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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. At its fifty-eighth session, the Commission, in its resolution 2002/41 of 23 April 2002, requested the Working Group to meet before the fifty-ninth session. Accordingly, the first session of the Working Group was held from 6 to 17 January 2003.
2. In its resolution 2003/38 of 23 April 2003, the Commission took note of the Group's report and requested it to meet before the sixtieth session in order to continue its work. It also requested the Chairperson to undertake informal consultations with all interested parties in order to prepare for the second session of the Working Group.
3. In pursuance of that resolution, informal consultations were held from 1 to 5 September 2003, following which the Chairperson prepared a working paper to facilitate the subsequent discussions.
4. The second session of the Group was held from 12 to 23 January 2004. The session was opened by Mr. Bertrand Ramcharan, Acting High Commissioner for Human Rights, who delivered an opening address.

I. ORGANIZATION OF THE SESSION

A. Election of officers

5. At its 1st meeting, on 12 January 2004, the Working Group re-elected Mr. Bernard Kessedjian (France) as its Chairperson-Rapporteur.

B. Attendance

6. Representatives of the following States members of the Commission on Human Rights attended the Working Group's meetings: Argentina, Australia, Austria, Brazil, Chile, China, Congo, Costa Rica, Cuba, Dominican Republic, Egypt, France, Germany, Guatemala, Hungary, India, Indonesia, Ireland, Italy, Japan, Mexico, Netherlands, Nigeria, Pakistan, Paraguay, Peru, Russian Federation, Sri Lanka, Sudan, Sweden, United Kingdom of Great Britain and Northern Ireland, United States of America.
7. The following States non-members of the Commission on Human Rights were represented by observers at the Working Group's meetings: Algeria, Bangladesh, Belarus, Belgium, Bolivia, Canada, Colombia, Cyprus, Czech Republic, Denmark, Ecuador, El Salvador, Estonia, Finland, Ghana, Greece, Iran (Islamic Republic of), Latvia, Lebanon, Libyan Arab Jamihiriya, Lithuania, Luxembourg, Madagascar, Malaysia, Malta, Morocco, New Zealand, Nicaragua, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Switzerland, Syrian Arab Republic, Thailand, Turkey, Uruguay and Venezuela.
8. The Holy See was also represented by an observer.

9. 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, Human Rights Watch, International Association against Torture, International Commission of Jurists, International Federation of Human Rights Leagues, International Service for Human Rights and Latin American Federation of Associations of Relatives of Disappeared Detainees.

10. The International Committee of the Red Cross (ICRC) and the League of Arab States were represented by observers.

11. The following experts also participated in the session: Manfred Nowak, in pursuance of his mandate under resolution 2001/46; 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 J. 'Bayo Adekanye and Stephen Toope, members of the Working Group on Enforced or Involuntary Disappearances.

C. Documentation

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

E/CN.4/2004/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 Sub-Commission's sessional Working Group on the Administration of Justice
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, in pursuance of paragraph 11 of Commission resolution 2001/46
E/CN.4/2003/71	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.4/2004/WG.22/WP.1/Rev.1	Working paper

II. ORGANIZATION OF WORK

13. At its 1st meeting, on 12 January 2004, the Working Group adopted its agenda as it appears in document E/CN.4/2004/WG.22/1.

14. The Chairperson-Rapporteur then introduced the working paper which he had prepared and made available to the delegations before the session (E/CN.4/2004/WG.22/WP.1/Rev.1). He explained that the paper, which was proposed as a basis for work, took into account the observations made by delegations during the Working Group's first session and the informal consultations, and, as far as possible, incorporated the existing language of international instruments.

15. The Chairperson then proposed organizing the discussions by reviewing the working paper, after delegations had had an opportunity to make preliminary observations of a general nature.

III. DISCUSSION ON THE CHAIRPERSON'S WORKING PAPER

A. Definition of enforced disappearance

16. Substantial convergence of views among delegations was noted on the reference to three cumulative elements regarded as fundamental in the draft definition¹ in the working paper: deprivation of liberty in whatever form, refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person, and the placing of the person outside the protection of the law.

17. However, some delegations expressed regret that the proposed definition differed in some respects from the definition set out in the Rome Statute of the International Criminal Court (A/CONF.183/13 (vol. I)), which constituted the most recent formulation of international law in that regard.

18. Other participants considered that the definition used in the Rome Statute should be regarded as a basis, but that it should be adapted. The Rome Statute was an instrument of a different nature from the one the Working Group had been entrusted with drawing up. In particular, its purpose was to grant the International Criminal Court the power to hear cases involving enforced disappearances which constituted crimes against humanity. The purpose of the future instrument, in contrast, was to offer the broadest possible protection for all persons against enforced disappearances, including those which did not constitute crimes against humanity. A wider definition of enforced disappearances would help in achieving that objective.

¹ Article 1 of the working paper: "For the purposes of [*this instrument*], enforced disappearance is considered to be the deprivation of a person's liberty, in whatever form, committed by agents of the State or by a political organization, or by persons or groups of persons acting with the authorization, support or acquiescence of the State or the political organization, followed by refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person, which places such person outside the protection of the law."

19. The discussions covered the following points in particular:

(a) Deprivation of liberty “in whatever form”

20. Some delegations pointed out that the expression “deprivation of liberty in whatever form” in the paper prepared by the Chair was imprecise. They preferred the terms “arrest, detention or abduction”. However, some noted the difficulty of drawing up an exhaustive list of the various forms that the deprivation of liberty could take. Proposals for the addition of the term “confinement”, or for the use of the expression “arrest, detention, abduction, or any other form of deprivation of liberty”, received support from several participants.

21. Some delegations considered that the word “unlawful” should be inserted before the expression “deprivation of liberty”. Others pointed out that deprivations of liberty which were authorized under the law could be used to perpetrate enforced disappearances. One delegation noted that the future instrument should not hamper the legitimate enforcement of the law.

(b) Removal from the protection of the law “for a prolonged period of time”

22. Some delegations considered that the definition of the crime of enforced disappearance should contain a reference to removal from the protection of the law “for a prolonged period of time”. The need to allow a certain amount of time to elapse between arrest and notification of the detention was cited in support of this proposal.

23. Others, however, pointed out that an enforced disappearance could be carried out from the moment of arrest, if there was a refusal to acknowledge the deprivation of liberty. The definition of enforced disappearances would also be less precise, owing to the vague and unspecific nature of the expression “prolonged period”. Several participants, emphasizing the new instrument’s aim of prevention and early warning, considered that it was important to confer on the persons concerned and the national and international monitoring bodies the ability to intervene as soon as the deprivation of liberty began, without the need to wait for a certain period to elapse.

(c) Removal from the protection of the law as intent or consequence

24. Several delegations suggested that a reference should be made to the intention of the perpetrators of enforced disappearances to remove the victims from the protection of the law. They pointed out that national criminal laws required the presence of an element of intent in the commission of crimes.

25. Other delegations supported the wording proposed by the Chair, pointing out that intent was difficult to prove. Some participants considered that the element of criminal intent was implicit in the draft definition, and that an additional element of intent was not required. They noted that, in paragraph 74 of his report (E/CN.4/2002/71), the expert Manfred Nowak had opted for a wording which contained no reference to such an additional element of intent.

26. As a compromise, it was suggested that a reference should be included to the “direct or indirect intention” of the perpetrators not to acknowledge the deprivation of liberty or to conceal the fate or whereabouts of the disappeared person. Another proposal that it should be stipulated that agents of the State “intentionally” deprive a person of liberty, in whatever form, received

support from several participants. It was also suggested that a general clause should be drafted whereby States would be able to introduce the elements of intent which their criminal law required.

