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FM USMISSION GENEVA

TO SECSTATE WASHDC PRIORITY 2149

INFO USMISSION USUN NEW YORK

UNCLAS GENEVA 002441

STATE FOR IO/SHA, DRL/MLA, L/HRR

E.O. 12958: N/A

TAGS: PHUM, UNHRC-1

SUBJECT: COMMUNICATION FROM THE WORKING GROUP ON ENFORCED
DISAPPEARANCES

1. Mission received the following letter dated August 25, 2004 from the Chairman of the Working Group on Enforced or Involuntary Disappearances, Stephen J. Toope, addressed to Ambassador Moley. The letter concerns reports the Working Group has received regarding alleged secret detention centers under United States' authority in various parts of the world and invites the USG to submit written information by October 15 and/or send a representative to appear in person at the next Working Group session November 8-15, 2004.

2. Text of letter and annex follows:

Begin text.

25 August 2004

Dear Mr. Ambassador,

I should like to communicate to you, on behalf of the Chairman of the Working Group on Enforced or Involuntary Disappearances, the following letter addressed to you:

"Dear Mr. Ambassador,

I have the honour to write to you on behalf of the Working Group on Enforced or Involuntary Disappearances, which held

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 18 JUN 2009 200706444

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its seventy-third session from 16 to 20 August 2004 at the United Nations Office in Geneva. UNCLASSIFIED

In the course of the session, the Working Group decided to inform your Government of reports it had received about developments in your country having an influence on the phenomenon of disappearances or the solution of the cases not yet clarified, and/or on the implementation of the Declaration on the Protection of All Persons from Enforced Disappearances. A summary is provided as an Annex to this letter.

I would like to take this opportunity to remind your Government that the Working Group will hold its seventy-fourth session from 8 to 15 November 2004, at the United Nations Office in Geneva. It would therefore be very much appreciated if any written information that your Government wishes to submit for the Working Group's consideration, could be received, if possible, by 15 October 2004.

In conformity with its usual practice, the Working Group is prepared to receive representatives of interested Governments during the first three days of its session. Should your Government wish to be represented at the forthcoming session, I would appreciate your contacting the Group's secretariat at the United Nations Office of the High Commissioner for Human Rights in Geneva (tel. 022-917-9176), in order to schedule an appointment with the Group.

I remain
Dear Mr. Ambassador,

Yours sincerely

Stephen J. Toope
Chairman
Working Group on Enforced or Involuntary Disappearances"

I remain,
Dear Mr. Ambassador,

Yours sincerely,
////////////////////
Tanya Smith
Secretary a.i.
Working Group on Enforced or Involuntary Disappearances

ANNEX
WORKING GROUP ON ENFORCED OR INVOLUNTARY DISAPPEARANCES

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General allegations

United States of America

The Working Group received information from non-governmental organizations concerning the reported non-compliance by the Government of the United States of America with provisions of the Declaration on the Protection of All persons from Enforced Disappearance.

Reports were received by the Working Group regarding secret detention centers under United States' authority in various parts of the world, in which an unknown number of persons are detained. Reports assert that there was inadequate provision of notice to families about the capture of detainees and

their conditions, legal status and rights. It is also reported that it is unclear in many circumstances which U.S. agency is ultimately responsible for the arrest or the conditions of confinement of the detainees in these facilities.

Reports further specify that the most sensitive and high-profile detainees are not being held in Guantanamo because it is believed that detainees there will eventually be monitored by the U.S. courts. It is stated that terrorism suspects are detained by the United States in "undisclosed locations," presumably outside the United States, with no access to the ICRC, no notification to families, no oversight of any sort of their treatment, and in most cases no acknowledgment that they are even being held. Information was provided on 13 specific alleged detainees, apprehended in places such as Pakistan, Indonesia, Thailand, Morocco, and the United Arab Emirates, who have reportedly disappeared in U.S. custody.

American authorities have also apparently refused to disclose the names of men secretly detained during the past few years within the United States. Families have not been informed on the arrested persons' locations. Reports state that some of these detainees have now been released or deported.

End text.

3. Mission transmitted a copy of the letter by fax to IO/SHA, Attention Director.
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 DRAFTED BY: IO/SHA:JRMALKIN -- 04/05/2001 202-647-2506
 APPROVED BY: IO/SHA:HPERLOW
 IO/SHA:BZWEIBEN
 DRL/MLA:LELBINGER
 L/HRR:ASURENA
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UNCLAS STATE 060693

E.O. 12958: N/A
 TAGS: PHUM, UNHRC-1, US
 SUBJECT: 57TH CHR: INITIAL GUIDANCE ON DRAFT RESOLUTION ON
 INVOLUNTARY DISAPPEARANCES

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PAGE 02 STATE 060693 060002Z
 REF: GENEVA FAX NO. 73 DATED 4/5/01

1. USDEL SHOULD OPPOSE EFFORTS IN OP11 AND OP12 TO CREATE AN AN INTERSESSIONAL WORKING GROUP AND APPOINT AN EXPERT TO CREATE A DRAFT INTERNATIONAL CONVENTION ON THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE BASED ON THE WORK OF THE SUB-COMMISSION ON THIS ISSUE. THIS INTERNATIONAL CONVENTION WOULD CLEARLY DUPLICATE WORK NOW BEING HANDLED BY A HOST OF INTERNATIONAL INSTRUMENTS, INCLUDING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, THE CONVENTION AGAINST TORTURE, THE DECLARATION OF THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCES (ADOPTED BY THE GENERAL ASSEMBLY IN 1992) AND THE INTER-AMERICAN CONVENTION

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ON DISAPPEARANCES. EXISTING TREATY BODIES INCLUDING THE HUMAN RIGHTS COMMITTEE AND THE COMMITTEE AGAINST TORTURE ARE ALREADY CHARGED WITH MONITORING STATE COMPLIANCE WITH RESPECT TO THE QUESTION OF INVOLUNTARY DISAPPEARANCES. THE CREATION OF YET ANOTHER TREATY BODY COULD VERY WELL CONFUSE THE LINES OF AUTHORITY TO THE DETRIMENT OF WORK CURRENTLY BEING PERFORMED IN THIS AREA.

