ОРГАНИЗАЦИЯ ОБЪЕДИНЕННЫХ НАЦИЙ **E**

ЭКОНОМИЧЕСКИЙ И СОЦИАЛЬНЫЙ СОВЕТ

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КОМИССИЯ ПО ПРАВАМ ЧЕЛОВЕКА
Пятьдесят девятая сессия
Пункт 11 предварительной повестки дня

ГРАЖДАНСКИЕ И ПОЛИТИЧЕСКИЕ ПРАВА

Право на правовую защиту и возмещение ущерба для жертв нарушений международных норм в области прав человека и гуманитарного права**

Записка Верховного комиссара по правам человека

В своей резолюции 2002/44 Комиссия по правам человека просила Верховного комиссара по правам человека при содействии заинтересованных правительств провести с использованием имеющихся ресурсов консультативное совещание для всех заинтересованных государств-членов, межправительственных и неправительственных организаций, имеющих консультативный статус при Экономическом и Социальном Совете, с целью завершения разработки "Основных принципов и руководящих положений, касающихся права на правовую защиту и возмещение ущерба для жертв нарушений международных норм в области прав человека и гуманитарного права" с учетом представленных комментариев.

В пункте 4 этой резолюции Комиссия просила также Верховного комиссара представить Комиссии на ее пятьдесят девятой сессии итоговый документ консультативного совещания для его рассмотрения.

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* Переиздан по техническим причинам.

** Доклад распространяется на всех официальных языках. Приложения к докладу распространяются только на том языке, на котором они были представлены.

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Соответственно, Верховный комиссар имеет честь препроводить Комиссии доклад Председателя-докладчика посла Алехандро Салинаса (Чили) о работе консультативного совещания по проекту Основных принципов и руководящих положений, касающихся права на правовую защиту и возмещение ущерба для жертв нарушений международных норм в области прав человека и гуманитарного права.

Доклад о работе консультативного совещания по проекту Основных принципов и руководящих положений, касающихся права на правовую защиту и возмещение ущерба для жертв нарушений международных норм в области прав человека и гуманитарного права

Председатель-докладчик: посол Алехандро Салинас (Чили)

Итоговое резюме

Во исполнение резолюции 2002/44 Комиссии по правам человека Управление Верховного комиссара по правам человека при содействии правительства Чили провело на основе использования имеющихся ресурсов международное консультативное совещание для всех заинтересованных государств-членов, межправительственных организаций (МПО) и неправительственных организаций (НПО) с целью завершения разработки проекта Основных принципов и руководящих положений, касающихся права на правовую защиту и возмещение ущерба для жертв нарушений международных норм в области прав человека и гуманитарного права (далее именуется как "проект Руководящих положений"), который содержится в приложении к документу E/CN.4/2000/62.

Работа над проектом Руководящих положений началась в 1989 году в соответствии с резолюцией Подкомиссии по предупреждению дискриминации и защите меньшинств. После этого разработка проекта Руководящих положений осуществлялась при участии двух экспертов и с использованием многочисленных серий замечаний, поступавших со стороны государств-членов, а также международных и неправительственных организаций.

Консультативное совещание, проведенное 30 сентября - 1 октября 2002 года в Женеве с целью завершения разработки проекта Руководящих положений, проходило под председательством г-на Алехандро Салинаса (Чили). Уполномоченные авторы проекта Руководящих положений г-н Тео ван Бовен и г-н М. Шериф Бассиуни осуществляли экспертное обеспечение работы консультативного совещания. Немаловажное значение для работы совещания имело также широкое участие государств-членов, МПО и НПО.

