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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)

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Introduction

1. At its fifty-seventh session, the Commission on Human Rights decided, in its resolution 2001/46 of 23 April 2001, to establish an intersessional open-ended working group charged with elaborating a draft legally binding normative instrument for the protection of all persons from enforced disappearance, taking into account in particular the draft international convention on the protection of all persons from enforced disappearance transmitted by the Sub-Commission on the Promotion and Protection of Human Rights in its resolution 1998/25 of 26 August 1998 (hereinafter "1998 draft"). In the same resolution, the Commission requested its Chairperson to appoint an independent expert to examine the international criminal and human rights framework for the protection of persons from enforced or involuntary disappearance, with a view to identifying any gaps in order to ensure full protection from enforced or involuntary disappearance and to report to the Commission at its fifty-eighth session and to the working group at its first session.

2. At its fifty-eighth session, the Commission, in its resolution 2002/41 of 23 April 2002, requested the working group, which was to meet before the fifty-ninth session for a period of 10 working days, to prepare, for consideration and adoption by the General Assembly, a draft legally binding instrument on the basis of the Declaration on the Protection of All Persons from Enforced Disappearance adopted by the General Assembly in its resolution 47/133 of 18 December 1992 (hereinafter "1992 Declaration"), in the light of the work of the independent expert and taking into account, inter alia, the 1998 draft (E/CN.4/Sub.2/1998/19, Annex).

3. Pursuant to the above-mentioned resolutions, the working group met from 6 to 17 January 2003. Its session was opened by Mr. Bertrand Ramcharan, Deputy High Commissioner for Human Rights, who made an introductory statement summarizing United Nations activities with respect to enforced disappearances since the 1970s.

I. ORGANIZATION OF WORK

A. Election of officers

4. At its 1st meeting, on 6 January 2003, the working group elected Mr. Bernard Kessedjian (France) as its Chairperson-Rapporteur.

B. Attendance

5. Representatives of the following States members of the Commission on Human Rights attended the working group's meetings: Algeria, Argentina, Armenia, Austria, Australia, Belgium, Brazil, Canada, China, Chile, Costa Rica, Cuba, Democratic People's Republic of Korea, France, Germany, Guatemala, India, Ireland, Japan, Malaysia, Mexico, Pakistan, Paraguay, Peru, Poland, Republic of Korea, Russian Federation, Saudi Arabia, Senegal, South Africa, Sri Lanka, Sudan, Sweden, Thailand, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela.

6. The following States non-members of the Commission on Human Rights were represented by observers at the working group's meetings: Belarus, Bolivia, Colombia, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, Egypt, Ethiopia, Finland, Georgia, Greece, Hungary, Iran (Islamic Republic of), Iraq, Jordan, Latvia, Lebanon, Madagascar, Mauritania, Mauritius, Monaco, Morocco, Nepal, New Zealand, Netherlands, Norway, Oman, Philippines, Portugal, Qatar, Romania, Slovakia, Slovenia, Spain, Switzerland, Tunisia, Turkey.

7. The Holy See was also represented by observers.

8. The following non-governmental organizations (NGOs) 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, Association of World Citizens, International Association against Torture, International Commission of Jurists, International Federation of Human Rights, Latin American Federation of Associations of Relatives of Disappeared Detainees, Group for Study and Research on Democracy and Economic and Social Development in Africa, Human Rights Watch, Indian Movement Tupaj Amaru, International Service of Human Rights.

9. The International Committee of the Red Cross and the Office of the United Nations High Commissioner for Refugees were also represented by observers.

10. Mr. Manfred Nowak, in pursuance of his mandate under resolution 2001/46, and Mr. Louis Joinet, in his capacity as independent expert and Chairman of the working group on the administration of justice of the Sub-Commission, that drew up the 1998 draft convention, also participated in the session. Several delegations urged that Mr. Nowak, Mr. Joinet and at least one member of the Working Group on Enforced or Involuntary Disappearances of the Commission on Human Rights should take part in the open-ended working group's future work.

C. Documentation

11. The working group had before it the following documents:

E/CN.4/2003/WG.22/1	Provisional agenda
A/RES/47/133	Declaration on the Protection of All Persons from Enforced Disappearance
E/CN.4/Sub.2/RES/1998/25	Draft international convention on the protection of all persons from enforced disappearance
E/CN.4/Sub.2/1998/19	Report of the sessional working group on the administration of justice of the Sub-Commission on Prevention of Discrimination and Protection of Minorities
E/CN.4/2001/69 and Add.1	Question of enforced or involuntary disappearances: note by the secretariat

E/CN.4/2002/71

Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to paragraph 11 of Commission resolution 2001/46.

