Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance

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III. DISCUSSION ON THE CHAIRPERSON'S WORKING PAPER

Discussions on Part II

1. Discussions on the functions of the monitoring body

1. The Chairperson's working paper suggested that the monitoring body should be assigned the following functions: receiving and considering reports on the action taken by States to give effect to the future instrument (art. II-A); considering requests for disappeared persons to be sought and found under an emergency procedure (art. II-B); conducting fact-finding missions to the territory of States parties in response to such requests (art. II-C); receiving and considering individual communications (art. II-C bis); referring particularly serious situations to the Secretary-General of the United Nations (art. II-C ter) and submitting an annual report on its activities to the General Assembly (art. II-F).

Reporting procedure (art. II-A)

2. Most delegations supported the Chairperson's suggestion of establishing a procedure whereby all States parties would be required to submit a report on the action taken to give effect to the new instrument. It was proposed that reports should be required to be submitted two years after entry into force.

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3. Many participants indicated that they did not favour a system of periodic reports like that established under other conventions, because the procedure was too unwieldy. They did, however, propose requiring States parties to submit reports or additional information to the monitoring body whenever that body considered appropriate.

4. If the future instrument were to take the form of an optional protocol to the International Covenant on Civil and Political Rights, some delegations suggested following the lead of the two optional protocols to the Convention on the Rights of the Child, which called for the submission of an initial report, then the provision of any new information about the application of the protocols in the periodic reports due under the main Convention.

Emergency procedure (art. II-B)

5. At the fourth session, the Chairperson suggested replacing the text in the working paper by the following:

"*1. A request that disappeared persons should be sought and found may be submitted to the Committee by relatives of the disappeared persons or their legal representatives, their counsel or any person authorized by them, as well as by any person able to claim a legitimate interest.*

"*2. If the Committee considers that a request submitted in pursuance of paragraph 1*

(a) is not manifestly unfounded,

(b) does not constitute an abuse of the right to submit such communications,

(c) has previously been submitted to the competent authorities of the State party concerned, and

(d) is not incompatible with the provisions of [this instrument],

it shall request the State party to provide information on the situation of the person concerned, within a time limit set by the Committee.

"*3. The Committee shall submit to the State party concerned a recommendation in the light of the response provided by that State party in accordance with paragraph 2 above. It may also request the State party to take appropriate action and report thereon to the Committee within a time limit which the Committee shall set, given the urgency of the situation.*"

6. Most delegations supported this procedure, which they regarded as essential inasmuch as it sought not only to forestall forced disappearances but also to put an end to any that had already occurred. Providing for such a procedure under a conventional instrument was, in the view of several delegations, a step forward. There were discussions on the question of overlapping terms of reference with the Working Group on Enforced and Involuntary Disappearances, which also had an emergency procedure.

7. Regarding admissibility criteria, it was suggested that applicants should be required to activate domestic channels of appeal at the same time. Many participants opposed the incorporation of a requirement that domestic remedies should have been exhausted into the emergency procedure. Several felt that the admissibility requirement should apply only to available and effective remedies.

8. Several participants said it was necessary to stipulate that the monitoring body should be able to request the State party to take appropriate action, "including interim protective measures".

9. It was suggested that the instrument should specify that the dialogue between the monitoring body and the State party concerned would continue until the fate of the disappeared person had been elucidated. Several delegations also called for a stipulation that the monitoring body would keep applicants informed of the replies received from the State party and the action taken in response to their applications.

10. One delegation proposed that, when the monitoring body requested a State to take appropriate action and report thereon, the State should do so not "within a time limit which the

[body] shall set" but "as quickly as possible". The Chairperson, however, argued that the monitoring body should be left free to assess situations case by case. The time limits it set might range, for example, from 48 hours to a matter of weeks.

Fact-finding missions (art. II-C)

11. Several delegations at the third session expressed support for the establishment of a fact-finding procedure while others wondered how appropriate it was, given that the primary aim of the instrument was prevention. The discussions also touched on the duration of fact-finding missions, the composition of the delegations assigned to carry them out, whether or not the assent of the State concerned was required, and what delegations should do in the course of such visits.

