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COMMISSION ON HUMAN RIGHTS

Sub-Commission on Prevention of  
Discrimination and Protection  
of Minorities  
Forty-second session  
Agenda item 10 (a)

THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

(A) QUESTION OF HUMAN RIGHTS OF PERSONS SUBJECTED TO  
ANY FORM OF DETENTION AND IMPRISONMENT

Written statement submitted by the American Association of Jurists  
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).

[22 May 1990]

1. I have the honour to transmit to you, for the Working Group on Detention subordinate to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, a number of comments on the draft Declaration on enforced or involuntary disappearance worked out at the meeting held on 21 March 1990.

2. In our view, this draft - and we understand that there is a consensus to that effect - should serve as the basic working document for discussion of the item at the next meeting of the Working Group on Detention. We have therefore formulated the following comments on the draft.

Comments on the latest version of the draft Declaration on enforced or involuntary disappearance prepared at the meeting in March 1990

3. Preamble: We propose that the second preambular paragraph should be deleted since it is a repetition, in reverse order, of the second part of the first preambular paragraph.

Third preambular paragraph: The separate citation of Article 55 of the Charter is not relevant, since the obligation of States under the Charter is established in Article 4 (1) of the Charter and the promotion of human rights in particular appears not only in Article 55, but also in Article 1 (3) and in the Preamble. We therefore propose that the reference to Article 55 should be deleted and that the paragraph should be consistent with the two Covenants on Human Rights.

4. We propose that the fourth paragraph, beginning "Deeply concerned ...", should be replaced by a paragraph reading: "Deeply concerned at reports from various parts of the world of numerous cases of enforced or involuntary disappearance;". We suggest that the description of the constituent elements of enforced disappearance should be deleted from this paragraph, leaving the definition of this offence to article 1 of the Declaration.

5. We propose that the reference, in the seventh paragraph, to the Geneva Conventions and the Additional Protocols should be deleted, since these instruments deal with a totally different question: disappearance as a result of armed conflict, and not disappearance as a deliberate practice, which is the theme of this Declaration (see Jan Egeland, Humanitarian Initiative against Political Disappearances, chap. II, para. 3, Institut Henri Dunant, Geneva).

6. We propose that in the penultimate preambular paragraph the words "other entities exercising effective power" should be replaced by "the organs and officials responsible for enforcing the law". We consider that confusion will arise from the phrase we propose to change, and in particular from the term "entities", which already appears in the English and Spanish texts of the 1975 Declaration on the Protection of All Persons from being Subjected to Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, but not in the French text, which uses the term "autorités".

7. Article 1, paragraph 1:

We propose that the text should be changed to the following:

"For the purposes of this Declaration, enforced or involuntary disappearance shall be defined as seizure of a person by means of official or unofficial detention, abduction or transfer from an official place of detention, carried out by agents of the State or private individuals with the connivance, support, acquiescence or toleration of the State or its agents, followed by failure to inform the relatives or representatives of the said person of his arrest or transfer, and/or concealment of his whereabouts, and/or a refusal to acknowledge his detention.

The connivance, support, acquiescence or toleration of the State or its agents shall be presumed to exist in the event of disappearance if the following circumstances, among others, exist:

(a) When the judicial, police, security or military authorities omit or refuse to carry out, or delay in carrying out, the measures required to prevent the disappearance or to establish the whereabouts of the disappeared person and to cause him to be brought without further formality before an independent and impartial magistrate so that the latter may take the appropriate decision according to the law;

(b) When an agent of the State of any rank places any impediment or obstacle in the way of requests for, or execution of, the measures referred to in (a), including searches or visual inspection, and/or when the representatives of the disappeared person are not permitted to exhaust all remedies in order to locate him;

(c) When the arrest of a person, presumably carried out by agents of the State, is not recorded at the police station having jurisdiction over the place where it occurred, together with the names of the persons who participated in the procedure and the authority which ordered it;

(d) When, in cases where such details are recorded, the detainee's representatives or relatives are not permitted to see the relevant record;

(e) When the transfer of an officially detained person from one place of detention to another is not fully justified in writing, with the date and time of the transfer and the names of the persons carrying it out, together with those of the persons receiving the detainee and the new place of detention, or when such information is withheld from the relatives or representatives of the detainee.

The concomitant existence of a systematized practice of enforced or involuntary disappearance and/or of clandestine or unofficial places of detention under the operational control of organizations, institutions or agents of the State constitutes a grave presumption of enforced or involuntary disappearance."