II. ORGANIZATION OF THE DEBATE

12. In his opening statement, the Chairperson-Rapporteur recalled that the working group's main objective was to elaborate a legally binding normative instrument to strengthen the protection of all persons from enforced disappearance. He said that the issue of enforced disappearance had been dealt with many times over the last 30 years and that the elaboration of such an instrument was the culmination of that process. He paid tribute to all those who had taken a stand against enforced disappearances over the years.

13. At its first meeting, on 6 January 2003, the working group adopted its agenda as it appears in document E/CN.4/2003/WG.22/1.

14. The Chairperson then proposed organizing the discussions in four stages: substantive provisions, monitoring mechanism, nature of the instrument and final clauses. Several topics were identified under each of these stages.

15. Following a general discussion from 6 to 8 January 2003, the working group devoted the remainder of its session to the consideration of substantive provisions.

III. GENERAL DEBATE

16. All speakers agreed that the practice of enforced disappearances was abhorrent. It removed disappeared persons from the protection of the law. It deprived them of all their rights, especially their civil and political rights. The specificity and complexity of the concept of enforced disappearance were due to the simultaneous commission of violations of several human rights, such as protection against torture and inhuman or degrading treatment, the right to life, liberty and security, the right to a fair and public trial and the right to recognition of legal status and to equal protection of the law.

17. Some non-governmental organizations drew attention to the fact that enforced disappearances constituted acts of collective terror, aimed not only at individuals or their families, but at society as a whole.

18. In the opinion of several delegations, the phenomenon of enforced disappearances was universal, insofar as it affected many countries on all continents, as shown in the annual reports of the Working Group on Enforced or Involuntary Disappearances of the Commission on Human Rights. Even though some States were not nowadays exposed to the problem or believed they were not at risk, the elaboration of a universal instrument was still useful and would have a preventive effect.

19. Some delegations questioned whether it was worth elaborating a legally binding instrument on the subject, in view of the instruments and mechanisms that already existed. Most of the States present, however, strongly supported the idea of a new instrument. The Chairperson recalled that that was the mandate entrusted to the working group by the Commission.

20. Some speakers mentioned the need to fill existing gaps in international law concerning measures to combat enforced disappearances. The phenomenon of enforced disappearances was dealt with in international law in three corpuses: international human rights law, international humanitarian law and international criminal law, each with its own approach. Whereas international human rights law focused on the responsibility of States, the aim of international humanitarian law was to protect persons in time of armed conflict and to regulate methods of warfare. International criminal law, on the other hand, held individuals responsible more than States. This meant that the subject of enforced disappearances was dealt with under different headings and drafting a consolidated, coherent instrument was therefore justified.

21. Mr. Louis Joinet, who had witnessed the development of international law on the subject of enforced disappearances over the past two decades, drew attention to the added value of a legally binding international instrument and the specificity of enforced disappearances as human rights violations per se. Enforced disappearances were “crimes of suspended time”, the result of “organized not knowing”, a deception. They also had major consequences for the relatives of the disappeared persons, including consequences in civil law (absence, adoption). He said that the 1998 draft could be improved as a result of recent developments in international law, especially the Rome Statute of the International Criminal Court [A/CONF.183/13 (Vol. I)], the advances achieved in terms of universal jurisdiction and the work of the International Law Commission on State responsibility.

22. The International Committee of the Red Cross expressed the view that the working group’s work was extremely important and reported that an international conference on “the missing” would be held in February 2003; its recommendations could be useful to the working group. ICRC also indicated that provision should be made for the new instrument to apply during armed conflicts, following the example of article 2, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and article 7 of the 1992 Declaration, according to which no circumstances whatsoever, whether a threat of war, a state of war, internal political instability or any other public emergency, may be invoked to justify enforced disappearances.