12. At the fourth session, the Chairperson suggested the following wording:

> "*1. If the Committee considers that a visit to the territory of a State is necessary for the discharge of its mandate, it may request one or more of its members to undertake a fact-finding mission and report back to it without delay. The member or members of the Committee who undertake the mission may be accompanied if necessary by interpreters, secretaries and experts. No member of the delegation, with the exception of the interpreters, may be a national of the State party to which the visit is made.*
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> "*2. The Committee shall seek the cooperation of the State party concerned. It shall notify it in writing of its intention to conduct a fact-finding mission, indicating the purpose of the mission and the composition of the delegation. The State party shall inform the Committee without delay of its agreement or opposition to a fact-finding mission in territory over which it has jurisdiction.*"

13. Many delegations supported this text. One suggested that the fact-finding function should follow the lines of article 20 of the Convention against Torture. The following additions were proposed: a State party agreeing to a fact-finding mission should be obliged to provide all necessary facilities; a State objecting to a fact-finding mission should be obliged to give its

reasons; the delegation's findings should be communicated to the State party and published; the arrangements for the visit should be established by agreement between the monitoring body and the State concerned.

Individual communication procedure (art. II-C bis)

14. Several delegations voiced support for this procedure at the third session. Others did not regard it as absolutely necessary but would not object to it. Others again insisted that the procedure should be optional, as in the case of the other international instruments. One proposed the deletion of the article since such a procedure was not essential and would duplicate the procedure available under the Optional Protocol to the International Covenant on Civil and Political Rights. Another emphasized that the procedure would be pointless if the new instrument were to take the form of an additional protocol to that Covenant.

15. The discussions also touched on the question of who would be entitled to approach the monitoring body; what shortcomings could be brought to the monitoring body's attention under the procedure; the exhaustion of domestic remedies, particularly when the remedies available were not effective; the powers of the monitoring body; and the procedure for adopting interim protective measures in cases where the victim could suffer irreparable harm while a communication was under discussion.

16. At the fourth session, the Chairperson suggested the following wording:

"*1. The State party may, at the time of ratification or thereafter, declare that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation of the provisions of [this instrument]. The Committee shall not admit any communication concerning a State party which has not made such a declaration.*

"2. The Committee may not consider a communication if:

(a) The communication is anonymous;

(b) The communication constitutes an abuse of the right to submit such communications or is incompatible with the provisions of [this instrument];

(c) The communication is not substantiated or is manifestly groundless;

(d) The same matter is being examined under another procedure of international investigation or settlement;

(e) The individual concerned has not exhausted all effective domestic remedies available. This rule shall not apply if the recourse procedures are excessively prolonged.

"3. If the Committee considers that the communication meets the requirements set out in paragraph 2, it shall transmit the communication to the State concerned, requesting it to provide, within a time limit that the Committee shall set, its observations or its comments. In case of need, the Committee shall recommend interim measures of protection.

"4. The Committee shall meet in camera when considering the communications provided for in this article. It shall terminate the procedure set forth in this article by communicating its findings to the State party and the author of the communication."

17. Many delegations supported this text. Amendments were proposed, including deleting subparagraph 2 (c) and bringing the article fully into line, terminologically and otherwise, with the Optional Protocol to the International Covenant on Civil and Political Rights. One delegation proposed adding regional bodies under subparagraph 2 (d), but there was no unanimity on this proposal.

Referral to the Secretary-General (art. II-C ter)

18. Several delegations at the third session said that they supported this new procedure. Others voiced reservations, wondering whether there were precedents in other human rights instruments. Several delegations felt that the Secretary-General's authority derived from the Security Council and the United Nations General Assembly, and he could not take action without consulting them. Others felt that such questions should be handled by political bodies such as the Commission on Human Rights or the Economic and Social Council, and called for article II-C ter to be deleted. Some delegations asked whether the action the Secretary-General was expected to take should not be spelt out. Others considered that the Secretary-General could

transmit information to the Security Council which could, for example, pass a case to the International Criminal Court. The Chairperson considered that the text should remain within the scope of the Secretary-General's existing powers, leaving it to him to decide what action to take.

19. One participant pointed out that there were human rights instruments allowing matters to be taken to the political bodies of the United Nations, in particular article VIII of the Convention on the Prevention and Punishment of the Crime of Genocide and article VIII of the International Convention on the Suppression and Punishment of the Crime of Apartheid. The new instrument could establish a link between the fact-finding procedure, on-site visits and the possibility of ensuring that conclusions were followed up through the Secretary-General.

20. At the fourth session, the Chairperson suggested the following wording:

> *"If the Committee receives information which appears to it to contain well-founded indications that enforced disappearance is being practised on a widespread or systematic basis in the territory of a State party, it may, after seeking from the State party concerned all relevant information on the situation, refer the matter to the Secretary-General of the United Nations, who will take action within the powers conferred upon him by the Charter of the United Nations."*

21. Several delegations repeated previously advanced arguments. Some felt that the article was of a piece with the reforms envisaged by the Secretary-General. One delegation proposed replacing "refer the matter to" by "bring the matter to the attention of", and "within the powers" by "in accordance with the powers".

