Working Group on a draft legally binding normative instrument for the protection of all persons from enforced disappearances

4th October 2004

At the start of the session, the group re-elected Ambassador Kessedjan as President by popular acclaim. Numerous delegations (**Germany**, **Chilli**, **Costa Rica** and **Argentina**) congratulated the President and acknowledged his past work. The President recalled his determination to see the project advance rapidly by presenting the text to the Commission of Human Rights and then to the General Assembly in 2005.

The President proposed to divide the working week into three parts: the first two days would look at section II of the working document concerning the monitoring mechanism whose arrangements have not yet all been discussed, then spending two days on section I, and the last day on the final arrangements.

Before opening the discussion on section I, several delegations made comments about the general order of the group.

General Comments on the working document.

The Netherlands, speaking in the name of the European Union as well as other States (**Lichtenstein**, **Norway**, **Serbia-Montenegro**...), believe the presidency's document to be a sound basis for work, in order to achieve a text that assures an operational and effective monitoring organ. They insist on three important points: the fight against impunity, the protection of persons, and for inter static co-operation. These will allow the text to make real advances in the domain of human rights.

Costa Rica enumerated several important points for the project: article 3 about communication and the protection of children, as well as the most salient point of article 1b or 9b about the superior hierarchical responsibility.

The **Costa Rican** delegation pays tribute to the formulation of the document, which makes a distinction between the responsibility of the State for forced disappearance by agents of the State and those carried out by actors with no link to the State. She also pays tribute to the possibility of an alert of the General Secretary (article 2 C ter).

Argentina underlines the importance of the question of reports with respect to the monitoring organ.

The **Russian Federation**, while deploring the lateness with which the Russian version of the working document was sent to them, reserves the right to come back to the question of the responsibility of the State for enforced disappearances committed by non-State actors.

Chilli drew up a list of the projects most important points that have succeeded: recognition of enforced disappearances as a crime with the consequences that follow, the notion of unrelenting crime. It evoked the progress that remains still to do: so that a right to the truth is passes, the right to continue the search for as long as the fate of the disappeared remains unknown, the importance of legal, social, and financial protection for the victim, their relations and their children. In particular, the fundamental right to not disappear, the rights of children affected by disappearance must be urgently protected, in order to fight against something that is happening at the moment.

China, recalls that enforced disappearances represent a human rights violation, considers that the international community ought to make more effort to fight against disappearances. She insists on the fact that all States must adopt all kinds of measures to put this into practice and that this must be in the form of a universal document.

Other contentious points were raised by other delegations: for **Germany,** conformity with national law might be complicated and the project must concentrate on the essential issues. For the **United**

States, the President's text is a good working base.

Egypt made several remarks on the monitoring mechanism. She rallied to the position of the African group, which prefers that the instrument takes the form of an additional protocol to the International Covenant on Civil and Political Rights (ICCPR), and that it is under the scrutiny of the Human Rights Committee.

Fedefam recalled that the families have been waiting for a long time and that it must moved forward and move forward calmly.

Fedefam concluded the general remarks and debates about the monitoring mechanism.

Some delegations (**Angola**, **Egypt**, **and Russian Federation**) wish to, first of all, resolve the question about whether a new organ needs to be created or if exiting mechanisms can be used. Others, including the President, think that it necessary to first identify the functions that we wish it to undertake, before deciding whom to confer the responsibility to.

Catherine Calothy (council to the President) explained the essential elements for the set up of the monitoring mechanism. She confirmed that the text takes no position with regards to the nature of the organ only to its functions. Periodic reports are not foreseen. An essential part of its functioning is managing emergencies, which is in two parts: contact with States so that they enforce the measures, and field visits made with the agreement of the State visited. The other functions of the monitoring mechanism include: dealing with individual communications, competence to petition the Secretary General in specific cases, and informing the General Assembly about its activities.

Mr. Amor, president of the Human Rights Committee, confirmed that his preference for the monitoring mechanism is basically political and underlines that the Human Rights Committee's previous experience allows him to make several remarks. Firstly, the international system for the protection of human rights of the UN is made up of 7 conventional mechanisms. Mr. Amor left open the question about whether this is positive or negative. He judges that is certainly the case that every human rights' convention requires a monitoring mechanism, this has allowed jurisprudence to develop in this area. However, the multiplication of mechanisms can, in his opinion, make them

difficult to manage.
He underlines that it is the rich experience of the Human Rights Committee, through its final and general observations are important for developing law, and that his concerns are for the future of the organ especially through article 6,7 and 9 of the ICCPR. The lateness of the work are above all due to the lateness of States in presenting their reports, declared Mr Amor. He foresees, in the case whereby the monitoring mechanism against enforced disappearances is entrusted to the Human Rights Committee, to resolve certain procedural questions about this new function in the internal rules. For Mr Amor the adoption of a protocol to the ICCPR would be the princely if not royal way to proceed.

Mr. Nowak wishes to make some general remarks. He believes that part I of the working document has a very sound structure. Nevertheless, the question of non-State entities is not resolved by article 2.2, which does not make it clear to what extent States are responsible for acts non-attributable to the State.
For Part II of the Pact, Mr. Nowak has above all comments on the procedure. He does not understand why supplementary reports were not foreseen after the initial report. He adds that the arrangements for individual communication and emergency measures should mention on the ground enquiries.
Concerning article II-F§2, Mr. Nowak agrees that confidentiality would make sense during the Cold War, but judges that today it should be in the public domain. He asks if all the procedures should really be confidential.
Article II - C bis relating to individual complaints uses the terminology of international human rights law - the term "serious breach". It would be better to use the classic terminology in human rights law such as "violations" or "alleged violations". The expert acknowledges that article IICter to petition the Secretary General of the UN is good but that it must be specified what the Secretary General could do.

Next **Mr. Joinet** intervenes to say that the Secretary General must be notified of the initiative. He is in agreement that in the first place the method is to discuss the content of the functions and then, if time permits, the type of organ.

Mr. Gottliger was part of the working group on enforced disappearances. In his opinion, it is

important to modify customary law for enforced disappearances. One important evolution would be to consecrate a right to shelter from enforced disappearances, the right of victims for the truth about the circumstances of the disappearances and on the fate of the disappeared, and the right to damages.

Referring to the proposition to be silent about limitations on amnesty, he encourages the group to reflect on the matter. He suggests, as a reflection about the opportunity to ban all amnesty laws, to take into account the experience of the working group during its visits to countries where enforced disappearance had occurred in great numbers. Furthermore, he asks about the attitude to take in cases where there is no trace of the person. The experience of the working group shows that there is often co-operation with the Committee Against Torture that tried to avoid back peddling. He recalls the distinction between the mandates of the working group and that of the organ which had created the normative working group regarding the humanitarian mandate and legally.

Form of the instrument and type of monitoring mechanism

Switzerland spoke again about the monitoring body and the question about the form of the instrument, which are "intrinsically linked". The Swiss delegation wishes that the monitoring mechanism is entrusted to the Human Rights Committee, or a sub-committee of 5 people working under the auspices of the Human Rights Committee. **Belgium** is in agreement with this position as well as the **Czech Republic**. However, the **Swiss delegation** is not in agreement with making a link to the working group on enforced disappearances

Angola insists on the fact that the question about the form of the instrument and the nature of the monitoring body must be resolved first of all.

The **Russian Federation** rallied to this position, as did **Ethiopia, Pakistan**, and **Turkey** want that the Human Rights Committee to be the monitoring body.

Other delegations declare themselves of the same opinion, the Human Rights Committee being in their opinion capable to treat the question of enforced disappearances in a State. **China**, **USA**, **India**, **Russian Federation** and **Japan** expressed the same opinion, because of the possibility of doubling up tasks. **Poland** thinks in the same way that the reports should not be multiplied.

Japan recognised that the Human Rights Committee is over-burdened. The question of the price of a new organ is raised by **Saudi Arabia**, **Australia**, **USA**, **Guatemala** and **Russia**.

The **Canadian delegation** admits that doubling-up of tasks may be a problem but underlines the necessity of a monitoring mechanism. **Australia** thinks the monitoring mechanism should be different.

Certain members of the group raised the question about the legal possibility of a solution that entrusted the monitoring mechanism to the Human Rights Committee. The **International Commission of Jurists** (ICJ) sees that this might lead to a major problem, as it would require an amendment to the ICCPR. **France** wants **Switzerland** to explain its proposition of a sub-commission.

Germany asks how to assure the adhesion of States who are not members of the ICCPR.

The **International Federation of Human Rights** (FIDH**)** is shocked by the numerous delegations who seem to want to entrust the monitoring mechanism to the Human Rights Committee when there is no reason to believe that this would be the most simple, least expensive and most efficient than a new body. The President intervenes several times to emphasise the method adopted, which makes it first necessary to determine the needs of the monitoring mechanism. The **ICJ** supports this method.

Canada declared in favour of an additional facultative protocol to the ICCPR, but believes that the question of the organ raises the problem of adhesion and perhaps an amendment to the ICCPR. In principle, the Canadian delegation believes that the importance of enforced disappearances merits an amendment to the ICCPR. Equally, the **Czech Republic** suggests the possibility of adopting a facultative protocol.