(d) The status of perpetrators of enforced disappearances

27. One delegation suggested that the term “agents of the State” should be replaced by “public officials”, as in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

28. Several delegations expressed approval for the insertion, in the definition proposed by the Chair, of a reference to the perpetrators of enforced disappearances including “political organizations”.

29. However, some delegations pointed out that the reference was overrestrictive, and that the definition of enforced disappearances should be extended to the actions of organized groups and individuals. Others raised the possibility of including “any organization”, including economic entities. However, reservations were expressed concerning the proposal that the range of potential perpetrators of enforced disappearances should be broadened to include all persons.

30. Discussion arose on the use of the expressions “organized groups” and “political organizations”, which some considered imprecise. One delegation noted that it would be better to use the expression “members of political organizations”, so as to underline the criminal responsibility of individuals, and not that of the groups.

31. Other delegations expressed reservations concerning the reference to non-State actors in the future instrument, pointing out that the obligations contained in the future instrument were addressed solely to States, and that such an insertion would alter the traditional framework of responsibility in relation to human rights.

32. The participants were agreed in emphasizing that, at all events, prime responsibility in relation to respect for and protection of human rights lay with States. Some delegations pointed out that the purpose of the paper submitted by the Chair was to recognize that enforced disappearances could be committed by non-State actors, without thereby detracting from commitments entered into by States, to which the obligations were exclusively addressed.

33. It was also suggested that all references to the perpetrators of enforced disappearances, whether they were State or non-State actors, should be removed from the definition. An obligation appearing later in the instrument to punish enforced disappearances under the criminal law would commit States to punishing the perpetrators of enforced disappearances, whoever they were.

34. A further proposal for the insertion of a provision requiring States parties to take all necessary steps to prohibit and punish under the criminal law enforced disappearances perpetrated by non-State actors was put forward and supported by several participants.

35. On the basis of these suggestions, the Chairperson suggested that all references to political organizations should be deleted from the definition. He also suggested that a new paragraph should be inserted in draft article 2, relating to the obligation to characterize enforced

disappearance as a criminal offence, which would stipulate that any State might take similar measures in the case of an enforced disappearance committed by an organization, a group or individuals outside the control of the State, without calling into question the prime responsibility of the State in the protection of human rights.

36. This proposal received support in principle from a large number of participants. One delegation expressed the view that the inclusion of the new paragraph would have no consequences as to the content of the State obligations set out in the other articles in the draft.

37. However, some changes were proposed. Some delegations emphasized that the new paragraph should stipulate that any State party “shall take” the measures indicated, while others insisted on keeping the initial wording proposed by the Chair.

38. Some delegations underlined that the “similar measures” to be adopted by States should be spelt out, and should preferably be understood as “similar measures in criminal law”.

39. Questions were raised concerning the list of non-State actors to be mentioned in the new paragraph. No agreement of principle could be reached on this point. The reference to the lack of State control over private actors was deemed inappropriate by several participants. One delegation suggested drawing on international humanitarian law, and mentioning “organizations or groups in effective control of part of the territory of a State”. Another participant suggested referring to “persons acting outside the direct or indirect authority of the State”.

40. Some delegations considered that the reference to the “responsibility of the State” should specify that the responsibility was “in relation to human rights”. Others pointed out that the principle that the State could not be relieved of responsibility in the case of acts by private actors should be subject to exceptions in certain exceptional circumstances. Several participants said that this reference to the prime responsibility of States in relation to human rights was unnecessary, and sought its deletion.

41. Several participants suggested a formula urging States to take the necessary measures to prevent and punish under their criminal law enforced disappearances committed by actors other than those referred to in article 1.

B. Enforced disappearance as a crime against humanity

42. There was a discussion on the need to refer in the future instrument to the crime of enforced disappearance as a crime against humanity.

43. Some delegations felt that the instrument should not broach the question, which was already covered by other international instruments, in particular the Rome Statute.

44. Other delegations considered that a reference acknowledging the existence and particularly serious nature of enforced disappearances that amounted to crimes against humanity should be inserted in the future instrument. Some emphasized that the absence of such a reference might imply a step backwards as compared with existing international instruments, referring in particular to the preamble to the Declaration on the Protection of All Persons from Enforced Disappearance (referred to below as “the 1992 Declaration”).

45. Some delegations considered that a simple reference in the preamble would suffice. Others also wanted a specific clause to be inserted in the operative part of the instrument. It was pointed out that the Rome Statute, which was concerned with punishment, did not cover all the points that an instrument designed to offer protection against enforced disappearance should contain, not least as regards preventive action. The purpose of the Statute was to define the competence of the International Criminal Court, and it did not contain any obligation to criminalize enforced disappearance amounting to a crime against humanity in domestic criminal law. Hence the future instrument should lay down such an obligation. Others considered that, in one way or another, it should be pointed out that enforced disappearances amounting to crimes against humanity were subject to a different legal regime. Lastly, some participants pointed out that article 22, paragraph 3, of the Statute did not affect the characterization of any conduct as criminal under international law, independently of the Statute, while article 10 stipulated that no provision should be interpreted as limiting or prejudicing existing or developing rules of international law for purposes other than the Statute.

46. A new article 1 bis was therefore proposed, stating that “the crime of enforced disappearance as defined in article 1 shall constitute a crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. Another proposal, namely the insertion of a new article 2 bis which would state that “the widespread or systematic practice of enforced disappearance constitutes a crime against humanity and shall attract the consequences provided for under international law”, was supported by several delegations.

47. Many delegations emphasized the importance of maintaining consistency within the international legal system and not adopting a standard that departed from current international law, in particular the Rome Statute. Nevertheless, some delegations preferred to have no explicit reference to the Statute, so as to make it easier for States which were not party to that Statute to ratify the future instrument.

48. Summing up, the Chairperson proposed that a reference to enforced disappearances that amounted to crimes against humanity should be made in the preamble to the future instrument, as well as in the operative part.

C. Offences and penalties

(a) Enforced disappearance as an independent offence

49. Several participants expressed approval for draft article 2, paragraph 1 of the paper prepared by the Chair, whereby “each State party shall take the necessary measures to ensure that enforced disappearance, as defined in article 1, constitutes an offence under its criminal law”. This wording constituted an invitation to grasp the specificity and complexity of the offence of enforced disappearance, which may not be reduced to a combination of discrete actions. One delegation considered that the words “as defined in article 1” were not necessary, as they were implicit. One delegation suggested that States should be urged to stipulate in their criminal law that enforced disappearance constitutes a “serious offence”.

50. On the other hand, some delegations considered that the States parties should not be required to characterize enforced disappearance as an independent offence in their domestic

criminal law, but merely to prosecute the perpetrators of “acts of enforced disappearance”. The need to take the diversity of domestic systems into account, and the difficulties encountered by some federal States in modifying their criminal legislation, were cited in support of this view. Yet others pointed out that those responsible for acts of enforced disappearance could already be prosecuted under their domestic law, even in the absence of an independent offence.

51. A number of proposals were made with a view to making the text more flexible. For example, it was suggested that the text should stipulate that the measures adopted were adopted “in accordance with States’ constitutional or legislative procedures”, and that the definition of the offence in domestic law “should include all the elements mentioned in article 1”. Another delegation suggested a provision to the effect that “enforced disappearance is a crime subject to national criminal law”.

52. However, the Chairperson considered that defining the crime of enforced disappearance as an independent offence was one of the key elements of the future instrument, from which a large number of its provisions stemmed. Hence it was not appropriate to introduce into draft article 2 wording which could give rise to ambiguity in that regard. The proposed wording, calling on States to “take the necessary measures”, already allowed an element of flexibility.

