

INTERNATIONAL COURT OF JUSTICE

**CASE CONCERNING
APPLICATION OF THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION
OF THE FINANCING OF TERRORISM AND OF THE INTERNATIONAL CONVENTION
ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION**

(UKRAINE V. RUSSIAN FEDERATION)

**VOLUME XIX OF THE ANNEXES
TO THE MEMORIAL
SUBMITTED BY UKRAINE**

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TABLE OF CONTENTS

- Annex 738 U.N. General Assembly Resolution No. 2106A (XX), U.N. Doc. A/RES/20/2106, International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965)
- Annex 739 Kitok v. Sweden, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988)
- Annex 740 Lubicon Lake Band v. Canada, Communication No. 167/1984, U.N. Doc. Supp. No. 40 (A/45/40) (26 March 1990)
- Annex 741 Intentionally Omitted
- Annex 742 Intentionally Omitted
- Annex 743 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Article 2, Adopted by General Assembly resolution 47/135 of 18 December 1992
- Annex 744 U.N. Security Council Resolution 827, U.N. Doc. S/RES/827 (25 May 1993)
- Annex 745 Human Rights Committee, General Comment 18, Non-discrimination (Thirty-Seventh Session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994)
- Annex 746 Intentionally Omitted
- Annex 747 International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 (1994).
- Annex 748 OHCHR General Comment No. 23: The rights of minorities, Doc No. o8/04/94, CCPR/C/21/Rev.1/Add.5 (1994)
- Annex 749 Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (17 July 1998)
- Annex 750 Mahuika et al. v. New Zealand, Communication No. 547 / 1993, U.N. Doc. CCPR/C/70/D/547/1993 (27 October 2000)
- Annex 751 Althammer v. Austria, Communication No. 998/2001, U.N. Doc CCPR/C/78/D/998/2001 (22 September 2003)
- Annex 752 Cecilia Derksen v. Netherlands, Communication No. 976/2001, U.N. Doc CCPR/C/D/976/2001 (1 April 2004)
- Annex 753 Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General (pursuant to Security Council Resolution 1564 of 18 September 2004) (25 January 2005)

- Annex 754 CESCR General Comment No. 16, The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights, E/C.12/2005/4 (11 August 2005)
- Annex 755 CESCR General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights, E/C.12/GC/20 (2 July 2009)
- Annex 756 Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations Report Regarding Russia's Compliance with the ICCPR, Russian Federation, 1.CCPR/C/RUS/CO/6 (24 November 2009)
- Annex 757 CESCR General Comment No. 21, Right of Everyone to Take Part in Cultural Life, E/C.12/GC/21 (21 December 2009)
- Annex 758 CEDAW General Recommendation No. 28 on the Core Obligations of State Parties under Article 2. CEDAW/C/GC/28 (16 December 2010)
- Annex 759 OHCHR, Situation of Human Rights in the Temporarily Occupied Autonomous Republic of Crimea and the City of Sevastopol (Ukraine) (22 February 2014 to 12 September 2017)
- Annex 760 United Nations Human Rights Council, Report of the Special Rapporteur on Minority Issues on Her Mission to Ukraine (7–14 April 2014), U.N. Doc. A/HRC/28/64/Add.1 (26 August 2014)
- Annex 761 Intentionally Omitted
- Annex 762 OHCHR, Report on the Human Rights Situation in Ukraine (15 April 2014)
- Annex 763 OHCHR, Report on the Human Rights Situation in Ukraine (15 May 2014)

Annex 738

U.N. General Assembly Resolution No. 2106A (XX), U.N. Doc. A/RES/20/2106, International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965)

United Nations
**GENERAL
ASSEMBLY**

TWENTIETH SESSION

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**1406th
PLENARY MEETING**

Tuesday, 21 December 1965,
at 10.30 a.m.

NEW YORK

CONTENTS

	Page
<i>Agenda item 58:</i>	
<i>Draft International Convention on the Elimination of All Forms of Racial Discrimination Report of the Third Committee</i>	1

President: Mr. Amintore FANFANI (Italy).

AGENDA ITEM 58

Draft International Convention on the Elimination of All Forms of Racial Discrimination

REPORT OF THE THIRD COMMITTEE (A/6181)

Mr. Macdonald (Canada), Rapporteur of the Third Committee, presented the report of that Committee and then spoke as follows.

1. Mr. MACDONALD (Canada), Rapporteur of the Third Committee: As the Assembly is aware, in resolution 1906 (XVIII), entitled "Preparation of a draft international convention on the elimination of all forms of racial discrimination", the General Assembly requested the Economic and Social Council to invite the Commission on Human Rights to give absolute priority to the preparation of a draft international convention on the elimination of all forms of racial discrimination.

2. On the basis of a preliminary draft prepared by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the Commission on Human Rights prepared in 1964 seven substantive articles which the Economic and Social Council transmitted to the General Assembly in resolution 1015 B (XXXVII) of 30 July 1964.

3. At the present session of the General Assembly the Third Committee considered in great detail, at forty-three meetings, and adopted unanimously a draft convention comprising a preamble and twenty-four articles. These twenty-four articles are divided into three parts. Part I consists of the substantive articles; part II, of articles on implementation; part III contains the final clauses.

4. I wish to draw to the Assembly's attention the fact that the Third Committee decided not to include a territorial application clause, a federal clause or a reservations clause in the draft convention. On the reservations clause the Assembly has before it an amendment submitted by thirty-three Powers [A/L.479]. There is also an amendment to article 4 by five Latin American Powers [A/L.480].

5. I would also draw the Assembly's attention to the two draft resolutions which appear in paragraph 212

of the Third Committee's report [A/6181] and on which the Assembly is requested to take action.

6. Lastly, I would draw the attention of the Assembly to the report of the Fifth Committee [A/6182], which deals with the financial implications that arise in connexion with part II of the draft Convention, on measures of implementation.

7. Mr. LAMPTEY (Ghana): I should like to introduce the amendment contained in document A/L.479. We have submitted this amendment because, to many delegations gathered here, the absence of a reservations clause from the draft Convention is a major flaw that could conceivably nullify the effect of the Convention ab initio. That the reservations clause was deleted in the Third Committee, by a vote of 25 to 19 with 34 abstentions [see A/6181, para. 194], was itself a tragic circumstance and could have happened only because we were all tired and the effect of this action was not obvious to many. We believe that, on second thought, most delegations now realize the necessity of a reservations clause: the number of co-sponsors of the amendment bespeaks that fact.

8. The three-paragraph clause that we promise is simple enough and is a restatement in positive terms of a formulation which enjoys wide support with respect to reservations to multilateral conventions. Before dealing specifically with this text and with reservations generally, however, I should like to comment briefly on the articles of the Convention which purportedly would be subject to significant reservations.

9. First, there is article 4, the first paragraph of which has given concern to some delegations. It should be recalled that that paragraph was the outcome of a difficult compromise after hours, and even days, of discussion, drafting and redrafting. In that process, most of us yielded from fixed positions, and no argument has since been brought forth to show that this article would be in derogation of the fundamental right of freedom of speech.

10. We listened very carefully to the recent intervention of Mr. Goldberg, in which he touched upon this subject, and we can suggest only that a reservation would not be the proper mode of dealing with this matter. It was the consensus in the Committee that this article should not be in derogation of "the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention". Thus, a unilateral declaratory statement as to this consensual interpretation is what is necessary, and not a reservation, for a reservation, ipso facto, amounts to a

modification and in this case, a modification of a difficult compromise.

11. What can be reiterated also is the correlative consensus of the Committee that these fundamental freedoms should not be employed to violate the purposes and objectives of this Convention. It is for this reason that we cannot accept a new formulation of article 4.

12. Articles 14 and 15 have also created some concern among certain delegations. As for article 14, its very optional nature makes it necessary to comment thereon. In our view, a juridical position that denies that a State, in exercise of its own sovereign will, can grant to individuals within its borders a right of petition to an international forum is tenuous, to say the least. Article 15, however, is another matter.

13. My delegation took an active part in objecting to the original article 13 bis and to the reformulation of the present article 15. We objected to article 13 bis because we believed that it was legally dubious to extend mandatorily a right denied the citizens of a metropolitan State to the colonial subjects of the State through an instrument of this type. It is, however, different when a procedural link between bodies of the United Nations and a body established through a multilateral convention and charged with the common task of achieving the purposes of the Charter is contended to be in violation of law. Such a contention is based on political expediency and is legally spurious.

14. In the first place, the Members of the United Nations have undertaken certain obligations in respect of human rights. We are aware that there is a divergence of viewpoints among the authorities concerning the legal effect of Articles 55 and 56—the so-called human rights Articles of the Charter. While Hudson, Kelsen and Drost, among others, claim that these Articles are not constitutive of enforceable legal norms, they agree that

"The Members"—of the United Nations—"have undertaken to act in conformity with the Purposes of the Organization. They have legally committed themselves to a legislative program, national and international, in respect of human rights." ^{1/}

15. Even the Legal Adviser of the United States Department of State in his famous memorandum to the Attorney-General in connexion with the McGhee and Shelley cases did admit that the Articles

"appear to place Member States under the obligation to co-operate with the United Nations in the carrying out of its function, which is stated here and elsewhere in the Charter as being the promotion of universal respect for and observance of human rights and fundamental freedoms". ^{2/}

But for the failure of the conference at San Francisco twenty years ago to adopt the proposal of the representative of Panama for a positive declaration that one of the purposes of the United Nations would be

^{1/} Pieter N. Drost, Human Rights as Legal Rights (Leiden, A.W. Sijthoff, 1951), p. 29.

^{2/} H. Lauterpacht, International Law and Human Rights (London, Stevens and Sons, 1950), p. 149, foot-note.

"to see to it that the essential liberties of all are respected without distinction of race, language and creed", there would have been no doubt about the legal effect of the human rights provisions. We for our part agree with Sir H. Lauterpacht that the cumulative legal result of the various human rights pronouncements of the Charter cannot be ignored and that the legal character of these obligations of the Charter would remain even if the Charter were to contain no provisions of any kind for their implementation. As that distinguished English jurist has said:

"Any construction of the Charter according to which Members of the United Nations are, in law, entitled to disregard—and to violate—human rights and fundamental freedoms is destructive of both the legal and moral authority of the Charter as a whole...[and] runs counter to a cardinal principle of construction according to which treaties must be interpreted in good faith." ^{3/}

16. If the principle pacta sunt servanda is accepted, then all the Members of this Organization are under legal obligation to accept the right of petition expressly granted to the peoples of the colonial territories under the provisions of the Charter and extended by the establishment of constituent United Nations Committees of permanent and ad hoc nature.

17. If we cannot, arguendo, deny the legality of the bodies to which these petitions lie, we cannot question the legal validity of a procedural link between the Committee established under this Convention, a convention adopted under the aegis of the United Nations with the aim of achieving a pre-emptory purpose of the Charter—the elimination of all forms of racial discrimination, which is an essential requisite in the realization of the dignity and worth of man—and the established bodies of the United Nations to which its counsel would be highly useful. That is all that Article 15 attempts to do.

18. Article 71 of the Charter authorizes the Economic and Social Council to consult and co-operate with other international, national and non-governmental organizations handling matters which fall within its purview, and such co-operation has significantly helped that Council to achieve its goals.

19. The Constitution of the International Refugee Organization provides that it may establish

"Such effective relationships as may be desirable with other international organizations"

and that it is

"to consult and co-operate with public and private organizations whenever it is deemed advisable, in so far as such organizations share the purpose of the Organization and observe the principles of the United Nations".

20. The Constitution of the International Civil Aviation Organization, the ILO and many others have similar provisions, and, as Sir H. Lauterpacht says, while these

"provisions add little to the formal status and procedural capacity of the individual... in the inter-

^{3/} Ibid., p. 149.

national sphere, . . . they illustrate both the inadequacy of the hitherto predominant doctrine and the manner in which international practice may soften and eventually discard a rigid rule no longer in keeping with modern needs". ^{4/}

21. The various specialized agencies in special relationship with the United Nations are all beings of separate and distinct international treaties: their memberships are different in instances from that of the United Nations. Thus there are several precedents for the procedural link envisaged between the Committee and other United Nations bodies. The *raison d'être* for this co-operation is that these bodies are all dedicated to the achievement of Charter objectives.

22. The Committee established under this Convention may, within a relatively short period, achieve expertise in problems of racial discrimination. In such case would its advisory role to a United Nations body like the Committee of Twenty-Four not far outweigh in results the slim possibility of political propaganda for which its comments and recommendations could be used? Those who would oppose this procedural link could base their opposition only on political considerations and not on legal or constitutional factors.

23. Let me now turn to the question of reservations generally. It is true that the subject of reservations is a complex one, but let us not exaggerate this complexity.

24. The practice followed by the League of Nations with respect to multilateral conventions was that, to be valid, a reservation must be accepted by all contracting parties. Substantially the same practice was followed by the Secretary-General of the United Nations until the decision of the International Court of Justice ^{5/} on the Genocide Convention. The rule adhered to by the Secretary-General then was formulated by the International Law Commission in 1951 as follows:

"A State may make a reservation when signing, ratifying or acceding to a convention, prior to its entry into force, only with the consent of all States which have ratified or acceded thereto up to the date of entry into force; and may do so after the date of entry into force only with the consent of all States which have theretofore ratified or acceded." ^{6/}

25. The difficulty that has arisen in recent years with respect to reservations has come about mainly because of the sharp multiplicity and varied nature of multilateral conventions since the Second World War and the attainment of nationhood by many colonial peoples that were not party to the development of the traditional concepts of international law; but there is sufficient evidence both of the old and of the new concepts to guide us. Restricting ourselves, then, to the type of humanitarian convention before us, let us hear what some of the experts have to say.

^{4/} *Ibid.*, p. 29.

^{5/} Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951, pp. 29 and 30.

^{6/} Official Records of the General Assembly, Sixth Session, Supplement No. 9 (A/1858), para. 19.

26. According to Lord McNair,

"The law leaves the negotiating parties completely free to create their own rules governing the question of reservations to the particular treaty in the negotiation with which they are concerned. They are at liberty to insert in the treaty a clause dealing with reservations, and it is in this way that they can comply in advance with the principle of unanimous consent, which is the basis of treaty obligations. Fidelity to this principle forms no obstacle to the desire to create greater flexibility in the matter of reservations in order to encourage and facilitate the universality of obligations, on the one hand, without destroying on the other hand the essential degree, though not necessarily the complete degree, of uniformity of obligation."

And he adds:

"What is vitally necessary is to draw the attention of groups of States engaged in negotiating a treaty to the imperative necessity of facing up to the question of reservations and inserting in each treaty the clause appropriate to it in that particular case, whether the clause forbids reservations or permits them. In the case of treaties negotiated under the auspices of the United Nations it is the practice of the Secretariat to do this, and it was expressly done when the Genocide Convention was being negotiated, but without result; for that Convention contained no article dealing with reservations." ^{7/}

I want to repeat: "for that Convention contained no article dealing with reservations".

27. Sir Hersch Lauterpacht, commenting on the projected International Bill of the Rights of Man, the idea from which this Convention emanated, stated:

"The dignity and effectiveness alike of the Bill demand that there should be no room in it for reservations of any kind or description. The Bill of Rights is a Bill of the fundamental rights of man. The idea of any reservations to them is, prima facie, objectionable . . . if reservations were to be appended in large numbers they would lend substance to the charge that governments hope to contrive to become parties to a basic international enactment without undue sacrifice." ^{8/}

28. It is not only the publicists who speak in this vein. In the drafting both of the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956, and of the UNESCO Convention against Discrimination in Education of 1960, the discussions now going on here took place. In these instances the reservations clause finally adopted was similar to that proposed by Chile and Uruguay to the draft covenants which state in essence: "Reservations to this Convention shall not be permitted."

29. It would perhaps be useful for our understanding of the problem if we listened to some of the arguments

^{7/} Lord McNair, *The Law of Treaties* (Oxford, Clarendon Press, 1961), pp. 169, 170.

^{8/} H. Lauterpacht, *op. cit.*, p. 390.

that finally won the day during consideration of the Slavery Convention.^{9/}

30. The Argentine representative, Mr. Beltramino, had suggested the deletion of the reservations clause. To this Miss Lunsingh-Meijer of the Netherlands demurred, arguing that the absence of a reservations article would raise serious difficulties and complicated legal questions. Mr. Jafri of Pakistan, in a penetrating analysis, stated that if reservations were to be allowed there would be little justification for all the efforts which had been made to secure a generally acceptable text, and added that whatever might be said about the sovereign rights of States, reservations detracted from the efficacy and advantages of any multilateral convention, whatever its object. Reservations were necessary only in cases where highly controversial articles had been forced through by the pressure of "brute majority" voting.

31. In the view of the French representative, Mr. Giraud, the main point to bear in mind was that conventions most commonly rested on compromises and, in those circumstances, reservations enabling States to accept what they liked and reject what they did not like would upset the balance of the convention and certain States would feel that they had been unfairly thwarted. The Turkish representative, Mr. Tuncel, objecting to the Argentinian proposal, said he had the impression that some delegations had the draft covenants on human rights particularly in mind and that they would not like any precedent to be created which would affect possible reservations to the covenants. This of course should not be a fear.

32. But perhaps the most articulate representation against deletion was that of the United Kingdom representative, Mr. Scott-Fox. He said that the opponents of the reservations article had based their objections on the principle that the inclusion of a non-reservations clause was incompatible with the sovereign rights of States. He disagreed. If, on becoming a party to the Convention, a State agreed that no reservations to it should be allowed, it would not be doing anything incompatible with its sovereign rights. Each case would of course have to be considered on its merits, but there were a certain number of conventions, including the present one, reservations to which would open the door to modifications that would destroy the fundamental value of the convention. It was in the interests of all States intending to become parties to the Convention that they should agree beforehand to allow no reservations. The International Court's advisory opinion in connexion with the Genocide Convention had not, in the opinion of many international lawyers, resolved the difficulties with respect to reservations. It was for that reason that, by its resolution 598 (VI), the General Assembly had recommended that organs of the United Nations, specialized agencies and States should, in the course of preparing multilateral conventions, consider the insertion therein of provisions relating to the admissibility or non-admissibility of reservations and to

the effect to be attributed to them. It was in accordance with that resolution and to avoid the many difficulties that reservations would create that the article on reservations had been included in the draft.

33. We have quoted the summary of Mr. Scott-Fox's statement extensively because it is cogent and apt and applies with full force to the present case; for, in our view, slavery is the mother of racial discrimination and we cannot understand a change of attitude with respect to the anti-discrimination Convention before us. Furthermore, none of the articles of the draft Convention of the elimination of all forms of racial discrimination has been adopted by "brute majority" voting, to use Mr. Jafri's words. Each has been the result of a deliberate and fine compromise and has been adopted almost overwhelmingly.

34. With respect to the UNESCO Convention on Discrimination in Education, it is pertinent to quote the report of the Special Committee of Governmental Experts, which met in Paris from 13 to 29 June 1960, on this question:

"The authors of the draft Convention, while mindful of the necessity of preparing a text capable of ratification by the largest possible number of States, felt that that consideration should not have the effect of detracting from the creative value of the text prepared or of weakening the principles and rules enunciated. The draft Convention accordingly precludes the possibility of States making reservations to it."

35. Most of the co-sponsors of the amendment before us share the viewpoints so ably stated by the publicists, governmental experts and governmental delegates, and we would have liked to introduce the Chilean-Uruguayan proposal that precludes reservations completely. However, in a spirit of compromise and to avoid a long debate in plenary, we are proposing this three-paragraph reservations article. One thing that all who are conversant with this subject are agreed upon is that the question of reservations must be squarely faced by the conference that adopts a multilateral convention. This is what the Secretary-General as depositary would want us to do; this is what we insist must be done.

36. First, recognizing the fact that all the Members of the United Nations have been afforded the opportunity to participate in the negotiation and adoption of the Convention, and that as a human rights instrument its reach must be universal, we have proposed in paragraph 1 that the Secretary-General, as the depositary of the Convention, should circulate any reservation among the signatory States indicated in article 17 of the Convention for their consideration. This is no innovation, for it has been applied by several conventions among which is the Convention on the Political Rights of Women. And as reasoned by the International Law Commission in its Yearbook of 1951, at the time a reservation is tendered, "a signatory State may be actively engaged in the study of the convention, or it may be in the process of completing the procedures necessary for its ratification, or for some reason, such as the assembling of its parliament, it may have been com-

^{9/} United Nations Conference of Plenipotentiaries on a Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery, Geneva, 13 August-4 September 1956.

pelled to delay its ratification." ^{10/} We share the opinion of the International Law Commission that the objection of such a State should have no legal effect but serve as indication of the State's attitude with respect to the reservation. Upon the ratification or accession of the State, however, its objection will become legally effective unless the objection is withdrawn. Thus States will have the opportunity to assess the eventual fate and effect of proposed reservations.

37. In paragraph 2 we have adopted the formulation of the International Court of Justice as to compatibility in its decision on the Genocide Convention in the first part of the first sentence, a fortiori applied to the second part of the sentence. In the second sentence we have provided that the objection of two thirds of the States Parties is tantamount to non-acceptance of the reservation. This is a departure from the traditional concept of unanimity and is one that was widely shared during the consideration of the question by the International Law Commission in 1962. It is similar to but even weaker than the proposal of the United Kingdom to the draft Convention which would deem a reservation to be accepted "if not less than two-thirds of the States to whom copies have been circulated in accordance with this article accept or do not object to it within a period of three months following the date of circulation". It is no innovation but it is a clause which this Assembly as master of its house can adopt to save the Convention from destruction and a great number of law suits over interpretation.

38. A suggestion that the International Court of Justice replace the States in this matter is untenable, for it is the States that have negotiated and will adopt this Convention. It is their intent which is vital to any judicial construction as to interpretation and it is they who must have the primary responsibility of guaranteeing the integrity of the Convention. Their actions, even if political, will be based on their understanding of the consensus achieved in adopting the Convention and as to the purpose and object they mutually had in mind when inserting the various articles. Of course, in the case of a dispute, the Convention, by article 21, will have given ultimate jurisdiction to the International Court of Justice.

39. The third paragraph is self-explanatory and needs no comment. Repetitious as it may sound, let me quote the advice of the International Law Commission on this question:

"It is always within the power of negotiating States to provide in the text of the convention itself for the limits within which, if at all, reservations are to be admissible and for the effect that is to be given to objections taken to them, and it is usually when a convention contains no such provisions that difficulties arise. It is much to be desired, therefore, that the problem of reservations to multilateral conventions should be squarely faced by the draftsmen of a convention text at the

time it is being drawn up; in the view of the Commission, this is likely to produce the greatest satisfaction in the long run." ^{11/}

40. Finally, let me emphasize that this Convention is the result of a remarkable compromise between gentlemen. We cannot therefore conceive of a State wishing to frustrate its object and purpose, an object and purpose that is already bound by the Charter, and most likely by its own Constitution, to realize. But if a State wishes to do this, then other like-minded States interested in the Convention are in duty bound to ensure the integrity of the Convention and to prevent it from becoming a variety of conventions.

41. Many of us were not here—in fact we were not independent—when the General Assembly unanimously adopted the resolution Mr. Scott-Fox referred to, but we are now loyal Members of the United Nations, and the Assembly's wishes are our commands. It is in this spirit that we propose our amendment. It is in this spirit that we expect it will receive unanimous approval.

42. Mr. BELTRAMINO (Argentina) (translated from Spanish): First of all, I should like to thank my friend the representative of Ghana for referring to the statement I made at the Conference on Slavery in 1956, which shows that our position in regard to the reservations clause is not of recent date. From the very first mention of the idea of introducing at this late hour in the General Assembly, when we are almost at the end of our labours, a new draft article concerning the reservations clause, we were opposed to it for the following basic reasons: in the first place, because the question of the submission of reservations is a very serious one, since it touches very closely on the question of the sovereignty of States, and because in the past, even in the United Nations, it has been handled in a great variety of ways according to the particular Convention involved, so that we cannot speak of uniform practice. Secondly, because the fact that the text was submitted so late made it impossible for delegations to have the proper consultations with their Governments.

43. We understand perfectly well the desire to ensure that reservations do not in any way undermine the Convention itself, which was drawn up with such labour and patience by the Third Committee. This seemed to us only common sense, and therefore we feel that oratorical displays indulged in for the purpose of attacking or defending the attitude of this or that country in the past are superfluous, simply because they are unnecessary. This is not the subject under discussion here. The question is whether a provision adopted in haste can serve the purposes of the Convention, the vigorous and unequivocal implementation of its clauses, and encourage its adoption by all States Members of the United Nations.

44. This twofold purpose was borne in mind constantly by my delegation and the other Latin American delegations while the Convention was being drawn up. Some will argue that the new article on reser-

^{10/} Yearbook of the International Law Commission 1951, Vol. II (United Nations publication, Sales No.: 57.V.6), document A/1858, para. 29.

^{11/} Official Records of the General Assembly, Sixth Session, Supplement No. 9 (A/1858), para. 27.

vations in document A/L.479 is too weak; others will find it acceptable. But there is no doubt about it—this is not just one further article in the Convention; the principles involved are of importance, as I feel sure my co-sponsors would agree.

45. We do feel that it is desirable to have a reservation clause in this Convention; but rather than incorporate in the text a clause which has not been fully weighed, a clause on which Governments have not been properly consulted, it would be better from every point of view not to have any clause on reservations whatever. This is a special kind of Convention with a peculiar system of implementation, and it deals, moreover, with a problem whose solution will be under constant supervision by a special committee and by the General Assembly. Hence we do not feel that reservations appropriate to earlier conventions can be adapted to suit it, at least not without thorough study.

46. Our attitude is one of principle, although we agree that even if there is no reservation clause, reservations must not inhibit the aims and purposes of the Convention, the noble humanitarian and practical ends it is designed to subserve. If they did, we should regard it as a calamity. We do not feel it is acceptable, merely because it has not been possible to produce a better formula or out of a desire to restrict the reservations that a particular State may make, simply and solely to decide that reservations shall be subject to the approval of two thirds of the States Parties to the Convention. Even without any such proviso, there is nothing to prevent the Committee provided for in the Convention from entering into negotiations with the State or States concerned with a view to inducing them to reconsider their attitude—a point which is not covered by the thirty-three-Power amendment [A/L.479], and even with a view to making suggestions to the General Assembly regarding the reports which the State involved has to submit. This way might be less spectacular than requiring sanction by a two-thirds majority, but it might also be more effective in practice. My delegation will therefore be unable to vote for the draft article in its present form.

47. I would now like briefly to introduce the amendment appearing in document A/L.480. It refers to article IV (a) of the Convention and is very simple. Its purpose is to remove an inconsistency in the text as it stands. We decided to submit this text in the light of other amendments to the Convention already submitted. We should like to make it emphatically clear at the outset that we resolutely support the provisions of article IV in so far as they provide for penalties to be imposed by law on organizations practising racial discrimination, propaganda activities, acts of violence and the incitement or promotion of discrimination. Here again, our position is not new. As is well known, in 1963, when the Declaration on the Elimination of All Forms of Racial Discrimination was considered, it was the Argentine delegation that proposed—and the proposal was subsequently adopted by the General Assembly [resolution 1904 (XVIII)]—that consideration should be given to the question of both the promotion of and incitement to racial discrimination. In fact, we went even further

here than article IV (b). It is also a well-known fact that the Argentine penal code lays down a number of penalties for such discrimination with a view to preventing any discrimination that may arise in the future. Our position is thus clear and unequivocal in the matter.

48. Secondly, at the very outset, when the Committee considered an amendment to article IV (a) condemning the mere oral or written expression of the notion of superiority of one race over another, my delegation and others as well were flatly opposed to this. Our attitude is thus one of principle and is consistent. What we are anxious to condemn and proscribe as categorically as possible is not the fact that, for example, a scientist may publish a document pointing out differences between individuals of different races, as has occurred in the past and as still happens today, nor public discussions on such subjects between two or more persons. What we condemn is any incitement to racial discrimination as a result of such publications or discussions. In this event the State must take vigorous action at all times to nip in the bud incitement to racial discrimination by such means.

49. This, then, is the limit of freedom of speech as we understand it. The mere expression of ideas is not in itself punishable if it is not accompanied by incitement to discrimination or racial hatred. This is the aim of those who genuinely want the Convention. There are, admittedly, certain qualifications in the introductory part of article IV, but we are most concerned that this Convention—as we have desired and urged from the outset—shall be as perfect as possible, avoiding provisions of any kind likely to lead to abuse or misinterpretation which it might be difficult to remedy. This is why we state quite unequivocally in our amendment that all incitement to racial discrimination, no matter what form it may take, shall be punishable by law. We have particularly added, in order to preserve the original idea of the text, the question of discrimination based on racial superiority or hatred, on which we are entirely in agreement. We consider that in this way article IV (a) is satisfactorily rounded off and the purposes of the Convention are duly fulfilled.

50. Finally, I should like to reply to the point raised by the representative of Ghana in order to set the record straight. Contrary to what he said, there has never, I repeat never, been any compromise with the members of the Latin American group nor with certain other delegations regarding the drafting of this article. A compromise requires action on the part of all the parties to the negotiations.

51. Mrs. CABRERA (Mexico) (translated from Spanish): The Mexican delegation regards the draft international Convention on the Elimination of All Forms of Racial Discrimination as a document of singular importance in the effort to put into practice the lofty principles set forth in the Declaration of Human Rights. For this reason, it bears in its train important innovations which must be examined in absolute freedom by the various Parliaments or Houses of Representatives which make it possible for the Governments of Member States to ratify the Convention.

