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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)

CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
Introduction	1	3
I. ORGANIZATION OF THE SESSIONS	2 - 9	3
A. Election of officers	2	3
B. Attendance	3 - 8	3
C. Documentation	9	4
II. ORGANIZATION OF WORK	10	4
III. DISCUSSION ON THE CHAIRPERSON'S WORKING PAPER	11 - 173	5
A. Discussions on Part I	11 - 120	5
B. Discussions on Part II	121 - 168	30
(a) Functions of the monitoring body	121 -146	30
(b) Form of the future instrument and monitoring body	147 - 168	35
C. Discussions on Part III	169 - 173	38
IV. ADOPTION OF THE REPORT	174	39

Introduction

1. By its resolution 2004/40 of 19 April 2004, the Commission on Human Rights at its sixtieth session requested the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance to meet for a period of 15 working days in two formal sessions before the sixty-first session of the Commission, with one session of 10 working days and one session of 5 working days with a view to the prompt completion of its work. Pursuant to that resolution, the Working Group held its third and fourth sessions at the Palais des Nations in Geneva from 4 to 8 October 2004 and from 31 January to 11 February 2005, respectively. The Commission also requested the Chairperson-Rapporteur of the Intersessional Working Group to undertake informal consultations with all interested parties.

I. ORGANIZATION OF THE SESSIONS

A. Election of officers

2. On a motion from Germany seconded by Argentina, the Working Group at its third session re-elected Mr. Bernard Kessedjian (France) as its Chairperson-Rapporteur.

B. Attendance

3. Representatives of the following States members of the Commission on Human Rights attended the Working Group's meetings: Argentina, Australia, Brazil, Canada, China, Congo, Costa Rica, Cuba, Dominican Republic, Ecuador, Egypt, Finland, France, Germany, Guatemala, Hungary, India, Indonesia, Ireland, Italy, Japan, Malaysia, Mexico, Netherlands, Nigeria, Pakistan, Paraguay, Peru, Qatar, Romania, Russian Federation, South Africa, United Kingdom of Great Britain and Northern Ireland, United States of America.

4. The following States non-members of the Commission on Human Rights were represented by observers at the Working Group's meetings: Algeria, Angola, Austria, Azerbaijan, Bangladesh, Belgium, Bolivia, Chile, Croatia, Cyprus, Czech Republic, Denmark, El Salvador, Estonia, Ghana, Greece, Haiti, Iran (Islamic Republic of), Israel, Libyan Arab Jamahiriya, Lithuania, Luxembourg, Madagascar, Malta, Morocco, New Zealand, Norway, Philippines, Poland, Portugal, Rwanda, Spain, Serbia and Montenegro, Slovenia, Sweden, Switzerland, Syrian Arab Republic, Tunisia, Turkey, Uruguay.

5. The Holy See was also represented by an observer.

6. The following non-governmental organizations in consultative status with the Economic and Social Council were represented by observers at the Working Group's meetings: Amnesty International, Association for the Prevention of Torture, Conference of Non-Governmental Organizations in Consultative Relationship with the United Nations (CONGO), Families of Victims of Involuntary Disappearance (FIND), Human Rights Watch, International Association against Torture, International Commission of Jurists, International Federation of Human Rights Leagues, International League for the Rights and Liberation of Peoples, International Service for

Human Rights, Latin American Federation of Associations of Relatives of Disappeared Detainees (FEDEFAM), Permanent Assembly of Human Rights, Philippine Human Rights Information Centre, World Federation of Trade Unions, World Peace Council.

7. The International Committee of the Red Cross (ICRC), the European Commission and the League of Arab States were represented by observers.

8. The following experts also participated in the sessions: Manfred Nowak, in pursuance of his mandate under Commission 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 Darko Götlicher (third session) and Santiago Corcuera Cabezut (fourth session), members of the Working Group on Enforced or Involuntary Disappearances.

C. Documentation

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

E/CN.4/2005/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, pursuant to paragraph 11 of Commission resolution 2001/46
E/CN.4/2004/59	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.2	Working paper

II. ORGANIZATION OF WORK

10. At the outset of the third session the Chairperson-Rapporteur submitted a working paper containing a draft instrument which he had prepared and made available to delegations before the session (E/CN.4/2004/WG.22/WP.2). The document was a revised version of the working

paper considered at the second session (E/CN.4/2004/WG.22/WP.1/Rev.1), taking account of comments made by delegations at that session and in informal consultations. He suggested taking the new working paper as a working basis and conducting the discussions on it. The Working Group agreed to that suggestion. Discussions of the paper continued at the fourth session.¹

III. DISCUSSION ON THE CHAIRPERSON'S WORKING PAPER

A. Discussions on Part I

Preamble

The States Parties to [this instrument],

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

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

Determined to combat impunity for the crime of enforced disappearance,

Affirming the right of victims to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person,

Have agreed as follows:

11. Several delegations suggested adding references to international agreements of relevance to enforced disappearance in the fields of human rights, international humanitarian law and international criminal law. Particular reference was made to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention against Torture, the Code of Conduct for Law Enforcement Officials, the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, the Basic Principles for the Treatment of Prisoners, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the 1949 Geneva Conventions, including the protocols additional thereto. One delegation also suggested a reference to the Charter of the United Nations, the International Bill of Human Rights, international humanitarian law and the Vienna Declaration and Programme of Action. References to the Rome Statute, the Inter-American Convention on the Forced Disappearance of Persons and the Working Group on Enforced and Involuntary Disappearances were also suggested.

12. The suggestion was made to incorporate the idea that enforced disappearance was a grave violation of human rights, in particular of several of the rights set forth in the International Covenant on Civil and Political Rights; a reference to enforced disappearance as a crime against humanity was also suggested.

13. One delegation proposed adding paragraphs speaking of States parties' determination to prevent enforced disappearances, to ensure that those guilty of such a crime did not go unpunished and to offer greater protection against enforced disappearances under international human rights and humanitarian law.

14. Several participants emphasized that it was important to mention right of victims to know the truth regarding the circumstances of the enforced disappearance and the fate of the disappeared person. That right, which had already been contemplated in article 32 of the first Protocol additional to the Geneva Conventions, before the 1992 Declaration had even been adopted, ought to be applicable in time of peace. In that connection, one participant suggested that the reference should be to the right of "family members" rather than "victims". Other delegations, however, voiced doubts as to the existence of a "right to the truth", and proposed stressing the obligation of States to provide all possible information in accordance with the law. One delegation wondered whether it was appropriate to allude to a right to the truth in the case of enforced disappearances perpetrated by non-State actors.

15. Several participants suggested adding references to victims' rights to justice and reparation. Some delegations were opposed to the inclusion of an unlimited right to reparation, pointing out that the question of non-State actors had yet to be settled, or that their domestic law recognized a right to seek reparation rather than a right to reparation itself. One delegation pointed out that the existence of a right to reparation for crimes as serious as enforced disappearances could no longer be challenged under international law.

16. It was pointed out by some that the right to reparation was implicit in the right to justice, not only in the legal sense but also from a philosophical and moral standpoint. That position was contested, however, for reparation was not necessarily obtained through judicial proceedings: sometimes it was granted as the outcome of an administrative procedure.

17. Several participants felt that the Preamble should contain an explicit reference to the right of everyone not to be subjected to enforced disappearance.

Article 1

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 persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which places such a person outside the protection of the law.

18. Several delegations supported that text; some emphasized that it defined a violation of human rights rather than giving a definition under criminal law that States would be required to transpose unaltered into their domestic law.

19. Several delegations suggested adding certain forms of deprivation of liberty by way of example: arrest, detention and abduction, for instance. Some participants maintained that the definition must be kept sufficiently broad by referring to "any other form of deprivation of liberty".