ICJ is of the same opinion as Mr Amor on the subject of the political nature of the choice between diverse possibilities. At the same time the NGO emphasises the idea of a sub-committee which would require its capacities to be reinforced. It recalls the communication delays of the Human Rights Committee, which are an average of 5 to 7 years and up to 15 years.

Article II-O: for **China**, the notion of "privileges and immunities" is unnecessary here if the monitoring is entrusted to the Human Rights Committee.

The report question: article II-A

The expression "to warn" is condemned by **China**, **Egypt** and **India**.

Numerous delegations believe that the initial report is not sufficient and that there must be a monitoring. Among these States some would choose to put into place an obligation to make periodic reports. The periodic nature is proposed at one or two years (**Belgium**, **China**, **USA**), both options were considered sufficient by certain delegations (**Australia**). Other States are more favourable to a more flexible form based on reports (**Argentina** and **Chilli**) or complementary information demanded on an *ad hoc* basis by the monitoring mechanism (**Italy**).

Certain delegations support the principle of monitoring without specifying a mechanism for it: **Germany**, **Chilli**, **Belgium**, **Spain**, **Mexico**, **Czech republic**. Supporting these delegations, the **ICJ** confirms that in its January Report it said the delegations tended towards a request for information when it was needed. **Manfred Nowak** supports the possibility to ask for further information. In his opinion, this procedure should serve to inform the monitoring body the putting into place of a principle of universal competence for enforced disappearances.

Algeria said it had no opinion on the matter.

Canada believes, on the other hand that periodic reports are not appropriate, articles IIB et IIC, constitute also a form of monitoring.

The **Czech republic** declares that the expression "to whom he can reply" of paragraph 3 should be replaced by "to whom he can make comments".

Articles IIB and IIC:

Emergency Procedure: article II-B

A risk of doubloon between the Working Group on Enforced Disappearances (WGED) and the monitoring body for the emergency procedure is raised by **China** and **Switzerland**. **Argentina** recalls that in this respect the working group does not have a permanent mandate. In an eventual co-ordination between the two organs, the Argentinean delegation evokes the co-ordination put into practice between the Committee Against Torture and the Special Rapporteur.

The **USA** judges that the expressions "manifestly lacking in founds" is inappropriate in paragraph 2.

The necessity to assure the speed of the procedure is underlined by **Greece**.

Enquiries, article II-C:

The **USA** wishes that the question of reports between the members of the monitoring body and the State visited will be explained in the text, by a re-established procedure. According to **Manfred Nowak**, it is necessary to precise what will be the reports of the monitoring body to the working group. **India** proposes that in this respect the working group could, in certain cases, send an incident to the monitoring body.

Some delegations insist on the importance of the condition of the agreement of the State visited: **Algeria**, **Cuba**, **USA**, and **India**. **Belgium** proposes that States should give reasons in cases of refusal.

Into paragraphed 3, **Japan** wants to add to the following expression ".. after having consulted the State Party, can notably...". He suggests writing: "If the State Party agrees to the investigative mission, it shall provide the [monitoring body] with all the facilities needed for the performance of its task. The [monitoring body] may, after consultation with the State Party, in particular :…"

On the other hand, **China** asks about the opportunity for enquiries.

Individual communications – article II-C(a)

Switzerland is questioning whether it is necessary to establish a procedure for individual communications regarding article II-B and II-C, when the Human Rights Committee, who Switzerland would like to see invested with the facility to follow up this instrument, already has this capability. Conversely, the **ICJ** considers this procedure to be fundamental.

Canada is of the opinion that in cases where complaints are brought against a large number of people, the complaint system is perhaps unsuitable. The text of this article, according to Canada, is too detailed.

Numerous delegations criticise the use of the term 'serious lapses': **Belgium** and **Canada** consider this to be unclear, as do **Argentina**, **France** and **Switzerland**. **Mr Nowak** agrees with these delegations. Moreover, the Argentine delegation emphasised the origin of this expression, which is drawn from the Geneva Conventions, while this instrument concerns human rights. Argentina is proposing that article II-B be re-drawn.

The **FIDH** agrees with the delegations mentioned above and proposes that the term 'serious' be deleted, and the **ICJ** agrees.

Spain's view is that the use in article II-C(a) of 'State party' should be eliminated.

Manfred Nowak points out that if an optional protocol of the ICCPR is adopted, this article will not be necessary, as it corresponds to article 5 of optional protocol 1 of the Covenant. He adds that this procedure seems more inspired by the 1503 Procedure than by the idea of a real individual communications procedure.

Canada believes that more people should be given the capability of presenting communications. The **Czech Republic** believes that here it is possible to speak of 'victims'.

Submission of the Secretary General, article II-C(b):

Belgium and **Switzerland** have declared themselves to be in favour of article II-C(b). **Belgium** adds that the Secretary General could refer this to the Security Council, which in its turn would be in a position to refer it to the International Criminal Court. According to **Manfred Nowak**, it is possible to make the link between the follow-up organisation and the political entity of the UN represented by the Secretary General, and this link already exists in the form of the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention against Apartheid.

The **United States** is asking for clarification on how to proceed with this submission. The **Czech Republic** expressed its concern that this will overlap with the task of the High Commissioner. **China** is not in favour of this submission, and neither are **Algeria** or **Egypt**. According to the **Algerian delegation**, the Secretary General is not bound to intervene in this matter, as human rights are a matter for the Economic and Social Council (ECOSOC).

Article II-E

Several delegations would like to see the expression 'loss of liberty' replaced by 'enforced disappearance': namely **Australia**, **Canada**, **India**, the **Czech Republic**, and the **United Kingdom**. The **ICJ** expressed its agreement with this suggestion.

Annual report and publication of the observations of the follow-up body: Article II-F

Article II-F is supported by **Switzerland**, which believes that this 'Sword of Damocles' hanging over States is necessary. **Nigeria** raises the question of the profitability of this measure. For the **Czech Republic**, paragraph 2 of this article is unclear with regards to article II-E.

Issues of confidentiality in part II

For **Canada**, the follow-up body will not be capable of fulfilling its mandate if confidentiality requirements are pushed too far. Putting such stress on confidentiality seems to be an out of date measure. **Mexico** also asks that this issue of confidentiality be reviewed, and **Chile** stresses its disagreement, giving as a reason the preventative effect of publicity (notably during enquiries). It

would be a step back to say that the procedure in article II-C(a) is confidential. This does not fit with the changing framework of human rights. **Argentina** is of the same opinion, and re-states that the fundamental objective of the follow-up body is to seek the person, a basic element of this type of instrument. This is a procedure that would not be easy if it had to function under strict confidentiality rules. The mandate of the WGED is to obtain information from 'reliable' sources, but the principle of confidentiality does not apply here. The countries where there have been problems with disappearances know that searches have to be accompanied by a certain amount of publicity. The **Czech Republic** supports the idea of publishing some decisions. The **FIDH** also wishes that confidentiality be limited and in any case should not apply to the procedure of taking observations arising from the individual communications procedure. The **ICJ** is of the opinion that the follow-up body is forming a legal quasi-precedent and that this fact should be publicised, particularly because of its potential pedagogical value, and it would like to see all mention of confidentiality excised.

Making exhaustive use of domestic measures

Spain considers it necessary to include in articles II-B§1 and II-C(a)§1 a condition that all domestic measures be exhaustively used. **Egypt** and **Nigeria** support this position. **Mexico** hopes that the instrument follows in this respect the practice of existing working groups, which do not require that all domestic measures be exhaustively used. The **Czech Republic** is in partial agreement, giving the opinion that one should not, in certain cases, demand that all domestic measures are exhaustively used.

The **FIDH** hopes that the meaning of the term 'effective' in article II-C(a) will be clarified, such that it will be clear that this term defines all cases where the rules on the exhaustive use of domestic measures will not be imposed on the state in question.

According to the **ICJ**, articles II-B and II-C which are brought to the group's attention are designed to propose an effective solution through a strengthened international procedure, a kind of international *habeas corpus.* The NGO is convinced that the rule on exhaustive use of domestic measures is inadequate, as this is not a question of establishing the State's responsibility but of bringing back the person.

Other: General Remarks

Mexico believes that regulation of this body should be established. The necessity of having a strong and effective body is stressed particularly by **Argentina**, **Belgium**, **Chile**, **France**, **Italy**, **Mexico** and **Nigeria**. The **Chilean delegation** emphasises the preventative function of the follow-up body. **Cuba** hopes for a strong, efficient and independent body, which is geographically representative.

Communication between states:

Argentina is not in favour of the inclusion of this mechanism.

Protective measures:

The **ICJ** points out the opportunity for establishing a protective measures procedure, inspired by the project of the 1998 Convention. **Manfred Nowak** said he was pleasantly surprised to see such convergent views on the procedures to be established.

5th October 2004

On this date the working group examined Part II of the instrument's plan, which relates to the functions of the follow-up body.