52. The delegation of Mexico collaborated in an honest and unwavering manner with the majority of the members of the Third Committee to adopt a text which would receive unanimous support. Unanimity was achieved as a result of concessions on all sides based on mutual understanding and goodwill. To introduce amendments which, in one way or another, have already been rejected by the Third Committee would upset the balance achieved and force delegations to reconsider their position in the matter.

53. We believe that the Mexican legislature should be left absolutely free to consider the various implications of the Convention. Majority acceptance of an article such as that envisaged in document A/L.479 severely restricts this freedom and prejudices the action which the Mexican legislature may take.

54. For this reason, and despite the fact that in its domestic and international policies alike, the Mexican Government has championed in the past and will continue to champion the concept of racial non-discrimination, my delegation feels obliged to vote against this amendment; and if it is adopted, we shall have to abstain from voting on the draft Convention as a whole.

55. The PRESIDENT (translated from French): We shall now proceed to vote, beginning with the thirty-three-Power amendment [A/L.479] to part III of the annex to draft resolution A [A/6181, para. 212]. The amendment calls for the insertion of a new article 20 in the draft Convention. A separate vote has been requested on the second sentence of paragraph 2 of the article, which reads as follows:

"A reservation shall be considered incompatible or inhibitive if at least two thirds of the States parties to the Convention object to it."

I now put this sentence to the vote. A vote by roll-call has been requested.

The vote was taken by roll-call.

Mali, having been drawn by lot by the President, was called upon to vote first.

In favour: Mali, Mauritania, Mongolia, Morocco, Nepal, Nigeria, Pakistan, Philippines, Poland, Romania, Rwanda, Saudi Arabia, Senegal, Sierra Leone, Somalia, Sudan, Syria, Togo, Trinidad and Tobago, Tunisia, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, Upper Volta, Uruguay, Yemen, Yugoslavia, Zambia, Afghanistan, Algeria, Bulgaria, Burundi, Byelorussian Soviet Socialist Republic, Cameroon, Chad, Congo (Brazzaville), Cuba, Cyprus, Czechoslovakia, Dahomey, Ethiopia, Gabon, Ghana, Guinea, Hungary, India, Iran, Iraq, Ivory Coast, Jamaica, Japan, Jordan, Kenya, Kuwait, Laos, Lebanon, Liberia, Libya, Madagascar, Malawi.

Against: Mexico, Panama, Paraguay, Peru, Spain, United States of America, Venezuela, Argentina, Australia, Belgium, Bolivia, Colombia, Costa Rica, Dominican Republic, El Salvador, France, Guatemala, Honduras.

Abstaining: Netherlands, New Zealand, Norway, Portugal, Sweden, Thailand, Turkey, United Kingdom of Great Britain and Northern Ireland, Austria, Brazil, Burma, Canada, Ceylon, Chile, China, Congo (Democratic Republic of), Denmark, Finland, Greece, Haiti, Iceland, Ireland, Israel, Italy, Luxembourg, Malaysia, Maldives Islands.

The sentence was adopted by 62 votes to 18, with 27 abstentions.

56. The PRESIDENT (translated from French): I now put paragraph 2 to the vote.

Paragraph 2 was adopted by 76 votes to 13, with 15 abstentions.

57. I now put the amendment as a whole to the vote.

The amendment as a whole was adopted by 82 votes to 4, with 21 abstentions.

58. The PRESIDENT (translated from French): I invite the Assembly to vote on the five Power amendment [A/L.480] to part I of the annex to draft resolution A. It refers to article 4 (a) of the draft Convention.

The amendment was rejected by 54 votes to 25, with 23 abstentions.

59. The PRESIDENT (translated from French): I would remind representatives that the Fifth Committee has submitted a report [A/6182] on the financial implications of adoption of the draft Convention. The report refers in particular to part II of the annex to the draft resolution, i.e., part II of the draft Convention.

60. I now put to the vote draft resolution A, as amended. A roll-call vote has been requested.

The vote was taken by roll-call.

The Philippines, having been drawn by lot by the President, was called upon to vote first.

In favour: Philippines, Poland, Portugal, Romania, Rwanda, Saudi Arabia, Senegal, Sierra Leone, Somalia, Spain, Sudan, Sweden, Syria, Thailand, Togo, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Upper Volta, Uruguay, Venezuela, Yemen, Yugoslavia, Zambia, Afghanistan, Algeria, Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Burma, Burundi, Byelorussian Soviet Socialist Republic, Cameroon, Canada, Ceylon, Chad, Chile, China, Colombia, Congo (Brazzaville), Congo (Democratic Republic of), Costa Rica, Cuba, Cyprus, Czechoslovakia, Dahomey, Denmark, Dominican Republic, El Salvador, Ethiopia, Finland, France, Gabon, Ghana, Greece, Guatemala, Guinea, Haiti, Honduras, Hungary, Iceland, India, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Jordan, Kenya, Kuwait, Laos, Lebanon, Liberia, Libya, Luxembourg, Madagascar, Malaysia, Maldives Islands, Mali, Mauritania, Mongolia, Morocco, Nepal, Netherlands, New Zealand, Niger, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru.

Against: None.

Abstaining: Mexico.*

Draft resolution A, as amended, was adopted by 106 votes to none, with 1 abstention.

61. The PRESIDENT (translated from French): I now put to the vote draft resolution B [A/6181, para. 212].

Draft resolution B was adopted by 98 votes to none, with 7 abstentions.

62. The PRESIDENT (translated from French): With regard to the resolution just adopted, I am informed that it will take some time to prepare copies of the Convention for signature. As soon as the copies are ready, the date for signature will be announced in the United Nations Journal. This will enable Governments wishing to sign the Convention to grant the appropriate full powers to their plenipotentiaries.

63. I shall now call on each of the representatives in turn who wish to explain their votes.

64. Mr. OSPINA (Colombia) (translated from Spanish): I asked permission to speak before the vote, and it seems to me that this raises a point of order, because one reason why I wanted to speak was to ask for a separate vote on certain sentences or phrases in article 4. With this in mind—and I hope that the Assembly will take due note of it—I shall say what I would have said prior to the voting.

65. The Third Committee approved the draft International Convention on the Elimination of All Forms of Racial Discrimination in a text which appears in document A/6181 of 18 December 1965. If this draft is adopted by a majority vote, it will go from the Assembly to the States which are parties to the Convention for ratification in accordance with the terms set forth in the Convention.

66. My delegation has worked with tremendous zeal in order to give this humanitarian draft such force that it could become an international covenant with which States Members of the United Nations would comply. To achieve this, it would have to be in keeping with the spirit and the letter of the universal principles of law as well as with the constitutional principles of Member States; and this has proved extremely difficult in spite of the fact that the sponsors in the Committee itself made concessions towards extending the bounds of international positive law and eliminating errors in the text.

67. Nevertheless, certain articles of the Convention still embody extremist clauses which are unacceptable because they are at variance with the political constitutions of particular countries, and this will mean that reservations will be made when the draft is voted upon and at the time of ratification once it is converted into a covenant.

68. As far as the political constitution of Colombia is concerned, the enshrinement of the liberties in it is based on the recognition of the rights of the human person, and these rights are safeguarded up to the point where the rights of others or the rights of the

community begin. However, if the law or international treaties attempt to restrict these freedoms in the interest of the community or of mankind, this can only extend to the point at which the principle of freedom remains intact—in other words, personal freedom can be regulated but not encroached upon.

69. The Colombian constitution is based on the principles of Rousseau, adjusted in the light of the advances made in the social field; and individualism has had to and still has to make concessions in the interests of the community, without stamping out the individual, without encroaching upon his freedom, respecting his right to think and to express his deliberate decisions in actions or words.

70. Freedom of thought has been violently curtailed by tyrants throughout the course of history, by the Inquisition and by those who in the name of royal powers opposed the independence of the Americas. These are facts which show clearly that to penalize ideas, whatever their nature, is to pave the way for tyranny, for the abuse of power; and even in the most favourable circumstances it will merely lead to a sorry situation where interpretation is left to judges and law officers. As far as we are concerned, as far as our democracy is concerned, ideas are fought with ideas and reasons; theories are refuted with arguments and not by resort to the scaffold, prison, exile, confiscation or fines.

71. For these reasons we ask for a separate vote on the phrase "based on ideas or theories" in the second line of the first paragraph of article 4, and "of ideas based on superiority or hatred" in the first line of article 4 (a). If these phrases are not rejected, my delegation would like to enter reservations on them here and now.

72. Moreover, we believe that penal law can never presume to impose penalties for subjective offences. This barbarous practice is merely the expression of fanaticism such as is found among uncivilized people and is hence proscribed by universal law. Here, therefore, is one voice that will not remain silent while the representatives of the most advanced nations in the world vote without seriously pondering on the dangers involved in authorizing penalties under criminal law for ideological offences. The interpretation of article 4 to which I referred not only stipulates punishment for individuals but for organizations as well. It is known that juridical persons, let alone juridical persons associated for political purposes, are not subject to penal sanctions or the passive object of criminal law. Article 4, in the terms in which it is drafted, is legally unsound, in addition to having the constitutional defects I have pointed out.

73. The Colombian Parliament will not authorize ratification of a covenant at variance with the political constitution of the country and with the tenets of public law. Colombia practises freedom of ideas and will not depart from the principles underlying its civilization.

74. My delegation is eager for this convention to be adopted. There are no racial problems in Colombia. There is crossing of blood; men are valued for their

*The Mexican delegation subsequently informed the Secretariat that it would like Mexico to be included in the list of delegations voting in favour of draft resolution A.

virtues as citizens; coloured persons occupy and have always occupied the highest public offices side by side with whites; races live in harmony and merge without more ado, because it is a commonplace occurrence. There, in the crucible of Latin America, the blood and the races of the future meet and mingle; and since there is no discrimination of any kind in Colombia, my delegation felt that it could freely and frankly analyse article 4. And we find that in its present wording it is a retrograde measure instead of being a step forward on mankind's road towards the future.

75. In conclusion, may I—again in explanation of my vote—point out certain faults we have found with article 15 of the Convention. This provision establishes a special situation in respect of the territories referred to in General Assembly resolution 1514 (XV) of 14 December 1960. This exceptional treatment provided for in article 15 in regard to the right of petition, converting it into something resembling a new right which might be described as a right of direct petition since it does not involve intervention by the State concerned, the Committee being informed through the competent bodies of the United Nations, arouses misgivings on the part of my delegation precisely because of its exceptional nature.

76. At first sight it would seem that a political problem is being injected into the Convention, whereas my delegation is conscious of the fact that the aim of the Convention is eminently humanitarian. Thus problems are created in the United Nations itself, issues being transferred from one committee to another without any apparent authorization to do so. Administering Powers might feel that there was some derogation from their sovereignty and that they are exposed to the danger of violation for want of clarity in the rules applied.

77. My delegation believes that since the colonial status of certain Territories constitutes a temporary legal situation, this provision too should be temporary and not permanent. My delegation will abstain from the voting on this article, with the exception of paragraph 1, for which we intend to vote.

78. I shall not refer to the amendment to article 20 [A/L.479], since I am entirely in agreement with the views expressed by the representatives of Argentina and Mexico. A few days ago the United States representative, speaking in the Third Committee [1373rd meeting], said that this Convention was more than a mere restatement of laudable principles. That is true: the Convention is a resounding victory, which must not be demeaned by political issues.

79. Mr. VERRET (Haiti) (translated from French): The delegation of Haiti, in spite of the reservations it expressed in the Third Committee concerning certain paragraphs of the various articles of the draft International Convention on the Elimination of All Forms of Racial Discrimination, voted for the draft Convention as a whole, even though it still has some misgivings concerning the full effectiveness of the measures of implementation. It also approved the report of the Third Committee on this subject as an absolute imperative of the present time, when

human passions are revealed as more deadly than the most modern weapons.

80. Now, heaven be praised, we have produced a document of which the least that can be said is that it is reasonably reassuring. We applaud it, and we join in the chorus of authoritative voices of the nations assembled in this Hall to intone in all solemnity the hymn of reconciliation among the races which fantastic theories tend to divide, vaunting the supremacy of some peoples over others regarded as inferior and hence despised and held in servitude, if not indeed destined for utter annihilation. That was the judgement of Gobineau and his disciples with their theory of the inequality of human races; of the German philosopher Nietzsche, the champion of force, in his famous book Thus Spake Zarathustra; and a whole series of sorcerers' apprentices who came after them. They ignored the fact that in the beginning, when men dwelt in caves, no matter where they were such ideas had not yet occurred to them, and they formed groups and mingled together all on the same footing in their fierce struggle against the wild beasts and the elements they had not yet subdued.

81. We have no desire to dwell on the controversial writings of specialists in anthropology or genetics. We in the Republic of Haiti, ever since the days when our African ancestors freed themselves from the diabolical colonial yoke, have always practised tolerance towards all races, in accordance with our laws and customs, in spite of the tortures of every kind inflicted on our forefathers and the ostracism suffered by our country because of our ethnic origins. We have practised tolerance in the belief that all races are on a par and that the barriers set up between them have been erected through the ages merely as a sequel to struggle and conquest, where the victorious side subjugated the other and regarded the race of the vanquished as inferior to its own. That was the way with the civilizations that have died out, and it is the same with the new civilizations.

82. There is no need to cite the ancient empires, whose doleful fate the history books recount, except to recall that the instinct to dominate has ever been one of the characteristics of the human species, and that men today, in spite of the new gospels preached by the wise men of every part of the world, still confront each other in antagonistic ideologies whose baleful shadows cast gloom over the places where they fall. History is like the sea, ever beginning anew, and men have not changed over the ages. Confronted with its prey, the beast shows its claws.

83. Thus, to safeguard the higher interests of an epoch, the colonial Powers regarded Haiti as fair game throughout the last century, following the proclamation of its independence, because for them it set a dangerous example.

84. Libelled by racist writers and theorists who claimed that in Haiti's first steps as a sovereign nation they detected a congenital inferiority inherent in the black race; isolated by the Powers which made no move to recognize it; and excluded, only recently still, from international gatherings, Haiti neverthe-

less fulfilled its destiny. This island, the home of a free people, proud of its origins, pursuing its onward and upward march, slowly but surely, despite the obstacles of every kind deliberately placed in its path, towards progress and modern civilization, in peace and dignity at all times, under the enlightened leadership of a just and learned Chief of State, H.E. Dr. François Duvalier, Life President of the Republic. And because though our forefathers were oppressed we still believe in a better future, we share the distaste felt by the majority of the peoples of the world for all forms of racial discrimination, no matter by what means they are called: anti-semitism, colonialism, nazism, apartheid and all such, past and present. They are all of them as degrading as the minds that conceived them.

85. It is most gratifying that after centuries during which the war-lords have caused the destruction of so much life and property, the nations represented here have approved this international Convention on the Elimination of All Forms of Racial Discrimination, for the purpose of promoting greater understanding among peoples and building a new world where, in an atmosphere of more brotherly, more just and more human feelings, the smoke from the pipe of peace will bring with it progress and happiness to nations sincerely reunited.

86. The peoples of the world will be grateful to us Member States if we are able to respect this Convention. Let us at least wish it long life, so that the peace so dear to the hearts of men may reign on earth.

87. In conclusion, the delegation of Haiti pays homage to the members of the Third Committee and the General Assembly for this meritorious effort, which represents a new landmark on the path to social progress.

88. Mr. LAMPTEY (Ghana): A generation ago, a young African student landed on the shores of these United States in pursuit of higher learning. He slept on the subways of New York City and rubbed shoulders with the workers in the shipyards of Pennsylvania. Alone in a strange country, he came face to face with racial discrimination.

89. A decade later he left for the United Kingdom, and there again, in the lower-class restaurants of Camden Town and Tottenham Court Road in London, he was to experience the subtlety of racial discrimination.

90. He did not become a bitter man in consequence of those experiences: he became a better man. For he became convinced that if an honest and enduring relationship between men of different races and ethnic origins must come, it must be preceded by the elimination of all forms of racial discrimination.

91. Osagyefo Kwame Nkrumah, the man of whom I speak, has with determination and consistency employed the influence and power that destiny has bestowed upon him to ensure the total eradication of this cancerous tumour from the face of the earth. It is for this reason that he can never, and his people will never, consider the struggle of the Americans of African descent for equality as an

isolated struggle peculiar to them; nor can he and his people remain immune from the privations suffered by millions of black men in the southern part of Africa.

92. It is in the name of this leader, and the nation of which he is the architect, that my delegation has been proud to vote for the adoption of this International Convention on the Elimination of All Forms of Racial Discrimination.

93. In explaining our vote, let us state that we are not completely satisfied with the Convention just adopted, for we would have hoped that, seven centuries after the Magna Carta declared "...to no one will we refuse or delay right or justice"; more than a century and a half after the American Declaration of Independence asserted that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness"; 172 years after the French Declaration of the Rights of Man and Citizen proclaimed that "forgetfulness and contempt of the natural rights of men are the sole causes of the miseries of the world"; almost half a century after Lenin proclaimed the brotherhood of man; twenty years after the great Charter of the United Nations reaffirmed "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women...", and seventeen years after we, through the Universal Declaration of Human Rights, declared that "all are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination", the representatives of Governments here gathered would have adopted a strong Convention able to insure the speedy disappearance of racial discrimination, that dogma and practice which is a travesty of the very essence of justice. But, alas, realism dictated that we take an infant step. Let me therefore register the hope of my Government and people that the Convention just adopted will, in a few years, be subject to revision, and a more effective instrument adopted.

94. "...That the great and terrible war which has now ended was a war made possible by the denial of the democratic principles of the dignity, equality and mutual respect of men, and by the propagation, in their place, through ignorance and prejudice, of the doctrine of the inequality of men and races." These are the words of the preamble to the Constitution of UNESCO. It was Santayana who remarked that he who does not know the past is doomed to repeat it. In taking this first step in providing the nations of the world with a multilateral treaty for the elimination of all forms of racial discrimination, a treaty capable of enforcement, we have demonstrated our capacity not to forget. Let us then hope that the nations of the world will demonstrate their commitment to this purpose by faithfully adopting and executing the principles enshrined in this Convention. Then the day may yet come when it can truly be said, as it was said by Confucius twenty-five centuries ago, that: "Within the Four Seas all are Brothers."

95. My delegation has been proud and honoured to participate in the drafting and adoption of this Convention, and we thank those who joined us in this collective task. If in the process we have seemed impatient, we beg forgiveness, for we meant no offence to anybody—but we were dedicated to the conclusion of this task.

96. We leave this rostrum convinced that, because of what you have done today; when the story of the twentieth session of the General Assembly comes to be told, it can well be said, as it was once said by a great war leader: This was its finest hour.

97. Miss WILLIS (United States of America): It is a source of deep satisfaction to the United States delegation that the Committee, under the skilful and patient leadership of its able Chairman, successfully persisted in the arduous task of drafting the International Convention on the Elimination of All Forms of Racial Discrimination. The adoption of this Convention will certainly be one of the main achievements of this session. All delegations which worked hard to achieve this result are to be congratulated.

98. The United States voted for the Convention as a whole because we agree with its constructive humanitarian objectives. It is more than a statement of lofty ideals. It provides machinery for implementation which goes well beyond any previous human rights instrument negotiated in the United Nations. It is inevitably a complex document and will require careful study not only by my Government but also, I am sure, by many other Governments.

99. It is not appropriate here to recapitulate even the substance of statements made by the United States representative in the Third Committee on various articles. For the record, however, here in this Assembly, I wish to state that the United States understands article 4 of the Convention as imposing no obligation on any party to take measures which are not fully consistent with its constitutional guarantees of freedom, including freedom of speech and association. This interpretation is entirely consistent with the opening paragraph of article 4 of the Convention itself, which provides that, in carrying out certain obligations of the Convention, States Parties shall have "due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention". Article 5, in turn, lists, among the rights to be guaranteed without distinction as to race, colour, or national or ethnic origin, the right to freedom of opinion and expression.

100. Let me now turn very briefly to the question of the reservations article. My delegation believes that it would have been better for this Convention not to contain an article on reservations. The absence of such an article need not have impaired the effectiveness of the Convention. The omission of an article on reservations would, however, have made possible the acceptance of the Convention by a greater number of States, thereby contributing to the eradication of racial discrimination over a wider area.

101. We think it would have been preferable in this Convention, if there had to be an article on reser-

vations, for it to provide for a judicial decision on the question of whether a reservation made by a State was or was not compatible with the object and purpose of the Convention.

102. What I have said explains why we abstained from voting on the article contained in document A/L.479. Notwithstanding our difficulties with some aspects of the text, we welcome the adoption of this Convention by the General Assembly. We hope that it will help in bringing to an end the evils of racial discrimination, for racial discrimination has no place in the world we, the peoples of the United Nations, are seeking to build.

103. Mr. COMBAL (France) (translated from French): The French delegation would have liked to be able to rejoice unreservedly in the adoption by the General Assembly of a draft international Convention on the Elimination of All Forms of Racial Discrimination. For that reason we regret that we felt obliged this morning to oppose the adoption of the amendment [A/L.479] to insert a new article 20 in the text of the draft Convention.

104. While paragraph 3 of this document merely reiterates generally recognized international principles, paragraphs 1 and 2 introduce new ideas which my delegation cannot endorse.

105. In the first place, paragraph 1, because of ambiguous or perhaps merely inept drafting, would be likely to extend beyond the sphere of the States parties to the Convention the procedure for examining reservations and make it possible for States that are not and never will be parties to the Convention to be seized of reservations submitted by others which had decided to accede to the Convention.

106. The French delegation likewise felt obliged to vote against paragraph 2. The admissibility of ratifications or accessions subject to reservations should be decided upon normally by each Contracting State on the basis of legal considerations; but the procedure envisaged—the submission of such decisions for approval by a two-thirds majority of the Contracting States—does not respect that rule; it introduces into the draft Convention not only a principle foreign to the spirit of a contractual instrument, but also an element of a political nature calculated to distort the purpose and scope of the instrument.

107. The French delegation was nevertheless able to vote in favour of the draft international Convention as a whole. To be sure, several of its provisions, in addition to the new article 20 just added by the General Assembly, evoked criticism and reservations. Moreover, there are still too many places where the text transmitted by the Third Committee has shortcomings attributable to the *ad hoc* nature of the wording used and the undue haste with which the Committee frequently had to take decisions. However, the lofty moral and humanitarian aims of this instrument, combined with the need to provide the international community with a text, even though an imperfect one, which should at any rate help it to remove this blot on human society—racial discrimination—seemed to my delegation reasons enough for waiving our difficulties and joining with

those who have supported the Convention on the Elimination of All Forms of Racial Discrimination.

108. Mr. BOSCO (Italy) (translated from French): The Italian delegation has given its enthusiastic approval to the draft International Convention on the Elimination of All Forms of Racial Discrimination, which was discussed at great length by the Third Committee and carefully drawn up by eminent jurists.

109. We are convinced that today's date will constitute a landmark in the history of the United Nations. The document submitted to us for approval is not merely the outcome of heavy labours and close cooperation within the Organization; it is first and foremost a solemn affirmation of the will of the peoples of those nations to do away once and for all with abominable doctrines and practices which for too many centuries, and until the present day, have been the cause of suffering and manifold distress. No one can fail to remember the millions of victims that racial hatred and anti-semitism have made in our generation. No one can fail to be conscience-stricken and revolted by the policy of racial segregation which, alas, is still rife today. It is hardly necessary to recall here how many times the voice of the United Nations has been raised, affirming that all forms of racial discrimination are an offence to the dignity of the human person and that therefore they cannot be justified de jure, let alone tolerated de facto in any shape or form.

110. The Universal Declaration of Human Rights has pointed the way for us. The draft Convention just adopted is the means, the tool forged by the United Nations for attaining the ends of the Declaration. It is now for our countries, our Parliaments and Governments, to become parties to the Convention and adopt the measures they deem most appropriate for implementing it.

111. In conclusion, I am happy to declare here on behalf of my delegation that the affirmative vote we have cast is the solemn expression of our full moral support for the principles and obligations of this Convention, which the law and policies of the Italian Republic has always supported.

112. Mr. MOROZOV (Union of Soviet Socialist Republics) (translated from Russian): The Soviet delegation voted in favour of the adoption of the Convention on the Elimination of all Forms of Discrimination. We believe that the Convention just adopted will be warmly welcomed by world public opinion and that its adoption will be regarded by all progressive people as an event of great international importance.

113. Racism and racial discrimination are such shameful and odious products of imperialism and colonialism that all peoples and all decent human beings are resolutely demanding that they be ended.

114. Even now the policy of racism and racial discrimination is still causing millions of people mental and physical suffering and constituting a source of hostility and conflict not only in relations between individuals and peoples but also between States, thereby creating an immediate threat to international peace and security.

115. We all know—and there is no need to dwell on the subject at this time—that there is abundant and irrefutable evidence that racist ideas and policies still prevail in a number of countries in the fields of administration, the economy, education, public health, social security, family relations and the like.

116. Hence the adoption of the Convention on the Elimination of All Forms of Racial Discrimination is a logical development of the historic United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples, and of the Declaration on the Elimination of All Forms of Racial Discrimination, adopted earlier by the General Assembly [1904 (XVIII)].

117. Today, at its twentieth session, and on the twentieth anniversary of the founding of the United Nations, the General Assembly has added a memorable page to the annals of the Organization.

118. The delegation of the Soviet Union, representing the peoples of the Soviet State, who feel the deepest sympathy and understanding for peoples who have to endure apartheid, segregation and other manifestations of racism, has made every effort to help to formulate a meaningful convention on the elimination of all forms of racial discrimination. The drafting of the Convention revealed that, despite the fact that racism has been branded as a most grievous crime against mankind, and despite the adoption of a special declaration resolutely condemning racism and all forms of racial discrimination, there is still a tendency on the part of certain States to hinder the implementation of these United Nations decisions, to emasculate them, to interpret these documents in such a way as to reduce to nothing or belittle their practical significance. Interpretations of this kind have been put forward in the Third Committee also and reflected in the statements of some speakers at the present session of the General Assembly. It is also a regrettable fact that they are advanced precisely by delegations of countries which, like the United States for example, have so far obstinately refused to ratify agreements and conventions previously prepared by the United Nations and designed to promote the fulfilment of one of the tasks laid down in the United Nations Charter—the task of promoting universal respect for human rights and fundamental freedoms without distinction as to race, sex, language or religion.

119. It should also be pointed out that there are various other conventions, adopted earlier by the United Nations, which are still awaiting the signature of the countries whose delegations have spoken in the Third Committee, at this session of the General Assembly, also, of restricting in one way or another the Convention which we have just adopted. Suffice it to mention such instruments as the Convention against Discrimination in Education^{12/} and even such an important convention as the Convention on the Prevention and Punishment of the Crime of Genocide.^{13/}

^{12/} Convention against Discrimination in Education, adopted by the General Conference of UNESCO at its eleventh session (Paris, 14 December 1960).

^{13/} Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide (General Assembly resolution 260 (III), annex).

120. As regards the Soviet people, we are convinced that the General Assembly's decision to adopt the Convention will be fully appreciated by all the peoples of our multinational State.

121. In 1917 the Soviet people were the first in the history of mankind to put an end to discrimination and all other manifestations of the imperialist system of exploitation. More than 110 nationalities, drawn together by bonds of indissoluble friendship, go to make up the 230-million-strong people of the Soviet Union. To our people all questions connected with the elimination of racism and other forms of discrimination are a thing of the past—they are history. Soviet law strictly prohibits all forms of racial discrimination. We need only recall that the Constitution of the Soviet Union, as well as the Constitutions of all fifteen Union Republics and of all thirty Soviet Autonomous Republics, clearly establish the equality of all citizens, regardless of their race or national origin, in all fields—economic, political and social—as an immutable law. Any direct or indirect limitation of rights whatsoever or, conversely, the establishment of any direct or indirect privileges for citizens on account of their race or national origin, is punishable by law, as is any advocacy of racial or national exclusiveness or hatred and contempt.

122. We should like, in conclusion, to emphasize that it is the duty of the United Nations to ensure that the provisions of the Convention are implemented in the very near future and are strictly observed everywhere.

123. Lady GAITSKELL (United Kingdom): We did, of course, vote in favour of the Convention as a whole because we strongly support the general objectives and purposes of that Convention. We also voted for article 20 as a whole because, as the representative of Ghana pointed out, we have already on previous occasions made clear our opposition in principle to the placing of reservations on articles of implementation. We were glad to see that some of our colleagues shared this view.

124. We still, however, maintain our objections to article 15. These objections were explained in detail in Committee and there is no need for me to repeat them. Nothing has been said to refute them. The Ghanaian representative's arguments seem to turn on the assertion that the right to petition has already been granted by the Charter. This is, of course, not the case except to inhabitants of Trust Territories.

125. I shall confine myself to reiterating the general criticism of article 15 already expressed in the Third Committee by an able and distinguished colleague: it represents bad politics and worse law.

126. Mrs. MANTZOULINOS (Greece): My delegation voted for the deletion of the reservations clause when the vote was taken in the Third Committee [1368th meeting] because, in view of the amendments proposed to the draft, we thought that deletion was a better solution, taking into consideration the fact that a number of United Nations and specialized agencies conventions had not included a reservations clause. The reservations formula would permit any reservation by any State party to the Con-

vention or to any article of the Convention and, according to United Nations procedure, communication through the Secretary-General of such reservations to all States parties to the Convention, for their acceptance or disagreement.

127. In the absence of a reservations clause in a given convention, under United Nations practices and in conformity with the principles of international law no reservation could be entered into by a State if it were incompatible with the object and purposes of the convention.

128. The amendment submitted to the Assembly today [A/L.479], interpreting these principles of international law, seemed acceptable to my delegation and we voted in favour of it.