2. THE ABOVE SHOULD NOT BE CONFUSED WITH THE WORKING GROUP ON ENFORCED AND INVOLUNTARY DISAPPEARANCES WHOSE BASIC MANDATE IS TO ASSIST THE RELATIVES OF DISAPPEARED PERSONS TO ASCERTAIN THE FATE AND WHEREABOUTS OF THEIR FAMILY MEMBERS. THE U.S. STRONGLY SUPPORTS THIS WORKING GROUP AND THE RENEWAL OF ITS MANDATE FOR AN ADDITIONAL THREE YEARS (OP9).
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 USMISSION USUN NEW YORK

UNCLAS GENEVA 000025

L/HRR, IO/SHA, DRL

E.O. 12958: N/A
 TAGS: UNHR, UNGA, PHUM
 SUBJECT: FORCED DISAPPEARANCES: THIRD FORMAL NEGOTIATING
 SESSION

1. (U) Summary. During the Third Formal Session of the Working Group to Elaborate a draft convention to punish and prohibit forced disappearances, held in Geneva from October 4-8, 2004, the Working Group, chaired by the French Permanent Representative, devoted the majority of the session to an initial and thorough discussion of the proposed treaty monitoring body, its structure and functions, found in Part II of the draft text. The final two days were devoted to a discussion of several articles in Part I that contain contentious issues, namely, the definition of enforced disappearance, criminalization as an autonomous offense, complicity, defense of superior orders, and jurisdiction, in particular "found in" quasi-universal jurisdiction. The Fourth formal session of the Working Group, scheduled to take place from January 31-February 11, 2005, will pick up with Article 11 (the extradite or prosecute provisions). Although the chair would like to conclude the negotiations during the fourth session and produce a final text for adoption by the CHR and by the UNGA in 2005, many delegations believe that the work remaining to be done will not accommodate such an ambitious schedule. End Summary.

2. (U) Treaty Monitoring Body. The first three days of the session were devoted to discussion of the proposed treaty monitoring body, its structure and mandate. The group considered whether the proposed instrument should be styled as an Optional Protocol to the International Covenant on

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Civil and Political Rights (ICCPR), ~~UNCLASSIFIED~~ ^{Using the Human Rights} Committee (or a subcommittee of that Committee) as the monitoring body. This optional approach appears to be supported by the vast majority of States in the room (including the United States). Alternatively, the group considered whether the proposed instrument should be an independent treaty that creates a new monitoring body, a position supported by a number of Latin states and all NGOs representing families of the disappeared. Both the longtime UN expert on involuntary disappearances Manfred Nowak and the current Chair of the Human Rights Committee, Mr. Abdelfattah Amor, who punctuated the week-long session with scholarly and thoughtful contributions, support an Optional Protocol using the existing Human Rights committee. The two experts underscored that the Human Rights Committee already has jurisdiction over disappearances, which are a violation of several of the rights granted under the ICCPR, and also jurisdiction over individual communications alleging disappearances with respect to States Parties to the First Optional Protocol to the ICCPR (to which the U.S. is not a party). Although the overwhelming majority of States support structuring this instrument as an Optional Protocol to ICCPR, the Chair seems reluctant to let go of his vision for a treaty and new monitoring body.

3. (U) Treaty Body Functions. The Working Group spent much time discussing the potential mandate of the monitoring body.

The chair's draft text envisions several monitoring body functions including:

- a. Examining initial State reports;
- b. An urgent action procedure that would also entail a possible site visit, if consented to by the State Party in question. However, this procedure (as currently worded) would also afford nearly unfettered discretion to the monitoring body in determining the modalities of the visit once consent is granted. The chair envisions this element of the mandate to be a core function for the monitoring body;
- c. An individual communication mechanism that, as currently drafted, is an awkward melding of the traditional treaty-based individual communications procedure and the CHR's 1503 procedure;
- d. A contemplated referral procedure to the Secretary General in cases where widespread or systematic enforced disappearance is practiced within or by a State, a function that would be unprecedented in a human rights treaty; and
- e. An annual report prepared by the monitoring body which could include a section that would "name and shame" States that are uncooperative with the treaty body.

4. (U) Discussion also focused on additional important

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issues; including:

- a. the proposal supported by some delegations to rework the individual communications procedure to render it consistent with current treaty body law and practice, including making it optional;
- b. the merits and demerits of confidentiality of complaints and of "naming and shaming";
- c. the desirability of providing for follow-up state reports at the request of the treaty body;
- d. the potential duplication between the proposed urgent action mechanisms of the treaty monitoring body and the existing CHR special procedure (i.e., the working group on involuntary disappearances, created in 1980);
- e. the absence of a state-to-state, or inter se, complaints

mechanism;

- f. the need to clarify the predicates for a monitoring body site visit;
- g. the need to make approved site visits subject to agreed modalities between the State and the treaty body;
and
- h. the reasons underlying the serious reservations of many States regarding referral to the Secretary General.

5. (U) Despite the chair's ambitious desire for a speedy adoption of this text, additional conceptual refinement and additional redrafting of Part II of the draft text remains to be done. Moreover, if this instrument is ultimately styled as an Optional Protocol to the ICCPR and thus entails use of the Human Rights Committee, Part II could be radically simplified along the lines of the procedural articles of the Second Optional Protocol to the ICCPR (articles 3-5), with the possible addition of an urgent action procedure and a site visit upon state consent. For this reason, several States urged that the working group decide the question of nature of the instrument before discussing the details of Part II. However, the Chair deferred decision-making on this issue, apparently in order to allow time for broader support to develop for adoption of a new, autonomous instrument.

