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DROITS CIVILS ET POLITIQUES

Le droit à un recours et à réparation des victimes de violations du droit international relatif aux droits de l'homme et du droit international humanitaire*

Note du Haut-Commissaire aux droits de l'homme

Par sa résolution 2002/44, la Commission des droits de l'homme a demandé au Haut-Commissaire aux droits de l'homme d'organiser, au moyen des ressources disponibles et avec la coopération des gouvernements intéressés, une réunion de consultation à l'intention de tous les États Membres, organisations intergouvernementales et organisations non gouvernementales dotées du statut consultatif auprès du Conseil économique et social intéressés en vue de mettre au point la version définitive des «Principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations du droit international relatif aux droits de l'homme et du droit international humanitaire», sur la base des observations reçues.

* Nouveau tirage pour raisons techniques.

* Le présent rapport est distribué dans toutes les langues officielles. Ses annexes sont distribuées dans la langue où elles ont été présentées uniquement.

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Par ailleurs, aux termes du paragraphe 4 de la résolution, la Commission a demandé également au Haut-Commissaire de lui soumettre pour examen, à sa cinquante-neuvième session, le résultat final de cette réunion de consultation.

En conséquence, le Haut-Commissaire a l'honneur de communiquer ci-joint à la Commission le rapport du Président-Rapporteur, M. Alejandro Salinas (Chili), Ambassadeur, sur la réunion de consultation qui s'est tenue sur le projet de principes fondamentaux et de directives concernant le droit à un recours et à réparation des victimes de violations du droit international relatif aux droits de l'homme et du droit international humanitaire.

Rapport de la réunion de consultation sur les projets de principes fondamentaux et de directives concernant le droit à un recours et à réparation des victimes de violations du droit international relatif aux droits de l'homme et du droit international humanitaire

Président-Rapporteur: M. Alejandro Salinas (Chili), Ambassadeur

Résumé

En application de la résolution 2002/44 de la Commission des droits de l'homme, le Haut-Commissariat aux droits de l'homme, agissant en coopération avec le Gouvernement chilien, a organisé, au moyen des ressources disponibles, une réunion internationale à l'intention de tous les États Membres, organisations intergouvernementales et organisations non gouvernementales intéressés en vue de mettre au point la version définitive du projet de principes fondamentaux et de directives concernant le droit à un recours et à réparation des victimes de violations du droit international relatif aux droits de l'homme et du droit international humanitaire (ci-après dénommé «projet de directives»), dont le texte est reproduit à l'annexe du document E/CN.4/2000/62.

L'élaboration du projet de directives a débuté en 1989, en application d'une résolution de la Sous-Commission de la lutte contre les mesures discriminatoires et de la protection des minorités. Depuis lors, les travaux ont bénéficié du concours des deux experts, de même que de multiples observations d'États Membres, d'organisations internationales et d'organisations non gouvernementales.

La réunion de consultation, qui s'est tenue à Genève du 30 septembre au 1er octobre 2002 pour établir la version définitive du projet de directives, était placée sous la présidence de M. Alejandro Salinas (Chili). M. Theo van Boven et M. M. Cherif Bassiouni, qui avaient été chargés de rédiger le projet de directives, ont éclairé de leurs observations les participants à la réunion, laquelle a rassemblé les représentants de nombreux États Membres, organisations intergouvernementales et organisations non gouvernementales.

Après que le projet de directives eut été présenté par les deux experts, les participants ont abordé son examen dans le détail, principe par principe, en dégageant les points de convergence et les problèmes restant à résoudre. À la clôture de la réunion, le Président-Rapporteur et les participants ont examiné la suite éventuelle à lui donner, en particulier les recommandations du Président-Rapporteur en la matière. Les participants sont convenus d'inclure dans le rapport à la Commission des droits de l'homme sur le résultat final de la réunion de consultation les

conclusions et recommandations du Président-Rapporteur sur la suite à lui donner, de même qu'un résumé des travaux de la réunion (voir annexe I).

Se fondant sur les travaux de la réunion, le Président-Rapporteur a recommandé à la Commission des droits de l'homme de prendre les mesures ci-après pour donner suite à la réunion de consultation:

a) Créer, à sa session suivante, un mécanisme approprié et efficace qui serait chargé de mettre au point la version définitive de l'ensemble de principes fondamentaux et de directives concernant le droit à un recours et à réparation des victimes de violations du droit international relatif aux droits de l'homme et du droit international humanitaire dont le texte est reproduit à l'annexe du document E/CN.4/2000/62;

b) Inviter le mécanisme, agissant sur la base des discussions qui ont eu lieu et des conclusions du Président-Rapporteur figurant dans le rapport de la réunion de consultations, à établir, dans le cadre de ses travaux, des consultations et une coopération avec les gouvernements, les organisations intergouvernementales et les organisations non gouvernementales intéressés, ainsi qu'avec les deux experts, M. Theo van Boven et M. M. Cherif Bassiouni.

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Introduction

1. En application de la résolution 2002/44 de la Commission des droits de l'homme, le Haut-Commissariat aux droits de l'homme (HCDH) a organisé du 30 septembre au 1er octobre 2002, au moyen des ressources disponibles, une réunion de consultation internationale en vue de mettre au point la version définitive du projet de principes fondamentaux de directives concernant le droit à un recours et à réparation des victimes de violations du droit international relatif aux droits de l'homme et du droit international humanitaire (ci-après dénommé «projet de directives»). La réunion s'est tenue sous la présidence de M. Alejandro Salinas et a bénéficié de l'assistance des deux experts qui avaient été chargés de rédiger le projet, M. Theo van Boven et M. M. Cherif Bassiouni. Y ont participé des représentants d'un grand nombre d'États Membres, d'organisations gouvernementales et d'organisations internationales. (Pour la liste des participants, se reporter à l'annexe III.)

2. La réunion de consultation était saisie du rapport final du Rapporteur spécial, M. M. Cherif Bassiouni, sur «Le droit à restitution, indemnisation et réadaptation des victimes de violations flagrantes des droits de l'homme et des libertés fondamentales» (E/CN.4/2000/62), accompagné de son annexe intitulée «Principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations du droit international relatif aux droits de l'homme et du droit international humanitaire».

3. La réunion a été ouverte par un représentant du Haut-Commissaire aux droits de l'homme. À l'issue de l'élection du Président-Rapporteur, elle a adopté son ordre du jour (voir annexe II).

4. Le Président a ensuite encouragé les participants à formuler des observations générales sur le projet de directives. Après que les deux experts eurent présenté le projet, il a invité les participants à passer en revue les différents groupes de principes. Les participants ont procédé à cet examen principe par principe, en dégageant les points de convergence et les problèmes restant à résoudre. Puis le Président et les participants ont abordé la question de la suite à donner à la réunion. Les participants sont convenus d'incorporer dans le rapport à la Commission des droits de l'homme sur le résultat final de la réunion de consultation, les conclusions et recommandations du Président sur la suite à lui donner, de même qu'un résumé des travaux (joint en tant qu'annexe I au présent document compte tenu du caractère impératif de la limitation du nombre de pages des documents de la Commission).

I. CONCLUSIONS DU PRÉSIDENT-RAPPORTEUR

5. Se fondant sur les débats qui ont eu lieu au cours de la réunion, le Président a formulé les conclusions suivantes, qui ne sont censées être ni exhaustives ni limitatives, mais dont l'objet est uniquement d'offrir un résumé des principales questions abordées.

A. Observations générales

6. Les auteurs ont naturellement rédigé le projet de principes fondamentaux et de directives concernant le droit à un recours et à réparation des victimes de violations du droit international relatif aux droits de l'homme et du droit international humanitaire en se plaçant du point de vue de la victime et ont ainsi ordonné les principes tirés de toutes les sources juridiques en fonction non pas des instruments et des sources mais des besoins et des droits des victimes.

Il conviendrait de retenir cette démarche, qu'illustrent au demeurant l'économie et la teneur du projet.

7. Judicieusement, le projet de directives ne pose aucune obligation juridique nouvelle: il ne fait que regrouper les règles existantes telles qu'elles se sont formées.

8. Opportunément, dans le projet de directives, le présent de l'indicatif («shall») est utilisé lorsqu'il est question d'une norme internationale contraignante qui est en vigueur, et le mot «devrait» («should») lorsqu'il s'agit d'une norme internationale moins contraignante.

9. Les auteurs du projet de directives se sont attachés à juste titre à respecter l'impératif qui veut que les principes et directives énoncés ne doivent pas se situer en deçà des règles internationales en vigueur.

10. Le projet de directives s'inspire du droit international et de la pratique internationale tels qu'ils se sont développés et va même au-delà. Par exemple, la Sous-Commission avait à l'origine l'intention de se polariser sur les «violations flagrantes», mais il se trouve que cette notion, comme toutes les autres notions relevant du droit relatif aux droits de l'homme, a d'ailleurs connu des transformations, et cela aussi est le cas de la notion de «crimes contre l'humanité». En conséquence, le projet de directives tel qu'il se présente aujourd'hui s'inscrit dans une démarche plus vaste: il couvre l'ensemble des règles relatives aux droits de l'homme et au droit humanitaire énoncées dans les traités, le droit coutumier et les législations nationales. Il y est reconnu que les victimes, prises individuellement, peuvent considérer que leur vie et la dignité de leur personne sont des éléments des plus essentiels, mais il y est reconnu également que l'ensemble des droits sont liés entre eux et interdépendants et qu'ils ne se prêtent pas à une hiérarchisation. On pourrait cependant envisager de se référer explicitement dans le texte, y compris dans le titre, aux «violations flagrantes», selon que de besoin.

11. Il a été dûment tenu compte dans le projet de directives des évolutions récentes. Par exemple, à propos de la question de la responsabilité des acteurs autres que l'État, le droit relatif aux droits de l'homme est encore en gestation, mais comme le projet de directives n'a pas vocation à être un traité, il convient d'y évoquer aussi les concepts qui sont en train d'apparaître en la matière.

B. Principe 1

12. Parce qu'elle renvoie à la fois au droit relatif aux droits de l'homme et au droit international humanitaire, c'est-à-dire deux branches du droit distinctes, la démarche centrée sur la victime adoptée en l'occurrence présente des problèmes particuliers. Il conviendrait de maintenir nettement la distinction entre violation des droits de l'homme et violation du droit international humanitaire, en ce qui concerne en particulier les acteurs non étatiques appelés en vertu du droit international humanitaire à répondre de leurs agissements; mention expresse de ces acteurs devrait être faite.

C. Principe 2

13. L'obligation d'«incorporer» dans le droit interne les normes du droit international gagnerait à être clarifiée de manière à préciser que celles-ci ne sont pas toutes censées être

transposées automatiquement sans qu'il soit tenu compte des modalités propres à chaque système juridique national. De même, les obligations pertinentes ne sont pas toutes susceptibles d'incorporation, certaines d'entre elles devant seulement être «exécutées» dans le cadre du droit interne. Il reste que le droit international humanitaire pose l'obligation à la fois d'incorporation et d'exécution. Quant au droit relatif aux droits de l'homme, il admet diverses démarches parce qu'il a évolué davantage. La Convention contre la torture, par exemple, impose les deux obligations. Le projet de directives laisse aux États dans ce domaine une certaine marge de manœuvre.