129. However, the last phrase of paragraph 2, providing that it is up to the States parties to decide, by a two-thirds majority, what is incompatible or inhibitive with regard to the object of reservations, seemed to us not a familiar clause in the proceedings of international conventions. We would have preferred to have this matter decided upon by a juridical body, rather, such as the Legal Section of the United Nations Secretariat, which would accordingly give its competent opinion on reservations entered into by States at a time of ratification or accession. This stage was provided for by the Convention.

130. Under the circumstances, however, we abstained on the last phrase of paragraph 2, but voted in favour of paragraph 2 as adopted, with the retention of its last phrase.

131. In explaining its vote in favour of resolutions A and B respectively preceding and following the text of the Convention [A/6181, para. 212] the delegation of Greece whole-heartedly welcomes the adoption of the Convention by the General Assembly. Despite some imperfections in the text, my delegation considers it an outstanding United Nations instrument, an achievement in international life. We are confident that it will effectively meet its purposes and objectives; namely, to combat racial discrimination in all its forms, and thus serve the great cause of human rights and human dignity.

132. Mr. BAROODY (Saudi Arabia): Racial discrimination should have been an anachronism a long time ago. Unfortunately, there are still certain countries and societies which practice racial discrimination, despite the fact that their national Constitutions forbid it. It is our fervent hope that the Convention we have just approved will reaffirm the right of all peoples, regardless of the colour of their skin.

133. I am happy to note that reservations have no place in such a Convention. We trust that it will not be too long before all the vestiges of racial discrimination will have disappeared from the face of this earth. The Convention has reaffirmed the fact that the United Nations, in its totality, believes that we all belong to the same human family.

134. Finally, it is indeed auspicious that the Convention has been adopted during the session which has been presided over by a scholarly, gentle and noble son of Italy—Italy, which has played a historic role in humanism, in art and in culture.

135. The PRESIDENT (translated from French): I call on the Secretary-General.

136. The SECRETARY-GENERAL: It is with great pleasure that I welcome the adoption by the General Assembly, at this twentieth session, of the International Convention on the Elimination of All Forms of Racial Discrimination.

137. I am convinced that the Convention will constitute a most valuable instrument by which the United Nations may carry forward its efforts to eradicate the vestiges of racial discrimination wherever they may persist throughout the world.

138. In the Charter, the peoples of the United Nations proclaimed their determination to reaffirm faith in fundamental human rights and in the dignity and worth of the human person. The Convention which the General Assembly has just adopted represents a significant step towards the achievement of that goal. Not only does it call for an end to racial discrimination in all its forms; it goes on to the next, and very necessary, step of establishing the international machinery which is essential to achieve that aim.

139. Since the Universal Declaration of Human Rights was adopted and proclaimed on 10 December 1948, the world has anxiously awaited the completion of other parts of what was then envisaged as an International Bill of Human Rights, consisting of the Declaration, one or more international conventions, and measures of implementation. That is why the adoption of this Convention, with its measures of implementation set out in part II, represents a most significant step towards the realization of one of the Organization's long-term goals.

140. I am most happy that this step has been taken at this time, at the culmination of the observance of the International Co-operation Year, and I am gratified that the Convention has been adopted by so decisive a vote.

141. I note that the Secretary-General has been assigned an important role in providing the Secretariat and otherwise assisting the Committee on the Elimination of Racial Discrimination which will be established when the Convention comes into effect, and the Conciliation Commission which will be appointed as required. For my part, I am pleased to say that I accept these obligations.

142. The preparation of the Convention was a cooperative effort in which many organs of the United Nations participated, including the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the Commission on Human Rights, and the Economic and Social Council, and this General Assembly. In particular, it was the great initiative and drive displayed by the Third Committee which gave the Convention its full form and substance. I should like to commend them for this achievement, which is in keeping with the high hopes and expectations of the peoples of the world.

143. It is now the duty of all of us to see to it that the Convention comes into effect as soon as possible and that its terms are carried out precisely and in a spirit of mutual respect and understanding between peoples and nations, in accordance with the great humanitarian objectives of the Charter and the principles laid down in the Universal Declaration of Human Rights.

144. The PRESIDENT (translated from French): I thank the Secretary-General for his statement. Ten days or so ago, in this same Assembly Hall, we celebrated the anniversary of the Universal Declaration of Human Rights. It is a great pleasure for me, as your President, to say that there is no better way of celebrating the anniversary of the Universal Declaration than by the vote we have cast this morning at the twentieth session.

The meeting rose at 1.40 p.m.

Annex 739

Kitok v. Sweden, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988)



Ivan Kitok v. Sweden, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988).

Communication No. 197/1985

Submitted by: Ivan Kitok

Alleged victim: The author

State party concerned: Sweden

Date of communication: 2 December 1985 (date of initial letter)

Date of decision on admissibility: 25 March 1987

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights:

Meeting on 27 July 1988;

Having concluded its consideration of communication No. 197/1985, submitted to the Committee by Ivan Kitok under the Optional Protocol to the International Covenant on Civil and Political Rights;

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication (initial letter dated 2 December 1985 and subsequent letters dated 5 and 12 November 1986) is Ivan Kitok, a Swedish citizen of Sami ethnic origin, born in 1926. He is represented by counsel. He claims to be the victim of violations by the Government of Sweden of articles 1 and 27 of the Covenant.

2.1 It is stated that Ivan Kitok belongs to a Sami family which has been active in reindeer breeding for over 100 years. On this basis the author claims that he has inherited the "civil right" to reindeer breeding from his forefathers as well as the rights to land and water in Sörkaitum Sami Village. It appears that the author has been denied the exercise of these rights because he is said to have lost his membership in the Sami village ("sameby", formerly "lappby"), which under a 1971 Swedish statute is like a trade union with a "closed shop" rule. A non-member cannot exercise Sami rights to land and water.

2.2 In an attempt to reduce the number of reindeer breeders, the Swedish Crown and the Lap bailiff have insisted that, if a Sami engages in any other profession for a period of three years, he loses his status and his name is removed from the rolls of the lappby, which he cannot re-enter unless by special permission. Thus it is claimed

that the Crown arbitrarily denies the immemorial rights of the Sami minority and that Ivan Kitok is the victim of such denial of rights.

2.3 With respect to the exhaustion of domestic remedies, the author states that he has sought redress through all instances in Sweden, and that the Regeringsrätten (Highest Administrative Court of Sweden) decided against him on 6 June 1985, although two dissenting judges found for him and would have made him a member of the sameby.

2.4 The author states that the same matter has not been submitted for examination under any other procedure of international investigation or settlement.

3. By its decision of 19 March 1986, the Working Group of the Human Rights Committee transmitted the communication, under rule 91 of the provisional rules of procedure, to the State party concerned, requesting information and observations relevant to the question of the admissibility of the communication. The Working Group also requested the State party to provide the Committee with the text of the relevant administrative and judicial decisions pertaining to the case, including (a) the decision of 23 January 1981 of the Länsstyrelsen, Norrbottens län (the relevant administrative authority), (b) the judgement of 17 May 1983 of the Kammarrätten (administrative court of appeal) and (c) the judgement of 6 June 1985 of the Regeringsrätten (supreme administrative court) with dissenting opinions.

4.1 By its submission dated 12 September 1986 the State party provided all the requested administrative and judicial decisions and observed as follows: "Ivan Kitok has alleged breaches of articles 1 and 27 of the International Covenant on Civil and Political Rights. The Government has understood Ivan Kitok's complaint under article 27 thus: that he through Swedish legislation and as a result of Swedish court decisions has been prevented from exercising his 'reindeer breeding rights' and consequently denied the right to enjoy the culture of the Sami. With respect to the author's complaint under article 1 of the Covenant, the State party observes that it is not certain whether Ivan Kitok claims that the Sami as a people should have the right to self-determination as set forth in article 1, paragraph 1, or whether the complaint should be considered to be limited to paragraph 2 of that article, an allegation that the Sami as a people have been denied the right freely to dispose of their natural wealth and resources. However, as can be seen already from the material presented by Ivan Kitok himself, the issue concerning the rights of the Sami to land and water and questions connected hereto, is a matter of immense complexity. The matter has been the object of discussions, consideration and decisions ever since the Swedish Administration started to take interest in the areas in northern Sweden, where the Sami live. As a matter of fact, some of the issues with respect to the Sami population are currently under consideration by the Swedish Commission on Sami issues (Samerättsutredningen) appointed by the Government in 1983. For the time being the Government refrains from further comments on this aspect of the application. Suffice it to say that, in the Government's opinion, the Sami do not constitute a 'people' within the meaning given to the word in article 1 of the Covenant . . . Thus, the Government maintains that article 1 is not applicable to the case. Ivan Kitok's complaints therefore should be declared inadmissible under article 3 of the Optional Protocol to the International Covenant on Civil and Political Rights as being incompatible with provisions of the Covenant."

4.2 With respect to an alleged violation of article 27, the State party "admits that the Sami form an ethnic minority in Sweden and that persons belonging to this minority are entitled to protection under article 27 of the Covenant. Indeed, the Swedish Constitution goes somewhat further. Chapter 1, article 2, fourth paragraph, prescribes: "The possibilities of ethnic, linguistic or religious minorities to preserve and develop a cultural and social life of their own should Chapter be promoted. Chapter 2, article 15, prescribes: No law or other decree may imply the discrimination of any citizen on the ground of his belonging to a minority on account of his race, skin colour, or ethnic origin. The matter to be considered with regard to article 27 is whether Swedish legislation and Swedish court decisions have resulted in Ivan Kitok being deprived of his right to carry out reindeer husbandry and, if this is the case, whether this implies that article 27 has been violated? The Government would in this context like to stress that Ivan Kitok himself has observed before the legal instances in Sweden that the only question at issue in his case is the existence of such special reasons as enable the authorities to grant him admission as a member of the Sijrkaikum Sami community despite the Sami community's refusal . . . The reindeer grazing legislation had the effect of dividing the Sami population of Sweden into reindeer-herding and

non-reindeer-herding Sami, a distinction which is still very important. Reindeer herding is reserved for Sami who are members of a Sami village (sameby), an entity which is a legal entity under Swedish law. (The expression 'Sami community' is also used as an English translation of 'sameby'.) These Sami, today numbering about 2,500, also have certain other rights, e. g. as regards hunting and fishing. Other Sami, however -the great majority, since the Sami population in Sweden today numbers some 15,000 to 20,000 -have no special rights under the present law. These other Sami have found it more difficult to maintain their Sami identity and many of them are today assimilated into Swedish society. Indeed, the majority of this group does not even live within the area where reindeer-herding Sami live. The rules applicable on reindeer grazing are laid down in the 1971 Reindeer Husbandry Act [hereinafter the 'Act']. The ratio legis for this legislation is to improve the living conditions for the Sami who have reindeer husbandry as their primary income, and to make the existence of reindeer husbandry safe for the future. There had been problems in achieving an income large enough to support a family living on reindeer husbandry. From the legislative history it appears that it was considered a matter of general importance that reindeer husbandry be made more profitable. Reindeer husbandry was considered necessary to protect and preserve the whole culture of the Sami . . . It should be stressed that a person who is a member of a Sami village also has a right to use land and water belonging to other people for the maintenance of himself and his reindeer. This is valid for State property as well as private land and also encompasses the right to hunt and fish within a large part of the area in question. It thus appears that the Sami in relation to other Swedes have considerable benefits. However, the area available for reindeer grazing limits the total number of reindeer to about 300,000. Not more than 2,500 Sami can support themselves on the basis of these reindeer and additional incomes. The new legislation led to a reorganization of the old existing Sami villages into larger units. The Sami villages have their origin in the old siida, which originally formed the base of the Sami society consisting of a community of families which migrated seasonally from one hunting, fishing and trapping area to another, and which later on came to work with and follow a particular self-contained herd of reindeer from one seasonal grazing area to another. Prior to the present legislation, the Sami were organized in Sami communities (lappbyar). Decision to grant membership of these villages was made by the County Administrative Board (Länsstyrelsen). Under the present legislation, membership in a Sami village is granted by the members of the Sami village themselves. A person who has been denied membership in a Sami village can appeal against such a decision to the County Administrative Board. Appeals against the Board's decision in the matter can be made to the Administrative Court of Appeal (Kammarrätten) and finally to the Supreme Administrative Court (Regeringsrätten). An appeal against a decision of a Sami community to refuse membership may, however, be granted only if there are special reasons for allowing such membership (see sect. 12, para. 2, of the 1971 Act). According to the legislative history of the Act, the County Administrative Board's right to grant an appeal against a decision made by the Sami community should be exercised very restrictively. It is thus required that the reindeer husbandry which the applicant intends to run within the community be in an essential way useful to the community and that it be of no inconvenience to its other members. An important factor in this context is that the pasture areas remain constant, while additional members means more reindeers. There seems to be only one previous judgement from the Supreme Administrative Court concerning section 12 of the Reindeer Husbandry Act. However, the circumstances are not quite the same as in Ivan Kitok's case . . . The case that Ivan Kitok has brought to the courts is based on the contents of section 12, paragraph 2, of the Reindeer Husbandry Act. The County Administrative Board and the Courts have thus had to make decisions only upon the question whether there were any special reasons within the meaning of the Act to allow Kitok membership in the Sami community. The County Administrative Board found that there were no such reasons, nor did the Administrative Court of Appeal or the majority of the Supreme Administrative Court . . . When deciding upon the question whether article 27 of the Covenant has been violated, the following must be considered. It is true that Ivan Kitok has been denied membership in the Sami community of Sörkaikum. Normally, this would have meant that he also had been deprived of any possibility of carrying out reindeer husbandry. However, in this case the Board of the Sami community declared that Ivan Kitok, as an owner of domesticated reindeer, can be present when calves are marked, reindeer slaughtered and herds are rounded up and reassigned to owners, all this in order to safeguard his interests as a reindeer owner in the Sami society, albeit not as a member of the Sami community. He is also allowed to hunt and fish free of charge in the community's pasture area. These facts were also decisive in enabling the Supreme Administrative Court to reach a conclusion when judging the matter. The Government contends that Ivan Kitok in practice can still continue his reindeer husbandry, although he cannot exercise this

right under the same safe conditions as the metiers of the Sami community. Thus, it cannot be said that he has been prevented from 'enjoying his own culture'. For that reason the Government maintains that the complaint should be declared inadmissible as being incompatible with the Covenant."

4.3 Should the Committee arrive at another opinion, the State party submits that: "As is evident from the legislation, the Reindeer Husbandry Act aims at protecting and preserving the Sami culture and reindeer husbandry as such. The conflict that has occurred in this case is not so much a conflict between Ivan Kitok as a Sami and the State, but rather between Kitok and other Sami. As in every society where conflicts occur, a choice has to be made between what is considered to be in the general interest on the one hand and the interests of the individual on the other. A special circumstance here is that reindeer husbandry is so closely connected to the Sami culture that it must be considered part of the Sami culture itself. In this case the legislation can be said to favour the Sami community in order to make reindeer husbandry economically viable now and in the future. The pasture areas for reindeer husbandry are limited, and it is simply not possible to let all Sami exercise reindeer husbandry without jeopardizing this objective and running the risk of endangering the existence of reindeer husbandry as such. In this case it should be noted that it is for the Sami community to decide whether a person is to be allowed membership or not. It is only when the community denies membership that the matter can become a case for the courts. Article 27 guarantees the right of persons belonging to minority groups to enjoy their own culture. However, although not explicitly provided for in the text itself, such restrictions on the exercise of this right.... must be considered justified to the extent that they are necessary in a democratic society in view of public interests of vital importance or for the protection of the rights and freedoms of others. In view of the interests underlying the reindeer husbandry legislation and its very limited impact on Ivan Kitok's possibility of 'enjoying his culture', the Government submits that under all the circumstances the present case does not indicate the existence of a violation of article 27. For these reasons the Government contends that, even if the Committee should come to the conclusion that the complaint falls within the scope of article 27, there has been no breach of the Covenant. The complaint should in this case be declared inadmissible as manifestly ill-founded."

5.1 Commenting on the State party's submission under rule 91, the author, in submissions dated 5 and 12 November 1986, contends that his allegations with respect to violations of articles 1 and 27 are well-founded.

5.2 With regard to article 1 of the Covenant, the author states: "The old Lapp villages must be looked upon as small realms, not States, with their own borders and their government and with the right to neutrality in war. This was the Swedish position during the Vasa reign and is well expressed in the royal letters by Gustavus Vasa of 1526, 1543 and 1551. It was also confirmed by Gustavus Adolphus in 1615 and by a royal judgement that year for Suondavare Lapp village . . . In Sweden there is no theory, as there is in some other countries, that the King or the State was the first owner of all land within the State's borders. In addition to that there was no State border between Sweden and Norway until 1751 in Lapp areas. In Sweden there is the notion of allodial land rights, meaning land rights existing before the State. These allodial land rights are acknowledged in the travaux préparatoires of the 1734 law-book for Sweden, including even Finnish territory. Sweden has difficulty to understand Kitok's complaint under article 1. Kitok's position under article 1, paragraph 1, is that the Sami people has the right to self-determination . . . If the world Sami population is about 65,000, 40,000 live in Norway, 20,000 in Sweden, 4,000 to 5,000 in Finland and the rest in the Soviet Union. The number of Swedish Sami in the kernel areas between the vegetation-line and the Norwegian border is not exactly known, because Sweden has denied the Sami the right to a census. If the number is tentatively put at 5,000, this population in Swedish Sami land should be entitled to the right to self-determination. The existence of Sami in other countries should not be allowed to diminish the right to self-determination of the Swedish Sami. The Swedish Sami cannot have a lesser right because there are Sami in other countries . . ."

5.3 With respect to article 27 of the Covenant, the author states: "The 1928 law was unconstitutional and not consistent with international law or with Swedish civil law. The 1928 statute said that a non-sameby-member like Ivan Kitok had reindeer breeding, hunting and fishing rights but was not entitled to use those rights. This is a most

extraordinary statute, forbidding a person to use civil rights in his possession. The idea was to make room for the Sami who had been displaced to the north, by reducing the number of Sami who could use their inherited land and water rights . . . The result is that there are two categories of Sami in the kernel Sami areas in the north of Sweden between the vegetation-line of 1873 and the Norwegian 1751 border. One category is the full Sami, i. e., the village Sami; the other is the half-Sami, i. e., the non-village Sami living in the Sami village area, having land and water rights but by statute prohibited to use those rights. As this prohibition for the half-Sami is contrary to international and domestic law, the 1928-1971 statute is invalid and cannot forbid the half-Sami from exercising his reindeer breeding, hunting and fishing rights. As a matter of fact, the half-Sami have exercised their hunting and fishing rights, especially fishing rights, without the permission required by statute. This has been common in the Swedish Sami kernel lands and was valid until the highest administrative court of Sweden rendered its decision on 6 June 1985 in the Ivan Kitok case . . . Kitok's position is that he is denied the right to enjoy the culture of the Sami as he is just a half-Sami, whereas the Sami village members are full Sami . . . The Swedish Government has admitted that reindeer breeding is an essential element in the Sami culture. When Sweden now contends that the majority of the Swedish Sami have no special rights according to the present law, this is not true. Sweden goes on to say 'these other Sami have found it more difficult to maintain their Sami identity and many of them are today assimilated in Swedish society. Indeed the majority of this group does not even live within the area where reindeer-herding Sami live'. Ivan Kitok comments that he speaks for the estimated 5,000 Sami who live in the kernel Swedish Sami land and of whom only 2,000 are sameby members. The mechanism of the sameby . . . diminishes the number of reindeer-farming Sami from year to year; there are now only 2,000 persons who are active sameby members living in kernel Swedish Sami land. When Sweden says that these other Sami are assimilated, it seems that Sweden confirms its own violation of article 27. The important thing for the Sami people is solidarity among the people (folksolidaritet) and not industrial solidarity (näringsolidaritet). This was the great appeal of the Sami leaders, Gustaf Park, Israel Ruong and others. Sweden has tried hard, however, to promote industrial solidarity among the Swedish Sami and to divide them into full Sami and half-Sami . . . It is characteristic that the 1964 Royal Committee wanted to call the Lapp village 'reindeer village' (renby) and wanted to make the renby an entirely economic association with increasing voting power for the big reindeer owners. This has also been achieved in the present sameby , where members get a new Vote for every extra 100 reindeer. It is because of this organization of the voting power that Ivan Kitok was not admitted into his fatherland Sörkaitum Lappby. Among the approximately 3,000 non-sameby members who are entitled to carry out reindeer farming and live in kernel Swedish Sami land there are only a few today who are interested in taking up reindeer farming. In order to maintain the Sami ethnic-linguistic minority it is, however, very important that such are encouraged Sami to join the sameby."

5.4 In conclusion, it is stated that the author, as a half-Sami, "cannot enjoy his own culture because his reindeer-farming, hunting and fishing rights can be removed by an undemocratic graduated vote and as a I half-Sami he is forced to pay 4,000 to 5,000 Swedish krona annually as a fee to the Sörkaitum sameby association that the full Sami do not pay to that association. This is a stigma on half-Sami."

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its provisional rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee noted that the State party did not claim that the communication was inadmissible under article 5, paragraph 2, of the Optional Protocol. With regard to article 5, paragraph 2 (a), the Committee observed that the matters complained of by Ivan Kitok were not being examined and had not been examined under another procedure of international investigation or settlement. With regard to article 5, paragraph 2 (b), the Committee was unable to conclude, on the basis of the information before it, that there were effective remedies in the circumstances of the present case to which the author could still resort.

6.3 With regard to the State party's submission that the communication should be declared inadmissible as incompatible with article 3 of the Optional Protocol or as "manifestly ill-founded", the Committee observed that the author, as an individual, could not claim to be the victim of a violation of the right of self-determination enshrined in article 1 of the Covenant. Whereas the Optional Protocol provides a recourse procedure for

individuals claiming that their rights have been violated, article 1 of the Covenant deals with rights conferred upon peoples, as such. However, with regard to article 27 of the Covenant, the Committee observed that the author had made a reasonable effort to substantiate his allegations that he was the victim of a violation of his right to enjoy the same rights enjoyed by other members of the Sami community. Therefore, it decided that the issues before it, in particular the scope of article 27, should be examined with the merits of the case.

6.4 The Committee noted that both the author and the State party had already made extensive submissions with regard to the merits of the case. However, the Committee deemed it appropriate at that juncture to limit itself to the procedural requirement of deciding on the admissibility of the communication. It noted that, if the State party should wish to add to its earlier submission within six months of the transmittal to it of the decision on admissibility, the author of the communication would be given an opportunity to comment thereon. If no further submissions were received from the State party under article 4, paragraph 2, of the Optional Protocol, the Committee would proceed to adopt its final views in the light of the written information already submitted by the parties.

6.5 On 25 March 1987, the Committee therefore decided that the communication was admissible in so far as it raised issues under article 27 of the Covenant, and requested the State party, should it not intend to make a further submission in the case under article 4, paragraph 2, of the Optional Protocol, to so inform the Committee, so as to permit an early decision on the merits.

7. By a note dated 2 September 1987, the State party informed the Committee that it did not intend to make a further submission in the case. No further submission has been received from the author.

8. The Human Rights Committee has considered the merits of the communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol. The facts of the case are not in dispute.

9.1 The main question before the Committee is whether the author of the communication is the victim of a violation of article 27 of the Covenant because, as he alleges, he is arbitrarily denied immemorial rights granted to the Sami community, in particular, the right to membership of the Sami community and the right to carry out reindeer husbandry. In deciding whether or not the author of the communication has been denied the right to "enjoy [his]own culture", as provided for in article 27 of the Covenant, and whether section 12, paragraph 2, of the 1971 Reindeer Husbandry Act, under which an appeal against a decision of a Sami community to refuse membership may only be granted if there are special reasons for allowing such membership, violates article 27 of the Covenant, the Committee bases its findings on the following considerations.

9.2 The regulation of an economic activity is normally a matter for the State alone. However, where that activity is an essential element in the culture of an ethnic community, its application to an individual may fall under article 27 of the Covenant, which provides: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

9.3 The Committee observes in this context that the right to enjoy one's own culture in community with the other members of the group cannot be determined in abstracto but has to be placed in context. The Committee is thus called upon to consider statutory restrictions affecting the right of an ethnic Sami to membership of a Sami village.

9.4 With regard to the State party's argument that the conflict in the present case is not so much a conflict between the author as a Sami and the State party but rather between the author and the Sami community (see para. 4.3 above), the Committee observes that the State party's responsibility has been engaged, by virtue of the adoption of the Reindeer Husbandry Act of 1971, and that it is therefore State action that has been challenged. As the State party itself points out, an appeal against a decision of the Sami community to refuse membership can only be granted if there are special reasons for allowing such membership; furthermore, the State party

acknowledges that the right of the County Administrative Board to grant such an appeal should be exercised very restrictively.

9.5 According to the State party, the purposes of the Reindeer Husbandry Act are to restrict the number of reindeer breeders for economic and ecological reasons and to secure the preservation and well-being of the Sami minority. Both parties agree that effective measures are required to ensure the future of reindeer breeding and the livelihood of those for whom reindeer farming is the primary source of income. The method selected by the State party to secure these objectives is the limitation of the right to engage in reindeer breeding to members of the Sami villages. The Committee is of the opinion that all these objectives and measures are reasonable and consistent with article 27 of the Covenant.

9.6 The Committee has none the less had grave doubts as to whether certain provisions of the Reindeer Husbandry Act, and their application to the author, are compatible with article 27 of the Covenant. Section 11 of the Reindeer Husbandry Act provides that: "A member of a Sami community is: 1. A person entitled to engage in reindeer husbandry who participates in reindeer husbandry within the pasture area of the community. 2. A person entitled to engage in reindeer husbandry who has participated in reindeer husbandry within the pasture area of the village and who has had this as his permanent occupation and has not gone over to any other main economic activity. 3. A person entitled to engage in reindeer husbandry who is the husband or child living at home of a member as qualified in subsection 1 or 2 or who is the surviving husband or minor child of a deceased member." Section 12 of the Act provides that: "A Sami community may accept as a member a person entitled to engage in reindeer husbandry other than as specified in section 11, if he intends to carry on reindeer husbandry with his own reindeer within the pasture area of the community.

"If the applicant should be refused membership, the County Administrative Board may grant him membership, if special reasons should exist."

9.7 It can thus be seen that the Act provides certain criteria for participation in the life of an ethnic minority whereby a person who is ethnically a Sami can be held not to be a Sami for the purposes of the Act. The Committee has been concerned that the ignoring of objective ethnic criteria in determining membership of a minority, and the application to Mr. Kitok of the designated rules, may have been disproportionate to the legitimate ends sought by the legislation. It has further noted that Mr. Kitok has always retained some links with the Sami community, always living on Sami lands and seeking to return to full-time reindeer farming as soon as it became financially possible, in his particular circumstances, for him to do so.

9.8 In resolving this problem, in which there is an apparent conflict between the legislation, which seems to protect the rights of the minority as a whole, and its application to a single member of that minority, the Committee has been guided by the ratio decidendi in the Lovelace case (No. 24/1977, Lovelace v. Canada), namely, that a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole. After a careful review of all the elements involved in this case, the Committee is of the view that there is no violation of article 27 by the State party. In this context, the Committee notes that Mr. Kitok is permitted, albeit not as of right, to graze and farm his reindeer, to hunt and to fish.

Annex 740

Lubicon Lake Band v. Canada, Communication No. 167/1984, U.N. Doc. Supp. No. 40
(A/45/40) (26 March 1990)



Lubicon Lake Band v. Canada, Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990).

Submitted by: Chief Bernard Ominayak and the Lubicon Lake Band (represented by counsel)

Alleged victim: Lubicon Lake Band

State party concerned: Canada

Date of communication: 14 February 1984 (date of initial letter)

Date of decision on admissibility: 22 July 1987

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 March 1990,

Having concluded its consideration of communication No. 167/1984, submitted to the Committee by Chief B. Ominayak and the Lubicon Lake Band under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and by the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol*

1. The author of the communication (initial letter dated 14 February 1984 and subsequent correspondence) is Chief Bernard Ominayak (hereinafter referred to as the author) of the Lubicon Lake Band, Canada. He is represented by counsel.

2.1 The author alleges violations by the Government of Canada of the Lubicon Lake Band's right of self-determination and by virtue of that right to determine freely its political status and pursue its economic, social and cultural development, as well as the right to dispose freely of its natural wealth and resources and not to be deprived of its own means of subsistence. These violations allegedly contravene Canada's obligations under article 1, paragraphs 1 to 3, of the International Covenant on Civil and Political Rights.

2.2 Chief Ominayak is the leader and representative of the Lubicon Lake Band, a Cree Indian band living within the borders of Canada in the Province of Alberta. They are subject to the jurisdiction of the Federal Government of Canada, allegedly in accordance with a fiduciary relationship assumed by the Canadian Government with respect to Indian peoples and their lands located within Canada's national borders. The Lubicon Lake Band is a self-identified, relatively autonomous, socio-cultural and economic group. Its members have continuously inhabited, hunted, trapped and fished in a large area encompassing approximately 10,000 square kilometres in northern Alberta since time immemorial. Since their territory is relatively inaccessible, they have, until recently, had little contact with non-Indian society. Band members speak Cree as their primary language. Many do not speak, read or write English. The Band continues to maintain its traditional culture, religion, political structure and subsistence economy.