6. (U) Substantive Articles (Article 1-11). During the last two days, the Working Group also discussed several (but not all) of the first eleven articles (on a somewhat hurried basis due to lack of time). Those provisions included:

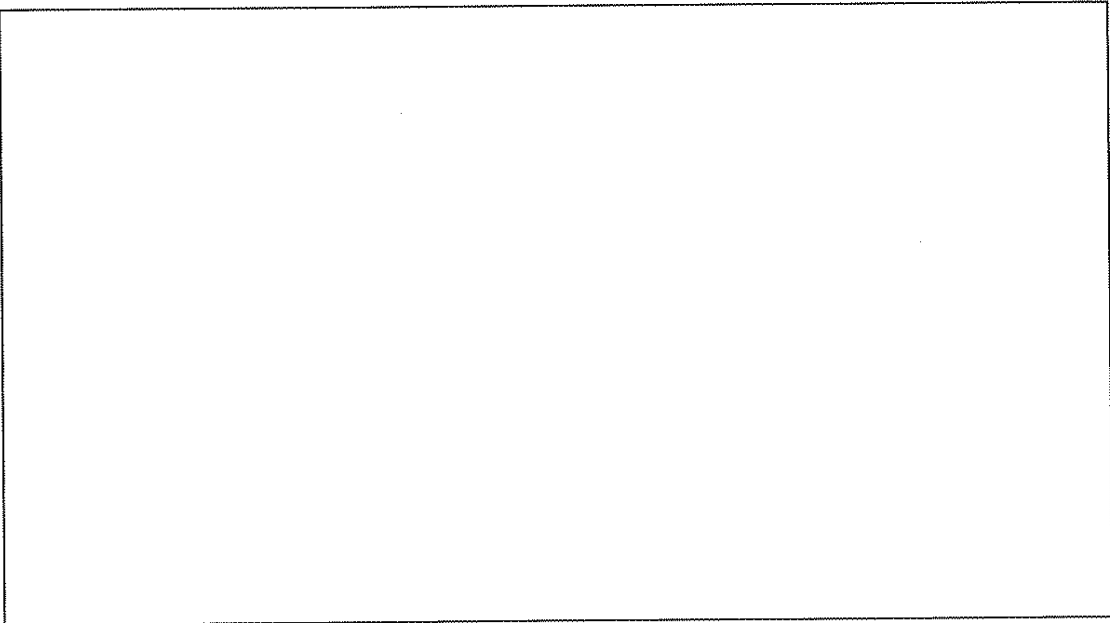
- a. PP2 and article 2bis on crimes against humanity;
- b. pp4 on the right to know;
- c. article 1 on the definition of a forced disappearance and on state action;
- d. article 2 on criminalization as an autonomous offense;

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- e. article 3 on complicity and on elimination of defense of superior orders;
- f. article 4 on mitigating circumstances;
- g. article 5 on statute of limitations;
- h. article 9 on jurisdiction; and
- i. article 11 on "found in" (quasi-universal) jurisdiction.

(Note: We continue to be seriously concerned that such a provision could expose U.S. officials to criminal prosecution for alleged involvement in military or law enforcement activities that arguably fall within the overbroad definition of enforced disappearances, should such officials travel to the territory of a State party. However, there is near-universal support for a quasi-universal jurisdiction provision).

7. (U) In execution of the written guidance for the delegation, which incorporated comments of several agencies including DOD/OSD, DOJ/OIA, DHS, and HHS/ACF, and which was cleared in full by NSC, DOD, and several offices within the State Department, the delegation made interventions that addressed the structure and authorities of the treaty monitoring body and each of the substantive issues noted in paragraphs 1-6 above. The U.S. delegation underscored that the overbroad and vague definition was not only flawed in and of itself but also that it rendered more problematic a number of other articles in the instrument, including elimination of a defense of superior orders and the jurisdictional provisions. The delegation also continued to object to provisions that would require or imply recognition of a right to know, eliminate a defense of superior orders, or require quasi-universal jurisdiction.



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SENSITIVE

FOR IO/SHA - TOM JOHNSON, L/HRR - ANDRE SURENA, L/HRR GILDA
 BRANCATO, L/LEI - DENISE MANNING, L/PM, DRL/MLA - CHRIS
 CAMPOUNOVO, DOJ/OIA - THOMAS BURROWS, DOD/GC - ELIANA
 DAVIDSON

E.O. 12958: N/A
 TAGS: PHUM, UNHRC, SOCI
 SUBJECT: FINAL REPORT ON UNHRC WG SESSION ON FORCED
 DISAPPEARANCES (JANUARY 6-17, 2003)

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 REF: GENEVA 00095

1. (SBU) SUMMARY. DURING THE SECOND AND FINAL WEEK OF THE
 WG SESSION ON A PROPOSED LEGALLY BINDING INSTRUMENT ON FORCED
 DISAPPEARANCES, DISCUSSION CONTINUED ON THE CORE SUBSTANTIVE
 ELEMENTS OF THE PROPOSED INSTRUMENT (E.G., DEFINITION OF
 "FORCED DISAPPEARANCE" AND ITS CRIMINALIZATION; PROTECTION
 AGAINST IMPUNITY; DOMESTIC PROSECUTION AND INTERNATIONAL
 COOPERATION; PREVENTION; VICTIMS; AND CHILDREN OF DISAPPEARED
 PERSONS). THROUGHOUT, THE DIALOGUE REMAINED ANALYTICAL,
 FOCUSED, APOLITICAL, AND HIGHLY CONSTRUCTIVE, INCLUDING
 CONTRIBUTIONS FROM THE NGOS. HOWEVER, IT IS CLEAR THAT WHEN
 A DRAFT WORKING TEXT IS PRESENTED AT THE NEXT TWO-WEEK
 SESSION, THERE WILL BE MAJOR DIVIDES BETWEEN ACTIVIST GRULAC