После презентаций, с которыми выступили два эксперта, участники совещания рассмотрели проект Руководящих положений. Детальное обсуждение проекта Руководящих положений проводилось последовательно по каждому отдельному принципу, в результате чего были выявлены аспекты, по которым имеется согласие, а также вопросы, остающиеся нерешенными. В ходе заключительной части совещания Председатель-докладчик и участники обсудили возможные шаги, которые могли бы быть предприняты после этого консультативного совещания, включая рекомендации по таким последующим шагам, составленные Председателем-докладчиком. Участники совещания решили, что доклад для Комиссии по правам человека об итогах его работы должен включать выводы Председателя, рекомендации в отношении последующих шагов в контексте этого консультативного совещания и резюме состоявшихся на нем дискуссий (приложение I).

На основе результатов дискуссий, состоявшихся в ходе консультативного совещания, Председатель-докладчик рекомендовал Комиссии по правам человека в качестве последующих шагов:

a) создать на ее следующей сессии надлежащий и эффективный механизм с целью завершения разработки свода Основных принципов и руководящих положений, касающихся права на правовую защиту и возмещение ущерба для жертв нарушений международных прав в области прав человека и гуманитарного права, который содержится в приложении к документу E/CN.4/2000/62;

b) в свете состоявшихся дискуссий и выводов Председателя-докладчика, содержащихся в докладе о работе консультативного совещания, в ходе своей работы этот механизм должен консультироваться и сотрудничать с заинтересованными правительствами, МПО, НПО и двумя экспертами - г-ном Тео ван Бовеном и г-ном М. Шерифом Бассиуни.

СОДЕРЖАНИЕ

Введение

1. С 30 сентября по 1 октября 2002 года Управление Верховного комиссара по правам человека (УВКПЧ) на основе использования имеющихся ресурсов провело международное консультативное совещание с целью завершения разработки проекта Основных принципов и руководящих положений, касающихся права на правовую защиту и возмещение ущерба для жертв нарушений международных норм в области прав человека и гуманитарного права (далее именуется как "проект Руководящих положений"). Это консультативное совещание, проведенное во исполнение резолюции 2002/44 Комиссии по правам человека, проходило под председательством г-на Алехандро Салинаса и при участии уполномоченных авторов проекта Руководящих положений - г-на Тео ван Бовена и г-на М. Шерифа Бассиуни, которые осуществляли экспертное обеспечение. В работе консультативного совещания участвовали представители большого числа государств-членов, НПО и международных учреждений. (Список участников см. в приложении III.)

2. В распоряжении участников консультативного совещания имелся заключительный доклад Специального докладчика г-на М. Шерифа Бассиуни под названием:

> "Право на возмещение ущерба и компенсацию жертвам грубых нарушений прав человека и основных свобод, а также на их реабилитацию" (E/CN.4/2000/62) и прилагаемые к нему "Основные принципы и руководящие положения, касающиеся права на правовую защиту и возмещение ущерба для жертв нарушений международных норм в области прав человека и гуманитарного права".

3. Совещание было открыто представителем Верховного комиссара по правам человека. После избрания Председателя-докладчика участники совещания приняли повестку дня совещания (приложение II ниже).

4. После этого Председатель предложил участникам высказать общие замечания по проекту руководящих положений. После презентаций, с которыми выступили два эксперта, Председатель предложил участникам провести рассмотрение различных групп принципов. Участники совещания провели обсуждение проекта Руководящих положений последовательно по каждому отдельному принципу, в результате чего были выявлены аспекты, по которым имеется согласие, а также вопросы, остающиеся нерешенными. Затем Председатель и различные участники обсудили последующие шаги, которые могли бы быть предприняты после этого консультативного совещания. Участники совещания решили, что доклад для Комиссии по правам человека об итогах его работы должен

включать выводы Председателя, рекомендации в отношении последующих шагов в контексте этого консультативного совещания и резюме состоявшихся на нем дискуссий (резюме дискуссий, которое было включено в качестве приложения в силу строгих ограничений, установленных в отношении объема документов Комиссии, см. в приложении I).