2.3 It is claimed that the Canadian Government, through the Indian Act of 1970 and Treaty 8 of 21 June 1899 (concerning aboriginal land rights in northern Alberta), recognized the right of the original inhabitants of that

area to continue their traditional way of life. Despite these laws and agreements, the Canadian Government has allowed the provincial government of Alberta to expropriate the territory of the Lubicon Lake Band for the benefit of private corporate interests (e.g., leases for oil and gas exploration). In so doing, Canada is accused of violating the Band's right to determine freely its political status and to pursue its economic, social and cultural development, as guaranteed by article 1, paragraph 1, of the Covenant. Furthermore, energy exploration in the Band's territory allegedly entails a violation of article 1, paragraph 2, which grants all peoples the right to dispose of their natural wealth and resources. In destroying the environment and undermining the Band's economic base, the Band is allegedly being deprived of its means to subsist and of the enjoyment of the right of self-determination guaranteed in article 1.

3.1 The author states that the same matter has not been submitted for examination under another procedure of international investigation or settlement.

3.2 With respect to the exhaustion of domestic remedies, it is stated that the Lubicon Lake Band has been pursuing its claims through domestic political and legal avenues. It is alleged that the domestic political and legal process in Canada is being used by government officials and energy corporation representatives to thwart and delay the Band's actions until, ultimately, the Band becomes incapable of pursuing them, because industrial development at the current rate in the area, accompanied by the destruction of the environmental and economic base of the Band, would make it impossible for the Band to survive as a people for many more years.

3.3 On 27 October 1975, the Band's representatives filed with the Registrar of the Alberta (Provincial) Land Registration District a request for a caveat, which would give notice to all parties dealing with the caveated land of their assertion of aboriginal title, a procedure foreseen in the Provincial Land Title Act. The Supreme Court of Alberta received arguments on behalf of the Provincial Government, contesting the caveat, and on behalf of the Lubicon Lake Band. On 7 September 1976, the provincial Attorney General filed an application for a postponement, pending resolution of a similar case; the application was granted. On 25 March 1977, however, the Attorney General introduced in the provincial legislature an amendment to the Land Title Act precluding the filing of caveats; the amendment was passed and made retroactive to 13 January 1975, thus predating the filing of the caveat involving the Lubicon Lake Band. Consequently, the Supreme Court hearings were dismissed as moot.

3.4 On 25 April 1980, the members of the Band filed an action in the Federal Court of Canada, requesting a declaratory judgement concerning their rights to their land, its use, and the benefits of its natural resources. The claim was dismissed on jurisdictional grounds against the provincial government and all energy corporations except one (Petro-Canada). The claim with the federal Government and Petro-Canada as defendants was allowed to stand.

3.5 On 16 February 1982, an action was filed in the Court of Queen's Bench of Alberta requesting an interim injunction to halt development in the area until issues raised by the Band's land and natural resource claims were settled. The main purpose of the interim injunction, the author states, was to prevent the Alberta government and the oil companies (the "defendants") from further destroying the traditional hunting and trapping territory of the Lubicon Lake people. This would have permitted the Band members to continue to hunt and trap for their livelihood and subsistence as a part of their aboriginal way of life. The provincial court did not render its decision for almost two years, during which time oil and gas development continued, along with rapid destruction of the Band's economic base. On 17 November 1983, the request for an interim injunction was denied and the Band, although financially destitute, was subsequently held liable for all court costs and attorneys' fees associated with the action:

3.6 The decision of the Court of Queen's Bench was appealed to the Court of Appeal of Alberta; it was dismissed on 11 January 1985. In reaching its decision, the Court of Appeal agreed with the lower court's finding that the Band's claim of aboriginal title to the land presented a serious question of law to be decided at trial. None the less, the Court of Appeal found that the Lubicon Lake Band would suffer no irreparable harm if resource development continued fully and that the balance of convenience, therefore, favoured denial of the injunction.

3.7 The author states that the defendants attempted to convince the Court that the Lubicon Lake Band has no right to any possession of any sort in any part of the subject lands, which, logically, included even their homes. In response, the Court pointed out that any attempt to force the members of the Lubicon Lake Band from their dwellings might indeed prompt interim relief, as would attempts to deny them access to traditional burial grounds or other special places, or to hunting and trapping areas. In its complaint, the Band alleged denial of access to all of these areas, supporting its allegations with photographs of damage and with several uncontested affidavits. Yet, the Court overlooked the Band's evidence and concluded that the Band had failed to demonstrate that such action had been taken or indeed threatened by the defendants.

3.8 The author further states that the legal basis for the Court of Appeal's decision was its own definition of irreparable injury. This test was: injury that is of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice. The author submits that the Lubicon Lake Band clearly met this test by demonstrating, with uncontested evidence, injury to their livelihood, to their subsistence economy, to their culture and to their way of life as a social and political entity. Yet, the Court found that the Band had not demonstrated irreparable harm.

3.9 On 18 February 1985, the Band presented arguments to a panel of three judges of the Supreme Court of Canada, requesting leave to appeal from the judgement of the Alberta Court of Appeal. On 14 March 1985, the Supreme Court of Canada refused leave to appeal. Generally, the author states, the criteria for granting leave to appeal are: whether the questions presented are of public importance, whether the case contains important issues of law or whether the proceedings are for any reason of such a nature or significance as to warrant a decision by the Supreme Court of Canada. He states that the issues presented by the Lubicon Lake Band involved such questions as the interpretation of the constitutional rights of aboriginal peoples, the existence of which was recently confirmed by the Constitution Act, 1982; the remedies available to aboriginal peoples; the rights of aboriginal peoples to carry out traditional subsistence activities in traditional hunting and trapping grounds; the legal regime applicable to a large area of land in northern Alberta; conflicts between Canada's traditional, land-based societies and its industrial society; public interests and minority interests; the competing rights of public authorities and individuals; considerations of fundamental and equitable justice; equality before the law; and the right to equal protection and benefit of the law. The author submits that at least the first four questions have not yet been adjudicated by the Supreme Court of Canada and that they undeniably fall within the criteria for granting leave to appeal.

4. By decision of 16 October 1984, the Working Group of the Human Rights Committee transmitted the communication under rule 91 of the rules of procedure to the State party, requesting information and observations relevant to the question of the admissibility of the communication. The main points reflected in the information and observations received from the State party are set out in paragraphs 5.1 to 5.7 and 6.1 to 6.4 below.

Exhaustion of domestic remedies

5.1 In its submission dated 31 May 1985, the State party contends that the Lubicon Lake Band has not pursued to completion domestic remedies commenced by it and that responsibility for any delays in the application of such remedies does not lie with the Government of Canada. The State party recalls that the Lubicon Lake Band, suing in its own legal right, and Chief Bernard Ominayak, suing in his personal capacity, and with other Band councillors in a representative capacity, have initiated three different legal procedures and points out that only the litigation concerning the caveat filed by the Band has been finally determined. Two other legal actions, one in the Federal Court of Canada and one in the Alberta Court of Queen's Bench, were said to be still pending.

5.2 With regard to the Federal Court action referred to in the communication, the State party recalls that the Band and its legal advisers, in April 1980, sought to sue the Province of Alberta and private corporations in proceedings in the Federal Court of Canada. It is submitted that in the circumstances of this case, neither the province nor private entities could have been sued as defendants in the Federal Court of Canada. Rather than reconstitute the proceedings in the proper forum, the State party submits, the Band contested interlocutory proceedings brought by the defendants concerning the issue of jurisdiction. These interlocutory proceedings

resulted in a determination against the Band in November 1980. An appeal by the Band from the decision of the Federal Court of Canada was dismissed by the Federal Court of Appeal in May 1981.

5.3 Following the interlocutory proceedings relating to the jurisdiction of the Federal Court, a new action was instituted on 21 February 1982 against the province and certain corporate defendants in the Court of Queen's Bench of Alberta. As indicated in the communication, the Band sought an interim injunction. In November 1983, after extensive proceedings, the Band's interim application was dismissed by the Court of Queen's Bench based on the case of Erickson v. Wiggins Adjustments Ltd. (1980) 6 W.R.R. 188, which set out the criteria that must be present for a court to grant an interim injunction. Pursuant to that case, an applicant for an interim injunction must establish:

- (a) That there exists a serious issue to be tried;
- (b) That irreparable harm will be suffered prior to trial if no injunction is granted;
- (c) That the balance of convenience between the parties favours relief to the applicant.

The State party points out that the Alberta Court denied the Band's application on the grounds that the Band had failed to prove irreparable harm and that it could be adequately compensated in damages if it was ultimately successful at trial.

5.4 Rather than proceed with a trial on the merits, the Band appealed against the dismissal of the interim application. Its appeal was dismissed by the Alberta Court of Appeal of 11 January 1985. The Band's application for leave to appeal the dismissal of the interim injunction to the Supreme Court of Canada was refused on 14 March 1985. Almost two months later, on 13 May 1985, the State party adds, the Supreme Court of Canada denied another request by the Band that the Court bend its own rules to rehear the application. Thus, the State party states, the Court upheld its well-established rule prohibiting the rehearing of applications for leave to appeal.

5.5 The State party submits that, after such extensive delays caused by interim proceedings and the contesting of clearly settled procedural matters of law, the author's claim that the application of domestic remedies is being unreasonably prolonged has no merit. It submits that it has been open to the Band as plaintiff to press on with the substantive steps in either of its legal actions so as to bring the matters to trial.

Additional remedies

5.6 The State party submits that the term "domestic remedies", in accordance with the prevailing doctrine of International law, should be understood as applying broadly to all established municipal procedures of redress. Article 2, paragraph 3 (b), of the Covenant, it states, recognizes that in addition to judicial remedies a State party to the Covenant can also provide administrative and other remedies. Following the filing of its defence in the Federal Court action, the federal Government proposed late in 1981 that the claim be settled by providing the Band with reserve land pursuant to the treaty concluded in 1899. The conditions proposed by the province (which holds legal title to the lands) were not acceptable to the Band and it accordingly rejected the proposed resolution of the dispute.

5.7 The Band's claim to certain lands in northern Alberta, the State party submits, is part of a complex situation that involves competing claims from several other native communities in the area. In June 1980, approximately two months after the Band commenced its action in the Trial Division of the Federal Court, six other native communities filed a separate land claim with the Department of Indian Affairs asserting aboriginal title to lands that overlap with the property sought by the Lubicon Lake Band's claim. Subsequently, in June 1983, the Big Stone Cree Band filed a claim with the Department of Indian Affairs - this time claiming treaty entitlement - to an area that also overlaps with land claimed by the Lubicon Lake Band. The Big Stone Cree Band allegedly represents five of the native communities that filed the June 1980 claim based on aboriginal title. To deal with this very complex situation, in March 1985 the Minister of Indian and Northern Affairs appointed a former judge of the British Columbia Supreme Court as a special envoy of the Minister to meet with representatives from the

Band, other native communities and the province, to review the entire situation and to formulate recommendations. The State party submits that consideration of the Lubicon Lake Band's claim in isolation from the competing claims of the other native communities would jeopardize the domestic remedy of negotiated settlement selected by the latter.

Right of self-determination

6.1 The Government of Canada submits that the communication, as it pertains to the right of self-determination, is inadmissible for two reasons. First, the right of self-determination applies to a "people" and it is the position of the Government of Canada that the Lubicon Lake Band is not a people within the meaning of article 1 of the Covenant. It therefore submits that the communication is incompatible with the provisions of the Covenant and, as such, should be found inadmissible under article 3 of the Protocol. Secondly, communications under the Optional Protocol can only be made by individuals and must relate to the breach of a right conferred on individuals. The present communication, the State party argues, relates to a collective right and the author therefore lacks standing to bring a communication pursuant to articles I and 2 of the Optional Protocol.

6.2 As to the argument that the Lubicon Lake Band does not constitute a people for the purposes of article I of the Covenant and it therefore is not entitled to assert under the Protocol the right of self-determination, the Government of Canada points out that the Lubicon Lake Band comprises only one of 582 Indian bands in Canada and a small portion of a larger group of Cree Indians residing in northern Alberta. It is therefore the position of the Government of Canada that the Lubicon Lake Indians are not a "people" within the meaning of article 1 of the Covenant.

6.3 The Government of Canada submits that while self-determination as contained in article 1 of the Covenant is not an individual right, it provides the necessary contextual background for the exercise of individual human rights. This view, it contends, is supported by the following phrase from the Committee's general comment on article 1 (*CCPR/C/21/Add.3*, 5 October 1984), which provides that the realization of self-determination is "an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights". This general comment, the State party adds, recognizes that the rights embodied in article I are set apart from, and before, all the other rights in the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. The rights in article 1, which are contained in part I of the Covenant on Civil and Political Rights are, in the submission of Canada, different in nature and kind from the rights in part III, the former being collective, the latter individual. Thus, the structure of the Covenant, when viewed as a whole, further supports the argument that the right of self-determination is a collective one available to peoples. As such, the State party argues, it cannot be invoked by individuals under the Optional Protocol.

6.4 The Government of Canada contends that the Committee's jurisdiction, as defined by the Optional Protocol, cannot be invoked by an individual when the alleged violation concerns a collective right. It therefore contends that the present communication pertaining to self-determination for the Lubicon Lake Band should be dismissed.

7. In a detailed reply, dated 8 July 1985, to the State party's submission, the author summarized his arguments as follows. The Government of Canada offers three principal allegations in its response. It alleges, first, that the Lubicon Lake Band has not exhausted domestic remedies. However, the Band has, in fact, exhausted these remedies to the extent that they offer any meaningful redress of its claims concerning the destruction of its means of livelihood. Secondly, the Government of Canada alleges that the concept of self-determination is not applicable to the Lubicon Lake Band. The Lubicon Lake Band is an indigenous people who have maintained their traditional economy and way of life and have occupied their traditional territory since time immemorial. At a minimum, the concept of self-determination should be held to be applicable to these people as it concerns the right of a people to their means of subsistence. Finally, the Government of Canada makes allegations concerning the identity and status of the communicant. The "communicant" is identified in the Band's original communication. The "victims" are the members of the Lubicon Lake Band, who are represented by their unanimously elected leader, Chief Bernard Ominayak.

8.1 By interim decision of 10 April 1986, the Committee, recalling that the State party had informed it that the Minister of Indian and Northern Affairs had appointed a special envoy and given him the task to review the situation, requested the State party to furnish the Committee with the special envoy's report and with any information as to recommendations as well as measures which the State party had taken or intended to take in that connection.

8.2 In the same decision the Committee requested the author to inform it of any developments in the legal actions pending in the Canadian courts.

9.1 In his reply, dated 30 June 1986, to the Committee's interim decision, the author claims that there has been no substantive progress in any of the pending court proceedings. He reiterates his argument that:

"The Band's request for an interim injunction to halt the oil development, which has destroyed the subsistence livelihood of its people, was denied and the Supreme Court of Canada refused to grant leave to appeal the denial ... The development and the destruction, therefore, continue unabated. The Band's attorney is continuing to pursue the claims through the courts despite the fact that the Band is unable to provide financial support for the effort and that there is no possible hope of resolution for the next several years. Therefore, the Band has no basis for altering its previous conclusion that, for all practical purposes, its domestic judicial remedies have been exhausted."

9.2 The Band also points out that the Federal Government's special envoy, Mr. E. Davie Fulton, was relieved of his responsibilities following the submission of his "discussion paper".

"In the discussion paper ... Mr. Fulton reached much the same conclusion as the Band itself, that the Canadian Government must bear the blame for the situation at Lubicon Lake and that the resolution of the problem is up to the Federal Government. His report also suggested a land settlement based on the Band's current population and recognized the importance of providing the Band with wildlife management authority throughout its hunting and trapping territory. The land settlement proposed by Mr. Fulton, which would result in a reserve significantly larger than the 25 square mile reserve the Band was promised in 1940, is consistent with the position of the Band with regard to this issue ... Mr. Fulton also recommended that Alberta compensate the Band for damage caused by the unrestricted oil and gas development for which it has issued leases within the Band's territory. In addition to relieving Mr. Fulton of his responsibility in the matter, the Federal Government, to date, has refused to make his discussion paper public."

10.1 In its reply to the Committee's interim decision, dated 23 June 1986, the State party forwarded the text of Mr. Fulton's report and noted that it had appointed Mr. Roger Tasse to act as negotiator. Furthermore, it informed the Committee that on 8 January 1986 the Canadian Government had made an ex gratia payment of \$1.5 million to the Band to cover legal and other related costs.

10.2 In a further submission of 20 January 1987, the State party argues that following the rejection of the Band's application for an interim injunction:

"The Band should then have taken steps with all due speed to seek its permanent injunction before seeking international recourse. The Band alleges in its submission ... that the delay in the litigation will cause it irreparable harm. Its action for a permanent injunction would, if successful, permanently prevent that harm."

11.1 In submissions dated 23 and 25 February 1987, the author discussed, inter alia, matters of substance, such as the Fulton discussion paper, and argued that "Canada has abandoned key recommendations contained in the Fulton discussion paper", and that "Canada is attempting retroactively to subject the Band to a law which this Committee has held to be in violation of article 27 of the International Covenant on Civil and Political Rights and which Canada amended in accordance with the findings of this Committee".

11.2 With regard to the pending litigation proceedings, the Band contends that a permanent injunction would not constitute an effective remedy because it would come too late, explaining that:

"The recognition of aboriginal rights or even treaty rights by a final determination of the courts will not undo the irreparable damage to the society of the Lubicon Lake Band, will not bring back the animals, will not restore the environment, will not restore the Band's traditional economy, will not replace the destruction of their traditional way of life and will not repair the damages to the spiritual and cultural ties to the land. The consequence is that all domestic remedies have indeed been exhausted with respect to the protection of the Band's economy as well as its unique, valuable and deeply cherished way of life."

12. In a further submission, dated 12 June 1987, the author states that:

"The Lubicon Lake Band is not requesting a territorial rights decision. Rather, the Band requests only that the Human Rights Committee assist it in attempting to convince the Government of Canada that:

"(a) The Band's existence is seriously threatened by the oil and gas development that has been allowed to proceed unchecked on their traditional hunting grounds and in complete disregard for the human community inhabiting the area;

"(b) Canada is responsible for the current state of affairs and for co-operating in their resolution in accordance with article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights."

13.1 Before considering a communication on the merits, the Committee must ascertain whether it fulfils all conditions relating to its admissibility under the Optional Protocol.

13.2 With regard to the requirement, in article 5, paragraph 2 (b), of the Optional Protocol, that authors must exhaust domestic remedies before submitting a communication to the Human Rights Committee, the author of the present communication had invoked the qualification that this requirement should be waived "where the application of the remedies is unreasonably prolonged". The Committee noted that the author had argued that the only effective remedy in the circumstances of the case was to seek an interim injunction, because "without the preservation of the status quo, a final judgement on the merits, even if favourable to the Band, would be rendered ineffectual", in so far as "any final judgement recognizing aboriginal rights, or alternatively treaty rights, [could] never restore the way of life, livelihood and means of subsistence of the Band". Referring to its established jurisprudence that "exhaustion of domestic remedies can be required only to the extent that these remedies are effective and available", the Committee found that, in the circumstances of the case, there were no effective remedies still available to the Lubicon Lake Band.

13.3 With regard to the State party's contention that the author's communication pertaining to self-determination should be declared inadmissible because "the Committee's jurisdiction, as defined by the Optional Protocol, cannot be invoked by an individual when the alleged violation concerns a collective right", the Committee reaffirmed that the Covenant recognizes and protects in most resolute terms a people's right of self-determination and its right to dispose of its natural resources, as an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. However, the Committee observed that the author, as an individual, could not claim under the Optional Protocol to be a victim of a violation of the right of self-determination enshrined in article I of the Covenant, which deals with rights conferred upon peoples, as such.

13.4 The Committee noted, however, that the facts as submitted might raise issues under other articles of the Covenant, including article 27. Thus, in so far as the author and other members of the Lubicon Lake Band were affected by the events which the author has described, these issues should be examined on the merits, in order to determine whether they reveal violations of article 27 or other articles of the Covenant.

14. On 22 July 1987, therefore, the Human Rights Committee decided that the communication was admissible in so far as it might raise issues under article 27 or other articles of the Covenant. The State party was requested, under rule 86 of the rules of procedure, to take interim measures of protection to avoid irreparable damage to Chief Ominayak and other members of the Lubicon Lake Band.

15. In its submission under article 4, paragraph 2, dated 7 October 1987, the State party invokes rule 93, paragraph 4, of the Committee's provisional rules of procedure and requests the Committee to review its decision on admissibility, submitting that effective domestic remedies have not been exhausted by the Band. It observes that the Committee's decision appears to be based on the assumption that an interim injunction would be the only effective remedy to address the alleged breach of the Lubicon Lake Band's rights. This assumption, in its opinion, does not withstand close scrutiny. The State party submits that, based on the evidence of the Alberta Court of Queen's Bench and the Court of Appeal - the two courts which had had to deal with the Band's request for interim relief - as well as the socio-economic conditions of the Band, its way of life, livelihood and means of subsistence have not been irreparably damaged, nor are they under imminent threat. Accordingly, it is submitted that an interim injunction is not the only effective remedy available to the Band, and that a trial on the merits and the negotiation process proposed by the Federal Government constitute both effective and viable alternatives. The State party reaffirms its position that it has a right, pursuant to article 5, paragraph 2 (b), of the Optional Protocol, to insist that domestic redress be exhausted before the Committee considers the matter. It claims that the terms "domestic remedies", in accordance with relevant principles of international law, must be understood as applying to all established local procedures of redress. As long as there has not been a final judicial determination of the Band's rights under Canadian law, there is no basis in fact or under international law for concluding that domestic redress is ineffective, nor for declaring the communication admissible under the Optional Protocol. In support of its claims, the State party provides a detailed review of the proceedings before the Alberta Court of Queen's Bench and explains its long-standing policy to seek the resolution of valid, outstanding land claims by Indian Bands through negotiation.

16.1 Commenting on the State party's submission, the author, in a letter dated 12 January 1988, maintains that his and the Lubicon Lake Band's allegations are well founded. According to Chief Ominayak, the State party bases its request for a review of the decision on admissibility on a mere restatement of the facts and is seeking to have the Committee reverse its decision under the guise of substantiation of its previous submissions, without adducing any new grounds. Recalling the Committee's statement that the communication is admissible in so far as it raises issues under article 27 "or other articles of the Covenant", the author spells out which articles of the Covenant he considers to have been violated. First, he claims that Canada has violated article 2, paragraphs 1 to 3, of the Covenant: paragraph 1, because the State party has treated the Lubicon Lake Band without taking into consideration elements of a social, economic and property nature inherent in the Band's indigenous community structure; paragraph 2, because it is said to continue to refuse to solve some issues complained of by the Band for which there remain means of redress; and paragraph 3, because it is said to have failed to provide the Band with an effective remedy with regard to its rights under the Covenant.

16.2 The author further alleges that the State party, through actions affecting the Band's livelihood, has created a situation which "led, indirectly if not directly, to the deaths of 21 persons and [is] threatening the lives of virtually every other member of the Lubicon community. Moreover, the ability of the community to [survive] is in serious doubt as the number of miscarriages and stillbirths has skyrocketed and the number of abnormal births ... has gone from near zero to near 100 per cent". This, it is submitted, constitutes a violation of article 6 of the Covenant. Furthermore, it is claimed that the appropriation of the Band's traditional lands, the destruction of its way of life and livelihood, and the devastation wrought to the community constitute cruel, inhuman and degrading treatment within the meaning of article 7 of the Covenant for which the State party must be held accountable.

16.3 The author raises further questions about the State party's compliance with articles 14, paragraph 1, and 26, of the Covenant. He recalls that the domestic court proceedings instituted by the Lubicon Lake Band, founded on aboriginal rights and title to land, challenge certain of the State's asserted powers and jurisdiction, which he contends are "inherently susceptible to precisely the types of abuses that articles 14, paragraph 1, and 26 are intended to guard against". In this context, he claims that "the bias of the Canadian courts has presented a major

obstacle to the Band's attempt to protect its land, community and livelihood, and that the courts' biases arises from distinctions based on race, political, social and economic status". He further claims that the economic and social biases the Band has been confronted with in the Canadian courts, especially in the provincial court system in Alberta, have been greatly magnified by the "fact that several of the judges rendering the decisions of these courts have had clear economic and personal ties to the parties opposing the Band in the actions".

16.4 In addition to the above, it is submitted that in violation of articles 17 and 23, paragraph 1, of the Covenant, the State party has permitted the members of the Lubicon Lake Band to be subjected to conditions that are leading to the destruction of the families and the homes of its members. The author explains that in an indigenous community, the entire family system is predicated upon the spiritual and cultural ties to the land and the exercise of traditional activities. Once these have been destroyed, as in the case of the Band, the essential family component of the society is irremediably damaged. Similarly, it is alleged that the State party has violated article 18, paragraph 1, of the Covenant since, as a consequence of the destruction of their land, the Band members have been "robbed of the physical realm to which their religion - their spiritual belief system - attaches".

16.5 With respect to the requirement of exhaustion of domestic remedies, the author rejects the State party's assertion that a trial on the merits would offer the Band an effective recourse against the federal Government and redress for the loss of its economy and its way of life. First, this assertion rests upon the assumption that past human rights violations can be rectified through compensatory payments; secondly, it is obvious that the Band's economy and way of life have suffered irreparable harm. Furthermore, it is submitted that a trial on the merits is no longer available against the federal Government of Canada since, in October 1986, the Supreme Court of Canada held that aboriginal land rights within provincial boundaries involve provincial land rights and must therefore be adjudicated before the provincial courts. It was for that reason that, on 30 March 1987, the Lubicon Lake Band applied to the Alberta Court of Queen's Bench for leave to amend its statement of claim before that court so as to be able to add the federal Government as a defendant. On 22 October 1987, the Court of Queen's Bench denied the application. Therefore, despite the fact that the Canadian Constitution vests exclusive jurisdiction for all matters concerning Indians and Indian lands in Canada with the federal Government, it is submitted that the Band cannot avail itself of any recourse against the federal Government on issues pertaining to these very questions.

17.1 In a submission dated 3 March 1988, the State party submits that genuine and serious efforts continue to be made with a view to finding an acceptable solution to the issues raised by the author and the Band. In particular, it explains that:

"On 3 February 1988, the Minister of Indian Affairs and Northern Development delivered to the Attorney General of Alberta a formal request for reserve land for the Lubicon Lake Band. In this request, he advised Alberta that a rejection of the request would require Canada to commence a legal action, pursuant to the Constitution Act, 1930, to resolve the dispute as to the quantum of land to which the Lubicon Lake Band is entitled. In any event, the Minister of Indian Affairs and Northern Development asked Alberta to consider, as an interim measure, the immediate transfer to the Band of 25.4 square miles of land ... without prejudice to any legal action.

"By letter dated 10 February 1988, the federal negotiator advised counsel for the Band of the above developments and, as well, sought to negotiate all aspects of the claim not dependent on Alberta's response to the formal request ... The communicant, by letter dated 29 February 1988, rejected this offer, but indicated that he would be prepared to consider an interim transfer of 25.4 square miles without prejudice to negotiations or any court actions. As a consequence of the above developments, negotiators for the federal and provincial Governments met on 1 and 2 March 1988 and concluded an interim agreement for the transfer of 25.4 square miles as reserve land for the Band, including mines and minerals. This agreement is without prejudice to the positions of all parties involved, including the Band ..."

17.2 With respect to the effectiveness of available domestic remedies, the State party takes issue with the author's submission detailed in paragraph 16.5 above, which it claims seriously misrepresents the legal situation

as it relates to the Band and the federal and provincial Governments. It reiterates that the Band has instituted two legal actions, both of which remain pending: one in the Federal Court of Canada against the federal Government; the other in the Alberta Court of Queen's Bench against the province and certain private corporations. To the extent that the author's claim for land is based on aboriginal title, as opposed to treaty entitlement, it is established case law that a court action must be brought against the province and not the federal Government.

17.3 The State party adds that in the action brought before the Alberta Court of Queen's Bench:

"The communicant sought leave to add the federal Government as a party to the legal proceedings in the Alberta Court of Queen's Bench. The Court there held that, based on existing case law, a provincial court is without jurisdiction to hear a claim for relief against the federal Government; rather, this is a matter properly brought before the Federal Court of Canada. The plaintiff has in fact done this and the action is, as already indicated, currently pending. Therefore, recourse against the Government of Canada is still available to the Band, as it has always been, in the Federal Court of Canada. Moreover, the communicant has appealed the decision of the Court of Queen's Bench to the Alberta Court of Appeal".

17.4 Finally, the State party categorically rejects most of the author's allegations detailed in paragraphs 16.2 and 16.3 above as unfounded and unsubstantiated; it submits that these allegations constitute an abuse of process that should result in the dismissal of the communication pursuant to article 3 of the Optional Protocol.

18.1 In a further submission dated 28 March 1988, the author comments on the State party's overview of recent developments in the case (see para. 17.1) and adds the following remarks: (a) the Lubicon Lake Band was not a party to the negotiation of the settlement offer; (b) the settlement offer rests on a "highly prejudicial" view of the Band's rights under Canadian law and an equally prejudicial determination of Band membership; (c) the federal Government would negotiate non-land issues such as housing with fewer than half of the Band members; (d) Canada has leased all but 25.4 square miles of the Band's traditional lands for development, in conjunction with a pulp mill to be constructed by the Daishowa Canada Company Ltd. near Peace River, Alberta; (e) the Daishowa project frustrates any hopes of the continuation of some traditional activity by Band members; and (f) the Parliamentary Standing Committee on Aboriginal Affairs, the oversight committee of the Canadian Parliament with respect to such matters, does not support the approach to negotiated settlement being taken by the Minister of Indian Affairs and Northern Development.

18.2 The author reaffirms that the essential part of the court actions initiated by the Band relates to aboriginal rights claims and that, with the decision of the Alberta Court of Queen's Bench of 22 October 1987 and in the light of recent Supreme Court decisions referred to by the State party, the Band continues to be denied redress against the federal Government.