Mr Amor agreed with most of the observations made by **Manfred Nowak**, particularly on the excision of 'loss of liberty' (which is also desired by **Syria**) and on the adjective 'serious' qualifying 'lapses' (an argument also adopted by **France** and **Belgium**, among others).

On the other hand, on the subject of the functions delegated to the Secretary General, **Mr Amor** was confused. The conventions against apartheid and genocide only mention the possible intervention of 'competent bodies' and not of the Secretary General in particular.

Is it necessary to specify a certain body? In terms of the coherence of legal precedents, selecting a

new body is not the most sensible course of action. The creation of a sub-committee of the Human Rights Committee (HRC) could be envisaged, as could a court charged with following up the question of enforced disappearances. In terms of reporting and individual communications, the legal precedent of the HRC is well established in the area of enforced disappearances. There is no mechanism within the Committee's framework to deal with urgent referrals; at most there are protective measures which could become emergency measures in certain circumstances. The same situation exists for inquiries: the HRC is not really familiar with this procedure.

So, if the HRC is chosen, there are questions that should be clarified, while others have already been addressed. In any case, three fundamental questions should be examined: which body? Which functions? Which procedure?

The president re-stated that discussion of the form the body should take had been postponed until the end of the session, to allow concentration first of all on its substance. The working group's task is not to analyse the functions of the HRC. The choice of body cannot be made until after legal consultations.

Mr Gottlicher described the experience of the Working Group on Enforced Disappearances (WGED) and stressed that the working group asks for the greatest possible detail on the disappearance and finds out what measures have already been taken to discover the fate of the person in question. The source must be reliable, but this does not constitute a legal requirement: rather, it is simply a principle the working group has laid down for itself. The mandate of the working group is universal.

Article II-C(a): the confidentiality rule may vary according to the circumstances (protection of sources, for example).

For **FEDEFAM** (the Latin American group of families of the disappeared) the presidential project marks a major step forward. Disappearances are still happening, and the setting up of a restrictive legal instrument along with a follow-up body is essential. The families of the disappeared were shocked to learn that the question of the cost of the body could be a determining factor.

The **Permanent Assembly of Human Rights** (PAHR) wishes for an autonomous process endowed with the power to make its own decisions. Are existing bodies capable of ensuring that this complex function is performed? Moreover, the cost criterion is not useful. In any case, it is necessary to go further than the simple presentation of reports: the follow-up body must be able to react rapidly and be able to attend on the ground.

The PAHR declared itself in favour of an autonomous Convention. **AFAD** mentioned the example of Sri Lanka. The families of the disappeared need a restrictive autonomous instrument, endowed with effective powers of control. The relatives of the disappeared expressed support for the positions expressed by the other NGOs: the necessity to adopt an autonomous convention and not an additional Protocol for the ICCPR. It is also fundamentally important that the follow-up body be given powers of inquiry. **RADIF** (the African Network against Forced Disappearances) considers that most of the national initiatives still fall short of the achievements of RADIF. Establishing the truth is a fundamental and elementary right for the families of the disappeared. It is sceptical about the choice of the HRC as a follow-up body. The financial costs described do not reflect reality: the creation of an autonomous body would not be more expensive.

The President wished to recall some principles, which should guide the group's work:

1. We are only speaking of enforced disappearances, and we are not attempting to correct other judicial problems with the establishment of the legal instrument that is the core work of this group.

2. The current text does not imply that useless constraints on States should be created: maximum flexibility is sought.

3. The text draws from three sources: International Humanitarian Law, the Universal Declaration on Human Rights, and the International Criminal Law: the main source may well be the second, but numerous aspects of the criminal law appear in the text. From this point of view, the question of the appropriateness of the follow-up body merits examination. In any case, the idea of the follow-up body at the start of the process was much more modest than that which has currency now: it was much more inspired by the workings of the working group on forced disappearances than by those of the HRC. The main idea is that of the early warning and of being able to act urgently, and not

assessing the efforts of States in general to protect people against enforced disappearances.

In any case the first projects did not mention individual communications. As for the submission to the Secretary General, this provision only reflects the provision relative to the crime against humanity initially contained in the instrument: its aim is purely formal.

4. The spirit of pragmatism, which has perfused the working group, should be maintained: for example, concerning the time elapsed between the signature and the presentation of the 'initial' report. As for confidentiality: why should States be considered *a priori* suspect, when they themselves intend being bound by these legal obligations? In this project, the only goal is to protect people against enforced disappearances, and why not base this on a foundation of trust? The follow-up body will only be a catalyst; this is not about judging States. The follow-up body is there to observe matters with an expert legal eye, and to engage States Parties in dialogue. The issue of periodical reports can even be questioned: why would these be needed?

In the end, accepting communications could become optional in order to meet the demands of all, and in so far as the specific function of the instrument is fundamentally to receive early warnings to help combat this 'crime where time stands still', as the expression of **Louis Joinet** has it. This is more of a permanent observing body than a means of judging States, hence the possibility of establishing a permanent secretariat. The idea of sanctions should not dominate the work of the group.

Article by article scrutiny

Manfred Nowak does not wish the obligation to produce periodical reports to be included. The solution would be to refer to article 40 of the ICCPR: one initial report and then one each time the follow-up body requires, i.e. there should be an *ad hoc* examination of the situation.

The Presidency clarified that once the initial report is sent, the dialogue between the State and the Committee is now permanent, and it is therefore unnecessary to mention possible subsequent reports in the provisions. The **United Kingdom** stressed the necessity of permanent dialogue, as did **Greece**, which made the proposal that the follow-up body should be made into a permanent

observer on matters of enforced disappearance: **Belgium** agreed with this position.

According to **Switzerland**, whatever form the instrument may take (a Convention or an optional Protocol) the obligations on States will be exactly the same. The delegation argued for an optional Protocol for the ICCPR, in so far as an enforced disappearance represents the violation of six to eight of the rights contained in this Covenant. There is therefore a close tie between them. This choice would favour continuity, and would be in keeping with legal precedent. The follow-up body could therefore be a sub-committee of the HRC. Several delegations agreed with this proposal, notably **Costa Rica**.

However, **France** explained that if the obligations placed upon States are identical, then the extent of a Protocol is not the same as that of an autonomous convention, as it would immediately exclude the States not party to the Convention. France wishes for an autonomous follow-up body (**Estonia**, **Cuba**, **Argentina** and **Chile** agree with this). France added that drawing on article 17 of the CAT would avoid the risk of incoherence, which had been pointed out by some parties: this framework would enable states to propose the same experts for different Committees.

On the suggestion of **Argentina**, most of the delegations said they were in favour of only one report being submitted, followed possibly by supplementary information as required by the follow-up body: **Switzerland**, **Chile**, **Italy**, **Mexico**, the **United Kingdom**, **France**, **Greece**, **Belgium**, **Bolivia**, **Ecuador** and **New Zealand** expressed this view.

Many emphasised the necessity of follow-up, particularly with regard to the establishment of and respect for good practice, and as a source of inspiration. Only **Russia** and **China** were in favour of simply adjoining a chapter on enforced disappearances in a pre-existing report. Almost all the delegations are flexible as to the period of time between the ratification of the instrument and the delivery of the Report; the majority would prefer a period of at least two years (**Switzerland**, **Ethiopia**, **India**, **Algeria**, **France**, **Syria**, **Pakistan** and **Cuba**). Some support this argument by invoking the delay inherent in conventional mechanisms for examining Reports (this was vigorously opposed by **Mr Amor**: only twelve reports currently await examination by the HRC and all are projected for 2005 at the latest) and the inability of States themselves to produce them in this time period, even when they do not simply refuse to hold to this pledge (as is the case of 92 States before

the HRC, according to Mr Amor).

Some delegations would like to see the term 'warned' ('mise en garde') in articles II A and II B § 3 excised: **Ethiopia**, **India**, **Egypt**, **Pakistan** and the **United States** expressed this view. **Egypt** thinks it necessary to put in place a solution for a case where the State concerned does not co-operate.

The delegations are divided as to the reference to the SGNU in article II. C 3 : **Ethiopia**, **Egypt**, **Algeria**, **Pakistan** want to remove it ; **Belgium**, **Costa Rica**, **Chili** and **Switzerland** want to keep it whilst defining its scope. As a result the **Presidency** stresses that its intention was not to grant to the SGNU new powers, but to assign a special jursidiction to the monitoring body. With regard to this, **Saudi Arabia** asks whether the conventional bodies have the right to address the SGNU.

Spain submits a draft modifying article II A § 1. It also proposes a reference to the exhaustion of domestic remedies in article II B. This stand is opposed by the **Presidency**, as well as by **France**, **Belgium**, **Costa Rica** and **Switzerland** with regard to any part of the process involving urgency, but it is nonetheless supported by two delegations : **Egypt**, **Netherlands.**

New Zealand – supported by **Australia**, and also by **India**, **Japan**, **Norway** and **Pakistan** – declares itself in favour of an optional Protocol to the ICCPR and mentions the supplementary Protocol to the Convention on the Rights of the Child, as a source of inspiration. It also questions whether the body which is being constituted conforms to the present reform of the conventional UN mechanisms.

