

**COMMENTS OF THE COMMITTEE OF LEGAL ADVISERS
ON PUBLIC INTERNATIONAL LAW (CAHDI)
ON RECOMMENDATION 1995 (2012) OF THE PARLIAMENTARY ASSEMBLY
“THE INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS
FROM ENFORCED DISAPPEARANCE”**

1. On 28 March 2012, the Ministers' Deputies communicated to the Steering Committee for Human Rights (CDDH) and the Committee of Legal Advisers on Public International Law (CAHDI), for information and possible comments, Recommendation 1995 (2012) of the Parliamentary Assembly on “*The International Convention for the Protection of All Persons from Enforced Disappearance*”.

2. Under the terms of this Recommendation, the Parliamentary Assembly:

- reiterated its support for the *International Convention for the Protection of All Persons from Enforced Disappearance*;
- nevertheless recalled that the United Nations Convention notably:
 - fails to fully include in the definition of enforced disappearances the responsibility of non-State actors;
 - remains silent on the need to establish a subjective element (intent) as part of the crime of enforced disappearance ;
 - refrains from placing limits on amnesties or jurisdictional and other immunities ;
 - severely limits the temporal jurisdiction of the Committee on Enforced Disappearances ;
- invited the Committee of Ministers to:
 - urge all the Council of Europe member States which have not yet done so to sign, ratify and implement this Convention;
 - consider launching the process of preparing the negotiation, in the framework of the Council of Europe, of a European Convention for the Protection of All Persons from Enforced Disappearance.

3. At its 44th meeting (Paris, 19-20 September 2012), the CAHDI examined the aforementioned recommendation and adopted the following comments.

4. From the outset, the CAHDI welcomes the entry into force of the *United Nations International Convention for the Protection of All Persons from Enforced Disappearance* as well as the setting up of its monitoring mechanism, and in particular the Committee on Enforced Disappearances.

5. Moreover, the CAHDI notes that at its 65th meeting, the CDDH adopted an “Opinion on Recommendation 1995 on the International Convention for the Protection of All Persons from Enforced Disappearance” (Appendix III to its report of 1 July 2012, document CDDH(2012)R75), stating that it “*does not recommend at this stage carrying out new normative work in this field*”. The CDDH considered that it was “*premature at this stage to assess the effectiveness of the United Nations Convention system*”. The CAHDI agrees with the CDDH on this point, considering that it is too early to judge the effectiveness of the United Nations Convention, which came into force on 23 December 2010.

6. The first three points listed in the recommendation are (1) extending the definition of the crime of enforced disappearance to acts committed by non-State actors – on this point, the CAHDI underlines that an Article 3 imposing obligations on States where acts of enforced disappearance are committed by non-State actors was added at the request of a number of States during the negotiations on the United Nations Convention, (2) including a subjective element (intent) in the definition, and (3) adding a provision to preclude amnesties and jurisdictional immunities. The CAHDI considers that it would be inappropriate to reopen the debate on these questions during any negotiations to be held in the framework of the Council of Europe. Indeed, the analysis of the *travaux préparatoires* of the United Nations Convention clearly demonstrates that these points have already been discussed in depth and the text of the United Nations Convention is the result of the consensus reached under these negotiations. It is not established that any new negotiations at the European level could produce any significant changes on these points.

7. In connection with the fourth point concerning the temporal jurisdiction of the Committee on Enforced Disappearances, this restriction would seem to have been prompted by the concern not to unduly burden the Committee right from the outset. The Committee can consequently only deal with cases of enforced disappearance emerging after the entry into force of the United Nations Convention, even where the causes of the disappearance have not yet been determined at the date of its entry into force. The CAHDI notes that this monitoring mechanism held its first session in November 2011. It has not yet examined any communications, but should receive, by the end of the year, the reports on implementation of the Convention by some twenty States having ratified it. It is therefore difficult for the moment to assess its functioning. Furthermore, the CAHDI stresses that the restriction on the temporal jurisdiction of the Committee on Enforced Disappearances is counterbalanced by the existence of mechanisms responsible for dealing with situations emerging before the entry into force of the United Nations Convention. These bodies operate both at the international level (in its reports, the Working Group on Enforced or Involuntary Disappearances, set up under Resolution 20 (XXXVI) of the Human Rights Commission of 18 December 1992, sets out observations on the individual communications submitted to it) and at the European level. In particular, the European Court of Human Rights has already ruled in cases of enforced disappearances, and declared itself competent *ratione temporis* to examine, under Article 2 in its procedural aspect, an allegation of enforced disappearance occurring prior to the entry into force of the ECHR in respect of the country in question (see *inter alia* the case of *Varnava et al. v. Turkey* [Grand Chamber], No. 16064/90, judgment of 18 September 2009).

8. The CAHDI notes that the United Nations Convention has only 34 States Parties to date, including only 11 Council of Europe member States. It is important to invite “*all the Council of Europe member States which have not yet done so to sign, ratify and implement this convention*”, as Recommendation 1995 (2012) of the Parliamentary Assembly suggests, and to invite them to consider recognising the competence of the Committee on Enforced Disappearances. It would therefore be useful to focus efforts primarily on the universalisation of the United Nations Convention.

9. At this stage, the CAHDI considers that it is too early to assess the effectiveness of the United Nations Convention and its monitoring mechanism. It will only become possible to conduct such an assessment in light of the manner in which the States Parties implement this Convention as well as the practice adopted by the Committee on Enforced Disappearances.