UNITED STATES DEPARTMENT OF STATE
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 DATE/CASE ID: 24 JUL 2009 200706444

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THAT IS PRECISE, EASILY TRANSPOSED INTO NATIONAL LAW, AND ACCEPTABLE TO A WIDE GROUP OF STATES. MODERATE STATES INCLUDE CANADA, JAPAN, SWITZERLAND, THE UK (AND POTENTIALLY THE US). A THIRD GROUP OF MORE OPENLY RELUCTANT STATES INCLUDES INDIA, SAUDI ARABIA, RUSSIA, AND PAKISTAN, SOME OF WHICH BELIEVE THERE IS NO CURRENT, DEMONSTRATED NEED FOR AN INSTRUMENT. WHETHER THIS THIRD GROUP WILL REMAIN RIGIDLY OPPOSED TO AN INSTRUMENT OR SOFTEN THEIR POSITION OVER TIME REMAINS TO BE SEEN.

2. (SBU) SUMMARY CONTINUED. ON THE FINAL DAY, JANUARY 17, THE WORKING GROUP REVIEWED AND APPROVED IN PRINCIPLE THE CHAIR'S (FRENCH PERMREP BERNARD KESSEDJIAN) DRAFT REPORT WHICH REFLECTED THE TWO WEEKS OF DELIBERATIONS. THE WG SESSION ENDED WITH A CHORUS OF PRAISE FOR THE CHAIR'S BALANCED AND SUBSTANTIVE CONDUCT OF THE PROCEEDINGS. THE

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CHAIR REITERATED HIS INTENTION TO SEEK A ONE-WEEK INFORMAL SESSION IN GENEVA IN SEPTEMBER 2003 BEFORE THE SECOND FORMAL SESSION IN JANUARY 2004. AT THE LATTER MEETING, A PROPOSED WORKING DOCUMENT IS EXPECTED TO BE PRESENTED AND DISCUSSED. WE PREDICT THAT, AT THAT TIME, DIVERGENCES IN THE VIEWS OF DELEGATIONS WILL BECOME MORE SHARPLY CLARIFIED AND DEBATED. END SUMMARY.

3. (SBU) FROM JANUARY 6-17, THE WG'S DELIBERATIONS WERE EXPLORATORY IN NATURE AND FOCUSED ON SEVERAL GROUPINGS OF ISSUES, SPECIFICALLY: DEFINITION/CRIMINALIZATION/JURISDICTION/PENALTIES, AND "PROTECTIONS AGAINST IMPUNITY," THAT IS, STATUTE OF LIMITATIONS, IMMUNITIES, MILITARY COURTS AND SPECIAL TRIBUNALS, A DEFENSE OF "SUPERIOR ORDERS," APPLICATIONS FOR ASYLUM, AMNESTY AND PARDON, OTHER CAUSES OF EXONERATION, ALLEVIATION OF CRIMINAL LIABILITY, AND MITIGATION. MAJOR SUBSIDIARY ISSUES RAISED INCLUDED (1) THE NEED FOR PRECISION IN THE DEFINITION; (2) WHETHER THE TREATY WILL REQUIRE STATES PARTIES TO ENACT A SPECIFIC, STAND-ALONE OFFENSE OF "FORCED DISAPPEARANCE" OR WHETHER IT WILL SIMPLY PROHIBIT "ACTS" OF FORCED DISAPPEARANCE (THE US DELEGATION SUPPORTED THE LATTER VIEW); (3) WHETHER A STATUTE OF LIMITATIONS FOR FORCED DISAPPEARANCES SHOULD BE THE LONGEST PERIOD ALLOWED UNDER DOMESTIC LAWS OR, AS PROPOSED BY THE US DELEGATION, A PERIOD OF TIME COMMENSURATE WITH THE GRAVITY OF THE OFFENSE; AND (4) PROHIBITION OF ALL SPECIAL TRIBUNALS AND MILITARY COURTS, WHICH WAS OPPOSED BY THE US DELEGATION. AMNESTIES, ASYLUM AND REFUGE, NON-REFOULEMENT, IMMUNITIES AND MITIGATION PROVOKED MUCH DISCUSSION BUT SURPRISINGLY LITTLE DISSENSION

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AT THIS MEETING. WE EXPECT IMMUNITY AND ASSISTANCE TO
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BECOME CONTROVERSIAL AT A FUTURE STAGE.

4. (SBU) THE NEXT TRANCHE OF TOPICS DISCUSSED WERE JURISDICTION, EXTRADITION, AND MUTUAL LEGAL ASSISTANCE. SEVERAL DELEGATIONS (INCLUDING THE FRENCH) SUPPORTED BROAD JURISDICTIONAL GROUNDS TO ENSURE CRIMINAL PROSECUTION OF ENFORCED DISAPPEARANCE OFFENDERS (E.G., "PRESENT IN" OR QUASI-UNIVERSAL CRIMINAL JURISDICTION), WHILE OTHERS PROPOSED A MORE CAUTIOUS APPROACH. THE US DELEGATION RECOMMENDED THAT THE OPTIONAL PROTOCOL ON CHILD SALE/PROSTITUTION SERVE AS A REFERENCE TEXT (IN ADDITION TO THE TEXTS ON THE TABLE, THAT IS THE 1992 DECLARATION ON FORCED DISAPPEARANCES, THE 1998 DRAFT CONVENTION ON FORCED DISAPPEARANCES ADOPTED BY THE SUB-COMMISSION ON THE PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, THE ICCPR, AND THE CONVENTION AGAINST TORTURE) FOR PROVISIONS RELATING TO JURISDICTION, EXTRADITION, AND MUTUAL LEGAL ASSISTANCE.