23. Regarding the monitoring mechanism for the future instrument, several speakers said it would be preferable to avoid the proliferation of mechanisms within the United Nations and proposed the preparation of an optional protocol to an existing instrument rather than a convention with yet another monitoring body. The relationship with the Working Group on Enforced or Involuntary Disappearances, the reform of the treaty monitoring bodies and the question of the consideration of individual communications also needed to be taken into consideration. Other delegations thought it necessary to draft a convention, using, if necessary, formulations borrowed from existing instruments.

24. Most of the concerns raised during the general discussion are discussed in greater detail elsewhere in this report.

**IV. GENERAL DISCUSSION ON THE REPORT BY MR. MANFRED NOWAK,
INDEPENDENT EXPERT CHARGED WITH EXAMINING THE
EXISTING INTERNATIONAL CRIMINAL AND HUMAN RIGHTS
FRAMEWORK FOR THE PROTECTION OF PERSONS FROM
ENFORCED OR INVOLUNTARY DISAPPEARANCE**

25. Under agenda item 5, Mr. Manfred Nowak summarized his report on the existing international criminal and human rights framework for the protection of persons against enforced or involuntary disappearances and answered many questions raised by participants. He referred to the gaps in international law which, in his view, justified the preparation at the current stage of a legally binding international normative instrument and suggested the most important points that the future instrument should cover.

26. In Mr. Nowak's view, the act culminating in an enforced disappearance constituted a violation of several human rights, but describing an act leading to an enforced disappearance as a cumulative violation of human rights was controversial. It therefore seemed necessary either to establish a new, autonomous and non-derogable human right, namely, the right not to be subjected to enforced disappearance, or to specify in a legally binding way that any act leading to an enforced disappearance constituted, besides arbitrary deprivation of liberty, inhuman treatment which was incompatible with article 7 of the International Covenant on Civil and Political Rights and also infringed other rights. He thought it desirable to establish a new, non-derogable human right.

27. He pointed out that every human right entailed the triple obligation for the State to respect, give effect to and protect that right against violations by third parties. The new instrument should clearly establish the obligation of States to adopt criminal legislation to punish acts of disappearance, including those committed by private individuals.

28. Whether the members of a disappeared person's family should also be considered victims under international law and, as such, enjoy independent rights, was also controversial. The future instrument should therefore contain a precise definition of the right of disappeared individuals' families to learn the truth, with all the attendant legal consequences.

29. He described the items which were listed in his report and which the future instrument should contain on protection against impunity, prevention, the right to compensation and the protection of children.

30. It would be helpful, in his view, if the future instrument contained provisions dealing with States' obligations in respect of universal jurisdiction. The International Criminal Court would consider very few cases of enforced disappearances. National courts must therefore have the jurisdiction to try crimes of enforced disappearance.

31. He said that it would be desirable to draw up an instrument which, like all human rights instruments, was applicable both in wartime and in peacetime. The situation of persons missing in combat should not, however, be covered by the future instrument.

32. With regard to the form of the future instrument, he emphasized that a new convention would be welcome. One proposal might be an optional protocol to the International Covenant on Civil and Political Rights. The Working Group on Enforced or Involuntary Disappearances should remain in existence for at least two reasons: (a) its geographical scope was universal, whereas a convention was effective only between States parties; and (b) its mandate was humanitarian in nature, since the aim was to trace disappeared persons, whereas the body monitoring the future instrument might be given a much broader mandate to supervise and make enquiries. Lastly, he emphasized the importance of establishing an emergency procedure. Provision should also be made for coordination between the two bodies.

V. DISCUSSION ON SUBSTANTIVE PROVISIONS

A. Definition

33. Delegations took the view that the definition of enforced disappearance should contain at least three constituent elements:

- (a) Deprivation of liberty in whatever form;
- (b) Refusal to acknowledge that deprivation of liberty;
- (c) Removal of the disappeared person from the protection of the law and all universally recognized rights.

34. Some delegations thought that a more detailed definition was needed. Others thought that the definition should take account of all the sources of law drawn upon by the working group (international human rights law, international humanitarian law and international criminal law), since it should not be forgotten that the future instrument would be a human rights instrument.

35. The definition could also refer to the perpetrators of the enforced disappearance. In this respect, many delegations considered that the instrument should refer first of all to agents of the State and related persons. Some delegations thought it would be worth examining the responsibility and situation of those commonly called "non-State actors". The majority of delegations recognized that States bore the prime responsibility for preventing and punishing enforced disappearances, including those perpetrated by non-State actors, and for ensuring compensation.