D. Principe 3

14. Le texte pourrait être remanié afin d'établir une distinction plus nette entre les États et les acteurs non étatiques et entre le droit international humanitaire et le droit relatif aux droits de l'homme.

15. Comme il se peut que des mesures législatives et administratives ne suffisent pas pour prévenir les violations, il conviendrait d'inclure à l'alinéa *a* du principe 3 l'adoption de mesures d'ordre politique et culturel.

16. Il conviendrait de préciser les limites territoriales de l'application des obligations énoncées dans ce principe, par exemple en ce qui concerne la responsabilité des acteurs autres que les ressortissants nationaux et/ou la responsabilité pour des actes commis hors du territoire national.

17. Il importe de mieux définir la portée des obligations énoncées à l'alinéa *c* du principe 3, en particulier vis-à-vis des acteurs autres que les États.

18. Alors que la notion de responsabilité des acteurs non étatiques évolue, il faudrait être attentif au libellé du texte, lequel, dans son état actuel, pourrait implicitement admettre la reconnaissance de la responsabilité d'acteurs autres que les États pour violations du droit relatif aux droits de l'homme. Tous les participants ont admis que les acteurs non étatiques peuvent être tenus pour responsables de violations en vertu du droit international humanitaire et du droit pénal international, mais certaines délégations ont maintenu que seuls les États (et leurs agents) peuvent violer le droit relatif aux droits de l'homme en tant que tel.

19. Parallèlement, il a été reconnu que, en particulier dans les conflits et les situations actuels, et le droit international humanitaire et le droit relatif aux droits de l'homme font l'objet de violations qui empêchent toute distinction nette entre eux. Le texte du principe, tel que libellé, tient dûment compte de ces deux sources, de même que la distinction entre elles et de l'applicabilité de l'une et de l'autre.

20. Il a été jugé important de préciser que les enquêtes doivent être «efficaces», par opposition à insincères ou déficientes.

21. L'idée de permettre d'obtenir plus facilement réparation renvoie à bon escient aux cas dans lesquels un État représentera ses ressortissants dans le cadre de réclamations présentées hors de ses frontières, par exemple devant une instance internationale ou dans un autre État.

E. Principes 4 et 5

22. Le principe 4 énonce l'obligation, importante, de lutter contre l'impunité, qui est un des objectifs fondamentaux du projet de directives.

23. On a reconnu qu'il existait, en droit, de longue date, l'obligation de juger les auteurs des crimes internationaux, que ce principe avait été confirmé par la Cour internationale de Justice (à propos du génocide) et qu'il en allait de même pour la torture, les exécutions extrajudiciaires, sommaires ou arbitraires et certaines autres violations, comme l'atteste une abondante jurisprudence internationale dans ce domaine. Néanmoins, le libellé du principe devra être remanié en remplaçant l'expression «l'obligation de poursuivre» par les termes ou expressions employés dans la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants de manière à reprendre avec plus de précision les obligations internationales qui existent en matière de poursuites.

24. Reconnaître plus explicitement les attributions, les pouvoirs et les obligations prévus dans les systèmes juridiques nationaux et aussi le rôle des instances judiciaires internationales en tant qu'elles complètent les systèmes nationaux et leur compétence ne pourrait qu'améliorer le texte.

25. Le principe 5 gagnerait à être remanié de manière à bien rendre les impératifs du droit international s'agissant de l'extradition et autres mécanismes d'entraide judiciaire. En particulier, il conviendrait de nuancer le texte pour le rendre compatible avec l'obligation de ne pas extrader des personnes qui risqueraient d'être soumises à des actes de torture ou à d'autres violations dans l'État vers lequel elles sont extradées.

26. Mention est faite à juste titre du principe de la compétence universelle, qu'il conviendrait toutefois de préciser.

F. Principes 6 et 7

27. On a reconnu que le texte de ces principes reflétait d'une part les normes internationales en vigueur concernant l'imprescriptibilité de l'autre et les modalités pratiques de leur application, mais il a été jugé souhaitable de préciser la force et la portée dans le droit international en vigueur des dispositions proposées.

28. Il a été admis à cet égard que, bien que la Convention sur l'imprescriptibilité des crimes de guerre et des crimes contre l'humanité ait été ratifiée par un nombre restreint d'États, le principe de la prescription était de plus en plus reconnu en droit international, à la faveur d'autres instruments juridiques renfermant des dispositions analogues (dont le Statut de Rome de la Cour internationale de Justice et la Convention contre la torture).

29. On a considéré qu'il serait utile de clarifier, au principe 7, l'expression «ne devrait pas restreindre indûment l'aptitude d'une victime à intenter une action…».

G. Principes 8 et 9

30. On a reconnu que la définition de la victime donnée dans cette section s'inspirait de celle figurant dans la Déclaration des principes fondamentaux de justice relatifs aux victimes de la criminalité et aux victimes d'abus de pouvoir.

31. Il a été noté à cet égard que, sans préjudice de la question de savoir qui doit répondre de l'acte ou quand une action devrait être intentée, point n'était besoin d'établir la responsabilité directe de l'État pour reconnaître à une personne la qualité de victime, dont la définition est l'unique objet de cette section du projet de directives.

32. La notion de collectivité des victimes était reconnue dans des instruments internationaux, dont la Déclaration des principes fondamentaux de justice relatifs aux victimes de la criminalité et aux victimes d'abus de pouvoir et les décisions de la Cour interaméricaine des droits de l'homme. Il était cependant nécessaire de clarifier et de préciser les effets de l'inclusion dans le texte à l'étude de cette notion, son applicabilité à des violations comme les actes racistes et l'apartheid systématiques, son applicabilité dans le cas d'actions intentées par des groupes raciaux, ethniques, religieux ou linguistiques et son opportunité dans la prise en compte de certains critères culturels spécifiques dans les systèmes de réparation individuelle et collective.

33. Il faudrait en particulier préciser si l'élément «collectivité» vise l'ensemble des requêtes émanant de groupes de victimes prises individuellement, ou les requêtes collectives émanant de groupes ou de populations caractérisés par leur origine nationale, ethnique, raciale ou sociale. On a fait observer qu'un certain nombre de délégations s'opposaient à cette dernière interprétation, tandis que d'autres la jugeaient appropriée.

34. On a noté que le mot «victime» ne s'appliquait qu'à une personne ou des personnes ayant effectivement subi un préjudice, sans faire naturellement abstraction des droits et du rôle des familles des victimes, des «personnes morales» comme les organisations qui avaient introduit la requête ou des représentants des victimes. Les personnes intervenant qui seraient lésées seraient considérées comme étant des victimes. De fait, il existe d'importantes raisons de principe pour accorder protection et réparation aux personnes qui sont lésées alors qu'elles interviennent au nom des victimes.

35. Pour contourner les difficultés inhérentes à l'autodéfinition donnée de la qualité de victime, il conviendrait de préciser dans le projet de directives quelles seraient les autorités habilitées à déterminer ou affirmer si les conditions énoncées dans la définition figurant aux principes 8 et 9 ont été remplies.

36. On a estimé que les notions de préjudice mental et de souffrance morale étaient deux éléments importants, et que leur inclusion était compatible avec les normes et la philosophie internationales en la matière, dont celles de la Convention contre la torture. Mais peut-être conviendrait-il de mieux préciser ces notions dans le texte.

H. Principe 10

37. On a relevé l'importance du principe, qui prenait en compte le fait que, dans certains systèmes juridiques, les victimes étaient souvent traitées avec moins de dignité et de compassion que les auteurs des actes incriminés.

38. On a considéré que la mention des organisations intergouvernementales et non gouvernementales et des institutions privées tenait dûment compte du fait que, actuellement, la fourniture de services aux victimes ou, dans certains cas, l'exercice, s'agissant des droits des victimes, certaines fonctions relevant de la justice pénale étaient souvent délégués à ces entités.

I. Principe 11

39. À juste titre, le projet de directives n'est pas limité aux recours purement judiciaires mais englobe aussi des mesures législatives, administratives et autres.

40. L'avis a été émis qu'il serait peut-être nécessaire de préciser les implications et les modalités du droit d'accès collectif aux instances judiciaires, en indiquant s'il était largement admis dans les systèmes juridiques.

41. On a reconnu que l'accès aux informations factuelles prévu à l'alinéa *c* visait des informations touchant spécifiquement la violation considérée essentielles pour que les victimes puissent disposer des informations recueillies à l'occasion de l'enquête officielle et dont elles pourraient avoir besoin pour présenter ou étayer une demande, et qu'il fallait préciser le texte dans ce sens.

J. Principe 12

42. De même, on a fait observer qu'il était nécessaire de déterminer les implications de l'absence de tout critère territorial s'agissant de l'accès aux instances judiciaires.

43. On a souligné que l'alinéa *b* était important face au phénomène mondial d'actes d'intimidation et d'agression contre des personnes présentant des plaintes pour violation des droits de l'homme.

K. Principes 13 et 14

44. On a estimé que cette section était importante en ce qu'elle visait à assurer l'accès des victimes à différents dispositifs dont mais non exclusivement l'action en justice et l'indemnité. Elle énonce tout un éventail de mesures fondamentales relatives à l'accès aux instances judiciaires. Elle gagnerait à reprendre la teneur de l'article 68 du Statut de Rome, concernant l'exposé des vues des victimes au cours de la procédure.

45. On a relevé que la mention faite des demandes collectives de réparation correspondait à la pratique internationale actuelle. Il y avait par exemple les mécanismes de l'OIT (en ce qui concerne la liberté d'association et les peuples autochtones), de la Cour interaméricaine des droits de l'homme (audition des organisations confessionnelles et autres) et du Comité pour l'élimination de la discrimination à l'égard des femmes en vertu du Protocole facultatif à la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes. En outre, certaines formes de recours sont, par leur nature même, collectives: il s'agit par exemple de certains aspects des procédures suivies par les commissions vérité et réconciliation. Il serait néanmoins utile de clarifier et préciser cette mention de demande collective de réparation et les types de demandes collectives visés.

46. S'il est vrai que chaque mécanisme international a ses propres règles en ce qui concerne le principe de l'épuisement des recours internes, il n'en reste pas moins que le texte gagnerait à préciser cette notion. Et il devrait être tenu compte à cet égard du critère selon lequel ces recours doivent être effectivement disponibles et accessibles.

L. Principes 15 à 20

47. On a reconnu qu'en droit international, les formes et les modalités de la réparation pouvaient diverger mais que le droit à réparation s'appliquait à la fois aux violations des droits de l'homme et aux violations du droit international humanitaire, indépendamment de la qualité de l'auteur ou de la succession des gouvernements. Le projet de directives contribue à renforcer la position des victimes.

48. En ce qui concerne le principe 17, il a été reconnu que des acteurs autres que les États, par exemple des groupes armés, pouvaient assurément perpétrer des violations, mais on a jugé nécessaire d'énoncer dans le texte de façon plus explicite la responsabilité de ces acteurs, sans pour autant amoindrir celle des États, et ce afin de dûment refléter les différences qui existaient entre le droit relatif aux droits de l'homme et le droit international humanitaire dans leur application à des acteurs non étatiques. On a reconnu qu'un acte commis par un acteur autre qu'un État combiné à une action ou une omission de l'État (par exemple le fait de ne pas intervenir ou de ne pas enquêter) établirait la responsabilité de l'État.

