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**CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTION OF  
ENFORCED OR INVOLUNTARY DISAPPEARANCES**

**Report of the Intersessional Open-ended Working Group to elaborate  
a draft legally binding normative instrument for the protection of all  
persons from enforced disappearance**

*Chairperson-Rapporteur: Mr. Bernard Kessedjian (France)*

**Summary**

This report, presented pursuant to Commission on Human Rights resolution 2005/27, summarizes the discussions at the fifth session of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance, which was held from 12 to 23 September 2005. The Working Group continued its discussions on the draft instrument, focusing primarily on the articles on which agreement in principle had not been reached at the previous sessions. The Working Group then undertook a complete review of the draft instrument.

At the end of the discussions, the Chairperson of the Working Group said that there had been no objection to the transmission of the draft instrument to the Commission and that negotiations within the Working Group were thus concluded. The draft, on which the Commission will need to take action, appears as annex I to this report.

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## **Introduction**

1. At its sixty-first session, in resolution 2005/27 of 19 April 2005, the Commission on Human Rights requested the Intersessional Open-ended Working Group set up to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance to meet for a period of 10 working days in one formal session before the end of 2005 with a view to the completion of its work. In pursuance of that resolution, the Group held its fifth session from 12 to 23 September 2005 at the Palais des Nations in Geneva. The Commission also requested the Chairperson-Rapporteur of the Working Group to undertake informal consultations with all interested parties in order to prepare for the session.

### **I. ORGANIZATION OF THE SESSION**

#### **A. Election of officers**

2. Following a proposal by Ireland, the Working Group re-elected Mr. Bernard Kessedjian (France) as its Chairperson-Rapporteur.

#### **B. Attendance**

3. Representatives of the following States members of the Commission on Human Rights attended the Working Group's meetings: Argentina, Armenia, Brazil, Canada, China, Congo, Cuba, Dominican Republic, Ecuador, Egypt, Finland, France, Germany, Honduras, Hungary, India, Indonesia, Ireland, Italy, Japan, Netherlands, Qatar, Republic of Korea, Romania, Russian Federation, Sri Lanka, Sudan, Ukraine, United Kingdom of Great Britain and Northern Ireland and United States of America.

4. The following States non-members of the Commission on Human Rights were represented by observers at the Working Group's meetings: Algeria, Angola, Austria, Azerbaijan, Belgium, Bolivia, Chile, Colombia, Cyprus, Czech Republic, Denmark, El Salvador, Estonia, Greece, Iran (Islamic Republic of), Iraq, Lebanon, Madagascar, Malta, Morocco, New Zealand, Norway, Panama, Poland, Portugal, Slovakia, Spain, Sweden, Switzerland, Syrian Arab Republic, Thailand, Tunisia, Turkey, Uruguay, Venezuela (Bolivarian Republic of) and Yemen.

5. The Holy See was also represented by observers.

6. The following non-governmental organizations in consultative status with the Economic and Social Council were represented by observers at the Working Group's meetings: Amnesty International, Association for the Prevention of Torture, Families of Victims of Involuntary Disappearance (FIND), Human Rights Watch, International Association against Torture, International Commission of Jurists, International Federation of Action by Christians for the Abolition of Torture, International Federation of Human Rights Leagues, International League for the Rights and Liberation of Peoples, International Service for Human Rights, International Women's Rights Action Watch, Latin American Federation of Associations of Relatives of Disappeared Detainees, New Humanity, Non-Violence International, Permanent Assembly of Human Rights, Philippine Human Rights Information Centre, South Asia Human Rights Documentation Centre and World Federation of Trade Unions.

7. The International Committee of the Red Cross (ICRC) was also represented by observers.
8. The following experts also participated in the session: Louis Joinet, in his capacity as independent expert and Chairman of the Working Group on the Administration of Justice of the Sub-Commission on the Promotion and Protection of Human Rights, which drew up the draft international convention on the protection of all persons from enforced disappearance in 1998, and Stephen Toope, Chairperson of the Working Group on Enforced or Involuntary Disappearances of the Commission on Human Rights.

### **C. Documentation**

9. The Working Group had before it the following documents:

E/CN.4/2005/WG.22/2	Provisional agenda
E/CN.4/2005/66	Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance
E/CN.4/2005/WG.22/WP.1	Working paper

## **II. ORGANIZATION OF WORK**

10. At the beginning of the session, the Chairperson-Rapporteur submitted a working paper containing a new draft of the instrument (E/CN.4/2005/WG.22/WP.1) prepared by the Chair in the light of the discussions at the fourth session, which was held from 31 January to 11 February 2005; the paper was accepted by the Group as a basis for its work.
11. The Working Group agreed to a suggestion from the Chair that a substantive discussion should first be held on articles 2, 20, 26 and 32 of the draft, on which agreement had been particularly difficult to reach at previous sessions. The Group would then proceed to a final review of each article in the draft.

## **III. DISCUSSION ON DRAFT ARTICLES 2, 20 AND 32**

### **A. Acts similar to enforced disappearances committed by non-State actors (draft article 2)**

12. At the fourth session, the Working Group had been unable to reach agreement on how the problem of disappearances committed by non-State actors should be handled in the instrument.<sup>1</sup> At the fifth session the Chairperson suggested the following wording:

“Each State Party shall take the necessary measures to investigate enforced disappearances committed by persons or groups of persons acting without the authorization, support or acquiescence of the State, and to bring those responsible to justice.”

13. Many delegations suggested replacing the words “enforced disappearances” by a reference to acts or conduct described or defined in article 1, in order to highlight the fact that disappearances committed by non-State actors are not of the same nature as those committed by agents of the State and fall outside the sphere of application of article 1.

14. Some delegations emphasized that the proposed wording placed excessively heavy obligations on States. They suggested replacing “necessary” by “appropriate” and adding that the measures would be taken in accordance with domestic law. Others deplored the fact that the extent of State obligations was limited to investigating the facts and bringing those responsible to justice, and suggested adding, for example, the obligation to extradite alleged perpetrators or to protect victims.

15. The amended text, annexed hereto as article 3, was accepted by the Working Group. The Group also accepted a proposal by the Chairperson to modify the order of draft articles 1, 2 and 3.

### **B. Refusal to provide information on a detainee (draft article 20)**

16. Draft article 20 included the following wording:

“1. States Parties may refuse the requests for information referred to in article 18, where necessary in a democratic society and in accordance with the law, if the transmission of the information undermines the privacy or safety of a person or hinders a criminal investigation, or in accordance with other legal provisions that are not contrary to the objectives of [this instrument]. In no case shall States Parties refuse to provide information on whether the person has been deprived of liberty or has died while deprived of liberty.

2. Without prejudice to consideration of the lawfulness of the deprivation of a person’s liberty, States Parties shall guarantee to the persons referred to in article 18, paragraph 1, the right to a prompt and effective remedy as a means of obtaining without delay the information referred to in article 18, paragraph 1. This right to a remedy may not be suspended or restricted in any circumstances.”

17. Some delegations considered that this provision should be removed, as it was inimical to the very purposes of the instrument. Many delegations expressed readiness to accept the text for the sake of consensus. Several emphasized that States parties should in no case withhold information on the place of detention. Others opposed the addition of a provision to that effect, on the grounds that the article would apply not only in cases of enforced disappearance but also in the case of detentions where there was no risk of disappearance. In some countries, however, the law provided for the possibility that the place of detention might not be revealed on grounds such as witness protection. In that regard, one delegation also proposed deleting the reference in the second sentence of the first paragraph to information on whether a person had been deprived of liberty.

18. One delegation suggested adding threats to national security to the list appearing in the first sentence of the first paragraph. Others also suggested adding information on the physical integrity of the detainee to the list of information that should not be withheld.

19. Several delegations called for emphasis to be placed on the exceptional nature of situations in which States could refuse to comply with requests for information. It was accordingly proposed that phrases such as “in exceptional circumstances” should be added, or a provision that refusals must be authorized by a judicial authority. Others suggested deleting the reference to other legal provisions.
20. A few delegations considered that the provision of information should not be refused but postponed. However, that raised the difficulty of determining how long the postponement might be.
21. Several participants called for reference to be made to judicial remedies in paragraph 2.
22. In response to these difficulties, the delegations of eight countries proposed the following text:
- “1. If a person is under the protection of the law, and the detention is carried out under judicial supervision, the right to information provided for in article 18 may be restricted only in exceptional circumstances and strictly to the extent that the situation so requires and the law so permits, if the transmission of the information undermines the privacy or safety of a person or hinders a criminal investigation, or in another manner provided for in the law and in accordance with applicable international law and with the objectives of this instrument. In no case may restrictions on the right to information provided for in article 18 constitute conduct defined in article 2.
2. Without prejudice to consideration of the lawfulness of the deprivation of a person’s liberty, States Parties shall guarantee to the persons referred to in article 18, paragraph 1, the right to a prompt, simple and effective remedy as a means of obtaining without delay the information referred to in article 18, paragraph 1. This right to a remedy may not be suspended or restricted in any circumstances.”
23. This text was welcomed by many delegations. However, several of them emphasized that, even with that wording, they would have preferred to delete the first paragraph which, in the words of one delegation, ran counter to the right to the truth which the instrument was supposed to protect. On the other hand, they were ready to accept it so as not to stand in the way of consensus, and bearing in mind the quite exceptional nature of the situations in which information might be withheld.
24. Amendments to the first paragraph were proposed. One delegation, for example, suggested that the paragraph should begin with a phrase such as “Only in cases where a person is under the protection of the law ...”. No objection was raised by delegations to this addition. Another delegation suggested adding to the last sentence language to the effect that restrictions on the right to information could not run counter to the prohibition in article 17, paragraph 1, on detention incommunicado. This proposal was supported by a number of delegations. One delegation noted, however, that article 17, paragraph 1, was vague and did not refer to specific conduct. It would therefore prefer no such addition.

25. One delegation suggested that the reference to international law should be complemented by a reference to international human rights law, but others considered the addition superfluous or restrictive. It was nonetheless emphasized that the reference to international law should be interpreted so as to embrace international human rights law and international humanitarian law.

26. It was suggested that the phrase “or in another manner provided for in the law” should be deleted as being too broad, and might be replaced by a phrase such as “for other comparable reasons”.

27. A proposal by some delegations that the phrase “right to information” should be replaced by the phrase “right of access to information” was not adopted.

28. Some delegations considered that the reference to a “simple” judicial remedy in paragraph 2 was inappropriate, since it could give rise to confusion in some judicial systems.

29. The amended text annexed hereto was accepted by the Working Group.

**C. Extension of the instrument to all territory for whose international relations a State is responsible (draft article 32)**

30. The draft article contained the following wording:

“1. Any State, at the time of signature, ratification or accession, may declare that [this instrument] will be extended to all territory for whose international relations it is responsible. Such a declaration shall take effect when [this instrument] enters into force for the State concerned.

