate disappearances. This phenomenon which presents a comprehensive and unequivocal threat to human rights comprises a number of complex elements, one of which is unacknowledged detention. It is necessary to consider these elements in their entirety in order to respond effectively to that request.

I. Elements of enforced or involuntary disappearances

Violations of human rights committed by and in the practice of disappearances are made possible by a readiness on the part of the authorities and to disregard domestic law, in breach of international norms which, under a universally recognized régime of law, limit State sovereignty with regard to the human person.

A. Threefold government responsibility

1. Involvement in the act

(a) Direct involvement as a result of a wish on the part of the Government which involves the State apparatus willy-nilly in the organization and execution of that wish;

(b) Indirect involvement by the complicity of the Government and the forces of law and order in actions by groups of any kind or by their passive consent to such actions.

2. Denial of the act

The Government mendaciously denies allegations that it has knowledge of the fate of the missing persons.

The law-enforcement authorities refuse to acknowledge any arrest or detention.

The unacknowledged detention entails the suppression of the law:

(a) To the detriment of those directly or indirectly affected in that:

The missing person is deprived of the protection of the law; whether innocent or not under criminal law, he can be neither punished nor protected;

Applications made by the family or legal representative are either ignored or receive a negative answer;

The law-enforcement authorities make no attempt to trace the missing person;

(b) To the benefit of the instigators and perpetrators in that:

Like the victims, the criminals remain beyond the reach of the law;

Unacknowledged detention, as a means of suppressing domestic law, is the clandestine aspect of the practice of disappearances, since what it causes to disappear is not the person himself, but his legal personality, i.e. the link between rights and obligations which ensures the reality of his existence within society and of the acts relating to it.

3. Impunity regarding the act

Distortion of the law: by abolishing the relationship between rights and obligations, unacknowledged detention makes possible both the act and the impunity regarding the act which, although temporary, nevertheless has grave legal and political consequences for the Government responsible. By reverse manipulation, the law is then used in order to cancel the act and to secure permanent impunity (manipulation of civil laws governing absence and criminal laws of amnesty). 2/

B. Violation of international norms

1. Offences against the rights of the human person

(a) Violations committed during the act leading to the disappearance:

Unlawful arrest, unlawful deprivation of liberty, abduction and unlawful entry, involving violations of the rights to freedom, security and protection against arbitrary detention which are protected by the Universal Declaration of Human Rights (articles 3 and 9), the International Covenant on Civil and Political Rights (article 9, paragraphs 1-4) and the Code of Conduct for Law Enforcement Officials (articles 1, 2 and 3).

(b) Violations committed following a disappearance:

- (i) Violation of the right to recognition as a person. (Universal Declaration of Human Rights, article 6, International Covenant, article 16 (to which no exception is permitted));

Violation of the right to equality before the law, the protection of the law, the presumption of innocence, a fair trial and a public hearing and to proportionality of the penalty (Universal Declaration, articles 7, 10 and 11; International Covenant, articles 14, 15 and 26);

2/ See Louis Joinet, Colloque de Paris sur la disparition forcée de personnes in "Le refus de l'oubli" Berger-Levrault, and Study on amnesty laws ... E/CN.4/Sub.2/1984/15, pp. 9-16.

- (ii) Violation of the right of all detainees to be treated with humanity and with respect and to communicate with their families or legal representatives (International Covenant, articles 10 and 17; Standard Minimum Rules for the Treatment of Prisoners, as a whole; 3/);

Unlawful interference with privacy and family (Universal Declaration, article 16, paragraph 3; International Covenant, article 17);

- (iii) Murder, summary executions, torture; violation of the rights to life and to physical and moral integrity (Universal Declaration, articles 3 and 5; International Covenant, articles 6, 7 and 10, paragraph 1; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, articles 1-5 (a), articles 10-14 and article 16; 4/ Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Punishment, as a whole; 5/ Code of Conduct, articles 5, 6 and 8; Principles of Medical Ethics, as a whole 6/);
- (iv) Violations committed specifically against children (Universal Declaration, article 16, paragraph 3; International Covenant, article 23, paragraph 1, article 24, paragraphs 1 and 2; Declaration of the Rights of the Child, Principles 1, 6, 8, 9, paragraph 1, and 10 7/);