5. (SBU) THE GROUP ALSO DISCUSSED PREVENTION OF FORCED DISAPPEARANCES, INCLUDING MONITORING OF DETENTIONS, REGISTRATION OF DETAINEES, ACCESS TO INFORMATION, TRAINING OF LAW ENFORCEMENT PERSONNEL, AND JUDICIAL REMEDIES. NUMEROUS DELEGATIONS UNDERScoreD THE IMPORTANCE OF PROHIBITION OF SECRET PLACES OF DETENTION AND THE AVAILABILITY OF

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FOR IO/SHA - TOM JOHNSON, L/HRR - ANDRE SURENA, L/HRR GILDA BRANCATO, L/LEI - DENISE MANNING, L/PM, DRL/MLA - CHRIS CAMPOUNOVO, DOJ/OIA - THOMAS BURROWS, DOD/GC - ELIANA DAVIDSON

E.O. 12958: N/A

TAGS: PHUM, UNHRC, SOCI

SUBJECT: FINAL REPORT ON UNHRC WG SESSION ON FORCED DISAPPEARANCES (JANUARY 6-17, 2003)

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NON-DEROGABLE JUDICIAL REMEDIES, SUCH AS HABEAS CORPUS. DELEGATIONS ALSO HIGHLIGHTED THE IMPORTANCE OF EXPEDITED INVESTIGATIONS INTO DISAPPEARANCES. THE UNITED STATES DELEGATION SUGGESTED STRENGTHENING THE TRAINING PROVISION AND MODELING THE ARTICLES ON JUDICIAL REMEDIES UPON THE ICCPR (ARTICLES 2 AND 9).

6. (SBU) THE FINAL DAYS OF SUBSTANTIVE DELIBERATIONS FOCUSED ON THE DEFINITION AND RIGHTS OF VICTIMS, RIGHT TO REPARATION, AND THE CHILDREN OF DISAPPEARED PERSONS, WHO ARE TAKEN FROM THEIR PARENTS DURING THE ABDUCTION OR UPON BIRTH TO A DISAPPEARED MOTHER. THERE WAS AGREEMENT IN PRINCIPLE ON THE NEED FOR EFFECTIVE REMEDIES, BUT THE DEVIL WILL BE IN THE DETAILS, PARTICULARLY REGARDING THE BREADTH OF CIVIL REMEDIES AVAILABLE TO THE DISAPPEARED PERSON, FAMILY MEMBERS, AND POSSIBLY OTHERS DIRECTLY AFFECTED BY THE DISAPPEARANCE.

7. (SBU) THE SESSION CONCLUDED WITH REVIEW AND ENDORSEMENT IN PRINCIPLE OF A DRAFT REPORT PREPARED BY THE CHAIR AND THE SECRETARIAT WHICH SUMMARIZES THE TWO WEEKS OF DISCUSSION. IT IDENTIFIES THE SUBSTANTIVE ISSUES AND CONCEPTS THAT WERE DISCUSSED, AND PROVIDES "CHAIRMAN'S SUMMARIES" OF THE SALIENT CONCLUSIONS THAT APPEARED TO EMERGE FROM THE WORKING GROUP'S DISCUSSIONS OF THE CORE SUBSTANTIVE ISSUES NOTED ABOVE. DELEGATIONS MADE ORAL COMMENTS ON THE DRAFT REPORT, AND, IN RESPONSE TO THE CHAIR'S INVITATION FOR DELEGATIONS TO SUBMIT WRITTEN COMMENTS ON IT, THE U.S. DELEGATION HAS PREPARED WRITTEN PROPOSED EDITS IN AN EFFORT TO ENSURE GREATER ACCURACY AND BALANCE IN THE DESCRIPTION OF WHAT WAS DISCUSSED. THOSE COMMENTS WILL BE PRESENTED TO THE CHAIR DURING THE WEEK OF JANUARY 20. THE DRAFT REPORT RECOMMENDS

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THAT THE WORKING GROUP MEET FORMALLY BEFORE THE SESSION OF THE CHR (EARLY IN 2004) AND THAT AN INFORMAL PREPARATORY MEETING OF FIVE WORKING DAYS TAKE PLACE LATER THIS YEAR, PREFERABLY AT THE BEGINNING OF SEPTEMBER, TO LAY THE FOUNDATION FOR THE 2004 FORMAL SESSION. AT THAT SESSION, THE WG WILL PROBABLY ADDRESS OTHER ISSUES OF PARTICULAR IMPORTANCE TO THE U.S., SUCH AS THE NATURE OF THE INSTRUMENT (SEPARATE CONVENTION VICE OPTIONAL PROTOCOL), RELATIONSHIP WITH OTHER INSTRUMENTS (PARTICULARLY THE GENEVA CONVENTIONS OF 1949 AND ADDITIONAL PROTOCOLS), THE QUESTION OF A SUPERVISORY MECHANISM (EXISTING OR NEW TREATY BODY, AND ITS COMPETENCE), AND FINAL CLAUSES OF THE INSTRUMENT, NOTABLY WHETHER RESERVATIONS WILL BE PERMITTED.

8. (SBU) IN SEVERAL PRIVATE ASIDES, THE CHAIR REPEATEDLY THANKED THE UNITED STATES DELEGATION FOR ITS ACTIVE ENGAGEMENT, WHILE ACKNOWLEDGING THAT THE U.S. GOVERNMENT RESERVES ITS POSITION ON THE OUTCOME OF THIS PROCESS.