Competence *ratione temporis* of the monitoring body (art. II-E)

22. Many States were of the opinion that the monitoring body would be competent to take up only "enforced disappearances" and not "deprivations of liberty" commencing after the entry into force of the instrument.

Confidentiality (art. II-F)

23. The working paper proposes that the procedures referred to in articles II-B, II-C and II-C bis should be confidential. Pursuant to article II-F, however, if procedures launched

under articles II-B and II-C bis elicit a manifest refusal to cooperate on the part of the State party concerned or produce no real results, the monitoring body may decide to comment publicly on the question or situation brought to its attention. The Chairperson explained that article II-F reflected a determination to rely on bona fide cooperation between the State party and the monitoring body.

24. Several participants at the third session felt that such confidentiality rules amounted to a step backwards from existing text and current practice. They were opposed to confidentiality unless it would make for more effective procedures or was ultimately intended to protect the individual concerned. Confidentiality, moreover, should apply to the procedure, not the outcome. Two delegations proposed language making it clear that the monitoring body could decide to comment publicly "after taking seriously into consideration the fact that doing so might imperil the life and safety of the disappeared person, his or her family and anyone else involved".

25. Some participants called for article II-F, paragraph 3, to be deleted since it made going public dependent on a prior response from the State, and that was not consistent with current international standards. Others called for the confidentiality clauses to be retained. Some delegations felt that the paragraphs dealing with the waiver of confidentiality in certain cases should be deleted because the effect of a waiver would be to accuse a State party. One delegation considered it might be feasible to amend article II-F, paragraph 2, so that the way in which information was published would not tarnish the international image of the State concerned.

26. In the view of several delegations, the confidentiality rules proposed in article II-B, paragraph 5, and article II-C, paragraph 5, were a step backwards. In particular, the Working Group on Enforced or Involuntary Disappearances was not subject to such restrictions. These delegations felt that it should be possible to keep the source of a report confidential, so as to protect the victim and his or her family, but not the fact that a disappeared person was being sought.

27. Several speakers observed that, by current international standards, any decision adopted in the course of a quasi-juridical procedure, including decisions on admissibility or otherwise,

should be made public. One delegation felt that the monitoring body should include in its annual report a summary of what it had accomplished pursuant not only to articles II-B and II-C bis, but also to article II-C ter.

Procedure for communication between States

28. Some present regretted that the working paper made no provision for a procedure for communication between States, and suggested provision be made.

2. Discussions on the form of the future instrument and the monitoring body (art. II-O)

29. Working paper E/CN.4/2004/WG.22/WP.2, submitted by the Chairperson at the October session, took no position on the form of the monitoring body. At the January session of the working group, the Chairperson suggested replacing the text of article II-O in that paper by the following wording:

> *"1. A Committee on Enforced Disappearances (hereinafter referred to as the Committee) comprising five experts of high moral calibre and acknowledged authority in the field of human rights, serving in their personal capacities, shall be established to execute the provisions of [this instrument]. The members of the Committee shall be elected by the States parties subject to equitable geographical distribution.*
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> *"2. Elections shall be conducted by secret ballot on the basis of a list of candidates designated by States parties, at biennial meetings of the States parties convened for that purpose by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States parties shall constitute a quorum, the persons elected to the Committee shall be those obtaining the largest numbers of votes and an absolute majority of the votes of the representatives of States parties present and voting.*
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> *"3. The initial elections shall be held no later than six months after the date of entry into force of the [present instrument]. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States parties inviting them to submit nominations within three months. The Secretary-General*

shall prepare a list in alphabetical order of the candidates thus nominated, indicating for each which State party is putting him/her forward. He shall communicate the list to all States parties.

"4. Committee members shall be elected for four-year terms. They shall be eligible for re-election once. However, the terms of two of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of those two members shall be chosen by lot by the person chairing the meeting referred to in paragraph 4 of this article.

"5. If a Committee member dies or resigns or for any other cause can no longer perform his/her Committee duties, the State party which nominated him/her shall appoint another expert from among its nationals to serve, subject to the Committee's approval, for the remainder of the term.

"6. The Committee shall determine its own rules of procedure.

"7. The Secretary-General of the United Nations shall make available to the Committee the means, staff and facilities it requires for the effective performance of its functions. The Secretary-General of the United Nations shall convene the initial meeting of the Committee.