18.3 The author further rejects the State party's contention that the claims made in his submission of 12 January 1988 are unsubstantiated and unfounded and constitute an abuse of the right of submission; he reaffirms his readiness to furnish detailed information on the "21 unnatural deaths resulting directly or indirectly from the destruction of the traditional Lubicon economy and way of life". Finally, he points out that the State party continues to disregard the Committee's request for interim measures of protection pursuant to rule 86 of its rules of procedure, as evidenced by Canadian backing of the Daishowa paper mill project. This means that far from adopting interim measures to avoid irreparable harm to the Band, Canada has endorsed a project that would contribute to the further degradation of the Band's traditional lands.

19.1 In another submission dated 17 June 1988, the State party points to further developments in the case and re-emphasizes that effective remedies continue to be open to the Lubicon Lake Band. It explains that, since 11 March 1988, the date of the Band's refusal of the Government's interim offer to transfer to it 25.4 square miles of reserve land, discussions:

"have taken place between the federal Government, the Province of Alberta and the communicant. However, virtually no progress was made towards settlement. As a consequence, on 17 May 1988,

the federal Government initiated legal proceedings against the Province of Alberta and the Lubicon Lake Band in order to enable Canada to meet its lawful obligations to the Band under Treaty 8. The Statement of Claim, commencing the legal action, asks the Court of Queen's Bench of Alberta for a declaration that the Lubicon Lake Band is entitled to a reserve and a determination of the size of the reserve. On 9 June 1988 the Lubicon Lake Band filed a Statement of Defence and Counterclaim. On 10 June 1988, all parties to the dispute appeared before Chief Justice Moore of the Alberta Court of Queen's Bench and agreed that best efforts should be made to expedite this case with a preliminary trial date to be set on 10 January 1989."

19.2 The State party accepts its obligation to provide the Lubicon Lake Band with a reserve pursuant to Treaty 8. It argues that the issue that forms the basis of the domestic dispute, as well as the communication under consideration, concerns the amount of land to be set aside as a reserve and related issues. As such, the State party asserts that the communication does not properly fall within any of the provisions of the Covenant and cannot therefore form the basis of a violation.

20.1 In a submission dated 5 July 1988, the author furnishes further information and comments on the State party's submission of 17 June 1988. He identifies "many problems" inherent in the court action initiated by the federal Government against the provincial government in the Alberta Court of Queen's Bench. Among these are: (a) the purported fact that it ignores the Band's aboriginal land claim; (b) the fact that it seeks a declaratory judgement with respect to Band membership "apparently based on the unique and highly controversial approach to determination of Band membership that has been discussed in previous submissions"; and (c) the fact that much of the substance of the issues addressed are already before the courts in the Band's pending actions. The author notes that since "the action was filed in the lowest court in Canada, and will entail subpoena of an argument over the extremely lengthy and complex Lubicon genealogical study, as well as appeals from any decision rendered, there is no basis for believing that the action will do anything but delay indefinitely [the] resolution of the Lubicon land issues". The author believes that the Government's action is intended to have precisely this effect.

20.2 By letter dated 28 October 1988, the author informs the Committee that on 6 October 1988, the Lubicon Lake Band asserted jurisdiction over its territory. He explains that this action was the result of the federal Government's failure to contribute to a favourable solution of the Band's problems. He adds that the State party has continuously delayed action on the issue, accusing it of "practicing deceit in the media and dismissing advisors who recommend any resolution favourable to the Lubicon people. At the same time the Band has watched the Province of Alberta continue to grant leases for oil and gas development and now for timber development on the Lubicons' traditional lands ...".

20.3 The author further observes that the action of the Lubicon Lake Band has resulted in:

"a positive response from the Alberta provincial government. Alberta Premier Don Getty negotiated an agreement with Chief Ominayak whereby Alberta will offer to sell to the Federal Government 79 square miles of land with surface and subsurface rights, to be designated as a reserve for the benefit of the Lubicon Lake Band. The province has agreed to sell an additional 16 square miles of land to the federal Government with surface rights only, and to make subsurface development on such land subject to Band approval. Thus the total area agreed to by the province is 95 square miles, the amount to which the Band is entitled, based on its present membership, under Canadian federal Indian law The federal Government has stated that it is willing to consider the transfer of 79 square miles of land for the benefit of the Lubicon people. However, it has refused to accept the remaining 16 square miles, recommending that such land be transferred to the Band to be held in free title. The effect of this would be to subject the land in question to taxation and alienation, while reducing the level of federal obligation to the Lubicon people ..."

21.1 In a further submission dated 2 February 1989, the State party observes that in November 1988, following an agreement between the provincial government of Alberta and the Lubicon Lake Band to set aside 95 square miles of land for a reserve, the federal Government initiated negotiations with the Band on the modalities of the land transfer and related issues. During two months of negotiations, consensus was reached on the majority of

issues, including Band membership, size of the reserve, community construction and delivery of programmes and services. No agreement could, however, be found on the issue of cash compensation and on 24 January 1989 the Band withdrew from the negotiations when the federal Government presented its formal offer.

21.2 After reviewing the principal features of its formal offer (transfer to the Band of 95 square miles of reserve land: the acceptance of the Band's membership calculation; the setting aside of \$C 34 million for community development projects; the granting of \$C 2.5 million per year of federal support programmes; the proposal of a special development plan to assist the Band in establishing a viable economy on its new reserve; and the establishment of a \$C 500,000 trust fund to assist Band elders wishing to pursue their traditional way of life), the State party observes that the Government's formal overall offer amounts to approximately \$C 45 million in benefits and programmes, in addition to a 95 square mile reserve. The Band has claimed additional compensation of between \$C 114 million and \$C 275 million for alleged lost revenues. The State party has denied the Band's entitlement to such sums but has advised it that it is prepared to proceed with every aspect of its offer without prejudice to the Band's right to sue the federal Government for additional compensation.

21.3 The State party concludes that its most recent offer meets two tests of fairness, namely: that it is consistent with other recent settlements with native groups, and that it addresses the legitimate social and economic objectives of the Band. It adds that the community negotiation process must be considered as a practical vehicle and opportunity for Indian communities to increase their local autonomy and decision-making responsibilities. The federal policy provides for negotiations on a wide range of issues, such as government institutions, membership, accountability, financial arrangements, education, health services and social development. Based on the above considerations, the State party requests the Committee to declare the communication inadmissible on the grounds of failure to exhaust all available domestic remedies.

22.1 In a further submission dated 22 March 1989, the author takes issue with the State party's submission of 2 February 1989, characterizing it as not only misleading but virtually entirely untrue. He alleges that recent negotiations between the Lubicon Lake Band and the federal Government did not, on the Government's side, "in any way represent a serious attempt at settlement of the Lubicon issues". Rather, he submits, the Government's "formal offer" was an exercise in public relations, which committed the Federal Government to virtually nothing. It is submitted that the offer, if accepted, would have stripped the community's members of any legal means of redressing their situation.

22.2 In substantiation of these allegations, the author argues that the Government's "formal offer" contains no more than a commitment to provide housing and a school. On the other hand, it lacks "any commitment to provide the facilities and equipment necessary for the Lubicon people to manage their own affairs, such as facilities for essential vocational training, support for commercial and economic development, or any basis from which the Band might achieve financial independence". It is further submitted that contrary to the State party's statement that an agreement had been reached on the majority of issues for which the Band seeks a viable solution, including membership, reserve size and community construction, no agreement or consensus had been reached on any of these issues. Furthermore, the author argues that while the State party has claimed that its offer would amount to approximately \$C 45 million in benefits and programmes, it has failed to indicate that the majority of these funds remain uncommitted and that without adequate means of legal redress the Lubicon Lake Band would be incapable of seeking to obtain any future commitments from the Government.

23.1 By submission of 30 May 1989, the author recalls that the Band has been pursuing its domestic claims through the Canadian courts for over 14 years, and that the nature of the claims and the judicial process involved is bound to draw out these proceedings for another 10 years. He submits that the State party does not dispute that court actions and negotiations undertaken to ensure the Band's livelihood have produced no results, and that court proceedings addressing the issues of land title and compensation would take years in resolution, if resolution ever occurred. It is pointed out that following the Band's refusal to endorse a settlement offer, which would force the Band to relinquish all rights to legal action involving a controversy with the State party in exchange for promises of future discussions between Canada and the Band, Canada terminated the negotiations. The author adds that: "Rather than continuing to seek a course of compromise and settlement, Canada has sent agents into non-native communities of northern Alberta, in the area immediately surrounding the traditional Lubicon territory." Working through a single individual who is said to retain some ties with the Band but who

has not lived in the community for 40 years, these agents are said to try to induce other native individuals to strike their own private deals with the federal Government. Most of the individuals identified by the agents do not appear to be affiliated with any recognized aboriginal society.

23.2 In substantiation of earlier allegations, the author explains that the Band's loss of its economic base and the breakdown of its social institutions, including the transition from a way of life marked by trapping and hunting to a sedentary existence, has led to a marked deterioration in the health of the Band members:

"... the diet of the people has undergone dramatic changes with the loss of their game, their reliance on less nutritious processed foods, and the spectre of alcoholism, previously unheard of in this community and which is now overwhelming it As a result of these drastic changes in the community's physical existence, the basic health and resistance to infection of community members has deteriorated dramatically. The lack of running water and sanitary facilities in the community, needed to replace the traditional systems of water and sanitary management is leading to the development of diseases associated with poverty and poor sanitary and health conditions. This situation is evidenced by the astonishing increase in the number of abnormal births and by the outbreak of tuberculosis, affecting approximately one third of the community."

24.1 In a submission dated 20 June 1989, the State party concedes "that the Lubicon Lake Band has suffered a historical inequity and that they are entitled to a reserve and related entitlements". It maintains, however, that it has made offers to the Band which, if accepted, would enable the Band to maintain its culture, control its way of life and achieve economic self-sufficiency, and that its offer would provide an effective remedy to the violations of the Covenant alleged by the Band. However, a remedy of this nature cannot be imposed on the Band. The State party recalls that negotiations between the Lubicon Lake Band and senior government officials took place from November 1988 to January 1989; during the autumn of 1988, Chief Ominayak also met with the Prime Minister of Canada. It is submitted that the State party met virtually every demand of the author, either in full or to such an extent that equal treatment with other indigenous groups in Canada was approximated or exceeded. Thus, 95 square miles of land, mineral rights over 79 square miles, community facilities for each family living on the reserve, control over membership and an economic self-sufficiency package were offered in full to the Band. On the basis of a total of 500 Band members and a government package worth \$C 45 million (non-inclusive of mineral and land rights), this offer amounted to \$C 90,000 per person or almost \$C 500,000 for each family of five. A number of the Band's demands, such as a request for an indoor ice arena or a swimming pool, were refused.

24.2 According to the State party, the major remaining point of contention between the federal Government and the Band is a claim by the Band for \$C 167 million in compensation for economic and other losses allegedly suffered. In an endeavour to permit the resolution of the matters agreed on between the parties, the federal Government put forth a proposal that would enable the Band to accept the State party's offer in its entirety, while continuing to pursue their general claim for compensation in the Canadian courts. The State party rejects the contention that "virtually all items of any significance" in its offer "were left to future discussions", and contends that most of the Band's claims for land, mineral rights, community facilities, control over membership and an economic self-sufficiency package have been agreed to by the Government. Finally, the State party rejects the allegation that it negotiated in bad faith.

24.3 On procedural grounds, the State party indicates that, since the Committees's decision on admissibility, no clarifications have been put forward by the Committee to enable the State party to address specific allegations of violations of the Covenant. It therefore maintains that the proceedings have not progressed from the admissibility stage. It further submits that by acting within its jurisdiction and procedure, the Committee should (a) issue a ruling pursuant to rule 93, paragraph 4, indicating the outcome of its reconsideration of admissibility; (b) if finding the communication admissible, stipulate the articles and the evidence on which the finding is based; and (c) provide the federal Government with a six-month period during which to file its observations on the merits.

25. By interlocutory decision of 14 July 1989, the Human Rights Committee invited the State party to submit to the Committee any further explanations or statements relating to the substance of the author's allegations, in

addition to its earlier submissions, not later than by 1 September 1989. The State party was again requested, pursuant to rule 86 of the rules of procedure and pending the Committee's final decision, to take measures to avoid damage to the author and the members of the Lubicon Lake Band.

26.1 In its reply to the interlocutory decision, dated 31 August 1989, the State party asserts that it is being denied due process, since the principles of natural justice require that a party be aware of the specific charge and evidence on which the accusations of the author of the communication are based. It claims that since it was never informed of the articles of the Covenant and the evidence in respect of which the communication was declared admissible, the principles of procedural fairness have not been respected, and that the federal Government remains prejudiced in its ability to respond to the Band's claim.

26.2 In respect of the alleged violations of articles 14, paragraph 1, and 26, the State party rejects as "totally unfounded" the claim that it failed to provide the Band with an independent and impartial tribunal for the resolution of its claims: the long tradition of impartiality and integrity of Canadian courts includes numerous cases won by aboriginal litigants. It is submitted that the Band has failed to adduce any evidence that would indicate that the judiciary acted any differently in proceedings concerning the Lubicon Lake Band. Furthermore, the State party claims that the responsibility for major delays in the resolution of the Band's court actions lies largely with the Band itself. Not only did the Band fail to take the necessary steps to move any of the actions it initiated forward and refuse to co-operate with the federal Government in the action it had initiated in an effort to resolve the matter, but, in addition, on 30 September 1988, the Band declared that it refused to recognize the jurisdiction of the Canadian courts, thus undermining any attempt to obtain a resolution through the judicial process.

26.3 The State party provides a detailed outline of the chronology of the judicial proceedings in the Band's case. Three court actions in respect of the Band remain outstanding. The first of these was initiated by the Band in the Federal Court of Canada against the federal Government. This action has not moved forward since 1981 although, according to the State party, it was the Band's responsibility to take the next step in this suit. The second action was initiated by the Band in the Alberta Court of Queen's Bench against the province and some private corporations. After the Band was denied an interim injunction in 1985, it did not take substantive steps in the proceedings and abandoned its appeal against the Court's refusal to add the federal Government as a party. The third action was initiated by the federal Government in May 1988 in an attempt to overcome jurisdictional wrangles, to bring both the provincial and federal Governments and the Band before the same courts, and to finally solve matters. The Band chose not to participate in this action, despite the efforts of the Chief Justice of the Court of Queen's Bench of Alberta to expedite matters - this action remains in abeyance. For the State party, each of the above court actions provides a vehicle by which the Band could resolve its claims.

26.4 In addition to judicial proceedings, the State party maintains, the federal Government has sought to settle matters with the Lubicon Lake Band by way of negotiation. Thus, the offers put forward during these negotiations (outlined in para. 24.1 above) met virtually all of the author's claim in full or to a large extent. The State party adds that a new round of negotiations has started and that "extensive efforts are being made in this regard". Discussions between the Band and the Alberta provincial government resumed on 23 August 1989, and further discussions with the federal Government were scheduled to start on 7 September 1989. The State party reiterates that its offer to the Band remains valid.

26.5 In respect of the determination of Band membership, the State party rejects as "completely incorrect" the Band's claim that "Canada has attempted to subject Lubicon Lake Band members to a retroactive application of the Canadian Indian Act as it stood prior to its amendment following the decision in Sandra Lovelace v. Canada". On the contrary, the State party submits, the Band submitted, in 1985, a membership code pursuant to the Indian Act (as amended following the Committee's decision in the Lovelace case), which was accepted by Canada and gave the Band total control over its membership. As a result, the federal Government's offer is based on the approximately 500 individuals considered by the Band leadership to be members of the Lubicon Lake community.

26.6 In respect of the alleged violations of articles 17 and 23, paragraph 1, 18 and 27, the State party rejects as inaccurate and misleading the Band's claim that "Canada is participating in a project by which virtually all

traditional Lubicon lands have been leased for timber development". It points out that the Daishowa pulp mill, which is under construction north of Peace River, Alberta, is neither within the Band's claimed "traditional" lands nor within the area agreed to by the Band and the provincial government for a reserve. It is stated that the new pulp mill is located approximately 80 kilometres away from the land set aside for the Band. The State party continues:

"As regards the area available to the pulp mill to supply its operations, the forest management agreement between the province of Alberta and the pulp mill specifically excludes the land proposed for the Lubicon Lake Band. Moreover, in the interests of sound forest management practices, the area cut annually outside of the proposed Lubicon reserve will involve less than 1 per cent of the area specified in the forest management agreement."

26.7 Finally, the State party draws attention to recent developments in the Cadotte Lake/Buffalo Lake community, within which the majority of the Lubicon Lake Band members reside. In December 1988, the federal Government was informed of the existence of a new group within the community, which was seeking to solve the rights of its members under Treaty 8 independent of the Lubicon Lake Band. This group, composed of about 350 individuals, requested from the Government recognition of its status as the Woodland Cree Band. According to the State party, the group consists of Lubicon Lake Band members who formally expressed their intention of joining the new Band, former Lubicon Lake Band members whose names were removed by the Lubicon Lake Band in January 1989 from the list of Band members, and other native individuals living within the community. The federal Government agreed to the creation of the Woodland Cree Band. The State party adds that it recognizes the same legal obligations in respect of the Woodland Cree Band as it does in respect of the Lubicon Lake Band members.

26.8 In a further submission dated 28 September 1989, the State party refers to the tripartite negotiations between the federal Government, the provincial government and the Lubicon Lake Band, scheduled to take place at the end of August/early September 1989; it claims that although the Band had undertaken to provide a comprehensive counterproposal to the federal Government's outstanding offer and to provide a list of the persons it represented in the negotiations, it was informed, on 7 September 1989, that a counterproposal had not been prepared by the Band and that no list of the individuals purported to be represented by the Band would be forthcoming. The Band allegedly stated that it refused to negotiate in the presence of Mr. Ken Colby, a member of Canada's negotiating team, because of his activities as a government media spokesman. Thus, owing to the Band's refusal to continue a meaningful discussion of its claim, negotiations were not resumed.

27.1 In his comments of 2 October 1989 on the State party's reply to the Committee's interim decision, the author contends that the State party's claim of prejudice in conducting the case before the Human Rights Committee is unfounded, as all the factual and legal bases of the Band's claims have been thoroughly argued. As to whether domestic remedies continue to be available to the Band, it is pointed out that no domestic remedy exists which could restore the Lubicon Lake Band's traditional economy or way of life, which "has been destroyed as a direct result of both the negligence of the Canadian Government and its deliberate actions". The author submits that from the legal point of view, the situation of the Band is consistent with the Committee's decision in the case of Munoz v. Peru, [a/in](#) which it was held that the concept of a fair hearing within the meaning of article 14, paragraph 1, of the Covenant necessarily entails that justice be rendered without undue delay. In that case, the Committee had considered a delay of seven years in the domestic proceedings to be unreasonably prolonged. In the case of the Band, the author states, domestic proceedings were initiated in 1975. Furthermore, although the Band petitioned the federal Government for a reserve for the first time in 1933, the matter remains unsettled. According to the Band, it was forced to bring 14 years of litigation to an end, primarily because of two decisions that effectively deny the Band an opportunity to maintain aboriginal rights claim against the federal Government. Thus, in 1986, the Supreme Court of Canada denied federal court jurisdiction in aboriginal rights cases arising within provincial boundaries in the Joe case. In the light of that decision, the Band requested the Alberta courts, in 1987, to include the federal Government as a necessary party in the Band's aboriginal rights claim; this request was opposed by the federal Government. In May 1988, the federal Government instituted proceedings, which, in the author's opinion, were intended to persuade the Alberta Court of Queen's Bench that the Band merely had treaty-based rights to 40 square miles of land. It is submitted that a

favourable decision would, for the Government, virtually clear the title to the Daishowa timber leases, encompassing nearly all of the traditional Lubicon territory, while not rendering "moot issues related to [the] destruction of the Band's economic base". The author submits that the Chief Justice of the Court of Queen's Bench recognized that aboriginal rights had to be determined before any decision on the issue of treaty rights, and that if the State party had wanted the courts to truly settle the Lubicon land issue, rather than using them so as to forestall any efforts to solve the matter, it would have referred the issue directly to the Supreme Court of Canada.

27.2 As to the State party's reference to a negotiated settlement, the author submits that the offer is neither equitable nor does it address the needs of the Lubicon community, since it would leave virtually all items of any significance to future discussions, decisions by Canada, or applications by the Band; and that the Band would be required to abandon all rights to present any future domestic and international claims against the State party, including its communication to the Human Rights Committee. The author further submits that the agreement of October 1988 between the Band and the Province of Alberta does not in the least solve the Band's aboriginal land claims, and that the State party's characterization of the agreement has been "deceptive". In this context, the author argues that, contrary to its earlier representations, the State party has not offered to implement the October 1988 agreement and that if it were willing to honour its provisions, several issues including the question of just compensation would have to be settled.

27.3 In substantiation of his earlier submissions concerning alleged violations of articles 14 and 26, the author claims that the State party has not only failed to provide the Band equal protection vis-a-vis non-Indian groups, but that it also attempted to deny it equal protection vis-a-vis other Indian bands. Thus, with respect to the issue of Band membership, the author alleges, the effect of the formula proposed by Canada in 1986 for determining Band membership would deny aboriginal rights to more than half of the Lubicon people, thereby treating the Band members in an unequal and discriminatory way in comparison with the treatment of all other native people. It is submitted that as late as December 1988, the State party sought to apply to the Band criteria that were those of the legislation "prior to the Human Rights Committee's views in the case of Lovelace v. Canada, [b/](#) which legislation was found to be contrary to article 27 of the Covenant.

27.4 With respect to the alleged violations of articles 17, 18, 23 and 27, the author reiterates that the State party has sought to distort the presentation of recent events and engaged in a misleading discussion of the Daishowa timber project, so as to divert the Committee's attention from "Canada's knowing and wilful destruction of Lubicon society". He recalls that only seven months after the Committee's request for interim protection under rule 86, virtually all of the traditional Lubicon land was leased for commercial purposes in connection with the Daishowa timber project. The relevant forest management agreement to supply the new pulp mill with trees, allegedly completely covers the traditional Lubicon hunting and trapping grounds, which cover 10,000 square kilometres, with the exception of 65 square kilometres set aside but never formally established as a reserve. It is submitted by the author that Canada has acted in violation of the Committee's request for interim protection when it sold the timber resources of the 10,000 square kilometres, allegedly traditionally used by the Band and never ceded by it, to a Japanese company. Moreover, Canada is alleged to portray wrongly the Impact of the Daishowa project as minimal; the author points out that current production plans would call for the cutting of 4 million trees annually, and that plans to double the envisaged annual production of 340,000 metric tons of pulp in three years have recently been announced. This economic activity, if proceeding unabated, would, in the author's opinion, continue to destroy the traditional lifeground of the Lubicon community. He submits that the fact that the 95 square miles set aside under the October 1988 agreement are relatively intact would be irrelevant, since the game on which the Band members have traditionally depended for their livelihood has already been driven out of the entire 10,000 square kilometres area.

27.5 Finally, the author submits that the State party's creation of the "Woodland Cree Band", through which it is allegedly attempting to "fabricate" a competing claim to traditional Lubicon lands, places the State party in further violations of articles 1, 26 and 27 of the Covenant. In this context, the author claims that the Woodland Cree Band is:

"a group of disparate Individuals drawn together by Canada from a dozen different communities scattered across Alberta and British Columbia, who have no history as an organized aboriginal

society and no relation as a group to the traditional territory of the Lubicon Lake Band [and that it] is Canada's most recent effort to undermine the traditional Lubicon society and to subvert Lubicon land rights."

The author adds that the federal Government has supported the Woodland Cree Band both financially and legally, recognizing it "with unprecedented dispatch", thereby bypassing more than 70 other groups, including six different homogenous Cree communities in northern Alberta that had been awaiting recognition as bands for over 50 years. Some of the alleged members of the "Woodland Cree" band are said to come from these very communities. The author refers to section 17 of the Indian Act, which gives the Canadian Indian Affairs Minister the power to constitute bands and to determine that "such portion of the reserve land and funds of the existing Band as the Minister determines" may be earmarked for the benefit of the new band. It is submitted by the author that the powers conferred under section 17 of the Indian Act are "extraordinary and unconstitutional" and that they have been invoked "in order to create [the] 'Woodland Cree Band' and to dispossess the Lubicon Lake Band of its traditional territory and culture". Furthermore, while the State party claims that the Woodland Cree Band represents some 350 individuals, the author alleges that the new Band has steadfastly refused to release the names of its members, so that its claims might be verified. He states that the federal Government has recognized that the Woodland Cree Band members comprise only 110 individuals.

27.6 The author concludes that the State party has been unable to refute his allegations of violations of articles 2, 6, paragraph 1, 7, 14, paragraph 1, 17, 18, paragraph 1, 23, paragraph 1, 26 and 27, as set out in his submissions of 12 January 1988 and 30 May 1989, and requests the Committee to find against the State party in respect of these articles. In respect of an alleged violation of article 1, he points out that while he has, as the representative of the Band, signed all the submissions to the Committee, he merely acts in his capacity as a duly elected representative of the Band and not on his own behalf. In this context, he notes that while article 2 of the Optional Protocol provides for the submission of claims to the Committee by individuals, article I of the Covenant guarantees "all peoples ... the right of self-determination". He adds that "if the Committee determines that an individual submitting a claim on behalf of a group, in compliance with the provisions of article 2 of the Optional Protocol, may not state a case on behalf of that group under article I of the Covenant, the Committee effectively has determined that the rights enumerated in article 1 of the Covenant are not enforceable". The author further adds that it "clearly could not be the intent of the Committee to reach such a result" and that "therefore, the Band respectfully submits that as a people, represented by their duly elected leader, Chief Bernard Ominayak, the Lubicon Lake Band has been the victim of violations by the federal Government of Canada of the Band's rights as enumerated in article I of the Covenant on Civil and Political Rights".

28.1 In a final submission dated 8 November 1989, the State party recalls that in any assessment of the judicial proceedings in the case of the Lubicon Lake Band, the State party's constitutional division of powers between the federal and provincial governments and the respective jurisdiction of the courts has to be borne in mind. Where provincially owned lands are claimed, as in the case of the Lubicons, the Supreme Court of Canada has held that claims must be filed in the provincial courts against provincial governments. The Supreme Court's ruling clearly defines, the State party submits, the proper judicial forum for the Band's claim to aboriginal land rights. The State party emphasizes that the failure of the Band's representatives to initiate proceedings in the competent courts does not imply that Canadian courts are either unable or unwilling to guarantee a fair hearing in the case.

28.2 Regarding the distinction between aboriginal rights and treaty rights, the State party explains that under Canadian constitutional law, aboriginal rights may be superseded by treaty rights. Whenever this occurs, Indian bands may claim benefits under the superseding treaties. The State party acknowledges that the Lubicon Lake Band has a valid claim to benefits under Treaty 8, which was entered into with the Cree and other Indians in the Province of Alberta in 1899. Rights under Treaty 8 formed the basis of the offers made by the Canadian and Albertan governments to the Band. The land offered by the provincial government under the October 1988 agreement is related to these Treaty provisions. On the other hand, the 10,000 square kilometres area referred to by the Band in its submissions relate to its aboriginal claims, which have not been recognized by the federal Government. The Band's complaint about oil exploration and exploitation and impending timber development,

refers to activities on this wider territory of 10,000 square kilometres - not on lands that were identified in proposed settlements between the Band and the federal and provincial government.

28.3 The State party refutes the Band's claim that its trapping and hunting lifestyle has been irretrievably destroyed and points out that in areas covered by timber leases the forest, generally, remains intact and sustains an animal population sufficient to satisfy those members of the Lubicon Lake Band who wish to engage in traditional activities. It adds that disturbances of the forest ecosystems usually result in an increase of the population of larger mammals, as they increase food availability in open areas.

28.4 Lastly, the State party reaffirms the voluntary nature of the establishment of the Woodland Cree Band. It points out that a minority of those wishing to join the Woodland Cree Band were at one point in time full members of the Lubicon Lake Band. Some of them, the State party points out, have since left the Band voluntarily, while about 30 of the members were expelled recently by decision of the Lubicon Lake Band. It is submitted that members of the Woodland Cree Band petitioned the federal Government, much in the same way as members of the Lubicon Lake Band did prior to the Band's recognition in the 1930s. The new Band was recognized because, in the State party's view, some of its members have land entitlements pursuant to Treaty 8 which they wish to assert. The State party adds that it recognized the Woodland Cree Band, at the express request of those who sought recognition, so that their desire to form a community could be realized, and that the Woodland Cree Band has not sought any land portions also claimed by the Lubicons.

Summary of the submissions

29.1 At the outset, the author's claim, although set against a complex background, concerned basically the alleged denial of the right of self-determination and the right of the members of the Lubicon Lake Band to dispose freely of their natural wealth and resources. It was claimed that, although the Government of Canada, through the Indian Act of 1970 and Treaty 8 of 1899, had recognized the right of the Lubicon Lake Band to continue its traditional way of life, its land (approximately 10,000 square kilometres) had been expropriated for commercial interest (oil and gas exploration) and destroyed, thus depriving the Lubicon Lake Band of its means of subsistence and enjoyment of the right of self-determination. It was claimed that the rapid destruction of the Band's economic base and aboriginal way of life had already caused irreparable injury. It was further claimed that the Government of Canada had deliberately used the domestic political and legal processes to thwart and delay all the Band's efforts to seek redress, so that the industrial development in the area, accompanied by the destruction of the environmental and economic base of the Band, would make it impossible for the Band to survive as a people. The author has stated that the Lubicon Lake Band is not seeking from the Committee a territorial rights decision, but only that the Committee assist it in attempting to convince the Government of Canada: (a) that the Band's existence is seriously threatened; and (b) that Canada is responsible for the current state of affairs.