36. Other points were raised, such as the duration of enforced disappearance, the scope of the instrument during armed conflicts and the question whether to mention transnational disappearances in the body of the definition. Several delegations proposed that enforced disappearance should be defined using simple and clear terms such as "arrest", "detention" and "abduction".

B. Offences and penalties

(a) Enforced disappearance as an independent offence in domestic criminal law

37. Enforced disappearances are often accompanied by other serious crimes such as torture and summary executions. According to some delegations, States should ensure that all acts leading to an enforced disappearance should constitute offences under their criminal law. In the view of other participants, States should have to define enforced disappearance as an independent offence in their domestic criminal law. That would better reflect the complexity of enforced disappearances, would make criminal sanctions more effective and would make it easier to establish rules concerning specific aspects of the offence, such as statutory limitations, exemption from responsibility and extradition. It was recalled that the institution of independent offences in domestic law was supported by the Committee against Torture, the Special Rapporteur on the question of torture and the Working Group on Enforced or Involuntary Disappearances.

38. In the opinion of several delegations, the future instrument should take account of the diversity of national criminal law systems. Others thought that the future instrument should limit the instances in which domestic law would have to be amended.

(b) Enforced disappearance as a crime against humanity

39. Most speakers thought that enforced disappearances carried out systematically or on a large scale should be characterized in the instrument as crimes against humanity. Some thought that the working group should discuss this question in the light of other instruments such as the Statute of the International Criminal Court and the diversity of legal systems. Several speakers pointed out that the systematic nature of violations implied forward planning.

(c) The subjective element as a constituent element of the offence of enforced disappearance

40. According to article 2, paragraph 1, of the 1998 draft, the perpetrators of the offence of enforced disappearance should be punishable only if they knew or ought to have known that the offence was about to be or was in the process of being committed. In the same spirit, article 3, paragraph 2, of the 1998 draft stipulates that the perpetrators of enforced disappearances constituting crimes against humanity should be charged only where they knew or ought to have known that the act was part of a systematic or massive practice of enforced disappearances. Several speakers took the view that, for the sake of the effectiveness of criminal justice, such limitations should not be included in the future instrument. Other participants, on the other hand, thought that such a clarification should be retained.

41. In conclusion, the Chairperson put forward the following preliminary general comments:

- Enforced disappearances are a crime. Some doubts remained, however, about the question of defining the offence of enforced disappearance as an independent offence in domestic law;

- The working group should specify under what circumstances, if any, certain enforced disappearances might be considered as crimes against humanity (large scale, systematic or widespread in nature);
- The working group referred to the principal elements of the offence (attempt, conspiracy, aiding and abetting, instigation and incitement) on which it should continue to focus its discussions. It should also consider in more detail such important questions as concealment, culpable failure to act and the responsibility of hierarchical superiors, etc.;
- With regard to penalties, the working group might reproduce the sort of wording used in existing texts and in the 1998 draft, according to which penalties should be adequate and proportional to the seriousness of the offence.

C. Protection against impunity

42. Several speakers asked whether it was possible to include a general clause requiring the adoption by States of the necessary measures to combat impunity. However, other participants thought that it would be preferable to indicate clearly in the future instrument the various measures that should be taken in that regard in order to set out States' obligations clearly.

(a) Statute of limitations

43. Emphasis was placed on the non-applicability of statutory limitations to enforced disappearances that constituted crimes against humanity.

44. In the case of enforced disappearances that did not constitute crimes against humanity, most speakers considered that, in view of the continuing nature of the offence, the limitation period should begin from the time the case was solved. However, some participants considered that the period should run from the time of the commission of the offence. Another delegation considered that, in the case of persons who had admitted to participation in committing the offence, the period should begin as from the time of the confession.

45. Most of the participants considered that the length of the limitation period should be the longest of those provided for in domestic law. In the view of one delegation, such an approach could be adopted only if enforced disappearances were regarded as separate offences in domestic law. Other participants thought that the limitation period should be commensurate with the seriousness of the offence, bearing in mind the diversity of legal systems. One delegation pointed out that, in some States, there was no limitation period for particularly serious crimes.

46. Some speakers pointed to the need to allow for the possibility of suspending limitation periods in cases where the situation in the country made effective remedies impossible.

