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PERMANENT MISSION OF INDIA TO THE UN, GENEVA

**HUMAN RIGHTS COUNCIL
13TH SESSION (01-26 Mar 2010)**

**AGENDA ITEM 3: Interactive Dialogue with Working Group on Arbitrary
Detention and Working Group on Enforced or Involuntary Disappearances
(9th Mar 2010)**

Statement by India

Mr. President,

We thank the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances, and the Special Rapporteur on Displaced Persons, for their annual reports and would like to confine our remarks to the Report of the Working Group on Enforced or Involuntary Disappearances.

2. While we appreciate the work being done by the Working Group, we would like to express, with regard to its latest General Comment on enforced disappearances as a crime against humanity, our reservation at the assertion in paragraph 14 of the Comment according to which “the definition given by Article 7 (1) of the Statute of the International Criminal Court now reflects customary international law”.

3. To arrive at its assertion in paragraph 14, the General Comment essentially relies on the decisions of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the fact that there are now over 100 States Parties to the Rome Statute. We would like to make the following two observations in this context:

- a) First, the concept of enforced disappearance as a crime against humanity is fairly recent and, originally, applied only to situations of armed conflict. Its *extension* to *non-conflict* situations was first justified by the ICTY and later by the Rome Statute – something that was objected to by several States, including India. In fact, the statutes of ICTY, ICTR and the special court for Sierra Leone do *not* include enforced disappearances in the definition of crimes against humanity. Therefore, it is a rather new concept that has developed over the last few years and, at best, it would be more accurate to claim that the concept is a reflection of the *current* state

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of international law, rather than to deem it as having acquired the status of customary international law;

- b) Second, it bears mention that, in the first place, the legality of the establishment of the ICTY by the United Nations Security Council is not without controversy. The Security Council, in the view of many delegations, does not possess any legislative or judicial powers under the UN Charter and many states, thus, question its competence to establish a tribunal like the ICTY. Therefore, citing the judgments of a tribunal like the ICTY as evidence of customary international law is highly unpersuasive. Besides, the Rome Statute does not enjoy universal acceptance and, to that extent, any new norms enunciated therein cannot be taken as evidence of customary international law.

Thank you, Mr. President.
