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APLICACIÓN DE LA RESOLUCIÓN 60/251 DE LA ASAMBLEA GENERAL, DE 15 DE MARZO DE 2006, TITULADA "CONSEJO DE DERECHOS HUMANOS"

Nota verbal de fecha 20 de junio de 2006 dirigida a la Secretaría del Consejo de Derechos Humanos por la Misión Permanente de los Estados Unidos de América ante la Oficina de las Naciones Unidas en Ginebra

La Misión Permanente de los Estados Unidos de América saluda atentamente a la Secretaría del Consejo de Derechos Humanos y tiene el honor de solicitar a ésta que distribuya el documento que se adjunta* sobre el proyecto de convención internacional para la protección de todas las personas contra las desapariciones forzadas entre todos los miembros y observadores del Consejo, y que lo incluya entre la documentación oficial del Consejo.

* Se reproduce en el anexo como se presentó, en el idioma original únicamente.

Annex

The United States appreciates the opportunity to address the Human Rights Council on the Draft Convention for the Protection of All Persons from Enforced Disappearance. We thank the Chair of the Working Group and all participants in the Working Group for focusing attention on this serious human rights violation, although we express disappointment that the draft text of the Convention, albeit significantly improved from earlier drafts, does not represent the consensus of all members of the Working Group. The United States has been an active participant in the Working Group in each session, and given our steady participation, we are providing our understanding of the intent of States that participated in the Working Group on a number of core issues. We will provide further, detailed interpretations when this document comes up for consideration at the UN General Assembly. We reaffirm and incorporate herein our Closing Statement at the final session of the Working Group, reproduced at pages 48-49 of the Working Group Report of the Fifth Session (E/CN.4/2006/57) ("Report").

We underscore at the outset our view, shared by other delegations, that the definition of the crime (Article 2) would have been much improved had it been more precise and included an explicit requirement for intentionality, particularly the specific intent to place a person outside the protection of the law. The need for intentionality was recognized by the Chair and recorded in paragraph 96 of the Report, which states that an intentionality requirement is implicit in the definition of enforced disappearance, recognizing that "in no penal system was there an offense of enforced disappearance without intent." We agree and reaffirm our understanding that under the Convention *mens rea* is an essential ingredient of the

crime under Articles 2, 4, 6 (particularly Article 6(2)), 12(4), 22, 25, & other articles.

Second, the United States expresses its intent to interpret the Right to Truth in the preamble and in Article 24(2) consistent with the Commission on Human Rights Resolution on the Right to Truth (2005/66), which states that the right may be recognized in various legal systems (such as our own) as freedom of information, the right to know, or the right to be informed, and also consistent with the International Covenant on Civil and Political Rights which speaks to the right to seek, receive and impart information. As noted in our Explanation of Position delivered upon adoption of UNCHR resolution 2005/66, the United States' position on the right to know has not changed since the ICRC Conference on the Missing in February 2003 as well as at the 28th ICRC/Red Cross Conference in December 2003; that is, the United States is committed to advancing the cause of families dealing with the problem of missing persons; however, we do not acknowledge any new international right or obligation in this regard. For the United States, which is not a party to the 1977 Additional Protocol I to the Geneva Conventions and has no obligations vis-à-vis any "right to truth" under Article 32 of that instrument, families are informed of the fate of their missing family members based on the longstanding policy of the United States and not because of Article 32.

Third, the United States wishes to place on record our understanding of Article 43 of the draft Convention. We understand this provision to confirm that the provisions of the law of armed conflict, also called international humanitarian law, remain the *lex specialis* in situations of armed conflict and other situations to which

international humanitarian law applies. The United States understands Article 43 to operate as a "savings clause" in order to ensure that the relevant provisions of international humanitarian law take precedence over any other provisions contained in this Convention.

Fourth, the United States continues to support the use of an existing treaty body to perform monitoring functions, that is, the Human Rights Committee, which currently deals with forced disappearances, in view of the Committee's expertise; in the interests of consistency of jurisprudence, efficiency, avoidance of redundancy, and cost; and in light of the ongoing proposals for treaty body reform. We would hope that, per Article 27 of the draft Convention, States Parties adopt in the future use of the Human Rights Committee as the monitoring body.

In addition to the points expressed above, we place on the record our reservations, many of which are noted in the Report and in our Closing Statement, to, *inter alia,* the following articles, which is an illustrative (not exhaustive) list:

- Article 4 on criminalization should not be read to require various domestic legal systems to enact an autonomous offense of enforced disappearance, which is unnecessary and, from a practical standpoint, unworkable in, for example, a federal system such as our own.
- Article 5 requiring criminalization of crimes against humanity is vague, aspirational in nature, and inappropriate as an operative treaty provision. The United States agrees with the statement in paragraph 106 of the Report that Article 5 would "not create any additional obligations on States to accede to particular instruments or amend their domestic legislation."

- Article 6(2) on the unavailability of a defense of obedience to superior orders in a prosecution related to enforced disappearance could under certain circumstances be inconsistent with due process guarantees and could subject unwitting government personnel to the possibility of prosecution for actions that they did not and could not know were prohibited. Therefore, as stated in paragraph 109 of the Report, the United States interprets Article 6(2) to establish no criminal responsibility on the part of an individual unaware of participating in the commission of an enforced disappearance.
- Article 8 on statute of limitations presents problems of implementation in a federal system and contains unclear text in paragraph 2.
- Article 9(2) on "found in" jurisdiction remains unacceptable to the United States, especially in view of the lack of precision in the definition of enforced disappearance.
- Article 16 on *non-refoulement*, which refers to violations of international humanitarian law in the country of return, does not conform to international principles on *non-refoulement*, as articulated in the 1951 Refugee Convention.
- Article 17 on standards for and access to places of detention retains the possibility of conflict with constitutional and other legal provisions in the laws of some States; accordingly we would interpret the term "any persons with a legitimate interest" in Articles 17, 18, and 30 in accordance with the domestic law of a State.

- Article 18 on access to information similarly retains the possibility of conflict with constitutional and other legal provisions of a State and sets unreasonable standards guaranteeing information.
- Article 22 on additional criminalization, among other concerns, should contain an express intentionality requirement, and the United States will interpret it to contain such an intent requirement (as noted above).
- Article 24 on the right to the truth and reparation contains text that is vague and at the same time overly specific, employs an overbroad definition of a "victim," and may not be consistent with a common law system for granting remedies and compensation.
- Article 25 on children must be interpreted consistent with adoption laws and other relevant domestic laws and with international obligations of the State regarding children.

The United States respectfully requests that its views be made a part of the official record of the Human Rights Council.

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