"8. Committee members shall be entitled to the facilities, privileges and immunities granted to experts on mission for United Nations as set forth in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

"9. Each State party shall undertake to cooperate with the Committee and assist its members in the fulfilment of their mandate, subject to such limits on the Committee's functions as the State concerned has accepted."

30. The Chairperson also suggested the addition of an article II-O bis reading as follows:

"The Committee shall cooperate with all the relevant United Nations bodies, offices, specialized agencies and funds, with all committees established under relevant international instruments, with the special procedures of the United Nations Commission

on Human Rights, with all appropriate regional, intergovernmental organizations or institutions, and with all relevant national institutions, agencies and offices working to protect everyone from enforced disappearance."

31. Almost all delegations felt it was necessary to guarantee the implementation of the future instrument through a strong, effective monitoring body. One delegation, however, questioned the need to establish a monitoring body and proposed that the matter should be simply left to the Meeting of States Parties.

32. Several alternatives were proposed as to the form the instrument and the monitoring body should take. The first involved drafting an optional protocol to the International Covenant on Civil and Political Rights and entrusting the task of monitoring to the Human Rights Committee. A variant of that proposal involved establishing a subcommittee of the Human Rights Committee that would be specifically tasked with monitoring the protocol. The second option would be to draft a separate treaty that would have its own monitoring body.

33. At the request of the Chairperson, a preliminary cost estimate of two options - establishment of a new treaty body composed of 5 experts and expansion of the membership of the Human Rights Committee to 23 - was conducted by the Office of the High Commissioner for Human Rights. The first option, which included the holding of two sessions a year, one annual week-long mission of on-site visits by two members and all associated expenses, would cost $886,494. The second option, which also included an annual week-long mission of on-site visits by two members and associated expenses, would cost $929,364.

34. The question of overlap between the functions of the monitoring body and those of the Working Group on Enforced or Involuntary Disappearances was discussed. Several delegations cited the risk of overlap, particularly with regard to the consideration of urgent appeals, on-site visits and individual communications.

35. Several participants stressed the complementarity of the two mechanisms. They recalled that the mandate of the Working Group on Enforced and Involuntary Disappearances covered all States Members of the United Nations as well as all cases of enforced disappearance that had occurred since the United Nations was founded, whereas the new monitoring body would have competence only in respect of the States parties to the future instrument and would not be able

to consider enforced disappearances that had occurred that long ago. It was pointed out that in other areas, such as torture, treaty bodies and special procedures of the Commission on Human Rights already existed and had demonstrated their importance and usefulness. Moreover, the Working Group on Enforced and Involuntary Disappearances was not a permanent body, as its mandate had to be renewed every three years by the Commission on Human Rights.

36. Accordingly, several participants felt that the Working Group on Enforced and Involuntary Disappearances should continue to function until the future instrument had been universally ratified. It was noted that, from a practical standpoint, the Secretariat, the annual meeting of chairpersons of treaty bodies and the special mechanisms of the Commission on Human Rights would ensure coordination. Some delegations were still concerned about the overlap that the coexistence of two bodies would generate.

37. Several delegations welcomed the article II-O bis, although they thought that it should be more specific and strengthened. In particular, it was proposed that the treaty bodies that would cooperate with the new monitoring body should be specifically mentioned, as should the Working Group on Enforced and Involuntary Disappearances.

Proposal for the drafting of an optional protocol to the International Covenant on Civil and Political Rights, with monitoring entrusted to the Human Rights Committee

38. During its session in October 2004, the Working Group had heard the Chairperson of the Human Rights Committee, Mr. Abdelfattah Amor, who had set out several arguments in favour of the drafting of an optional protocol to the International Covenant on Civil and Political Rights, with monitoring entrusted to the Human Rights Committee. That Committee, which had many years of experience, was well placed to deal with enforced disappearances, in the light of articles 6, 7 and 9 of the Covenant. By amending its rules of procedure it could create internal structures, if necessary, to take up any new mandates assigned to it. The Chairperson of the Human Rights Committee had noted that increasing the number of monitoring mechanisms could lead to problems with consistency of jurisprudence.

39. Many delegations voiced support for that option. They cited the arguments set out above and added that enforced disappearances were a violation of several articles of the International

Covenant on Civil and Political Rights; choosing that option would make it possible to ensure continuity in the practice of the Human Rights Committee in that area and to take into account the ongoing discussion on reform of the treaty-monitoring bodies.