2. Offences under international law

- (a) Violation of provisions relating to the implementation of the International Bill of Human Rights (Universal Declaration, articles 2, 8, 28, 29 and 30; International Covenant, article 2, paragraphs 2 and 3, article 5, paragraph 1 and article 9, paragraph 5);
- (b) Violation of provisions relating to the obligation imposed on States by the Charter of the United Nations to promote universal respect for and observance of human rights and freedoms (Charter of the United Nations, Preamble, article 1, paragraph 3, Article 55, paragraph 3 and article 56; Universal Declaration, preamble, articles 1, 13, 19 and 20, paragraph 1, and article 21; International Covenant: preamble, article 1, paragraph 1, article 2, paragraph 1, and articles 3, 12, 18, 19, 21, 22 and 25).

3/ Adopted by the first United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva 1955; adopted by the Economic and Social Council in resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

4/ General Assembly resolution 39/46.

5/ General Assembly resolution 3452 (XXX).

6/ General Assembly resolution 37/194.

7/ General Assembly resolution 1386 (XIV).

II. Responses under international law

A. Draft declaration against unacknowledged detention 8/

1. Content

The provisions of the draft declaration are less forceful than those of the instruments concerning the protection of persons subjected to detention or imprisonment already drafted by the United Nations.

These instruments are:

Standard Minimum Rules for the Treatment of Prisoners. These Rules also protect persons imprisoned without charge;

Code of Conduct for Law Enforcement Officials;

Draft Body of principles for the protection of all persons under any form of detention or imprisonment.

The first draft of the declaration sets out a number of guidelines without dealing with the actual nature of unacknowledged detention. What does unacknowledged detention really mean? Not the violation of a right, but the violation of the law.

2. Scope

Like other sets of rules considered above, the provisions of the draft, in order to be applicable, assume that the detention is acknowledged. In other words, the draft assumes that domestic law is enforced in the very place where it has ceased to be enforced!

How can the elimination of a procedure which depends on the negation of the internal order be based on the strength of that same order?

Unacknowledged detention is an integral part of the system of disappearances. Neither can be eliminated by means based solely on the enforcement of domestic law, when it is precisely the suspension of that law with regard to the persons whom it is intended to protect that permits the perpetration of the violations which it is designed to prevent.

B. Status of the law

1. Condemnation as a crime against humanity

Two regional intergovernmental organizations have adopted resolutions condemning the practice of enforced or involuntary disappearances as a crime against humanity:

The Organization of American States 9/ and the Parliamentary Assembly of the Council of Europe. 10/ 11/

The constituent elements of the practice of enforced or involuntary disappearances correspond to the criteria for a crime against humanity derived from the principles of the Nürnberg and Tokyo proceedings and currently applied in international case-law and by the International Law Commission in its preparatory work on a draft code of offences against the peace and security of mankind. 12/ 13/ 14/

The various reports of the Commission on Human Rights' Working Group on Enforced or Involuntary Disappearances, the European Commission of Human Rights, the Inter-American Commission on Human Rights, the Argentine National Commission of Enquiry (CONABEP), and non-governmental organizations have established beyond all doubt that acts committed in the course of and as a result of the practice of disappearances qualify as serious acts systematically practised or condoned by government authorities who use State machinery to eliminate social, political or religious opposition groups by disorganizing all moral, physical or legal defences of such groups.

The violations committed in the course of and as a result of the practice of disappearances are serious offences under the Geneva Conventions and their additional protocols. All such grave offences are dealt with in the same way as war crimes under the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. 15/

It should be recalled that the International Court of Justice has clearly established that, under certain conditions, the deprivation of fundamental human rights constitutes a flagrant violation of the purposes and principles of the Charter of the United Nations. 16/

As an integral part of the system of enforced or involuntary disappearances, unacknowledged detention can be defined as an act whereby the authorities of a State or individuals acting at the instigation, or with the consent of such

9/ R 66 XIII-0/83.