I. ВЫВОДЫ ПРЕДСЕДАТЕЛЯ-ДОКЛАДЧИКА

5. На основе результатов дискуссий, состоявшихся в ходе консультативного совещания, Председатель составил нижеследующие выводы, которые не носят всеобъемлющего или исчерпывающего характера, а призваны лишь резюмировать основные вопросы, затронутые в ходе совещаний.

A. Общие замечания

6. В проекте Основных принципов и руководящих положений, касающихся права на правовую защиту и возмещение ущерба для жертв нарушений международных норм в области прав человека и гуманитарного права, надлежащим образом учтены интересы жертв, поскольку принципы, заимствованные из различных правовых источников, выстроены не по соответствующим документам и источникам, а в соответствии с потребностями и правами жертв. Этот учет интересов жертв, отраженный в структуре и содержании, следует сохранить.

7. В проекте Руководящих положений весьма целесообразно не устанавливается никаких новых принципиальных правовых обязательств, а лишь консолидируются существующие нормы с учетом их эволюции.

8. В проекте Руководящих положений термин "shall" ("должны") вполне справедливо используется лишь в тех случаях, когда речь идет об обязательной международной норме, действующей в настоящее время. Когда международная норма имеет менее обязательный характер, используется менее обязывающее слово "should" ("следует").

9. В проекте Руководящих положений правильно предпринимается попытка добиться того, чтобы содержащиеся в нем принципы и руководящие положения не были более узкими по сравнению с требованиями существующих международных норм.

10. Проект Руководящих положений включает и имеет в своей основе международно-правовые нормы и практику с учетом их эволюции. Таким образом, если взять концепцию "грубых нарушений", которая по первоначальному замыслу Подкомиссии должна быть в центре внимания этого документа, то эта концепция, как и все прочие правовые концепции в области прав человека, в том числе концепция "преступлений против человечности", претерпевает соответствующую эволюцию. Проект Руководящих положений отражает сегодня более широкий подход, охватывающий все нормы в области прав человека и гуманитарного права, которые содержатся в договорах, а также в положениях обычного права и национальных законов. Признавая тот факт, что, по мнению отдельных жертв, наиболее важное значение имеют их жизнь и личное достоинство, проект Руководящих положений отражает также признание и того факта, что все права взаимосвязаны, взаимозависимы и не допускают установления какой-либо иерархии. Тем не менее можно было бы рассмотреть вопрос о надлежащем включении упоминания о "грубых нарушениях", в том числе в названии документа.

11. В проекте Руководящих положений должным образом учтены новые изменения. Таким образом, поскольку правовые нормы в области прав человека, касающиеся вопроса ответственности негосударственных субъектов, по-прежнему находятся в процессе развития, а проект Руководящих положений не является договором, в нем следует также отразить эти эволюционирующие концепции.

B. Принцип 1

12. Подход, центральное место в котором занимает жертва нарушений, объединяющий в себе и нормы в области прав человека, и нормы международного гуманитарного права (МГП), вызывает особые вопросы в контексте этого раздела, поскольку он объединяет две отдельные сферы. Следует проводить четкое разграничение между нарушениями прав человека и нарушениями МГП, особенно в отношении негосударственных субъектов, подпадающих под действие норм МГП, и о таких субъектах следует упомянуть отдельно.

C. Принцип 2

13. Упомянутое обязательство относительно "включения" соответствующих норм в национальное законодательство следовало бы разъяснить, с тем чтобы показать, что не все международные правовые нормы предполагают их автоматическое включение в национальное законодательство, без указания соответствующих условий, существующих в национальных правовых системах. И точно так же не все соответствующие обязательства требуют включения в национальное законодательство, поскольку некоторые из них подлежат лишь "выполнению" в системе национального права. Вместе

с тем нормы МГП предполагают их обязательное включение и выполнение. В системе правовых норм в области прав человека существуют различные подходы, поскольку эта система претерпевает все бóльшую эволюцию. Так, например, Конвенция против пыток предусматривает оба обязательства. В этом отношении проект Руководящих положений дает государствам определенные возможности.