20. One delegation suggested adding a second paragraph whereby apparently legal deprivation of liberty that was in fact illegally motivated could not be invoked to justify an enforced disappearance.
21. One delegation suggested clarifying the notion of agents of the State by specifying that they acted “in the course of their official duties”. Another proposed replacing “agents of the State” by “public officials”, as in article 1 of the Convention against Torture.
22. A debate took place as to the definition of non-State actors, the content of which is reflected in paragraphs 29-35 below.
23. A discussion ensued as to whether removal from the protection of the law should be regarded as a consequence of enforced disappearance or as part of the definition in its own right. In the interests of consensus, the Chairperson suggested removing the word “*ainsi*” from the phrase “*la soustrayant ainsi à la protection de la loi*”² in the French and Spanish versions of the working paper, leaving the English text as it was; that would make for “constructive ambiguity” on the question of whether removal from the protection of the law was a consequence or part of the definition of enforced disappearance. However, that suggestion did not elicit a consensus. One participant suggested simply deleting the last clause of the article, which added nothing to the definition.
24. Some delegations suggested adding wording about intention and duration: the purpose of the disappearance should be to remove the individual concerned from the protection of the law for a long period. Other delegations also underlined the need to incorporate the element of intent so as to allow charges to be brought. One delegation in particular emphasized that doing so would allow a distinction to be drawn between enforced disappearances and situations in which the State legitimately refused for a certain period to divulge information on what had happened to an individual.
25. Several delegations, however, opposed the incorporation into the definition of the element of intent. They emphasized that their domestic criminal law always provided for general intent (*dol général*), and there was no need for the instrument to mention it. Removal from the protection of the law was simply a consequence of disappearance and should not be regarded as an additional element of intent (*dol spécial*). Adding a further criterion by which intention must be demonstrated would merely make proof more difficult.

Article 1 bis

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

26. Several amendments were suggested: for example, changing paragraph 1 to read “Everyone shall have the right not to be subjected to enforced disappearance”; adding, by analogy with the Convention against Torture, a sentence stating that “each State Party shall take effective legislative, administrative, judicial or other measures to prevent enforced disappearances in any territory under its jurisdiction”; replacing the text of paragraph 2 with the wording “no one may be subjected to enforced disappearance at any time, in any circumstances”; and replacing “whether” by “including” in paragraph 2 to make it clear that the list of circumstances was not exhaustive.

27. The Chairperson suggested that the word “may” should be replaced by “shall” in paragraph 1 and that the phrase “no circumstance” in paragraph 2 should be amended to read “no exceptional circumstances”. The suggestion met with no objections.

Article 2

1. *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.*

2. *Each State Party shall take comparable measures when the acts defined in article 1 are carried out by persons or groups of persons acting without the authorization, support or acquiescence of the State.*

28. Several delegations supported the wording proposed in paragraph 1. Some delegations thought it would be possible to use an open formula, leaving States some latitude to make enforced disappearance an independent offence or not. Others, however, opposed the proposal, stressing that scattershot prosecutions should be avoided, and that enforced disappearance must be made a criminal offence in itself, given its specific and complex nature, which was not merely a series of random acts. Besides, leaving States such latitude would have legal implications for such matters as the prescription of criminal proceedings. One delegation suggested that States that were not in favour of an independent offence could make an interpretative declaration on ratifying the instrument.

29. During the discussions on paragraph 2, one delegation proposed expanding the definition of enforced disappearance given in article 1 to cover non-State actors. To that end it was proposed that any reference to perpetrators should be deleted from the definition. Another possibility would be to reword article 1 to read:

“For the purposes of [this instrument], enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, thereby placing such a person outside the protection of the law. States have a responsibility to prevent and combat enforced disappearances.”

30. That proposal was supported by several delegations, who pointed out that the instrument must take account of the situation on the ground and of the fact that States were no longer the sole subjects of international law. One delegation called for the future instrument to indicate that States could not be held responsible for acts committed by non-State actors.

31. Numerous delegations pointed out that a reference in the instrument to acts by non-State actors ought not under any circumstances to exonerate the State from responsibility, and that establishing direct responsibility for non-State actors under the future instrument was not an option. The proposal to expand the definition in article 1 to cover non-State actors would rob the future instrument of its force and change its nature. The definition of disappearance would then be too broad and might cover acts such as abduction that were already punishable under national law. It was pointed out that the supervisory mechanism made sense only in relation to enforced disappearances committed by the State. In view of those arguments, several delegations supported the wording of article 2, paragraph 2.

32. Several participants suggested keeping the reference to State actors in article 1, and addressing the issue of non-State actors, not in the incrimination provisions, as had been done in article 2, paragraph 2, but in another place, for example in Part III of the future instrument. Others, however, felt that it should be addressed in article 1, but in a separate paragraph.

33. Several participants felt that the future instrument could, if necessary, be more specific about States' obligations with regard to enforced disappearances committed by non-State actors. Some felt that there was no need to take too restrictive an approach, excluding non-State actors, and emphasized that the expression "comparable measures" was imprecise. They felt that paragraph 2 as proposed could be interpreted as requiring States parties to classify enforced disappearances committed by non-State actors as criminal offences to the exclusion of any other obligation. The suggestion was therefore made to supplement paragraph 2 with an exhaustive list of the State obligations that would also exist in the event of enforced disappearances committed by non-State actors. The list, it was suggested, might include the obligations set forth in articles 1 to 15 bis and 23 to 25.

34. Another participant suggested wording that would introduce the idea of "due diligence". Under that concept States parties would undertake, if enforced disappearances were committed by non-State actors, to take any steps that might reasonably be expected of them in the circumstances to prevent the occurrence of such disappearances, punish the perpetrators under criminal law and offer reparation to the victims.

35. Several alternative texts were proposed with a view to achieving a consensus, although a consensus was not reached.

Article 2 bis

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

36. Some delegations expressed reservations about including a provision on crimes against humanity in the instrument.

37. Several participants suggested that the words “as defined in international law” should be added after “a crime against humanity”. Others suggested moving the provision to follow article 1 bis and replacing “international law” with “applicable international law”. The Chairperson endorsed those proposals.

38. It was proposed to amend article 2 bis to read: “Where enforced disappearance is committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, it constitutes a crime against humanity and shall attract the consequences provided for under international law.” Other delegations expressed their disagreement, however, saying that the President’s new proposal constituted an acceptable compromise. One delegation wished to reserve its position at the present stage of the debate.

Article 3

39. After the debate at the third session, the Chairperson suggested that the text contained in the working paper should be replaced by the following wording:

1. *Each State Party shall take the necessary measures to hold criminally responsible:*

(a) *Those who commit, instigate, attempt to commit, are accomplices or participate in the commission of an enforced disappearance;*

(b) *The superior who:*

(i) *Knew, or consciously disregarded information which clearly indicated that subordinates under his/her effective authority and control were committing or about to commit an enforced disappearance; and*

(ii) *Failed to take all necessary and reasonable measures within his or her power to prevent or repress the enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution.*

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

40. Some delegations asked for account to be taken of applicable domestic law. Adding “under domestic law” after “necessary measures” in the first sentence of the article was suggested.

41. Several delegations insisted that the text should retain a reference to the individual ordering an enforced disappearance and those encouraging, facilitating or abetting its commission. Others called for references to conspiracy to commit enforced disappearance, and

to those responsible for instigating or concealing an enforced disappearance. Still others felt that such conduct might already be covered by the notion of complicity. There was also a proposal to add, at the end of the list of persons subject to prosecution, the words “or who bear accessory responsibility by virtue of the principles of criminal law”.

42. The wording of paragraph 1 (b), which was inspired by article 28 of the Rome Statute, gave rise to a number of discussions. One delegation said that account should be taken of the fact that the provisions dealing with the responsibility of a superior applied only to agents of the State, not to private (non-State) agents. One delegation asked for a clear definition of the responsibility of a superior who “knew” that an enforced disappearance was taking place, and wondered how far the chain of responsibility might extend in, for example, the case of crimes against humanity. Several delegations felt it needed to be stated that a superior could not be held responsible for acts other than those committed by subordinates “under his or her effective authority and control”. Otherwise the instrument would be establishing a liability for the actions of others, which was not acceptable under criminal law.

43. One delegation suggested that a new provision should be introduced in paragraph 1 (b), indicating that the superior “exercised effective responsibility and control on activities that were concerned with the crime of enforced disappearance”. Several participants objected to that proposal, saying that it would lower military commanders’ responsibility as contemplated in international law, including article 28 of the Rome Statute. Some delegations suggested reverting to the full language of article 28 of the Rome Statute, as that would eliminate the possibility of discrepancies between international instruments. To address those concerns it was proposed that a new paragraph should be added indicating that the preceding subparagraphs were without prejudice to higher norms of international law relating to the responsibility of a military leader or a person acting as a military leader. That proposal was widely accepted.

44. One delegation proposed adding new text to paragraph 2 to establish that an order from a superior or a public authority could not be invoked as a justification of enforced disappearance unless the accused did not know that the order was illegal, or could not reasonably be expected to do so. Another suggested adding a clause inspired by article 27 of the Rome Statute whereby “the present instrument shall apply to all equally, without distinction as to official capacity”.