49. Le projet de directives a ceci de positif qu'il prévoit que la réparation par l'État est indépendante de toute obligation d'établir la responsabilité d'un agent de l'État.

50. Le libellé de cette section et celui d'autres sections du projet de directives devraient être harmonisés, car il est question indifféremment de droit international des droits de l'homme, de normes internationales, etc. Il serait bon d'utiliser en lieu et place une expression commune du genre «obligations».

M. Principes 21 à 25

51. On a fait observer que cette section mettait en lumière la nécessité de veiller à ce que les différentes versions linguistiques reflètent pleinement les diverses notions évoquées. Par exemple, on a fait observer que, la notion anglaise originale de «compensation» était mal rendue en espagnol. De même, la notion de «moral damage», absente dans la version anglaise originale, figure dans la version espagnole, dans laquelle aussi les mots «una reparación» peuvent à tort être interprétés comme visant une forme de réparation à l'exclusion des autres. Plus loin dans le projet de directives, il est question au principe 26 dans la version anglaise de la nécessité de «develop» (en français «mettre en place») des moyens d'information; or ce mot n'est pas rendu en espagnol par l'équivalent «desarrollar». Il importe donc de veiller à l'harmonisation des diverses versions linguistiques du projet.

52. On a noté que dans le projet de directives, la notion de «réparation» ne visait pas uniquement une forme de réparation économique et financière. À cet égard, le mot «restitution» qui apparaît au principe 21 du projet a été interprété comme englobant le rétablissement de certains droits, par exemple le rétablissement dans la citoyenneté ou les droits civils. En revanche, la notion d'«indemnisation» a une connotation essentiellement économique.

53. Il a été reconnu que le principe 21 avait pour objet d'énumérer les formes de réparation envisagées plutôt que de déterminer ceux qui devaient l'assurer, mais des différences d'interprétation potentielles ont été relevées: il prévoit que les «États» devraient assurer les

diverses formes de réparation, alors que le principe 17 prévoit, lui, que des acteurs non étatiques devraient assurer aussi réparation. Les principes 17 et 21 gagneraient donc à être harmonisés.

54. On a noté qu'au principe 23, les mots «résultant de» avaient été utilisés au lieu des mots «causé par des», afin de tenir compte de la manière dont les différents systèmes juridiques abordaient le problème de la causalité.

55. On a fait observer par ailleurs qu'il serait utile d'inclure au principe 23 la notion de «préjudice moral» telle que définie dans la jurisprudence européenne.

56. La notion de «perte d'une chance», telle qu'elle figure à l'alinéa *b* du principe 23, a été jugée importante. Elle devrait cependant être définie. La mention de l'éducation qui lui est associée a été interprétée comme n'étant pas limitative et avoir été incluse uniquement à titre d'exemple concret. On a reconnu que d'autres droits, outre le droit à l'éducation, seraient également visés. De plus, un renvoi à l'interdépendance et à l'indivisibilité de l'ensemble des droits de l'homme permettrait d'apporter à cet égard des éclaircissements utiles.

57. On a considéré que la nécessité pour les victimes, dont plusieurs appartiennent aux secteurs et aux groupes de la société les plus démunis, d'avoir accès à des services médicaux, psychologiques, juridiques et sociaux, comme le prévoit le principe 24, était un point essentiel. C'est pourquoi, il conviendrait peut-être de faire état dans le projet de directives de la nécessité de dispenser une formation appropriée en la matière aux personnels des services médicaux, juridiques et sociaux.

58. On a considéré que l'alinéa *b* du principe 25 constituait un élément important aux fins de la manifestation de la vérité, compte dûment tenu cependant de la protection des victimes et des témoins. Il devrait être peut-être développé de manière à établir un juste équilibre entre ces différentes considérations.

59. Selon l'alinéa *c* du principe 25 tel que libellé, les personnes disparues sont présumées décédées − ce qui n'est pas toujours le cas. Il conviendrait donc d'en remanier le texte de manière à l'appliquer aussi à la recherche des personnes disparues qui sont peut-être en vie.

60. On a émis l'avis qu'il conviendrait d'ajouter à la liste des mesures préventives à prendre donnée à l'alinéa *i* du principe 25 d'autres mesures, par exemple l'adoption de réformes d'ordre législatif et administratif et la diffusion des décisions, ainsi que la limitation de la compétence des tribunaux militaires et la reconnaissance de la compétence exclusive des tribunaux civils pour juger des civils. Cette section pourrait aussi faire l'objet d'un chapitre distinct.

61. Il a été entendu que l'énumération de certaines catégories des personnels à l'alinéa *i* iv) du principe 25 n'impliquait pas l'adoption de mesures de protection différentes: elle avait pour seul objectif de déterminer certains groupes nécessitant des mesures de prévention en raison des risques particuliers auxquels ils étaient exposés du fait de leur rôle dans leur soutien aux victimes.

62. L'inclusion d'une mention explicite de la formation au droit humanitaire, outre la formation aux droits de l'homme, permettrait de renforcer l'alinéa *i* v) du principe 25.

63. Il conviendrait de remanier à l'alinéa *i* vii) du principe 25 la référence à l'«intervention préventive», de manière à exclure toute caution présumée d'une intervention militaire préventive ou d'une intervention dite à des fins humanitaires, tous les États ne reconnaissant pas la licéité de ces notions.

N. Principe 26

64. On a dit qu'il s'agissait là d'une disposition générale sur la transparence et l'accès du public à l'information. À ce titre, ce principe a un lien, même s'il s'en distingue, avec le principe 11, qui traite plus spécifiquement de l'accès des victimes aux informations factuelles touchant l'affaire considérée dans le cadre des recours judiciaires qu'elles forment.

O. Principe 27

65. L'expression «sans discrimination», qui est tirée du droit humanitaire et d'autres instruments, tend à distinguer les discriminations illicites des distinctions licites destinées à privilégier les catégories les plus défavorisées.

66. On a noté que l'orientation sexuelle avait été à l'origine des persécutions et actes de torture infligés à certaines victimes, mais qu'elle ne constituait pas, dans la plupart des pays, un motif de discrimination licite en matière de soins de santé, protection policière et autres services publics. On a toutefois noté que tous les États n'étaient pas d'accord pour inclure au principe 27 l'expression «orientation sexuelle» parmi les différents motifs susceptibles d'être une source de discrimination.

67. Il serait bon d'ajouter avant les mots «ou l'incapacité» les mots «l'état de santé».

68. De même, les mots «l'ascendance» devraient être ajoutés à la liste des motifs sur lesquels aucune discrimination ne saurait être fondée, telle qu'elle figure au principe 27.

II. RECOMMANDATIONS DU PRÉSIDENT-RAPPORTEUR CONCERNANT LA SUITE À DONNER À LA RÉUNION DE CONSULTATION

69. Le Président-Rapporteur de la réunion de consultation sur le projet de principes fondamentaux et de directives concernant le droit à un recours et à réparation des victimes de violations du droit international relatif aux droits de l'homme et du droit international humanitaire recommandé à la Commission des droits de l'homme de:

a) Créer, à sa session suivante, un mécanisme approprié et efficace qui serait chargé de mettre au point la version définitive de l'ensemble de principes fondamentaux et de directives concernant le droit à un recours et à réparation des victimes de violations du droit international relatif aux droits de l'homme et du droit international humanitaire dont le texte est reproduit à l'annexe du document E/CN.4/2000/62;

b) Inviter le mécanisme, agissant sur la base des discussions qui ont eu lieu et des conclusions du Président-Rapporteur figurant dans le rapport de la réunion de consultation, à établir, dans le cadre de ses travaux, des consultations et une coopération avec les gouvernements, les organisations intergouvernementales et les organisations non gouvernementales intéressés, ainsi qu'avec les deux experts, M. Theo van Boven et M. M. Cherif Bassiouni.

Annex I

SUMMARY OF THE DISCUSSIONS DURING THE MEETING

CONTENTS

I. OPENING OF THE MEETING

1. The meeting was opened by Ms. Stefanie Grant on behalf of the High Commissioner for Human Rights. Ms. Grant welcomed the participants, noted the Commission mandate for the meeting (resolution 2002/44), and recalled the history of the Draft Guidelines. While discussions on the matter dated back to at least 1990, work on the Draft Guidelines had begun in 1989, pursuant to resolution 1989/13 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The resolution entrusted the expert, Mr. Theo van Boven, with the task of preparing a study on the restitution, compensation and rehabilitation of victims and of proposing draft guidelines for this purpose, in the light of relevant international standards. Mr. van Boven submitted his final study (E/CN.4/Sub.2/1993/8), in July 1993, in which he reviewed the question from the point of view of international law, and to which he annexed the first Draft Guidelines. At its 1994 session, the Commission on Human Rights expressed its appreciation to Mr. van Boven, called for priority attention to be paid to the subject, and requested the Sub-Commission to examine the Draft Guidelines with a view to making proposals thereon to the Commission.

2. The following year, the Commission urged the Sub-Commission to continue its work on the question and invited States to provide information to the Secretary-General on legislation relating to restitution, compensation and rehabilitation of victims (resolution 1995/34). The Sub-Commission did so and, pursuant to its own resolution 1996/28, transmitted a revised version of the Draft Guidelines to the Commission in 1996. The Commission, having received the revised draft at its 1997 session, invited the Secretary-General to solicit the views of States thereon, and to report back to the Commission (resolution 1997/29). Accordingly, the secretariat circulated the draft widely among States, NGOs and agencies in 1997 and 1998, and registered a number of observations. Thereafter, at its 1998 session, the Commission decided to appoint an independent expert to revise the Draft Guidelines in the light of the substantive comments received by the secretariat. Pursuant to Commission resolution 1998/43, Mr. M. Cherif Bassiouni was appointed to serve as independent expert for the purpose of revising the Draft Guidelines. Mr. Bassiouni then held a series of consultations in 1998 and 1999, sequentially revised the Draft Guidelines in the light of the comments received through that process, and submitted his final report to which the revised Draft Guidelines were annexed in 2000.

3. At the following meeting, the Commission requested the Secretary-General to circulate the report of the independent expert, including the revised Draft Guidelines, to all Member States, as well as to IGOs and NGOs for comment (resolution 2000/41). The Commission invited OHCHR to convene, with the cooperation of interested Governments, a consultative meeting for States, IGOs and NGOs, with a view to finalizing the Draft Guidelines. As few comments were received that year, the period for comment was extended for a further year, and the proposed consultative meeting was again mandated in 2002 (resolution 2002/44).

4. Thus, Ms. Grant stated that the purpose of the meeting was to hold consultations with a view to finalizing the Draft Guidelines. Ambassador Alejandro Salinas (Chile) was elected Chairperson-Rapporteur.

5. The Chairman reminded participants that the Draft Guidelines were rooted in the principles of international law, reflected national practice across the globe, and would serve as framework for ensuring reparation for victims of human rights violations. The Draft Guidelines had benefited from the expertise of two distinguished international experts (Mr. van Boven and Mr. Bassiouni) and had incorporated multiple rounds of comments by States and organizations over a long period of time.