D. Принцип 3

14. Этот раздел также можно было бы скорректировать, с тем чтобы провести более четкое разграничение между государствами и негосударственными субъектами, а также между нормами МГП и правовыми нормами в области прав человека.

15. Поскольку для целей предотвращения нарушений одних лишь правовых и административных норм может быть недостаточно, принцип 3 a) следовало бы также дополнить мерами политического и культурного характера.

16. В этот раздел было бы полезно внести некоторые уточнения относительно территориальных ограничений для закрепленных в них обязательств, например, относительно ответственности виновных, не являющихся гражданами соответствующего государства, и/или в отношении актов, совершенных за пределами национальной территории.

17. Необходимо более четко определить сферу действия обязательств, закрепленных в принципе 3 c), в частности в отношении негосударственных субъектов.

18. В силу того, что концепция ответственности негосударственных субъектов постоянно эволюционирует, в формулировках этого раздела следует проявлять осторожность, поскольку в нынешней редакции они могут косвенно предполагать наличие ответственности негосударственных субъектов за нарушение правовых норм в области прав человека. Если ответственность негосударственных субъектов в рамках МГП и международного уголовного права признается всеми, то правовые нормы в области прав человека как таковые, по мнению некоторых делегаций, могут нарушать лишь государства (и их агенты).

19. В то же время признано, что, особенно в современных конфликтах и отдельных ситуациях, нарушения норм МГП и правовых норм в области прав человека происходят в таких условиях, когда невозможно провести четкое разграничение между этими двумя сферами. Текст этого раздела в его нынешней редакции является достаточно четким в плане включения обоих этих источников и отражения различия между ними, а также применимости их обоих.

20. Концепция "эффективных расследований" признана в качестве важного нюанса, предотвращающего проведение недобросовестных или недостаточных расследований.

21. Справедливо включенное в текст упоминание о "содействии" возмещению ущерба относится к тем ситуациям, когда государство представляет своих граждан в ходе рассмотрения исков за пределами его территории, т.е. в международном органе или в другом государстве.

E. Принципы 4 и 5

22. Принцип 4 представляет собой важное изложение обязательства относительно борьбы с безнаказанностью, что является одной из основных целей проекта Руководящих положений.

23. Признано, что уже давно существует юридическое обязательство предавать суду виновных в совершении международных преступлений, что этот принцип подтвержден Международным судом (например, в отношении геноцида) и что то же самое относится к пыткам, внесудебным казням, казням без надлежащего судебного разбирательства или произвольным казням и некоторым другим нарушениям, о чем свидетельствует наличие обширной международной практики в этой области. Тем не менее формулировка этого раздела потребует пересмотра, предполагающего замену "обязанности подвергать преследованию лиц" формулировкой, использованной в Конвенции против пыток и других жестоких, бесчеловечных или унижающих достоинство видов обращения и наказания, с тем чтобы более точно отразить существующие международные обязательства в области преследования виновных.

24. Этот раздел можно было бы усовершенствовать, более четко отразив признание компетенции, полномочий и обязанностей национальных правовых систем, а также роли международных правовых институтов в плане дополнения национальных систем и их юрисдикции.

25. Принцип 5 было бы полезно пересмотреть на предмет обеспечения того, чтобы в нем были должным образом отражены требования международного права в отношении выдачи и других механизмов правового сотрудничества. В частности, это положение следовало бы уточнить таким образом, чтобы обеспечить его соответствие с обязательством не выдавать лиц в тех случаях, когда в принимающем государстве они могут подвергнуться пыткам или другим нарушениям.

26. В этом разделе справедливо включена ссылка на принцип универсальной юрисдикции. Вместе с тем этот упоминаемый принцип было бы полезно дополнительно разъяснить.