Following the **United Kingdom**, **Estonia**, and **Chili**, declare themselves in favour of replacing the term "committment" with "obligation", in II. O § 1 in particular. **Egypt**, **Ethiopia** and **China** request that article. II F § 2 be deleted, contrary to the wishes of **Estonia** and **Switzerland**.

Algeria feels that the notion of "interest" in acting for victims also needs to be discussed in order to be clarified.

The question of confidentiality has also given rise to much debate. **Switzerland** has no objection to

the procedure being confidential but stresses that the outcome however must be know to all. **Argentina** stresses that retaining the confidentiality of the source might be a matter of security, but that the confidentiality of the procedure is not necessary.

The **United States** wonders whether the United Nations Convention on the privileges and immunities of its workers is applicable. It also proposes the deletion of the term "to grant assistance" in article II O § 3 and asks that the expression "call on" be modified in order to make article II B § 3 less strong.

Examination of financial effects :

Cf. document produced by the Secretariat on which **Argentina**, **Sweden**, **Saudi Arabia** and the **United States** wish more information, whilst they do not dispute the figures.

6th October 2004

(continuation of discussions on Part II)

L. Joinet : According to M. Joinet a clear distinction must be made between content and container. As regards the content, four points should be raised :

1. There is the question regarding initial reports and possible additional reports. In this connection, one should certainly not, in his opinion, ignore the reaction of States which, themselves, have expressed their concern about an "increase" in reports following the obligations imposed by this new instrument.

2. The second point concerns the exhaustion of domestic remedies (hereafter EVRI). In the context of enforced disappearances, the exhaustion of domestic remedies (EVRI) is not a necessary

condition, least of all in the case of a warning procedure. More emphasis should, on the other hand, be given to effective remedies.

3. With regard to the modified article II-C, it is certainly necessary that the State concerned can object to an investigation mission in terms of the wording in the paragraph, but one must also make sure that this new legal instrument does not produce bad faith.

4. Finally, the last point raised by M. Joinet concerns confidentiality of procedure. Paragraph 5 of article II-B which puts forward this principle should be qualified. In fact, for reasons of credibility, the final phase should be public. It is then a case of relative and not absolute confidentiality.

As regards the container, M. Joinet gives a series of arguments in favour of an autonomous monitoring body:
- argument for avoiding overloading the Human Rights Committee;
- argument of the cost following a valuation made by the secretariat of the working group;
- the Human Rights Committee is already a sufficiently complex structure which should not be burdened any further;
- non-legal argument: an autonomous monitoring body reinforces the visibility of this new instrument.

Manfred Nowak begins by giving a general impression on the debates of the last two days by identifying two schools of thought. On the one hand there is the school which adopts a human rights approach, and on the other hand there is a school which adopts a humanitarian rights approach.
Subsequently, M. Nowak makes several remarks relating to the stage spent on the examination of the document article by article :
- Article II-F introduces a new concept in relation to other instruments concerning human rights in as much as it provides for the publication of an observation (made by the monitoring body regarding a situation about which it should know) when the State in question refuses to co-operate. In other words, one is talking about a kind of sanction in the event of non-cooperation.
- with regard to article II-B, there is a risk of overlap between the monitoring body and the work group on enforced disappearances.
- several delegations have expressed their opinion on the role played by the Secretary General as

envisaged by article II-C ter. But M. Nowak states that this article is simply a referral to the Secretary General and does not attempt to define what he should do. In fact it makes it the responsibility of the Secretary General to make an adequate response in accordance with the powers conferred on him by the United Nations Charter.

Following these speeches, the **Presidency** agrees to accept that the present text is perhaps not sufficiently clear with regard to the distinction between, on the one hand, classic procedure and, on the other hand, the new emergency procedure.

Speech by NGO's:

FIDH straightaway makes it known that it is ready to help all the delegations in progressing the development of this instrument. After emphasising the role of the NGO's as first-hand "users" of the international procedures for protecting human rights, it makes a plea for the creation of an autonomous monitoring body. In this connection, one should not confuse the two arguments which are quite distinct. One concerns the conventional supervisory bodies conventionnels which already exist, whilst the other concerns the creation of an independent and effective body in the form of the instrument being studied in this work group. Setting up a new autonomous committee in the future instrument does not detract from pursuing, within other areas, the argument relating to the reform of the existing mechanisms. With regard to the criticism of the idea of a new body expressed by some delegations, the FIDH does not see any danger of inconsistency between the precedents of the different supervisory bodies. On the contrary, interaction amongst them has up till now guaranteed consistency of precedents.
FIDH believes that what is at stake in creating an autonomous body is both the principle of equality and also respect for the dignity of the victims of enforced disappearances. Failure to create an autonomous body would result in destroying the normative reasoning which up till now has been followed by the United Nations. How can one explain the creation of a body for racial discrimination, for torture, for migrant workers etc. but when the question of enforced disappearances arises, it is felt sufficient to create a "sub-committee" of the Human Rights Committee. As regards confidentiality, the FIDH believes that it is the interest and protection of victims – and not States – which should guide the work group in this matter. In this very way the EVRI should be rejected in the form of a warning procedure. Finally, the FIDH gave its support to

article II-C ter which introduces the possibility of advising the Secretary General in the event of an enforced disappearance carried out in a generalised and systematic manner.

First, the **ICJ** announces it has submitted to the Presidency of the work group a written proposition on part II of the instrument. Two aspects are worth accepting :
- article II-C-ter : this article covers the role of the Secretary General, and in particular his duties with regard to enforced disappearances. The ICJ in fact shares the view of Manfred Nowak who had suggested that the Secretary General had already played a role in other instruments relating to human rights, mainly in article 40 of the ICCPR. Here it is not a question of widening the power of the Secretary General, the new instrument merely allows the possibility of referral to him. But the Secretary General's jurisdiction will always be defined by the Charter of the United Nations.
- monitoring body : the ICJ stresses the complexity of a possible enlargement of the Human Rights Committee and accordingly rejects this proposal. With regard to the creation of a sub-committee (itself linked to the Human Rights Committee) it is a question of knowing how and on what legal basis the Human Rights Committee and the new sub-committee would then share the tasks and duties concerning the matter of enforced disappearances. In short, this is why the creation of an autonomous monitoring body constitutes for the ICJ the most effective solution which could provide the best protection for victims of enforced disappearances.

General Assembly of Human Rights, on behalf also of the **AFAD**, the **RADIF** and **FEDEFAM**, draws attention to the question of confidentiality of procedure. Contrary to popular belief, the nature of confidentiality rarely encourages "co-operation" with a supervisory body from the States concerned. The comparison between the experience of Chile and that of Argentina speaks volumes in this connection. For years Argentina stayed with the confidential procedure, whilst Chile, which did not enjoy the same political alliances, was subject to a public examination before the Commission on Human Rights. In Argentina, confidentiality led to criminals going unpunished and the disappearance of victims, whilst publicity was for Chile a guarantee of protection and a factor in improving the situation.

FEDEFAM believes that the new instrument represents significant progress in the present system for protecting disappeared persons as the instruments currently in force do not offer sufficient protection for the victims of this evil practice. To guarantee the effectiveness of this new system of

protection, the FEDEFAM thinks that the creation of an autonomous monitoring body is an absolute necessity. With regard to confidentiality, this should be reserved for those persons who admit to their wrongdoings, but not to the State which has perpetrated the crime.

Finally, there are some short speeches by various delegations. **Spain** is anxious to clear up some misunderstanding over its suggestion regarding the introduction of EVRI. In fact, Spain specifies that it is not suggesting the exhaustion of all domestic remedies, but envisages effective remedies.

The **Czech Republic** raises the issue of the nature of the instrument. In the event of the adoption of a protocol to the ICCPR, some reflection would need to be given to the necessity of having to submit independent reports (as opposed to reports which have to be submitted to other supervisory bodies) on the part of the States. It might in fact be enough to produce documents supplementary to the reports submitted to the Human Rights Committee. With regard to individual communication, the Czech Republic requires more precision in the criteria regarding admissibility.

As for the **Polish delegation**, it believes that the presentation of a single report does not constitute sufficient guarantee for ensuring the implementation of this instrument. What in fact would be required would be additional reports which would have to be provided at the request of the monitoring body. This solution would then combine both the effective implementation of this new instrument and the minimum increase in the burden on the States regarding their obligation to have reports presented.

Japan returns to its speech on the so-called humanitarian procedure as proposed by articles II-B and C. Whilst supporting this procedure, the delegation is keen to introduce a system of intervention which would be effective. It is, moreover, made clear that the case in point does not involve a contentious procedure. It seems clear that the EVRI is not suitable in such a system and that confidentiality should be considered from the perspective of the protection of the victim and not of the State. Broadly speaking, the delegation is in general satisfied with the approach chosen in the present text, but would nevertheless delete article II-C bis. With regard to article II-F, Japan maintains that transparency should not be considered as an end in itself. On the contrary, the accent should be on the protection of the victim and his/her family. That is why paragraph 2 of this article should be completed as follows: "…, the [monitoring body] may decide to make public an

observation of the issue or situation before it, after serious consideration of the possibility that this may jeopardize the life and security of the disappeared person, his or her relatives and any other persons concerned".

