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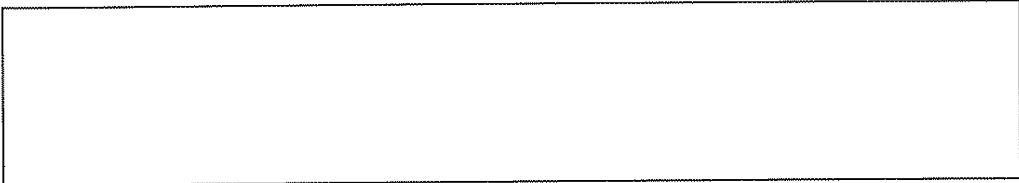
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TAGS: UNGA, UNHR, PHUM, SOCI
SUBJECT: REPORTING CABLE ON FORCED DISAPPEARANCES TREATY
NEGOTIATIONS

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
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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 ~~UNCLASSIFIED~~ in the original 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 in 8) 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]

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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.

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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

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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 humanity& 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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