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NONPAPER To French Chair 2004

The Chair of the Working Group for the Elaboration of a Treaty to Punish and Prohibit Forced Disappearances inquired of the United States delegation as to the red-lines for the United States Government regarding this proposed treaty text. The following list, which is non-exhaustive, highlights areas of critical concern to the United States Government. Articles are treated in numerical sequence and not in order of importance.

***Critical Provisions for the United States in the Forced Disappearances Draft Treaty Text include, but are not limited to, the following.***

**PP4, Articles 16bis, 17 and 22 - Right to Know** - It is critical for the United States to have acceptable text on the "RIGHT TO KNOW", which recognizes the need of families to have access to the truth without endorsing unacceptably broad "rights" based language and without requiring provision of information that could impair national security, law enforcement, or privacy interests.

**Article 1 - Definition.**

We have urged since the first treaty negotiation session in January 2003 that the definition of forced disappearances must be sufficiently precise, narrow and tailored to the problem of forced disappearances so as not to capture lawful military and law enforcement activities. Thus we believe that inclusion of an express intent requirement in the definition is extremely important. Further, inclusion of state action as an element of the definition is also of critical importance to the United States (and many other delegations) for reasons expressed at length during the negotiations.

As we have also urged throughout the treaty negotiations, the definition is critical not only intrinsically but also because an overbroad or otherwise flawed definition renders even more problematic other thorny provisions in the text, including:

- the jurisdiction provisions (notably "found in" (quasi-universal) jurisdiction),
- elimination of a defense of superior orders,
- command responsibility,
- non-refoulement,
- required refusal to obey an order relating to a forced disappearance,

and other provisions.

One definition proposed by the United States is the following:

"the arrest, detention or abduction of a person by, or with the authorization, support or acquiescence of, a State, followed by a refusal by the State to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such persons, with the intention of removing that person from the protection of the law for a prolonged period of time."

During the upcoming negotiations commencing January 31, the United States delegation will be pleased to give consideration to alternative definitions submitted by other delegations, for example by the delegation of Japan, with a view to their precision and inclusion of an intent requirement.

**Article 2 - Criminalization**

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A treaty provision requiring enactment of a new criminal statute (or statutes) containing a dedicated offense of forced disappearance would in and of itself defeat USG support of a treaty text. Under the United States Constitution, the United States has a federal system, and much criminal law authority is retained by the fifty states.

## **Article 2bis- Crime against Humanity**

An operative provision in the treaty on crime against humanity is not acceptable to the United States.

## **Article 4 - Elimination of a defense of superior orders**

The United States has consistently maintained that the overbroad definition of a forced disappearance makes it difficult for the United States to support elimination of a defense of superior orders. The United States was able to support the provision in the Convention Against Torture that eliminates a defense of superior orders because there we took the view that torture was limited to deliberate and calculated acts of an extremely cruel and inhuman nature, which an individual of ordinary sense would know to be criminal. We are unable to reach the same conclusion regarding forced disappearances as defined in the treaty text, and therefore believe that principles of fairness and due process compel maintenance of a defense of superior orders.

## **Article 5 - Statute of Limitations**

While the United States appreciates that the statute of limitations provision has been revised to require that the statute of limitations be commensurate with the seriousness of the offense, which is a substantial improvement over earlier drafts, other provisions in the statute of limitations article remain problematic, in particular article 5(2) which reads as follows:

"The term of limitation for criminal proceedings which is provided for in paragraph 1 shall be suspended for as long as no effective remedy is available in a State Party to any victim of enforced disappearance."

There is precedent in treaty law for tolling (or suspending) a statute of limitations during the period that the defendant is absent from the jurisdiction or has otherwise evaded justice, and there is recognition in law for the concept of a continuous offense. However, the language above raises the question whether the *ex post facto* principle would be implicated. If the intent is to toll or suspend the statute of limitation because a State has not implemented a criminal statute, any subsequent enactment of a criminal statute would not be applicable to offenses occurring prior to enactment. Thus, we find the above provision to be totally unclear as to meaning and as to the obligations it would impose on a State Party.

Moreover, to the extent that the provision intends to link a criminal statute of limitations with the availability of civil remedies, such a provision would be highly questionable.

Statutes of limitations for a forced disappearance are a matter of state law under the federal system in the United States, and it would not be possible to guarantee that all 50 states' statute of limitations would operate in the fashion contemplated in the treaty text.

## **Articles 9-11 : Jurisdictional provisions**

Precise criminal jurisdictional provisions, with mandatory jurisdiction limited to territorial and nationality jurisdiction, are critical for USG support of a treaty text. "Found in" jurisdiction,

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when coupled with an overbroad definition of forced disappearance, is unacceptable to the United States.

## **Article 12: Investigations, access to places of detention**

Access to sites of detention is unacceptable unless access is made "subject to domestic law."

## **Articles 13 and 14: Extradition and Legal Assistance**

The USG believes that these provisions should track the extradition and legal assistance provisions in the Optional Protocol on Child Sale, Prostitution and Pornography. We would need to review final provisions before deciding whether provisions are acceptable.

## **Article 15bis - Non-refoulement**

It is critical for the United States that the non-refoulement provision conform to existing international law on non-refoulement. Among other factors, the non-refoulement provision should contain identical or nearly identical text to that contained in the non-refoulement provision in the Convention on the Status of Refugees article 33(2). Article 33(2) reads as follows: "The benefit of the present provision may not, however, be claimed by a [person] whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

## **Article 22 - Reparation**

The reparation provision would be acceptable if it tracked the compensation provision of CAT (CAT Article 14). We would need to review final text to determine if provision on reparation is acceptable.

## **Part II - Treaty Monitoring Body**

It is critical for the United States that if the instrument has a treaty monitoring body, that an existing treaty monitoring body is used, especially as the Human Rights Committee already has competence over forced disappearances, including individual complaints of forced disappearance against States Parties to the First Optional Protocol to the ICCPR. In this regard, any individual complaint mechanism in the disappearances instrument must be optional and should conform with existing treaty individual complaint mechanisms.

The predicate of state consent for a site visit by the treaty body must be maintained.

The United States reserve on other provisions in Part II notably the provision regarding referral to the UN Secretary-General.

## **Military tribunals.**

Should a prohibition on military proceedings be re-introduced into the text of the instrument, the United States would be firmly opposed.

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