29.2 From the outset, the State party has denied the allegations that the existence of the Lubicon Lake Band has been threatened and has maintained that continued resource development would not cause irreparable injury to the traditional way of life of the Band. It submitted that the Band's claim to certain lands in northern Alberta was part of a complex situation that involved a number of competing claims from several other native communications in the area, that effective redress in respect of the Band's claims was still available, both through the courts and through negotiations, that the Government had made an ex gratia payment to the Band of \$C 1.5 million to cover legal costs and that, at any rate, article 1 of the Covenant, concerning the rights of people, could not be invoked under the Optional Protocol, which provides for the consideration of alleged violations of individual rights, but not collective rights conferred upon peoples.

29.3 This was the state of affairs when the Committee decided in July 1987 that the communication was admissible "in so far as it may raise issues under article 27 or other articles of the Covenant". In view of the seriousness of the author's allegations that the Lubicon Lake Band was at the verge of extinction, the Committee requested the State party, under rule 86 of the rules of procedure "to take interim measures of protection to avoid irreparable damage to [the author of the communication] and other members of the Lubicon Lake Band".

29.4 Insisting that no irreparable damage to the traditional way of life of the Lubicon Lake Band had occurred and that there was no imminent threat of such harm, and further that both a trial on the merits of the Band's claims and the negotiation process constitute effective and viable alternatives to the interim relief which the Band had unsuccessfully sought in the courts, the State party, in October 1987, requested the Committee, under rule 93, paragraph 4, of the rules of procedure, to review its decision on admissibility, in so far as it concerns the requirement of exhaustion of domestic remedies. The State party stressed in this connection that delays in the judicial proceedings initiated by the Band were largely attributable to the Band's own inaction. The State party further explained its long-standing policy to seek the resolutions of valid, outstanding land claims by Indian bands through negotiations.

29.5 Since October 1987, the parties have made a number of submissions, refuting each other's statements as factually misleading or wrong. The author has accused the State party of creating a situation that has directly or indirectly led to the death of many Band members and is threatening the lives of all other members of the Lubicon community, that miscarriages and stillbirths have skyrocketed and abnormal births have risen from zero to near 100 per cent, all in violation of article 6 of the Covenant; that the devastation wrought on the community constitutes cruel, inhuman and degrading treatment in violation of article 7; that the bias of the Canadian courts has frustrated the Band's efforts to protect its land, community and livelihood, and that several of the judges have had clear economic and personal ties to the parties opposing the Band in the court actions, all in violation of articles 14, paragraph 1, and 26; that the State party has permitted the destruction of the families and homes of the Band members in violation of articles 17 and 23, paragraph 1; that the Band members have been "robbed of the physical realm to which their religion attaches" in violation of article 18, paragraph 1; and that all of the above also constitutes violations of article 2, paragraphs 1 to 3, of the Covenant.

29.6 The State party has categorically rejected the above allegations as unfounded and unsubstantiated and as constituting an abuse of the right of submission. It submits that serious and genuine efforts continued in early 1988 to engage representatives of the Lubicon Lake Band in negotiations in respect of the Band's claims. These efforts, which included an interim offer to set aside 25.4 square miles as reserve land for the Band, without prejudice to negotiations or any court actions, failed. According to the author, all but the 25.4 square miles of the Band's traditional lands had been leased out, in defiance of the Committee's request for interim measures of protection, in conjunction with a pulp mill to be constructed by the Daishowa Canada Company Ltd. near Peace River, Alberta, and that the Daishowa project frustrated any hopes of the continuation of some traditional activity by Band members.

29.7 Accepting its obligation to provide the Lubicon Lake Band with reserve land under Treaty 8, and after further unsuccessful discussions, the Federal Government, in May 1988, initiated legal proceedings against the Province of Alberta and the Lubicon Lake Band, in an effort to provide a common jurisdiction and thus to enable it to meet its lawful obligations to the Band under Treaty 8. In the author's opinion, however, this initiative was designated for the sole purpose of delaying indefinitely the resolution of the Lubicon land issues and, on 6 October 1988 (30 September, according to the State party), the Lubicon Lake Band asserted jurisdiction over its territory and declared that it had ceased to recognize the jurisdiction of the Canadian courts. The author further accused the State party of "practicing deceit in the media and dismissing advisors who recommend any resolution favourable to the Lubicon people".

29.8 Following an agreement between the provincial government of Alberta and the Lubicon Lake Band in November 1988 to set aside 95 square miles of land for a reserve, negotiations started between the federal Government and the Band on the modalities of the land transfer and related issues. According to the State party, consensus had been reached on the majority of issues, including Band membership, size of the reserve, community construction and delivery of programmes and services, but not on cash compensation, when the Band withdrew from the negotiations on 24 January 1989. The formal offer presented at that time by the federal Government amounted to approximately \$C 45 million in benefits and programmes, in addition to the 95 square mile reserve.

29.9 The author, on the other hand, states that the above information from the State party is not only misleading but virtually entirely untrue and that there had been no serious attempt by the Government to reach a settlement. He describes the Government's offer as an exercise in public relations, "which committed the Federal

Government to virtually nothing", and states that no agreement or consensus had been reached on any issue. The author further accused the State party of sending agents into communities surrounding the traditional Lubicon territory to induce other natives to make competing claims for traditional Lubicon land.

29.10 The State party rejects the allegation that it negotiated in bad faith or engaged in improper behaviour to the detriment of the interests of the Lubicon Lake Band. It concedes that the Lubicon Lake Band has suffered a historical inequity, but maintains that its formal offer would, if accepted, enable the Band to maintain its culture, control its way of life and achieve economic self-sufficiency and, thus, constitute an effective remedy. On the basis of a total of 500 Band members, the package worth \$C 45 million would amount to almost \$C 500,000 for each family of five. It states that a number of the Band's demands, including an indoor ice arena or a swimming pool, had been refused. The major remaining point of contention, the State party submits, is a request for \$C 167 million in compensation for economic and other losses allegedly suffered. That claim, it submits, could be pursued in the courts, irrespective of the acceptance of the formal offer. It reiterates that its offer to the Band stands.

29.11 Further submissions from both parties have, *inter alia*, dealt with the impact of the Daishowa pulp mill on the traditional way of life of the Lubicon Lake Band. While the author states that the impact would be devastating, the State party maintains that it would have no serious adverse consequences, pointing out that the pulp mill, located about 80 kilometres away from the land set aside for the reserve, is not within the Band's claimed traditional territory and that the area to be cut annually, outside the proposed reserve, involves less than 1 per cent of the area specified in the forest management agreement.

30. The Human Rights Committee has considered the present communication in the light of the information made available by the parties, as provided for in articles 5, paragraph 1, of the Optional Protocol. In so doing, the Committee observes that the persistent disagreement between the parties as to what constitutes the factual setting for the dispute at issue has made the consideration of the claims on the merits most difficult.

Request for a review of the decision on admissibility

31.1 The Committee has seriously considered the State party's request that it review its decision declaring the communication admissible under the Optional Protocol "in so far as it may raise issues under article 27 or other articles of the Covenant". In the light of the information now before it, the Committee notes that the State party has argued convincingly that, by actively pursuing matters before the appropriate courts, delays, which appeared to be unreasonably prolonged, could have been reduced by the Lubicon Lake Band. At issue, however, is the question of whether the road of litigation would have represented an effective method of saving or restoring the traditional or cultural livelihood of the Lubicon Lake Band, which, at the material time, was allegedly at the brink of collapse. The Committee is not persuaded that that would have constituted an effective remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. In the circumstances, the Committee upholds its earlier decision on admissibility.

31.2 At this stage, the Committee must also state that it does not agree with the State party's contention that it was remiss in not spelling out, at the time of declaring the communication admissible, which of the author's allegations deserved consideration on the merits. Although somewhat confusing at times, the author's claims have been set out sufficiently clearly as to permit both the State party and the Committee, in turn, to address the issues on the merits.

Articles of the Covenant alleged to have been violated

32.1 The question has arisen of whether any claim under article 1 of the Covenant remains, the Committee's decision on admissibility notwithstanding. While all peoples have the right of self-determination and the right freely to determine their political status, pursue their economic, social and cultural development and dispose of their natural wealth and resources, as stipulated in article 1 of the Covenant, the question whether the Lubicon Lake Band constitutes a "people" is not an issue for the Committee to address under the Optional Protocol to the Covenant. The Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the Covenant, articles 6 to 27, inclusive. There is,

however, no objection to a group of individuals, who claim to be similarly affected, collectively to submit a communication about alleged breaches of their rights.

32.2 Although initially couched in terms of alleged breaches of the provisions of article 1 of the Covenant, there is no doubt that many of the claims presented raise issues under article 27. The Committee recognizes that the rights protected by article 27, include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong. Sweeping allegations concerning extremely serious breaches of other articles of the Covenant (6, 7, 14, para. 1, and 26), made after the communication was declared admissible, have not been substantiated to the extent that they would deserve serious consideration. The allegations concerning breaches of articles 17 and 23, paragraph 1, are similarly of a sweeping nature and will not be taken into account except in so far as they may be considered subsumed under the allegations which, generally, raise issues under article 27.

32.3 The most recent allegations that the State party has conspired to create an artificial band, the Woodland Cree Band, said to have competing claims to traditional Lubicon land, are dismissed as an abuse of the right of submission within the meaning of article 3 of the Optional Protocol.

Violations and the remedy offered

33. Historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue. The State party proposes to rectify the situation by a remedy that the Committee deems appropriate within the meaning of article 2 of the Covenant.

APPENDIX I

Individual opinion: submitted by Mr. Nisuke Ando pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Committee's views on communication No. 17/1984,

B. Ominayak and the Lubicon Lake Band v. Canada

I do not oppose the adoption of the Human Rights Committee's views, as they may serve as a warning against the exploitation of natural resources which might cause irreparable damage to the environment of the earth that must be preserved for future generations. However, I am not certain if the situation at issue in the present communication should be viewed as constituting a violation of the provisions of article 27 of the Covenant.

Article 27 stipulates: "In those States in which ethnic, religious or linguistic minorities exists, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language". Obviously, persons belonging to the Lubicon Lake Band are not denied the right to profess and practice their own religion or to use their own language. At issue in the present communication is therefore, whether the recent expropriation by the Government of the Province of Alberta of the Band's land for commercial interest (e.g. leases for oil and gas exploration) constitutes a violation of those persons' right "to enjoy their own culture".

It is not impossible that a certain culture is closely linked to a particular way of life and that industrial exploration of natural resources may affect the Band's traditional way of life, including hunting and fishing. In my opinion, however, the right to enjoy one's own culture should not be understood to imply that the Band's traditional way of life must be preserved intact at all costs. Past history of mankind bears out that technical development has brought about various changes to existing ways of life and thus affected a culture sustained thereon. Indeed, outright refusal by a group in a given society to change its traditional way of life may hamper the economic development of the society as a whole. For this reason I would like to express my reservation to the categorical statement that recent developments have threatened the life of the Lubicon Lake Band and constitute a violation of article 27.

Nisuke ANDO

APPENDIX II

Individual opinion: submitted by Mr. Bertil Wennergren pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Committee's views on Communication N0.167/1984,

B. Ominayak and the Lubicon Lake Band v. Canada

The communication in its present form essentially concerns the authors' rights to freely dispose of their natural wealth and resources, and to retain their own means of subsistence, such as hunting and fishing. In its decision of 22 July 1987, the Human Rights Committee decided that the communication was admissible in so far as it could have raised issues under article 27 or other articles of the Covenant. With respect to provisions other than article 27 the authors' allegations have remained, however, of such a sweeping nature that the Committee has not been able to take them into account except in so far as they may be subsumed under the claims which, generally, raise issues under article 27. That is the basis of my individual opinion.

Since the Committee adopted its decision on admissibility, discussions seeking a resolution of the matter have taken place between the Federal Government, the Province of Alberta and the authors. As no progress was made towards a settlement, the Federal Government initiated legal proceedings against the Province of Alberta and the Lubicon Lake Band on 17 May 1988, in order to enable Canada to meet its legal obligations vis-a-vis the authors under Treaty 8. The Statement of Claim, initiating the legal action, seeks from the Court of the Queen's Bench of Alberta (a) a declaration that the Lubicon Lake Band is entitled to a reserve and (b) a determination of the size of that reserve.

On 9 June 1988, the Lubicon Lake Band filed a Statement of Defence and Counterclaim. In this connection, the State party has submitted that the issue forming the basis of the domestic dispute as well as the basis of the communication before the Human Rights Committee concerns the extent of the territory to be set aside as a reserve, and related issues. It is not altogether clear that all issues which may be raised under article 27 of the Covenant are issues to be considered by the Court of Queen's Bench of Alberta in the case still pending before it. At the same time, it does appear that issues under article 27 of the Covenant are inextricably linked with the extent of the territory to be set aside as a reserve, and questions related to those issues.

The rationale behind the general rule of international law that domestic remedies should be exhausted before a claim is submitted to an instance of international investigation or settlement is primarily to give a respondent State an opportunity to redress, by its own means within the framework of its domestic legal system, the wrongs alleged to have been suffered by the individual. In my opinion, this rationale implies that, in a case such as the present one, an international instance shall not examine a matter pending before a court of the respondent State. To my mind, it is not compatible with international law that an international instance consider issues which, concurrently, are pending before a national court. An instance of international investigation or settlement must, in my opinion, refrain from considering any issue pending before a national court until such time as the matter has been adjudicated upon by the national courts. As that is not the case here, I find the communication inadmissible at this point in time.

Bertil WENNERGREN

Notes

a/ Communication No. 203/1986, final views adopted on 4 November 1988, para. 11.3.

b/ Communication No. 24/1977, final views adopted on 30 July 1981.

* Individual opinions submitted by Mr. Nisuke Ando and Mr. Bertil Wennergren, respectively, are appended.

HOME TREATIES SEARCH LINKS

Annex 741

Intentionally Omitted

Annex 742

Intentionally Omitted

Annex 743

UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Article 2, Adopted by General Assembly resolution 47/135 of 18 December 1992

[WHAT ARE HUMAN RIGHTS?](#)[DONATE](#)[HOME](#)[ABOUT US](#)[ISSUES](#)[HUMAN RIGHTS
BY COUNTRY](#)[WHERE WE
WORK](#)[HUMAN RIGHTS
BODIES](#)[NEWS AND
EVENTS](#)[PUBLICATIONS AND
RESOURCES](#)[English](#) > [Professional Interest](#) > [Declaration on Minorities](#)

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

Adopted by General Assembly resolution 47/135 of 18 December 1992

The General Assembly ,

Reaffirming that one of the basic aims of the United Nations, as proclaimed in the Charter, is to promote and encourage respect for human rights and for fundamental freedoms for all, without distinction as to race, sex, language or religion,

Reaffirming faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small,

Desiring to promote the realization of the principles contained in the Charter, the Universal Declaration of Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, and the Convention on the Rights of the Child, as well as other relevant international instruments that have been adopted at the universal or regional level and those concluded between individual States Members of the United Nations,

Inspired by the provisions of article 27 of the International Covenant on Civil and Political Rights concerning the rights of persons belonging to ethnic, religious and linguistic minorities,

Considering that the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of States in which they live,

Emphasizing that the constant promotion and realization of the rights of persons belonging to national or ethnic, religious and linguistic minorities, as an integral part of the development of society as a whole and within a democratic framework based on the rule of law, would contribute to the strengthening of friendship and cooperation among peoples and States,

Considering that the United Nations has an important role to play regarding the protection of minorities,

Bearing in mind the work done so far within the United Nations system, in particular by the Commission on Human Rights, the Sub-Commission on Prevention of Discrimination and Protection of Minorities and the bodies established pursuant to the International Covenants on Human Rights and other relevant international human rights instruments in promoting and protecting the rights of persons belonging to national or ethnic, religious and linguistic minorities,

Taking into account the important work which is done by intergovernmental and non-governmental organizations in protecting minorities and in promoting and protecting the rights of persons belonging to national or ethnic, religious and linguistic minorities,

Recognizing the need to ensure even more effective implementation of international human rights instruments with regard to the rights of persons belonging to national or ethnic, religious and linguistic minorities,

Proclaims this Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities:

Article 1

See also

[The core international human rights instruments](#)

[Universal human rights instruments](#)

[Charter of the United Nations](#)

[The International Bill of Human Rights](#)

[Universal Declaration of Human Rights 1948](#)

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[Human rights conferences](#)

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[The 20th Anniversary of the OHCHR](#)

[VDPA booklet \(20th anniversary edition - PDF\)](#)

1. States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.
2. States shall adopt appropriate legislative and other measures to achieve those ends.

Article 2

1. Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.
2. Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.
3. Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.
4. Persons belonging to minorities have the right to establish and maintain their own associations.
5. Persons belonging to minorities have the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties.

Article 3

1. Persons belonging to minorities may exercise their rights, including those set forth in the present Declaration, individually as well as in community with other members of their group, without any discrimination.
2. No disadvantage shall result for any person belonging to a minority as the consequence of the exercise or non-exercise of the rights set forth in the present Declaration.

Article 4

1. States shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.
2. States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.
3. States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.
4. States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole.
5. States should consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country.

Article 5

1. National policies and programmes shall be planned and implemented with due regard for the legitimate interests of persons belonging to minorities.
2. Programmes of cooperation and assistance among States should be planned and implemented with due regard for the legitimate interests of persons belonging to minorities.

Article 6

States should cooperate on questions relating to persons belonging to minorities, inter alia, exchanging information and experiences, in order to promote mutual understanding and confidence.

Article 7

States should cooperate in order to promote respect for the rights set forth in the present Declaration.

Article 8

1. Nothing in the present Declaration shall prevent the fulfilment of international obligations of States in relation to persons belonging to minorities. In particular, States shall fulfil in good faith the obligations and commitments they have assumed under international treaties and agreements to which they are parties.

2. The exercise of the rights set forth in the present Declaration shall not prejudice the enjoyment by all persons of universally recognized human rights and fundamental freedoms.

3. Measures taken by States to ensure the effective enjoyment of the rights set forth in the present Declaration shall not prima facie be considered contrary to the principle of equality contained in the Universal Declaration of Human Rights.

4. Nothing in the present Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States.

Article 9

The specialized agencies and other organizations of the United Nations system shall contribute to the full realization of the rights and principles set forth in the present Declaration, within their respective fields of competence.

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[Employment](#)
[Mobile App](#)

[Site Map](#)
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Annex 744

U.N. Security Council Resolution 827, U.N. Doc. S/RES/827 (25 May 1993)



Security Council

Distr.
GENERAL

S/RES/827 (1993)
25 May 1993

RESOLUTION 827 (1993)

Adopted by the Security Council at its 3217th meeting, on
25 May 1993

The Security Council,

Reaffirming its resolution 713 (1991) of 25 September 1991 and all subsequent relevant resolutions,

Having considered the report of the Secretary-General (S/25704 and Add.1) pursuant to paragraph 2 of resolution 808 (1993),

Expressing once again its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of "ethnic cleansing", including for the acquisition and the holding of territory,

Determining that this situation continues to constitute a threat to international peace and security,

Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

Convinced that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace,

Believing that the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed,

Noting in this regard the recommendation by the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia for the establishment of such a tribunal (S/25221),

Reaffirming in this regard its decision in resolution 808 (1993) that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991,

Considering that, pending the appointment of the Prosecutor of the International Tribunal, the Commission of Experts established pursuant to resolution 780 (1992) should continue on an urgent basis the collection of information relating to evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law as proposed in its interim report (S/25274),

Acting under Chapter VII of the Charter of the United Nations,

1. Approves the report of the Secretary-General;
2. Decides hereby to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace and to this end to adopt the Statute of the International Tribunal annexed to the above-mentioned report;
3. Requests the Secretary-General to submit to the judges of the International Tribunal, upon their election, any suggestions received from States for the rules of procedure and evidence called for in Article 15 of the Statute of the International Tribunal;
4. Decides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute;
5. Urges States and intergovernmental and non-governmental organizations to contribute funds, equipment and services to the International Tribunal, including the offer of expert personnel;
6. Decides that the determination of the seat of the International Tribunal is subject to the conclusion of appropriate arrangements between the United Nations and the Netherlands acceptable to the Council, and that the International Tribunal may sit elsewhere when it considers it necessary for the efficient exercise of its functions;
7. Decides also that the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law;
8. Requests the Secretary-General to implement urgently the present resolution and in particular to make practical arrangements for the effective

functioning of the International Tribunal at the earliest time and to report periodically to the Council;

9. Decides to remain actively seized of the matter.

Annex 745

Human Rights Committee, General Comment 18, Non-discrimination (Thirty-Seventh Session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994)



Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994).

1 Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights. Thus, article 2, paragraph 1, of the International Covenant on Civil and Political Rights obligates each State party to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Indeed, the principle of non-discrimination is so basic that article 3 obligates each State party to ensure the equal right of men and women to the enjoyment of the rights set forth in the Covenant. While article 4, paragraph 1, allows States parties to take measures derogating from certain obligations under the Covenant in time of public emergency, the same article requires, inter alia, that those measures should not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Furthermore, article 20, paragraph 2, obligates States parties to prohibit, by law, any advocacy of national, racial or religious hatred which constitutes incitement to discrimination.

3. Because of their basic and general character, the principle of non-discrimination as well as that of equality before the law and equal protection of the law are sometimes expressly referred to in articles relating to particular categories of human rights. Article 14, paragraph 1, provides that all persons shall be equal before the courts and tribunals, and paragraph 3 of the same article provides that, in the determination of any criminal charge against him, everyone shall be entitled, in full equality, to the minimum guarantees enumerated in subparagraphs (a) to (g) of paragraph 3. Similarly, article 25 provides for the equal participation in public life of all citizens, without any of the distinctions mentioned in article 2.

4. It is for the States parties to determine appropriate measures to implement the relevant provisions. However, the Committee is to be informed about the nature of such measures and their conformity with the principles of non-discrimination and equality before the law and equal protection of the law.

5. The Committee wishes to draw the attention of States parties to the fact that the Covenant sometimes expressly requires them to take measures to guarantee the equality of rights of the persons concerned. For example, article 23, paragraph 4, stipulates that States parties shall take appropriate steps to ensure equality of rights as well as responsibilities of spouses as to marriage, during marriage and at its dissolution. Such steps may take the form of legislative, administrative or other measures, but it is a positive duty of States parties to make certain that spouses have equal rights as required by the Covenant. In relation to children, article 24 provides that all children, without any discrimination as to race, colour, sex, language, religion, national or social origin,

property or birth, have the right to such measures of protection as are required by their status as minors, on the part of their family, society and the State.

6. The Committee notes that the Covenant neither defines the term "discrimination" nor indicates what constitutes discrimination. However, article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. Similarly, article 1 of the Convention on the Elimination of All Forms of Discrimination against Women provides that "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

7. While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

8. The enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance. In this connection, the provisions of the Covenant are explicit. For example, article 6, paragraph 5, prohibits the death sentence from being imposed on persons below 18 years of age. The same paragraph prohibits that sentence from being carried out on pregnant women. Similarly, article 10, paragraph 3, requires the segregation of juvenile offenders from adults. Furthermore, article 25 guarantees certain political rights, differentiating on grounds of citizenship.

9. Reports of many States parties contain information regarding legislative as well as administrative measures and court decisions which relate to protection against discrimination in law, but they very often lack information which would reveal discrimination in fact. When reporting on articles 2 (1), 3 and 26 of the Covenant, States parties usually cite provisions of their constitution or equal opportunity laws with respect to equality of persons. While such information is of course useful, the Committee wishes to know if there remain any problems of discrimination in fact, which may be practised either by public authorities, by the community, or by private persons or bodies. The Committee wishes to be informed about legal provisions and administrative measures directed at diminishing or eliminating such discrimination.

10. The Committee also wishes to point out that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.

11. Both article 2, paragraph 1, and article 26 enumerate grounds of discrimination such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The Committee has observed that in a number of constitutions and laws not all the grounds on which discrimination is prohibited, as cited in article 2, paragraph 1, are enumerated. The Committee would therefore like to receive information from States parties as to the significance of such omissions.

12. While article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitations. That is to say, article 26 provides that all persons are

equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.

13. Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

[Home](#) || [Treaties](#) || [Search](#) || [Links](#)

Annex 746

Intentionally Omitted

Annex 747

International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 (1994).



Security Council

Distr.
GENERAL

S/RES/955 (1994)*
8 November 1994

RESOLUTION 955 (1994)

Adopted by the Security Council at its 3453rd meeting,
on 8 November 1994

The Security Council,

Reaffirming all its previous resolutions on the situation in Rwanda,

Having considered the reports of the Secretary-General pursuant to paragraph 3 of resolution 935 (1994) of 1 July 1994 (S/1994/879 and S/1994/906), and having taken note of the reports of the Special Rapporteur for Rwanda of the United Nations Commission on Human Rights (S/1994/1157, annex I and annex II),

Expressing appreciation for the work of the Commission of Experts established pursuant to resolution 935 (1994), in particular its preliminary report on violations of international humanitarian law in Rwanda transmitted by the Secretary-General's letter of 1 October 1994 (S/1994/1125),

Expressing once again its grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda,

Determining that this situation continues to constitute a threat to international peace and security,

Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace,

* Reissued for technical reasons.

Believing that the establishment of an international tribunal for the prosecution of persons responsible for genocide and the other above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed,

Stressing also the need for international cooperation to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity for those courts to deal with large numbers of suspects,

Considering that the Commission of Experts established pursuant to resolution 935 (1994) should continue on an urgent basis the collection of information relating to evidence of grave violations of international humanitarian law committed in the territory of Rwanda and should submit its final report to the Secretary-General by 30 November 1994,

Acting under Chapter VII of the Charter of the United Nations,

1. Decides hereby, having received the request of the Government of Rwanda (S/1994/1115), to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 and to this end to adopt the Statute of the International Criminal Tribunal for Rwanda annexed hereto;

2. Decides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 28 of the Statute, and requests States to keep the Secretary-General informed of such measures;

3. Considers that the Government of Rwanda should be notified prior to the taking of decisions under articles 26 and 27 of the Statute;

4. Urges States and intergovernmental and non-governmental organizations to contribute funds, equipment and services to the International Tribunal, including the offer of expert personnel;

5. Requests the Secretary-General to implement this resolution urgently and in particular to make practical arrangements for the effective functioning of the International Tribunal, including recommendations to the Council as to possible locations for the seat of the International Tribunal at the earliest time and to report periodically to the Council;

6. Decides that the seat of the International Tribunal shall be determined by the Council having regard to considerations of justice and fairness as well as administrative efficiency, including access to witnesses, and economy, and subject to the conclusion of appropriate arrangements between

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the United Nations and the State of the seat, acceptable to the Council, having regard to the fact that the International Tribunal may meet away from its seat when it considers it necessary for the efficient exercise of its functions; and decides that an office will be established and proceedings will be conducted in Rwanda, where feasible and appropriate, subject to the conclusion of similar appropriate arrangements;

7. Decides to consider increasing the number of judges and Trial Chambers of the International Tribunal if it becomes necessary;

8. Decides to remain actively seized of the matter.

Annex

Statute of the International Tribunal for Rwanda

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter referred to as "the International Tribunal for Rwanda") shall function in accordance with the provisions of the present Statute.

Article 1

Competence of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

Article 2

Genocide

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

/...

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

Article 3

Crimes against humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation;
- (e) Imprisonment;
- (f) Torture;
- (g) Rape;
- (h) Persecutions on political, racial and religious grounds;
- (i) Other inhumane acts.

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Article 4

Violations of Article 3 common to the Geneva
Conventions and of Additional Protocol II

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;

(h) Threats to commit any of the foregoing acts.

Article 5

Personal jurisdiction

The International Tribunal for Rwanda shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 6

Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

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2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

Article 7

Territorial and temporal jurisdiction

The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens. The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994.

Article 8

Concurrent jurisdiction

1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

2. The International Tribunal for Rwanda shall have primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.

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Article 9

Non bis in idem

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda.

2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if:

(a) The act for which he or she was tried was characterized as an ordinary crime; or

(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal for Rwanda shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10

Organization of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall consist of the following organs:

- (a) The Chambers, comprising two Trial Chambers and an Appeals Chamber;
- (b) The Prosecutor; and
- (c) A Registry.

Article 11

Composition of the Chambers

The Chambers shall be composed of eleven independent judges, no two of whom may be nationals of the same State, who shall serve as follows:

- (a) Three judges shall serve in each of the Trial Chambers;
- (b) Five judges shall serve in the Appeals Chamber.

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Article 12

Qualification and election of judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

2. The members of the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as "the International Tribunal for the Former Yugoslavia") shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda.

3. The judges of the Trial Chambers of the International Tribunal for Rwanda shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for judges of the Trial Chambers from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;

(b) Within thirty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in paragraph 1 above, no two of whom shall be of the same nationality and neither of whom shall be of the same nationality as any judge on the Appeals Chamber;

(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twelve and not more than eighteen candidates, taking due account of adequate representation on the International Tribunal for Rwanda of the principal legal systems of the world;

(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the six judges of the Trial Chambers. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-Member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.

4. In the event of a vacancy in the Trial Chambers, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of paragraph 1 above, for the remainder of the term of office concerned.

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5. The judges of the Trial Chambers shall be elected for a term of four years. The terms and conditions of service shall be those of the judges of the International Tribunal for the Former Yugoslavia. They shall be eligible for re-election.

Article 13

Officers and members of the Chambers

1. The judges of the International Tribunal for Rwanda shall elect a President.

2. After consultation with the judges of the International Tribunal for Rwanda, the President shall assign the judges to the Trial Chambers. A judge shall serve only in the Chamber to which he or she was assigned.