II. GENERAL COMMENTS

6. Upon the adoption of the agenda, the Chairman invited participants to make general comments on the Draft Guidelines. The representative of Mexico expressed its general support for the Draft Guidelines, its agreement with the report of the independent expert, and its hope that the draft would make explicit reference to the inter-American system. The representative of Denmark, speaking on behalf of EU, thanked the Chair, OHCHR and the two experts, and noted the long history and complexity of the draft. The draft was worthy of careful consideration. While EU had no common position, all of its members were committed to contributing actively to the process.

7. A spokesperson for a broad coalition of NGOs urged a speedy adoption of the Draft Guidelines. Remedy and reparation were rights under international law, and a body of international jurisprudence had been developed on this issue. The Draft Guidelines, drawing on human rights and humanitarian law, would help to systematize the *corpus juris*, provide guidance at the national, regional and international levels, and promote the cause of prevention. They were thus necessary and would constitute a significant contribution to the field. The long and difficult drafting process should then move on to its logical conclusion of an early adoption of the Draft Guidelines.

8. Peru expressed its support for the Draft Guidelines, and hoped that they would be adopted soon. Peru believed in the concept of reparation for victims and applied it both nationally and through the inter-American system.

9. The representative of South Africa expressed his gratitude to the two experts and considered the Draft Guidelines, which reflected the spirit of the approach taken by the country, as an excellent document. South Africa agreed fully with the victim-oriented approach to the form and substance of the draft. As to violations of human rights law (hereinafter "HR") and international humanitarian law (hereinafter "IHL"), the draft conceded that there were a number of recognized gross violations, grave breaches, and international crimes. He asked the two experts also to comment on violations committed under racism and colonialism, which had so ravaged South Africa.

10. Mr. van Boven congratulated the Chair and thanked the previous speakers. He was pleased that the process was progressing after a period of "standstill". He thought that the preamble gave an effective overview of the principles. His involvement in the drafting process started in 1990 in the Sub-Commission. Since that date, the plight of victims had received increased international attention in law and policy, which was significant. The former approach

was to focus on actual violations, whereas the focus of the struggle against impunity was currently on perpetrators and victims alike. Notable was the work done by the International Law Commission on State responsibility, and the entry into force of the Rome Statute of the International Criminal Court. Mr. Bassiouni's contribution was important in that it reflected more clearly the humanitarian and criminal law perspectives and the principles of victims' rights. Mr. van Boven believed that the Draft Guidelines were important because the plight of victims was all too often overlooked, as he had noted in his report. Reparation to victims was an essential imperative of justice. In addition to their legal value, the Guidelines would have an important moral and awareness-raising value. Moreover, they were already being used as a tool to guide legal work at the national and international levels. If the Guidelines were endorsed, they would strengthen work in favour of victims at all those levels. Finally, they would enhance consistency and coherence by clarifying an important chapter of international law. Replying to a question from South Africa, Mr. van Boven expressed the belief that persistent and systematic racial discrimination was a gross violation and, in fact, a crime against humanity. He noted that the Truth and Reconciliation Commission in South Africa had itself limited compensation to certain types of cases, since most people in that country were victims of apartheid.

11. Mr. Bassiouni thanked the Chair and Mr. van Boven. He said that the Draft Guidelines were needed at the international level. They were based on general principles of law emanating from national legal practice around the world, and would consolidate the international *corpus juris* on the subject. All legal systems endeavoured to provide justice and rights for victims not only by dealing with perpetrators, but also by offering remedies, compensation, and protection. The Guidelines were nothing new, insofar as they simply reflected the principles and procedures of the various national systems relating to redress for victims. The questions involved are related to procedure, substance, and method. The international legal system approached the question of victims in the context of disputes between States representing the interests of their nationals. Consequently, the question was determined by the nature of State fault for harm caused to another. However, those concepts had evolved to reflect newly recognized values of international accountability for the commission of international crimes. The underlying principle was that, without justice, peace was unlikely. And justice had two sides - accountability of the perpetrator and redress for and protection of the rights of the victim.

12. The rights of victims were recognized in many international instruments, giving rise to a broad, increasingly harmonized regional and international *corpus juris*. The following logical step was to collect those principles and guidelines in a single instrument, in order to enhance clarity, coherence and enforceability. To those ends, the draft attempted to give structure to the relevant principles and guidelines. The obligation to respect and ensure respect for international human rights and humanitarian law, codified in paragraph 1, provided one challenge. The principles existed in conventions and custom, including in treaties ratified by all countries. The only remaining question was how to give effect to those principles. A violation of IHL required accountability of the perpetrator and a remedy for the victim. This applied to grave breaches of IHL and to gross violations of human rights law. Obvious examples included genocide, torture, slavery and extrajudicial executions. Those were both gross violations of human rights law and international crimes, and the subjects of the first part of the Draft Guidelines.

13. The second cluster of issues dealt with the particular rights of victims, which were based both on legal principles of accountability and on social principles of solidarity with victims. That extended the protection of victims' rights beyond cases where the perpetrator could be held accountable by calling on the Government concerned to support victims directly, even if it was not at fault. A serious approach to human rights must take account of the rights, needs and dignity of victims. Since 1945, there had been twice as many victims as there were in the two world wars, most of them women and children. The third cluster of principles set out forms of reparation to respond to that reality. The final sections addressed access to information and the principle of non-discrimination. It was time, he concluded, to move on to the next stage and to adopt the principles.

III. REVIEW OF SPECIFIC PRINCIPLES

14. The Chair thanked the two experts for their clear presentations. He invited delegations to review the various clusters of principles and proposed that the meeting proceed through the document principle by principle, and identify points of agreement and remaining challenges.

A. Principle 1

15. The representative of Sweden thanked the Chair, OHCHR and the two experts, and expressed support for the victim-oriented approach of the Draft Guidelines. The scope of the draft was broad, covering responsibility under both human rights and humanitarian law, for both public and private actors. The distinction between human rights violations and breaches of international humanitarian law needed to be kept in mind while examining the Draft Guidelines, especially with regard to the responsibility of non-State actors. Those two sets of international norms were in some circumstances overlapping as regards "gross" human rights violations.

16. The representative of Cuba attached great importance to the issue at hand, particularly with the rise of impunity currently evident in the world. The Draft Guidelines should thus become the subject of a multilateral negotiating process, which should continue until they gain greater weight. As for principle 1, Cuba saw no reason to distinguish between IHL and HR obligations. Principle 1 should, however, distinguish between treaty and customary international law obligations and principles.

17. The representative of Canada thanked OHCHR for convening the meeting, and congratulated the two experts on their work. With regard to principle 1, the point on incorporation in domestic law needed clarification to ensure that international law norms are not expected to be automatically incorporated in national law.

18. The representative of Guatemala congratulated the Chair and thanked the experts. The delegation believed that there was confusion as to violations by the State and those by non-State actors, and acts of State commission were confused with those of omission. These must be clearly distinguished. There was also a problem regarding incorporation in national law. In Guatemala, treaties automatically became part of national law. But with an instrument such as the Draft Guidelines (which are not a treaty), the law did not have the same effect. Thus, a different approach should be found to avoid that problem.

19. The representative of the United Kingdom thanked OHCHR and congratulated the Chair and the two experts. The United Kingdom believed that the combination of HR law and IHL, which were two distinct areas of expertise, created particular challenges. It expressed a desire to hear from the experts an explanation of how States could manage an instrument that mixed the two, with the analytical and practical problems that that posed.

20. Mr. Bassiouni, responding to questions on the various sources of law (customary international law, IHL, HR law), clarified that the goal of the Draft Guidelines was not to provide an extensive and comprehensive codification of law. The Draft Guidelines intentionally adopted a victim-oriented perspective, organizing principles from all legal sources not according to instruments and sources, but according to the needs and rights of victims.

21. Mr. van Boven, responding to questions on the scope of the Draft Guidelines, and their coverage of gross violations, noted that that was the original idea of the Sub-Commission. But his study revealed that there was no clear definition of "gross violations". While there were some clear examples of gross violations on which all would agree, the concept was fluid and evolving. The concept of crimes against humanity had evolved with considerable clarity. What was more, the whole set of rights was interrelated and interdependent, and no hierarchy could be established. Victims, however, might feel that their life and personal dignity were most fundamental. The Guidelines build on practice and law as it had evolved. He would favour the inclusion in the title of the document of the term "gross" before "violations", but that could be given more thought. The important thing was to retain the victim's perspective in the structure and content of the document.

B. Principle 2

22. The representative of Mexico sought clarification on principle 2, which might set vague obligations for the State. The Draft Guidelines seemed to require only access to court. Also, subparagraph (c) made reparation obligatory even for violations not covered by the scope of paragraph 1.

23. The representative of Japan noted that it had submitted written comments in 1999, 2000 and 2002. The basic question, from the point of view of Japan, was the lack of clarity as to whether the measures stipulated were existing obligations, or points that the international community should take steps to make obligatory. The interventions of the two experts suggested that they represented the former - articulation of existing obligations. Thus, it would be useful to determine the status of the Draft Guidelines explicitly. Japan would make proposals in that regard at the appropriate moment. Principle 2 should be clarified.

24. The representative of Canada thanked the Chair. The Canadian delegation appreciated Mr. van Boven's comments about the need to include in the title of the Draft Guidelines the world "gross" before "violations". The representative of Canada believed that there was no international obligation to "incorporate" in national law, only to implement.

25. The representative of Sweden expressed agreement with Canada on the point made in the preceding paragraph.

26. The representative of Spain congratulated the Chair and thanked the two experts. Spain supported the positions of Canada and Sweden, and sought clarification from the experts on modalities for the implementation of principle 2 (d).

27. Mr. van Boven pointed out that, according to a general principle of human rights law, where various mechanisms are available, that which is most favourable to the victim should apply. This was reflected in principle 2 (d).

28. Mr. Bassiouni, responding to the representative of Canada and others, noted that IHL imposed a dual obligation - to incorporate into domestic law and to implement. In HR law, a variety of approaches existed, since HR law had "evolved on a more piecemeal basis". CAT, for example, imposed both obligations. The principle in the Draft Guidelines provided reasonable scope to States. To answer Japan, he affirmed that the Guidelines introduced no new principles or obligations.

C. Principle 3

29. The representative of Norway viewed the document as an important one. He had some concerns about the need to distinguish between States and non-State actors, and between IHL and HR law. Those were the most important concerns of Norway on this subject.

30. The representative of Argentina congratulated the Chair. He viewed principle 3 (a) as inadequate in addressing the important element of prevention. Legal and administrative measures were not enough. The subparagraph should cover political and cultural measures of prevention as well. The Velásquez Rodriguez case in the Inter-American Court of Human Rights expressly recognized that.

31. The representative of Mexico agreed with Argentina that political and cultural measures were important for prevention. Most important was the restoration of the rights of the victim.

32. The representative of Canada still wished a clarification that the scope was only for "gross violations". It also sought clarification of the territorial limitations of the obligations. The scope of subparagraph (c) seemed very broad. Does it hold States accountable for the violations committed against other States?

33. The representative of the United Kingdom reiterated its concern about suggestions, implicit in the section, that non-State actors could violate HR law. The United Kingdom believed that only States could violate HR law, while others could violate IHL. That was the problem of lack of clarity that emerged when HR law and IHL were combined in a single document.