Article 4

1. *Each State Party shall make enforced disappearance punishable by appropriate penalties that take into account its extreme seriousness.*

2. *Each State Party may establish:*

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

(b) *Aggravating circumstances, inter alia in the event of the death of the victim or the commission of an enforced disappearance in respect of pregnant women, minors or other particularly vulnerable persons.*

Two delegations suggested that a reference to the ongoing nature of the offence of enforced disappearance should be included in paragraph 1. One delegation proposed the addition in the chapeau to paragraph 2 of the words “in accordance with its internal legislation”. Those proposals were not taken up by the Chairperson, who suggested instead the insertion of the words “the offence of” before “enforced disappearance” in paragraph 1, and the words “without prejudice to other criminal proceedings” at the beginning of paragraph 2 (b).

Article 5

Without prejudice to article 2 bis,

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

(a) Is substantial and proportionate to the extreme seriousness of this offence;

(b) Commences from the moment when the offence of enforced disappearance ceases and the fate of the disappeared person is established.

2. The term of limitation for criminal proceedings which is provided for in paragraph 1 shall be suspended for as long as no effective remedy is available in a State Party to any victim of enforced disappearance.

45. Several delegations and participants expressed support for the text as representing essential elements that must be retained in combating impunity. Article 17 of the 1992 Declaration and the jurisprudence of international bodies were recalled in that regard. Other delegations proposed amendments, concerning in particular the beginning of the term of limitation and suspension thereof.

46. The following proposals were put forward: to amend paragraph 1 (a) to read: “Is for the longest period provided for in domestic legislation”; to leave the question of limitation to be dealt with in national legislation; to delete, in paragraph 1 (b), the words “and the fate of the disappeared person is established”; to replace the word “and” by “or” in paragraph 1 (b); to replace paragraph 1 (b) with the phrase “Commences from the moment when all elements of the offence of disappearance cease”; to amend paragraph 2 to read: “The term shall be suspended as long as there is no effective remedy”; to add the following provision: “The State Party guarantees under all circumstances to any victim of enforced disappearance the right to an effective remedy by bringing criminal proceedings”; to add a third paragraph, to read: “The limitation of criminal proceedings shall have no effect on the right to reparation”; and to delete the provision relating to suspension of the term of limitation, which was unknown in certain legal systems, or to provide for greater flexibility in that regard.

47. In view of the proposals put forward, the Chairperson suggested that paragraph 1 (b) should be amended to read: “Commences from the moment when the offence of enforced disappearance ceases in all its elements, taking into account the continuous nature of the offence.”

48. The President suggested that paragraph 2 should be replaced by the following wording: “Each State Party guarantees the right of victims of enforced disappearances to an effective remedy during the term of limitation.” However, several delegations preferred the initial wording.

49. Several delegations proposed the addition of a new paragraph stating that an act of disappearance constituting a crime against humanity under international law would not be subject to any term of limitation. Others considered that a mere reference to article 2 bis in the chapeau of article 5 would be sufficient. The Chairperson accepted that proposal.

Article 9³

50. The Chairperson suggested that the article should read as follows:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offence of enforced disappearance:

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

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

(c) When the disappeared person is one of its nationals.

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

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

51. Some delegations proposed retaining the reference to stateless persons in paragraph 1 (b) by adding the words “or a stateless person usually resident in its territory”.

52. Several delegations thought that paragraph 1 (c) should contain wording similar to that used in article 5 of the Convention against Torture, which could be achieved by adding the phrase “and the State Party considers it appropriate”. The Chairperson agreed to that proposal.

53. The debate on paragraph 2 focused on the conditions for the transfer of an offender to another State. The wording retained by the Chairperson, namely that the transfer must be in accordance with the State’s international obligations, was generally accepted. However, one delegation proposed that only extradition should be dealt with in that paragraph. Another delegation proposed deleting paragraph 2.

Article 10

54. The Chairperson suggested that the article should read as follows:

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

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

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

55. A debate took place regarding the proposal by one delegation to add the word “preliminary” before “investigation” in paragraph 2, in keeping with article 6, paragraph 2, of the Convention against Torture. The Chairperson accepted that proposal.

Article 11

56. The Chairperson suggested that the article should read as follows:

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

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

3. *Any person regarding whom proceedings are brought in connection with an enforced disappearance shall be guaranteed fair treatment at all stages of the proceedings. In case of trial, offences of enforced disappearance shall be brought before a competent, independent and impartial court established by law.*

57. One delegation proposed deleting the words “in accordance with its international obligations” after the words “transfer him or her” in paragraph 1, given that the ad hoc international tribunals had not been established by treaties setting out obligations for States parties. Several delegations objected to that proposal. The deletion of the words “whose jurisdiction it has recognized” was also proposed.

58. One delegation proposed the exclusion of any special jurisdiction, including military jurisdictions, as provided for in article IX of the Inter-American Convention on Forced Disappearance of Persons or article 14 of the 1992 Declaration. The Chairperson emphasized in that connection that the working paper represented a compromise that had emerged from discussion of military jurisdictions at previous sessions. He trusted that that compromise would not be jeopardized.

59. Delegations made the following proposals with regard to paragraph 3: that it should be made a separate article; that the second sentence should be deleted because it was unnecessary; and that it should be brought into line with article 14, paragraph 1, of the International Covenant on Civil and Political Rights, without necessarily introducing the guarantee of a public hearing. Several delegations requested that the words “and which respects the guarantees of a fair trial” should be restored, since a “fair trial” was not the same as “fair treatment”. The Chairperson suggested wording to that effect.

Article 12

60. The Chairperson suggested that the article should read as follows:

1. Each State Party shall ensure that any individual who alleges that a person has been subjected to enforced disappearance has the right to report the facts to a competent authority, which shall examine the allegation promptly and impartially and, where appropriate, undertake a thorough and impartial investigation. Appropriate steps shall be taken, where necessary, to ensure that the complainant, witnesses, relatives of the disappeared person and their defence counsel, as well as persons participating in the investigation, are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given.

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

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

(a) Has the necessary powers and resources to conduct the investigation effectively, including the power to compel suspects or witnesses to appear before it;

(b) Has access to all documents and other information relevant for its investigation;

(c) Has access to any official place of detention where there are reasonable grounds to believe that a disappeared person may be present;

(d) *Has access to any other place, upon judicial authorization, where there are reasonable grounds to believe that the disappeared person may be present.*

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

5. *The investigation provided for in this article should take into consideration relevant international principles and guidelines applicable to investigations into human rights violations, including those on torture, to the prevention of extralegal, summary or arbitrary executions, as well as to the search for disappeared persons, forensic examinations and identification.*

61. With regard to paragraph 1, delegations proposed the following amendments: to add “independent” or “impartial” to “competent” in describing the authority; to retain the word “*immédiatement*” in the French text and to replace it in the English text by “promptly”; and to render “authority” in the plural. One participant said that the text should refer not only to judicial investigations but also those conducted by other independent authorities, such as national institutions for the protection of human rights.

62. One participant proposed bringing paragraph 2 into line with article 12 of the Convention against Torture and emphasized that an investigation should be held even where there was no formal complaint.

63. With regard to paragraph 3 (a), one delegation proposed the deletion of “including the power to compel suspects or witnesses to appear before it”, since such appearances automatically formed part of the investigation. Turning to paragraph 3 (b), some delegations proposed that access to documents and other information should be subject to judicial authorization and to certain restrictions having chiefly to do with national security. Several alternative versions were proposed, but no consensus was reached on the issue.

64. Some delegations proposed merging subparagraphs (c) and (d), to read: “Have access, where appropriate on judicial authorization, to any official place of detention where there are reasonable grounds for believing that the disappeared person may be present.” Other delegations proposed the merging of subparagraphs (b), (c) and (d), to read: “Have access, where appropriate on judicial authorization, to all documents relevant to the investigation and to any place where there are reasonable grounds for believing that the disappeared person may be present.” Some delegations proposed the deletion of any reference to judicial authorization. Certain delegations proposed that access should be “in accordance with internal law”. The Chairperson suggested the following wording: “(a) Has the necessary powers and resources to conduct the investigation effectively, including access to documents and other information relevant to its investigation; (b) Has access, where appropriate with prior authorization of a

judicial authority that rules as quickly as possible, to any place of detention and any other place where there are reasonable grounds for believing that the disappeared person may be present.” One participant thought that the possibility of holding private discussions with any person in a place of detention should be reflected in article 12.