F. Принципы 6 и 7

27. Было признано, что этот раздел отражает существующие международные нормы, касающиеся неприменимости положений о сроке давности, и практические требования в отношении применения этих норм, но вместе с тем было сочтено, что было бы целесообразно более четко указать статус и объем этих положений в существующем международном праве.

28. Так, несмотря на то, что Конвенция о неприменимости срока давности к военным преступлениям и преступлениям против человечества ратифицирована ограниченным числом государств, было отмечено, что сам по себе этот принцип получает все большее международное признание в силу других договоров, которые содержат аналогичные положения (включая Римский статут Международного уголовного суда и Конвенцию против пыток).

29. Было сочтено, что в принципе 7 было бы полезно дополнительно разъяснить значение выражения "не должны неоправданным образом ограничивать возможности пострадавшего предъявлять иск…".

G. Принципы 8 и 9

30. Было признано, что определение жертвы, приведенное в этом разделе, основывается на определении, содержащемся в Декларации основных принципов правосудия для жертв преступлений и злоупотребления властью, принятой в рамках Организации Объединенных Наций.

31. В этом контексте было отмечено, что вне зависимости от того, на ком лежит ответственность или где должен подаваться иск, наличие непосредственной вины государства не составляет обязательного условия для определения того или иного лица в качестве жертвы, что является единственным предметом этого раздела проекта Руководящих положений.

32. Элемент коллективности был признан на международном уровне, в том числе в Декларации основных принципов правосудия для жертв преступлений и злоупотребления властью, принятой в рамках Организации Объединенных Наций, а также в решениях Межамериканского суда. В то же время нужно дополнительно прояснить и уточнить последствия включения положений, касающихся коллективного статуса жертв, степень их применимости к таким нарушениям, как систематические проявления расизма и апартеида, их применимости к искам, подаваемым расовыми, этническими, религиозными или языковыми группами, а также степень их соответствия некоторым подходам к возмещению ущерба и программам коллективного возмещения ущерба, учитывающим специфику соответствующих культурных укладов.

33. В частности, нужно было внести ясность в вопрос о том, относится ли "элемент коллективности" к объединенным искам, подаваемым группами отдельных жертв, или же к коллективным искам национальных, этнических, расовых или социальных групп или народов. Было отмечено, что ряд делегаций выступают против включения последнего элемента, в то время как другие делегации считают его включение целесообразным.

34. Было отмечено, что термин "жертва" применяется лишь к лицу или лицам, которому/которым был действительно нанесен ущерб. Это, естественно, не затрагивает права и функции семей жертв, "моральных лиц", таких, как организации, подающие иски, или представителей жертв. Вмешивающиеся лица, которым наносится ущерб, рассматривались бы как жертвы. Так, имеются веские политические основания для того, чтобы лицам, которым в процессе вмешательства от имени жертв наносится ущерб, обеспечивалась соответствующая защита и компенсация.

35. Во избежание трудностей, с которыми могут столкнуться лица в процессе оценки их собственного положения в качестве жертв, в проекте Руководящих положений было бы полезно четко указать, какие компетентные органы уполномочены определять или утверждать, выполнены ли требования определения жертвы, закрепленные в принципах 8 и 9.

36. Включенные в текст положения о душевных страданиях и психическом вреде были расценены в качестве важных элементов, соответствующих международным нормам и судебной практике в этой области, в том числе Конвенции против пыток. Вместе с тем эти положения текста было бы полезно дополнительно разъяснить.

H. Принцип 10

37. Было отмечено, что этот раздел имеет важное значение в свете того, что в различных правовых системах отношение к жертвам отличается меньшим уважением к их достоинству и сочувствием, чем отношение к нарушителям.

38. Упоминание о межправительственных и неправительственных организациях, а также о частных учреждениях было расценено как надлежащее признание того факта, что в настоящее время таким структурам нередко делегируются полномочия, связанные с предоставлением жертвам различных услуг, а в некоторых случаях - с выполнением функций уголовного правосудия, затрагивающих права жертв.