34. The representative of Japan, referring to subparagraph 3 (d), sought clarification on the term "appropriate remedies" and wondered whether they were limited to those listed in the document. With regard to subparagraph 3 (e), "provide" was clear enough, but Japan saw the term "or facilitate" as vague.

35. The representative of the European Court of Human Rights noted the European case law concept of "effective investigations", to avoid disingenuous or inadequate investigations. He also encouraged inclusion of guarantees for access by victims to investigative machinery.

36. The representative of ICJ reacted to points raised on the three first principles. He agreed with the points raised by the experts regarding the victim-oriented approach and structure. Typically in today's conflicts and situations, both HR and IHL violations occurred, in a manner which precluded a clear distinction between the two. The text, as drafted, was adequately clear.

37. Mr. Bassiouni, referring to the provision on access to justice, noted that the principle was further elaborated in principles 12, 13 and 14, which specified further the right of access to justice in all cases. Responding to Japan's question about "facilitating" reparations, he clarified that there were situations where a State would represent its nationals in claims outside its borders, i.e. in an international body or in another State.

38. Mr. van Boven reminded participants that HR law was subject to evolution. The reference to "effective investigation" was a case in point. That was a new and helpful development produced by the European cases. As for territorial effect, international law had expanded earlier understandings on that important concept. For example, there was broad acceptance that, when extraditing persons to a State in which they could be subjected to torture, the extraditing State commits a violation. The question of non-State responsibility was also evolving. Such new developments must be taken into account in the Draft Guidelines. It may be that HR law had not yet developed far enough on non-State responsibility, but, as the draft was not a treaty, it could reflect those emerging concepts as well.

D. Principles 4 and 5

39. The Chairman introduced principles 4 and 5, inviting comments from the floor. The representative of the United States of America congratulated the Chairman and expressed thanks to the two experts. The delegation of the United States questioned the phrase "the duty to prosecute", as, in its view, there was no duty to prosecute under customary international law. Instead, the international community only recognized a duty to seek or pursue prosecutions, since the authorities must themselves determine the probable ground for prosecution. The United States delegation would welcome the advice of the experts on the matter.

40. The representative of Sweden considered that the principles exceeded customary law requirements. Quite apart from the requirements stipulated in the Rome Statute of ICC, CAT and IHL, the Swedish delegation was of the opinion that there was no general international obligation to prosecute, only to suppress acts.

41. The representative of Japan agreed with the concerns expressed by the United States on principle 4. Maintaining that States had an obligation to prosecute was not adequately precise, outside of those explicit requirements of certain treaties, and in those cases, only with regard to the parties to those treaties. Beyond that, Japan was not convinced of the existence of other crimes under international law. Thus, the principle may be too broadly drafted.

42. The representative of Canada also agreed with the United States delegation on this matter. The "duty to prosecute" should be replaced by the requirement that the case be submitted to the competent authorities for prosecution, as in the Convention against Torture.

43. The representative of Egypt congratulated the Chair and thanked OHCHR and the two experts for their work. In general, the Egyptian delegation agreed with the ideas articulated in the Draft Guidelines. Principle 5, in the view of Egypt, should include ICC obligations.

44. The representative of Cuba believed that principles 4 and 5 showed a lack of balance between the resources and competence of national law on the one hand and international law and its institutions on the other. International law institutions could only complement national systems and their jurisdiction. Principle 5 did not adequately reflect the requirements of international law vis-à-vis extradition and other legal mechanisms.

45. The representative of Norway believed that some principles were too detailed for adequate harmonization with national law. Principle 5 should be balanced against concerns about torture, capital punishment and related issues.

46. The representative of Mexico understood that principle 5 referred only to the obligation to prosecute and punish certain international crimes, even if such acts were not criminalized under national law. What needed clarification was the universal jurisdiction reference to principle 5, and not the duty to prosecute.

47. The representative of Argentina believed that, while the text of principle 4 could be negotiated, it was an articulation of the obligation to combat impunity. Similarly, the concept of universal jurisdiction must be retained in principle 5.

48. The representative of the Russian Federation was concerned that principles 4 and 5, as drafted, did not reflect the state of current international law. The text went further than current obligations, and should thus be brought into line with current international law.

49. The representative of Germany congratulated the Chair and thanked OHCHR and the two experts. The German delegation was reluctant to recognize an obligation to extradite perpetrators if they were likely to be subjected to human rights violations. The paragraph in question would thus require redrafting.

50. The representative of ICRC congratulated the Chair and thanked the two experts for their work. ICRC had long been associated with the process. Whatever the wording of principle 4, it must not go below existing standards, including the duty to prosecute or extradite persons responsible for war crimes. As for incorporating IHL in the document, article 3 of the Hague Convention of 18 October 1907 (currently part of customary law) required States to compensate individuals who were victims of violations. Indeed, under international law, including IHL, all violations were subject to reparations. Finally, it would be useful if delegates clarified their reservations on the question of non-State actors.

51. The representative of the International Commission of Jurists (ICJ) endorsed the position of the delegations of Mexico, Argentina and ICRC, there is indeed a legal obligation to try perpetrators of international crimes. That was a long-standing principle, dating back to at least 1925, and was recently confirmed by ICJ with regard to genocide. The same was true of torture and extrajudicial executions. There was a good deal of jurisprudence on the question.

52. Mr. van Boven commented that the principle of the obligation and intent to maintain the existing floor of international law should be explicitly included in the Draft Guidelines. One of the basic purposes of the draft was to combat impunity. He agreed that the language used in the Convention against Torture might indeed be better than the current words "duty to prosecute". As for extradition, he agreed as well that extradition of perpetrators to places where they risked torture or other violations must be guarded against in the text, and the wording could be made clearer in that regard.

E. Principles 6 and 7

53. The Chair introduced principles 6 and 7, following which Sweden questioned the authority of those provisions, on the ground that the Convention on the Non-Applicability of Statutes of Limitations to War Crimes and Crimes against Humanity was ratified only by 44 States. Thus, aside from the crimes within ICC jurisdiction, the provisions went too far.

54. The representative of the Russian Federation was concerned that principles 6 and 7 contradicted existing international law and the national law of most countries regarding statutes of limitations (hereinafter "SOL"), and could cut against a "culture of justice", of which SOL was part. Russia agreed with the delegation of Sweden that those provisions did not reflect existing basic principles of international law.

55. The representative of Canada requested clarification on the question of non-retroactive penalties, and whether that would interfere with remedying past violations.

56. The representative of the United States of America associated himself with the comments and concerns of Sweden on those provisions.

57. The representative of Japan was concerned that, while it was true that some treaties did provide for non-applicability of statutes of limitations to certain crimes, those had very few ratifications, and the principles were not yet part of customary international law. It also raised the question of which crimes the provisions applied to. That would certainly have to be clarified.

58. The representative of Argentina believed that principle 7 would benefit from clarification by the experts. The phrase "Should not unduly restrict" raised unanswered questions of reasonable time periods.

59. The representative of Mexico believed that a proper wording could be found to accommodate proper uses of SOL.

60. The representative of Ecuador reminded the meeting that, according to Mr. van Boven, the principles should not only describe the present situation in legal terms, but should also look at the reparation measures. It would be useful to clarify the question of SOL and to identify more clearly which violations would be classified as crimes under international law.

61. The representative of Redress pointed out that there was an international obligation for States to provide remedies and that failure to do so would constitute a further violation.

62. Mr. Bassiouni stated that principle 6 described both existing norms on SOL and what was required to give effect to those norms. Crimes against international law, whether the treaty or customary law, were by definition subject to criminal sanction (grave breaches of the Geneva Conventions of 1949, the Convention on the Prevention and Punishment of the Crime of Genocide, customary law crimes against humanity, the Rome Statute of the ICC, the Convention against Torture, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Slavery Convention, the Convention on the Law of the Sea, etc.). Many of those instruments contain provisions on non-applicability of SOL. One could either identity specific crimes, or just say "those crimes that are subject to non-applicability of statutes of limitations under international law".

63. Mr. van Boven recalled that, when he carried out his study, many gross violations went unpunished owing to SOL and to amnesty laws. Today, even if the principle of non-applicability of SOL was not broadly accepted, it did have growing international recognition by virtue of other treaties containing such provisions (Rome Statute, Convention against Torture, etc.). Finally, he reminded the meeting that, where the idea was less mandatory, the non-mandatory word "should" was used.

F. Principles 8 and 9

64. The Chair introduced principles 8 and 9. Cuba considered that the definition of victim in the Draft Guidelines was too directed to an individual perspective, thereby excluding collective phenomena like apartheid and racism. Thus principle 8 should contain references to collective elements as well, including, among others, peoples, race, ethnicity and linguistic and social status.

65. The representative of Sweden preferred a definition such as that used in United Nations principles on victims and had serious reservations about any reparation schemes for collectivities. Reparation and compensation for human rights violations needed to be tailored to the damage and suffering inflicted on an individual, even where a group of individual victims were involved. Any assessment of suffering ought to be made on an individual basis.

66. The representative of France thanked OHCHR and congratulated the Chair and the two experts. In 2000 France submitted written comments, which had been reflected in the Draft Guidelines. France supported the victim's perspective approach. Regarding principle 8, France wished to see the inclusion therein of moral persons, such as institutions and organizations.

67. The representative of Japan believed that the definition should be simpler and clearer, as it would be used to evaluate and calculate damages, i.e. appropriate compensation. Mental suffering and impairment of legal rights were obscure terms which could not be used to calculate damages and reparations. Further, compensation should be limited to victims directly affected, not to families, etc. The Draft Guidelines should focus on "core victims" - that is, those directly harmed. As for the collective element, Japan preferred to see the application restricted to individual victims.

68. The representative of the United Kingdom called for accuracy in identifying obligations. The provisions on victims lacked an objective test to determine who is a victim. The current provision was self-defining and did not require findings or corroboration by any official body. That would make it difficult to identify a victim in a legal sense. Finally, the document should not undermine the current status, and should not second-guess existing law in an attempt to reflect evolving principles.

69. The representative of Germany noted that the first sentence of principle 8 gave a very broad definition of "victim". The term "emotional suffering" required further clarification. Immediate families of victims may also be considered victims, but it was not appropriate to go beyond that. Finally, the word "collectively" should be clarified by the authors.

70. The representative of Portugal congratulated the Chair and thanked the experts. Portugal supported the victim-oriented approach of the Draft Guidelines. Principle 8 captured very well the concerns of treaties, custom and national law. However, the word "collectively" was unclear and should be explained. The delegation of Portugal recognized groups of victims, but not a collective victim as such.

71. The representative of Spain viewed principle 8 as a core principle of the document, but agreed with the United Kingdom on the a need for a connection between the victim and State responsibility. That was not sufficiently clear in the Draft Guidelines.

72. The delegation of Canada associated itself with those delegations concerned about the overly broad scope of the term "victim" and about collectivities of victims.

73. The representative of Egypt viewed the collective aspect as crucial in regard to crimes under international law, such as foreign occupation. He also was concerned about the vague notion of emotional suffering.

74. The representative of Ecuador, commenting on collectivities, raised the question of ethnic cleansing, which was by definition aimed at groups. Such violations must be covered by the Draft Guidelines, whatever the final wording.