(b) Accessories, attempted commission and conspiracy, and responsibility of the superior

53. Many delegations called for draft article 3, on issues of accessories, attempted commission and conspiracy, to be reformulated. In particular, some considered that a clearer distinction should be made, in the structure of the article itself, between those participating in the commission of an offence (perpetrators, abettors, accessories) and those assisting in preparations for it.

54. Others suggested drawing on formulations used in existing instruments, such as article 3, paragraph 2 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, and article 2, paragraphs 2 and 3 of the International Convention for the Suppression of Terrorist Bombings.

55. Participants proposed that the responsibility of the superior should be addressed in a separate article from that relating to accessories, attempted commission and conspiracy. However, one delegation pointed out that the draft provision on responsibility of the superior was not necessary, as that responsibility was already covered by the concept of accessories.

56. Several delegations said that it was difficult to provide for the criminal responsibility of the superior who “ought to have known” that his or her subordinate was in the process of committing or was about to commit an enforced disappearance. Instead, one delegation suggested that States should be invited to provide for the responsibility of the superior when he or she had “closed his or her eyes” to the actions of the subordinate. Another proposal was to adopt a phrase from article 28 of the Rome Statute, to the effect that “the superior either knew, or consciously disregarded information which clearly indicated”, that the subordinate was committing or was about to commit such a crime. Lastly, one delegation suggested using the wording from article 10, paragraph 2 of the United Nations Convention against Transnational Organized Crime.

57. In the light of the discussion, the Chairperson proposed a new draft article 3 (a), under which the States parties would be required to take the necessary measures to punish the perpetrators of forced disappearance and those who were accessories to it, including “those who order, facilitate or induce the commission or attempted commission of such an offence, those who facilitate its commission or attempted commission by aiding, abetting or otherwise assisting in it, including providing the means for its commission or attempted commission”. Finally, the new proposal assigned responsibility to a superior who “knew, or consciously disregarded information which clearly indicated, that a subordinate under his or her effective authority or control was in the process of committing or planned to commit an enforced disappearance”.

(c) Penalties

58. Several delegations welcomed the room for manoeuvre granted to States in paragraph 1 of draft article 4, under which “each State party shall make enforced disappearance punishable by appropriate penalties which take into account its grave nature”. One delegation suggested that States should be called on to take into account the “extremely grave nature” of enforced disappearance. It was also suggested that the punishments applicable to foreigners should be no less severe than those applicable to citizens.

59. Some delegations considered that the list of aggravating and mitigating circumstances set out in paragraph 2 was too restrictive. A broader wording, authorizing States to specify aggravating and mitigating circumstances in keeping with the purpose of the future instrument, was suggested. Mention was also made of the possibility of deleting the provisions relating to aggravating and mitigating circumstances.

60. Other delegations called for the provision relating to aggravating circumstances in the case of an enforced disappearance in respect of “a person who is particularly vulnerable” to make specific mention of minors and pregnant women. Most of the participants, however, considered that it was impossible to draw up a list of vulnerable persons. A proposal to add the victim’s death as an aggravating circumstance was considered to be of interest. However, one delegation noted that such an insertion should be made with extreme care, given the fact that in many cases it was impossible to confirm the death of the victim with certainty, and given the reluctance of the families in that regard. In any event, the punishment must take into account the grave nature of the acts.

61. In the light of the discussion, the Chairperson proposed that the list of mitigating and aggravating circumstances should be made non-exhaustive by introducing the phrase “inter alia”. The “death of the victim”, and the commission of an enforced disappearance “in respect of pregnant women, minors or other particularly vulnerable persons”, would be expressly mentioned as aggravating circumstances.

D. Protection against impunity

62. Articles 5 to 8 of the draft contained provisions designed to provide protection against impunity, particularly in relation to the statute of limitations, pardons and amnesties and obeying

the orders of a superior. In that context, the Chairperson pointed out that legislative changes prompted by the future instrument should be kept to a minimum, but that some would be indispensable. The aim was therefore to identify the fundamental minimum obligations in combating the impunity of those responsible for enforced disappearances.

(a) Statute of limitations for criminal proceedings

63. It was pointed out that draft article 5, relating to the statute of limitations for criminal proceedings, did not concern States which had established no statute of limitations in their domestic law. However, some delegations considered that the concept should be expressly mentioned in the text of the provision, as it was in article 17, paragraph 3, of the 1992 Declaration. Others indicated that the issue of the statute of limitations should be addressed in national legislation and in national courts.

64. Many delegations considered that the term of limitation in respect of enforced disappearances should not be “equal to the longest period laid down” in each set of domestic legislation, as suggested in the draft. They preferred a more flexible wording, referring to a term which was “long and proportionate to the gravity of the crime of enforced disappearance”. However, one delegation pointed out that different terms could be adopted for the different acts constituting enforced disappearance.

65. Some delegations questioned the value of stipulating that the term of limitation should be “substantial”.

66. The Chairperson presented a new draft article 5, under paragraph 1 of which any State party “which applies a statute of limitations in respect of enforced disappearances shall take the necessary measures to ensure that the term of limitation for criminal proceedings (a) is substantial and proportionate to the extreme seriousness of the offence; (b) shall not commence as long as the perpetrators continue to conceal the fate and whereabouts of persons who have disappeared and these facts remain unclarified”. Finally, paragraph 2 provided that the statute of limitations for criminal proceedings “shall be suspended as long as an effective remedy is unavailable to any person in a State party whose civil and political rights have been violated”.

67. Several participants expressed approval for the proposal in the draft that the term of limitation should commence “from the moment when the fate of the disappeared person is established with certainty”. However, other delegations would prefer the term to commence “from the moment when the offence of enforced disappearance ceases”. It was noted that the first formula indicated precisely the moment when an enforced disappearance ceased. However, it could be improved by inserting a provision indicating, along the lines of the 1992 Declaration, that enforced disappearance should be considered a continuing offence as long as the perpetrators continued to conceal the fate and whereabouts of persons who had disappeared and those facts remained unclarified. A compromise formula was proposed, whereby the term would begin “from the moment when the offence of enforced disappearance ceases and at the moment when the fate of the disappeared person is established with certainty”.

68. The proposal in the draft that the statute of limitations should be suspended “when the remedies described in article 2, paragraph 3 (a), of the International Covenant on Civil and Political Rights are no longer effective” seems to have been accepted in principle. However, a few delegations considered that certain details should be spelt out, in particular concerning the situations which could give rise to such suspensions, or the authorities empowered to declare them.

69. Paragraph 2 of draft article 5 seems to have secured broad acceptance in principle. Under another proposal the statute of limitations would be suspended “for as long as an effective remedy was unavailable to any person”. However, one delegation preferred a more restrictive wording to the effect that the term of limitation “shall be longer when the alleged perpetrator of the offence has eluded justice”.

70. One delegation said the future instrument should specify that the provisions relating to the statute of limitations could not constitute an obstacle to the right to compensation.

71. It was suggested that a provision should be included to the effect that article 5 was “without prejudice to the provisions on the statute of limitations relating to civil action” or that “criminal proceedings shall not be extinguished as a result of civil action”.

(b) No justification for enforced disappearances

72. Draft article 6, under which “an order from a superior officer or a public authority may not be invoked as a justification of enforced disappearance”, received broad approval. However, some delegations wished to exclude also the justification of “prescription of law”. One delegation pointed out that this article would be clearer if an element of intent was inserted into the definition of enforced disappearances, in article 1.