40. Some participants observed that what must be increased was not the number of Committee members but the financial and human resources available to the Committee, particularly for on-site visits.

41. A proposal was made to take articles 3 to 5 of the second Optional Protocol to the International Covenant on Civil and Political Rights and article 8 of the Optional Protocol to the Convention on the Rights of the Child as a basis for drafting articles that would make reference to the existing functions of the Human Rights Committee.

Proposal for the establishment of a subcommittee of the Human Rights Committee

42. Some delegations expressed a preference for the drafting of an optional protocol to the International Covenant on Civil and Political Rights and the establishment of a subcommittee of the Human Rights Committee that would be specifically tasked with monitoring it. They felt that such a solution would ensure the continuity and consistency of the Human Rights Committee's jurisprudence in the area of enforced disappearances while giving the future mechanism greater visibility.

43. Others questioned the feasibility of such a proposal, noting that it would entail modifying the terms of reference of the Human Rights Committee and thus an amendment to the Covenant. Still others pointed out that there was no need to set up a subcommittee if the Human Rights Committee could establish the necessary body under its rules of procedure.

Proposal to elaborate a separate treaty and monitoring body

44. The Working Group heard a statement by expert Mr. Louis Joinet, who explained that in its 1998 draft the Sub-Commission had not proposed giving the Human Rights Committee a monitoring mandate as the Committee was already overburdened, and expanding it would be a complex exercise with no financial benefit. Moreover, it had been stressed that a distinction

would have to be drawn between States that had ratified the Covenant and/or the Optional Protocol and those that had not, and that such a solution would have little visibility for victims. The idea of setting up a separate committee had ultimately prevailed.

45. Many delegations expressed support for the new text submitted by the Chairperson, pointing out that nothing in it indicated that making the Human Rights Committee the monitoring body would be the simplest or least costly solution. They noted that the proposal to increase that Committee's burden also threatened to undermine the quality of its work and pointed out that the drafting of a separate treaty would avoid any risk of amending the Covenant.

46. Those participants felt that entrusting the monitoring mandate to the Human Rights Committee or to a subcommittee would in any event entail additional costs. Moreover, practical problems would arise: the members of the Human Rights Committee were nationals of States parties to the Covenant, which might not be parties to an optional protocol on enforced disappearances. And as in the case of the two existing protocols to the Covenant, only States that were parties to the Covenant itself could become parties to the protocol, a situation that would automatically limit opportunities for ratification. On the last point, however, several delegations cited the example of the Optional Protocols to the Convention on the Rights of the Child, which allowed ratification by States that had only signed the Convention.

47. Several participants maintained that the concern for maintaining consistency of jurisprudence among the various treaty bodies could not be cited to oppose the establishment of a separate mechanism, as there were already many bodies that had overlapping mandates - in the area of torture, for example - without that giving rise to any problems of consistency.

48. It was stressed that the proposed functions were new in the field of human rights, in that they combined "humanitarian" with more conventional legal procedures. It would therefore be difficult to entrust the mandate to an existing body.

49. Lastly, the drafting of an optional protocol to the Covenant would draw attention away from the specific nature of enforced disappearances and dilute the message the United Nations sought to convey.

50. Some delegations questioned the need to limit the number of members of the future committee to five. They suggested increasing that number to 10.

51. Some delegations proposed spelling out, in paragraph 7 of the new article II-O proposed by the Chairperson, that the Secretary-General would provide the Committee with a "permanent secretariat". One delegation, however, said that such a statement was both ambiguous and pointless. Another proposed wording to the effect that the Secretary-General would provide the committee with the resources, staff and facilities it needed to conduct its work effectively "and permanently".

52. Two delegations expressed reservations as to the content of paragraph 7: if a separate committee was established, its financing should come not from the regular budget of the United Nations but from the States parties to the instrument. Another delegation maintained that the monitoring body should in any event be financed from the regular budget of the Organization. Financial considerations could not stand in the way of ratification of the instrument. In reply to a question on that subject, a representative of the Office of the High Commissioner said that all treaty-monitoring bodies were currently financed from the regular budget of the United Nations. Two treaties had originally provided for financing by the States parties, but that system had created serious problems in the work of the treaty bodies concerned, and the treaties had been amended. Until those amendments entered into force, the General Assembly, in its resolution 47/111, had decided to finance the bodies concerned from the regular budget.

53. At the end of the debate several delegations announced that they wished to remain flexible on the question, since what was most important was the establishment of an effective mechanism. Some delegations felt that it was important to agree on the functions of the monitoring body first and to determine the form it should take afterwards.