75. The representative of the International Society for Traumatic Stress Studies observed that it was a scientifically established fact that victims suffer all their life and, if not helped, pass suffering on to succeeding generations. That fact had implications for SOL and other factors.

Also, being targeted as an individual was a different experience from being targeted as part of a group. There was much science behind the experience of victims, including emotional suffering, a well-documented scientific phenomenon. The definition of a victim in the text must not, therefore, be narrowed.

76. The representative of ICJ pointed out that the definition of a victim in the Draft Guidelines was almost identical to that in the United Nations victims declaration, including the reference to collective victims. Also, it would be a mistake to overemphasize the detail of national law provisions. Many State laws did not even criminalize torture. Clearly, there was no intention to exclude them here. As the representative of France said, NGOs and organizations representing victims must be empowered to act as parties on behalf of victims. Of course, that was different from having victim's rights, and was more akin to the subject of subsequent principles.

77. Mr. Bassiouni explained that the principles were only for the purpose of identifying who was a victim. The text came from the victims declaration. Mental suffering was included in the definition of torture. That was not new. A victim is a person. Not a people. Not moral or abstract entities. A person, period. But that person can be a part of a collectivity or a group. When you represent a victim or victims, you do not become one; you only represent one. Emotional and mental victimization was a reality, even if you were not touched: such as when people are forced to watch as their loved ones are being tortured or killed. If you, as a matter of policy, wish to encourage victim intervention, the one who intervenes and is harmed must be given some rights and protection. This did not exist in international law, but in national law ("good Samaritan" clauses). There was no link between who is a victim and the responsibility of a State, or the right to bring a legal claim in a State. A person can be a victim without these. The next question, of course, is against whom does the claim apply and where. But this does not change the fact that the person is a victim.

78. Mr. van Boven also defended the use of the term "collectively". He said that was necessary to cover other cultural understandings, as well as reparation schemes. International bodies have recognized this (including the Inter-American Court), and it should be retained here.

G. Principle 10

79. The Chair introduced principle 10.

80. The representative of Mexico would prefer the use of "shall" rather than just "should". Also, what is required for "compassion"? This is the first reference to compassion, and it is undefined.

81. The representative of Germany was concerned by the reference to intergovernmental organizations in principle 10. This seemed to put States and non-State actors on the same level, which the German delegation did not agree with.

82. The representative of Japan, in response to comments by the representative of Mexico, noted that the Guidelines were not intended to be legally binding. Thus, the word "should" is more appropriate than "shall".

83. Mr. Bassiouni explained that the word "shall" is used where there is an established international legal obligation. Otherwise, "should" has been used. He added that it was a sad truth that victims were often treated by legal systems with less respect and compassion than the perpetrators of the crime. Additionally, the inclusion of States, NGOs and private entities is because these are the institutions engaged in victim services, management, and the like. This is increasingly true with the privatization of criminal justice systems of States. Thus, the obligations must match the delegation of the functions.

H. Principles 11 and 12

84. The Chair introduced principles 11 and 12.

85. The representative of Argentina believed that reparation should not be limited to purely judicial measures, but should also include other measures, legislative bodies and truth commissions.

86. The representative of Sweden sought clarification with regard to principles 11 and 12, asking what the collective right of access to justice was. Also, a distinction needed to be made between cases where there is a connection between victim, claim, etc., in regard to standing and appropriateness vis-à-vis other forums.

87. The representative of Pakistan congratulated the Chairman. In principle 11, the word "include" is used before those specified. Did that include by implication other remedies, such as religious-system remedies? Also, what was meant by "factual information" as opposed to "necessary information"?

88. The representative of the Russian Federation did not recognize collective claims to reparations, as many systems indeed did not. How broadly had such claims been recognized in legal systems? Additional clarification would be useful. Also, did that section reflect the work of ILC on diplomatic protection?

89. The representative of Germany believed that the right of victims to present their views during the proceedings seemed to be missing. Was there some reason for that? Would not article 69 of the Rome Statute of ICC be helpful in that regard?

90. The United Kingdom saw no territorial limitation on clarity of the appropriate national forum for claims to be brought. Recent history suggested that that should be clarified.

91. The representative of the European Court requested clarification of subparagraph 11 (c). Was that intended to relate to document discovery or to compelling witness testimony and, if so, should it not be made explicit?

92. The representative of Redress sought clarification of the comments of the United Kingdom delegation. The right of access to justice for victims of torture was not questioned in those cases, only certain procedural issues relating to standing and forum.

93. The representative of the International Service for Human Rights, commenting on principle 12 (b), noted the frequent and well-documented attacks on human rights defenders across the world, and the relevance of the subparagraph to that situation. Victims and their relatives needed expert assistance, and that must be reflected in the text.

I. Principles 13 and 14

94. The Chair introduced principles 13 and 14.

95. The representative of the Russian Federation noted the general requirement that domestic mechanisms be first exhausted before appealing to international mechanisms. That should be reflected in the text.

96. The representative of Japan, commenting on principle 13, expressed concern that, if groups of victims had a right to make claims without the consent of all the victims they claim to represent, the provision might in fact run contrary to the rights of victims.

97. The representative of Germany, also commenting on the notion of collective claims in principle 13, asked the experts to comment on models and modalities for such claims (e.g. United States class-action suits).

98. The representative of Mexico noted the experiences of the inter-American system, in which claims had been made by collectivities, such as churches, hospitals, etc. That had also been the case with ILO, where indigenous peoples have brought collective claims.

99. The representative of Finland noted that the ending of principle 13 "to receive reparation collectively" needed clarification. He pointed out as well, that the Convention on the Elimination of All Forms of Discrimination against Women's optional protocol allowed collective complaints.

100. The representative of Canada, agreed that domestic remedies must first be exhausted.

101. The representative of Pakistan also sought clarification of the question of exhausting domestic remedies. Also, he agreed that ILO had no problem receiving human-rights collective claims (relating to freedom of association). What, he wondered, was the basis in international law for collective claims?

102. The representative of ICJ noted that all international mechanisms had their rules regarding when domestic remedies must or must not be exhausted. Thus, that posed no problem for the Draft Guidelines.

103. Mr. van Boven recognized the general principle that national remedies should be exhausted where such effective remedies actually existed. He also noted that courts were not the only mechanisms that provided reparations. Also, some forms of reparations were by their

nature collective, such as those determined by truth commissions. Monetary reparations were not the only form addressed by the Draft Guidelines. He also agreed that reference should be added (article 68 of ICC) on the right of victims to present their views during proceedings. It was not the function of the principles to establish jurisdiction.

104. Mr. Bassiouni explained that access to factual information related to information arising out of government investigations into the case, and which was needed for a victim to bring a claim. That said, the language could be adjusted to adequately reflect the concerns in principle 26. As for the word "collective", it might be useful to clarify it. The collectivity in the Draft Guidelines may be of the kind that has legal standing, but not as a beneficiary, i.e. as a representative. In other cases, some collectivities, as pointed out by Mr. van Boven, did have collective claims. Those could be clarified and further defined in the draft. As for the right of access to justice, the draft merely sets forth a range of measures relating to access to justice.

J. Principles 15 to 20

105. With reference to principle 17, Guatemala enquired about the implications of combining human rights and humanitarian law sources in a single document. Certainly, the right to reparation applied to both cases. Nevertheless, where attention to non-State actors is involved, care must be taken to ensure that the responsibility of the State is not diminished. A reformulation of this section might, therefore, be in order.

106. The representative of Argentina, commenting on principles 17 and 18, noted its understanding that the non-State entities referred to therein would include those recognized in principle 3 common to the Geneva Conventions of 1949 and in Protocol II of 1977.

107. Commenting on principle 16, Mexico believed that it is important to include reparation by the State independently of any determination of the responsibility of one of its agents. It is important as well to ensure that related processes in this regard are compatible with principle 10, particularly in avoiding the repetition of trauma.

108. The representative of Canada saw a potential inconsistency in the wording of some principles in the Draft Guidelines. Principle 15, for example, uses the term "international human rights or humanitarian law", while principle 16 refers to "international human rights and humanitarian law norms". Perhaps a common term, such as "obligations", could be substituted throughout the text for various references to norms, law, etc.

109. The representative of Georgia supported Guatemala's suggestion of reformulating principle 17. Perhaps, it was suggested, this principle could be merged with principle 18 and reformulated.

110. The representative of Norway emphasized the importance of preserving primary State responsibility in the Draft Guidelines, so as to avoid the risk of States deferring responsibility to other actors. In Norway, a violation exists where the State has not ensured the right of an individual. Norway also queried the implications of the requirement in principle 19 that the State endeavour to enforce foreign judgements.

111. The representative of the Association for the Prevention of Torture, responding to a question from Mexico, explained the importance of requiring that States provide reparation even if a perpetrator is not found. This, it was suggested, is particularly important in the case of reparations for past violations to be provided by legal Governments replacing repressive regimes.

112. Referring to principle 19, the representative of the United Kingdom asked, given that the Draft Guidelines make no distinction between violations of human rights law and humanitarian law, to what extent States should give reparations for acts of non-State actors.

113. Mr. Bassiouni explained that the requirement in paragraph 19 of enforcing judgements is entirely a reiteration of existing legal obligations. Furthermore, the Draft Guidelines requires that "valid" foreign judgements be enforced, and that the validity of foreign judgement be determined by national law.

114. Responding to a number of interventions regarding who is responsible for violations (States or non-State actors), he explained that the Draft Guidelines do not emphasize this question, but rather emphasize the situation of the victim, and thus seek to ensure that victims receive remedy and reparation, regardless of who is the principal violator. On another question, he noted that States do sometimes provide remedies for violations occurring outside their territory, as, for example, in the case of the Alien Tort Claims Act in the United States of America. Similarly, in Switzerland, the law provides for judicial assistance in enforcing foreign judgements, through, for example, the freezing of assets.

115. The representative of Guatemala reiterated the importance of the issue of State responsibility, observing that the Draft Guidelines should be carefully prepared so as not to diminish existing obligations and standards. In the view of the delegation of Guatemala, the State is always responsible for violations, even if the actual perpetrator cannot be identified.

116. Mr. Bassiouni added that it is important to distinguish the question of the sources of responsibility from that of the rights of victims. The Draft Guidelines deal with the rights of victims. The sources of violations will vary. He suggested that this might be clarified in the introduction to the Principles. Nevertheless, it should be clear that the task of the draft is not to establish principles of State responsibility, but to provide guidance on whether there are obligations to provide reparations as a consequence of violations. The task was to identify and incorporate all sources. As for Canada's questions regarding the use in parts of the draft of the term "norms" instead of "obligations", Mr. Bassiouni noted that "obligations" sometimes refer to general obligations that may not give rise to rights. Nevertheless, he agreed that there is some room for the harmonization of these terms.

117. The representative of the United States of America expressed concern that principle 18 might be understood as implying that a State that has not violated a human right would nevertheless be obligated to pay reparations. This obligation does not exist. A more suitable word might be assistance, rather than "reparation" in this case. With regard to principle 17, it was noted that a human rights violation can only be committed by a State or an agent under its order or service, and not by an individual acting on his own behalf.