(c) Amnesties, pardons and other similar measures

73. Several participants considered that draft article 7, under which pardons, amnesties and other similar measures from which the perpetrators or suspected perpetrators of enforced disappearances might benefit should not have the effect of preventing effective recourse to any remedy for securing reparation, nor hamper the right to obtain accurate and full information on the fate of disappeared persons, was too lax.

74. The participants considered that the limitations imposed on these measures should not be restricted to the issue of reparation alone, and should extend to the victims’ right to justice. They noted, in particular, that the reference to “suspected perpetrators of enforced disappearances” indicated that pardon and amnesty measures could be granted before such persons were convicted by a court. It was therefore suggested that this expression should be deleted, or replaced by a reference to “perpetrators of enforced disappearances”. Other participants suggested a stipulation that amnesties, pardons and other measures could not have the effect of exempting the perpetrators or suspected perpetrators of enforced disappearances “from any criminal proceedings or sanction, before they are tried and, as the case may be, convicted”.

75. Some participants considered that inserting in the future instrument a provision relating to amnesties, within the meaning of article 18, paragraph 1, of the 1992 Declaration, could constitute a step forward, in that no similar provision currently appeared in any treaty instrument. Draft article 7 did not perform that role, and even constituted a step backwards compared with various advances, particularly in the area of judicial practice, that had been recorded in domestic and international law. Consequently, they considered that it should be amended as suggested, or else deleted.

76. Some delegations considered that the existence of amnesties could not be ignored, that they were sometimes necessary elements of processes of national reconciliation and that draft article 7 correctly reflected the discussions on the matter within the Working Group.

77. One delegation called for deletion of the reference to “other similar measures”, namely possible plea bargaining arrangements, which were covered by the provision on mitigating circumstances. This call appears to have been generally accepted.

78. Some delegations expressed reservations concerning the obligation to guarantee the right of victims to know the truth “in all circumstances”. It was noted that the formula referring to a “right to obtain accurate and full information on the fate of disappeared persons” was not appropriate, and that a reference to a commitment by States to supply such information would be preferable.

79. The Chairperson, noting the various positions on the question of amnesties, proposed two options. The first would be the proposal made by one delegation to prohibit amnesties before judgement or conviction of the authors of enforced disappearances. The second proposal would be to remove all references to pardons and amnesties and to insert in the chapter relating to victims a provision that “no measure may have the effect of preventing effective recourse to any remedy or the securing of reparation, or of interrupting the search for disappeared persons”, and that “the right to obtain accurate and full information on the fate of disappeared persons, in particular” must be “guaranteed in all circumstances”.

80. Many delegations expressed support for the Chairperson’s second proposal. However, some of them emphasized that it was only a fallback solution in the absence of agreement on a provision which prohibited pardons and amnesties. Others considered that discussion should continue on the possible prohibition of amnesties for the perpetrators of enforced disappearances.

(d) Asylum

81. Several delegations expressed support for draft article 8 in the paper prepared by the Chair, pointing out that enforced disappearance was a serious non-political offence within the meaning of article 1, section F, paragraph (b), of the Convention relating to the Status of Refugees. Some delegations said they preferred deletion of the reference to the Convention. However, the participants agreed to delete the provision as a whole as unnecessary.

E. Prosecutions in domestic courts

(a) Jurisdiction of domestic courts

82. Draft article 9, specifying the circumstances in which States must establish jurisdiction in respect of enforced disappearances, drew on article 5 of the Convention against Torture while also taking account of recent developments in international law. The Chairperson pointed out that the principle of establishing quasi-universal jurisdiction over cases of enforced disappearance had been broadly accepted.

83. Some delegations were of the view that paragraph 1 (c) of draft article 9, requiring a State to establish jurisdiction “when the disappeared person is one of its nationals”, should add that the State should do so only if it judged it “appropriate”, following the example of article 5 of the Convention against Torture. One delegation proposed an additional criterion for State jurisdiction: when the disappeared person was “a stateless person normally resident in its territory”.

84. Several proposals were put forward for draft article 9, paragraph 1 (d), on the establishment of State jurisdiction when “the alleged perpetrator of the offence is in a territory under its jurisdiction, unless the State extradites him or her or transfers him or her to an international criminal tribunal”. It was suggested that the French term “*déferer*” (“transfers”) should be replaced by the more precise terms “*remet*” or “*transfère*”, and that the same changes should be made in paragraph 1 of draft article 11, where the same expression was used. Other delegations suggested the wording “transfer or otherwise surrender”. The better to take account of recent developments, one delegation suggested that reference should be made to “transferring” the individual concerned “to a State”.

85. One delegation, fearing that the wording proposed in draft articles 9, paragraph 1 (d), and 11, paragraph 1, might give the impression that States were required to extradite suspects or hand them over to an international court, preferred to fall back on the wording of article 5 of the Convention against Torture.

86. One delegation felt that States should be allowed to enter reservations to subparagraph (d). Another delegation demanded that the reference to an international criminal tribunal should be struck out. Lastly, one delegation suggested that this paragraph should be revised once the Working Group had reached agreement on the definition of enforced disappearance.

87. The Chairperson proposed the following amendments to subparagraphs (b) and (c) of article 9, paragraph 1:

“(b) When the alleged perpetrator of the offence is one of its nationals or a stateless person habitually residing in its territory;

“(c) When the disappeared person is one of its nationals and the State deems it appropriate to do so.”

88. Regarding subparagraph (d), the Chairperson proposed the following separate paragraph:

“Each State party shall also take the necessary measures to establish jurisdiction in respect of enforced disappearance when the alleged perpetrator of the offence is in a territory under its jurisdiction, unless the State extradites him or her or transfers him or her to an international criminal tribunal whose jurisdiction it has recognized.”

(b) Detention of a suspect

89. Draft article 10, under which “a State party on whose territory a person suspected of having committed an enforced disappearance is present shall ... take him into custody or take other legal measures to ensure his presence”, derived from article 6 of the Convention against Torture, with some simplifications. One delegation suggested adding a subparagraph to specify that the person held in custody was entitled to be visited by a representative of the State of which he or she was a national or, in the case of a stateless person, the State where he or she normally resided.

90. Another delegation suggested the deletion of paragraph 3 of the article, concerning the right of the person held in custody to communicate with the representative of the State of which he or she was a national, or its replacement with wording to the effect that “any alien held in custody may communicate with an appropriate representative of the State of which he or she is a national, in accordance with the applicable international legal obligations”.

(c) Trial of the perpetrators of enforced disappearances by independent, impartial courts

91. Draft article 11, concerning trials of perpetrators of enforced disappearances, drew on article 7 of the Convention against Torture, with the added stipulation that “any person alleged to have committed enforced disappearance shall be tried in a court of general jurisdiction which offers guarantees of competence, independence and impartiality and respects guarantees of a fair trial”.

92. Some delegations insisted that trial by military courts should not be ruled out or should be expressly mentioned in the text. The expressions “by a court duly established by law” or “by a competent, independent and impartial court which guarantees the right to a fair trial” were proposed. Others felt that the words “of general jurisdiction” should be deleted.

93. Several participants opposed any reference to military courts. Some pointed out that monitoring bodies set up under the United Nations and the Organization of American States had insisted that enforced disappearances must be tried in the ordinary courts and held that military courts had no jurisdiction to try violations of human rights.

(d) National investigation

94. Draft article 12, on the reporting of offences and investigations, drew on articles 12 and 13 of the Convention against Torture. Language on the powers and resources of the investigating authority, prompted by the 1992 Declaration, had been added.

95. Some delegations were of the view that “any person” should have the right to complain to a competent authority, as suggested in article 12, paragraph 1, only if an incident had taken place in territory “under the jurisdiction of the State” concerned. One delegation argued that the authority complained to must be “independent”. Another delegation considered that the “authority” concerned was a “national authority”, and called for that clarification to be added to the text.