2. Notification of such an extension may be addressed at any time to the Secretary-General of the United Nations, and the extension will take effect [...] days after notification has been received by the Secretary-General of the United Nations.”

31. This provision had been proposed by China in order to take account of the fact that some of the country’s autonomous territories had different legal systems.<sup>2</sup> Hence some treaties might not apply throughout the territory but only in the mainland or in the autonomous territories. The Chinese delegation maintained that such a territorial clause was perfectly compatible with the Vienna Convention on the Law of Treaties and featured in other treaties to which the State was a party.

32. At the fourth session, several delegations had opposed the inclusion of such a clause. At the fifth session those delegations emphasized that, while they did not challenge the goal pursued by the Chinese delegation, they considered that it could be achieved by means of an interpretative declaration made at the time of ratification. The clause itself should be deleted, because it introduced a unilateral and subjective element.

33. In the light of the discussions, and in view of the fact that the Working Group did not contest the goal pursued by the Chinese delegation, that delegation agreed to withdraw it. All delegations accepted the possibility that China might make a unilateral declaration to that effect at the time of signature, ratification or accession.



#### **IV. DISCUSSION ON THE FUNCTIONS OF THE MONITORING BODY**

34. Before taking a decision on the form of the future instrument and the nature of the body to be responsible for monitoring its implementation by States parties, the Working Group considered it useful to seek agreement on the functions of the body. These were described in articles 26-3 to 26-7 of the draft and consisted in the consideration of national reports, the urgent procedure, visits to the territory of a State party, individual communications and the procedure for bringing matters before the Secretary-General. The Working Group also discussed the inter-State complaint procedure.

35. Prior to its discussion on functions, the Working Group expressed its views on article 26-2 in the working paper presented by the Chair, which read as follows:

“1. The Committee shall cooperate with all the relevant organs, offices and specialized agencies and funds of the United Nations, with all relevant treaty bodies instituted by relevant international instruments and special procedures of the Commission on Human Rights of the United Nations, and with all relevant regional intergovernmental organizations or bodies, as well as with all relevant State institutions, agencies or offices working towards the protection of all persons against enforced disappearances.

2. As it discharges its mandate under article 26-4, the Committee shall cooperate fully with the Working Group on Enforced or Involuntary Disappearances established by resolution 1980/45.

3. As it discharges its mandate under article 26-6 in particular, the Committee shall take due account of the observations and recommendations of other treaty bodies instituted by relevant international human rights instruments.”

36. Some delegations questioned the advisability of referring in paragraph 2 to the Working Group on Enforced or Involuntary Disappearances, whose future was not assured. Most felt that a more general reference to the special procedures of the Commission on Human Rights would be more appropriate.

37. It was suggested that paragraph 3 should be redrafted to place greater emphasis on the idea of consultations among the treaty bodies, with a view to ensuring that their observations and recommendations were consistent. Specific mention of the Human Rights Committee was also suggested, but the issue was set aside until the Working Group had expressed its views on the nature of the future monitoring body.

##### **A. Consideration of reports by States**

38. The text of draft article 26-3 read as follows:

“1. Each State Party shall submit to the Committee, through the Secretary-General of the United Nations, a report on the measures taken to give effect to its obligations under [this instrument], within two years after the entry into force of [this instrument] for the State Party concerned.

2. The Secretary-General of the United Nations shall make this report available to all States Parties.

3. Each report shall be considered by the Committee, which shall issue such comments, observations or recommendations as it may deem appropriate. The comments, observations or recommendations shall be communicated to the State Party concerned, which may respond to them, on its own initiative or at the request of the Committee.

4. The Committee may also request at any time information from States relevant to the implementation of [this instrument].”

39. This text received general assent. However, a few changes were made to paragraph 4, to specify that the Committee might seek “additional” information. Although the words “at any time”, which appeared in the previous version of the article, were removed, it was emphasized that that idea remained implicit.

### **B. Urgent procedure**

40. The text of draft article 26-4 read as follows:

“1. A request that a disappeared person should be sought and found may be submitted to the Committee by relatives of the disappeared person or their legal representatives, their counsel or any person authorized by them, as well as by any person having a legitimate interest.

2. If the Committee considers that the request submitted in pursuance of paragraph 1:

(a) Is not manifestly unfounded;

(b) Does not constitute an abuse of the right of submission of such communications requests;

(c) Has already been duly presented to the competent bodies of the State Party concerned, when this possibility exists; and

(d) Is not incompatible with the provisions of [this instrument];

it shall request the State Party concerned to provide it with information on the situation of the person concerned, within a time limit set by the Committee.

3. In the light of the response provided by the State Party concerned in accordance with paragraph 2, the Committee shall transmit a recommendation to the State Party and shall inform the person presenting the request. The Committee may also request the State Party to take appropriate measures, including interim measures, and to report to it on them, within a time limit set by the Committee, taking into account the urgency of the situation.

4. The Committee shall continue its efforts to work with the State Party concerned for as long as the fate of the person sought remains unresolved. The person presenting the request shall be kept informed.”

41. Several delegations wished to maintain the option available to the State to furnish a response to an urgent request at the domestic level and sought the inclusion of a condition in paragraph 2 (c) that domestic remedies must have been exhausted. In the absence of that insertion, the emergency mechanism should be made optional. Many other delegations opposed such an insertion, emphasizing that it was incompatible with the concept of urgency and was not necessary within a non-judicial procedure with essentially humanitarian aims. Several participants considered that this procedure, which was at the heart of the mandate of the future monitoring body, could not be made optional. Following lengthy discussions, it was agreed that, as the present wording of paragraph 2 required the competent national authorities to be notified, the possibility remained for a State to respond to a complaint under its domestic law.

42. In order to avoid any overlapping, several delegations suggested adding a new subparagraph (e) to paragraph 2, specifying that only requests which were not already being examined under another procedure of international investigation or settlement were admissible. It was emphasized that the bodies and procedures in question should be “of the same nature” as the body operating under the urgent procedure.

43. Participants also discussed which national authorities complainants should first submit their requests to. It was suggested that reference should be made to competent authorities “such as those authorized to undertake investigations”, a formulation encompassing national human rights institutions, which victims sometimes found it easier to contact.

44. Some delegations suggested that the reference to interim measures in paragraph 3 should be deleted, on the grounds that such measures formed an inherent part of an urgent procedure. However, many other participants insisted on keeping the reference, emphasizing that, even under an urgent procedure, interim measures were fundamental insofar as they involved the immediate adoption of specific measures to protect the rights of the persons concerned. It was suggested that some more specific provisions concerning the purpose of the interim measures should be inserted in paragraph 3.

45. Lastly, it was decided to insert a few references to the notion of urgency in this article, so as to indicate the configuration of the procedure more clearly.

46. The delegation of the Islamic Republic of Iran said it would oppose the article because of the insertion and proposed the inclusion of an additional admissibility criterion requiring the urgent action request to be corroborated by the facts. The Working Group did not accept the proposal, considering that subparagraph (a) already contained the necessary safeguards. The delegation of Egypt said that it was difficult to determine what was urgent and what was not. It would have preferred the procedure to be optional.

### **C. Visits to the territory of a State party**

47. The text of draft article 26-5 read as follows:

“1. If the Committee considers that a visit to the territory of a State is necessary to discharge its mandate, it may request one or more of its members to undertake a visit and report back to it without delay. The member or members of the Committee who undertake the visit may be accompanied if necessary by interpreters, secretaries and experts. No member of the delegation, with the exception of the interpreters, may be a national of the State to which the visit is made.

2. The Committee shall seek the cooperation of the State Party concerned. It shall notify the State Party concerned in writing of its intention to organize a visit, indicating the composition of the delegation and the purpose of the visit. The State Party shall inform the Committee as soon as possible of its agreement or opposition to the visit in a territory over which it has jurisdiction.

3. If the State Party agrees to the visit, the Committee and the State Party concerned shall work together to define the modalities of the visit and the State Party shall provide the Committee with all the facilities needed for the successful completion of the visit.”

48. It was suggested that the phrase “territory of a State” in paragraph 1 should be replaced by the phrase “any territory under the jurisdiction of a State Party”. The latter phrase would be used throughout the instrument.

49. Some delegations considered that scope for visits should be limited to situations in which breaches of the instrument were massive or systematic. Others opposed such an approach, emphasizing the preventive function of the visit mechanism and the fact that it complemented the urgent procedure described in article 26-4. General assent was given to a formulation whereby the Committee would request visits when it received reliable information to the effect that grave violations of the instrument were taking place in a State party.

50. To reinforce the idea of cooperation, a new paragraph was suggested to make it clear that the Committee could postpone or cancel a visit if it received a substantiated request from the State.

51. A fourth paragraph was suggested to set out how the monitoring body should follow up on the visit.

### **D. Consideration of individual communications**

52. The text of draft article 26-6<sup>3</sup> read as follows:

“1. A State Party may at the time of ratification or at any time afterwards declare that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation of the provisions of [this instrument]. The Committee shall not admit any communication concerning a State Party which has not made such a declaration.

2. The Committee may not consider a communication where:
  - (a) The communication is anonymous;
  - (b) The communication constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of [this instrument];
  - (c) The same matter is being examined under another procedure of international investigation or settlement;
  - (d) The individual concerned has not exhausted all effective available domestic remedies. This rule shall not apply where the application of the remedies is unreasonably prolonged.

3. If the Committee considers that the communication meets the requirements set out in paragraph 2, it shall transmit the communication to the State Party concerned, requesting it to provide observations and comments within a time limit set by the Committee. If need be, it shall request interim measures.

4. The Committee shall hold closed meetings when examining communications under the present article. It shall inform the author of the communication of the responses provided by the State Party concerned. It shall terminate the procedure set out in this article by communicating its views to the State Party and to the author of the communication.”

53. It was emphasized that the wording of paragraph 1 allowed for non-governmental organizations to bring cases before the Committee. Several delegations suggested a stipulation that under this procedure cases could be brought before the Committee not only by individuals, but also by “groups of persons”.

54. In relation to paragraph 2 (a), one delegation, recalling the practice of existing committees in such situations, said that it should be possible to withhold the identity of the person submitting a communication in certain cases.

55. It was decided to specify, in paragraph 2 (c), that the other procedures of international investigation or settlement should be understood as being those “of the same nature”.

56. One delegation pointed out that paragraph 2 (d) did not make clear, as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment did, that the rule that domestic remedies must have been exhausted did not apply if the application of the remedies was unlikely to bring effective relief to the victim. However, it considered that that point was implicitly covered by the phrase “effective available domestic remedies”.