118. The representative of ICRC, commenting on the question raised by the United Kingdom regarding whether international humanitarian law applies to reparations, noted that article 3 of the Hague Regulations applies to the compensation of individuals. More generally, the representative of ICRC noted that, under general international law, any breach gives right to a claim for reparation.

119. The representative of Cuba believed that the starting point for this discussion is that States have an obligation to provide reparation. Violations can be perpetrated by States, their agents, or others with the tolerance or acquiescence of the State. Principles 17 and 18 are important. States are responsible even when individuals or other entities are the actual perpetrators. The responsibility of the State cannot disappear and includes cases where violations are committed outside its territory.

120. The representative of the International Society for Traumatic Stress Studies referred to the long-lasting effects of victimization as further evidence of the need for reparations, remedies and assistance to be granted to victims. Where States do not meet these obligations, victims suffer lifelong consequences, and may even pass consequences on to their children. The negative consequences can be felt for generations.

121. The representative of Redress, referring to principle 17 and the comments of the delegation of the United States thereon, noted that there are cases where individuals have been held responsible for human rights violations, irrespective of the responsibility of the State arising from the same violation. Such has been the case under the Alien Tort Claims Act in the United States.

122. The representative of Japan, referring to the text of principle 16, under which reparations should be related to international obligations, asked about the scope of such reparations.

123. Mr. Van Boven recalled that the aim of the Draft Guidelines is to strengthen the position of victims, who have been traditionally disadvantaged. He believed that the draft struck the right balance between the responsibility of States and the rights of victims. In the end, he recalled, States are always responsible for the well-being of their citizens.

124. Mr. Bassiouni added that the word “reparation” was used throughout the text with flexibility. The specific forms of reparation are spelled out later in the document. The paragraphs in section IX deal with the rights of victims to receive reparation, and not with the ways to secure it. Finally, this section creates no new State obligations and reflects only existing law.

125. The representative of Sweden considered that the word “Government” in principle 20 should be replaced by “State” alone since it is the State that is responsible for human rights violations, regardless of whether the Government changes.

126. The representative of ICJ observed that the State always has some degree of responsibility. One should distinguish between the fact that generates the violation and the act that is typified as a violation. An act committed by an individual may be the actual violation, but the State would clearly be responsible if it does not take appropriate action, investigate, etc.

K. Principles 21 to 25

127. The representative of Guatemala appealed for a careful harmonization of the various language versions of the Draft Guidelines. The Spanish version of principle 23, for example, uses the equivalent of indemnity in place of compensation.

128. The representative of Mexico added that the concept of "moral damage", while absent in the English version, appears in the Spanish text in principle 23. The Mexican delegation also believed that principle 25 should be drafted in a way that does not suggest an exhaustive list of means for satisfaction and guarantees of non-repetition. The principle should talk of these as minimum standards, leaving the door open for other forms.

129. The representative of the Russian Federation sought the advice of the experts on clarifying how the reference to education in principle 23 (b) relates to the concept of "lost opportunities". The delegation also wondered about "questionable ideological concepts" underlying the preventive measures in subparagraphs i to iv of principle 25 (i), which emphasize civilian control and restricting military tribunals, while crimes against military officers are often ignored. Similarly, the concept of providing special protection for categories such as the media and human rights defenders would seem to contradict the principle of equality under the law, reverting to earlier times when there were different regimes of protection for different categories of persons.

130. The representative of Cuba believed that, given the interdependence and indivisibility of all rights, the concept of "lost opportunities" in principle 23 (b) should not only include education, but also food, employment and health. Explicit reference should be made to this interdependence and indivisibility. The representative of Cuba shared some of the concerns of the Russian Federation delegation regarding principle 25. Cuba also believed that the reference in principle 25 (i) (i) and (vii) to "preventive intervention" should be reformulated in a manner that excludes presumed endorsement of preventive military intervention or the so-called humanitarian intervention as concepts not recognized as lawful by all States.

131. The representative of Ecuador, while recognizing that the Draft Guidelines do not establish that one form of reparation excludes others, nevertheless noted that this is not sufficiently clear in the Spanish version where, for example, reference is made to "*una reparación*". Ecuador also saw the reference in principle 24 to social and legal services as not clearly signifying elements of rehabilitation.

132. The representative of Japan suggested that the words "and possessing reasonable causal relationship to" should be inserted after the words "resulting from" in principle 23, because it believed compensation should be provided for those types of damage in which the relationship between the damage incurred and causes of the event are clearly and reasonably established. The representative of Japan pointed out that it is questionable whether all forms of reparation listed in principles 24 and 25, such as "rehabilitation" and "satisfaction and guarantees of non-repetition", are necessarily effective to recover from the damage and that the content of social service is not clear. The representative of Japan sought clarification on principle 25, asking, in particular, what kinds of specific, concrete measures are envisaged as "official declaration" and "public acknowledgement".

133. The representative of Germany believed that there are potential interpretive inconsistencies in the principle 21 reference to "States" providing the various forms of reparations, while principle 17 recognizes that others beside the State should provide reparation as well. The two principles would benefit from harmonization. The representative of Germany also believed that, while compensation for "lost opportunities", as contained in principle 23 (b), is an interesting concept, it presents difficulties in practice. The wording of principle 25 (d), extending applicability to "persons closely connected", would require clarification. Finally, principle 25 (i), setting out means of preventing the recurrence of violations, might be better separated from this section, as it relates more to a political goal.

134. The representative of Sweden believed that principle 25 (i) is of particular importance, and suggested that it should be supplemented to include additional measures, such as legislative and administrative measures and the dissemination of rulings.

135. The representative of ICRC, commenting on principle 25 (i) and (v), suggested the addition of a reference to international humanitarian law training.

136. The representative of Norway, commenting on principle 22, observed that restoration is sometimes very difficult in practice, and, even where possible, it is not always appropriate. By way of example, Norway referred to child custody cases, where it may not be determined to be in the best interests of the child to be transferred back to previous custodial arrangements.

137. The representative of Jamaica, while noting that return to one's place of residence is explicitly included as a form of restitution in principle 22, also believed that the grounds for compensation in principle 23 should include displacement.

138. The representative of the United States of America believed that the vagueness of the concept "lost opportunities" in principle 23 (b) might present problems of definition. The reference in principle 24 to legal services would need to be clarified. The United States delegation intervened in response to principle 25 (i) and (ii), which urge restricting the jurisdiction of military tribunals exclusively to military offences committed by members of the armed forces. The representative of the United States objected to the language and took exception to the premise that restricting the jurisdiction of properly constituted military tribunals would prevent recurrence of violations of law. He argued, on the contrary, that to the extent that unlawful combatants might be excluded from jurisdiction of such tribunals, there is a risk of the opposite occurring. He supported the observation of the representative of Germany regarding the need to harmonize principles 21 and 17. He also supported the comments of ICRC on the inclusion of humanitarian law training in principle 25 (i) and (v).

139. The representative of Mexico noted the relevance of the jurisprudence of the Inter-American Court of Human Rights to the question of lost opportunities, including the "life project" cases of that Court. Similarly, many regional bodies, including the Inter-American Court, have found that civilian tribunals should try civilians, and that the jurisdiction of military courts should be limited. Mexico believed that it was proper to recognize special protection for certain groups who run particular risks owing to their work, including human rights defenders. This would be consistent with existing resolutions and documents of the Commission on Human Rights and other bodies on the question.

140. Mr. Bassiouni clarified that the reference to forms of reparation in the Draft Guidelines is merely intended to be a list of the various forms, without defining them in detail. A link with State responsibility is not required here, and a State may provide reparation even if it is not responsible for the violation. Some forms have evolved more than others. As not all forms reflect existing obligations, the term "should" is used in the draft, rather than "shall". The draft could be amended to show more clearly that these are in the nature of recommendations. He explained that the notion of restitution in principles 21 and 22 is not limited to in-kind restitution, but extends also to restoration of rights, e.g. return of citizenship, passport and civil status. Compensation, on the other hand, is essentially economic. In principle 23, the term "resulting from" is used as opposed to "caused by" in order to accommodate variations from different legal systems relating to issues of causation.

141. Mr. Bassiouni, responding to questions asked, noted that the Draft Guidelines would indeed apply to reparation for displacement, adding that, if the displacement caused economic problems then compensation would apply, while other forms of reparation would apply to other problems caused. The forms listed in the draft are not intended to be exclusive. He recognized that the preventive measures in the draft could be viewed as policy goals, and could be contained in a separate section, although he viewed them as forms of satisfaction. He supported the representative of Sweden's suggestion to include legal and administrative measures. Responding to the comments of the representative of the Russian Federation, he recognized that military forces could be victims of violations, as suggested. He noted that the protection of certain special categories of persons in the draft is not intended to establish a new distinction of classes or casts, but is merely a recognition of the reality that some persons run more risks than others because of their profession and activities. The concept of "lost opportunities", he conceded, did present certain challenges, and could mean different things to different people. Nevertheless, there were many tangible cases and examples, including the question of education.

142. Mr. van Boven observed that, while it is often assumed that reparation is economic and financial, there are many other forms. The restoration of dignity, public acknowledgment and other such forms are increasingly used. Various formulas can be applied. Some of these concepts overlap and many of them can be used at the same time. Mr. van Boven believed that principle 21 could be improved by adding reference to others besides States. Regarding "lost opportunities", he recalled that the Inter-American Court of Human Rights had indeed elaborated on the concept of lost opportunities. He did not object to the suggestion that preventive measures be included in a separate chapter. Referring to principle 25 (i) and (ii), he noted that there is jurisprudence of the Inter-American Court of Justice on the need to restrict the jurisdiction of military courts. In conclusion, he noted that special categories of persons needing special protection had been defined by the Commission on Human Rights, which had itself created a number of mechanisms to protect human rights defenders and the judiciary.

143. The International Service for Human Rights, the International Commission of Jurists, and Redress jointly observed that the starting principle of principle 25 (b) is the right to full access to information and the truth as an element to avoid recurrence of violations. An appropriate amendment to the text could include: "the participation of the victims, their representatives and experts designated by them should be facilitated in order to contribute to ensuring transparency in the process and satisfaction to the victims, and to prevent measures from further unnecessarily injuring the victims, the witnesses and other persons, or endangering their security".

144. The representative of the International Rehabilitation Council for Torture Victims, responding to the comments of delegates on the principle 24 provisions regarding legal and social services, observed that victims often come from the least well resourced groups in society, and thus need assistance to avail themselves of the system. They suggested that principle 24 might be amended by adding to it the following text: "To this end, States should ensure the acquisition of appropriate knowledge and skills within the relevant legal, medical, psychological and social professions, and support the establishment of treatment facilities and services." They also believed that a reference to medical and health care professionals should be added to protected persons listed in principle 25 (i) and (iv).

145. With regard to the listing in principle 23 of economically assessable forms of damage, the representative of the European Court of Human Rights asked why the concept of "moral damage", as recognized in European jurisprudence, does not appear in the Draft Guidelines.

146. The representative of the International Federation of Human Rights Leagues, commenting on principle 25, noted that they saw subparagraphs (b) and (f) as two distinct and important phases in a process of reparation. Subparagraph (b) was vital to the full disclosure of the truth, and the final disclosure of the truth should not be limited. As for subparagraph (f) it should be clarified in order that the administrative or judicial sanctions may not be interpreted as an alternative for the State. There is a good deal of jurisprudence on the question of right to truth and the right to justice. Commenting on chapter X, the representative of the International Federation of Human Rights Leagues pointed out the importance of this generic definition of the right to reparation, already defined as such by an abundant jurisprudence.