As for the **Finnish delegation**, it believes that the crime of enforced disappearance constitutes a serious violation of human rights. Consequently this instrument should have an effective monitoring system. As to the structure of the monitoring body, this is a question which is directly linked to that of the body. For technical and legal reasons, Finland is not convinced that the Human Rights Committee is the appropriate body to supervise the implementation of this instrument. The idea of creating a new body should not therefore be rejected *a priori*, bearing in mind a possible sub-committee such as that proposed by Switzerland. Finally, Finland declares itself in favour of following up initial reports which should, themselves, be submitted within two years and it specifies that the investigation missions should not be dependent on the goodwill of the State concerned.

In its speech, the **Russian delegation** raises firstly the preventitive rather than punitive aim of the instrument and insists, in this connection, on the fact that the party States are obliged to transcribe the obligations, incumbent on them by virtue of this instrument, into their respective national laws. It is also specified that State responsibility is the issue here as this is what is the basis of the violation of this human right. With regard to the missions undertaken by the monitoring body, the Russian Federation, wonders about the cost of these, and opposes the solution contained in article II-C. There is a danger of duplicating the work of the WGEF. In article II C bis, there is a repitition of what is contained in the optional Protocol to the ICCPR.

As to the role played by the Secretary General, the Russian delelation does not support this and envisages, following the stand taken by Algeria, a modification of the Charter of the United Nations. With regard to the nature of the monitoring body, there is no need to rush things but it could already be said that the Human Rights Committee could itself create a subsidiary body, by virtue of its internal regulations.

Regarding the structure of the monitoring body, **Canada** agrees that it is necessary to turn to the Human Rights Committee, otherwise there is a danger of the system of committees collapsing. Instead of widening this body, it would be better to ensure sufficient resources for the 18 existing

experts to guarantee the smooth running of their new tasks. Canada, like Russia, believes that the Human Rights Committee could create, within itself, a subsidiary body, without the necessity of modifying the Treaty. Canada also welcomes article II C ter which allows matters to be referred to the Secretary General and rejects the concerns voiced by some delegations in this connection (a stand also backed by Estonia). Finally, the introduction of an inter-state communication system is proposed, following the example of the ICCPR, as well as the possibility for NGO's to present complaints on behalf of a victim. At this stage, **Manfred Nowak** interrupts to underline two propososals which appear particularly interesting to him. These are, on the one hand, the notion of dividing tasks between the Human Rights Committee and the new monitoring body, an idea which is worth exploring further, and, on the other hand, the Finnish proposal regarding the acceptance by the State concerned of on the spot visits.

Following this, the **British delegation** backs the proposal of the Finnish delegation and, with regard to article II-A, declares its agreement with the **Australian** idea. Briefly, for **France** the question arises as to knowing whether the **Swiss** proposal regarding the creation of a sub-committee and the relationship between it and the Human Rights Committee was similar to the modus vivendi existing between the CAT and the international sub-committee created by virtue of the optional Protocol to the Convention Against Torture.

The **United Kingdom** supports the Japanese approach to the question of confidentiality as well as Japan's proposal to amend article II-F. This delegation thinks it better to defer the question of article II-C ter until the discussion regarding the definition of the concept of crime against humanity.

France expresses doubts as to the feasibility of the Swiss proposal to create a "sub-committee" and asks for additional explanations.

Estonia expresses its support for the idea of an instrument which, above all, is supposed to be humanitarian. The monitoring body should, according to the Estonian delegation, play a role above all in the warning procedure. Confidentiality should apply to the procedure but not to the outcome. Estonia supports the proposal for article II-C ter.

India is concerned by the maximalist nature of the text submitted to the working group. It would be

preferable to make optional the acceptance of the jurisdiction of the monitoring body. India also expresses its worry about the absence of any reference to the EVRI in article 2 B, which is a way of prejudicing the weakness of national administrations.

After these speeches, the **Presidency** concludes part II of this instrument and proposes to deal with the first title.

Part I

According to the **Presidency** the aim of this sitting is to come as close as possible to an agreed form for the first title. This should be done by an article by article discussion.

Introduction:

The **Presidency** explains that it has chosen to write a very short, concise and incisive introduction which only mentions elements which are essential and absolutely indispensible.

Comments:

Bearing in mind the three sources on which this document is based, that is human rights, international humanitarian law and internation criminal law, the **Russian delegation** demands that reference be made to other legal instruments such as the ICCPR, the Geneva Conventions of 1949, including the additional protocols of 1977, as well as the Convention Against Torture. Moreover, it should be understood immediately that enforced disappearance may constitute, under certain circumstances, a crime against humanity, which would necessitate an explicit reference to the Rome Statute.

In response, the **Presidency** emphasises the short and concise nature required of the introduction so as not to overload the text. This restraint however should not exclude essential concepts in the introduction. In spite of the presidency's request not to linger too long on discussing the introduction, several delegations wish to speak.

Japan, backed by **Switzerland**, **Sweden** and **France**, suggests underlining more explicitly the right not to be subjected to enforced disappearance. **Sweden** suggests the inclusion of a reference to article 7 of the Rome Statute. **Argentina** is keen to make mention of the United Nations Charter, the Universal Declaration of Human Rights and the Vienna Convention as well as some instruments of international criminal law. According to **Chile**, it is absolutely necessary to place emphasis on the preventive nature of this instrument. In addition it proposes an additional clause which reads as follows : "Determined to protect persons from enforced disappearance in accordance with international law". As for the **American delegation**, it expresses reservations as to the concept of crime against humanity and does not want this to be mentioned in the introduction at the present stage of discussions. In this connection, the **Presidency** notes that it was in fact the United States which had inserted the crime against humanity into the introduction at the previous sitting instead of reference to it in the body of the document. **Manfred Nowak** voices his concern that the last paragraph could could be misleading. What in fact it should refer to is the family of the victim rather than the victim full stop.

The **ICJ** interrupts to emphasise the importance of explicitly mentioning the right of a person not to disappear, as well as the right to know what has happened to the disappeared person, a right guaranteed by article 32 of the Protocol Additional I to the Geneva Conventions. If this right is valid in wartime, then a fortiori it is valid in peacetime.

First article:

Angloa notes the not insignificant progress and proposes solely the insertion of the words "in the exercise of their duties" to clarify the notion of agents of the State. **Sweden** is keen to replace the definite article "the" with the indefinite article "a" when speaking about the State.

According to the **Netherlands**, article 1 should repeat the definition contained in article 7 of the Rome Statute (an opinion backed by **Japan**, by **Austria** which nonetheless said it remains flexible in this connection and by **Switzerland**, which says it does not want to go over this again). In addition article 2 para 2 of this document, which deals with non-state players, should be inserted into article 1. The **President** interrupts on the first issue to point out that there is no question of repeating the definition from the article of the Rome Statute, as all the States are not parties to the

Statute.

The **United Kingdom** thinks that the concept of "exclusion from the protection of the law" is not precise enough.

Japan raises some points which are considered problematic: imprecision of the term "deprivation of freedom", the need to reword the phrase "excluding him/her thus from the protection" by "excludes this person from the protectin of the law".

The **Presidency** interrupts to emphasise that enforced disappearance could result from legal detention. It also stresses the fact that the working group has created its own definition of enforced disappearance which comprises the following elements: 1. deprivation of freedom of whatever nature (legal or illegal); 2. act committed by agents of the State; 3. denial of acknowledgement of the deprivation of freedom. But, only a combination of all these elements qualifies as a disappearance in the sense of this instrument. As a result this means that the disappeared person is completely excluded from the protection of the law.

India declares itself in favour of the insertion of an element of intent in the definition, the disappearance having to be carried out with the intention of excluding the person from the protection of the law for a long period. The **Czech Republic** also wants to insert an element of intent in the definition which amounts to the idea of the intentional commission of the act. **Mexico** voices its firm opposition to the insertion of any element of intent in the definition, *a fortiori* if this intention assumes a temporal dimension. **Argentina** interrupting also on behalf of **Chile** supports the the President's proposal of article 1, which reflects the different definitions which exist in positive international law. **Canada** also expresses its general satisfaction and suggests, in answer to Japan's worry as to the vague character of the terms "deprivation of freedom" speaking about "all forms of deprivation of freedom". **Egypt** suggests mentioning the idea of "exclusion from the protection of the law" at the beginning of the article. The **United States** expresses its objection to the proposed definition, which it considers too wide and too vague, which would compromise in advance acceptance by this State of the instrument in its entirety.

The **Presidency** opens the session with a brief call to order. First, he says that no agreement has been reached as to the nature of the monitoring body over the past days. He laments the slowness of the debates despite the preparation of a new draft text following the last sitting of the working group. In order to hasten the discussion, the President proposes to the asssembly that the first title of the draft be completely scrubbed and an articles reserved when they are debated.

The debates begin with the examination of article 1 of Title 1 which defines enforced disappearance.

- **Article 1: definition of enforced disappearance**.