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RATHER THAN REQUIRE ADOPTION OF A SEPARATE, STAND-ALONE FORCED DISAPPEARANCE OFFENSE, THE CHAIR SUGGESTED THAT, PRIOR TO THE NEXT WG MEETING, FRANCE WOULD BE PREPARED TO HOST AN INFORMAL MEETING OF CRIMINAL LAW EXPERTS FROM THE US DEPARTMENT OF JUSTICE AND THEIR FRENCH COUNTERPARTS. THE MEETING COULD BE IN PARIS OR GENEVA AND THE PURPOSE WOULD BE TO EXCHANGE VIEWS ON PERTINENT LAW ENFORCEMENT ISSUES AND CONCERNS THAT WOULD BE RAISED BY A NEW INSTRUMENT ON FORCED DISAPPEARANCES. HE INTIMATED THAT HIS OWN JUSTICE MINISTRY LAWYERS HAVE CONCERNS THAT WOULD NEED TO BE ADDRESSED IN SUCH AN INSTRUMENT AND SUGGESTED THAT PERHAPS

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THE U.S. AND FRENCH EXPERTS COULD FIND SOME COMMON GROUND IN RESOLVING SOME OF THEIR RESPECTIVE CONCERNS. THOSE DISCUSSIONS MIGHT INCLUDE, HE SUGGESTED, SUCH ISSUES AS PENALIZATION, SANCTIONS, IMMUNITIES, JURISDICTION, EXTRADITION, AND MUTUAL LEGAL ASSISTANCE. MISSION GENEVA CONSIDERS THAT THIS SINCERELY TENDERED OFFER SHOULD BE GIVEN SERIOUS CONSIDERATION IN WASHINGTON. SUCH A FOCUSED EXCHANGE OF VIEWS AMONG SUCH CRIMINAL LAW EXPERTS COULD HELP SHAPE MORE CONSTRUCTIVELY THE FOLLOW-ON NEGOTIATIONS IN GENEVA, WITHOUT PREJUDICE TO THE USG'S CONTINUED RESERVATION OF ITS POSITION REGARDING ANY INSTRUMENT THAT FINALLY EMERGES FROM THE WG PROCESS.

9. (SBU) COMMENT: THE WG'S TWO WEEKS OF DELIBERATIONS WITNESSED A REMARKABLE CONVERGENCE OF SUBSTANTIVE, NON-POLEMICAL LEGAL DISCUSSION COUPLED WITH A SPIRIT OF

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THEY WOULD ONLY COMPLICATE THE EFFORTS TO REACH AN AGREEMENT ON A FORCED DISAPPEARANCES INSTRUMENT. IN VIEW OF THIS HELPFUL ATTITUDE, AND THE CHAIR'S STRONG DESIRE TO KEEP THE U.S. IN THE GAME, WE SHOULD REMAIN ACTIVELY ENGAGED IN THE PROCESS AND SEE IF A FINAL TEXT IS PRODUCED THAT MERITS SERIOUS U.S. CONSIDERATION. US PARTICIPATION IN ALL ASPECTS OF THE DISCUSSIONS WILL HELP TO ENSURE THAT THE WG, AND HOPEFULLY THE FINAL TEXT, REMAINS FOCUSED.

10. (SBU) COMMENT CONTINUED. THAT SAID, THE NEGOTIATIONS PROCESS WILL TAKE SOME TIME, POSSIBLY ANOTHER TWO YEARS, TO CONCLUDE. A SECOND FORMAL TWO-WEEK SESSION WILL REQUIRE AUTHORIZATION BY THE 59TH SESSION OF THE COMMISSION ON HUMAN RIGHTS (17 MARCH-25 APRIL, 2003) PURSUANT TO A NEW RESOLUTION ON ENFORCED DISAPPEARANCES (ANNUALLY PROPOSED BY THE FRENCH GOVERNMENT). WE EXPECT A RESOLUTION CONTAINING SUCH AUTHORIZATION TO BE ADOPTED. THE JUST-CONCLUDED INTER-SESSIONAL DELIBERATIONS REPRESENT AN INITIAL STAGE IN WHICH ALL INTERVENTIONS WERE PRELIMINARY IN NATURE. MANY STATES WERE SPEAKING WITHOUT FORMAL INSTRUCTIONS, AND NO FORMAL WORKING TEXT HAS YET BEEN PRESENTED. AS NEGOTIATIONS PROCEED AND BEGIN TO FOCUS ON A DRAFT TEXT, NEGOTIATORS FROM STATES' FOREIGN AFFAIRS AND JUSTICE DEPARTMENTS WILL INCREASINGLY BE CALLED UPON TO PROVIDE THEIR CONSIDERED VIEWS. THAT NEXT STAGE COULD BEGIN LATER THIS YEAR. END COMMENT.

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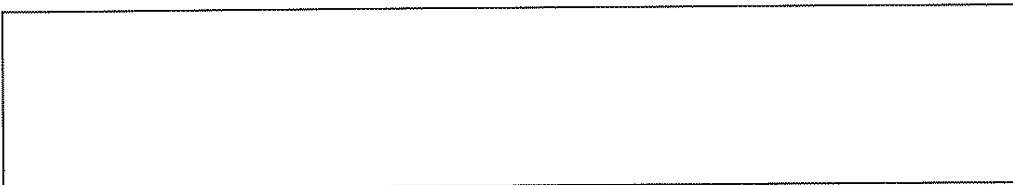
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E.O. 12958: N/A
 TAGS: UNGA, UNHR, PHUM, SOCI
 SUBJECT: REPORTING CABLE ON FORCED DISAPPEARANCES TREATY
 NEGOTIATIONS

REF: 03 GENEVA 3431

1. (SBU) SUMMARY: In two weeks of intense negotiations, the French Chair led the inter-sessional Working Group mandated to prepare a binding normative instrument on forced disappearances through a first, and somewhat hurried, reading of the Chair,s draft instrument, followed by a slightly more in-depth review of selected articles that presented particular difficulty or sensitivity.

