

## INTERSESSIONAL OPEN-ENDED WORKING GROUP TO ELABORATE A DRAFT LEGALLY BINDING NORMATIVE INSTRUMENT FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE

5<sup>th</sup> Session (Geneva 12 - 23 September 2005)

### Overview

- Successful completion of the draft text titled "*International convention for the protection of all persons from enforced disappearance*"
- Consensus reached on the inclusion of a separate article on non-State actors
- Finalising the provisions on the right to know the truth and the restrictions to the right to know
- Minor modifications to the Preamble
- Agreement on the functions of the instrument and the follow up mechanism "Committee on Enforced Disappearances"
- General statements and reservations expressed by States

### Background

At its 57<sup>th</sup> session, the Commission requested its the Chairperson to appoint an independent expert to examine the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearance. With a view to identifying any gaps, the Expert was mandated to examine: relevant legal instruments at the international and regional levels (such as the *Inter-American Convention on Forced Disappearances of Persons* (June 1994) and the *Declaration on the Protection of all Persons from Enforced Disappearance* (1992)); intergovernmental arrangements on judicial cooperation; and the draft international convention on the protection of all persons from enforced disappearance transmitted by the Sub-Commission in its resolution 1998/25. The Commission further decided to establish, at its 58<sup>th</sup> session, an inter-sessional open-ended working group to elaborate, in the light of the findings of the Independent Expert, a draft legally binding normative instrument for the protection of all persons from enforced disappearance, taking into account, *inter alia*, the afore mentioned draft international convention transmitted by the Sub-Commission.

The Working Group's first session was held from 6 to 17 January 2003. The Commission requested the continuance of the work of this group and the second session of the Working Group was held from 12 to 23 January 2004. The Working Group held its third session from 4 to 8 October 2004, and its fourth session from 31 January to 11 February 2005.

At its 61<sup>st</sup> session, the Commission requested the Working Group to meet for a period of 10 working days in one formal session, with a view to "the completion of its work". In pursuance of that resolution, the Group held its fifth session from 12 to 23 September 2005.

### Participants

The meeting was open to all interested member and non-member States, intergovernmental organisations, and non-governmental organisations (NGOs) in consultative status with the Economic and Social Council.

All **member States** from the Latin American and Caribbean region, Western Europe and Other regions, and the Eastern European region were present. Most of the Asian States were present with the exception of Nepal. The African States were poorly represented with only the Republic of Congo (the Congo), Egypt, and Sudan present. The **non-member States present** included: Algeria, Angola, Austria, Azerbaijan, Bangladesh, Belgium, Bolivia, Bulgaria, Cambodia, Chile, Columbia, Croatia, Cyprus, Czech Republic, Denmark, El Salvador, Estonia, Greece, Iran, Iraq, Lebanon, Madagascar, Malta, Morocco, New Zealand,

Norway, Panama, Poland, Portugal, Serbia and Montenegro, Sierra Leone, Spain, Sweden, Switzerland, Syria, Thailand, Tunisia, Turkey, Uruguay, Venezuela, Yemen. An observer also represented the Holy See.

A **particularly active role** was played by many States, including: Argentina, Algeria, Angola, Chile, Costa Rica, Canada, China, Egypt, France, Germany, India, Iran, Ireland, Italy, Japan, Mexico, Netherlands, New Zealand, the Russian Federation, Switzerland, Uruguay, the United Kingdom of Great Britain and Northern Ireland (UK), and the United States of America. These States regularly participated in the debates and suggested proposals and amendments to the draft text.

Among those **NGOs** and **intergovernmental organisations** present were: Amnesty International (AI), Asian Federation Against Involuntary Disappearances (AFAD), Family and Victims of Involuntary Disappearance (FIND), Human Rights Watch (HRW), Humanist Committee on Human Rights (HOM), International Commission of Jurists (ICJ), International Federation for Human Rights (FIDH), International Federation of the Action by Christians Against Torture (FIACAT), Latin American Federation of Associations for Relatives of Detained-Disappeared (FEDEFAM), Non-Violence Association International, Permanent Assembly of Human Rights in Argentina (APDH), We Remember Foundation, and World Federation of Trade Unions (WFTU). Observers included the International Committee of the Red Cross and a representative of the Office of the High Commissioner for Human Rights (OHCHR). Many of the NGOs played an active role in the meeting, regularly taking the floor and proposing amendments to the draft text.

The following **experts** participated in the session: Mr. Louis Joinet, as independent expert and the former Chairman of the Working Group on the Administration of Justice of the Sub-Commission on the Promotion and Protection of Human Rights; and Mr. Stephen Toope the Chair of the Working Group on Enforced or Involuntary Disappearances.