The **Czech Republic** supports the proposal of a definition of enforced disappearance different from that defined in the Rome Statute. Some points remain to be specified, principally on intentionality. **Mexico** proposes that the debates on this article should not be continued. A document in support of the President's proposal is drawn up by the delegation which proposes its next delivery. **Canada** is still concerned by the changes made to article 1 and is in agreement with the **British** and **Japanese delegations** who think that the given definition should specify the concept of deprivation of liberty "of whatever nature". According to the representative for **Egypt**, the idea of "exclusion from the protection of the law" has to be stressed in the elements defining enforced disappearance. In fact, the insertion of this element may resolve the question of demonstrating intentionality which is already implicitly understood in the willingness to deprive the disappeared of the protection offered by the law. So, according to Egypt, this element should be included at the beginning of the definition. **France**, referring to Egypt's proposal, asks that the criterion for exclusion from the protection of the law should not be accepted in the definition as an additional element of intent. Enforced disappearance is already an intentional act in fact, so adding a new criterion of demonstrating intentionality would only raise the level of proof. On the other hand, the delegation proposes that intentionality be integrated into article 2§1 and that the crime of enforced disappearance should be included in the national legislation of a State "when it is committed intentionally". **Switzerland** wonders whether the retained definition corresponds with the one given by the Human Rights Committee, this element possibly proving important if the method of an optional protocol was adopted. The **Presidency** reminds Switzerland that the discussion is no longer

on the nature of the instrument or of the monitoring body, but on the definition of enforced disappearance. Switzerland cannot reduce everything to the question of adopting an optional protocol. The **Russian Federation** insists that in articles 1 and 2§2 of the draft there should be a clear reflection of the non-state perpetrators of the crime of enforced disappearance. To this end, the representative proposes the deletion of any reference to perpetrators of enforced disappearance in the wording of article 1. According to the Russian Federation, that would considerably widen the scope of this article which, it feels, only deals partially with the crime of enforced disappearance. History has demonstrated that non-state perpetrators have also been responsible for these crimes, and it it therefore important for Russia that this consideration is not omitted.

NGO

The **ICJ** unreservedly backs the President's proposal. **Fedefam** also agrees with the proposal of the definition suggested in the working document. In this connection, the representative is keen to point out that in the crime of enforced disappearance, there are two principal elements :
1. the deprivation of liberty
2. the concealment of a person's fate
She suggests to the Presidency that it is possible that victims of enforced disappearances could give their evidence to this assembly so that the work group could assess the importance of these two elements.
The **Presidency** receives this suggestion with interest.
At this stage in the debates, the Presidency is anxious to make an non exhaustive list of the points highlighted in article 1.
- The question of placing in detention for a lengthy period was not accepted
- The problem of the idea of continuation of time: from what time can the enforced disappearance be characterised?

- Regarding the element of exclusion from the protection of the law, **Japan** proposes that this should be a constituent element, **Egypt** wishes to move this note to the start of the definition. The **Presidency** thinks that care should be taken not to link this element directly with deprivation of liberty.
- With regard to perpetrators, the **Russian Federation** proposes the deletion of any reference to

perpetrators of enforced disappearances.

In view of these developments, the **President** proposes not to return to the definition of the International Criminal Court: some States have not ratified the Statute and others are not keen to include the idea of crime against humanity.

Two solutions are suggested to make progress with the definition:
1. Redraft the wording of the 1992 Declaration by replacing "governments" with "State". This definition is very close to the proposed article 1 but specifies the deprivation of liberty "of whatever nature".
2. Amend the draft of the 1998 sub-committee which would mean that the idea of exclusion from the protection of the law, the very element of enforced disappearance, could be deleted.

The **Chairperson** reserved article 1.

Discussion of article 1 bis

The **Chairperson** recalled that the insertion of article 1 bis § 1 resulted from several proposals made by NGOs in particular. It related to the right not to be subjected to enforced disappearance. Paragraph 2 was taken from the previous article III-E from which only the reference to "exceptional" circumstances had been removed. Both **Angola** and **Switzerland** declared their support for the text of article 1 bis. The Swiss representative nevertheless wished this right to be reinforced by explicit reference to States' obligations: the obligation to take all legislative, administrative and judicial measures to punish enforced disappearances on its territory. This obligation could be inserted after paragraph 1. The **Chairperson** considered this reference superfluous and that it would serve no purpose. **Norway** proposed the addition of "including" in paragraph 2 in order to indicate that the list of "circumstances" was not restrictive. **Greece** expressed satisfaction in seeing this right mentioned explicitly in the instrument and suggested simply changing the tense of the phrase: "No-one shall be subjected to enforced disappearance". The **Chairperson** welcomed this suggestion and submitted it for immediate approval by the Working Group. The proposal made by **Greece** was adopted.

Article 2

Before beginning the discussion on article 2 of the draft, the **Chairperson** referred to two important items:

1. enforced disappearance as an independent offence
2. reference to non-State actors

The Chair suggested differentiating between these two items in the course of discussion.

Article 2§1: Enforced disappearance as an independent offence in national legislation. With regard to article 2, paragraph 1 the Chair recalled that during previous sessions several delegations had declared that they were unable to include such an offence under their national law. Nevertheless, the Chair emphasised the fact the definition included in article 2§1 was specifically founded on the notion of an "independent offence" with respect to the crime of enforced disappearance.

Mr. Nowak stated the importance of establishing an independent offence in this article, a principle that already appeared in the 1992 Declaration. The expert recalled that the article must create a specific obligation for States to legislate on enforced disappearance. For this reason there must be no amalgamation between articles 2 and 3; at the most the phrase "constitutes an independent offence" could be added to article 2§1. **Germany** believed however that this article allowed States significant leeway to decide whether or not to create an independent offence. The **German**, **New Zealand** and **Indian** delegations did not support the creation of enforced disappearance as an independent offence. The New Zealand delegation recalled that, when it ratified the Rome Statute, its country did not think it had to include enforced disappearance as an independent offence under its national legislation.

France proposed two arguments in support of the creation of an independent offence:

1. States must have better methods of combating this complex offence. A national judge responsible for judging the crime of enforced disappearance should not be obliged to assemble the various offences under criminal law that would enable the act of enforced disappearance to be pieced together and sentenced. Enforced disappearance should be instituted as an offence in its own right in order to avoid the fragmentation of legal proceedings.
2. the crime of enforced disappearance gave rise to exceptional dispensations under national law,

such as exemptions relating to public acts. Only the specific nature of the crime might justify such exceptions to national law. The **United States** declared that it was not opposed to making enforced disappearance an offence. It added that in American law the crime of enforced disappearance does not exist, but that sufficient elements existed for a person who has committed an act of enforced disappearance to be brought to justice and sentenced.

Congo referred to its national legislation and explained that its country had experienced problems of enforced disappearances and had encountered real difficulties, since the judge had no legal instruments for dealing with the offence. **Argentina** spoke in the same vein, as did **Chile**, and referred to the gaps in national law. In 1985 military leaders had been brought to court and found guilty of enforced disappearance, amongst other crimes. It had not been possible to sentence them, as this crime did not exist under the law of Argentina. It was therefore important that in States where such a crime did not exist, the future instrument should permit such a gap to be filled. The **United Kingdom** did not support the wording of article 2§1. Furthermore, **Ethiopia** suggested combining article 2§1 with article 3 for the sake of overall coherence of the text. In the same vein, **China** thought that articles 2, 3 and 4 of the draft should be linked. **Japan** proposed two points to the Working Group:

1. regarding to the form of the draft, article 2 could be linked to article 3.
2. regarding the substance of the draft, a State should be able to make the act of enforced disappearance an offence in itself, not its individual components.

Article 2§2

In order to rationalise the discussion the **Chair** proposed reconsidering the proposal made by the **Russian Federation** to remove any reference to the perpetrators, whether State or non-State, of enforced disappearances. In order to consider this proposal further, the Chair asked any States with alternative proposals to present them. Several States supported the inclusion of the wording "non-States agents". **France** emphasised the importance of dealing with agents of the State and disappearances perpetrated by organised, armed groups. It proposed inserting a new article in the third part of the text after III-O, stating that the instrument was without prejudice to the measures that States must take to punish acts of enforced disappearance perpetrated by non-State agents. **Peru** supported this proposal. **Algeria** recalled that enforced disappearances were often perpetrated

by groups that had no links to a State. The **Bolivian delegation** emphasised the importance of referring in the text to the responsibility of perpetrators with links to a State, and leaving it to the States the liberty to recognise enforced disappearances perpetrated by non-State agents. **Brazil** was concerned that the inclusion of this statement should not infer the direct responsibility of the State for these acts. **Angola**, **India** and **China** declared their support for the **Russian proposal** and **Angola** suggested that if it was not adopted a new paragraph should be inserted in article 1 referring to non-States agents. **Switzerland** proposed an amendment to the text under consideration, specifying that enforced disappearances were perpetrated by "groups of politically motivated persons". **Ethiopia** and **Turkey** supported this proposal but not **Brazil**, whose representative specified that these acts were not always politically motivated. **Mr Nowak** advised not taking too restrictive an approach that might exclude non-States agents and reduce the effectiveness of local remedies for victims, with the risk of the authorities backing out of their obligations. The expert supported **Angola's proposal** as well as that of the **Russian Federation**, which allows States not to be held responsible for acts committed by agents with which they have no links.