(b) Immunity and special courts

47. The question was raised whether the future instrument should ban special courts, especially military courts, from trying cases of enforced disappearance. For some delegations,

special courts could be useful in speedily resolving cases in certain circumstances and were acceptable as long as they remained impartial and respected the principles of the right to a fair trial. However, several speakers pointed out that international law was tending increasingly to rule out the use of such courts to try serious violations of human rights. It was underlined that the use of military courts very often led to situations of impunity.

48. The 1992 Declaration and the 1998 draft provided that no privileges, immunities or special exemptions should be admitted in trials of persons responsible for enforced disappearances, without prejudice to the provisions of the Vienna Convention on Diplomatic Relations. However, some delegations considered that exceptions should be allowed for perpetrators who agreed to reveal information of use in establishing the truth. One delegation considered that other grounds for plea bargaining available in domestic law might also be used. Several participants considered that plea bargaining should not lead to complete exoneration from responsibility. Lastly, it was noted that some legal systems allowed agreements to be reached between perpetrators and victims. One delegation considered that the future instrument should stipulate that no privileges, immunities or exemptions provided for in domestic law would be allowed, except insofar as they were in keeping with its aim and purpose and without prejudice to the privileges, immunities or exemptions recognized in international law, including the Vienna Convention on Diplomatic Relations.

(c) Asylum and refuge

49. Several delegations emphasized the need to link the obligation not to grant asylum or refuge to persons suspected of participation in an enforced disappearance with the obligation not to return (*refouler*) such persons to a State where they would run the risk of being subjected to enforced disappearance or other serious human rights violations. It was pointed out that the 1998 draft included such a guarantee. However, some delegations considered that the obligation not to return a person stipulated in article 15, paragraph 1, of the draft should apply only in cases where a risk of enforced disappearance existed rather than a risk of serious human rights violations, which was too broad a formula.

50. A representative of the Office of the High Commissioner for Refugees presented to the working group the exclusion clause contained in article 1F of the 1951 Geneva Convention relating to the Status of Refugees.

51. Some speakers considered that it was difficult to provide for a total ban on the granting of asylum to persons responsible for enforced disappearances, particularly in the case of those who agreed to reveal information of use in establishing the truth.

(d) Amnesty and pardons

52. Some delegations considered that, instead of prohibiting amnesty for those responsible for enforced disappearances, as in the 1998 draft, States should be recommended to take into consideration the extreme seriousness of acts leading to enforced disappearances. Several participants said that they were not opposed to amnesty in cases of enforced disappearance which

did not constitute crimes against humanity. Others, however, considered that, before amnesty was granted, a number of conditions must be fulfilled: an inquiry leading to the establishment of the truth; adequate compensation for the victims; and penalties imposed on the perpetrators.

(e) Other grounds for exemption from, and mitigation and aggravation of, criminal responsibility

53. Some delegations considered that it should not be possible for orders from a superior to constitute either a ground for exemption from responsibility, or a mitigating circumstance, either in peacetime or in wartime. Several participants took the view that the responsibility of the superior should be established independently of the subjective element referred to in article 9, paragraph 3, of the 1998 draft.

54. One delegation considered that mitigating circumstances might be accepted, but that they should be more strictly defined than in article 5, paragraph 2, of the 1998 draft.

55. Some participants considered that severer penalties should be applicable when the victims were vulnerable persons (the disabled, the elderly, pregnant women, children, etc.).

56. The Chairperson summed up the discussions as follows:

It had to be decided whether the instrument should contain a general obligation or more specific measures of protection against impunity;

In international law, there should be no statute of limitations for enforced disappearances which constituted crimes against humanity. Where enforced disappearances constituting offences under ordinary law were concerned, the longest limitation period stipulated in domestic law should be applied - or, in any event, a limitation period commensurate with the seriousness of the crime. The question of the point when the limitation period should begin was still unanswered;

The working group considered that immunity should be restricted to the maximum possible extent. However, the issue of immunities which were based on international law should be examined, as should means of applying immunities which were based on domestic law;

Amnesty and pardons should not have the result of preventing proper material compensation and non-pecuniary damages;

The use of special courts, especially military courts, prompted much concern;

In connection with the granting of asylum or refuge to persons suspected of enforced disappearances, the working group's goal should be to eliminate sanctuaries which could be used by those responsible for enforced disappearances;

Several delegations raised the question of measures to be taken in respect of persons who cooperated with the judicial authorities. That covered both the issue of immunity or reduced sentences and that of territorial asylum;

It was proposed to address the issue of obedience to manifestly illegal orders and instructions relating to enforced disappearances.