Process:

The Working Group re-elected Mr. Kessedjian, to once again Chair the 5<sup>th</sup> session. The working paper prepared as a result of the Working Group's 4th session (E/CN.4/2005/WG.22/WP.1) formed the basis of negotiations. The Chair proposed to finalise outstanding issues left unresolved in the previous session during the first week. He emphasised the consensus nature of the working paper and added that consultations should be carried out during the week to negotiate on proposals and amendments. However, the Chair stated that there will be no renegotiation on a point of substance that has already been discussed at length in previous sessions. The Chair devoted the second week for a re-reading of the entire text, adoption of the draft text and concluding comments and declarations.

Outcome:

#### *Definition of Enforced Disappearance*

After lengthy discussions in previous sessions, the definition of enforced disappearance was given the following elements:

- Deprivation of liberty (by arrest, detention, abduction, or other means)
- By an agent of the State
- Refusal to acknowledge the deprivation of liberty
- Places the person outside the protection of the law

The last element of the definition was described by the Chair as the "third and half element". This reflects the fact that some States led by the UK wished to have the phrase "which place such a person outside the protection of the law" as a distinct element in the definition of enforced disappearance. The Latin American States expressed their interpretation that there is no fourth element, but rather a person is placed outside the

protection of the law as a consequence of an enforced disappearance. The Chair expressed that this was the compromise that was reached to allow different interpretations of the text.

During the re-reading of the text, the USA suggested that there was a fundamental flaw in the definition, since it lacked the element of intention. The USA proposed an amendment to include the phrase “with the intention of removing that person” before “outside the protection of the law”. This amendment was strenuously objected to by several delegations including the Latin American States and France. The Chair resolved this issue by leaving the definition as it stands and asking the group to make a collective declarative statement; “There is no crime of enforced disappearance without the intention to commit it”.

### *Non-State Actors*

The issue of **non-State actors** remained unresolved in the previous session. The Chair presented a consolidated version of proposals made by States on the issue of non-State actors. The Chair's proposal was to have a separate article (now Article 3) on non-State actors from the definition article (now Article 2). There was general consensus supporting the rearrangement of the first three articles in this manner.

As for the content of the article on non-State actors, several delegations, such as Russia, Switzerland and Italy, believed this new drafting was a good compromise on State responsibility over non-State actors. Other delegations had problems with the wording of the article including the Latin American States, Japan, France and the NGO's. The position of these delegations was that States must have the primary responsibility over enforced disappearance and that a separate article places too much prominence on non-State actors. In addition, Mexico wished to enhance the responsibility of States over the actions of non-State actors by including the protection of victims in this article, a proposal that was not accepted in the final draft.

The debate on non-State actors rehashed the same arguments put forward by delegations during previous sessions. However, in the end, a compromise was reached based on the Chair's proposal to have the issue of non-State actors be addressed in a separate Article 3, with some minor amendments. In the final draft, the term "enforced disappearance" in the Chair's proposal was replaced with “acts defined in Article 2”.

### *Right to know the truth*

The concept of the **right to know** remained a deeply contentious issue, however, by the end of the session there was a movement towards consensus.

Many delegations supported the inclusion of some restrictions to the right to know as a balance between the competing interests of the right to access of information in protecting against enforced disappearance and the right to privacy. Delegations led by the UK, China, the USA, Egypt, and Iran defended restricting certain information from being disclosed. The primary concern was the necessity of withholding some information for many reasons including the safety of the individual concerned, the right to privacy and possible hindrance of a criminal investigation.

Strong arguments were put forth by the Latin American States as well as Italy and Spain, to delete any exceptions on the part of the state for refusing to provide information. They argued that the physical integrity of the individual and the right to life is paramount and takes precedence over the right to privacy. NGO's were also in favour of deleting the paragraph that referred to restriction on the information to be provided. There was some concern from NGO's that restrictions to access to information contained in Article 20, may in fact create a legalised form of enforced disappearance in cases where the State can conduct an enforced disappearance and then state that the person is "under the protection of the law", thereby removing their victims from the realm of protection. The Chair concluded that such an interpretation by a State party would be in bad faith and goes against the very nature of the principles of the instrument.

Several delegations, including the Latin American group and Mr. Joinet stressed the importance of always disclosing certain information, such as the **place of detention** or risk lowering the existing standard of protection. If the paragraph on restrictions to the right to know is left in, these delegations argued that there should never be restrictions on disclosing information on place of detention. Canada, the UK and other delegations stated that it could not accept the proposal to include place of detention in a list of items that cannot be restricted.