3. The judges of each Trial Chamber shall elect a Presiding Judge, who shall conduct all of the proceedings of that Trial Chamber as a whole.

Article 14

Rules of procedure and evidence

The judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the Former Yugoslavia with such changes as they deem necessary.

Article 15

The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

2. The Prosecutor shall act independently as a separate organ of the International Tribunal for Rwanda. He or she shall not seek or receive instructions from any Government or from any other source.

3. The Prosecutor of the International Tribunal for the Former Yugoslavia shall also serve as the Prosecutor of the International Tribunal for Rwanda. He or she shall have additional staff, including an additional Deputy Prosecutor, to assist with prosecutions before the International Tribunal for Rwanda. Such

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staff shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

Article 16

The Registry

1. The Registry shall be responsible for the administration and servicing of the International Tribunal for Rwanda.

2. The Registry shall consist of a Registrar and such other staff as may be required.

3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal for Rwanda. He or she shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.

4. The staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.

Article 17

Investigation and preparation of indictment

1. The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.

3. If questioned, the suspect shall be entitled to be assisted by counsel of his or her own choice, including the right to have legal assistance assigned to the suspect without payment by him or her in any such case if he or she does not have sufficient means to pay for it, as well as to necessary translation into and from a language he or she speaks and understands.

4. Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

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Article 18

Review of the indictment

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a prima facie case has been established by the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.

2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

Article 19

Commencement and conduct of trial proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal for Rwanda, be taken into custody, immediately informed of the charges against him or her and transferred to the International Tribunal for Rwanda.

3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.

4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

Article 20

Rights of the accused

1. All persons shall be equal before the International Tribunal for Rwanda.

2. In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to article 21 of the Statute.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

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4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

(b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

(c) To be tried without undue delay;

(d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

(f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda;

(g) Not to be compelled to testify against himself or herself or to confess guilt.

Article 21

Protection of victims and witnesses

The International Tribunal for Rwanda shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 22

Judgement

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.

2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

/...

Article 23

Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 24

Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:

- (a) An error on a question of law invalidating the decision; or
- (b) An error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

Article 25

Review proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal for Rwanda an application for review of the judgement.

Article 26

Enforcement of sentences

Imprisonment shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda. Such

/...

imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal for Rwanda.

Article 27

Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal for Rwanda accordingly. There shall only be pardon or commutation of sentence if the President of the International Tribunal for Rwanda, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

Article 28

Cooperation and judicial assistance

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

- (a) The identification and location of persons;
- (b) The taking of testimony and the production of evidence;
- (c) The service of documents;
- (d) The arrest or detention of persons;
- (e) The surrender or the transfer of the accused to the International Tribunal for Rwanda.

Article 29

The status, privileges and immunities of the
International Tribunal for Rwanda

1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the International Tribunal for Rwanda, the judges, the Prosecutor and his or her staff, and the Registrar and his or her staff.

/...

2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under articles V and VII of the Convention referred to in paragraph 1 of this article.

4. Other persons, including the accused, required at the seat or meeting place of the International Tribunal for Rwanda shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal for Rwanda.

Article 30

Expenses of the International Tribunal for Rwanda

The expenses of the International Tribunal for Rwanda shall be expenses of the Organization in accordance with Article 17 of the Charter of the United Nations.

Article 31

Working languages

The working languages of the International Tribunal shall be English and French.

Article 32

Annual report

The President of the International Tribunal for Rwanda shall submit an annual report of the International Tribunal for Rwanda to the Security Council and to the General Assembly.

Annex 748

OHCHR General Comment No. 23: The rights of minorities, Doc No. 08/04/94,
CCPR/C/21/Rev.1/Add.5 (1994)



CCPR General Comment No. 23: Article 27 (Rights of Minorities)

*Adopted at the Fiftieth Session of the Human Rights Committee, on 8 April 1994
CCPR/C/21/Rev.1/Add.5, General Comment No. 23. (General Comments)*

1. Article 27 of the Covenant provides that, in those States in which ethnic, religious or linguistic minorities exist, persons belonging to these minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. The Committee observes that this article establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant.

2. In some communications submitted to the Committee under the Optional Protocol, the right protected under article 27 has been confused with the right of peoples to self-determination proclaimed in article 1 of the Covenant. Further, in reports submitted by States parties under article 40 of the Covenant, the obligations placed upon States parties under article 27 have sometimes been confused with their duty under article 2.1 to ensure the enjoyment of the rights guaranteed under the Covenant without discrimination and also with equality before the law and equal protection of the law under article 26.

3.1. The Covenant draws a distinction between the right to self-determination and the rights protected under article 27. The former is expressed to be a right belonging to peoples and is dealt with in a separate part (Part I) of the Covenant. Self-determination is not a right cognizable under the Optional Protocol. Article 27, on the other hand, relates to rights conferred on individuals as such and is included, like the articles relating to other personal rights conferred on individuals, in Part III of the Covenant and is cognizable under the Optional Protocol.¹

3.2. The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the rights of individuals protected under that article - for example, to enjoy a particular culture - may consist in a way of life which is closely associated with territory and use of its resources.² This may particularly be true of members of indigenous communities constituting a minority.

¹ See *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 40 (A/39/40)*, annex VI, general comment No. 12 (21) (art. 1), also issued in document CCPR/C/21/Rev.1; *ibid.*, *Forty-fifth Session, Supplement No. 40, (A/45/40, vol. II, annex IX, section A, Communication No. 167/1984 (Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada)*, views adopted on 26 March 1990.

² See *ibid.*, *Forty-third Session, Supplement No. 40 (A/43/40)*, annex VII, section G, Communication No. 197/1985 (*Kitok v. Sweden*), views adopted on 27 July 1988.



4. The Covenant also distinguishes the rights protected under article 27 from the guarantees under articles 2.1 and 26. The entitlement, under article 2.1, to enjoy the rights under the Covenant without discrimination applies to all individuals within the territory or under the jurisdiction of the State whether or not those persons belong to a minority. In addition, there is a distinct right provided under article 26 for equality before the law, equal protection of the law, and non-discrimination in respect of rights granted and obligations imposed by the States. It governs the exercise of all rights, whether protected under the Covenant or not, which the State party confers by law on individuals within its territory or under its jurisdiction, irrespective of whether they belong to the minorities specified in article 27 or not.³ Some States parties who claim that they do not discriminate on grounds of ethnicity, language or religion, wrongly contend, on that basis alone, that they have no minorities.

5.1. The terms used in article 27 indicate that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language. Those terms also indicate that the individuals designed to be protected need not be citizens of the State party. In this regard, the obligations deriving from article 2.1 are also relevant, since a State party is required under that article to ensure that the rights protected under the Covenant are available to all individuals within its territory and subject to its jurisdiction, except rights which are expressly made to apply to citizens, for example, political rights under article 25. A State party may not, therefore, restrict the rights under article 27 to its citizens alone.

5.2. Article 27 confers rights on persons belonging to minorities which “exist” in a State party. Given the nature and scope of the rights envisaged under that article, it is not relevant to determine the degree of permanence that the term “exist” connotes. Those rights simply are that individuals belonging to those minorities should not be denied the right, in community with members of their group, to enjoy their own culture, to practise their religion and speak their language. Just as they need not be nationals or citizens, they need not be permanent residents. Thus, migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights. As any other individual in the territory of the State party, they would, also for this purpose, have the general rights, for example, to freedom of association, of assembly, and of expression. The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria.

5.3. The right of individuals belonging to a linguistic minority to use their language among themselves, in private or in public, is distinct from other language rights protected under the Covenant. In particular, it should be distinguished from the general right to freedom of expression protected under article 19. The latter right is available to all persons, irrespective of whether they belong to minorities or not.

³ See *ibid.*, *Forty-second Session, Supplement No. 40 (A/42/40)*, annex VIII, section D, Communication No. 182/1984 (*F.H. Zwaan-de Vries v. the Netherlands*), views adopted on 9 April 1987; *ibid.*, section C, Communication No. 180/1984 (*L.G. Danning v. the Netherlands*), views adopted on 9 April 1987.



Further, the right protected under article 27 should be distinguished from the particular right which article 14.3 (f) of the Covenant confers on accused persons to interpretation where they cannot understand or speak the language used in the courts. Article 14.3 (f) does not, in any other circumstances, confer on accused persons the right to use or speak the language of their choice in court proceedings.⁴

6.1. Although article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a “right” and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.

6.2. Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group. In this connection, it has to be observed that such positive measures must respect the provisions of articles 2.1 and 26 of the Covenant both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population. However, as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria.

7. With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.⁵ The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.

8. The Committee observes that none of the rights protected under article 27 of the Covenant may be legitimately exercised in a manner or to an extent inconsistent with the other provisions of the Covenant.

⁴ See *ibid.*, *Forty-fifth Session, Supplement No. 40, (A/45/40)*, volume II, annex X, section A, Communication No. 220/1987 (*T.K. v. France*), decision of 8 November 1989; *ibid.*, section B, Communication No. 222/1987 (*M.K. v. France*), decision of 8 November 1989.

⁵ See notes 1 and 2 above, Communication No. 167/1984 (*Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*), views adopted on 26 March 1990, and Communication No. 197/1985 (*Kitok v. Sweden*), views adopted on 27 July 1988.



OFFICE OF THE HIGH COMMISSIONER
FOR HUMAN RIGHTS



9. The Committee concludes that article 27 relates to rights whose protection imposes specific obligations on States parties. The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole. Accordingly, the Committee observes that these rights must be protected as such and should not be confused with other personal rights conferred on one and all under the Covenant. States parties, therefore, have an obligation to ensure that the exercise of these rights is fully protected and they should indicate in their reports the measures they have adopted to this end.

Annex 749

Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (17 July 1998)

Rome Statute of the International Criminal Court

Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

Table of Contents*

Preamble		1
Part I Establishment of the Court		2
Article 1	The Court	2
Article 2	Relationship of the Court with the United Nations	2
Article 3	Seat of the Court	2
Article 4	Legal status and powers of the Court	2
Part II Jurisdiction, admissibility and applicable law		3
Article 5	Crimes within the jurisdiction of the Court	3
Article 6	Genocide	3
Article 7	Crimes against humanity	3
Article 8	War Crimes	5
Article 9	Elements of Crimes	10
Article 10		10
Article 11	Jurisdiction <i>ratione temporis</i>	10
Article 12	Preconditions to the exercise of jurisdiction	11
Article 13	Exercise of jurisdiction	11
Article 14	Referral of a situation by a State Party	11
Article 15	Prosecutor	12
Article 16	Deferral of investigation or prosecution	12
Article 17	Issues of admissibility	12
Article 18	Preliminary rulings regarding admissibility	13
Article 19	Challenges to the jurisdiction of the Court or the admissibility of a case	14
Article 20	<i>Ne bis in idem</i>	16
Article 21	Applicable law	16
Part III General principles of criminal law		17
Article 22	<i>Nullum crimen sine lege</i>	17
Article 23	<i>Nulla poena sine lege</i>	17
Article 24	Non-retroactivity <i>ratione personae</i>	17
Article 25	Individual criminal responsibility	17
Article 26	Exclusion of jurisdiction over persons under eighteen	18
Article 27	Irrelevance of official capacity	18
Article 28	Responsibility of commanders and other superiors	19
Article 29	Non-applicability of statute of limitations	19
Article 30	Mental element	19
Article 31	Grounds for excluding criminal responsibility	20
Article 32	Mistake of fact or mistake of law	21
Article 33	Superior orders and prescription of law	21

* This Table of Contents is not part of the text of the Rome Statute adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 12 July 1998. It has been included in this publication for ease of reference.

Part IV	Composition and administration of the Court	22
Article 34	Organs of the Court	22
Article 35	Service of judges	22
Article 36	Qualifications, nomination and election of judges	22
Article 37	Judicial vacancies	25
Article 38	The Presidency	25
Article 39	Chambers	26
Article 40	Independence of judges	27
Article 41	Excusing and disqualification of judges	27
Article 42	The Office of the Prosecutor	27
Article 43	The Registry	28
Article 44	Staff	29
Article 45	Solemn undertaking	29
Article 46	Removal from office	30
Article 47	Disciplinary measures	30
Article 48	Privileges and immunities	30
Article 49	Salaries, allowances and expenses	31
Article 50	Official and working languages	31
Article 51	Rules of Procedure and Evidence	32
Article 52	Regulations of the Court	32
Part V	Investigation and prosecution	33
Article 53	Initiation of an investigation	33
Article 54	Duties and powers of the Prosecutor with respect to investigations	34
Article 55	Rights of persons during an investigation	35
Article 56	Role of the Pre-Trial Chamber in relation to a unique investigative opportunity	35
Article 57	Functions and powers of the Pre-Trial Chamber	37
Article 58	Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear	38
Article 59	Arrest proceedings in the custodial State	39
Article 60	Initial proceedings before the Court	40
Article 61	Confirmation of the charges before trial	40
Part VI	The trial	43
Article 62	Place of trial	43
Article 63	Trial in the presence of the accused	43
Article 64	Functions and powers of the Trial Chamber	43
Article 65	Proceedings on an admission of guilt	45
Article 66	Presumption of innocence	46
Article 67	Rights of the accused	46
Article 68	Protection of the victims and witnesses and their participation in the proceedings	47
Article 69	Evidence	48
Article 70	Offences against the administration of justice	48
Article 71	Sanctions for misconduct before the Court	49
Article 72	Protection of national security information	50
Article 73	Third-party information or documents	51

Article 74	Requirements for the decision	52
Article 75	Reparations to victims	52
Article 76	Sentencing	53

Part VII Penalties 54

Article 77	Applicable penalties	54
Article 78	Determination of the sentence	54
Article 79	Trust Fund	54
Article 80	Non-prejudice to national application of penalties and national laws	55

Part VIII Appeal and revision 56

Article 81	Appeal against decision of acquittal or conviction or against sentence	56
Article 82	Appeal against other decisions	57
Article 83	Proceedings on appeal	57
Article 84	Revision of conviction or sentence	58
Article 85	Compensation to an arrested or convicted person	59

Part IX International cooperation and judicial assistance 60

Article 86	General obligation to cooperate	60
Article 87	Requests for cooperation: general provisions	60
Article 88	Availability of procedures under national law	61
Article 89	Surrender of persons to the Court	61
Article 90	Competing requests	62
Article 91	Contents of request for arrest and surrender	63
Article 92	Provisional arrest	64
Article 93	Other forms of cooperation	65
Article 94	Postponement of execution of a request in respect of ongoing investigation or prosecution	68
Article 95	Postponement of execution of a request in respect of an admissibility challenge	68
Article 96	Contents of request for other forms of assistance under article 93	68
Article 97	Consultations	69
Article 98	Cooperation with respect to waiver of immunity and consent to surrender	69
Article 99	Execution of request under articles 93 and 96	69
Article 100	Costs	70
Article 101	Rule of speciality	71
Article 102	Use of terms	71

Part X Enforcement 72

Article 103	Role of States in enforcement of sentences of imprisonment	72
Article 104	Change in designation of State of enforcement	73
Article 105	Enforcement of the sentence	73
Article 106	Supervision of enforcement of sentences and conditions of imprisonment	73
Article 107	Transfer of the person upon completion of sentence	73

Article 108	Limitation on the prosecution or punishment of other offences	74
Article 109	Enforcement of fines and forfeiture measures	74
Article 110	Review by the Court concerning reduction of sentence	74
Article 111	Escape	75
Part XI Assembly of States Parties		76
Article 112	Assembly of States Parties	76
Part XII Financing		78
Article 113	Financial Regulations	78
Article 114	Payment of expenses	78
Article 115	Funds of the Court and of the Assembly of States Parties	78
Article 116	Voluntary contributions	78
Article 117	Assessment of contributions	78
Article 118	Annual audit	78
Part XIII Final clauses		79
Article 119	Settlement of disputes	79
Article 120	Reservations	79
Article 121	Amendments	79
Article 122	Amendments to provisions of an institutional nature	80
Article 123	Review of the Statute	80
Article 124	Transitional Provision	81
Article 125	Signature, ratification, acceptance, approval or accession	81
Article 126	Entry into force.	81
Article 127	Withdrawal	81
Article 128	Authentic texts	82

Preamble

The States Parties to this Statute,

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

Resolved to guarantee lasting respect for and the enforcement of international justice,

Have agreed as follows:

Part I Establishment of the Court

Article 1 The Court

An International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Article 2 Relationship of the Court with the United Nations

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

Article 3 Seat of the Court

1. The seat of the Court shall be established at The Hague in the Netherlands ('the host State').
2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.
3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

Article 4 Legal status and powers of the Court

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.
2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

Part II Jurisdiction, admissibility and applicable law

Article 5 Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
 - (a) The crime of genocide;
 - (b) Crimes against humanity;
 - (c) War crimes;
 - (d) The crime of aggression.
2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Article 6 Genocide

For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Article 7 Crimes against humanity

1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
 - (a) Murder;
 - (b) Extermination;

- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

- (a) 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
- (b) 'Extermination' includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- (c) 'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- (d) 'Deportation or forcible transfer of population' means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
- (e) 'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

- (f) 'Forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
 - (g) 'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
 - (h) 'The crime of apartheid' means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
 - (i) 'Enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.
3. For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above.

Article 8

War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, 'war crimes' means:
 - (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - (i) Wilful killing;
 - (ii) Torture or inhuman treatment, including biological experiments;
 - (iii) Wilfully causing great suffering, or serious injury to body or health;
 - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

- (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - (vii) Unlawful deportation or transfer or unlawful confinement;
 - (viii) Taking of hostages.
- (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
 - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
 - (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
 - (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
 - (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
 - (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
 - (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

- (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
- (xii) Declaring that no quarter will be given;
- (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- (xvi) Pillaging a town or place, even when taken by assault;
- (xvii) Employing poison or poisoned weapons;
- (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
- (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

- (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
 - (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
 - (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.
- (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:
- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (iii) Taking of hostages;
 - (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.
- (d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.
- (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

- (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (v) Pillaging a town or place, even when taken by assault;
- (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
- (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
- (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
- (ix) Killing or wounding treacherously a combatant adversary;
- (x) Declaring that no quarter will be given;
- (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

- (f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.
3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Article 9

Elements of Crimes

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.
2. Amendments to the Elements of Crimes may be proposed by:
 - (a) Any State Party;
 - (b) The judges acting by an absolute majority;
 - (c) The Prosecutor.

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.
3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

Article 10

Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

Article 11

Jurisdiction *ratione temporis*

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.
2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

Article 12

Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
 - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
 - (b) The State of which the person accused of the crime is a national.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Article 13

Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Article 14

Referral of a situation by a State Party

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.
2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

Article 15

Prosecutor

1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.
2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.
3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.
4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.
5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.
6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Article 16

Deferral of investigation or prosecution

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Article 17

Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
 - (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
 - (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
 - (d) The case is not of sufficient gravity to justify further action by the Court.
2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
 - (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
 - (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Article 18

Preliminary rulings regarding admissibility

1. When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.
2. Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

3. The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.
4. The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82. The appeal may be heard on an expedited basis.
5. When the Prosecutor has deferred an investigation in accordance with paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.
6. Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.
7. A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances.

Article 19

Challenges to the jurisdiction of the Court or the admissibility of a case

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.
2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:
 - (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;
 - (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
 - (c) A State from which acceptance of jurisdiction is required under article 12.
3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.

4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).
5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.
6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.
7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.
8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:
 - (a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;
 - (b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and
 - (c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.
9. The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.
10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.
11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.

Article 20

Ne bis in idem

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.
3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
 - (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
 - (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Article 21

Applicable law

1. The Court shall apply:
 - (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
 - (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
 - (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.
3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Part III General principles of Criminal Law

Article 22

Nullum crimen sine lege

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Article 23

Nulla poena sine lege

A person convicted by the Court may be punished only in accordance with this Statute.

Article 24

Non-retroactivity *ratione personae*

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.
2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

Article 25

Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
 - (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
 - (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
 - (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
 - (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
 - (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.
4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 26

Exclusion of jurisdiction over persons under eighteen

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

Article 27

Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 28

Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
 - (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
 - (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
- (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
 - (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
 - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
 - (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 29

Non-applicability of statute of limitations

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

Article 30

Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:
 - (a) In relation to conduct, that person means to engage in the conduct;
 - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly.

Article 31

Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:
 - (a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;
 - (b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;
 - (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;
 - (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
 - (i) Made by other persons; or
 - (ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.
3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

Article 32

Mistake of fact or mistake of law

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.
2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

Article 33

Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
 - (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
 - (b) The person did not know that the order was unlawful; and
 - (c) The order was not manifestly unlawful.
2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

Part IV Composition and administration of the Court

Article 34 Organs of the Court

The Court shall be composed of the following organs:

- (a) The Presidency;
- (b) An Appeals Division, a Trial Division and a Pre-Trial Division;
- (c) The Office of the Prosecutor;
- (d) The Registry.

Article 35 Service of judges

1. All judges shall be elected as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office.
2. The judges composing the Presidency shall serve on a full-time basis as soon as they are elected.
3. The Presidency may, on the basis of the workload of the Court and in consultation with its members, decide from time to time to what extent the remaining judges shall be required to serve on a full-time basis. Any such arrangement shall be without prejudice to the provisions of article 40.
4. The financial arrangements for judges not required to serve on a full-time basis shall be made in accordance with article 49.

Article 36 Qualifications, nomination and election of judges

1. Subject to the provisions of paragraph 2, there shall be 18 judges of the Court.
2.
 - (a) The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1, indicating the reasons why this is considered necessary and appropriate. The Registrar shall promptly circulate any such proposal to all States Parties.
 - (b) Any such proposal shall then be considered at a meeting of the Assembly of States Parties to be convened in accordance with article 112. The proposal shall be considered adopted if approved at the meeting by a vote of two thirds of the members of the Assembly of States Parties and shall enter into force at such time as decided by the Assembly of States Parties.

- (c)
 - (i) Once a proposal for an increase in the number of judges has been adopted under subparagraph (b), the election of the additional judges shall take place at the next session of the Assembly of States Parties in accordance with paragraphs 3 to 8, and article 37, paragraph 2;
 - (ii) Once a proposal for an increase in the number of judges has been adopted and brought into effect under subparagraphs (b) and (c) (i), it shall be open to the Presidency at any time thereafter, if the workload of the Court justifies it, to propose a reduction in the number of judges, provided that the number of judges shall not be reduced below that specified in paragraph 1. The proposal shall be dealt with in accordance with the procedure laid down in subparagraphs (a) and (b). In the event that the proposal is adopted, the number of judges shall be progressively decreased as the terms of office of serving judges expire, until the necessary number has been reached.
- 3.
 - (a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.
 - (b) Every candidate for election to the Court shall:
 - (i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or
 - (ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;
 - (c) Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.
- 4.
 - (a) Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either:
 - (i) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or
 - (ii) By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court.

Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of paragraph 3.

- (b) Each State Party may put forward one candidate for any given election who need not necessarily be a national of that State Party but shall in any case be a national of a State Party.

- (c) The Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations. In that event, the Committee's composition and mandate shall be established by the Assembly of States Parties.
- 5. For the purposes of the election, there shall be two lists of candidates:
List A containing the names of candidates with the qualifications specified in paragraph 3 (b) (i); and
List B containing the names of candidates with the qualifications specified in paragraph 3 (b) (ii).
A candidate with sufficient qualifications for both lists may choose on which list to appear. At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.
- 6.
 - (a) The judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under article 112. Subject to paragraph 7, the persons elected to the Court shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting.
 - (b) In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held in accordance with the procedures laid down in subparagraph (a) until the remaining places have been filled.
- 7. No two judges may be nationals of the same State. A person who, for the purposes of membership of the Court, could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.
- 8.
 - (a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:
 - (i) The representation of the principal legal systems of the world;
 - (ii) Equitable geographical representation; and
 - (iii) A fair representation of female and male judges.
 - (b) States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.
- 9.
 - (a) Subject to subparagraph (b), judges shall hold office for a term of nine years and, subject to subparagraph (c) and to article 37, paragraph 2, shall not be eligible for re-election.
 - (b) At the first election, one third of the judges elected shall be selected by lot to serve for a term of three years; one third of the judges elected shall be selected by lot to serve for a term of six years; and the remainder shall serve for a term of nine years.

- (c) A judge who is selected to serve for a term of three years under subparagraph (b) shall be eligible for re-election for a full term.
10. Notwithstanding paragraph 9, a judge assigned to a Trial or Appeals Chamber in accordance with article 39 shall continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber.

Article 37

Judicial vacancies

1. In the event of a vacancy, an election shall be held in accordance with article 36 to fill the vacancy.
2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term and, if that period is three years or less, shall be eligible for re-election for a full term under article 36.

Article 38

The Presidency

1. The President and the First and Second Vice-Presidents shall be elected by an absolute majority of the judges. They shall each serve for a term of three years or until the end of their respective terms of office as judges, whichever expires earlier. They shall be eligible for re-election once.
2. The First Vice-President shall act in place of the President in the event that the President is unavailable or disqualified. The Second Vice-President shall act in place of the President in the event that both the President and the First Vice-President are unavailable or disqualified.
3. The President, together with the First and Second Vice-Presidents, shall constitute the Presidency, which shall be responsible for:
 - (a) The proper administration of the Court, with the exception of the Office of the Prosecutor; and
 - (b) The other functions conferred upon it in accordance with this Statute.
4. In discharging its responsibility under paragraph 3 (a), the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.

Article 39 Chambers

1. As soon as possible after the election of the judges, the Court shall organize itself into the divisions specified in article 34, paragraph (b). The Appeals Division shall be composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges. The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience.
2.
 - (a) The judicial functions of the Court shall be carried out in each division by Chambers.
 - (b)
 - (i) The Appeals Chamber shall be composed of all the judges of the Appeals Division;
 - (ii) The functions of the Trial Chamber shall be carried out by three judges of the Trial Division;
 - (iii) The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence;
 - (c) Nothing in this paragraph shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires.
3.
 - (a) Judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter until the completion of any case the hearing of which has already commenced in the division concerned.
 - (b) Judges assigned to the Appeals Division shall serve in that division for their entire term of office.
4. Judges assigned to the Appeals Division shall serve only in that division. Nothing in this article shall, however, preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient management of the Court's workload so requires, provided that under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case.

Article 40

Independence of the judges

1. The judges shall be independent in the performance of their functions.
2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.
3. Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.
4. Any question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.

Article 41

Excusing and disqualification of judges

1. The Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence.
2.
 - (a) A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, *inter alia*, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.
 - (b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.
 - (c) Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

Article 42

The Office of the Prosecutor

1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.
2. The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.

3. The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.
4. The Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy Prosecutor to be filled. Unless a shorter term is decided upon at the time of their election, the Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and shall not be eligible for re-election.
5. Neither the Prosecutor nor a Deputy Prosecutor shall engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence. They shall not engage in any other occupation of a professional nature.
6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor, at his or her request, from acting in a particular case.
7. Neither the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground. They shall be disqualified from a case in accordance with this paragraph if, *inter alia*, they have previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted.
8. Any question as to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by the Appeals Chamber.
 - (a) The person being investigated or prosecuted may at any time request the disqualification of the Prosecutor or a Deputy Prosecutor on the grounds set out in this article;
 - (b) The Prosecutor or the Deputy Prosecutor, as appropriate, shall be entitled to present his or her comments on the matter.
9. The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.

Article 43

The Registry

1. The Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in accordance with article 42.
2. The Registry shall be headed by the Registrar, who shall be the principal administrative officer of the Court. The Registrar shall exercise his or her functions under the authority of the President of the Court.

3. The Registrar and the Deputy Registrar shall be persons of high moral character, be highly competent and have an excellent knowledge of and be fluent in at least one of the working languages of the Court.
4. The judges shall elect the Registrar by an absolute majority by secret ballot, taking into account any recommendation by the Assembly of States Parties. If the need arises and upon the recommendation of the Registrar, the judges shall elect, in the same manner, a Deputy Registrar.
5. The Registrar shall hold office for a term of five years, shall be eligible for re-election once and shall serve on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided upon by an absolute majority of the judges, and may be elected on the basis that the Deputy Registrar shall be called upon to serve as required.
6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

Article 44

Staff

1. The Prosecutor and the Registrar shall appoint such qualified staff as may be required to their respective offices. In the case of the Prosecutor, this shall include the appointment of investigators.
2. In the employment of staff, the Prosecutor and the Registrar shall ensure the highest standards of efficiency, competency and integrity, and shall have regard, *mutatis mutandis*, to the criteria set forth in article 36, paragraph 8.
3. The Registrar, with the agreement of the Presidency and the Prosecutor, shall propose Staff Regulations which include the terms and conditions upon which the staff of the Court shall be appointed, remunerated and dismissed. The Staff Regulations shall be approved by the Assembly of States Parties.
4. The Court may, in exceptional circumstances, employ the expertise of gratis personnel offered by States Parties, intergovernmental organizations or non-governmental organizations to assist with the work of any of the organs of the Court. The Prosecutor may accept any such offer on behalf of the Office of the Prosecutor. Such gratis personnel shall be employed in accordance with guidelines to be established by the Assembly of States Parties.

Article 45

Solemn undertaking

Before taking up their respective duties under this Statute, the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall each make a solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously.

Article 46

Removal from office

1. A judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar shall be removed from office if a decision to this effect is made in accordance with paragraph 2, in cases where that person:
 - (a) Is found to have committed serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure and Evidence; or
 - (b) Is unable to exercise the functions required by this Statute.
2. A decision as to the removal from office of a judge, the Prosecutor or a Deputy Prosecutor under paragraph 1 shall be made by the Assembly of States Parties, by secret ballot:
 - (a) In the case of a judge, by a two-thirds majority of the States Parties upon a recommendation adopted by a two-thirds majority of the other judges;
 - (b) In the case of the Prosecutor, by an absolute majority of the States Parties;
 - (c) In the case of a Deputy Prosecutor, by an absolute majority of the States Parties upon the recommendation of the Prosecutor.
3. A decision as to the removal from office of the Registrar or Deputy Registrar shall be made by an absolute majority of the judges.
4. A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar whose conduct or ability to exercise the functions of the office as required by this Statute is challenged under this article shall have full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure and Evidence. The person in question shall not otherwise participate in the consideration of the matter.