57. The Working Group discussed whether the reference in paragraph 3 to interim measures was necessary, or whether it was preferable to leave to the monitoring body the task of making provision for such a possibility in its rules of procedure. Several delegations argued for a reference in the instrument itself, emphasizing the importance of interim measures in relation

to enforced disappearances, especially in order to avoid irreparable harm and preserve evidence. A new wording was eventually drawn up, specifying in particular that the Committee could request States parties to adopt interim measures “at any time”.

58. Regarding paragraph 4, one participant said that, given the continuous nature of the offence of enforced disappearance, the monitoring body should be able to keep under consideration cases which had not been clarified. The expression “terminate the procedure” could be interpreted in the opposite way. It therefore proposed that the last sentence of the paragraph should be replaced by: “The Committee communicates its views to the State Party concerned and the author of the communication.” The Working Group discussed the issue and noted that the Committee should be able to keep a case under consideration or to close it. One delegation proposed the following text: “When the Committee decides to terminate the procedure, it shall communicate its views to the State Party.”

59. Sweden stated that it would reserve its position on this article, as it was not clear which provisions of the instrument would be covered by the procedure. The Chairperson reminded the Group that the procedure was optional. The Islamic Republic of Iran stated that it did not accept the competence of the Committee to receive and consider individual communications.

#### **E. Procedure for bringing matters before the Secretary-General**

60. The wording of article 26-7 proposed in the draft read as follows:

“If the Committee receives information which appears to it to contain well-founded indications that enforced disappearance is being practised on a widespread or systematic basis in the territory of a State Party, it may, after seeking from the State Party concerned all relevant information on the situation, bring the matter to the attention of the Secretary-General of the United Nations, who will act in accordance with the powers granted to him or her by the Charter of the United Nations.”

61. Several delegations expressed support for this provision, which they felt was in line with current developments within the United Nations, in particular as regards a resolve to focus on the cross-cutting nature of human rights in the various bodies and to increase scope for urgent action. They also considered such a mechanism important in the light of the gravity of the crimes in question and drew attention to article 8 of the Convention on the Prevention and Punishment of the Crime of Genocide as an example. These participants considered that mere notification to the General Assembly would not be in keeping with the urgent nature of the situations to which article 26-7 referred.

62. However, others sought deletion of the article on the grounds that it entailed entrusting a treaty body with the task of requesting the Secretary-General to take action in relation to a specific situation. They preferred wording allowing the Committee to draw a matter to the attention of the General Assembly.

63. Various proposals were made with a view to securing consensus. Under the one that was adopted, the Committee would bring urgent matters to the attention of the General Assembly through the Secretary-General of the United Nations.

### **F. Inter-State complaint procedure**

64. Following a proposal put forward by several delegations at previous sessions and reiterated at the fifth session, the Working Group decided to insert a new article creating an optional inter-State complaint procedure.

### **G. Competence *ratione temporis* of the monitoring body**

65. The draft of article 26-8 contained the following text:

“1. The Committee shall have competence solely in respect of deprivations of liberty which commenced after the entry into force of [this instrument].

2. If a State becomes a party to [this instrument] after its entry into force, the obligations of that State vis-à-vis the Committee shall relate only to deprivations of liberty which commenced after the entry into force of [this instrument] for the State concerned.”

66. This wording was broadly accepted. It was proposed that the phrase “deprivations of liberty” should be replaced by the phrase “enforced disappearances”. The delegations of Argentina, Chile and Italy emphasized, however, that, as enforced disappearance constituted a continuous crime, they intended to make an interpretative declaration, when ratifying the instrument, whereby certain rights and obligations, such as the right to truth, justice and reparation and those relating to the disappearance of children, would be extended to enforced disappearances which had commenced before the instrument had entered into force but which had not been clarified.

### **H. Annual report of the monitoring body**

67. The draft of article 26-9 contained the following text:

“1. The Committee shall submit an annual report on its activities under [this instrument] to the States Parties and to the General Assembly of the United Nations.

2. Before an observation on a State Party is published in the annual report, the State Party concerned shall be informed in advance and shall be given reasonable time to answer. This State Party may request the publication of its comments or observations in the report.”

68. No comments were made on this wording, which received broad assent.

## **V. DISCUSSION ON THE FORM OF THE INSTRUMENT AND THE NATURE OF THE MONITORING BODY**

69. As the working paper did not contain any proposals on this topic, the Chairperson said that three options seemed to be open to the Working Group. The first two, which had been extensively explored at previous sessions, involved either drawing up an additional protocol to the International Covenant on Civil and Political Rights and entrusting the Human Rights Committee with the role of monitoring its implementation, or drawing up an independent

convention and setting up a new, independent monitoring body. During the session, one delegation put forward a written text assigning monitoring functions to the Human Rights Committee. This text was supported by several delegations. One group of delegations submitted an alternative text under which these functions would be performed by a new committee comprising 10 members. At the Chairperson's request, the Secretariat replied to questions from the Working Group about the budgetary and legal aspects of these two options.

70. The Chairperson put forward a third option which would fit in with the proposal by the United Nations High Commissioner for Human Rights to study the possibility of merging all the treaty-monitoring bodies into one. His suggestion was to establish an independent committee and make provision for the Conference of States Parties to meet several years after the instrument came into force and settle the matter in the light of how the reform was progressing: "The Conference of States Parties shall meet no sooner than four years nor later than six years after the entry into force of [this instrument] to assess how the Committee is functioning and decide, in keeping with the arrangements laid down in article 34,<sup>4</sup> whether the monitoring of [this instrument] should be assigned to another body - no option being excluded - with the powers defined in articles 26-2 ff."

71. Many delegations expressed a preference for one or another of these options. Those favouring a mandate assigned to the Human Rights Committee argued that a proliferation of mechanisms must be resisted, that the work of the existing treaty bodies needed rationalizing, that advantage should be taken of the Human Rights Committee's experience and prestige and that victims should have a single body to turn to. Those in favour of an independent committee stressed the political visibility of a single body and the fact that the Human Rights Committee was already overworked and would in practice find it difficult to cope with such important and novel functions as were proposed in the new instrument, including preventive functions.<sup>5</sup> They also feared that the solution involving the Human Rights Committee might entail revision of the International Covenant on Civil and Political Rights, which would considerably delay the entry into force of the instrument.

72. Several delegations were impressed with the third option and said that they were ready to support it as a compromise solution. Others were more reluctant, since the option gave the impression that the Working Group was setting up a temporary body with less authority than the existing committees. They also noted that reform of the treaty bodies was a subject that States had not even begun to discuss. If the option suggested by the Chairperson was adopted, it should at least appear among the final provisions of the instrument. The delegation of Spain proposed the following text: "The Conference of States Parties shall meet not less than four years and not more than six years after the entry into force of [this instrument] to evaluate the functioning of the Committee and, in accordance with the arrangements set out in article 34,<sup>6</sup> to consider its future - without ruling out any eventuality - and to assess the implementation of [this instrument] by means of the procedures set out in article 26-2 ff."<sup>7</sup>

73. The delegation of Argentina emphasized that it was premature to take into consideration any reform of the treaty bodies, in view of the current stage of discussions on the topic. It therefore opposed the inclusion in a human rights instrument, such as that which the Working Group was currently drafting, of a review clause relating to that discussion. To ensure



that the instrument was universal and guaranteed protection for the greatest possible number of people, however, the delegation could accept a review clause if it led to the adoption of a convention with its own committee.

74. Some delegations which were in favour of the Human Rights Committee as the monitoring body suggested that the transition formula should be the other way around, that is, that States parties should meet after several years to decide whether it was appropriate for the Human Rights Committee to continue exercising monitoring functions.

75. On the membership of the possible independent committee, several delegations argued in favour of a committee of 10 members rather than 5, as had been suggested, to ensure better geographical representation. Many delegations suggested adding a reference to gender balance in the membership. The need to highlight the independence and impartiality of the members, the fact that they would act in a personal capacity and their expertise in criminal law were issues raised by many delegations.

76. Several delegations proposed the inclusion of a clause whereby “the function of committee member is incompatible with any post or function within the hierarchical structure of the executive branch of a State party”. However, consensus was not achieved on this clause.

77. In relation to the procedure for the election of members, the delegation of Spain observed that participation by the High Commissioner for Human Rights in drawing up the list of candidates proposed by States parties would be a positive element. Other delegations did not share that view.

78. The Working Group discussed whether it would be appropriate to offer States an opportunity to put forward candidates who were not their nationals. While some delegations viewed the possibility with interest, others considered that difficulties might arise, such as the election of two experts from the same country or an expert from a State which was not a party.

79. As regards the extension of terms of office, some delegations opposed the proposal to limit the number of terms to two (eight years in total). The delegation of Cuba, supported by other delegations, emphasized that the committee should be treated in the same way as the other treaty monitoring bodies, since enforced disappearances were as important as other violations of human rights. The Chairperson noted that the proposal was intended not to weaken the body but to strengthen it by making it more dynamic.

80. With regard to the question of geographical representation, one delegation suggested that the Working Group should adopt the expression used in other treaties on the subject, whereby members were elected with “due consideration being given to equitable geographical distribution”.

81. Some delegations suggested that the monitoring body should be funded by the States parties. Others were strongly opposed, pointing out that such a formula appeared in existing instruments and had never worked: funding of the committees in question was provided in practice from the regular budget of the United Nations. One delegation said that budgetary implications should be taken into consideration when a new body was set up

82. At the end of the discussion on the form that the instrument should take and the nature of the monitoring body, the Chairperson noted that the agreement reached by the Working Group concerning the functions of the monitoring body was more important than the actual nature of the body and that all delegations could agree on the idea of a convention. He said that the arguments for the various options had been most valuable. The option involving the Human Rights Committee, however, entailed a serious drawback, since it might mean that the International Covenant on Civil and Political Rights would need to be amended, which would mean a delay in the entry into force of the instrument. He did not consider it sensible to add to the Committee's duties without increasing the number of members or creating a subcommittee. At the same time, as some delegations had emphasized, it was extremely important to improve cooperation and harmonization among all the treaty bodies.

83. Having made these remarks, the Chairperson made the following proposal to: (a) decide, in principle, that the instrument should take the form of a convention; (b) to decide that the title of the convention would be "International Convention for the Protection of All Persons from Enforced Disappearance"; (c) to establish a new committee, to be called the "Committee on Enforced Disappearances", to monitor the convention; and (d) to include a clause providing for review by the Conference of States Parties. No objection was raised to this proposal.

84. In the course of the final statements, several delegations, including those of Angola, Canada, the Netherlands and the Islamic Republic of Iran, reiterated their view that the instrument should take the form of an optional protocol to the International Covenant on Civil and Political Rights and that the Human Rights Committee should be the body to monitor it. They stated, however, that, in the interests of the consensus, they would not oppose the proposed solution.