Eventually, a consensus was reached removing references to specific grounds for refusals such as “privacy” and “criminal investigation”. Instead, the text affirmed that the right to information can only be restricted on an “exceptional basis” and is only applicable when “a person is under the protection of the law and the deprivation of liberty is subject to judicial control.” In addition, the second sentence of the paragraph was strengthening to state that in no case shall these restrictions be allowed relating to a conduct of enforced disappearance (as defined in Article 2).

### *Preamble*

The discussion on the **right to know** the truth led to an intervention by the USA on the wording of the preamble. The USA proposed to delete the term “right to know” and replace it with the **“right to freedom to seek, receive and impart information”**. The USA delegation argued this wording more accurately reflects current international law and similar language in the *International Covenant on Civil and Political Rights (ICCPR)*. Since other delegations, such as Argentina opposed the deletion of “right to know”, the Chair stated that the current text would not be deleted, but could be added to. This resulted in the last sentence in the preamble being split into two principles. The first retained the “right of any person not to be subjected to an enforced disappearance” and “the right of victims to justice and reparations”. The second sentence included the USA concept of “the right to freedom to seek, receive and impart information”.

### *Functions and Form of the instrument*

The Chair decided that before entering into a debate on the form of the instrument, a consensus should be reached on the **functions of the monitoring body**. The Working Group agreed that the monitoring body would have five core functions:

- Consideration of State reports
- Country visits (with permission of the State)
- Individual complaints (optional)
- Humanitarian/Urgent action
- Referral to the Secretary-General/General Assembly on systemic disappearances

Some States led by Angola and Egypt, were reluctant to introduce the function of **humanitarian/urgent action**, arguing that urgent action procedures are a novelty and unprecedented in treaty monitoring bodies. There was further concern expressed by the delegation of Egypt (on behalf of several other delegations including Iran, India, China and Angola) that the **exhaustion of domestic remedies** should be an additional criteria for admissibility of humanitarian/urgent action measures. Several other delegations led by Argentina, Switzerland and Italy, opposed including exhaustion of domestic remedies, stating that the purpose of this function is prevention and this is not a judicial type of process such as in the case of individual complaints. In the final version of the text, exhaustion of domestic remedies was left out but an addition element that “the same matter is not being examined under another procedure of international investigation or settlement of the same nature” was added.

Concerns also arose about the role of the Committee in **referring matters of systemic disappearances to the Secretary-General** of the UN. This too was viewed by delegations, such as Russia, Egypt, China, and Iran, as a novel function of a treaty monitoring body. The Latin American states, supported by Italy, New Zealand and Canada, argued referral to the Secretary General is an important preventative function that

encourages cooperation and coordination among UN bodies. There was debate about whether this was an appropriate role for the Secretary General in accordance with the UN Charter. In the end, it was recognised that such a role does not confer any new powers to the Secretary-General and the language of the text was modified to read that the matter could be brought to "the attention of the General Assembly of the United Nations, through the Secretary General of the United Nations."

Regarding **State visits**, the delegations of China, Egypt and India suggested that criteria such as "widespread and systematic" should be added to warrant the necessity for a State visit. Other delegations such as Italy and the Latin American States, opposed the inclusion of criteria for visits arguing this would throw out of balance the consensus reached over State's rights and the Committee's ability to effectively carry out preventative functions. The Chair urged delegates to make visits easier for States to accept since visits are only possible with the consent of the State. The draft text was amended so that "grave violations" would warrant a visit after "consultation with the State Party concerned." There was also consensus based on a Swiss proposal to add into the text follow-up measures after the State visit.

During discussion on the **individual complaints procedures**, the USA, requested to remove the reference to "interim measures" in the draft instrument. The argument put forth by the USA delegation was that interim measures procedures should be in the rules of procedure and not in the body of the instrument. The delegation of Mexico, supported by Argentina and other Latin American states strenuously objected to this deletion stating that the ability of the Committee to make interim measures is an essential function of the Committee. New Zealand brought to the attention of the group Article 5 of *Convention on the Elimination of Discrimination Against Women (CEDAW)*, which had a similar interim measures provision. Interim measures was kept in the text and redrafted drawing on Article 5 of CEDAW.

Based on a Canadian proposal a **State-to-State complaint mechanism** was a new element added to the draft text (Article 42). Many delegations led by China and Angola were reluctant to include this novel mechanism into the draft instrument, especially the reference to submitting matter to the jurisdiction of the International Court of Justice (ICJ). In order to reach a consensus, the reference to the ICJ was removed and the article was placed at the end of the instrument rather than in the provisions dealing with the functions of the committee.