65. Some delegations proposed that paragraph 5 should be simplified or deleted, as it added nothing essential.

Article 13

66. The Chairperson suggested that the article should read as follows:

1. *For the purposes of extradition between States Parties, the offence of enforced disappearance shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused on these grounds.*
2. *The offence of enforced disappearance shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties before the entry into force of [this instrument].*
3. *States Parties undertake to include the offence of enforced disappearance as an extraditable offence in every extradition treaty subsequently to be concluded between them.*
4. *If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider [this instrument] as the necessary legal basis for extradition in respect of the offence of enforced disappearance.*
5. *States Parties that do not make extradition conditional on the existence of a treaty shall recognize the offence of enforced disappearance as an extraditable offence between States Parties themselves.*
6. *Extradition shall, in all cases, be subject to the conditions provided for by the law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition or make it subject to certain conditions.*
7. *Nothing in [this instrument] shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.*

67. Several delegations expressed the view that paragraph 6 of the article might encourage impunity and proposed the following wording: “Extradition shall, in all cases, be subject to the conditions established in the applicable extradition treaties or the international obligations of the requested State Party.”

68. A proposal was made to insert the phrase “membership of a particular social group”, which were used in the Convention relative to the Status of Refugees, after the words “ethnic origin” in paragraph 7. The Chairperson accepted that proposal.

Article 14

1. States Parties shall afford one another the greatest measure of judicial assistance in connection with any criminal investigation or proceedings relating to an enforced disappearance, including the supply of all evidence at their disposal necessary for the proceedings.

2. Such judicial assistance shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable treaties on mutual judicial assistance, including, inter alia, the conditions in relation to the grounds upon which the requested State Party may refuse to grant judicial assistance or may make it subject to conditions.

69. At the request of one delegation, the Chairperson agreed to the use of the phrase “legal assistance” rather than “judicial assistance”.

Article 15

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

70. No amendment was proposed.

Article 15 bis

1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of international humanitarian law.

71. The Chairperson suggested the addition of the word “transfer” after the words “return (‘refouler’)” in paragraph 1. Some delegations proposed the deletion of the reference to international humanitarian law in paragraph 2, since it did not appear in article 3 of the Convention against Torture and might have unforeseen consequences. Several delegations opposed such a deletion.
72. Various delegations drew attention to discrepancies between the French and English texts of paragraph 2 and suggested that the Working Group should proceed on the basis of the English version.
73. One delegation proposed the addition to article 15 bis of a paragraph based on article 33, paragraph 2, of the Convention relating to the Status of Refugees, to be worded: “The benefit of the present provision may not, however, be claimed by a person whom there are reasonable grounds for regarding as a danger to the security of the country in which he or she is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.”
74. One delegation made a statement in support of the principle of non-refoulement while stressing the need to find alternatives to the return of aliens who constituted a threat to security or another equally serious threat.

Article 16

75. The Chairperson suggested that the article should read as follows:
1. *Without prejudice to the other international obligations of the State Party with regard to deprivation of liberty, each State Party shall, under its law:*
 - (a) *Establish the conditions under which orders for the deprivation of liberty may be given;*
 - (b) *Indicate those authorities authorized to order deprivation of liberty;*
 - (c) *Guarantee that any person deprived of liberty shall be held solely in an officially recognized and supervised place;*
 - (d) *Guarantee that any person deprived of liberty shall be authorized to communicate with a member of his or her family, their counsel and any other person of their choice, and to receive visits from them, subject to reasonable conditions or restrictions;*
 - (e) *Guarantee access by the judicial authorities to the places where persons are deprived of liberty;*
 - (f) *Guarantee that any person deprived of liberty shall, in all circumstances, be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the deprivation of liberty and order his or her release if that deprivation of liberty is not lawful.*

2. *Each State Party shall compile and maintain one or more official registers or official files of persons deprived of liberty, which shall be made available promptly to any judicial authority or other independent competent national authority as well as to any other authority competent under the legislation of the State Party or any other international legal instrument to which the State in question is party that wishes to inform itself of the place in which a person is detained. Such information must, as a minimum, include:*

- (a) The identity of the person deprived of liberty;*
- (b) The date, time and place where the person was deprived of liberty and the identity of the officer who arrested the person;*
- (c) The authority that ordered the deprivation of liberty;*
- (d) The authority responsible for supervising the deprivation of liberty;*
- (e) The date and time of admission to the place of detention and the authority responsible for the place of detention;*
- (f) General state of health;*
- (g) In the event of death, the circumstances and causes of death;*
- (h) The date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.*

76. Participants stressed the importance of the article and recalled that it originated in article 10 of the 1992 Declaration, concerning which the Working Group on Enforced or Involuntary Disappearances had formulated a general comment.

77. In connection with paragraph 1, delegations made the following comments: in subparagraph (c), the reference to “place” should be in the plural (“places”); in subparagraph (d), the reference should be to family “members” (in the plural) and wording should be added to indicate that the restrictions must be established by law; and the word “only” should be added after “subject”. Consular authorities should also be added to the list. Some delegations expressed doubts concerning the expression “reasonable restrictions” and asked who decided whether or not restrictions were reasonable.

78. In subparagraph (e) it was suggested that other competent authorities or authorities authorized by law should be added to judicial authorities. In subparagraph (f) it was proposed that any person having a legitimate interest, and not only the person deprived of liberty, might be entitled to take proceedings before a court. Some delegations proposed that extension of the right to take proceedings before a court in order to determine the lawfulness of detention, guaranteed under the International Covenant on Civil and Political Rights, to families or persons having a legitimate interest must be limited to those cases in which there were grounds for

believing that the person had been the victim of an enforced disappearance and not to any deprivation of liberty. One delegation proposed limiting exercise of the right of appeal to counsel.

79. Participants proposed adding to paragraph 1 the prohibition of any form of detention in secret.

80. With regard to paragraph 2, delegations made the following specific comments:

- In the chapeau, the word “independent” should be deleted from the description of the national authority; reference should be made only to the authorities responsible for locating the person deprived of liberty;
- In subparagraph (b) the identity of the arresting officer should be deleted, since the officer was merely following orders. Several delegations opposed such a deletion. The name of the place of detention where the person was present should be added. One delegation asked what degree of precision should be used in indicating the time of deprivation of liberty;
- The reasons for the deprivation of liberty should be added to subparagraph (c). Subparagraphs (b) and (c) could be merged into a single subparagraph;
- To subparagraph (g) should be added “and, where appropriate, the place in which the remains are present”;
- One delegation emphasized that the information referred to in paragraph 2 should be available only to the authority responsible for the investigation.

81. One delegation proposed the addition of a third paragraph indicating that paragraphs 1 and 2 should not run counter to national legislation relating to the protection of privacy and the administration of justice.

Article 16 bis

82. The Chairperson suggested that the article should read as follows:

1. Each State Party shall guarantee to the person deprived of liberty and to his or her relatives, their legal representatives, their counsel and any person authorized by them, as well as to any person able to claim a legitimate interest, access to at least the following information:

- (a) The authority to which the person has been handed over;*
- (b) The authority responsible for supervising the deprivation of liberty;*
- (c) The whereabouts of the person deprived of liberty, including in the event of a transfer;*

- (d) *The date and place of release;*
- (e) *The general state of health;*
- (f) *In the event of death, the circumstances and causes of death.*

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

3. *Personal information, including medical or genetic information, collected and/or transmitted in the course of a search for a disappeared person may not be used for purposes other than the search for the disappeared person. This is without prejudice to the use of such information in criminal proceedings relating to an enforced disappearance and to the exercise of the right to obtain reparation.*

4. *The collection, processing, use and conservation of personal information, including medical or genetic information, must not violate or have the effect of violating an individual's human rights, fundamental freedoms or human dignity.*

83. With regard to paragraph 1, several delegations proposed replacing the phrase “person able to claim a legitimate interest”, which placed an undue burden on victims and family members of disappeared persons, with the phrase “person having a legitimate interest”, which was more closely based on the text of the 1992 Declaration and the draft Convention of 1998. It was pointed out that the State could still demonstrate that a person did not have a legitimate interest in obtaining specific information. One delegation preferred the version proposed by the Chairperson.

84. It was proposed that wording should be included to specify that the person must have a “direct” legitimate interest. Some delegations noted that the notion of a “direct” interest did not exist in their national legislation; it was also suggested that the proposal might unduly limit the access to information of persons who might act on behalf of the disappeared person.

85. One participant suggested adding non-governmental organizations to the list of persons mentioned in the chapeau to paragraph 1, as they were often contacted by families to initiate a search.