## **VI. GENERAL REVIEW OF SUBSTANTIVE ARTICLES**

85. The Working Group also carried out a general review of the draft instrument during the session. In the course of the review, some delegations requested that their comments should be recorded in this report.

### **Preamble**

86. The United States emphasized the importance of establishing a link between the right to know the truth, which was set out in the last preambular paragraph and in article 24, and freedom of information as protected by other instruments, notably the International Covenant on Civil and Political Rights. There could be no truth without information. Consequently, the United States delegation proposed that in the last preambular paragraph,<sup>8</sup> the phrase "right to know the truth" should be replaced by the phrase "freedom to seek, receive and impart information", taken from article 19, paragraph 2, of the Covenant.

87. Several delegations opposed any change in relation to the issue of the right to know the truth. The Chairperson considered that it was not appropriate to revisit the issue, which had been the subject of very lengthy negotiations and had received widespread assent. However, it would be possible to add a reference to freedom of information to the preamble, since it constituted a supplementary and very useful element of the right to the truth. Compromise proposals were put forward. The Working Group adopted the proposal which appears in the annex.

88. In the same paragraph, one delegation suggested deleting the reference to the “right of victims to justice”, which did not appear in existing human rights instruments. It emphasized that, while justice was the goal of the instrument, that did not mean that a new right should be created. The amendment was not adopted by the Working Group.

89. The delegation of Uruguay considered that the right to know the truth concerning the circumstances of an enforced disappearance entailed identification of those responsible.

### **Article 1<sup>9</sup> (formerly article 3)**

90. No comments were made on this article.

### **Article 2 (formerly article 1)**

91. The delegation of Argentina said that the fact that any person subjected to enforced disappearance was placed “outside the protection of the law” was inherent in such disappearance and resulted from the three elements making it up, namely, deprivation of liberty, State responsibility and concealment of the fate or whereabouts of the disappeared person. The phrase “which places such a person outside the protection of the law” could not be construed as an additional constituent element of the crime of enforced disappearance.

92. The delegations of China, Egypt and the United Kingdom, on the other hand, said that, according to their interpretation, the fact of a person’s being placed outside the protection of the law was not a consequence of the three preceding elements of the definition but a fourth element of the definition. The United Kingdom also said that, according to its interpretation, the fact that a person was placed outside the protection of the law meant that, in the eyes of the State, the deprivation of liberty or the detention of the person was not covered by the rules relating to deprivation of liberty or detention, or that those rules were not in accordance with applicable international law.

93. The Chairperson drew attention to the ambiguity in the text of the article, which gave legislators the option of interpreting the reference to a person being placed outside the protection of the law as an integral part of the definition or not. He also recalled that States were fully entitled to make an interpretative declaration on the matter at the time of ratification.

94. The United States delegation pointed out that, in the United States penal system, the elements of a crime, and in particular the element of intent, must be clearly established. In the absence of the element of intent, an individual could not be held responsible. Consequently, the delegation suggested adding to the definition of enforced disappearance the words “with the intention of removing the person from the protection of the law” after “disappeared person”.

95. Similarly, the delegation of Canada said that the definition of enforced disappearance in article 2, and any reference to crimes or offences in the instrument, especially the obligation for States to make enforced disappearance a crime, should be interpreted in the light of the fact that, in the legislation of some countries, the element of intent was essential to any criminal offence.

96. The Chairperson said that the addition was unnecessary, since it was implicit in the definition. It was hard to imagine that all the elements of the definition might be combined without intent. Moreover, it was important to note that in no penal system was there an offence of enforced disappearance without intent. That comment also applied to article 4.

97. At the suggestion of one delegation, which was accepted by the Working Group, the word “place” in the English text was replaced by “places”.

### **Article 3 (formerly article 2)**

98. The discussion of the question of non-State actors appears in paragraphs 12 to 15 above. In the course of the general review of the draft text, the delegation of Mexico suggested adding the following sentence at the end of the article: “In the interests of investigating a case and bringing it to trial, appropriate measures shall be taken to ensure protection of victims.” The suggestion was not accepted. When making its statement during the closure of the session, the delegation emphasized that, according to its interpretation of the article, the State was under an obligation to take measures to prevent enforced disappearances, protect the victims and bring those responsible to justice.

99. The Working Group did not adopt the proposal by one delegation to change the position of the article.

### **Article 4**

100. The United States delegation emphasized that, owing to the federal structure of the United States, it would be difficult to apply this article under the legislation of the federal states. It did not interpret the article as placing States under an obligation to introduce a new offence of enforced disappearance at each level of legislation. The State would be obliged only to ensure that all the elements of the offence were covered under each set of criminal legislation.

101. The Chairperson said that it was difficult to accept such an interpretation, while emphasizing that the difficulties raised by the United States delegation were technical rather than political in nature.

102. The delegation of China stated that it did not interpret the article as imposing on States the obligation to make enforced disappearance a separate offence under their domestic legislation. The Islamic Republic of Iran also said that it interpreted the article as not imposing new obligations on States, which could punish enforced disappearance under existing criminal law.

103. The delegation of Mexico considered it essential that enforced disappearance should be a separate offence under a State’s criminal law.

### **Article 5**

104. The United States delegation proposed that the article should be deleted because the content was not operative; it ought to be included in the preamble instead. Besides, the provision could be interpreted as creating an obligation for States to make the widespread or systematic practice of enforced disappearance a crime against humanity under their criminal legislation.

105. One delegation stressed that the definition of a crime against humanity in article 5 did not correspond to and in fact weakened existing international law. The delegation noted in particular that just one enforced disappearance could constitute a crime against humanity if committed in the context of a systematic or widespread attack. It therefore proposed that the article should be reworded to read: “Enforced disappearances that constitute a crime against humanity in certain circumstances as defined in international law shall attract the consequences provided for under applicable international law.”

106. Although some delegations supported that approach, the Working Group did not agree to amend article 5. The Chairperson noted that the text, which was neutral, in no way weakened international law relating to crimes against humanity but sought rather to preserve it. Moreover, article 27, which stipulated that instruments affording greater protection must apply, offered an important safeguard. Article 5 did not create any additional obligation on States to accede to particular instruments or amend their domestic legislation.

107. The delegation of Ireland and several others said that they interpreted article 5 and the instrument as a whole as having no effect on the definition of crimes against humanity in international law. Canada said that articles 5 and 6 should be interpreted in conformity with international law, including the Rome Statute of the International Criminal Court. The Netherlands regretted that a requirement of such conformity was not clearly established in the instrument.

#### **Article 6**

108. New Zealand, supported by the Netherlands, said that the article must be interpreted in a manner consistent with article 28 of the Rome Statute.

109. The United States said that it interpreted paragraph 2 to establish no criminal responsibility on the part of anyone unaware of participating in the commission of an enforced disappearance.

110. The Netherlands said, with reference to paragraph 1, that the concept of the responsibility of a superior ought to apply to such crimes as genocide, war crimes and crimes against humanity. The instrument would thus be consistent with the Rome Statute.

#### **Article 7**

111. The Working Group decided to add disabled persons to the list contained in paragraph 2 (b).

112. The delegation of Canada said that paragraph 2 (a) could not be interpreted in such a way that mitigating circumstances effectively amounted to an amnesty or granted impunity to those responsible for enforced disappearance, who should receive due punishment that took account of the seriousness of the crime.

### **Article 8**

113. At the proposal of one delegation, and to take into account the varying terms used in the legislation of Latin American countries, the Working Group agreed that the expression “continuous nature” in paragraph 1 (b) should be translated in the Spanish version of the instrument as “*carácter continuo o permanente*”.

114. The United States delegation said that it could not support the provision concerning the statute of limitations, in view, among other reasons, of its federal system.

115. The delegation of Canada said that the article must be interpreted in accordance with international law and should on no account be used to permit impunity. A statute of limitations should not be allowed for the crime of enforced disappearance when it constituted a crime against humanity.

116. The delegation of Cuba said that the instrument should state unequivocally that the crime of enforced disappearance was not subject to a statute of limitations. Those responsible for such acts should not be able to benefit from such measures as amnesties, statutes of limitation or pardons, the effect of which would be to exempt them from criminal prosecution or punishment. One aspect of the subject was not covered by the draft instrument, since no provision was made, among the acts that entailed responsibility in cases of enforced disappearance, for the acts of a State that abetted, whether openly or not, enforced disappearances in other States.

### **Article 9**

117. The United States of America proposed the deletion of paragraph 2 and said that it would not consider itself bound by the provision under any circumstances.

118. A proposal to add the words “or to a criminal tribunal in accordance with its international obligations” after the words “international criminal tribunal” was rejected.

### **Article 10**

119. At the proposal of one delegation, which said that the notion of a preliminary inquiry did not exist in its legal system, the reference to such an inquiry in paragraph 2 was amended by the addition of the words “or investigations”.

### **Article 11**

120. No comments were made on this article.

### **Article 12**

121. No substantive comments were made on this article.

### **Article 13**

122. With a view to bringing paragraph 1 into line with other international instruments, the Working Group decided to amend the last sentence by adding the word “alone” after the word “grounds”: a request might contain other grounds that justified a refusal to extradite.

#### **Article 14**

123. The text, which was based on article 9 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, was accepted by the Working Group.

#### **Article 15**

124. No comments were made on this article.

#### **Article 16**

125. The United States delegation stressed the importance of including an additional paragraph setting out an exception similar to that provided for in article 1, paragraph F, of the 1951 Convention relating to the Status of Refugees, which would exclude application of paragraph 1 to persons who constituted a danger to the country in which they were.<sup>10</sup> The United States considered that the article must be consistent with international law on the question of non-refoulement. The instrument under consideration was not the place in which to rewrite the law of refugees and non-refoulement. The proposed amendment would bring the instrument into conformity with the law of refugees.

126. The United States proposal was supported by another delegation, which proposed as an alternative that the Convention relating to the Status of Refugees should be added to the list of instruments mentioned in article 43.

127. Several delegations and the Chairperson recalled that article 16 was directly inspired by article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and that its scope was different from that of the Convention relating to the Status of Refugees. It was also pointed out that article 43 had to do with an entirely different issue, namely the functions of the International Committee of the Red Cross in relation to visits to places of detention, and that including a reference to the Convention relating to the Status of Refugees in that article was thus inappropriate.

128. It was decided not to make any amendments to the text suggested by the Chairperson and to note in the present report that article 16 was without prejudice to the Convention relating to the Status of Refugees.

#### **Article 17**

129. One delegation proposed that paragraph 1 should either be deleted or be reworded to read "No one shall be held in detention in a secret location". The proposal was not adopted.