I. Принцип 11

39. Проект Руководящих положений вполне справедливо не ограничивается одними лишь сугубо судебными средствами правовой защиты, а включает также законодательные, административные и другие меры.

40. Было высказано мнение, что, возможно, потребуется выяснить последствия и условия упоминания о коллективном доступе к правосудию и указать, насколько широко он признается в различных правовых системах.

41. Было признано, что доступ к фактической информации, предусмотренный в подпункте c), касается информации, имеющей отношение к конкретному делу, и имеет важное значение для обеспечения того, чтобы жертвы располагали информацией, которая может быть собрана в результате проведения официальных расследований и которая может потребоваться им для подачи или обоснования иска, и что в этом контексте текст можно было бы сделать более четким.

J. Принцип 12

42. Была также отмечена необходимость разъяснения последствий отсутствия каких-либо территориальных ограничений в отношении требований о доступе к правосудию.

43. Была подчеркнута важность подпункта b) в контексте широко распространенной практики запугивания и нападений на лиц, подающих жалобы о нарушении прав человека.

K. Принципы 13 и 14

44. Этот раздел был расценен как имеющий важное значение, поскольку он направлен на обеспечение доступа жертв к различным механизмам восстановления справедливости, включая, в частности, судебные процедуры и денежные компенсации. В нем определен ряд основных мер, связанных с обеспечением доступа. В нем, возможно, было бы полезно упомянуть о содержании статьи 68 Римского статута, которая предусматривает представление мнений жертв в ходе разбирательства.

45. Было отмечено, что включенное положение о коллективных исках основано на существующей международной практике. К числу примеров относятся механизмы МОТ (в отношении свободы ассоциаций и для коренных народов), Межамериканского суда (заслушивание религиозных и других организаций) и Комитета по ликвидации дискриминации в отношении женщин (в рамках Факультативного протокола). Кроме того, некоторые виды средств правовой защиты, такие, как определенные аспекты процедур установления истины и примирения, являются коллективными в силу своего характера. Вместе с тем было бы полезно внести дополнительную ясность и привести дополнительные подробности в вопросах о том, что понимается под коллективными исками и какие виды коллективных исков имеются в виду.

46. Хотя каждый международный механизм имеет свои собственные правила в отношении требований исчерпания внутренних средств правовой защиты, было признано, что здесь было бы полезно внести дополнительную ясность в вопросе об исчерпании внутренних средств правовой защиты. При этом следует учитывать, что такие средства правовой защиты должны иметься в наличии и быть реально доступными.

L. Принципы 15-20

47. Было признано, что, хотя в системе международного права формы и условия возмещения ущерба могут различаться, право на возмещение ущерба относится как к нарушениям прав человека, так и к нарушениям норм гуманитарного права вне зависимости от статуса нарушителя или от правопреемства правительств. Проект руководящих положений способствует укреплению положения жертв.

48. Что касается принципа 17, то, хотя в нем и признано, что негосударственные субъекты, например вооруженные группы, действительно могут совершать нарушения, было сочтено, что в текст необходимо внести дополнительное разъяснение в отношении ответственности негосударственных субъектов, не умаляя при этом ответственности государств, с тем чтобы правильно отразить различия между правовыми нормами в области прав человека и нормами МПГ применительно к негосударственным субъектам. Было признано, что действие негосударственного субъекта в сочетании с бездействием государства (таким, как невмешательство или непроведение расследования) приводило бы к возникновению ответственности государства.

49. Важным позитивным аспектом проекта Руководящих положений является то, что в нем предусматривается возмещение ущерба со стороны государства вне зависимости от какого бы то ни было требования относительно установления ответственности государственного агента.