96. In the view of one participant, States should be required to launch an investigation when there were “reasonable grounds” for believing that a person had been subject to enforced disappearance, as in article 12 of the Convention against Torture, not when there were “substantial grounds”, as the Chairperson’s draft article 12, paragraph 2, had it. One delegation suggested adding a provision to the effect that the authorities should undertake an investigation when the disappearances had occurred in any territory under the jurisdiction of the State concerned - also as in the Convention against Torture.

97. Regarding the powers attributed to the investigating authority, as mentioned in article 12, paragraph 3, one delegation suggested the addition of a subparagraph (d) allowing for the possibility of requiring the suspected perpetrators and other parties to an enforced disappearance to appear before it. One delegation suggested that the investigating authority should be required to fulfil its mandate “in conformity with national law”.

98. One delegation called for the deletion of the clause in draft article 12, paragraph 2, requiring the authorities to launch an investigation “even if there has been no formal complaint”. Another delegation, however, felt that the text should specify that the authorities should take action “automatically”.

(e) Protection of complainants, witnesses and family members of disappeared persons

99. Paragraph 1 of draft article 12 required States to take steps to ensure that the complainant and witnesses were protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given. One delegation felt that such measures should be “appropriate” and taken “if necessary”.

100. Paragraph 6 of draft article 12 set forth an obligation to ensure that “persons suspected of having committed an enforced disappearance are not in a position to influence the progress of the investigations, by means of pressure or acts of intimidation or reprisal directed towards persons involved in the investigation, witnesses, and the relatives of the disappeared person”.

101. A number of participants pointed out that the lists of people entitled to protection given in paragraphs 1 and 6 of the draft article should be extended to encompass, in particular, family members, individuals with an important role to play in tracking down the victim, experts and lawyers. One delegation, however, felt that the wording in paragraph 6 could be deleted.

102. Following the discussion, the Chairperson proposed the addition of the following to paragraph 1 of article 12: “Appropriate steps shall be taken, where necessary, to ensure that the complainant, witnesses, the family and defence counsel are protected against all ill-treatment.”

(f) Access to information on the investigation and identification of individuals with a legitimate interest

103. Paragraph 4 of article 12 guaranteed the right of persons who had a legitimate interest to be kept informed, at their request, of progress in and the findings of the investigation conducted against a person suspected of having committed an enforced disappearance. Under paragraph 5, the following persons were considered as having a legitimate interest: the person deprived of his or her liberty, his or her spouse, the members of his or her family, his or her counsel or legal representative, and any person authorized by them.

104. Several delegations made proposals as to the definition of individuals having a legitimate interest. One was to replace the expression “the spouse and the members of the family of the person deprived of his or her liberty” by “the relatives of the person deprived of his or her liberty”. Several delegations emphasized that the text must be made more flexible, and preferred wording which would include the individual deprived of his or her liberty, close relatives and any other person who, in the eyes of the national court, had a legitimate interest. One delegation commented that it was not appropriate to mention lawyers, who, under national law, always had the capacity to take action. One delegation suggested that the list should be reduced to the individual deprived of his or her liberty, the complainant and their representatives.

105. Some delegations pointed out that the right of persons with a legitimate interest to be kept informed of progress in and the findings of an investigation could not always be guaranteed. That was particularly true, in one delegation’s view, when it would markedly delay the proceedings or investigation, or when the disclosure of such information would be contrary to the higher interests of the individual concerned.

106. Another proposal was to merge draft article 16, paragraph 2, on information relating to the situation of a person deprived of liberty that should be communicated to persons having a legitimate interest, with draft article 12. Additional paragraphs would specify that States must have regard for the “basic need” of individuals with a legitimate interest to obtain “prompt and regular information on the fate of the disappeared individual”, that they should, where necessary, adopt legal measures to ensure appropriate access to such information, and that access to such information should not be denied on “unreasonable” grounds but could be restricted for reasons of respect for the detainee’s private life or the needs of law enforcement and national security, or in the light of any other legally justified consideration.

107. The Chairperson emphasized that States would still be able to withhold information when the interests of the investigation so required, and that the right to be informed of progress in and the findings of an investigation was not the same thing as a right of access to the case file. He stressed that the right to be informed of progress in and the findings of an investigation was crucial and must not be worded in a way that would leave room for abuses or compromise the efficiency of the early warning machinery.

108. Following the debates, the Chairperson suggested that paragraphs 4 and 5 of draft article 12 should be merged to read as follows: “Each State party shall guarantee the right of the family members of the person deprived of liberty, his or her legal representative, his or her counsel and any person authorized by the person deprived of liberty or his family members, as well as any person able to claim a legitimate interest, to be kept informed, at their request, of progress in and the findings of the investigation conducted in pursuance of paragraphs 1 and 2.”

F. International cooperation

(a) The question of political crimes

109. Several delegations expressed agreement with the substance of article 13, paragraph 1, of the draft, under which, for purposes of extradition, enforced disappearance was not considered a political offence or an ordinary offence committed for political reasons. However, there were calls for the meaning of the expressions “political offence” and “ordinary offence committed for political reasons” to be more clearly indicated. One delegation suggested that paragraph 1 should be deleted.

(b) Existing and future extradition agreements

110. A number of delegations questioned whether it was possible to require States parties to include enforced disappearance among the extraditable offences in every extradition treaty they concluded (art. 13, para. 3), since a contracting party or contracting parties that did not accede to the instrument might not agree. It was suggested therefore that paragraph 3 should be made less peremptory by the addition of the words “as far as possible” or by the use of wording from the Convention against Torture (art. 8, paras. 1 and 3). The addition of the words “starting from the signing of the present convention” was also suggested.

111. One delegation suggested the inclusion of a provision prohibiting the granting of asylum or refuge to persons suspected of having brought about enforced disappearance.

(c) Non-discrimination

112. Under article 13, paragraph 7, of the draft, States might refuse extradition if the request involved reasons related to the gender, race, religion, nationality, ethnic origin or political opinion of the person concerned. While many delegations considered the concept of non-discrimination to be of special importance, some felt that it would be dangerous to have a finite list of grounds for discrimination. The alternatives suggested were therefore that there should be no list or that the wording should be amended by the addition of the terms “inter alia” or “for whatever reason”. A number of delegations expressed a strong preference for the inclusion of a detailed, open-ended list of grounds for discrimination.

(d) Refusal of legal assistance

113. Regarding refusal to provide legal assistance on grounds related to sovereignty, security, public order or other essential interests of the requested State, a number of delegations said that article 14, paragraph 3, should be deleted. It was considered “vague” and redundant, as language authorizing the refusal of legal assistance already appeared in paragraph 2 of the article.

(e) Humanitarian assistance

114. Delegations welcomed article 15 of the draft as providing an important supplement to legal assistance proper and making it possible to explore forms of cooperation between States that, although they were as yet little used, were crucial to searches for disappeared persons. Regarding assistance for the purpose of rescuing the victims of enforced disappearances, some delegations asked for the term “rescue” to be clarified, since it was imprecise and suggestive of military operations. One delegation suggested that the article should be softened through the addition of the expression “to the extent possible”.

G. Prevention of enforced disappearances

115. Many delegations stressed the importance of this part of the draft (arts. 16 to 21). A number of general comments were made. For example, one delegation suggested that there should be just one short article similar to article 11 of the Convention against Torture. Another suggested that there should be a cross-reference to an annex containing a detailed description of all the practical measures to be taken.