130. The delegation of Mexico stated that it interpreted paragraph 2 (d) to mean that the restriction on the right to communication of any person deprived of liberty should be subject to some limitation in time, should be reasonable and should be consistent with article 9, paragraph 3, of the International Covenant on Civil and Political Rights, in order to avoid secret detention.

131. On the proposal of one delegation it was decided to add, to paragraph 2 (e), the phrase “where necessary with the prior authorization of a judicial authority”, to take account of situations in which the places where persons were deprived of liberty were private. Another delegation suggested that the expression “legally authorized” should apply to authorities as well as to institutions; the suggestion was adopted.

132. The Working Group also adopted the proposal that paragraph 2 (f) should specify who qualified as a person with a legitimate interest, since the expression was used here for the first time in the instrument. The delegations of Angola and China stated that, according to their interpretation, it was for national law to define who such people were. The same applied to article 18, paragraph 1, and article 30, paragraph 1. The Chairperson said that he supported such an interpretation.

133. It was also proposed that the instrument should specify that persons with a legitimate interest should be able to bring proceedings before a court only in cases in which the person deprived of liberty could not do so himself or herself. Several delegations considered the addition superfluous, since there was a presumption of enforced disappearance. Eventually, since the term “presumption” had an excessively legalistic connotation and was likely to give rise to debate about the procedure to follow to determine whether or not there was a presumption, it was suggested that it should be replaced by the term “suspicion”.

#### **Article 18**

134. No comments were made on this article.

#### **Article 19**

135. No comments were made on this article.

#### **Article 20**

136. The delegation of Argentina said that the article could on no account be interpreted, even in exceptional cases, as meaning that it was permissible to deny or conceal information relating to the crime of enforced disappearance. In particular, it was not permissible to deny or conceal information on the fate of a person deprived of liberty, whether that person was alive or not, the person’s state of physical and mental health or the location at which the person was held.

#### **Article 21**

137. It was decided to insert the words “deprived of liberty” after the word “persons” in the first sentence.

#### **Article 22**

138. No comments were made on this article.



### Article 23

139. This wording was accepted by the Working Group. The delegation of Germany recalled its oft-stated reservations regarding detailed regulations on training.<sup>11</sup>

### Article 24

140. There was some discussion about paragraph 2 of the article and its relationship to the right to know the truth set forth in the last preambular paragraph. The Chairperson noted that paragraph 2 would remain unchanged and that any amendment should, rather, focus on the last preambular paragraph.

141. On the proposal of one delegation, the words “necessary measures” in paragraph 3 were replaced by the words “all appropriate measures”, so as to accord States parties greater latitude. The State must be able to require the existence of sufficient linkage of the crime to its national territory before undertaking an investigation and to decline to conduct an investigation where no successful outcome was possible or where there was no longer any criminal offence to be prosecuted. One delegation noted that the obligations set forth in paragraph 3 could not apply in cases of enforced disappearance committed by non-State actors, and proposed the insertion of the words “if possible” in the provision. The proposal was not adopted.

142. One delegation said that paragraphs 4 and 5 of the article applied only in cases of enforced disappearance as defined in draft article 2 and accordingly proposed the replacement in paragraph 4 of the words “in its legal system” by the words “in conformity with its laws”. The Chairperson expressed reluctance to amend the provisions in this way, noting that the obligation to make reparation was linked to responsibility and that it was State responsibility alone that was in question here. The article did not establish the legal responsibility of a State that was not involved in a disappearance.

143. One delegation requested the deletion of paragraph 5, since the list contained therein was not exhaustive and set forth means of reparation that were ambiguous and difficult to define. In the view of this delegation, it should be left to the national legal system to define suitable means of reparation. This view was not accepted by the Working Group.

144. The delegation of Canada said that article 24 must be interpreted in accordance with international law.

### Article 25

145. The Working Group decided to add the word “name” after the words “their nationality” in paragraph 4.

146. The United Kingdom made the following statement with regard to paragraph 4:

“The United Kingdom fully recognizes the importance of this article for many delegations and is not proposing any amendments to paragraph 4 in addition to those already suggested during the consultations. However, we should like to express our understanding of the obligations contained in this paragraph. The paragraph requires States to have in place legal procedures to revise and, where appropriate, annul adoptions or placements that originated in an enforced disappearance. We understand that this

article does not remove the obligation to establish legal procedures that would automatically lead to a review or a consideration of the question of whether an adoption was annulled. We also understand that this article does not require the automatic annulment of an adoption that originated in an enforced disappearance. We interpret this article as requiring States parties to have a procedure or procedures which make it possible to request the review of an adoption covered by the article. The question of whether an adoption was in fact reviewed or annulled should be determined in accordance with the legal procedures obtaining in the State concerned.”

## **VII. GENERAL REVIEW OF FINAL PROVISIONS**

### **Article 37 (formerly draft article 27)**

147. A new wording drawing on article 41 of the Convention on the Rights of the Child was accepted by the Working Group, with the aim of emphasizing that the provisions of the instrument did not undermine more favourable national or international provisions.

### **Article 38**

148. It was suggested that article 48 of the International Covenant on Civil and Political Rights should be drawn on to round out this article.

149. The delegation of China said that it interpreted the article to mean that States were entitled to make declarations of a territorial nature at the time of signature, ratification or accession.<sup>12</sup>

### **Article 39**

150. No comments were made on this provision.

### **Article 40**

151. No comments were made on this provision.

### **Article 41**

152. No comments were made on this provision.

### **Article 42**

153. At the suggestion of one delegation, the Working Group decided to insert a provision relating to arbitration and referral to the International Court of Justice, drawing on article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination. It was agreed that this clause would be optional.

154. The Islamic Republic of Iran said that it was opposed to the inclusion of such a provision and called for its deletion.

### **Article 43**

155. The Working Group decided not to agree to a proposal by one delegation that the word “opportunity” should be replaced by the word “right” and not to amend the provision, which had been the subject of lengthy discussions at previous sessions and on which the Working Group had reached agreement.

156. The delegation of the United Kingdom said that it interpreted the article as confirming that the obligations of States parties under international humanitarian law, including their rights and obligations under the 1949 Geneva Conventions and the 1977 Additional Protocols, constituted *lex specialis* in the case of armed conflict or any other situation in which international humanitarian law was applicable. For the United Kingdom delegation, the article was a saving clause aimed at ensuring that, where it was applicable, international humanitarian law took priority over any provision of the draft convention.

### **Article 44**

157. No comments were made on this provision.

### **Article 45**

158. No comments were made on this provision.

### **Reservations**

159. Egypt, supported by the Islamic Republic of Iran, said that, in the absence of a provision on reservations, it was understood that States parties had the right to enter reservations to any of the articles of the instrument, in accordance with international jurisprudence and the Vienna Convention on the Law of Treaties.

160. The Chairperson replied that States parties would have the right to enter reservations at the time of accession, on the understanding that such reservations must be in keeping with international law. In particular, if a reservation related to the substance of the instrument, other States parties could challenge it.

## **VIII. CLOSURE OF THE PROCEEDINGS AND ADOPTION OF THE REPORT**

161. At the end of the discussion, the Chairperson noted that:

- All the provisions of the draft convention had been approved, due regard being had to the statements recorded in the report;
- There was no objection to the transmission of the text to the Commission on Human Rights, for approval by the General Assembly;
- Negotiations were concluded and the Working Group had fulfilled its mandate.

162. The text of the draft convention forwarded by the Working Group to the Commission on Human Rights appears in annex I.

163. At the close of discussions, a number of delegations made statements expressing satisfaction at the work accomplished and gratitude to the Chairperson for his efforts, which had resulted in the successful drafting of a convention within a very short space of time. The delegations concerned, which also congratulated the experts and the non-governmental organizations for their contributions throughout the work of the Working Group, were the following: Algeria, Angola, Argentina, Austria, Belgium, Brazil, Canada, Chile, Costa Rica, Cuba, Egypt, France, Germany, Greece, Holy See, India, Islamic Republic of Iran, Ireland, Italy, Japan, Mexico, Morocco, Netherlands, Spain, Switzerland, United Kingdom and Uruguay.

164. Most delegations emphasized the importance of the new convention, especially certain provisions that made good deficiencies into protection from enforced disappearance under international human rights law, and expressed the hope that the draft text would be approved by the Commission on Human Rights and the General Assembly in 2006.

165. The International Committee of the Red Cross and the following non-governmental organizations also expressed thanks to the Working Group and the Chairperson and satisfaction with the draft convention: Families of Victims of Involuntary Disappearance (FIND), Humanist Committee on Human Rights, International Federation of Action by Christians for the Abolition of Torture, International Federation of Human Rights Leagues (speaking also on behalf of Amnesty International, Human Rights Watch and the International Commission of Jurists), Latin American Federation of Associations of Relatives of Disappeared Detainees, Permanent Assembly of Human Rights, Philippine Human Rights Information Centre and South Asia Human Rights Documentation Centre.

166. Several delegations asked for their final general statements to be reflected, in whole or in part, in this report. Those statements appear in annex II.

167. The Working Group adopted its report *ad referendum* at its twentieth plenary meeting, on 23 September 2005.

### Notes

<sup>1</sup> E/CN.4/2005/66, paras. 28-35.

<sup>2</sup> *Ibid.*, paras. 172 and 173.

<sup>3</sup> The Working Group decided to reverse the order of draft articles 26-5 and 26-6.

<sup>4</sup> Article 44 in the final text.

<sup>5</sup> For a summary of the discussions on this issue, see in particular the report of the Working Group on its third and fourth sessions (E/CN.4/2005/66), paras. 148-169.

<sup>6</sup> Article 44 in the final text.

<sup>7</sup> Articles 29 to 34 in the final text.

<sup>8</sup> “*Affirming* the right of any person not to be subjected to an enforced disappearance, the right of victims to justice and to reparation, and their right to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person.”

<sup>9</sup> The numbering of articles in this chapter corresponds to that of the final draft text appearing in annex I.

<sup>10</sup> The following wording was proposed: “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 judgement of a particularly serious crime, constitutes a danger to the community of that country.”

<sup>11</sup> See E/CN.4/2005/66, para. 102.

<sup>12</sup> See paras. 30 to 33 above.