At the heart of the debate was the **form of the instrument**. Delegations were generally divided into two main camps: the Latin American group supported by Italy and Spain led the drive towards **an autonomous convention with an independent monitoring committee**. The States in favour of an autonomous convention argued that the Human Rights Committee (HRC) is already over burdened with work and adding an additional function to the HRC would be counterproductive to the human rights system as a whole. The HRC would not be able to carry out the monitoring functions of the instrument without increasing the number of members of the Committee requiring an amendment to the ICCPR. In addition to the legal and administrative arguments the financial aspects showed there would no significant difference in costs to establish a new committee. It became apparent that the bottom line came down to political will. Those in favour of an autonomous convention stated that establishing a new committee would send a strong message to victims and their families. The NGO's supported the establishment of a new committee arguing that victims of enforced disappearances and their families deserved nothing less than an autonomous Convention and an independent monitoring body.

States, such as Canada, the USA, Germany, Russia, China, Egypt, and Iran favoured using **an existing treaty body mechanism such as the Human Rights Committee** as the monitoring body for the new instrument. The discussions on the form of the instrument took place during the conclusion of the World Summit in New York, with the UN and human rights reform proposals dominating the agenda. The delegations in favour of using the HRC argued that it would make no sense to create another treaty body in light of the human rights system reform and in particular proposals to merge the treaty bodies. However, other delegates noted that the idea of a unified treaty body is just a proposal and has not been finalised. In addition, arguments were made that it is unclear how long it will take for such reform proposals to be

established and operative. In the meantime, the issue of enforced disappearances continues to be a pressing and urgent concern that needs to be addressed through immediate action.

In order to come to a consensus, the Chair proposed to have a new committee with a **revision clause** to evaluate the functioning of the Committee within four to six years. During this evaluation the Conference of State Parties can determine if "it is appropriate to transfer to another body – without excluding any possibility – the monitoring of this Convention" (Article 27). There was concern expressed by many delegations with the Chair's proposed revision clause. Delegations led by Uruguay stated that the revision clause would subordinate a committee to a provisional level. In light of the Chair's proposal, the USA (supported by Russia, Australia and the UK) suggested that the idea of a revision clause was a good one, but instead of establishing a new committee, the revision clause could be used to evaluate assigning the monitoring functions to the HRC. After negotiations, delegates were able to concede to establishing a new Committee to be called the "Committee on Enforced Disappearance" with the inclusion of the revision clause.

A portion of the session was also devoted to structuring the **composition of the Committee**. The Working Group decided on a Committee with a membership of 10 experts to be elected by State Parties according to equitable geographical distribution and taking into account "**relevant legal experience and balanced gender representation**." In addition, members of the Committee can only be eligible for re-election once, a feature that is not present in any other treaty monitoring bodies.

#### *General Comments and Reservations*

Since a consensus-based approach was adopted in negotiating the text several delegations wished to make interpretive statements on the draft text. The interpretive statements included items such as the definition, where delegations restated their positions on the three vs. four elements. Another interpretive statement that was made concerned Article 4, on criminalizing enforced disappearances in domestic law. Several states, such as the UK and the USA, expressed their interpretation that this provision did not mean that enacting a new crime of enforced disappearances in domestic legislation is necessitated. Other delegations, such as Mexico, expressed their interpretation that enacting an autonomous crime of enforced disappearances is required. In addition, Egypt and Iran expressed the right to make reservations and declarations at the time of signing. Some States such as Russia and Syria reserved making any comments on the draft text as a whole until hearing from their capitals.

#### *Future Steps*

Delegates and NGO's praised the work of the Chair and the experts, in particular Mr. Joinet, for their role in producing such an important international instrument in such a short period of time (three years). It was a highly emotional setting in the room as the adoption of the draft Convention marked an important step that many advocates in the room have been waiting over 25 years to achieve. The Chair announced that he would be dedicating the final report to Ms. Marta Ocampo de Vásquez from FEDEFAM, an NGO advocate who has tirelessly worked on preventing enforced disappearances for almost 30 years.

Overall, the NGO's felt that although some provisions of the text have been watered down from previous versions, the Convention has made a strong statement on enforced disappearances. NGO's were pleased with the establishment of an autonomous Convention with an independent monitoring Committee. However, NGO's also recognised that this was just the beginning and there was still much more work to be done.

The draft text will be presented to the 62<sup>nd</sup> session of the Commission on Human Rights for approval to forward to the General Assembly. Those in attendance hoped for a speedy approval process without a vote at the Commission. Once the text is approved at the Commission and General Assembly, the NGOs acknowledged the need to lobby states to sign and ratify the Convention and bring it into force quickly.