116. The possibility was raised of replacing paragraphs 1 and 2 of article 16, relating to the rights of persons deprived of liberty, by article 9 of the International Covenant on Civil and Political Rights (referred to below as the Covenant). Some delegations opposed that idea, however, emphasizing that article 16 of the draft was innovative and that, unlike the Chairperson’s draft, article 9 of the Covenant sought to protect individuals in the event of judicial proceedings.

117. Some delegations drew attention to the importance of securing for persons deprived of liberty the possibility of communicating with the outside world, and suggested that the text should refer to it. One delegation suggested that the list in paragraph 1 should include procedural rights, while another suggested that the paragraph should be aligned with article 14 of the Covenant. One delegation suggested the inclusion of a provision similar to that of article X of the Inter-American Convention on Forced Disappearance of Persons, concerning access for judicial authorities to all detention centres where there was reason to believe a disappeared person might be found.

(a) Information on the situation of persons deprived of liberty

118. Article 16, paragraph 2, of the draft would make it incumbent on States to take measures to ensure that persons having a legitimate interest received information on the situation of persons deprived of liberty. For a number of delegations, a significant dichotomy existed in this regard: while none disputed the principle that relatives should have access to the type of information in question, several delegations mentioned the need to take other important elements into account, including the right to protection of privacy and the need to avoid harming persons deprived of liberty. These delegations considered that the text as it stood did not adequately guarantee privacy, and therefore suggested amendments. One delegation suggested using wording to be found in article 10, paragraph 2, of the 1992 Declaration, namely “unless a wish to the contrary has been manifested by the persons concerned”. Another delegation suggested that the information should not be provided if there were grounds for withholding it, such as a refusal by the person deprived of liberty.

119. As to the degree of detail of the information to be provided, one of the suggestions made was to add the reasons for detention to the list contained in paragraph 2. One delegation suggested that, for the sake of coherence, all the provisions concerning access to information should appear together in the text of the future instrument. Regarding access to information, attention was also drawn to the need to take account of domestic law.

120. One delegation suggested that, as in article 19, paragraph 3, of the Covenant and principle 16, paragraph 4, of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, restrictions should be placed on the information to be given to persons with a legitimate interest. Another delegation suggested a compromise wording based on article 19, paragraph 2, of the Covenant, calling on States to guarantee respect for the freedom of family members and other persons having a legitimate interest to seek and receive information, as laid down in the instrument.

121. The Chairperson proposed the following amendment to article 16, paragraph 2:

“Each State party shall guarantee the persons referred to in article 12, paragraph 4, as a minimum, access to the following information:

“(a) The authority to which the person has been handed over;

“(b) The authority responsible for the deprivation of liberty;

“(c) The authority in whose hands the person deprived of liberty has been placed;

“(d) The whereabouts of the person deprived of liberty, including in case of transfer;

“(e) Date of release, if any;

“(f) State of health.”

(b) Right to an effective remedy as a means of obtaining information

122. Article 17 of the draft includes the right to an effective remedy as a means of obtaining the information listed above. One delegation was of the view that the definition of persons with a legitimate interest entitled to a remedy should be broadened, and said that the legitimate interest must be more extensive in connection with prevention. It was also suggested that the remedy should be “prompt”.

123. The Chairperson submitted the following proposal:

“1. Without prejudice to the right of the person charged with a criminal offence to communicate with counsel of his or her own choosing, the information referred to in article 16, paragraph 2 can be legitimately withheld if its release would seriously jeopardize an ongoing investigation or if the information is requested for purposes other than that of searching for the person deprived of liberty.

“2. Without prejudice to consideration of the lawfulness of a deprivation of liberty, States parties shall guarantee to all persons referred to in article 12, paragraph 3 the right to an effective remedy as a means of obtaining the information referred to in article 16, paragraph 2. This right to a remedy may not be suspended or restricted in any circumstances.”

124. However, many delegations raised objections. They noted that the selected wording allowed the authorities considerable leeway in withholding information on the disappeared person, and thus failed to minimize the risks of disappearance. It was pointed out that the requirements of the investigation were often cited by the authorities responsible for enforced disappearance when withholding information on persons deprived of liberty.

125. Concerning the protection of privacy and personal data, several delegations considered that the guarantees offered remained inadequate. Others pointed out that protecting certain rights which were at risk in the event of an enforced disappearance, such as the right to life, security and physical integrity, was more important than protecting privacy, and that efforts to protect the latter should not result in diminished protection against enforced disappearances.

(c) Keeping of official registers

126. Several participants suggested, with regard to article 16, paragraph 3, of the draft, that the instrument should be more precise about the type of information to be contained in registers of persons deprived of liberty. The following wording was proposed:

- (a) The detainee's name and identity and the reasons for the deprivation of liberty;
- (b) The name and identity of the person who ordered the arrest;
- (c) The date and time of the detainee's arrest and removal to the detention centre;
- (d) The date and time of the detainee's appearance before a judicial authority;
- (e) The date, time and circumstances of the detainee's release or transfer to another place of detention.

127. The Chairperson suggested that the above items should be added to paragraph 3.

(d) Verification of release

128. Many delegations welcomed article 18 of the draft, concerning verification of release. Requests were, however, made for the article to be made more precise and reworded. For example, one delegation suggested the addition of “release after an enforced disappearance” and another said that the article should also cover release on parole.

(e) Impermissible conduct

129. Under article 19 of the draft, States parties would be obliged to prevent and punish certain conduct with regard to registration, remedies and the withholding of information. While many delegations agreed as to the types of conduct that the article should cover, others requested

more information. In particular, the terms “official” and “unlawful refusal” were the focus of discussion and requests for clarification. One delegation suggested that “prevent and punish” should be replaced by “prevent or punish”.

(f) Training of law enforcement officials

130. Concerning training in the provisions of the instrument, several delegations suggested that the list of persons to be given the training referred to in article 20 of the Chairperson’s draft should be expanded. It was suggested that use should be made of the list contained in article 10 of the Convention against Torture: “law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment”. Some delegations said that, to enable it to be applied more flexibly, article 20 should be less precisely worded.

(g) Non-refoulement

131. Article 21, paragraph 1 of the draft stipulated that no State party should expel, return (“*refouler*”) or extradite a person to another State if there were grounds for believing that an enforced disappearance might be committed against him or her in that State. Paragraph 2 provided that, for the purpose of determining whether there were such grounds, the competent authorities should 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 and international humanitarian law.

132. Some delegations questioned the need to include this article in this part of the draft. One of them suggested that paragraph 2 should be deleted as being highly political.

133. Several delegations said that the article was important, but that they would prefer it to be worded identically to article 3 of the Convention against Torture, which used the term “substantial grounds” and did not refer to humanitarian law in its paragraph 2. Other delegations said that article 21 was welcome as it stood, especially in view of the inclusion, in keeping with the course of development of public international law, of the reference to humanitarian law. One delegation considered that the wording of article 21 should take into account the question of the definition of enforced disappearance.

H. Victims of enforced disappearances

(a) Definition of a victim

134. In relation to article 22 of the draft, some delegations considered that the instrument should distinguish between two types of victims: those against whom the crime of disappearance had been committed and those whose interests had suffered owing to the commission of that crime, including members of the victim’s family. Some speakers referred to direct and indirect victims.

(b) Definition of the right to reparation

135. Several delegations stated that the concepts set out in the draft as falling under the right to reparation (compensation, restitution, readaptation, and restoration of honour and reputation) were imprecise, that the terms used were not necessarily recognized under all legal systems and that the list was not exhaustive. It would be better if the instrument simply contained one general provision similar to that found in article 14 of the Convention against Torture, and left the details of its enforcement to national courts in the light of domestic laws and the practice of the courts.