## **Annex I**

### **DRAFT INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE**

#### **Preamble**

The States Parties to this Convention,

*Considering* the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and fundamental freedoms,

*Having regard* to the Universal Declaration of Human Rights,

*Recalling* the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and all other relevant international instruments in the fields of human rights, humanitarian law and international criminal law,

*Recalling* the Declaration on the Protection of All Persons from Enforced Disappearance adopted by the General Assembly of the United Nations in its resolution 47/133 of 18 December 1992,

*Aware* of the extreme seriousness of enforced disappearance, which constitutes a crime and, in certain circumstances defined in international law, a crime against humanity,

*Determined* to prevent enforced disappearances and to combat impunity for the crime of enforced disappearance,

*Considering* the right of any person not to be subjected to enforced disappearance, the right of victims to justice and to reparation,

*Affirming* the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end,

*Have agreed* as follows:

## **PART I**

### **Article 1**

1. No one shall be subjected to enforced disappearance.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.

## **Article 2**

For the purposes of this Convention, enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

## **Article 3**

Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice.

## **Article 4**

Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law.

## **Article 5**

The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.

## **Article 6**

1. Each State Party shall take the necessary measures to hold criminally responsible at least:
  - (a) Any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance;
  - (b) A superior who:
    - (i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance;
    - (ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and
    - (iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution;

(c) Subparagraph (b) above is without prejudice to the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a military commander.

2. No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance.

#### **Article 7**

1. Each State Party shall make the offence of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness.

2. Each State Party may establish:

(a) Mitigating circumstances, in particular for persons who, having been implicated in the commission of an enforced disappearance, effectively contribute to bringing the disappeared person forward alive or make it possible to clarify cases of enforced disappearance or to identify the perpetrators of an enforced disappearance;

(b) Without prejudice to other criminal procedures, aggravating circumstances, in particular in the event of the death of the disappeared person or the commission of an enforced disappearance in respect of pregnant women, minors, persons with disabilities or other particularly vulnerable persons.

#### **Article 8**

Without prejudice to article 5,

1. A State Party which applies a statute of limitations in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings:

(a) Is of long duration and is proportionate to the extreme seriousness of this offence;

(b) Commences from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature.

2. Each State Party shall guarantee the right of victims of enforced disappearance to an effective remedy during the term of limitation.

#### **Article 9**

1. Each State Party shall take the necessary measures to establish its competence to exercise jurisdiction over the offence of enforced disappearance:

(a) When the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is one of its nationals;



(c) When the disappeared person is one of its nationals and the State Party considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its competence to exercise jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized.

3. This Convention does not exclude any additional criminal jurisdiction exercised in accordance with national law.

### **Article 10**

1. Upon being satisfied, after an examination of the information available to it, that the circumstances so warrant, any State Party in whose territory a person suspected of having committed an offence of enforced disappearance is present shall take him or her into custody or take such other legal measures as are necessary to ensure his or her presence. The custody and other legal measures shall be as provided for in the law of that State Party but may be maintained only for such time as is necessary to ensure the person's presence at criminal, surrender or extradition proceedings.

2. A State Party which has taken the measures referred to in paragraph 1 shall immediately carry out a preliminary inquiry or investigations to establish the facts. It shall notify the States Parties referred to in article 9, paragraph 1, of the measures it has taken in pursuance of paragraph 1 of this article, including detention and the circumstances warranting detention, and of the findings of its preliminary inquiry or its investigations, indicating whether it intends to exercise its jurisdiction.

3. Any person in custody pursuant to paragraph 1 may communicate immediately with the nearest appropriate representative of the State of which he or she is a national, or, if he or she is a stateless person, with the representative of the State where he or she usually resides.

### **Article 11**

1. The State Party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State Party. In the cases referred to in article 9, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 9, paragraph 1.

3. Any person against whom proceedings are brought in connection with an offence of enforced disappearance shall be guaranteed fair treatment at all stages of the proceedings. Any person tried for an offence of enforced disappearance shall benefit from a fair trial before a competent, independent and impartial court or tribunal established by law.

### **Article 12**

1. Each State Party shall ensure that any individual who alleges that a person has been subjected to enforced disappearance has the right to report the facts to the competent authorities, which shall examine the allegation promptly and impartially and, where necessary, undertake without delay a thorough and impartial investigation. Appropriate steps shall be taken, where necessary, to ensure that the complainant, witnesses, relatives of the disappeared person and their defence counsel, as well as persons participating in the investigation, are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given.

2. Where there are reasonable grounds for believing that a person has been subjected to enforced disappearance, the authorities referred to in paragraph 1 shall undertake an investigation, even if there has been no formal complaint.

3. Each State Party shall ensure that the authorities referred to in paragraph 1:

(a) Have the necessary powers and resources to conduct the investigation effectively, including access to the documentation and other information relevant to their investigation;

(b) Have access, if necessary with the prior authorization of a judicial authority, which shall rule promptly on the matter, to any place of detention or any other place where there are reasonable grounds to believe that the disappeared person may be present.

4. Each State Party shall take the necessary measures to prevent and punish acts that hinder the conduct of an investigation. It shall ensure in particular that persons suspected of having committed an offence of enforced disappearance are not in a position to influence the progress of an investigation by means of pressure or acts of intimidation or reprisal aimed at the complainant, witnesses, relatives of the disappeared person or their defence counsel, or at persons participating in the investigation.

### **Article 13**

1. For the purposes of extradition between States Parties, the offence of enforced disappearance shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused on these grounds alone.

2. The offence of enforced disappearance shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties before the entry into force of this Convention.

3. States Parties undertake to include the offence of enforced disappearance as an extraditable offence in any extradition treaty subsequently to be concluded between them.

4. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the necessary legal basis for extradition in respect of the offence of enforced disappearance.
5. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offence of enforced disappearance as an extraditable offence between themselves.
6. Extradition shall, in all cases, be subject to the conditions provided for by the law of the requested State Party or by applicable extradition treaties, including, in particular, conditions relating to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition or make it subject to certain conditions.
7. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin, political opinions or membership of a particular social group, or that compliance with the request would cause harm to that person for any one of these reasons.

#### **Article 14**

1. States Parties shall afford one another the greatest measure of mutual legal assistance in connection with criminal proceedings brought in respect of an offence of enforced disappearance, including the supply of all evidence at their disposal that is necessary for the proceedings.
2. Such mutual legal assistance shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable treaties on mutual legal assistance, including, in particular, the conditions in relation to the grounds upon which the requested State Party may refuse to grant mutual legal assistance or may make it subject to conditions.

#### **Article 15**

States Parties shall cooperate with each other and shall afford one another the greatest measure of mutual assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains.

#### **Article 16**

1. No State Party shall expel, return ("refouler"), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.

### Article 17

1. No one shall be held in secret detention.
2. Without prejudice to other international obligations of the State Party with regard to the deprivation of liberty, each State Party shall, in its legislation:
  - (a) Establish the conditions under which orders of deprivation of liberty may be given;
  - (b) Indicate those authorities authorized to order the deprivation of liberty;
  - (c) Guarantee that any person deprived of liberty shall be held solely in officially recognized and supervised places of deprivation of liberty;
  - (d) Guarantee that any person deprived of liberty shall be authorized to communicate with and be visited by his or her family, counsel or any other person of his or her choice, subject only to the conditions established by law, or, if he or she is a foreigner, to communicate with his or her consular authorities, in accordance with applicable international law;
  - (e) Guarantee access by the competent and legally authorized authorities and institutions to the places where persons are deprived of liberty, if necessary with prior authorization from a judicial authority;
  - (f) Guarantee that any person deprived of liberty or, in the case of a suspected enforced disappearance, since the person deprived of liberty is not able to exercise this right, any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel, shall, in all circumstances, be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the deprivation of liberty and order the person's release if such deprivation of liberty is not lawful.
3. Each State Party shall assure the compilation and maintenance of one or more up-to-date official registers and/or records of persons deprived of liberty, which shall be made promptly available, upon request, to any judicial or other competent authority or institution authorized for that purpose by the law of the State Party concerned or any relevant international legal instrument to which the State concerned is a party. The information contained therein shall include, as a minimum:
  - (a) The identity of the person deprived of liberty;
  - (b) The date, time and place where the person was deprived of liberty and the identity of the authority that deprived the person of liberty;
  - (c) The authority that ordered the deprivation of liberty and the grounds for the deprivation of liberty;
  - (d) The authority responsible for supervising the deprivation of liberty;

(e) The place of deprivation of liberty, the date and time of admission to the place of deprivation of liberty and the authority responsible for the place of deprivation of liberty;

(f) Elements relating to the state of health of the person deprived of liberty;

(g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains;

(h) The date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.

### **Article 18**

1. Subject to articles 19 and 20, each State Party shall guarantee to any person with a legitimate interest in this information, such as relatives of the person deprived of liberty, their representatives or their counsel, access to at least the following information:

(a) The authority that ordered the deprivation of liberty;

(b) The date, time and place where the person was deprived of liberty and admitted to the place of deprivation of liberty;

(c) The authority responsible for supervising the deprivation of liberty;

(d) The whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of deprivation of liberty, the destination and the authority responsible for the transfer;

(e) The date, time and place of release;

(f) Elements relating to the state of health of the person deprived of liberty;

(g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains.

2. Appropriate measures shall be taken, where necessary, to protect the persons referred to in paragraph 1, as well as persons participating in the investigation, from any ill-treatment, intimidation or sanction as a result of the search for information concerning a person deprived of liberty.

### **Article 19**

1. Personal information, including medical and genetic data, which is collected and/or transmitted within the framework of the search for a disappeared person shall not be used or made available for purposes other than the search for the disappeared person. This is without prejudice to the use of such information in criminal proceedings relating to an offence of enforced disappearance or the exercise of the right to obtain reparation.

2. The collection, processing, use and storage of personal information, including medical and genetic data, shall not infringe or have the effect of infringing the human rights, fundamental freedoms or human dignity of an individual.

#### **Article 20**

1. Only where a person is under the protection of the law and the deprivation of liberty is subject to judicial control may the right to information referred to in article 18 be restricted, on an exceptional basis, where strictly necessary and where provided for by law, and if the transmission of the information would adversely affect the privacy or safety of the person, hinder a criminal investigation, or for other equivalent reasons in accordance with the law, and in conformity with applicable international law and with the objectives of this Convention. In no case shall there be restrictions on the right to information referred to in article 18 that could constitute conduct defined in article 2 or be in violation of article 17, paragraph 1.

2. Without prejudice to consideration of the lawfulness of the deprivation of a person's liberty, States Parties shall guarantee to the persons referred to in article 18, paragraph 1, the right to a prompt and effective judicial remedy as a means of obtaining without delay the information referred to in article 18, paragraph 1. This right to a remedy may not be suspended or restricted in any circumstances.

#### **Article 21**

Each State Party shall take the necessary measures to ensure that persons deprived of liberty are released in a manner permitting reliable verification that they have actually been released. Each State Party shall also take the necessary measures to assure the physical integrity of such persons and their ability to exercise fully their rights at the time of release, without prejudice to any obligations to which such persons may be subject under national law.