D. Domestic prosecution and international cooperation

(a) Establishment of the jurisdiction of domestic courts

57. Several participants said that they were in favour of the wording contained in article 6 of the 1998 draft and article 5 of the Convention against Torture. That would lead the State to establish its jurisdiction, in respect of enforced disappearance, in cases where the offence was committed within that State's territory, where the offender or victim was a national of the State or where the offender was present in the territory of the State and was not being extradited by the latter. It was universal or quasi-universal jurisdiction that was at issue.

58. Some delegations noted that torture was often an element in cases of enforced disappearance. In the future instrument the basic rules on the jurisdiction of States should therefore at least be similar to those contained in article 5 of the Convention against Torture. One delegation cited the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography as a benchmark text for provisions relating to the establishment of jurisdiction, extradition and judicial cooperation.

59. Some participants said that it was always preferable, especially for the victims, to hold trials in States where the enforced disappearance had occurred. The jurisdiction of other States was provided for only as an additional possibility. States should therefore be encouraged to take steps at the internal level with a view to investigation and prosecution.

60. Several delegations made the point that the question of jurisdiction was directly related to that of the definition of the offence of disappearance.

(b) Extradition and judicial cooperation

61. Several participants said that the instrument should contain specific rules on extradition in order to avoid any possible gaps in that regard and to ensure that the principle *aut dedere aut judicare* was properly implemented. It was pointed out that, in the 1998 draft, the obligation to try existed, even when no extradition had been requested.

62. According to the 1998 draft, enforced disappearance was not considered a political offence for the purposes of extradition. Some speakers said that, even though such a provision was not contained in the 1992 Declaration, it did appear in many other international and regional instruments. The provision had been drafted because many extradition treaties prohibited extraditions for political offences.

63. One delegation mentioned the need to raise the question of the death penalty in discussions about extradition.

64. Some speakers said that the 1998 draft, which restricted judicial cooperation to criminal matters, should be improved. Other areas of cooperation should be added, especially in civil matters (of particular importance for disappeared children). Furthermore, several delegations considered that, as with the provisions on extradition, the future instrument could, in the absence of any judicial cooperation treaty between the States concerned, serve as a legal basis for such cooperation. It would therefore be worth drawing up a list of minimum investigatory measures which a State party could request of another State party, for example, with regard to testimony, searches and seizures. It was also pointed out that the need for judicial cooperation in the area of enforced transnational disappearances was essential.

65. The Chairperson summed up the discussion as follows:

The establishment of the broadest possible jurisdiction for domestic criminal courts in respect of enforced disappearance appeared to be essential if the future instrument was to be effective. Consideration might be given in that respect to the quasi-universal jurisdiction mechanism used by several other multilateral instruments;

The principle of *aut dedere aut judicare* was raised, the idea being to eliminate access to sanctuaries for the perpetrators of enforced disappearances;

With regard to international cooperation, extradition and judicial cooperation were two basic mechanisms whose use should be facilitated and encouraged. In the absence of a bilateral treaty, the future instrument could serve as a legal basis for extradition.

E. Prevention

(a) Supervision of detentions

66. On the basis of the 1998 draft and the proposals drawn up by the independent expert Manfred Nowak, the participants prepared an initial list of State obligations and principles with regard to the supervision of detentions (see below).

(i) Prohibition of incommunicado detention and of secret places of detention

67. The participants considered that this prohibition should be absolute.

(ii) Register of detainees

68. Several participants considered that such registers should be made available to persons with a legitimate interest in obtaining such information.

69. A few delegations pointed out that the specific structure of some States, for example federal States or States which had devolved a certain amount of power to their provinces, might make it difficult to keep a central register. Several solutions were put forward: the registers

could be maintained by the federated States or a register of places of detention could be kept at the federal level. In any event, it was vital that the registration of detainees should be carried out at two levels - the only way to cross-check information and hence ensure efficient supervision.

70. Participants noted that detainees must be released in a way that ensured their release was genuine.

(iii) Respect for the right of detainees to notify their lawyers, families and any persons with a legitimate interest of their situation

71. A few delegations considered that immediate notification of a lawyer and persons with a legitimate interest, as provided for in the 1998 draft, might constitute an excessively onerous requirement, bearing in mind the provisions of the domestic law of some States that a certain amount of time should elapse between arrest and notification, especially in serious cases.