Conversely, **Japan** recalled that enforced disappearances are serious violations of human rights and constitute an abuse of power by a State. Enforced disappearance was primarily a State offence and this must not be forgotten in the definition. **Argentina**, **Mexico**, **Canada** and **Germany** declared their full support for the Chair's wording of articles 1 and 2§2, a true text of compromise. **FIDH** would have preferred that the wording of the instrument take this issue further so that the scope for protection could be expanded. However it supported the proposal for article 2§2 subject to consensus agreement by the Working Group. The **Russian proposal**, which would omit State responsibility for de facto bodies such as death squadrons, self-defence groups, etc, should not be included. On the other hand, in response to the concerns expressed by **Brazil**, it might be useful to differentiate between States' "direct" and "indirect" responsibility with regard to enforced disappearances. States were not subject to the same type of responsibility depending whether an act was perpetrated by their agents or de facto bodies or by private persons. **FIDH** had made proposals in this vein, and these were available to delegations if the draft of article 2 § 2 did not obtain consensus approval.

The **ICJ** considered that the **Russian Federation** proposal would cause confusion between two types of responsibility, and that would result in all acts of enforced disappearance being imputed to

the States. Such confusion should preferably be avoided. For the **Permanent Human Rights Assembly**, States are obliged to guarantee human rights whether by action or by omission. The Chair ended the discussion and retained three points:
- all members of the Group agreed that the question of non-governmental perpetrators should be dealt with in the instrument;
- all members of the Group agreed that the nature and definition of such perpetrators should not be considered (political organisations, armed groups etc);
- all members of the Group considered that the adoption of the provision should not exonerate a State from its responsibility where this applied.

Article 2 bis: discussion on enforced disappearance as crimes against humanity.

The **Chair** recalled that article 2 bis was a "statement" of the current situation concerning international law. Delegations that opposed the provision as it stood were given the opportunity to speak. **Angola**, **Algeria**, the **Russian Federation**, **China** and **India** asked for this article not to appear in the text but only in the Preamble to the future instrument in order to permit broad support for it and its truly universal application.

Argentina, **Chile**, **France**, **Italy**, **Greece** and **Estonia** did not support these States and insisted that article 2 bis and reference to a crime against humanity appear in the text. The **United Kingdom** suggested ending the article with the additional phrase: "a crime against humanity as defined in international law" and **Japan** proposed inserting the verb "shall" in the English text between "enforced disappearances" and "constitute". **Human Rights Watch**, the sponsor of article 2 bis, spoke on behalf of the **ICJ** and the **FIDH** and noted that the discussion on article 2 was positive. In fact, no delegation had contested that the practice of enforced disappearance, whether general or systematic, constituted a crime against humanity. It supported the United Kingdom amendment, which improved the article, and supported the modification proposed by Japan.

Article 3

Catherine Calothy opened the discussion by analysing the agreed text for article 3 and proposed possibly eliminating paragraph 2 (a), which merely illustrated the definition of the responsibility of

perpetrators. **Switzerland** and **New Zealand** supported this proposal. Switzerland presented a written proposal for reworking Article 3. **Chile** asked for the insertion in article 3§1 a) of the responsibility of "instigators" of enforced disappearances and proposed that there should be reference to the responsibility of perpetrators and "other participants", instigators and accomplices. **Angola** spoke in support of this addition and requested that States should be required not only to punish perpetrators but also to "anticipate" these acts. **Mexico** also wished to include "persons who knew of enforced disappearances". **Japan** emphasised the primary responsibility of a person who perpetrates the act directly or indirectly. **France** agreed that article 3 should be simplified by eliminating paragraph 2 a), and approved the proposal to add instigators in the list of perpetrators. France also proposed modifying paragraph 1 by replacing "are punished" with "are criminally responsible". The **Democratic People's Republic of Korea** had doubts about paragraphs 2 b. i) and 2 b. ii). It suggested reworking paragraphs 1 and 2 of article 3 by including in the former reference to the perpetrators of enforced disappearances, and in the second the forms of participation in the offence of enforced disappearance (commission, attempt to commission, conspiracy etc). In the same vein, **Ethiopia** considered that in the first paragraph of the text there was confusion between perpetrators and the act itself. The representative proposed restructuring the text by putting point a. in § 2 and point b. and point c. in § 1. **China** approved this proposal. The Chair retained article 3 for consideration at the next session of the Working Group and closed the fourth day of the discussions.

8th October 2004

Continued discussion on article 3.

Norway considered that the instrument must make the passivity of a superior officer an offence. The delegation pointed out that the provisions focusing on superiors are not applicable to non-State actors. **Austria** expressed satisfaction with the current wording of article 3. The delegation wished to see inclusion of the responsibility of superior officers. The **Russian Federation** echoed the words of **Ethiopia**, **China** and **New Zealand** on the problems that might be posed by article 3. It wished to see the phrase "in the context of national legislation" at the head of article 3. The **Chairperson** considered that it would not be appropriate to include this phrase since the aim of this exercise was not necessarily to leave national law unchanged.

India agreed with the concerns of **Norway**. As with **New Zealand**, it was troubled by the notion of "superior officer". The term "knew or ought to have known" did not correspond sufficiently to the delegation's concerns. It queried the notion of "superior" in paragraph 2 of the article and considered that this provision established a form of passive responsibility. **Costa Rica** considered that article 3, as it stands, confuses several levels of responsibility: complicity, conspiracy etc. Yet it relates to different levels of criminal responsibility. **Germany** considered that the proposal by the Chair represented considerable progress. It supported the proposal to remove paragraph 3 (a). It also asked whether it was necessary, in paragraph 1 (c), to refer to "conspiracy to commit an enforced disappearance". The **Chairperson** replied that this inclusion was very important since it related to "conspiracy" which is recognised in many countries. **Belgium** supported the current proposal with some minor changes. It supported the proposal to remove paragraph 2 a) and the reworking of the text proposed by Switzerland. It also considered it appropriate to replace "pursue and punish" with "criminally responsible". It expressed disagreement with the **Russian proposal** to insert "in accordance with domestic law" since this would depart from established international law. The **United States** submitted a written proposal on articles 2 and 3. This had not yet received official agreement from Washington and was therefore ad referendum. It dealt in particular with making the text dealing with justification of a received order more flexible, as it was considered to be too rigid as it stood (article 3 § 3).

Louis Joinet suggested separating the types of responsibility in the draft of article 3. The new draft would enable point a) of paragraph 2 to be removed. Point b) of the same paragraph would become point d) following amalgamation of i) and ii). The **Chairperson** thought that it was necessary to simplify the text with the aim of giving national judges more latitude without departing from the original principle. However, the notion of superior officer appeared to be a problem for certain delegations.

What should be the response to the objections of Norway and India? **Louis Joinet** proposed that it should be specified that the superior officer was responsible for the acts of subordinates when he or she had effective authority over them. The **Chairperson** wondered whether discussion on article 4 should be reopened. The representative of **Saudi Arabia** asked whether the death penalty was envisioned in the context of this article. The Chairperson asked him not to reopen this discussion as he considered it to be closed. The question of the death penalty would not be mentioned in the

instrument. **Chile**, speaking also on behalf of **Argentina**, asked for the ongoing nature of the offence of enforced disappearance to be mentioned in this article. The **Chairperson** said that he did not wish to retain this proposal. The **United States** considered that paragraph 2 of article 4 did not give sufficient consideration to the diversity of States' practices. It would be appropriate to add the phrase "in accordance with national law" after "Each State party shall take". The terms "*inter alia*" or "in particular" should also be added to a) and b). **Louis Joinet** recalled that the objective of a treaty was to reach agreement on international standards and to adapt them. The clause referring to "accordance with national laws" was in contradiction to this approach. This did not mean, however, that the problems of internal implementation should not be taken into account. However, the adoption of a provision could not be opposed on the grounds that it contradicted domestic law. The **Chairperson** considered that article 4 had been "negotiated in depth" and decided to keep it in its current form.

Statute of limitations: article 5

Opening discussion on article 5, the **Chairperson** noted that it was appropriate at this stage to reserve the first line "Without prejudice to article 2 bis" since it referred to a provision for which no final decision had been taken. **Egypt** proposed removing "substantial" from the beginning of the phrase and considered that the second part of the text was sufficient: "proportionate to the extreme seriousness of this offence". But the representative believed that it was worth considering the matter in relation to the original French text that refers to *"longue durée"*. **Angola** did not object to 1a) but could not accept 1b) and paragraph 2 because the national law of this State did not recognise the principle of suspending the statute of limitations. The Angolan system considered that the statute of limitations came into effect when the offence had been committed.