86. A proposal was made to add to the list the authority to whom the person had been transferred, as that information would make it possible to identify the chain of responsibility, the place where the person had been deprived of liberty and the date and time of the person's admission to the place of detention. It was also suggested that paragraph 1 (c) should specify that information relating to the transfer of a person deprived of liberty referred to a transfer “to another place of detention” and also concerned “the destination of and the authority responsible for the transfer”. Paragraph 1 (d) should also include a reference to the time of release. One delegation observed that paragraph 1 (d) could not play a preventive role unless the

information was provided prior to release, so that it could be verified. It was also proposed that paragraph 1 (e) should be amended so that instead of referring to general state of health, it would refer to “information relating to the person’s physical integrity”, which would take the question of medical confidentiality into account. Lastly, paragraph 1 (f) could be expanded to include a reference to the “destination of the remains”.

87. Several delegations welcomed paragraphs 3 and 4. Some participants felt that those paragraphs could constitute a separate article and, if necessary, be supplemented by other provisions relating specifically to the issue of privacy. It was proposed that the word “legitimate” should be inserted before the word “search” in paragraph 3.

Article 17

88. The Chairperson suggested that article 17 should be amended to read:

1. Requests for information under article 16 bis may be denied if provision of the information jeopardizes the privacy or security of the person deprived of liberty or obstructs the work of a criminal investigation.

2. Without prejudice to consideration of the lawfulness of the deprivation of a person’s liberty, States Parties shall guarantee to the persons specified in article 16 bis, paragraph 1, the right to a prompt and effective remedy as a means of obtaining without delay the information referred to in article 16 bis. This right to a remedy may not be suspended or restricted in any circumstances.

89. Several delegations expressed support for paragraph 1, while others felt that it opened the door to many possible abuses. It was suggested, inter alia, that the paragraph should be deleted; that if the issue of privacy must be mentioned, such a reference should be included at the end of the instrument; and that the right not to be subjected to an enforced disappearance must take precedence over the right to privacy. Several participants were opposed to the withholding of information in order not to obstruct an investigation, noting that enforced disappearances could never be justified.

90. One delegation remarked that in some cases the protection of witnesses or of persons who had confessed required that certain information should be kept confidential. Several delegations requested that the paragraph should include a reference to national security. It was also proposed that the article should refer not only to the security of the person deprived of liberty but also to public security. Several participants were opposed to such an addition, saying that it ran counter to the very spirit of the instrument.

91. The Chairperson suggested the following alternative wording: “States Parties may refuse requests for information under article 18, where necessary in a State observing the rule of law and in accordance with the law, if the transmission of such information infringes a person’s privacy or security, obstructs the work of a criminal investigation or seriously compromises public security. In no case may States Parties refuse to provide information as to whether or not the person has been deprived of liberty or has died while being deprived of liberty.” That text obtained broad support, except for the question relating to public security.

92. As to paragraph 2, some delegations felt that the guarantee it contained was inadequate and proposed amending article 17 with a view to striking a better balance between the protection of persons from enforced disappearances on the one hand and the right to privacy and constraints imposed on States in the context of criminal investigations on the other hand. Accordingly, a proposal was made to stipulate that the denial of information must be “necessary and provided for by law”, and to provide for a minimum of information that could not be kept confidential. In particular, it was proposed that information regarding the fact that a person was being held in detention, the place of deprivation of liberty, the person’s physical integrity and whether or not the person had died must be communicated.

93. Other participants suggested that specific mention should be made of the fact that a request for information could not be refused except in certain exceptional circumstances, and that any refusal to comply with such a request should be made under the authority or supervision of a judicial authority. One participant thought that provision should be made for a verification and monitoring system, independently of any subsequent remedies.

94. Some delegations proposed adding a third paragraph to article 17 that would stipulate that “States Parties shall prohibit any secret forms of deprivation of liberty”.

Article 18

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

95. One delegation proposed replacing the words “by the law” with the words “under national legislation”.

Article 19

Each State Party shall take the necessary measures to prevent and punish the following conduct:

(a) Delaying or obstructing the remedy referred to in article 17;

(b) Failure to record the deprivation of liberty of any person, or the recording of any information which the official responsible for the official register knows or ought to know to be inaccurate;

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

96. The Chairperson suggested that subparagraph (a) should be amended to read: “Delaying or obstructing the remedy referred to in article 16, paragraph 1 (f), and article 17.”

97. Many delegations stressed that the term “*sanctionner*” [“punish”] in the French text referred both to criminal and to civil and administrative sanctions. The word “punish” in the English text should therefore be changed to “impose sanctions”. The Chairperson accepted that wording.

98. A debate ensued as to whether a distinction should be drawn between articles 1, 3 and 19 of the working paper. Some delegations felt that the acts described in article 19 might also constitute elements of the crime of enforced disappearance as defined in article 1 and the offences listed in article 3. Some participants wished to know whether the acts listed in article 19 had to be intentional, or whether simple negligence should also be punished. If the former case obtained, the element of intent must be reflected in the text.

99. Several participants replied that it was important to maintain a distinction between those articles. Article 19 was primarily intended to prevent enforced disappearances, obligating States parties to ensure the proper functioning of services that might otherwise unwittingly abet an enforced disappearance. Article 19 also had to do with errors committed by services through negligence, for which administrative sanctions were particularly well suited.

100. A discussion took place as to the wording of subparagraph (c), as some delegations maintained that not all officials of a State were authorized to provide information. One delegation observed that a refusal could also come from an authority and not merely from an official. To remedy that drafting problem, it was proposed that no reference to an official should be included in subparagraph (c).

Article 20

1. *Each State Party shall ensure that the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty includes the necessary education and information regarding the provisions of [this instrument], in order to:*

(a) *Prevent the involvement of such officials in enforced disappearances;*

(b) *Emphasize the importance of prevention and investigations in relation to enforced disappearances;*

(c) *Ensure that the urgent need to resolve cases of enforced disappearance is recognized.*

2. *Each State Party shall ensure that orders or instructions prescribing, authorizing or encouraging enforced disappearances are prohibited. Each State Party shall guarantee that a person who refuses to obey such an order will not be punished.*

3. *Each State Party shall take the necessary measures to ensure that the persons referred to in paragraph 1 who have reason to believe that an enforced disappearance has occurred or is planned shall report the matter to their superiors and, where necessary, to the appropriate authorities or organs vested with reviewing or remedial powers.*

101. Some delegations pointed out that it was unrealistic to call for the training of officials in the provisions of the instrument. One delegation proposed that States parties should undertake to disseminate the instrument. It was also proposed that provision should be made for education and information on the prohibition of enforced disappearances or on the relevant provisions of the instrument. The latter proposal was accepted by the Chairperson.

102. With regard to paragraph 3, one delegation felt that the obligation to report enforced disappearances should be part of the training given to State officials, and that a clause should be drafted to protect the officials making such reports.

Article 22⁴

103. The Chairperson suggested rewording the article to read:

1. *For the purposes of [this instrument], “victim” means the disappeared person and any individual who has suffered direct harm as a result of an enforced disappearance.*
2. *Each State Party shall take the necessary measures to search for, locate and release disappeared persons and, in the event of death, return their remains.*
3. *Each State Party shall take the necessary measures to inform victims of the circumstances of the enforced disappearance, the progress and outcome of the inquiry and the fate of the disappeared person.*
4. *Each State Party shall guarantee the right of victims of enforced disappearances to obtain prompt, fair and adequate reparation for the harm caused to them.*
5. *The right to obtain reparation referred to in paragraph 4 includes full compensation for material and psychological harm. It may also include other means of reparation such as:*
 - (a) *Restitution;*
 - (b) *Rehabilitation;*
 - (c) *Satisfaction, including restoration of honour and reputation;*
 - (d) *A guarantee of non-recurrence.*
6. *Without prejudice to the obligation to continue the investigation until the fate of the disappeared person has been clarified, each State Party shall take the necessary measures with regard to the legal situation of disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, custody of children and property rights.*

7. *Each State Party shall take the necessary measures to guarantee the right of victims of enforced disappearances to belong to organizations and associations concerned with establishing the circumstances of enforced disappearances and the fate of disappeared persons, and with providing assistance to the victims of enforced disappearances.*

104. Many delegations believed that it was essential to establish victims' right to the truth within the body of the instrument. Others thought it was preferable simply to state that the State had an obligation to provide information concerning, inter alia, the circumstances of the disappearance and the fate of the disappeared person; they noted that the right to truth was already mentioned in the Preamble.⁵

105. The point was made that States must investigate acts committed by non-State actors but would be required to communicate only the information available to them.