8. We regard it as essential that the Declaration should define enforced or involuntary disappearance, as is done for the subject of each Declaration in nearly all the Declarations adopted by the United Nations. We also consider

it necessary, as is almost unanimously held in penal doctrine and stated in penal legislation, for the definition of the offence to consist solely of the objective and subjective elements of the act, separately from its legal description. Lastly, we deemed it vital to include as a supplement to the definition legal presumptions of "the connivance, support, acquiescence or toleration of the State or its agents", thus making it possible to focus on State participation, either through action or omission, as a primary constituent element in the characterization of enforced or involuntary disappearance as an offence.

9. Article 1, paragraph 3:

We propose that the text should be amended to read: "The offence of enforced or involuntary disappearance, together with the systematized practice of enforced or involuntary disappearances, is a crime against humanity."

10. We believe it is not necessary that there should be a "systematized practice" of enforced disappearances for the characterization of "crime against humanity" to extend to it. An individual may effect a single enforced disappearance and this can be characterized as a crime against humanity if it forms part of a systematized practice of enforced disappearance (see debate on the definition of a crime against humanity in Yearbook of the International Law Commission, (A/CN.4/SER.A/1987/Add.1), 1987, Volume II, Part Two, paragraph 66 and the report of the International Law Commission on the work of its forty-first session, 2 May-21 July 1989, paragraphs 146-148 (Supplement No. 10, A/44/10)).

11. Article 4:

We propose the following wording: "Each State shall adopt the necessary measures to ensure that, under its criminal law, the enforced or involuntary disappearance of persons, whether perpetrated or attempted, as defined in article 1 paragraph 1, is regarded as a separate offence of the gravest kind, establishing severe penalties for its perpetrators, participants, instigators and accessories."

12. Article 5:

We propose the addition of "tolerated" before "or acquiesced".

13. Article 9, paragraph 1:

We propose that "and/or" should be substituted for "or" in the phrase "or identifying the authority ..."

14. Article 9, paragraph 2:

We propose that the first paragraph should read as follows: "In such proceedings, competent and independent national magistrates and investigating missions dispatched by the relevant United Nations bodies ...".

15. We believe it must be laid down that the national authorities responsible for the investigation are to be magistrates independent of the Administration, in other words, examining magistrates, prosecutors, etc., and not simply

"authorities". The Declaration cannot refer to competent international authorities since there are no international authorities having competence within the territory of a State.

16. Article 10, paragraph 2:

We propose that the end of the paragraph should be replaced by the phrase "any independent magistrate acting within his field of competence".

17. Article 13, paragraphs 1 and 2:

We propose that the word "authority" should be replaced by "magistrate".

18. Article 14:

We propose that the phrase "offence referred to in article 4" should be replaced by "offence defined in article 1, paragraph 1", and the term "competent authorities" by "competent and independent magistrates".

19. Article 16:

We propose that the following article should be inserted after article 16: "Mitigating or exculpatory circumstances may be established in national legislation for persons who, having taken part in enforced or involuntary disappearances, are instrumental in bringing the victims forward alive or voluntarily give information enabling cases of disappearance to be solved, unless they themselves have committed acts of torture or homicide" (see draft of Organization of American States, art. 13).

20. Article 17, paragraph 1:

We propose that the phrase "acts referred to in article 4" should be replaced by "acts described in article 1 paragraph 1". We further propose that a third paragraph should be added to article 17, reading as follows: "No privileges, special courts, or exclusive jurisdictions for the trial of the offence of enforced or involuntary disappearance shall be permitted. Such an offence shall not be considered as an offence committed in the course of military duties for the purpose of determining jurisdiction or the applicability of military penal legislation" (see draft of Organization of American States, art. 10).

21. Article 18:

We propose the addition of a second paragraph, reading as follows: "The offence of enforced or involuntary disappearance is a permanent offence, for the purposes of State responsibility and the criminal responsibility of the perpetrators. The offence ceases to exist only with the reappearance of the victim" (see report of the International Law Commission, Supplement No. 10 (A/44/10), already cited, para. 229, and the finding of the Inter-American Court in the Velázquez Rodríguez case, of 29 July 1988, paras. 181 and 184).

22. Article 21, paragraph 1: We propose that the phrase "deprivation of liberty" should be replaced by "enforced disappearance".