136. The Chairperson responded that, even if not all possible ways of making reparation were mentioned (the working paper mentioned only those that could be ordered by the courts), it was very important not to allow States too much room for manoeuvre, and to establish a basic minimum, which could at the same time serve as a guide for national authorities.

137. Most delegations and participants said that the draft took account of the diversity of legal systems, and supported the inclusion of a list. Reference was made to the current efforts to draft basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and international humanitarian law. Some speakers suggested that the list might be more complete, taking account of political as well as legal ways of making reparation.

138. Some delegations suggested adding the notions of fair, effective and swift reparation proportionate to the severity of the crime. Others thought it necessary to distinguish between criminal, civil and administrative reparations. Others again suggested that the instrument should refer to the “right to seek”, not the “right to obtain”, reparation. One delegation suggested a provision requiring States to take interim measures to guarantee that compensation would be paid. Some delegations and participants suggested that the text should incorporate the right to the truth, since the right to reparation had to be founded on the right to the truth.

I. Children of disappeared persons

(a) Prevention and punishment of abduction and appropriation

139. Several delegations and participants pointed out that a distinction had to be drawn between three types of situation: that of a child who was subjected to enforced disappearance in similar circumstances to an adult; that of a child detained with a parent or parents and subsequently deprived of its identity; and that of a child born to a disappeared mother in detention and also deprived of its real identity. The draft did not make that distinction clear. One delegation felt that the first situation was already covered by article 1 of the working paper, and that there was no need for an explicit reference to it. As to the third situation, one delegation said that the crime had three components: the failure to restore the child to its original family, the manufacture of a false identity and the deprivation of the original family of its rights over the child.

140. Several delegations asked for clarifications of the term “appropriation” as used in articles 23 to 25 of the draft, and said it would be difficult to find equivalents in some domestic legal systems. It might be preferable to avoid the term and explain what kinds of conduct were

meant in more detail. Some participants pointed out that appropriation was a different offence from enforced disappearance, and that the notion of “child stealing” might help lead towards the most appropriate term in the various legal systems.

(b) Return of abducted or appropriated children

141. On the subject of appropriated children who were later found, some delegations expressed doubts over the use, in article 25, paragraph 2 of the draft, of the notion of “the best interests of the child” in connection with possible restoration to the child’s original family. One delegation, while emphasizing the importance of the notion, said that other interests must also be taken into consideration. One participant cited article 3, paragraph 1, of the Convention on the Rights of the Child as a general principle to be borne in mind by the authorities in all decisions relating to children. One delegation suggested replacing draft article 25 by a general provision, in view of the existence of articles 9 and 10 of the Convention on the Rights of the Child.

142. Lastly, one delegation suggested the inclusion of a provision to regularize recorded details of birth once a child had rediscovered its true identity.

J. Monitoring body

(a) Form of the new instrument and selection of the monitoring body

143. Delegations debated whether to create a new monitoring mechanism and what missions to assign to this body, on the basis of part II of the draft.

144. Many delegations expressed their concern to avoid the proliferation of treaty-monitoring bodies and agree on the least costly solution in financial and human terms. They therefore suggested the drafting of an optional protocol to the Covenant, with monitoring entrusted to the Human Rights Committee. It was emphasized that enforced disappearances constituted violations of numerous provisions of the Covenant, and that the Committee had already accumulated a body of jurisprudence on the matter. Besides, certain monitoring procedures under the Covenant for the consideration of periodic reports and individual communications were already in existence.

145. Other participants argued that whether the already over-taxed Human Rights Committee could cope with the new mandate was a question that needed to be gone into more deeply. Questions were asked about whether it was possible, from a legal point of view, to assign to the Committee new functions, relating to new rights, by means of an optional protocol.

146. Some participants argued that a middle way could be found between the establishment of a new mechanism and the use of an existing one. The example of the Committee on the Rights of the Child, which, it had been proposed, could work in chambers, was cited. Another solution would be to set up a subcommittee of the Human Rights Committee along the lines of the subcommittee of the Committee against Torture. Several participants pointed out that, whatever formula was finally adopted, monitoring the new instrument would require additional resources.

147. Some delegations said that they had not yet taken a position on the question, emphasizing that their decisions would depend on the functions ultimately assigned to the body, and that the main criterion to apply should be how effective the body would be.

148. One delegation suggested that responsibility for monitoring the future instrument should be given to the Conference of the States Parties.

(b) Functions assigned to the monitoring body

Consideration of States' reports

149. Most delegations supported the Chairperson's proposal for the establishment of a procedure under which each State party would be required to present an initial report on the action it had taken in fulfilment of its obligations under the new instrument within one year of the instrument's entry into force in respect of the State concerned, followed by supplementary reports at the request of the monitoring body (art. II-A). One delegation suggested that initial reports should be due two years after ratification.

Emergency warning mechanism

150. Draft article II-B, under which a State party or any person who had a legitimate interest could request the monitoring body to seek and find a disappeared person, was supported by many delegations. It was suggested that the list of persons authorized to make such a request should be expanded to include, among others, non-governmental organizations.

151. Several delegations emphasized that the monitoring body should be assigned responsibility for taking preventive action. It was suggested that the circumstances in which the monitoring body could be approached should be expanded to include requests made "with a view to preventing the disappearance of a person", and that the monitoring body should be able to take interim protection measures.

152. Some delegations raised the issue of the exhaustion of domestic remedies as a condition for such applications to be admissible, and said that there should be a provision to regulate cases of litispendence as between the emergency procedure and the procedures for the consideration of individual communications by other international and regional monitoring bodies. Some delegations insisted that the admissibility criteria needed further discussion. One delegation considered that the issue of information on the situation of the person deprived of liberty that the State should provide to the monitoring body should also be discussed.

153. Many participants, however, observed that the emergency warning procedure was different from the quasi-legal procedure for the examination of individual communications inasmuch as its objective was to seek, find and afford immediate protection to the individual concerned, not to determine whether the State might be responsible for a violation of the provisions of the instrument. The procedure should not, therefore, be contingent upon the exhaustion of domestic remedies or the rules of litispendence.

154. One delegation insisted that the emergency warning mechanism must be optional, while others called its very desirability into question.

155. A proposal was made to add a provision committing States to conduct emergency investigations when contacted by the monitoring mechanism, and setting deadlines within which they must respond. One delegation, however, preferred wording that would request States to respond "within a reasonable period".

Investigation missions

156. Many delegations supported draft article II-C, under which the monitoring body could, if it considered that a visit to the territory of the State party under whose jurisdiction a disappeared person was reported to be was essential in order to respond to the request submitted to it in accordance with article II-B, undertake an investigation mission with the consent of the State party. Some delegations suggested that States should be asked to justify any refusal to allow such a visit. As regards the rules on making findings public, it was proposed that the rule set forth in article II-B, paragraph 5, whereby the monitoring body could make its findings public if it felt that no appropriate measures had been taken on its recommendations, should be extended to cover investigations.

157. Several delegations dwelt on the need to secure the consent of the State party before any visit to its territory, and one delegation wanted the mechanism to be optional. One delegation said that, in its view, the procedure was too intrusive.

158. Some participants commented on the “personalized” nature of the investigation procedure, inasmuch as it was designed to seek out individuals designated by name. The future instrument should also provide for an investigation mechanism along the lines of that established under article 20 of the Convention against Torture, which could be set in motion if the monitoring body received credible reports indicating that massive or systematic enforced disappearances were taking place in the territory of a State.