72. A discussion took place on the need to guarantee the right to respect for the privacy of the detainee, without enabling the authorities to conceal the detention, against the wishes of the detainee. Some speakers considered that the right to respect for privacy was not affected insofar as the information was communicated confidentially to specific individuals.

(iv) Establishment of mechanisms of habeas corpus and other guarantees against arbitrary detention

73. The importance of such mechanisms was emphasized. It was also pointed out that, under the 1998 draft, there was no derogation from the right to a remedy.

74. The importance of judicial supervision of detention was emphasized. The 1998 draft provided that other authorities would be competent to perform that function. In that regard, it was suggested that use might be made of the wording "other officer authorized by law to exercise judicial power" from article 9, paragraph 3, of the International Covenant on Civil and Political Rights.

(v) Obligation to conduct an investigation

75. Attention was drawn to the special importance of investigations, which could halt the process of disappearance.

76. Several participants considered that it should be possible for the investigation to be initiated not only at the request of the family, but also automatically when there were grounds for believing that a person had been the victim of an enforced disappearance.

77. According to several speakers, the body responsible for the investigation must be independent from the institution being accused and must be capable of conducting an impartial investigation. It must be provided with the requisite resources and powers, as well as sufficient authority to conduct the investigation speedily and efficiently. Lastly, one delegation emphasized that article 11 of the 1998 draft, under which the authority receiving the complaint must immediately proceed to an investigation, took no account of the fact that some authorities,

such as national parliaments, might not have the power both to receive complaints and to investigate. Some delegations said that the instrument should not weaken the mechanism for investigation and prevention.

(vi) The need to punish agents of the State who are guilty of obstruction

78. In the view of most of the participants, the penalties laid down could include non-penal sanctions. The future instrument could also ensure that no strict liability for agents was created.

(vii) The need to suspend persons suspected of enforced disappearances from all official duties for the duration of the investigation

79. In the view of several participants, this obligation should take account of the right of the suspected persons to the presumption of innocence. Some delegations pointed out that, in the case of high-level personnel, such a provision would raise difficulties, bearing in mind the procedures involved, which were sometimes constitutional in nature. A more flexible wording, placing an obligation on States to guarantee that investigation procedures would not be influenced by the suspected persons, might be preferable. Several participants emphasized that international law had already adopted the principle that persons who might exercise authority over the complainants, the witnesses and their families and over the persons carrying out the investigation should be suspended. There was also a need to ensure that the suspected persons were not in a position to commit additional violations.

(b) Education and training

80. Many speakers emphasized the need to strengthen the 1998 draft in this area. It should thus stipulate that the personnel concerned included police and prison staff, as well as judges, prosecutors and lawyers. The specific aims of training should be spelled out: specific mention was made of preventing the involvement of personnel in acts of enforced disappearance, recognition by personnel of the importance of preventing such acts and investigating and urgently resolving cases of enforced disappearance. Agents of the State should also be informed of their duty to disobey and of the unlawfulness of orders to carry out an enforced disappearance. Training in the specific features of investigations into enforced disappearances should also be provided. Lastly, members of the general public should be informed of their rights, as recognized in international law and also in domestic law.

81. One delegation submitted the following proposal:

“States parties shall ensure that the training of law enforcement personnel and officials includes the necessary education concerning the provisions of this instrument with a view to:

“(a) Preventing the involvement of such personnel and officials in enforced disappearances;

“(b) Ensuring recognition of the importance of the prevention of and investigations into enforced disappearances;

“(c) Ensuring recognition of the urgent need to resolve cases of enforced disappearance.”

82. The Chairperson summed up the discussions as follows:

Prior to any judicial investigation, provision must be made for the initiation of inquiries into the fate of the person alleged to have disappeared. The question of identifying the independent authorities responsible for such inquiries should be further studied;

States should guarantee a simple, rapid and effective remedy before a judicial authority. Penal or other sanctions should be laid down for those who hinder access to such remedies;

All steps should be taken by States to prohibit secret places of detention and incommunicado detention. This implies keeping a record of all detainees and all places of detention. The question arises as to how federal States can address this requirement. It will also be necessary to ensure the effective supervision of places of detention by the judicial authorities, as well as the notification of lawyers and relatives concerning steps taken with regard to detained persons and the places where they are located;

The authorities responsible for holding persons in detention should be properly trained. The proposal put forward by one delegation is in keeping with this objective. Mention was made of the need to create awareness among the public concerning the offence of enforced disappearance.