China had problems with paragraph 1 of article 5 and shared the concerns of the Angolan delegation regarding paragraph 2. **Norway** considered that it should be up to the States to determine the point at which the statute of limitations should begin, whether at the point at which the offence ceased or when the fate of the disappeared person was established, but not necessarily both. **India** considered that the problem should be resolved by national law. **Argentina** was in favour of the current wording of the article. The notion that the offence of enforced disappearance was ongoing was essential. **Argentina** proposed dissociating the victim from the statute of limitations in

paragraph 2 by simply stating: "The statute of limitations will be suspended for as long as there is no effective remedy". It was not only the victim who should be able to have recourse to an effective remedy. The issue was of concern to the whole of society.

The **Japanese delegation** admitted that this provision was one of the most problematical for it. It would prefer the instrument to be flexible and not go into detail. Paragraph 1a) did not present a problem. On the other hand, Japan proposed removing the second part of the phrase "and that the fate of the disappeared person is established" in paragraph 1b). The delegation also proposed removing paragraph 2. **Mexico** opposed the proposal to remove the second part of the phrase in paragraph 1a). The rights of families should also be maintained by adding a third subparagraph that would be entitled: "The statute of limitations for prosecution will have no effect on the right to reparation".

Catherine Calothy wished to recall certain details concerning article 5. The article did not make the introduction of a statute of limitations obligatory when this did not exist. It only applied when a statute of limitations existed for enforced disappearances. This provision arose from the notion that the statue of limitation must not benefit the offender. It should not encourage the offender to conceal the fate of the disappeared person for as long as possible. The offender must know that the fact that he or she lies for longer did not mean that he or she would escape prosecution. The notion of suspension of the statute of limitations was included in the 1992 Declaration and was consistent with the practice of the Human Rights Committee, which evaluated the effectiveness of the remedy on a case by case basis. It might be possible to try and clarify the provision by specifying that the remedy concerned only related to enforced disappearances. **Belgium** supported article 5 §1 b) but considered that the second part "and that the fate of the disappeared person is established", and which specified the moment when the offence of enforced disappearance ceased, was not essential. **France** defended the article as it stood. **Switzerland**, on the other hand, considered this part of the sentence to be a second criteria, to be combined with the first in its current form, but which, consistent with Norway's proposal, should be an alternative. Switzerland recommended more specifically that "and" should be replaced by "or" in this subparagraph. It also asked for a provision to be added that required that "the States parties guarantee under all circumstances to the victims of enforced disappearance the right to an effective remedy for taking legal proceedings". The **Democratic People's Republic of Korea** supported this position. **Russia** preferred the removal of

this subparagraph but did not insist on it, as the subparagraph was consistent with Russian legislation.

Article 7: Amnesty

The **Chairperson** recalled that it had been decided to remove article 7 following discussions that had taken place in January. He noted that none of the States contested its removal.

Article 9: Rules of jurisdiction

The **Chairperson** pointed out that the text set out rules for attribution of jurisdiction that did not exclude "additional" criteria for jurisdiction. **Angola** considered that reference should be made to retrospective jurisprudence. **France** asked for the inclusion of a separate subparagraph c) relating to optional jurisprudence for a stateless perpetrator. **Japan** supported this proposal. **Mexico** considered that the expression in article 9 §1 c) "when the State deems it appropriate to do so" should be removed. **Sweden** was in favour of retaining the expression. **France** wished for the expression to be replaced by "when the State deems it justified". **Egypt** and the **United States** wished the subparagraph to be retained as it stood. **Russia** proposed adoption of the wording "when the State deems it justified" with the further clarification: "if these measures are consistent with national law".

The **Mexican delegation** asked for it to be specified that the measures referred to in paragraph 2 should be taken "in accordance with national law". The **Chairperson** considered that this seemed self-evident. **Spain** proposed modifying paragraph 2 as follows: "the States parties shall also take the necessary measures … when the alleged perpetrator of the offence is in any part of its territory. Its jurisdiction will not apply if it extradites him or her or surrenders him or her to another State in accordance with international law or if it transfers him or her to an international tribunal whose jurisdiction it has recognised." **India** wondered whether the reference to international criminal tribunals was necessary if the instrument made no mention of crimes against humanity. The **Czech Republic** returned to the Mexican proposal, which it considered problematic. It proposed adopting wording similar to Article 5§2 of the Convention Against Torture. The new paragraph 2 would then refer to provisions on extradition (article 13§6). **Louis Joinet** thought it desirable to specify that

"surrender" to another State envisaged in the instrument should be carried out "by treaty". **France** felt the same and specified that the notion of "surrender" corresponded to the European warrant for arrest and could be accompanied by a reference to international law or by the expression "in the event of judicial proceedings". **China** considered that the instrument should specify that extradition could only be granted in cases over which the States have jurisprudence. **Mexico** proposed complementing paragraph 3 of the Article with "in accordance with national and international law". The **United States** thought it preferable not to be too vague on this point and favoured a term such as "international legal obligations to which the State is a party". **France** for its part proposed that this provision should be clarified by adding the term "additional jurisprudence", to specify that national jurisprudence is an additional criterion and not a provision that would restrict the criteria for jurisprudence specified in the instrument. The **United States** declared that it had no problem with this proposal.

The **United States** expressed reservations on paragraphs 2 and 3 of the article. **FIDH** supported the Mexican position regarding article 9§1c) regarding the removal of the term "and the State deems it appropriate to do so". It also approved the proposals made by Louis Joinet and by France, relating to article 9 paragraph 2, that it was not possible for the notion of "surrender" to be interpreted as avoiding the extradition procedure. FIDH would have preferred simply removing paragraph 3 of article 9, but it considered that the clarifications suggested by the Chair together with France's proposal for modification made the provision acceptable.

Article 10

The **United States** delegation considered that there was no major difficulty regarding articles 10 and 11, but it reserved the right to return to the issue. **Argentina** proposed adding the adjective "preliminary" to the reference to investigation in article 10 §2. **Algeria** thought a distinction must be made between preliminary investigation carried out by the police and detention, which came under the responsibility of the judge. **Canada** considered that paragraph 3 of article 10 should be cut after "of which he or she is a national". **Catherine Calothy** emphasised the fact that the Convention Against Torture included the provision referring to stateless persons contained in article 10§3. **Sweden** also drew attention to the Declaration on the rights of non-nationals and the principle of non-discrimination. **Angola** rejected the Canadian proposal. **FIDH** proposed inserting a full stop

after “take him or her into custody” and removing the rest of the paragraph.

Article 11

Argentina considered that the history of disappearances should be taken into account by the exclusion of any emergency jurisdiction, including military jurisdiction. Article 11 would specify “submit the case to its competent authorities with the exception of any emergency or special jurisdiction, especially military jurisdiction”. The **Chairperson** replied to this proposal and recalled that the working document is a document of compromise. The matter of military tribunals was discussed and Argentina’s proposal became an obstacle to reaching consensus. **Angola** stated that it had a new proposal for article 11 § 3, supported by **China**. The **Chairperson** said that he preferred that the consensus proposal that had been agreed at the last session should not be put into question. **China** wished for article 11§3 to be removed as it believed that paragraph 4 was sufficient. **Mexico** declared that it abstained from making additional proposals since the proposed articles had been reached as a result of long discussion.

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The **Chair** ended the session and made a summary of the various points that had been considered:

1°/ the principle of the monitoring body

Several possibilities could be considered. The Chairperson did not retain the argument that, since it is presumed that the States act in good faith, a monitoring body should not be set up.

2°/ Form of the monitoring body

There were various ways of creating the monitoring body. No decision was reached, but two solutions were identified:

a) entrust monitoring to an existing body.

The possibility of entrusting this responsibility to the working group on enforced disappearances

was not feasible and the group expert did not request this. Two possibilities existed with respect to the Human Rights Committee:

- maintain the Human Rights Committee as it stands without increasing its size.
- create a Human Rights Committee's subcommittee with a specific remit.

b) an independent body

This would be a return to the solution that had prevailed so far in drawing up the human rights conventions. It would be a very small body with around five members. Its missions would be:

- the Chair's proposal with regard to reports is probably not sufficiently clear, but his idea to authorise the monitoring body to request information at any moment was good, as was the presentation of an initial report by the States parties.
- with regard to rapid action and investigations (II B): a distinction must be made between emergency action and investigation. **Manfred Nowak** spoke of the risk of confusing the two. Early warning concerns prevention rather than establishing facts. Here was no opposition in principle to these two aspects.
- on site investigation missions would be "optional", but a system of impromptu visits could be envisaged, or visits made with the State's consent.
- II C bis: perhaps this article should be separated still further so that the procedure it established became still more optional?
- II C ter: this was a new proposal but it was not revolutionary. There was an obvious link with draft article 2 bis on crimes against humanity. With respect to confidentiality, the Chairperson proposed removing article II F § 2 and 3 to arrive at a more simple practice of making any procedure confidential in order to protect victims and witnesses, whilst the findings and observations would be made public. The Chairperson recalled that several delegations wished to replace the expressions "warning" and "instruct" with more usual terms. The Chairperson wished to return to the intersessional consultations regarding working methods. He also wondered about the opportunity to create an "open" drafting group.

The next session of the working group will take place from

31st January to 11th February 2005