10/ Resolution 828 (1984) concerning enforced disappearances.

11/ Some countries have already begun work on legislation condemning enforced or involuntary disappearances of persons as a crime against humanity (Argentina, Bolivia, Nicaragua); many non-governmental organizations have proclaimed the need for such condemnation.

12/ Report of the International Law Commission on the work of its thirty-sixth session, 7 May-27 July 1984, A/39/10, Chapter II.

13/ See E/CN.4/Sub.2/1983/SR.17, paragraphs 29-32.

14/ See E/CN.4/Sub.2/1984/15, paragraphs 54-59.

15/ General Assembly resolution 2391 (XXIII).

16/ Advisory opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, ICJ Reports, 1971.

authorities, suppress, in violation of international norms, the enforcement of domestic law, to the detriment of some sectors of the civilian population, with a view to committing crimes such as murder and persecution against such sectors.

Unacknowledged detention, which can be defined as conspiracy under article 2 (13) of the draft code of offences against the peace and security of mankind prepared by the International Law Commission, also meets the criteria of a crime against humanity.

The Preamble and Articles 1 and 55 c of the Charter of the United Nations, and the preamble and article 28 of the Universal Declaration of Human Rights, as reaffirmed by the Proclamation of Tehran, 17/ are clear in stating that the right to the rule of law is a reality of the values of modern civilization.

By undertaking to guarantee an "effective remedy" against any violation of one of the rights recognized in the Covenant, "notwithstanding that the violation has been committed by persons acting in an official capacity", under article 2, paragraph 3 of the International Covenant on Civil and Political Rights, States undertake to guarantee the machinery underlying the rule of law.

By attacking the rule of law, unacknowledged detention threatens all human rights. The problem presented by the practice of disappearances is the possibility of the breakdown of international human rights law through the efforts of Governments, who, acting from a position of exclusive power, use against the law an authority of which they have the safekeeping only by virtue of serving that law.

Proposals by the International Federation of Human Rights

The International Federation of Human Rights (FIDH) considers that, in its current form, as far as the substance and scope of its provisions are concerned, the revised draft declaration (E/CN.4/Sub.2/1985/WG.1/WP.1) serves no purpose. FIDH considers that existing United Nations instruments cover, and even go beyond, the scope of the project. It would be worth while drafting a declaration against enforced and involuntary disappearances, as requested by the international community, the measures provided for in which would be commensurate with the gravity of the offence, and the scope of which would include effective measures to condemn and prevent it and to protect the victim.

FIDH proposes, therefore, that the study of the current draft should be deferred and a new draft should be prepared for consideration next year. In the meantime, and in view of the urgency of the situation, it would be desirable for the Working Group to submit to the Sub-Commission a draft resolution proposing that the Commission should request the Economic and Social Council:

(1) To broaden the mandate of the Commission's Working Group on Enforced or Involuntary Disappearances, so that, like the Central Tracing Agency of ICRC, it would be competent to consider complaints submitted to it concerning allegations of disappearances and to assume the task of investigation where such complaints are substantiated;

17/ Adopted by the International Conference on Human Rights on 13 May 1968.

(2) To request the Secretary-General to transmit, as an exceptional measure, to the International Law Commission and the General Assembly the relevant documents and observations already made by members of the Sub-Commission indicating that the constituent elements of enforced or involuntary disappearances meet the criteria of a crime against humanity (see Sub-Commission resolution 1982/11);

(3) Either to appoint an expert of the Sub-Commission as Special Rapporteur on a draft declaration on enforced or involuntary disappearances of persons, or to establish an intersessional working group to prepare a comprehensive study on the question, with a view to informed consideration of it at the next session of the Sub-Commission.

This was the procedure adopted for the preparation of the draft body of principles for the protection of all persons under any form of detention or imprisonment.