#### **Article 22**

Without prejudice to article 6, each State Party shall take the necessary measures to prevent and punish the following conduct:

(a) Delaying or obstructing the remedies referred to in article 17, paragraph 2 (f), and article 20, paragraph 2;

(b) Failure to record the deprivation of liberty of any person, or the recording of any information which the official responsible for the official register knew or should have known to be inaccurate;

(c) Refusal to provide information on the deprivation of liberty of a person, or the provision of inaccurate information, even though the legal requirements for providing such information have been met.

### **Article 23**

1. Each State Party shall ensure that the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty includes the necessary education and information regarding the relevant provisions of this Convention, in order to:
  - (a) Prevent the involvement of such officials in enforced disappearances;
  - (b) Emphasize the importance of prevention and investigations in relation to enforced disappearances;
  - (c) Ensure that the urgent need to resolve cases of enforced disappearance is recognized.
2. Each State Party shall ensure that orders or instructions prescribing, authorizing or encouraging enforced disappearance are prohibited. Each State Party shall guarantee that a person who refuses to obey such an order will not be punished.
3. Each State Party shall take the necessary measures to ensure that the persons referred to in paragraph 1 who have reason to believe that an enforced disappearance has occurred or is planned report the matter to their superiors and, where necessary, to the appropriate authorities or bodies vested with powers of review or remedy.

### **Article 24**

1. For the purposes of this Convention, “victim” means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.
2. Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.
3. Each State Party shall take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains.
4. Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.
5. The right to obtain reparation referred to in paragraph 4 covers material and moral damages and, where appropriate, other forms of reparation such as:
  - (a) Restitution;
  - (b) Rehabilitation;
  - (c) Satisfaction, including restoration of dignity and reputation;
  - (d) Guarantees of non-repetition.

6. Without prejudice to the obligation to continue the investigation until the fate of the disappeared person has been clarified, each State Party shall take the appropriate steps with regard to the legal situation of disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, family law and property rights.

7. Each State Party shall guarantee the right to form and participate freely in organizations and associations concerned with attempting to establish the circumstances of enforced disappearances and the fate of disappeared persons, and to assist victims of enforced disappearance.

## **Article 25**

1. Each State Party shall take the necessary measures to prevent and punish under its criminal law:

(a) The wrongful removal of children who are subjected to enforced disappearance, children whose father, mother or legal guardian is subjected to enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance;

(b) The falsification, concealment or destruction of documents attesting to the true identity of the children referred to in subparagraph (a).

2. Each State Party shall take the necessary measures to search for and identify the children referred to in paragraph 1 (a) and to return them to their families of origin, in accordance with legal procedures and applicable international agreements.

3. States Parties shall assist one another in searching for, identifying and locating the children referred to in paragraph 1 (a).

4. Given the need to protect the best interests of the children referred to in paragraph 1 (a) and their right to preserve, or to have re-established, their identity, including their nationality, name and family relations as recognized by law, States Parties which recognize a system of adoption or other form of placement of children shall have legal procedures in place to review the adoption or placement procedure, and, where appropriate, to annul any adoption or placement of children that originated in an enforced disappearance.

5. In all cases, and in particular in all matters relating to this article, the best interests of the child shall be a primary consideration, and a child who is capable of forming his or her own views shall have the right to express those views freely, the views of the child being given due weight in accordance with the age and maturity of the child.

## **PART II**

### **Article 26**

1. A Committee on Enforced Disappearances (hereafter referred to as “the Committee”) shall be established to carry out the functions provided for under this Convention. The Committee shall consist of 10 experts of high moral character and recognized competence in the field of human rights, who shall serve in their personal capacity and be independent and impartial. The members of the Committee shall be elected by the States Parties according to



equitable geographical distribution. Due account shall be taken of the usefulness of participation in the work of the Committee by persons having relevant legal experience and to balanced gender representation.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by the States Parties from among their nationals, at biennial meetings of States Parties convened by the Secretary-General of the United Nations for this purpose. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of votes of the representatives of States Parties present and voting.

3. The initial election shall be held no later than six months after the date of entry into force of this Convention. Four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the State Party which nominated each candidate, and shall submit this list to all States Parties.

4. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election once. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 2 of this article.

5. If a member of the Committee dies or resigns or for any other reason can no longer perform his or her committee duties, the State Party which nominated him or her shall, in accordance with the criteria set out in paragraph 1 of this article, appoint another candidate from among its nationals to serve out his or her term, subject to the approval of the majority of the States Parties. Such approval shall be considered to have been obtained unless half or more of the States Parties respond negatively within six weeks of having been informed by the Secretary-General of the United Nations of the proposed appointment.

6. The Committee shall establish its own rules of procedure.

7. The Secretary-General of the United Nations shall provide the Committee with the necessary means, staff and facilities for the effective performance of its functions. The Secretary-General of the United Nations shall convene the initial meeting of the Committee

8. The members of the Committee shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations, as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

9. Each State Party shall cooperate with the Committee and assist its members in the fulfilment of their mandate, to the extent of the Committee's functions that the State Party has accepted.

### **Article 27**

A Conference of States Parties will take place at the earliest four years and at the latest six years following the entry into force of this Convention to evaluate the functioning of the Committee and to decide, in accordance with the procedure described in article 44, paragraph 2, whether it is appropriate to transfer to another body - without excluding any possibility - the monitoring of this Convention, in accordance with the functions defined in articles 28 to 36.

### **Article 28**

1. In the framework of the competencies granted by this Convention, the Committee shall cooperate with all relevant organs, offices and specialized agencies and funds of the United Nations, with the treaty bodies instituted by international instruments, with the special procedures of the United Nations and with the relevant regional intergovernmental organizations or bodies, as well as with all relevant State institutions, agencies or offices working toward the protection of all persons against enforced disappearances.
2. As it discharges its mandate, the Committee shall consult other treaty bodies instituted by relevant international human rights instruments, in particular the Human Rights Committee instituted by the International Covenant on Civil and Political Rights, with a view to ensuring the consistency of their respective observations and recommendations.

### **Article 29**

1. Each State Party shall submit to the Committee, through the Secretary-General of the United Nations, a report on the measures taken to give effect to its obligations under this Convention, within two years after the entry into force of this Convention for the State Party concerned.
2. The Secretary-General of the United Nations shall make this report available to all States Parties.
3. Each report shall be considered by the Committee, which shall issue such comments, observations or recommendations as it may deem appropriate. The comments, observations or recommendations shall be communicated to the State Party concerned, which may respond to them, on its own initiative or at the request of the Committee.
4. The Committee may also request States Parties to provide additional information on the implementation of this Convention.

### **Article 30**

1. A request that a disappeared person should be sought and found may be submitted to the Committee, as a matter of urgency, by relatives of the disappeared person or their legal representatives, their counsel or any person authorized by them, as well as by any other person having a legitimate interest.

2. If the Committee considers that a request for urgent action submitted in pursuance of paragraph 1:
  - (a) Is not manifestly unfounded;
  - (b) Does not constitute an abuse of the right of submission of such requests;
  - (c) Has already been duly presented to the competent bodies of the State Party concerned, such as those authorized to undertake investigations, where such a possibility exists;
  - (d) Is not incompatible with the provisions of this Convention; and
  - (e) The same matter is not being examined under another procedure of international investigation or settlement of the same nature;

it shall request the State Party concerned to provide it with information on the situation of the persons sought, within a time limit set by the Committee.

3. In the light of the information provided by the State Party concerned in accordance with paragraph 2, the Committee may transmit recommendations to the State Party, including a request that the State Party should take all the necessary measures, including interim measures, to locate and protect the person concerned in accordance with this Convention and to inform the Committee, within a specified period of time, of measures taken, taking into account the urgency of the situation. The Committee shall inform the person submitting the urgent action request of its recommendations and of the information provided to it by the State as it becomes available.
4. The Committee shall continue its efforts to work with the State Party concerned for as long as the fate of the person sought remains unresolved. The person presenting the request shall be kept informed.

### **Article 31**

1. A State Party may at the time of ratification of this Convention or at any time afterwards declare that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction claiming to be victims of a violation by this State Party of provisions of this Convention. The Committee shall not admit any communication concerning a State Party which has not made such a declaration.
2. The Committee shall consider a communication inadmissible where:
  - (a) The communication is anonymous;
  - (b) The communication constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of this Convention;
  - (c) The same matter is being examined under another procedure of international investigation or settlement of the same nature; or where

(d) All effective available domestic remedies have not been exhausted. This rule shall not apply where the application of the remedies is unreasonably prolonged.

3. If the Committee considers that the communication meets the requirements set out in paragraph 2, it shall transmit the communication to the State Party concerned, requesting it to provide observations and comments within a time limit set by the Committee.

4. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party will take such interim measures as may be necessary to avoid possible irreparable damage to the victims of the alleged violation. Where the Committee exercises its discretion, this does not imply a determination on admissibility or on the merits of the communication.

5. The Committee shall hold closed meetings when examining communications under the present article. It shall inform the author of a communication of the responses provided by the State Party concerned. When the Committee decides to terminate the procedure, it shall communicate its views to the State Party and to the author of the communication.

### **Article 32**

A State Party to this Convention may at any time declare that it recognizes the competence of the Committee to receive and consider communications in which a State Party claims that another State Party is not fulfilling its obligations under this Convention. The Committee shall not receive communications concerning a State Party which has not made such a declaration, nor communications from a State Party which has not made such a declaration.

### **Article 33**

1. If the Committee receives liable information indicating that a State Party is seriously violating the provisions of this Convention, it may, after consultation with the State Party concerned, request one or more of its members to undertake a visit and report back to it without delay.

2. The Committee shall notify the State Party concerned, in writing, of its intention to organize a visit, indicating the composition of the delegation and the purpose of the visit. The State Party shall answer the Committee within a reasonable time.

3. Upon a substantiated request by the State Party, the Committee may decide to postpone or cancel its visit.

4. If the State Party agrees to the visit, the Committee and the State Party concerned shall work together to define the modalities of the visit and the State Party shall provide the Committee with all the facilities needed for the successful completion of the visit.

5. Following its visit, the Committee shall communicate to the State Party concerned its observations and recommendations.

#### **Article 34**

If the Committee receives information which appears to it to contain well-founded indications that enforced disappearance is being practised on a widespread or systematic basis in the territory under the jurisdiction of a State Party, it may, after seeking from the State Party concerned all relevant information on the situation, urgently bring the matter to the attention of the General Assembly of the United Nations, through the Secretary-General of the United Nations.

#### **Article 35**

1. The Committee shall have competence solely in respect of enforced disappearances which commenced after the entry into force of this Convention.
2. If a State becomes a party to this Convention after its entry into force, the obligations of that State vis-à-vis the Committee shall relate only to enforced disappearances which commenced after the entry into force of this Convention for the State concerned.