106. One delegation felt that paragraph 2 should take into account situations where disappeared persons could not be released because they faced legitimate charges, suggesting the wording: "and, in appropriate cases, releasing" the disappeared persons. Several participants opposed such an addition.

107. It was suggested that paragraph 2 should indicate that States must take the necessary steps to discover what had happened to the victim's remains, in the event that he or she had died.

108. Several delegations suggested that States parties should also be urged, in paragraph 3, to take the necessary measures to inform "individuals having a legitimate interest". Other delegations were opposed to such an addition.

109. On the subject of paragraph 4, several delegations reiterated their preference that the instrument should speak not of victims' right to reparation but of their right to seek reparation; they proposed wording similar to that of article 14 of the Convention against Torture, which referred to a State party's obligation to ensure in its legal system the right to redress and compensation.

110. Some delegations recalled that States could not be obligated to provide reparation for acts committed by non-State actors. In such cases, the State party could offer victims support, for example by setting up a compensation fund, but it should not be required to make full reparation. It was also pointed out that the question of States' obligations with regard to disappearances perpetrated by non-State actors ought to be settled by means of article 2 of the instrument.

111. One delegation proposed using a formula whereby any State party "responsible for a criminal offence by virtue of article 1" would guarantee victims reparation for the injury they had suffered "in accordance with the provisions of its legal system". Others, however, noted that that proposal seemed to restrict the right to reparation to cases in which a court had found an agent of the State to be criminally responsible. There were, however, many ways in which reparation could be made.

112. One participant proposed that paragraph 4 should refer not to “fair” but to “full” reparation, an expression that took fuller account of the work of the International Law Commission on State responsibility. Others spoke in favour of the converse solution, arguing among other things that full reparation could not actually be guaranteed. One delegation said that paragraph 4, in positing the principle of adequate reparation, should take account of the economic constraints under which States operated. It was also proposed that States should be given greater flexibility in determining who was a victim and what was meant by reparation.

113. On the subject of paragraph 5, several delegations argued that it was not appropriate to set up compensation for material and psychological harm as the preferred means of making reparation for enforced disappearances. Other kinds of reparation were just as important to victims’ families and should therefore be not optional but obligatory, in keeping with the Principles that were currently being developed at the United Nations. Other delegations, however, preferred that the types of reparation provided for in subparagraphs (a) to (d) should remain optional. In an effort to reach consensus, formulas allowing States some flexibility were proposed.

114. Many delegations welcomed the introduction of the new paragraph 7. It was nevertheless decided to reword the paragraph so as to emphasize victims’ right to associate “freely” and to bring the text more closely into line with the International Covenant on Civil and Political Rights. One delegation wondered how appropriate it was to add such a paragraph, since it felt that freedom of association was not specific to the question of enforced disappearances. Several participants, however, emphasized the importance of the clause, given the major role that associations played in combating enforced disappearances and the violations that their members sometimes suffered.

Articles 23-25

115. The Chairperson suggested that articles 23 to 25 should be reworded to read:

Article 23

1. *Each State Party shall take the necessary measures to prevent and punish:*

(a) *The appropriation of children subjected to enforced disappearance or whose father, mother or legal representative has been subjected to enforced disappearance, or children born during the captivity of a mother subjected to enforced disappearance;*

(b) *Falsification or concealment of the true identities of the children referred to in subparagraph (a).*

2. *Each State Party shall take the necessary measures to search for and identify the children referred to in paragraph 1 (a) and return them to their families of origin.*

Article 24

States Parties shall assist one another in searching for, identifying and locating the children referred to in article 23.

Article 25

1. *Taking into account the need to uphold the best interests of the children referred to in article 23, paragraph 1 (a), and the right of such children to retain their identities, including their nationality and their legally recognized family ties, it must be possible, in States Parties that recognize adoption, to review the procedure by which such children are adopted and, in particular, to annul any adoption that proves to have stemmed from an enforced disappearance.*

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

116. Delegations questioned the use in article 23, paragraph 1, of the word “*appropriation*” in the French text and its equivalent in the other languages, since, contrary to what certain delegations had suggested, the conduct referred to could not be regarded as abduction. It was decided to use the word “*soustraction*” in the French text, “*apropiación*” in the Spanish text and “*wrongful removal*” in the English text. It was also proposed that paragraph 1 should mention the falsification, concealment or destruction of documents attesting to the true identity of children. That proposal was accepted by the Chairperson, who said that it would be up to States to determine what documents were concerned. With regard to the chapeau of paragraph 1, some delegations proposed that the matter should be left to national law; others felt there was a need to state that the sanctions applicable to such acts must be criminal sanctions.

117. With regard to paragraph 2, several delegations stressed that return to the family of origin must not be the only option available to such children. It was also proposed that such returns should be made with the child’s best interest in mind and in accordance with the applicable legal procedures and international treaties.

118. Delegations made the following proposals relating to article 25. Paragraph 1 should be amended to include an obligation on States to take steps to regularize documentation relating to rediscovered children, including papers dealing with the annulment of adoptions. Provision should be made for the right of such children to retain and recover their identities. The words “it must be possible” ought to be replaced by “there must be a mechanism”. The article should cover other procedures for placing children, not just adoption. The reference in the previous version of the article to bilateral or multilateral agreements should be retained.

119. One delegation wondered about the reference in paragraph 2 to the best interests of the child, pointing out that that might conflict with the interests of the biological family. Many delegations recalled that the best interests of the child was a basic principle that had to be interpreted in accordance with the Convention on the Rights of the Child and should be the inspiration for all three articles. One delegation proposed adding the child’s own views to the concept of best interests.

120. Some delegations suggested that the three articles should be merged into one.

B. Discussions on Part II

(a) Functions of the monitoring body

121. The working paper suggested that the monitoring body should be assigned the following functions: receiving and considering reports on the action taken by States to give effect to the future instrument (art. II-A); considering requests for disappeared persons to be sought and found under an emergency procedure (art. II-B); conducting fact-finding missions to the territory of States parties in response to such requests (art. II-C); receiving and considering individual communications (art. II-C bis); referring particularly serious situations to the Secretary-General of the United Nations (art. II-C ter); and submitting an annual report on its activities to the General Assembly (art. II-F).

Reporting procedure (art. II-A)

122. Most delegations supported the Chairperson's suggestion of establishing a procedure whereby all States parties would be required to submit a report on the action taken to give effect to the new instrument. It was proposed that reports should be required to be submitted two years after entry into force.

123. Many participants indicated that they did not favour a system of periodic reports, which they considered to be too unwieldy. They did, however, agree that States parties might submit additional reports to the monitoring body whenever that body so requested.

124. Some delegations suggested that if the future instrument should take the form of an optional protocol to the International Covenant on Civil and Political Rights, it ought to be modelled on the two optional protocols to the Convention on the Rights of the Child, which called for the submission of an initial report, after which any new information about the application of the protocols would be provided in the periodic reports due under the main Convention.

Emergency procedure (art. II-B)

125. At the fourth session the Chairperson suggested replacing the text contained in the working paper with the following:

1. *A request that disappeared persons should be sought and found may be submitted to the Committee by relatives of the disappeared persons or their legal representatives, their counsel or any person authorized by them, as well as by any person able to claim a legitimate interest.*
2. *If the Committee considers that a request submitted in pursuance of paragraph 1*
 - (a) *is not manifestly unfounded,*
 - (b) *does not constitute an abuse of the right to submit such communications,*

(c) *has previously been submitted to the competent authorities of the State Party concerned, and*

(d) *is not incompatible with the provisions of [this instrument],*

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

3. *The Committee shall submit to the State Party concerned a recommendation in the light of the response provided by that State Party in accordance with paragraph 2 above. It may also request the State Party to take appropriate action and report thereon to the Committee within a time limit which the Committee shall set, given the urgency of the situation.*

126. Most delegations supported that procedure, which they regarded as essential inasmuch as it sought not only to forestall enforced disappearances but also to put an end to any that had already occurred. The question of overlapping terms of reference with the Working Group on Enforced and Involuntary Disappearances, which also had an emergency procedure, was also discussed.

127. It was suggested that applicants should be required to activate domestic channels for finding the disappeared person at the same time. However, many participants opposed the incorporation of a requirement that domestic remedies must have been exhausted. Several felt that such a requirement should apply only to available and effective remedies.

128. Several delegations called for the inclusion of protective measures among the measures listed in paragraph 3. Others questioned the need to include such a reference in the emergency procedure.