Procedures for the consideration of communications from individuals and States

159. Several participants expressed regret that the draft did not propose arrangements similar to the now classic procedures for the consideration of individual and State communications. Those procedures, under which the question of the international responsibility of the State could be addressed, would be a very useful complement to the emergency mechanism. What was more, breaches of the future instrument relating to preventive and investigative measures, for example, were not covered by the emergency mechanism, which was concerned only with locating a disappeared individual. A draft article instituting a procedure for the examination of individual communications was presented by a few participants.

160. Some delegations, however, questioned the value of such procedures and emphasized that there was no need to duplicate procedures already in existence.

(c) Coordination with the Working Group on Enforced or Involuntary Disappearances

161. The question of overlapping between the functions of the monitoring body and those of the Working Group on Enforced and Involuntary Disappearances was discussed during a meeting with two members of the Working Group, who spoke in their personal capacities.

162. The discussions revealed that there would be no overlapping in responsibilities if the monitoring body was assigned the functions of considering periodic reports, the quasi-legal consideration of communications from individuals and States, and the conduct of investigation

missions. The Working Group had no mandate in those areas and did not deal with the international responsibility of States for violations of their human rights obligations. The Working Group did indeed visit States, but for the purpose of discussing the general situation. Nevertheless, de facto overlapping could not be ruled out.

163. As for the emergency warning mechanism, the Working Group also had a mandate in that area. The two mechanisms might therefore be regarded as complementary. In that way, the Working Group, with a mandate to conduct a dialogue with any United Nations Member State, has a universal calling which must be preserved. The monitoring body would have jurisdiction only vis-à-vis States parties to the future instrument but would have a “hard-hitting” treaty-based emergency warning procedure setting deadlines and capable of leading, where appropriate and with the State’s consent, to an investigation mission. There would have to be coordination between the secretariats of the Working Group and the monitoring body.

K. Final provisions

164. The discussions on part III of the draft, setting out the final provisions, covered the following points.

(a) The question of retroactivity

165. It was pointed out that there were two kinds of retroactivity: that of the instrument itself, and that of the competence of the monitoring body. Delegations agreed that there was no need for an explicit reference to the former in the text, because the general rule that the instrument would apply from the time it entered into force for the State concerned remained valid. As regards the competence of the monitoring body, they supported article II-E, paragraph 1, of the draft, which provided that the monitoring body had competence only in respect of deprivations of liberty which commenced after the entry into force of the instrument.

(b) Applicability of the instrument in wartime

166. Article III-E of the Chairperson’s paper stated that “no exceptional circumstances whatever, whether a state of war or threat of war, internal political instability or any other public emergency, may be involved as a justification of enforced disappearance”. One delegation felt that the reference to a state of war should not appear in the provision since the law that applied in wartime was international humanitarian law, not international human rights law. Although the two systems had some principles in common, their spheres of application were different. That being so, the same delegation suggested an alternative to article III-F of the draft which drew on article 21 of the International Convention for the Suppression of the Financing of Terrorism.

167. Several delegations disagreed with that proposal, stressing that the two systems complemented one another. Although international humanitarian law was specially applicable during armed conflicts, international human rights law and domestic law were also applicable because international humanitarian law could not cover every situation that might arise. Several delegations supported draft article III-E, pointing out that it was similar to article 7 of the 1992 Declaration and article 2, paragraph 2, of the Convention against Torture. With some amendments, they also supported article III-F of the draft.

168. In the light of the discussions, the delegations agreed to amend article III-F as follows, while leaving article III-E unchanged:

“The present instrument 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 Additional Protocols thereto of 8 June 1977, or the option available to any State to authorize the International Committee of the Red Cross to visit places of detention in cases for which international humanitarian law does not provide.”

(c) Applicability of the instrument to all the constituent entities of a State

169. Regarding article III-D of the draft, under which the provisions of the instrument would apply to all parts of federal States without any limitations or exceptions, one delegation suggested that account should be taken of the special situation of States with autonomous regions, and the fact that no ratified treaty could be applied in such regions unless it was consistent with their laws. This same delegation proposed a new text for article III-D along these lines.

L. Observations on the working paper by Manfred Nowak

170. Manfred Nowak participated in the work of the Working Group on 22 and 23 January 2004, and replied to numerous questions from delegations concerning a large number of matters that had been discussed during the session. He also emphasized that, in his view, the future instrument should:

(a) Establish a specific and non-derogable right not to disappear within the meaning of article 1. It was not enough to affirm that enforced disappearance involved a violation of several rights, such as the right to life, the right to liberty and security, the right not to be subjected to torture or the right to acknowledgement of one's legal personality. These were only partial aspects of the act of disappearance which did not take into account its full complexity;

(b) Establish a right to the truth, from which family members in particular should be able to benefit expressly. This right was already recognized in international humanitarian law and in international judicial practice relating to human rights;

(c) Establish an obligation on States to carry out exhumations, since they constituted one of the most important means of investigation and were sometimes necessary in order to determine the fate of persons who have disappeared;

(d) Ensure that disappearances carried out by non-State actors were taken into account in the context not only of the State's obligation to criminalize their acts, but also of the obligation to protect the rights of victims, such as the right to the truth, the right to a remedy and the right to reparation.

171. Mr. Nowak pointed out that the nature of the instrument and the monitoring body involved a political choice which should be made in the light of many factors. From the legal viewpoint, he saw no reason why the instrument should not take the form of an optional protocol to the Covenant. In that way the monitoring functions could be entrusted to the Human Rights

Committee or, bearing in mind the expected workload, a subcommittee of the Committee. He also emphasized the importance of investigations conducted automatically, which could result in a visit to the country concerned, and pointed out that provision was already made for such a mechanism in article 20 of the Convention against Torture and in the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.

IV. FUTURE ACTIVITIES

172. The Working Group considered that major progress had been made. The Chairperson suggested that work should continue over two more sessions - the second to be conclusive if possible - before the sixtieth session of the Commission on Human Rights. The presence of Mr. Nowak and Mr. Joinet, as well as members of the Working Group on Enforced or Involuntary Disappearances, had been most useful and should continue.

V. ADOPTION OF THE REPORT

173. The Working Group adopted its report by consensus at its eighteenth plenary meeting, on 23 January 2004.

Annex

**List of delegations which submitted written amendments to the articles
in the working paper***

- Article 1: Chile, United States of America.
- Article 2: Chile, United States of America, Human Rights Watch, International Commission of Jurists, International Federation of Human Rights Leagues.
- Article 3: Chile, Mexico.
- Article 4: Mexico, United States of America.
- Article 5: Chile, Mexico, Switzerland.
- Article 6: Chile, Switzerland, Human Rights Watch, International Commission of Jurists.
- Article 7: Chile, Switzerland, United States of America.
- Article 8: Switzerland.
- Article 9: Belgium, United States of America.
- Article 10: Belgium, United States of America.
- Article 11: Angola, Germany, United States of America.
- Article 12: Belgium, Chile, Germany, Mexico, Switzerland, United States of America, International Service for Human Rights.
- Article 13: Mexico, United States of America.
- Article 14: Chile, Mexico, United States of America.
- Article 15: United States of America, International Service for Human Rights.
- Article 16: Belgium, Chile, China, Germany, Mexico, United States of America, ICRC.
- Article 17: Chile, United States of America.
- Article 19: Mexico, United States of America.
- Article 20: Chile, United States of America.
- Article 21: Germany, Sweden, United States of America.

* These proposals may be consulted in the secretariat.

Article 22: Argentina, Belgium, Chile, Mexico, Spain, International Commission of Jurists.

Article 23: Chile, Mexico.

Article 26: Angola.

Article II-A: Chile, China.

Article II-B: Chile, China.

Article II-C: Chile, China, International Commission of Jurists, Human Rights Watch.

Article II-D: China.

Article II-F: United States of America, ICRC.