50. В этом и других разделах проекта Руководящих положений было бы полезно согласовать формулировки, поскольку в настоящее время здесь используются разные термины - "международные права человека", "международные нормы" и т.д. Вместо этого, возможно, было бы целесообразно использовать единую формулировку, такую, как "обязательства".

M. Принципы 21-25

51. Было отмечено, что этот раздел показывает, сколь пристальное внимание необходимо уделять обеспечению того, чтобы тексты на различных языках в полной мере отражали различные рассматриваемые концепции. Например, было отмечено, что в испанском варианте проекта Руководящих положений вместо "компенсации" упоминается концепция "возмещения". Кроме того, в испанском варианте фигурирует концепция "морального ущерба", отсутствующая в тексте оригинала на английском языке, а упоминаемое понятие "una reparación" можно ошибочно истолковать как предполагающее то, что одна форма возмещения ущерба исключает другую. Далее, в принципе 26 текста

проекта на английском языке говорится о необходимости "разработать" механизмы информирования, в то время как в испанском варианте не используется эквивалентное слово "desarrollar". Таким образом, важно обеспечить согласованность вариантов на различных языках.

52. Было отмечено, что концепция "возмещения ущерба" в проекте Руководящих положений не ограничивается экономическими и финансовыми средствами. В связи с этим термин "реституция" в принципе 21 проекта Руководящих положений был расценен как включающий восстановление прав, в том числе возвращение гражданства или гражданского статуса. Что касается "компенсации", то она носит главным образом экономический характер.

53. Было признано, что принцип 21 имеет целью перечислить формы возмещения ущерба, а не определить ответственную сторону, но вместе с тем была выявлена возможность возникновения несоответствий в толковании в связи с тем, что в принципе 21 говорится о "государствах", которые должны обеспечивать жертвам различные формы возмещения ущерба, в то время как в принципе 17 признается, что ущерб должны возмещать и другие стороны. Эти два принципа было бы полезно согласовать.

54. Было отмечено, что в тексте принципа 23 вместо формулировки "вызванный" использована формулировка "в результате", с тем чтобы охватить те подходы, которые используются применительно к вопросам причинности в различных правовых системах.

55. Было отмечено, что в текст принципа 23 было бы полезно включить концепцию "морального ущерба", определенную в европейской юриспруденции.

56. Концепция "утраченных возможностей", содержащаяся в тексте принципа 23 b), была расценена как весьма важное положение. Вместе с тем было бы полезно дать ей более развернутое определение. Упоминание об образовании было расценено как не носящее исчерпывающего характера и включенное для того, чтобы привести один практический пример. Было признано, что, кроме образования, столь же важное значение имеют права и в других областях. Добавление упоминания о взаимозависимости и неделимости всех прав человека позволило бы повысить ясность в этом аспекте.

57. Было признано исключительно важное значение предусмотренного в тексте принципа 24 необходимости оказания медицинских, психологических, юридических и социальных услуг для жертв, многие из которых являются представителями наименее обеспеченных слоев и групп общества. В проекте Руководящих положений, учитывая их характер, возможно, было бы полезно упомянуть о необходимости обеспечения надлежащей подготовки специалистов, работающих в медицинской, юридической и социальной сферах.

58. Принцип 25 b) был признан в качестве важного элемента, основу которого составляет концепция обнародования всей правды, но с должным учетом необходимости защиты жертв и свидетелей. Этот принцип, возможно, было бы полезно дополнительно доработать в целях достижения надлежащего баланса этих соображений.

59. Согласно принципу 25 c) в его нынешней редакции, исчезнувшие лица считаются мертвыми, что не всегда соответствует действительности. Формулировку текста было бы полезно изменить, с тем чтобы он охватывал также поиск исчезнувших лиц, которые могут быть живы.