F. Victims

(a) Definition

83. Delegations agreed to recognize that the notion of victim should not be restricted to disappeared persons only. In the view of many participants, the definition should include not only the disappeared person, but also others who might be adversely affected by the disappearance. Several delegations, however, queried the scope of the definition, particularly from the point of view of the consequences it might have with regard to the procedure for reparation. Some felt that article 24, paragraph 3, of the 1998 draft went very far in that respect and asked for further details. Others considered that the expression “relatives” in the draft should include not only spouses and children, but also parents and siblings. It was recalled that the criteria of article 24, paragraph 3, were based on the principles contained in paragraph 2 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. In the opinion of some participants, domestic courts should be allowed a certain latitude in the designation of beneficiaries of reparations.

(b) Right to reparation

84. Many delegations pointed out that the right to reparation was directly related to the definition of the victim and that reparation should be material as well as moral. One delegation asked at what stage the State should be made liable for granting reparation, considering that a

case of enforced disappearance might take a long time to resolve. It proposed that, in certain circumstances, the State should provide assistance to family members considered to be victims for the duration of the disappearance, given the continuing and potentially irreparable nature of the injury caused.

85. For some delegations, the text of article 24 of the 1998 draft needed clarification. One delegation took the view that the provision was not easy to transpose into domestic civil law and pointed out that the wording contained in article 14 of the Convention against Torture and articles 5 and 19 of the 1992 Declaration was already widely accepted.

86. Some speakers suggested that the new instrument should incorporate the concepts of compensation, rehabilitation, satisfaction, restitution (restoration of the victims' honour and reputation) and the guarantee of non-repetition. Such concepts are contained in documents of the United Nations, such as the report of the Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms and General Assembly resolution 56/83 of 12 December 2001 on responsibility of States for internationally wrongful acts.

87. Attention was also drawn to the need to make provision in the instrument for the establishment of domestic funds for the compensation of victims, in line with principle 13 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

88. The Chairperson summed up the discussion as follows:

A broad definition of victims is required. The question remains of how precisely the categories concerned should be defined in the future instrument, so as to allow domestic courts some margin of discretion;

The scope of the definition of victims is not necessarily the same for the purposes of investigation as for those of reparation;

The right of victims to participate in all stages of proceedings should be guaranteed;

Victims should be entitled to the broadest protection possible against violations of their rights during proceedings;

The issue of the State's civil liability was raised.

G. Children of disappeared persons

89. This is intended to deal with situations where the perpetrators of enforced disappearances have appropriated the children of disappeared persons, as well as situations in which children are born while their mothers are the victims of enforced disappearances. Such children are subsequently given up for adoption and thus lose their identity. It was suggested that the new instrument should:

Incorporate an obligation for the State to prevent and punish such acts;

Make provision for international cooperation mechanisms to locate and return such children;

Deal with the question of the civil status of such children and the possibility of reviewing adoptions.

90. Mention was also made of the possibility of establishing genetic data banks as a means of helping children one day to recover their identity and of the need to take account of the best interests of the child in any decision concerning their return.

91. The Chairperson summed up the discussion as follows:

The appropriation of children should be considered as a crime in itself and as an aggravating circumstance with respect to the offence of enforced disappearance;

The new instrument should include the strongest possible provisions to prevent, punish and make reparation for such acts.

VI. FUTURE ACTIVITIES

92. The working group considered that useful progress had been made and that work should continue. It concluded that, in order to ensure further significant progress within a reasonable time, it should meet again formally before the sixtieth session of the Commission on Human Rights. Moreover, an additional session of five working days, preceding the working group's second formal session, would speed up discussions. It would be advisable for Mr. Nowak and Mr. Joinet to be present at the group's forthcoming meetings, as they could provide useful information. A presentation of the work of the Working Group on Enforced or Involuntary Disappearances, the Committee against Torture and the Human Rights Committee would help ensure that existing mechanisms were fully taken into account in the discussions.

VII. ADOPTION OF THE REPORT

93. The working group adopted its report by consensus at its eighteenth plenary meeting on 17 January 2003.