147. The representative of the Association for the Prevention of Torture registered its support for the inclusion of the preventive measures listed in the text. It noted as well that principle 25 (h) also has elements of a preventive nature and expressed its support for Sweden's proposal to add legal and administrative measures to this section as well.

148. The representative of the International Commission of Jurists noted that principle 25 (c), as drafted, presumes disappeared persons to be dead, which is not always the case. The text would benefit from redrafting in order to also cover the search for disappeared persons who may be alive.

L. Principle 26

149. The representative of Mexico advised that principle 26 in the English text refers to the need "to develop" means of information, while the Spanish version does not use the equivalent "*desarrollar*". It will be important to ensure harmonization of the various language versions.

150. The representative of the International Centre for Criminal Law Reform sought guidance from the experts on the distinction between the principle 11 (c) provisions on access to factual information and principle 26 provisions on public access to information.

151. Mr. Bassiouni highlighted the distinction between the two provisions by explaining that principle 26 is a general provision dealing with transparency and general public access to information, while principle 11 relates specifically to victims' access to case-specific factual information in their pursuit of legal remedies.

M. Principle 27

152. Regarding principle 27, the representative of Pakistan, on behalf of the Organization of the Islamic Conference, proposed that the term "sexual orientation" be removed.

153. The representative of the United Kingdom enquired as to why the term "adverse distinction" is used in principle 27, instead of the term "discrimination".

154. The representative of Canada also questioned the use of the term "adverse distinction", and preferred the use of the term "non-discrimination". He suggested that the language of the International Covenant on Civil and Political Rights be used. Additionally, he believed that "wealth" as a ground for discrimination was problematic.

155. The representative of Japan sought clarification of the term "internationally recognized human rights law".

156. The representative of ICRC observed that "adverse distinction" is a term drawn from international humanitarian law and that it is equivalent to "discrimination" in human rights law. This term in humanitarian law is intended to distinguish impermissible discrimination from lawful distinctions intended to prioritize those most in need.

157. The representative of the Association for the Prevention of Torture proposed that the words "health status" be inserted in principle 27 before "disability".

158. The representative of Finland believed that the list in principle 27 should be as inclusive as possible. As such, the term "sexual orientation" should be retained in the draft. Additionally, the term "descent" should be added.

159. The representative of Sweden supported the proposals of the Finnish delegation on principle 27. Additionally, "disability" should be moved and placed before "other status".

160. The representative of Egypt supported the position of Pakistan regarding principle 27. He also sought clarification of the term "other status", mentioned in the same principle.

161. Mr. van Boven agreed that "descent" should be added to the discriminatory grounds in principle 27. On the question of sexual orientation, he noted that this has been the cause of subjecting some people to torture.

162. Mr. Bassiouni explained that principle 27 has at its basis an emphasis on adverse effects, drawing from international humanitarian law. He noted that the types of remedies may themselves require discrimination, but discrimination that produces positive effects. Hence the use of the term "adverse distinction". The term "other status" is necessary in order to protect

certain other groups, as in the case where illegitimate children are denied family status. In response to the comments of the representatives of Pakistan and Egypt, Mr. Bassiouni pointed out that, as regards such public services as health service and police protection, OIC States do not discriminate on the basis of sexual orientation.

IV. FOLLOW-UP TO THE CONSULTATIVE MEETING

163. Referring to the question of follow-up to the consultative meeting, the Chairperson proposed to submit the Chairperson's conclusions for inclusion in the report of the consultative meeting. The conclusions would be intended to be neither comprehensive nor exclusive, but merely to serve as a summary of the main issues addressed by the meeting. The report of the meeting would also include a point-by-point summary of the discussions, prepared by the secretariat. The Chairperson further proposed the inclusion of a recommendation to the Commission on Human Rights for the establishment of an appropriate follow-up mechanism in 2003 to complete work on the Draft Guidelines, taking account of the report of the consultative meeting.

164. The representative of Egypt sought clarification on the nature of the proposed follow-up mechanism. He wondered whether this would imply the establishment of a working group or the appointment of an independent expert.

165. The Chairperson indicated that the draft recommendations seek to establish a mechanism to finalize the Draft Guidelines, without specifying the type of mechanism. This will be up to the Commission to decide.

166. The representative of Guatemala agreed on the proposed content of the report and recommendations, and suggested that a deadline also be set for the conclusion of the work of the follow-up mechanism. The Draft Guidelines should be finally adopted by 2004.

167. The representative of Peru offered congratulations on the success of the meeting, and expressed its agreement with the statement of Guatemala, including its commitment to the adoption of the Draft Guidelines by 2004.

168. The representative of Argentina supported the recommendations and agreed on the need to set a deadline for adoption. Reflecting on the Chairperson's conclusions, the representative of Argentina noted that the battle against impunity is not only one of the principal purposes of the Draft Guidelines, but also that of the entire United Nations human rights treaty system.

169. The representative of Pakistan suggested that principle 2 of the recommendations, when referring to conclusions, should indicate that these are the Chairperson-Rapporteur's own conclusions.

170. The representative of Cuba would have liked the setting up of an intergovernmental process to finalize the Draft Guidelines as soon as possible, but expressed that it would have no difficulty to accept the Chairperson's overall proposals.

171. The representative of Spain expressed support for the recommendations of the Chairperson. Leaving open the question of a time frame for adoption of the Draft Guidelines, might facilitate consensus.

172. The representative of the United Kingdom found this to be a very good meeting. He would be happy to engage in further consultations on the subject, but did not think that it is necessarily good to set a time frame in the recommendations.

173. The representative of Mexico indicated that the meeting had facilitated progress on the issue, expressed support for the recommendations and saw no difficulties in setting a deadline in the recommendations.

174. The representative of the Netherlands said it would appreciate a clear way forward, adding that the establishment of any new mechanism needs to be accompanied by adequate financial resources. He called not only for political support, but also for the financial support of all delegations during the Commission on Human Rights.

175. The representative of Sweden expressed gratitude for the meeting and the hope that the experts will be also involved in the process in the future. She supported the request of the representative of Pakistan that the recommendations reflect that they "took account of the discussions and the Chairperson-Rapporteur's conclusions". The representative of Sweden preferred that the conclusions use the full term "customary law" rather than "custom". She would also prefer the use of the full term "extrajudicial, summary or arbitrary executions" in place of "extra-legal executions".

176. The representative of ICRC said that principle 7 of the Chairperson's draft conclusions should refer to "violations", rather than to "breaches" of international humanitarian law.

177. The representative of the United States expressed thanks for the meeting, which it saw as effective. Given its effectiveness, the United States delegation proposed that further work on the Draft Guidelines continue in the same manner. The Chairperson's recommendation of a follow-up mechanism could specifically call for another consultative meeting, drawing from the language of last year's Commission resolution.

178. The representative of Japan submitted a written proposal for the addition of the following text: "Nothing in the present Basic Principles and Guidelines shall be construed as having any implication as regards the rights and obligations of States under international law concerning the matters dealt with in the present Basic Principles and Guidelines."

179. The Chairperson agreed with the suggestion made by the representative of Pakistan to incorporate the phrase "Chairperson-Rapporteur's conclusions". As there was no consensus on the question of setting a deadline, the recommendations would be silent on the question. Similarly, the recommendations will not specify which mechanism should be established, thus making it possible for the Commission to make a decision on this issue.

180. The representative of the International Commission of Jurists, on behalf of a group of participating NGOs, expressed thanks for the meeting, which it viewed as an excellent mechanism.

181. Mr. Bassiouni, speaking on behalf of himself and Mr. van Boven, expressed the hope of both experts that progress towards the adoption of the Draft Guidelines will now be made. The consultative meeting showed how little there is to be done to amend the text. Indeed, he believed that two more days of consultation could have resulted in a completed text. Both experts remained at the disposal of the United Nations to assist in completing the process.

Annex II

AGENDA

"Basic Principles and Guidelines of the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law"

Conference Room VII, Palais des Nations, Geneva

Monday, 30 September 2002

10.00-11.30	Opening Appointment of the Chairperson-Rapporteur Adoption of the agenda Introduction by the Chairperson
11.30-13.00	Part 1: Draft Basic Principles and Guidelines[a] Principles 1-7
13.00-15.00	Lunch
15.00-18.00	Part 2: Draft Basic Principles and Guidelines Principles 8-14

Tuesday, 1 October 2002

10.00-13.00	Part 3: Draft Basic Principles and Guidelines Principles 15-20
13.00-15.00	Lunch
15.00-16.30	Part 4: Draft Basic Principles and Guidelines Principles 21-27
16.30-18.00	Conclusions and Recommendations

[a] See annex to document E/CN.4/2000/62, available at www.unhchr.ch/Huridocda/Huridoca.usf/(Symbol)/E.CN.4.2000.62.En?Opendocument.

Annex III

LIST OF PARTICIPANTS

Experts

Mr. Theo VAN BOVEN
Mr. M. Cherif BASSIOUNI

Member States

ARGENTINA	Mr. Sergio CERDA
AUSTRIA	Ms. Elisabeth ELLISON-KRAMER
BANGLADESH	Ms. Rabab FATIMA
BELARUS	Ms. Ina VASILEUSKAYA
BELGIUM	Mr. Leopold MERCKX
BRAZIL	Mr. Alexandre PEÑA GHISLENI
Canada	Ms. Deirdre KENT Mr. Thomas FETZ
CHILE	Mr. Juan Enrique VEGA Mr. Alejandro SALINAS Mr. Patricio UTRERAS Mr. Luis MAURELIA
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COLOMBIA	Ms. Ana PRIETO
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GEORGIA	Mr. Alexander KAVSADZE
GERMANY	Mr. Robert DIETER
GHANA	Mr. S.J.K. PARKER ALLOTEY
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PAKISTAN	Mr. Qazi KHALILULLAH Mr. Imtiaz HUSSAIN Mr. Farrukh KHAN Ms. Mumtaz ZAHRA BALOCH
PERU	Mr. Juan Pablo VEGAS
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SPAIN	Mr. Marcos GOMEZ MARTINEZ Mr. Carlos ESPOSITO
SWEDEN	Ms. Ulrika SUNDBERG
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TURKEY	Mr. Özden SAV
UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND	Ms. Susan McCRORY Mr. Bob LAST
UNITED STATES OF AMERICA	Mr. T. Michael PEAY Mr. Steven SOLOMON Mr. Rafael FOLEY Ms. Christy FISHER

Non-member States represented by observers

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Intergovernmental organizations

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Other entities

INTERNATIONAL COMMITTEE OF THE RED CROSS	Ms. Jelena PEJIC

Non-governmental organizations

AMNESTY INTERNATIONAL	Mr. Jonathan O'DONOHUE
ASSOCIATION FOR THE PREVENTION OF TORTURE	Ms. Isabelle HEYER Mr. Erik HOLST
INNU COUNCIL OF NITASSINAN	Mr. Armand McKENZIE
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Ms. Stefanie GRANT
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Ms. Mona RISHMAWI
Ms. Maria Luisa SILVA
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