#### **Article 36**

1. The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.
2. Before an observation on a State Party is published in the annual report, the State Party concerned shall be informed in advance and shall be given reasonable time to answer. This State Party may request the publication of its comments or observations in the report.

### **PART III**

#### **Article 37**

Nothing in this Convention shall affect any provisions which are more conducive to the protection of all persons from enforced disappearance and which may be contained in:

- (a) The law of a State Party;
- (b) International law in force for that State.

#### **Article 38**

1. This Convention is open for signature by all Member States of the United Nations.
2. This Convention is subject to ratification by all Member States of the United Nations. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. This Convention is open to accession by all Member States of the United Nations. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

### **Article 39**

1. This Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying or acceding to this Convention after the deposit of the twentieth instrument of ratification or accession, this Convention shall enter into force on the thirtieth day after the date of the deposit of that State's instrument of ratification or accession.

### **Article 40**

The Secretary-General of the United Nations shall notify all States Members of the United Nations and all States which have signed or acceded to this Convention of the following:

- (a) Signatures, ratifications and accessions under article 38;
- (b) The date of entry into force of this Convention under article 39.

### **Article 41**

The provisions of this Convention shall apply to all parts of federal States without any limitations or exceptions.

### **Article 42**

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation or by the procedures expressly provided for in this Convention shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
2. A State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by paragraph 1 of this article with respect to any State Party having made such a declaration.
3. Any State Party having made a declaration in accordance with the provisions of paragraph 2 of this article may at any time withdraw this declaration by notification to the Secretary-General of the United Nations.

### **Article 43**

This Convention is without prejudice to the provisions of international humanitarian law, including the obligations of the High Contracting Parties to the four Geneva Conventions of 12 August 1949 and the two Additional Protocols thereto of 1977, or to the opportunity available to any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.

#### **Article 44**

1. Any State Party to this Convention may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to this Convention with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.
2. Any amendment adopted by a majority of two thirds of the States Parties present and voting at the conference shall be submitted by the Secretary-General of the United Nations to all the States Parties for acceptance.
3. An amendment adopted in accordance with paragraph 1 of this article shall enter into force when two thirds of the States Parties to this Convention have accepted it in accordance with their respective constitutional procedures.
4. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Convention and any earlier amendment which they have accepted.

#### **Article 45**

1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States referred to in article 38.

## Annex II

### GENERAL STATEMENTS

#### United States of America

“As the task of the Working Group draws to a close and responsibility is passed to the Commission on Human Rights to consider further work, we express sincere appreciation to the Chair and his team, including the Secretariat, for your enormous dedication, skill and industriousness during negotiations on a binding instrument to combat this heinous crime. We also commend the State delegations, the independent experts, the International Committee of the Red Cross and non-governmental organizations for their intense commitment, expertise, tireless work and collegiality throughout, and give special thanks to the families of the disappeared for bearing witness to this terrible scourge.

“At the same time, as we have said before, in order to produce a document that will attract the widest possible number of States parties, treaty negotiations should be deliberate, unhurried and careful, allowing for full expression of views by all representatives, with every effort to achieve a consensus text that can be applied in all legal systems. We regret that often the pace of negotiations, among other factors, has resulted in a document that includes provisions the United States of America does not support, and to which we have registered key reservations. These reservations include, but are not limited to the following:

- Preambular paragraph 7 and article 24, paragraph 2, on the right to the truth. This is a notion that the United States views only in the context of the freedom of information, which is enshrined in article 19 of the International Covenant on Civil and Political Rights, consistent with our long-standing position under the Geneva Conventions. We are grateful for the goodwill shown in seeking compromise language in the preamble, but our reservations remain concerning this issue, including with respect to article 24, paragraph 2, which we read in this same light;
- We have serious concerns about article 2, which we firmly believe needs a more focused definition that includes the element of intentionality. This is the core of the Convention and we believe it needs a great deal more work;
- Article 5 requiring domestic legislation criminalizing crimes against humanity remains insufficiently defined and inappropriate to an operative paragraph in the text;
- As we have noted, the lack of a defence of superior orders in article 6, paragraph 2, could unfairly subject unwitting military and law enforcement personnel to the possibility of prosecution for actions that they did not and could not know were prohibited;



- Despite some modifications, the specific requirements for a statute of limitations in article 8 continue to present a problem of implementation within a federal system like that of the United States. Likewise, article 4 should not be read to require our various domestic legal systems to enact an autonomous offence of enforced disappearance, which is unnecessary and, from a practical standpoint, extremely burdensome and unworkable in the United States;
- We also note that our continuing objection to article 9, paragraph 2, concerning ‘found in’ jurisdiction has not been satisfactorily addressed;
- We have clearly stated for the record our continuing reservation as to the absence of language in article 16 explicitly bringing this text into conformity with the principle of non-refoulement articulated in the 1951 Convention relating to the Status of Refugees;
- We find that article 17 concerning access to places of detention, despite significant improvement, retains the possibility of conflict with constitutional and legal provisions in the laws of some States parties;
- Finally, we remain unconvinced that the appropriate vehicle for implementation of this instrument is a new treaty-monitoring body.

“Despite our continuing reservations, let me reiterate to you, Mr. Chairman, and your magnificent staff, the appreciation of my delegation for your outstanding leadership and the warm, cooperative and collegial spirit which defined these negotiations.”

### **Russian Federation**

This delegation congratulated the Chairperson and said that it was reserving its position on the draft convention as a whole until it had had the opportunity to consult its authorities.

### **India**

“The constructive ambiguity in the definition of enforced disappearance is not helpful, as it results in the creation of two different standards of proof for the same crime: one in this instrument and another in the Rome Statute. The missing elements of intent and knowledge in the definition will not help in easing the burden of proof, as *mens rea* is an essential element for the criminalization of any act. A proposition as to state of mind or knowledge is an essential ingredient of the definition of any crime and should have been included in the definition.

“It is our interpretation that the draft text enables national jurisdictions to criminalize the offence of enforced disappearance in accordance with their national legislation.

“The exclusion of non-State actors from the definition ignores the realities of our times and contemporary threats, which require a collective response.

“On the question of remedy and compensation, in a common-law system such as ours, there is no statutory right to remedy, but the judiciary at all levels, as well as the national human rights commission, regularly grants remedies and compensation to victims of human rights abuses.

“We are not convinced about the need for an independent convention and the creation of a new monitoring body. An optional protocol to the International Covenant on Civil and Political Rights with the existing Human Rights Committee is the optimal solution. If necessary, this arrangement can be reviewed after a few years on the basis of objective criteria and more data. This issue is important and merits further consideration.”

## **Italy**

“As in any international negotiation, it is inevitable that the final result is a compromise between different positions. Italy would have preferred specific provisions to bind the State always to grant all the information listed in article 18, to exclude the statute of limitations in respect of the crime of enforced disappearance, to prevent trials before special courts for those accused of such a crime and to prohibit pardons or amnesties in favour of the accused. These provisions were not included in the draft.

“However, Italy points out that, in certain cases, some appropriate solutions can be considered implicit in the relevant provisions of the draft. For instance, the several conditions set forth in article 20 lead to the practical result that the denial of information can never facilitate any practice of enforced disappearance or secret detention. From article 8, paragraph 2, it can be inferred that the statute of limitations is suspended as long as the victims are deprived of an effective remedy. Moreover, under article 36 of the draft, the Convention is without prejudice to the rules of international law or national legislation which ‘are more conducive to the protection of all persons from enforced disappearance’. Any State party is consequently free to adopt more advanced provisions when implementing the future Convention.

“Among the several solutions of the draft which can be fully subscribed to, Italy would point out the establishment of an ad hoc committee, which is the best way to grant an effective and urgent remedy to the victims of enforced disappearance.”

## **Japan**

The approval of the draft convention sends a message to the international community that enforced disappearance constitutes a human rights violation that is expressly forbidden by an international human rights instrument. The obligation of States to punish or extradite those responsible for such acts, and all the other measures provided for in the text, will contribute to the prevention of this offence. The fact that the tragic events that occurred in Latin America

were fundamental to the work of the Working Group does not mean that other regions, including Asia, have been spared this phenomenon. Japan itself is no exception. The adoption by the Working Group of the draft convention, the scope of application of which also extends to enforced disappearances perpetrated by agents of foreign countries, is thus of particular importance for Japan. Japan therefore participated actively from the outset in the work of the Working Group, through its high-level representatives. With regard to the definition of enforced disappearance and the statute of limitations, the Japanese delegation has striven to find solutions which would take account of the diversity of legal systems and could be accepted by the largest possible number of countries. As for the establishment of a new monitoring body, Japan has always been in favour of an independent body, given the political and legal importance of the draft convention. It is essential, however, that this new committee should be effective both in its capacity to provide a remedy for the victims of enforced disappearances and from the budgetary point of view.

**Mexico, speaking also on behalf of the Group of Latin American and Caribbean States (GRULAC)**

Mexico said that, among its many other achievements, the instrument established the right of every person not to be subjected to enforced disappearance; reaffirmed that the generalized or systematic practice of enforced disappearance constituted a crime against humanity; recognized the right of victims to justice and reparation; stressed the right to know the truth; provided for new procedures to find disappeared persons and bring cases before the General Assembly; and tackled the problem of child victims of enforced disappearances. All these elements indicated that a major step forward had been taken in the fight against impunity for this serious human rights violation and in working for its prevention.

**Switzerland, speaking also on behalf of Argentina, Belgium, Canada, Chile, Costa Rica, Ireland, Italy, Mexico and Spain**

The entry into force of the Convention is without prejudice to the mandate of the Working Group on Enforced or Involuntary Disappearances, which continues to operate within the framework of its own universal mandate. The new committee will, of course, establish close cooperation with the Working Group, in accordance with article 28, paragraph 1.

**Syrian Arab Republic**

The delegation of the Syrian Arab Republic stated that it would have preferred the instrument to be enshrined in an optional protocol and that the monitoring body should have been the Human Rights Committee. It has entered a reservation to the entire draft instrument.

**The United Kingdom of Great Britain and Northern Ireland, speaking also on behalf of the European Union and also Bulgaria, Romania, Turkey, Croatia, Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Serbia and Montenegro, Ukraine and the Republic of Moldova**

“The member States of the European Union would like to congratulate you and the Working Group as a whole on the excellent progress made during this session. We are glad to see that the Working Group has been able to complete its work and we appreciate the constructive atmosphere which has made this possible. We have always recognized the importance of the process leading to this instrument and will continue to support it.

“We are convinced that this instrument will prove to be an important step towards the effective prevention of enforced disappearance and will respond to the needs of victims. We look forward to this process being taken forward next year.”

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