129. It was suggested that the instrument should specify that the dialogue between the monitoring body and the State party concerned would continue until the fate of the disappeared person had been elucidated. Several delegations also called for a stipulation that the monitoring body would keep applicants informed of the replies received from the State party and the action taken in response to their applications.

130. One delegation proposed that, when the monitoring body requested a State to take appropriate action and report thereon, the State should do so not “within a time limit which the [body] shall set” but “as quickly as possible”. The Chairperson, however, argued that the monitoring body should be left free to assess situations on a case-by-case basis.

Fact-finding missions (art. II-C)

131. Several delegations at the third session expressed support for the establishment of a fact-finding procedure, while others wondered how appropriate it was, given that the primary aim of the instrument was prevention. The discussions also touched on the duration of fact-finding missions, the composition of the delegations assigned to carry them out, whether or not the assent of the State concerned was required, and what delegations should do in the course of such visits.

132. At the fourth session, the Chairperson suggested the following wording:

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

2. *The Committee shall seek the cooperation of the State Party concerned. It shall notify it in writing of its intention to conduct a fact-finding mission, indicating the purpose of the mission and the composition of the delegation. The State Party shall inform the Committee without delay of its agreement or opposition to a fact-finding mission in territory over which it has jurisdiction.*

133. Many delegations supported that text. Some suggested that the fact-finding function should follow the lines of article 20 of the Convention against Torture. The following additions were proposed: a State party agreeing to a fact-finding mission should be obliged to provide all necessary facilities; a State objecting to a fact-finding mission should be obliged to give its reasons; the delegation's findings should be communicated to the State party and published; and the arrangements for the visit should be established by agreement between the monitoring body and the State concerned.

Individual communication procedure (art. II-C bis)

134. At the third session the debate centred on whether or not such a procedure was necessary, and whether it duplicated the procedure available under the Optional Protocol to the International Covenant on Civil and Political Rights. Several delegations suggested that it should be optional, as was the case with other international instruments.

135. The discussions also touched on the question of who would be entitled to approach the monitoring body; what shortcomings could be brought to the monitoring body's attention under the procedure; the exhaustion of domestic remedies, particularly when the remedies available were not effective; the powers of the monitoring body; and the question of interim protective measures.

136. At the fourth session the Chairperson suggested the following wording:

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

2. *The Committee may not consider a communication if:*

(a) *The communication is anonymous;*

(b) *The communication constitutes an abuse of the right to submit such communications or is incompatible with the provisions of [this instrument];*

(c) *The communication is not substantiated or is manifestly groundless;*

(d) *The same matter is being examined under another procedure of international investigation or settlement;*

(e) *The individual concerned has not exhausted all effective domestic remedies available. This rule shall not apply if the recourse procedures are excessively prolonged.*

3. *If the Committee considers that the communication meets the requirements set out in paragraph 2, it shall transmit the communication to the State concerned, requesting it to provide, within a time limit that the Committee shall set, its observations or its comments. In case of need, the Committee shall recommend interim measures of protection.*

4. *The Committee shall meet in camera when considering the communications provided for in this article. It shall terminate the procedure set forth in this article by communicating its findings to the State Party and to the author of the communication.*

137. Many delegations supported the proposed text. Amendments were put forward, including the deletion of paragraph 2 (c) and the total alignment of the article with the Optional Protocol to the International Covenant on Civil and Political Rights. One delegation proposed including regional bodies in paragraph 2 (d), but there was no unanimity on that proposal.

Referral to the Secretary-General (art. II-C ter)

138. Several delegations at the third session said that they supported that new procedure. Others voiced reservations, believing that such a procedure might politicize the question and wondering whether any precedents existed in other human rights instruments. Several delegations felt that the Secretary-General's authority derived from the Security Council and General Assembly of the United Nations, and that he could not take action without consulting those bodies. Others felt that such questions should be handled by political bodies such as the Commission on Human Rights or the Economic and Social Council, and called for article II C ter to be deleted. Some delegations asked whether the action the Secretary-General was expected to take ought not to be spelled out. Others considered that the Secretary-General could transmit information to the Security Council, which could, for example, bring a case before the International Criminal Court. The Chairperson considered that the text should remain within the scope of the Secretary-General's existing powers, leaving it to him to decide what action to take.

139. One participant pointed out that there were human rights instruments that allowed matters to be brought before the political bodies of the United Nations, in particular article VIII of the Convention on the Prevention and Punishment of the Crime of Genocide and article VIII of the International Convention on the Suppression and Punishment of the Crime of Apartheid. The new instrument could establish a link between the fact-finding procedure, on-site visits and the possibility of ensuring that conclusions were followed up through the Secretary-General.

140. At the fourth session the Chairperson suggested the following wording:

If the Committee receives information which appears to it to contain well-founded indications that enforced disappearance is being practised on a widespread or systematic basis in the territory of a State Party, it may, after seeking from the State Party concerned all relevant information on the situation, refer the matter to the Secretary-General of the United Nations, who will take action within the powers conferred upon him by the Charter of the United Nations.

141. Several delegations repeated previously advanced arguments. Some felt that the article was of a piece with the reforms proposed by the High-Level Panel on Threats, Challenges and Change. One delegation proposed replacing “refer the matter to” by “bring the matter to the attention of”, and “within the powers” by “in accordance with the powers”.

Competence *ratione temporis* of the monitoring body (art. II-E)

142. Many States were of the opinion that the monitoring body would be competent to take up only “enforced disappearances” and not “deprivations of liberty” that occurred after the instrument entered into force.

Confidentiality (art. II-F)

143. According to the working paper, the procedures referred to in articles II-B, II-C and II-C bis would be confidential. Pursuant to article II-F, however, if procedures launched under articles II-B and II-C bis elicited a manifest refusal to cooperate on the part of the State party concerned or produced no real results, the monitoring body could decide to comment publicly on the question or situation brought to its attention.

144. Several participants at the third session felt that such confidentiality rules amounted to a step backwards from existing text and current practice. They were opposed to confidentiality unless it would make for more effective procedures or was ultimately intended to protect the individual concerned. Confidentiality, moreover, should apply to the procedure, not the outcome. Two delegations proposed language making it clear that the monitoring body could decide to comment publicly “after taking seriously into consideration the fact that doing so might imperil the life and safety of the disappeared person, his or her family and anyone else involved”. Other delegations asked that the confidentiality clauses should be retained.

145. The amendments to articles II-B to II-F suggested by the Chairperson at the fourth session established new rules by which confidentiality would be maintained while a procedure was in progress and lifted with respect to the outcome. Those rules were generally well received by delegations.

Procedure for communication between States

146. Some participants regretted that the working paper made no provision for a procedure for communication between States, and suggested that such a provision should be included.

(b) Form of the future instrument and monitoring body

147. Almost all delegations felt it was necessary to establish a strong, effective monitoring body. One delegation, however, questioned the need to establish a monitoring body and proposed that the matter should be simply left to the Meeting of States Parties.

148. Several delegations cited the risk of overlap between the functions of the monitoring body and those of the Working Group on Enforced and Involuntary Disappearances, particularly with regard to the consideration of urgent appeals, on-site visits and individual communications. Others stressed the complementarity of the two mechanisms. They recalled that the mandate of the Working Group covered all States Members of the United Nations as well as all cases of enforced disappearance that had occurred since the United Nations was founded, whereas the new monitoring body would have competence only in respect of the States parties to the future instrument and enforced disappearances that occurred after the instrument entered into force. It was pointed out that in other areas, such as torture, treaty bodies and special procedures of the Commission on Human Rights already existed and had demonstrated their importance and usefulness. Moreover, the Working Group on Enforced and Involuntary Disappearances was not a permanent body, as its mandate had to be renewed every three years by the Commission on Human Rights.

149. It was noted that, from a practical standpoint, coordination would be provided by the Secretariat, the annual meeting of chairpersons of treaty bodies and the special mechanisms of the Commission on Human Rights.

150. Several alternatives were proposed as to the form the instrument and the monitoring body should take. The first involved drafting an optional protocol to the International Covenant on Civil and Political Rights and entrusting the task of monitoring to the Human Rights Committee. A variant of that proposal involved establishing a subcommittee of the Human Rights Committee that would be specifically tasked with monitoring the protocol. The second option would be to draft a separate treaty that would have its own monitoring body.