60. Перечень превентивных мер, приведенный в тексте принципа 25 i), было предложено дополнить, включив в него дополнительные меры, такие, как законодательные и административные реформы и распространение информации о выносимых решениях, а также ограничение юрисдикции военных судов и обеспечение исключительной юрисдикции гражданских судов над гражданскими лицами. Этот раздел можно было бы выделить в отдельную главу.

61. Упоминания определенных категорий лиц в тексте принципа 25 i)-iv) были расценены не как предполагающие различные категории защиты, а лишь как указывающие - для превентивных целей - определенные группы лиц, которые подвергаются особому риску в связи с их собственными функциями в контексте оказания поддержки для жертв.

62. Принцип 25 i) v) можно было бы усилить, конкретно упомянув в нем, помимо обучения правам человека, обучение в вопросах гуманитарного права.

63. Фигурирующую в тексте принципа 25 i) vii) формулировку "профилактического вмешательства" следует изменить таким образом, чтобы исключить возможность толкования этого положения как предполагающего одобрение превентивного военного вмешательства или так называемого гуманитарного вмешательства, поскольку не все государства признают законность этих концепций.

N. Принцип 26

64. Этот принцип был расценен как общее положение, касающееся обеспечения открытости и общедоступности информации. В этом отношении он, будучи отдельным принципом, связан с принципом 11, который более конкретно касается доступа жертв к фактической информации, имеющей отношение к рассматриваемому вопросу, в контексте использования средств правовой защиты.

O. Принцип 27

65. Термин "неблагоприятно влияющие различия", заимствованный из системы гуманитарного права и других норм, служит для проведения разграничения между недопустимой дискриминацией и законными различиями, которые призваны обеспечивать приоритетное внимание для тех, кто наиболее нуждается в этом.

66. Было отмечено, что сексуальная ориентация может служить основой для преследования и пыток, однако в большинстве стран она не является основой для официальной дискриминации в сферах здравоохранения, защиты со стороны полиции и других общественных услуг. Вместе с тем было отмечено, что не все государства согласны с включением в принцип 27 термина "сексуальная ориентация" в качестве одной из категорий "неблагоприятно влияющих различий".

67. Перед термином "инвалидность" в это положение, возможно, было бы полезно включить термин "состояние здоровья".

68. Кроме того, в перечень оснований для дискриминации, приведенный в тексте принципа 27, следовало бы добавить термин "семейное происхождение".

II. РЕКОМЕНДАЦИИ ПРЕДСЕДАТЕЛЯ-ДОКЛАДЧИКА В ОТНОШЕНИИ ПОСЛЕДУЮЩИХ ШАГОВ В КОНТЕКСТЕ КОНСУЛЬТАТИВНОГО СОВЕЩАНИЯ

69. Председатель-докладчик консультативного совещания по проекту Основных принципов и руководящих положений, касающихся права на правовую защиту и возмещение ущерба для жертв нарушений международных норм в области прав человека и гуманитарного права, рекомендует Комиссии по правам человека:

a) создать на ее следующей сессии надлежащий и эффективный механизм с целью завершения разработки свода Основных принципов и руководящих

положений, касающихся права на правовую защиту и возмещение ущерба для жертв нарушений международных норм в области прав человека и гуманитарного права, который содержится в приложении к документу E/CN.4/2000/62;

b) в свете состоявшихся дискуссий и выводов Председателя-докладчика, содержащихся в докладе о работе консультативного совещания, в ходе своей работы этот механизм должен консультироваться и сотрудничать с заинтересованными правительствами, МПО, НПО и двумя экспертами - г-ном Тео ван Бовеном и г-ном М. Шерифом Бассиуни.

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, regional 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. This was 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 for 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) (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) (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) (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) (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) (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) (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
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CROATIA	Mr. Socanal BRANKO
CUBA	Mr. Jorge FERRER
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EGYPT	Mr. Khaled ABDELHAMID Mr. Mohamed LOUTFY
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GHANA	Mr. S.J.K. PARKER ALLOTEY
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Other entities

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Non-governmental organizations

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