The Chair made clear his ambitious intent to complete the negotiations process in time for adoption of a draft instrument at the 2005 session of the Commission on Human Rights (CHR) and subsequently by the UNGA. A few delegations (notably U.S., Canada, and China) have attempted to slow down the pace, underscoring that treaty negotiations require full review and discussion and that the entire draft text remains open and bracketed. For the time being, the Chair shows no sign of relenting from his pace, while relying upon a rough consensus on less controversial provisions as evidence of a coalescing instrument that requires only further review of the most controversial issues.



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UNITED STATES DEPARTMENT OF STATE
 REVIEW AUTHORITY: ARCHIE M BOLSTER
 DATE/CASE ID: 24 JUL 2009 200706444

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3. (SBU) The two-week session concluded with a hurried review and ad referendum adoption of the Chair,s draft report. The Chair confirmed his plan to produce a revised Chair,s text by June to serve as the basis for a two-week formal negotiating session in September, followed by another formal two-week session in January 2005, which he termed &the concluding negotiating session.8 He will seek to further lock in his proposed timetable in the coming weeks through adoption of a draft resolution on enforced disappearances that will be sponsored by the French delegation at the CHR session that begins mid-March. END SUMMARY.

4. (SBU)

UN independent expert on forced disappearances, Manfred Nowak, addressed the working group. His only constructive contribution was the suggestion that it probably made more sense to adopt the new instrument as an optional protocol to the International Covenant on Civil and Political Rights (ICCPR). Two current members of the UN expert Working Group on forced disappearances reminded negotiators to bear in mind the &woeful8 lack of Secretariat resources and

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support for existing human rights mechanisms and identified areas of potential overlap between their work and a proposed new treaty monitoring body on forced disappearances. UN expert Louis Joinet, and occasionally representatives from NGOs, punctuated the discussion with helpful legal analysis. Families of the disappeared from Latin America and Asia, some still searching for loved ones after twenty-six years, bore witness to the horror of that crime and the reign of terror that it spawned.

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6. (SBU) Chapter One. (Definition). The Chair appears ready to adopt the proposal made by the US and UK that the definition of &enforced disappearance8 should contain a state action requirement and that disappearances committed by private parties should be addressed in a separate criminalization provision. It remains to be seen, however, whether this bifurcated approach will prevail over continuing counter pressures.

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of a requirement to prove specific intent to remove the disappeared person from the protection of the law. The UK and Japan have proposed compromise definitions that would refer to arrest, abduction, detention, or other deprivation of liberty or, alternatively, to arrest, abduction, detention, confinement or similar deprivation of liberty. Mens rea as a key element of the crime remains a subject of live controversy. The US delegation underscored that a carefully framed definition is a critical fulcrum on which the acceptability of many other provisions -- such as quasi-universal jurisdiction, command responsibility, and elimination of the defense of superior orders -- depends.

8. (SBU) Chapter Two and Three. (Offenses and Penalties, Protection Against Impunity). A critical issue is whether the instrument will require criminalization of acts of forced disappearance (a formula used in Article 4 of the Torture Convention) or other language to this effect. Such wording would allow a number of States (like the U.S.) sufficient discretion within their existing national law to penalize the offense(s) within the spirit of the instrument. The French and Latin countries continue to strongly resist an acts approach and insist upon a requirement that States Parties enact a new, separate or autonomous crime of enforced disappearance as defined in the instrument. They argue that the punishment, jurisdiction, extradition, legal assistance, statute of limitations, and other provisions of the instrument would be more workable and uniform among States Parties if they all enact a new criminal offense denominated enforced disappearance. The U.S. was among the most forcefully outspoken Federal States in supporting an acts approach; India and Norway also made strong interventions to this effect. In this regard, the Chair formally invited India and Norway to provide papers that would explain and demonstrate how, under their existing legal system, they could punish crimes of enforced disappearance using an acts-based approach. The Chair, in a private aside, intimated that a similar paper from the U.S. would also be welcome.

9. (SBU) Other issues addressed within this chapter are: aggravating and mitigating circumstances; statutes of limitations; command responsibility; prohibition of the defense of superior orders; and amnesties and pardons. Advances were made in clarifying the scope of the first three of these subjects. Aggravating and mitigating circumstances listed in the treaty will not be considered exhaustive. The statute of limitations standard that seems to be gaining increasing favor is the requirement that it be commensurate with the gravity of the offense rather than the longest

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period prescribed under local law⁸ (as ~~in the original~~ UNCLASSIFIED Chair,s text). And the standard for command responsibility will track that contained in the ICC statute for non-military

superiors, which contains a higher mens rea requirement than for military superiors (see Rome Statute article 28).

10. (SBU) The United States was isolated in urging retention of the good soldier defense to ensure fairness and due process for the accused. We noted our objection for the record, underscoring that the eventual acceptability of this article may be linked to the specificity and mens rea components of the definition of the crime. Our point was that innocent actors following lawful, or ostensibly lawful, orders should not be prosecuted as accomplices to a crime.

11. (SBU) The issue of amnesties is among the most sharply contested in the evolving instrument. Some delegations, families of the disappeared, and NGOs believe that this instrument should in no way absolve enforced disappearances by means of amnesty provisions, fearing this would foster impunity and negate the value of the instrument. Other delegations emphasized the constitutional prerogatives of executives and legislatures in granting pardons and condoning amnesties. The Chair, however, appears to be leaning toward deleting any reference to amnesties from the instrument. He noted that international law and practice on amnesties is still evolving and that each State should be allowed to reach its sovereign decision on this sensitive subject. The Chair also deleted a proposed article in the instrument on asylum.