Proposal for the drafting of an optional protocol to the International Covenant on Civil and Political Rights

151. During its third session the Working Group had heard the Chairperson of the Human Rights Committee, Abdelfattah Amor, express his own views on the matter. He had set out several arguments in favour of the drafting of an optional protocol to the International Covenant on Civil and Political Rights, with monitoring entrusted to the Human Rights Committee. That Committee, which had many years of experience, was well placed to deal with enforced disappearances, in the light of articles 6, 7 and 9 of the Covenant. By amending its rules of procedure it could create internal structures, if necessary, to take up any new mandates assigned to it. The Chairperson of the Human Rights Committee had noted that increasing the number of monitoring mechanisms could lead to problems with consistency of jurisprudence.

152. Many delegations voiced support for that option. They pointed out that enforced disappearances were a violation of several articles of the International Covenant on Civil and Political Rights; choosing that option would make it possible to ensure continuity in the practice of the Human Rights Committee in that area and to take into account the ongoing discussion on reform of the treaty-monitoring bodies.

153. The possibility of increasing the number of members of the Committee was raised but was not favourably received, chiefly because it would require amending the Covenant. Some participants observed that what needed to be increased was not the number of Committee members but the financial and human resources available to the Committee.

154. A proposal was made to take articles 3 to 5 of the second Optional Protocol to the International Covenant on Civil and Political Rights and article 8 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts as a basis for drafting articles that would make reference to the existing functions of the Human Rights Committee.

Proposal for the establishment of a subcommittee of the Human Rights Committee

155. Some delegations expressed a preference for the drafting of an optional protocol to the International Covenant on Civil and Political Rights and the establishment of a subcommittee of the Human Rights Committee that would be specifically tasked with monitoring it. They felt that such a solution would ensure the continuity and consistency of the Human Rights Committee's jurisprudence in the area of enforced disappearances while giving the future mechanism greater visibility.

156. Others questioned the feasibility of such a proposal, noting that it would entail modification of the terms of reference of the Human Rights Committee and thus an amendment to the Covenant. Still others pointed out that there was no need to set up a subcommittee if the Human Rights Committee could establish the necessary body under its rules of procedure.

Proposal to elaborate a separate treaty and monitoring body

157. The Working Group heard a statement by expert Louis Joinet, who explained that in its 1998 draft the Sub-Commission had not proposed giving the Human Rights Committee a monitoring mandate as the Committee was already overburdened, and expanding it would be a complex exercise with no financial benefit. Moreover, it had been stressed that a distinction would have to be drawn between States that had ratified the Covenant and/or the Optional Protocol and those that had not, and that such a solution would have little visibility for victims. The idea of setting up a separate committee had ultimately prevailed.

158. Participants who favoured that option did not, however, believe that making the Human Rights Committee the monitoring body constituted the simplest or least costly solution. Additional costs would be entailed in any event. Practical problems would also arise: the members of the Human Rights Committee were nationals of States parties to the Covenant, which might not be parties to an optional protocol on enforced disappearances. Moreover, as

in the case of the two existing protocols to the Covenant, only States that were parties to the Covenant itself could become parties to the protocol, a situation that would automatically limit opportunities for ratification. On the last point, however, several delegations cited the example of the Optional Protocols to the Convention on the Rights of the Child, which allowed ratification by States that had only signed the Convention.

159. It was pointed out that the concern for maintaining consistency of jurisprudence among the various treaty bodies could not be used as an argument to oppose the establishment of a separate mechanism, as there were already many bodies that had overlapping mandates - in the area of torture, for example - without that giving rise to any problems of consistency.

160. It was stressed that the proposed functions were new in the field of human rights, in that they combined "humanitarian" procedures with more conventional legal procedures. It would therefore be difficult to entrust the mandate to an existing body. Moreover, increasing the work of the Committee might adversely affect the quality of the Committee's own work.

161. Lastly, the drafting of an optional protocol to the Covenant would draw attention away from the specific nature of enforced disappearances and dilute the message the United Nations sought to convey. Meanwhile, the drafting of a separate convention would eliminate any risk of having to amend the Covenant.

162. At the request of the Chairperson, a preliminary cost estimate of two options - establishment of a new treaty body composed of five experts and expansion of the membership of the Human Rights Committee to 23 - had been conducted by the Office of the High Commissioner for Human Rights. The first option, which included the holding of two sessions a year, one annual week-long mission of on-site visits by two members and all associated expenses, would cost \$886,494. The second option, which also included an annual week-long mission of on-site visits by two members and associated expenses, would cost \$929,364.

163. At the fourth session the Chairperson said that, taking into account the arguments that had been put forward, he believed that the establishment of a separate committee constituted the best solution. He therefore suggested wording for article II-O that would establish a Committee on Enforced Disappearances to be composed of five experts serving in their personal capacities. He also suggested that a new article II-O bis should be added, which would read:

The Committee shall cooperate with all the relevant United Nations bodies, offices, specialized agencies and funds, with all committees established under relevant international instruments, with the special procedures of the United Nations Commission on Human Rights, with all appropriate regional, intergovernmental organizations or institutions, and with all relevant national institutions, agencies and offices working to protect everyone from enforced disappearance.

164. Several delegations welcomed the Chairperson's suggestion. Others announced that they wished to remain flexible on the question, since what was most important was the establishment of an effective mechanism. Some delegations felt that it was important to agree on the functions of the monitoring body first and to determine the form it should take afterwards.

165. Some delegations questioned the need to limit the number of members of the future committee to 5, in view of the work to be done, and suggested increasing the number to 10.

166. Some delegations proposed spelling out in the new article II-O that the Secretary-General would provide the Committee with a “permanent secretariat”. One delegation, however, said that such a statement was both ambiguous and pointless. Another delegation proposed wording to the effect that the Secretary-General would provide the committee with the resources, staff and facilities it needed to conduct its work effectively “and permanently”.

167. Two delegations proposed that the new committee’s financing should come not from the regular budget of the United Nations, as the Chairperson had suggested, but from the States parties to the instrument. Many delegations objected to that proposal, arguing, *inter alia*, that it was unacceptable for financial considerations to stand in the way of ratification of the instrument. In reply to a question on that subject, a representative of the Office of the High Commissioner for Human Rights said that all treaty-monitoring bodies were currently financed from the regular budget of the United Nations. Two treaties had originally provided for financing by the States parties, but that system had created serious problems in the work of the treaty bodies concerned, and the treaties had been amended. Until those amendments entered into force, the General Assembly, in its resolution 47/111, had decided to finance the bodies concerned from the regular budget.

168. Several delegations welcomed the new article II-O bis, although they thought that it should be more specific and strengthened. In particular, it was proposed that the treaty bodies that would cooperate with the new monitoring body should be specifically mentioned, as should the Working Group on Enforced and Involuntary Disappearances.

C. Discussions on Part III

169. A debate was held on Part III of the working paper. In their statements delegations focused on the following topics:

170. With regard to the number of ratifications necessary for entry into force of the instrument (art. III-B), the Chairperson suggested that 20 ratifications should be required, as was the case with other human rights instruments. The Chairperson’s suggestion was accepted.

171. Article III-D bis, which was proposed in the working paper, was also discussed. According to that article:

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

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

172. One delegation proposed that that text should be retained, given that different legal regimes existed in some of that country's autonomous territories. Several delegations were opposed to the inclusion of such a provision, pointing out that the intended effect could be achieved by means of an interpretative declaration made by the State at the time of ratification. One delegation proposed that the article should give States the option of indicating, after ratification, the territories over which it had jurisdiction for international affairs to which the instrument would apply. The same delegation also proposed that the word "territory" should appear in the plural.

173. Some delegations raised the question of reservations, particularly in the light of the proposal put forward by one participant aimed at, inter alia, prohibiting any reservations that were incompatible with the purpose and objective of the instrument or that would paralyse the work of the monitoring body. Those delegations did not favour the inclusion of a particular regime and proposed that the question of reservations should be settled in accordance with the applicable provisions of international law while taking into account the current debate on the topic in the International Law Commission.

IV. ADOPTION OF THE REPORT

174. The Working Group adopted its report *ad referendum* at its 20th plenary meeting, on 11 February 2005.

Notes

¹ The articles of the working paper are reproduced in the present report to facilitate its reading. The Chairperson suggested amendments to some of these articles at the beginning of the fourth session in order to reflect the discussion at the third session as well as the informal consultations he had held after that session.

² No equivalent of the word "*ainsi*" occurred in the English text.

³ Articles 6, 7 and 8 as contained in the first working paper, which formed the basis of the working paper considered at the third and fourth sessions, have been deleted or incorporated in the text of other articles.

⁴ Article 21 was incorporated into article 15 bis.

⁵ See paras. ____