12. (SBU) Chapters Four and Five. (Domestic Prosecution and International Cooperation). There is strong support to include a requirement that States Parties exercise quasi-universal (&present in8) jurisdiction, so that any fugitive who is accused of enforced disappearance and is found within their territory will be subject to either prosecution or extradition. The US delegation submitted a proposal urging that this basis of jurisdiction (as well as passive personality) be made optional at the discretion of the State Party, but this approach currently seems unlikely to prevail. Delegations remain divided over whether a reservation with respect to such jurisdiction would be incompatible with the object and purpose of the instrument.

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13. (SBU) Importantly, what began as an express prohibition of military tribunals is now evolving towards a requirement to prosecute enforced disappearance crimes before independent and impartial tribunals with due process guarantees.⁸ Although the investigation, extradition, and legal assistance formulations within the proposed instrument were tightened during this round of negotiations, they still need further improvement. We will continue to oppose other problematic provisions within this chapter, such as one requiring immediate⁸ consular notification regarding someone accused of enforced disappearance. That standard could conflict with a matrix of existing multilateral and bilateral consular notification provisions.

14. (SBU) Chapters Six and Seven. (Measures of Prevention and Rights of Victims). These two chapters remain among the most difficult in the draft instrument. They seek to establish an unqualified right of families and others with a legitimate interest to know⁸ the whereabouts and other circumstances of a disappeared person. They attempt to regulate and specify the type of information to be provided. They seek to penalize the provision of misinformation and require training of official and medical personnel. They also contain broad provisions on civil remedies, requiring compensation, rehabilitation, and other forms of reparation. There was little consensus on these articles, and substantial further discussion is required.

15. (SBU) The US delegation, standing virtually alone on this issue, made a valiant effort to avoid recognition of an unqualified and enforceable right to know⁸ as an established concept in human rights law, while strongly recognizing, on compassionate grounds, the fundamental need of families to seek the truth and receive information. Toward this end, and with timely and critical support from the Department, the US delegation offered an alternate text that tracks language in the ICCPR (Article 19(2)) on the freedom to seek and receive information.⁸ Many delegations seek to have this right⁸ framed as both unqualified and universal, with no circumstances allowing for derogation or other exception. Notwithstanding recognition by Japan,

Canada and some other delegations as to a possible need in certain situations to balance privacy and law enforcement interests against a legitimate demand for information in the context of an enforced disappearance, [REDACTED]

NGOs and families of the disappeared have passionately pled that this should be one of the core principles of this instrument and have found strong support among many European and Latin States. Moreover, the Chairman has said to the U.S. delegation privately on several occasions that he regards inclusion of this right in the instrument as a key goal.

16. (SBU) The non-refoulement provision will likely be revised to conform to international standards (as a result of interventions by the U.S. and other delegations), although this is not yet a done deal. It remains unclear whether differences of view regarding the provisions on disappeared children will be resolved in favor of the &best interests of the child& standard (a principle enshrined in Article 3, paragraph one of the Convention on the Rights of the Child and used in the US for custody cases) or the &custodial parent& standard (found in Hague Convention on Abduction), particularly in addressing the abduction or surreptitious transfer of disappeared children to non-biological families.

17. (SBU) PART TWO OF THE INSTRUMENT. (Treaty Monitoring Body). There was substantial but incomplete discussion of the proposed mandate of the treaty monitoring body envisioned for this instrument. There was widespread support for an &urgent action request& procedure when there are credible grounds to believe a forced disappearance has occurred. There was also support for on-site visits predicated upon state consent, although some concern was expressed about proposed far-reaching powers that would be granted to the treaty body once the site visit is approved by the State Party. Some States supported expanding treaty body powers to include authority to receive individual petitions and to require a State to offer reasons for refusing a site visit. China proposed, in lieu of creating a treaty monitoring body, having a follow-up conference of States.

18. (SBU) There is increasing support among a number of delegations for using an existing treaty monitoring body, including the possibility of creating -- under the auspices of such a body -- a sub-committee on forced disappearances. This position gained further momentum when two expert members of the current UNCHR special mechanism on forced disappearances highlighted areas of potential overlap between their work and that of a treaty body, also underscoring the

severe and chronic underfunding of their work. They distributed a paper indicating that in 1999 the chair of their expert group questioned the need for a legally binding instrument on forced disappearances but demurred as to whether this remains the chair's current thinking.

19. (SBU) PART THREE. (Treaty clauses). The Working Group discussed principally Articles III-E (non-derogation) and III-F (Provisions of International Humanitarian Law), the two most critical to USG interests. Following lengthy US and International Committee of the Red Cross (ICRC) interventions on the distinctions between international human rights law and international humanitarian law, the Chair announced that he would include in his next text a new III-F clause acceptable to both the US and the ICRC that will read as follows. QUOTE The present instrument is without prejudice to the provisions of international humanitarian law, including the obligations of High Contracting Parties to the four Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 8 June 1977, or to the opportunity available to any State Party to authorize the ICRC to visit places of detention in situations not covered by international humanitarian law. UNQUOTE Inclusion of such an acceptable IHL clause making clear that the law of armed conflict remains the *lex specialis* governing situations of armed conflict would mean that Article III-E on non-derogation would remain unchanged.

20. (SBU) Finally, the Chair indicated continued support for keeping out of the text a clause that would flatly bar any reservations to the instrument, preferring to allow international treaty law to govern the subject. He noted that this approach would also foster the goal of wider acceptance of the instrument within the international community. Additionally, the Chair noted that most

delegations supported in principle a preambular reference to &crimes against humanity8 and that, in his view, it would also be useful to add an operative provision on this subject.

The United States delegation expressed serious concerns about any such references in the instrument and reserved to make it clear that there was no consensus in the room on such an approach. MOLEY

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