Article 47

Disciplinary measures

A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who has committed misconduct of a less serious nature than that set out in article 46, paragraph 1, shall be subject to disciplinary measures, in accordance with the Rules of Procedure and Evidence.

Article 48

Privileges and immunities

1. The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes.
2. The judges, the Prosecutor, the Deputy Prosecutors and the Registrar shall, when engaged on or with respect to the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity.

3. The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court.
4. Counsel, experts, witnesses or any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court.
5. The privileges and immunities of:
 - (a) A judge or the Prosecutor may be waived by an absolute majority of the judges;
 - (b) The Registrar may be waived by the Presidency;
 - (c) The Deputy Prosecutors and staff of the Office of the Prosecutor may be waived by the Prosecutor;
 - (d) The Deputy Registrar and staff of the Registry may be waived by the Registrar.

Article 49

Salaries, allowances and expenses

The judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall receive such salaries, allowances and expenses as may be decided upon by the Assembly of States Parties. These salaries and allowances shall not be reduced during their terms of office.

Article 50

Official and working languages

1. The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish. The judgements of the Court, as well as other decisions resolving fundamental issues before the Court, shall be published in the official languages. The Presidency shall, in accordance with the criteria established by the Rules of Procedure and Evidence, determine which decisions may be considered as resolving fundamental issues for the purposes of this paragraph.
2. The working languages of the Court shall be English and French. The Rules of Procedure and Evidence shall determine the cases in which other official languages may be used as working languages.
3. At the request of any party to a proceeding or a State allowed to intervene in a proceeding, the Court shall authorize a language other than English or French to be used by such a party or State, provided that the Court considers such authorization to be adequately justified.

Article 51

Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.
2. Amendments to the Rules of Procedure and Evidence may be proposed by:
 - (a) Any State Party;
 - (b) The judges acting by an absolute majority; or
 - (c) The Prosecutor.

Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

3. After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.
4. The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.
5. In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.

Article 52

Regulations of the Court

1. The judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning.
2. The Prosecutor and the Registrar shall be consulted in the elaboration of the Regulations and any amendments thereto.
3. The Regulations and any amendments thereto shall take effect upon adoption unless otherwise decided by the judges. Immediately upon adoption, they shall be circulated to States Parties for comments. If within six months there are no objections from a majority of States Parties, they shall remain in force.

Part V Investigation and prosecution

Article 53

Initiation of an investigation

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
 - (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
 - (b) The case is or would be admissible under article 17; and
 - (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:
 - (a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;
 - (b) The case is inadmissible under article 17; or
 - (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.
3.
 - (a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.
 - (b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.
4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

Article 54

Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor shall:
 - (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;
 - (b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and
 - (c) Fully respect the rights of persons arising under this Statute.
2. The Prosecutor may conduct investigations on the territory of a State:
 - (a) In accordance with the provisions of Part 9; or
 - (b) As authorized by the Pre-Trial Chamber under article 57, paragraph 3 (d).
3. The Prosecutor may:
 - (a) Collect and examine evidence;
 - (b) Request the presence of and question persons being investigated, victims and witnesses;
 - (c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate;
 - (d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;
 - (e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and
 - (f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

Article 55

Rights of persons during an investigation

1. In respect of an investigation under this Statute, a person:
 - (a) Shall not be compelled to incriminate himself or herself or to confess guilt;
 - (b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;
 - (c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and
 - (d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.

2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:
 - (a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;
 - (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;
 - (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and
 - (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

Article 56

Role of the Pre-Trial Chamber in relation to a unique investigative opportunity

1. (a) Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber.

- (b) In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.
 - (c) Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall provide the relevant information to the person who has been arrested or appeared in response to a summons in connection with the investigation referred to in subparagraph (a), in order that he or she may be heard on the matter.
- 2. The measures referred to in paragraph 1 (b) may include:
 - (a) Making recommendations or orders regarding procedures to be followed;
 - (b) Directing that a record be made of the proceedings;
 - (c) Appointing an expert to assist;
 - (d) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence;
 - (e) Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons;
 - (f) Taking such other action as may be necessary to collect or preserve evidence.
- 3.
 - (a) Where the Prosecutor has not sought measures pursuant to this article but the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may take such measures on its own initiative.
 - (b) A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis.
- 4. The admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber.

Article 57

Functions and powers of the Pre-Trial Chamber

1. Unless otherwise provided in this Statute, the Pre-Trial Chamber shall exercise its functions in accordance with the provisions of this article.
2.
 - (a) Orders or rulings of the Pre-Trial Chamber issued under articles 15, 18, 19, 54, paragraph 2, 61, paragraph 7, and 72 must be concurred in by a majority of its judges.
 - (b) In all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for in this Statute, unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber.
3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:
 - (a) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation;
 - (b) Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence;
 - (c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information;
 - (d) Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9 if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9;
 - (e) Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.

Article 58

Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear

1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:
 - (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and
 - (b) The arrest of the person appears necessary:
 - (i) To ensure the person's appearance at trial;
 - (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or
 - (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.
2. The application of the Prosecutor shall contain:
 - (a) The name of the person and any other relevant identifying information;
 - (b) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed;
 - (c) A concise statement of the facts which are alleged to constitute those crimes;
 - (d) A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; and
 - (e) The reason why the Prosecutor believes that the arrest of the person is necessary.
3. The warrant of arrest shall contain:
 - (a) The name of the person and any other relevant identifying information;
 - (b) A specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and
 - (c) A concise statement of the facts which are alleged to constitute those crimes.
4. The warrant of arrest shall remain in effect until otherwise ordered by the Court.

5. On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9.
6. The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe that the person committed the modified or additional crimes.
7. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear. The summons shall contain:
 - (a) The name of the person and any other relevant identifying information;
 - (b) The specified date on which the person is to appear;
 - (c) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; and
 - (d) A concise statement of the facts which are alleged to constitute the crime.

The summons shall be served on the person.

Article 59

Arrest proceedings in the custodial State

1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9.
2. A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:
 - (a) The warrant applies to that person;
 - (b) The person has been arrested in accordance with the proper process; and
 - (c) The person's rights have been respected.
3. The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender.
4. In reaching a decision on any such application, the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b).

5. The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the competent authority in the custodial State. The competent authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision.
6. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.
7. Once ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible.

Article 60

Initial proceedings before the Court

1. Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.
2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.
3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.
4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.
5. If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of a person who has been released.

Article 61

Confirmation of the charges before trial

1. Subject to the provisions of paragraph 2, within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.

2. The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:

- (a) Waived his or her right to be present; or
- (b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held.

In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.

3. Within a reasonable time before the hearing, the person shall:

- (a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and
- (b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.

The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.

4. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.

5. At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

6. At the hearing, the person may:

- (a) Object to the charges;
- (b) Challenge the evidence presented by the Prosecutor; and
- (c) Present evidence.

7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:

- (a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;

- (b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;
 - (c) Adjourn the hearing and request the Prosecutor to consider:
 - (i) Providing further evidence or conducting further investigation with respect to a particular charge; or
 - (ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.
8. Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.
9. After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.
10. Any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.
11. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

Part VI The trial

Article 62

Place of trial

Unless otherwise decided, the place of the trial shall be the seat of the Court.

Article 63

Trial in the presence of the accused

1. The accused shall be present during the trial.
2. If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

Article 64

Functions and powers of the Trial Chamber

1. The functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence.
2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:
 - (a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;
 - (b) Determine the language or languages to be used at trial; and
 - (c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.
4. The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division.
5. Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused.

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:
 - (a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11;
 - (b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;
 - (c) Provide for the protection of confidential information;
 - (d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;
 - (e) Provide for the protection of the accused, witnesses and victims; and
 - (f) Rule on any other relevant matters.
7. The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.
8.
 - (a) At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.
 - (b) At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.
9. The Trial Chamber shall have, *inter alia*, the power on application of a party or on its own motion to:
 - (a) Rule on the admissibility or relevance of evidence; and
 - (b) Take all necessary steps to maintain order in the course of a hearing.
10. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is made and that it is maintained and preserved by the Registrar.

Article 65

Proceedings on an admission of guilt

1. Where the accused makes an admission of guilt pursuant to article 64, paragraph 8 (a), the Trial Chamber shall determine whether:
 - (a) The accused understands the nature and consequences of the admission of guilt;
 - (b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and
 - (c) The admission of guilt is supported by the facts of the case that are contained in:
 - (i) The charges brought by the Prosecutor and admitted by the accused;
 - (ii) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and
 - (iii) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.
2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.
3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary trial procedures provided by this Statute and may remit the case to another Trial Chamber.
4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may:
 - (a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or
 - (b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.
5. Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court.

Article 66

Presumption of innocence

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
2. The onus is on the Prosecutor to prove the guilt of the accused.
3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

Article 67

Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;
 - (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;
 - (c) To be tried without undue delay;
 - (d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;
 - (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;
 - (f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks;
 - (g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;
 - (h) To make an unsworn oral or written statement in his or her defence; and
 - (i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Article 68

Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings *in camera* or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.
3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.
4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.
5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.

Article 69

Evidence

1. Before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.
2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.
3. The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.
4. The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.
5. The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.
6. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.
7. Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:
 - (a) The violation casts substantial doubt on the reliability of the evidence; or
 - (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.
8. When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.

Article 70

Offences against the administration of justice

1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:
 - (a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;
 - (b) Presenting evidence that the party knows is false or forged;

- (c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;
 - (d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;
 - (e) Retaliating against an official of the Court on account of duties performed by that or another official;
 - (f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.
2. The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.
3. In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.
4. (a) Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals;
- (b) Upon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.

Article 71

Sanctions for misconduct before the Court

1. The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.
2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be those provided for in the Rules of Procedure and Evidence.

Article 72

Protection of national security information

1. This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of article 56, paragraphs 2 and 3, article 61, paragraph 3, article 64, paragraph 3, article 67, paragraph 2, article 68, paragraph 6, article 87, paragraph 6 and article 93, as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.
2. This article shall also apply when a person who has been requested to give information or evidence has refused to do so or has referred the matter to the State on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.
3. Nothing in this article shall prejudice the requirements of confidentiality applicable under article 54, paragraph 3 (e) and (f), or the application of article 73.
4. If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national security interests, that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.
5. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defence or the Pre-Trial Chamber or Trial Chamber, as the case may be, to seek to resolve the matter by cooperative means. Such steps may include:
 - (a) Modification or clarification of the request;
 - (b) A determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, could be or has been obtained from a source other than the requested State;
 - (c) Obtaining the information or evidence from a different source or in a different form; or
 - (d) Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of *in camera* or *ex parte* proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.

6. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.
7. Thereafter, if the Court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, the Court may undertake the following actions:
 - (a) Where disclosure of the information or document is sought pursuant to a request for cooperation under Part 9 or the circumstances described in paragraph 2, and the State has invoked the ground for refusal referred to in article 93, paragraph 4:
 - (i) The Court may, before making any conclusion referred to in subparagraph 7 (a) (ii), request further consultations for the purpose of considering the State's representations, which may include, as appropriate, hearings *in camera* and *ex parte*;
 - (ii) If the Court concludes that, by invoking the ground for refusal under article 93, paragraph 4, in the circumstances of the case, the requested State is not acting in accordance with its obligations under this Statute, the Court may refer the matter in accordance with article 87, paragraph 7, specifying the reasons for its conclusion; and
 - (iii) The Court may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances; or
 - (b) In all other circumstances:
 - (i) Order disclosure; or
 - (ii) To the extent it does not order disclosure, make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.

Article 73

Third-party information or documents

If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it shall seek the consent of the originator to disclose that document or information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of article 72. If the originator is not a State Party and refuses to consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.

Article 74

Requirements for the decision

1. All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.
2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.
3. The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.
4. The deliberations of the Trial Chamber shall remain secret.
5. The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.

Article 75

Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.
4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.
5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

Article 76

Sentencing

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.
2. Except where article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence.
3. Where paragraph 2 applies, any representations under article 75 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing.
4. The sentence shall be pronounced in public and, wherever possible, in the presence of the accused.

Part VII Penalties

Article 77

Applicable penalties

1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:
 - (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
 - (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.
2. In addition to imprisonment, the Court may order:
 - (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;
 - (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

Article 78

Determination of the sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.
2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.
3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b).

Article 79

Trust Fund

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.
2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.
3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

Article 80

Non-prejudice to national application of penalties and national laws

Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.

Part VIII Appeal and Revision

Article 81

Appeal against decision of acquittal or conviction or against sentence

1. A decision under article 74 may be appealed in accordance with the Rules of Procedure and Evidence as follows:
 - (a) The Prosecutor may make an appeal on any of the following grounds:
 - (i) Procedural error,
 - (ii) Error of fact, or
 - (iii) Error of law;
 - (b) The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds:
 - (i) Procedural error,
 - (ii) Error of fact,
 - (iii) Error of law, or
 - (iv) Any other ground that affects the fairness or reliability of the proceedings or decision.
2.
 - (a) A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence;
 - (b) If on an appeal against sentence the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under article 81, paragraph 1 (a) or (b), and may render a decision on conviction in accordance with article 83;
 - (c) The same procedure applies when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence under paragraph 2 (a).
3.
 - (a) Unless the Trial Chamber orders otherwise, a convicted person shall remain in custody pending an appeal;
 - (b) When a convicted person's time in custody exceeds the sentence of imprisonment imposed, that person shall be released, except that if the Prosecutor is also appealing, the release may be subject to the conditions under subparagraph (c) below;

- (c) In case of an acquittal, the accused shall be released immediately, subject to the following:
 - (i) Under exceptional circumstances, and having regard, *inter alia*, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;
 - (ii) A decision by the Trial Chamber under subparagraph (c) (i) may be appealed in accordance with the Rules of Procedure and Evidence.
- 4. Subject to the provisions of paragraph 3 (a) and (b), execution of the decision or sentence shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.

Article 82

Appeal against other decisions

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:
 - (a) A decision with respect to jurisdiction or admissibility;
 - (b) A decision granting or denying release of the person being investigated or prosecuted;
 - (c) A decision of the Pre-Trial Chamber to act on its own initiative under article 56, paragraph 3;
 - (d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.
2. A decision of the Pre-Trial Chamber under article 57, paragraph 3 (d), may be appealed against by the State concerned or by the Prosecutor, with the leave of the Pre-Trial Chamber. The appeal shall be heard on an expedited basis.
3. An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.
4. A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.

Article 83

Proceedings on appeal

1. For the purposes of proceedings under article 81 and this article, the Appeals Chamber shall have all the powers of the Trial Chamber.

2. If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

- (a) Reverse or amend the decision or sentence; or
- (b) Order a new trial before a different Trial Chamber.

For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue. When the decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment.

3. If in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with Part 7.
4. The judgement of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The judgement shall state the reasons on which it is based. When there is no unanimity, the judgement of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.
5. The Appeals Chamber may deliver its judgement in the absence of the person acquitted or convicted.

Article 84

Revision of conviction or sentence

1. The convicted person or, after death, spouses, children, parents or one person alive at the time of the accused's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, may apply to the Appeals Chamber to revise the final judgement of conviction or sentence on the grounds that:
 - (a) New evidence has been discovered that:
 - (i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and
 - (ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict;
 - (b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;
 - (c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 46.

2. The Appeals Chamber shall reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

- (a) Reconvene the original Trial Chamber;
- (b) Constitute a new Trial Chamber; or
- (c) Retain jurisdiction over the matter,

with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgement should be revised.

Article 85

Compensation to an arrested or convicted person

1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.
2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.
3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.

Part IX International cooperation and judicial assistance

Article 86

General obligation to cooperate

States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

Article 87

Requests for cooperation: general provisions

1. (a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession.

Subsequent changes to the designation shall be made by each State Party in accordance with the Rules of Procedure and Evidence.

- (b) When appropriate, without prejudice to the provisions of subparagraph (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.
2. Requests for cooperation and any documents supporting the request shall either be in or be accompanied by a translation into an official language of the requested State or one of the working languages of the Court, in accordance with the choice made by that State upon ratification, acceptance, approval or accession. Subsequent changes to this choice shall be made in accordance with the Rules of Procedure and Evidence.
3. The requested State shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.
4. In relation to any request for assistance presented under this Part, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under this Part shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.
5. (a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an *ad hoc* arrangement, an agreement with such State or any other appropriate basis.
(b) Where a State not party to this Statute, which has entered into an *ad hoc* arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.

6. The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.
7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

Article 88

Availability of procedures under national law

States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.

Article 89

Surrender of persons to the Court

1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.
2. Where the person sought for surrender brings a challenge before a national court on the basis of the principle of *ne bis in idem* as provided in article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility.
3.
 - (a) A State Party shall authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay the surrender.
 - (b) A request by the Court for transit shall be transmitted in accordance with article 87. The request for transit shall contain:
 - (i) A description of the person being transported;
 - (ii) A brief statement of the facts of the case and their legal characterization; and
 - (iii) The warrant for arrest and surrender;
 - (c) A person being transported shall be detained in custody during the period of transit;

- (d) No authorization is required if the person is transported by air and no landing is scheduled on the territory of the transit State;
 - (e) If an unscheduled landing occurs on the territory of the transit State, that State may require a request for transit from the Court as provided for in subparagraph (b). The transit State shall detain the person being transported until the request for transit is received and the transit is effected, provided that detention for purposes of this subparagraph may not be extended beyond 96 hours from the unscheduled landing unless the request is received within that time.
4. If the person sought is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender to the Court is sought, the requested State, after making its decision to grant the request, shall consult with the Court.

Article 90

Competing requests

1. A State Party which receives a request from the Court for the surrender of a person under article 89 shall, if it also receives a request from any other State for the extradition of the same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender, notify the Court and the requesting State of that fact.
2. Where the requesting State is a State Party, the requested State shall give priority to the request from the Court if:
 - (a) The Court has, pursuant to article 18 or 19, made a determination that the case in respect of which surrender is sought is admissible and that determination takes into account the investigation or prosecution conducted by the requesting State in respect of its request for extradition; or
 - (b) The Court makes the determination described in subparagraph (a) pursuant to the requested State's notification under paragraph 1.
3. Where a determination under paragraph 2 (a) has not been made, the requested State may, at its discretion, pending the determination of the Court under paragraph 2 (b), proceed to deal with the request for extradition from the requesting State but shall not extradite the person until the Court has determined that the case is inadmissible. The Court's determination shall be made on an expedited basis.
4. If the requesting State is a State not Party to this Statute the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the Court has determined that the case is admissible.
5. Where a case under paragraph 4 has not been determined to be admissible by the Court, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State.

6. In cases where paragraph 4 applies except that the requested State is under an existing international obligation to extradite the person to the requesting State not Party to this Statute, the requested State shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to:
 - (a) The respective dates of the requests;
 - (b) The interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and
 - (c) The possibility of subsequent surrender between the Court and the requesting State.
 7. Where a State Party which receives a request from the Court for the surrender of a person also receives a request from any State for the extradition of the same person for conduct other than that which constitutes the crime for which the Court seeks the person's surrender:
 - (a) The requested State shall, if it is not under an existing international obligation to extradite the person to the requesting State, give priority to the request from the Court;
 - (b) The requested State shall, if it is under an existing international obligation to extradite the person to the requesting State, determine whether to surrender the person to the Court or to extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to those set out in paragraph 6, but shall give special consideration to the relative nature and gravity of the conduct in question.
- Where pursuant to a notification under this article, the Court has determined a case to be inadmissible, and subsequently extradition to the requesting State is refused, the requested State shall notify the Court of this decision.

Article 91

Contents of request for arrest and surrender

1. A request for arrest and surrender shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).
2. In the case of a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58, the request shall contain or be supported by:
 - (a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;
 - (b) A copy of the warrant of arrest; and

- (c) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.
- 3. In the case of a request for the arrest and surrender of a person already convicted, the request shall contain or be supported by:
 - (a) A copy of any warrant of arrest for that person;
 - (b) A copy of the judgement of conviction;
 - (c) Information to demonstrate that the person sought is the one referred to in the judgement of conviction; and
 - (d) If the person sought has been sentenced, a copy of the sentence imposed and, in the case of a sentence for imprisonment, a statement of any time already served and the time remaining to be served.
- 4. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (c). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

Article 92

Provisional arrest

- 1. In urgent cases, the Court may request the provisional arrest of the person sought, pending presentation of the request for surrender and the documents supporting the request as specified in article 91.
- 2. The request for provisional arrest shall be made by any medium capable of delivering a written record and shall contain:
 - (a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;
 - (b) A concise statement of the crimes for which the person's arrest is sought and of the facts which are alleged to constitute those crimes, including, where possible, the date and location of the crime;
 - (c) A statement of the existence of a warrant of arrest or a judgement of conviction against the person sought; and
 - (d) A statement that a request for surrender of the person sought will follow.

3. A person who is provisionally arrested may be released from custody if the requested State has not received the request for surrender and the documents supporting the request as specified in article 91 within the time limits specified in the Rules of Procedure and Evidence. However, the person may consent to surrender before the expiration of this period if permitted by the law of the requested State. In such a case, the requested State shall proceed to surrender the person to the Court as soon as possible.
4. The fact that the person sought has been released from custody pursuant to paragraph 3 shall not prejudice the subsequent arrest and surrender of that person if the request for surrender and the documents supporting the request are delivered at a later date.

Article 93

Other forms of cooperation

1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:
 - (a) The identification and whereabouts of persons or the location of items;
 - (b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;
 - (c) The questioning of any person being investigated or prosecuted;
 - (d) The service of documents, including judicial documents;
 - (e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;
 - (f) The temporary transfer of persons as provided in paragraph 7;
 - (g) The examination of places or sites, including the exhumation and examination of grave sites;
 - (h) The execution of searches and seizures;
 - (i) The provision of records and documents, including official records and documents;
 - (j) The protection of victims and witnesses and the preservation of evidence;
 - (k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and
 - (l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.

2. The Court shall have the authority to provide an assurance to a witness or an expert appearing before the Court that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom by the Court in respect of any act or omission that preceded the departure of that person from the requested State.
3. Where execution of a particular measure of assistance detailed in a request presented under paragraph 1, is prohibited in the requested State on the basis of an existing fundamental legal principle of general application, the requested State shall promptly consult with the Court to try to resolve the matter. In the consultations, consideration should be given to whether the assistance can be rendered in another manner or subject to conditions. If after consultations the matter cannot be resolved, the Court shall modify the request as necessary.
4. In accordance with article 72, a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security.
5. Before denying a request for assistance under paragraph 1 (l), the requested State shall consider whether the assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later date or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, the Court or the Prosecutor shall abide by them.
6. If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for such denial.
7. (a) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:
 - (i) The person freely gives his or her informed consent to the transfer; and
 - (ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.
- (b) The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State.
8. (a) The Court shall ensure the confidentiality of documents and information, except as required for the investigation and proceedings described in the request.
- (b) The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence.

- (c) The requested State may, on its own motion or at the request of the Prosecutor, subsequently consent to the disclosure of such documents or information. They may then be used as evidence pursuant to the provisions of Parts 5 and 6 and in accordance with the Rules of Procedure and Evidence.
- 9.
 - (a)
 - (i) In the event that a State Party receives competing requests, other than for surrender or extradition, from the Court and from another State pursuant to an international obligation, the State Party shall endeavour, in consultation with the Court and the other State, to meet both requests, if necessary by postponing or attaching conditions to one or the other request.
 - (ii) Failing that, competing requests shall be resolved in accordance with the principles established in article 90.
 - (b) Where, however, the request from the Court concerns information, property or persons which are subject to the control of a third State or an international organization by virtue of an international agreement, the requested States shall so inform the Court and the Court shall direct its request to the third State or international organization.
- 10.
 - (a) The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.
 - (b)
 - (i) The assistance provided under subparagraph (a) shall include, *inter alia*:
 - a. The transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court; and
 - b. The questioning of any person detained by order of the Court;
 - (ii) In the case of assistance under subparagraph (b) (i) a:
 - a. If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;
 - b. If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68.
 - (c) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a State which is not a Party to this Statute.

Article 94

Postponement of execution of a request in respect of ongoing investigation or prosecution

1. If the immediate execution of a request would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates, the requested State may postpone the execution of the request for a period of time agreed upon with the Court. However, the postponement shall be no longer than is necessary to complete the relevant investigation or prosecution in the requested State. Before making a decision to postpone, the requested State should consider whether the assistance may be immediately provided subject to certain conditions.
2. If a decision to postpone is taken pursuant to paragraph 1, the Prosecutor may, however, seek measures to preserve evidence, pursuant to article 93, paragraph 1 (j).

Article 95

Postponement of execution of a request in respect of an admissibility challenge

Where there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19.

Article 96

Contents of request for other forms of assistance under article 93

1. A request for other forms of assistance referred to in article 93 shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).
2. The request shall, as applicable, contain or be supported by the following:
 - (a) A concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request;
 - (b) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;
 - (c) A concise statement of the essential facts underlying the request;
 - (d) The reasons for and details of any procedure or requirement to be followed;
 - (e) Such information as may be required under the law of the requested State in order to execute the request; and
 - (f) Any other information relevant in order for the assistance sought to be provided.

3. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (e). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.
4. The provisions of this article shall, where applicable, also apply in respect of a request for assistance made to the Court.

Article 97

Consultations

Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, *inter alia*:

- (a) Insufficient information to execute the request;
- (b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or
- (c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.

Article 98

Cooperation with respect to waiver of immunity and consent to surrender

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Article 99

Execution of requests under articles 93 and 96

1. Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process.

2. In the case of an urgent request, the documents or evidence produced in response shall, at the request of the Court, be sent urgently.
3. Replies from the requested State shall be transmitted in their original language and form.
4. Without prejudice to other articles in this Part, where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State as follows:
 - (a) When the State Party requested is a State on the territory of which the crime is alleged to have been committed, and there has been a determination of admissibility pursuant to article 18 or 19, the Prosecutor may directly execute such request following all possible consultations with the requested State Party;
 - (b) In other cases, the Prosecutor may execute such request following consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party. Where the requested State Party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter.
5. Provisions allowing a person heard or examined by the Court under article 72 to invoke restrictions designed to prevent disclosure of confidential information connected with national security shall also apply to the execution of requests for assistance under this article.

Article 100

Costs

1. The ordinary costs for execution of requests in the territory of the requested State shall be borne by that State, except for the following, which shall be borne by the Court:
 - (a) Costs associated with the travel and security of witnesses and experts or the transfer under article 93 of persons in custody;
 - (b) Costs of translation, interpretation and transcription;
 - (c) Travel and subsistence costs of the judges, the Prosecutor, the Deputy Prosecutors, the Registrar, the Deputy Registrar and staff of any organ of the Court;
 - (d) Costs of any expert opinion or report requested by the Court;
 - (e) Costs associated with the transport of a person being surrendered to the Court by a custodial State; and

- (f) Following consultations, any extraordinary costs that may result from the execution of a request.
2. The provisions of paragraph 1 shall, as appropriate, apply to requests from States Parties to the Court. In that case, the Court shall bear the ordinary costs of execution.

Article 101

Rule of speciality

1. A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.
2. The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court and, if necessary, the Court shall provide additional information in accordance with article 91. States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so.

Article 102

Use of terms

For the purposes of this Statute:

- (a) "surrender" means the delivering up of a person by a State to the Court, pursuant to this Statute.
- (b) "extradition" means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.

Part X Enforcement

Article 103

Role of States in enforcement of sentences of imprisonment

1.
 - (a) A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.
 - (b) At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the Court and in accordance with this Part.
 - (c) A State designated in a particular case shall promptly inform the Court whether it accepts the Court's designation.
2.
 - (a) The State of enforcement shall notify the Court of any circumstances, including the exercise of any conditions agreed under paragraph 1, which could materially affect the terms or extent of the imprisonment. The Court shall be given at least 45 days' notice of any such known or foreseeable circumstances. During this period, the State of enforcement shall take no action that might prejudice its obligations under article 110.
 - (b) Where the Court cannot agree to the circumstances referred to in subparagraph (a), it shall notify the State of enforcement and proceed in accordance with article 104, paragraph 1.
3. In exercising its discretion to make a designation under paragraph 1, the Court shall take into account the following:
 - (a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution, as provided in the Rules of Procedure and Evidence;
 - (b) The application of widely accepted international treaty standards governing the treatment of prisoners;
 - (c) The views of the sentenced person;
 - (d) The nationality of the sentenced person;
 - (e) Such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence, as may be appropriate in designating the State of enforcement.
4. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the headquarters agreement referred to in article 3, paragraph 2. In such a case, the costs arising out of the enforcement of a sentence of imprisonment shall be borne by the Court.

Article 104

Change in designation of State of enforcement

1. The Court may, at any time, decide to transfer a sentenced person to a prison of another State.
2. A sentenced person may, at any time, apply to the Court to be transferred from the State of enforcement.

Article 105

Enforcement of the sentence

1. Subject to conditions which a State may have specified in accordance with article 103, paragraph 1 (b), the sentence of imprisonment shall be binding on the States Parties, which shall in no case modify it.
2. The Court alone shall have the right to decide any application for appeal and revision. The State of enforcement shall not impede the making of any such application by a sentenced person.

Article 106

Supervision of enforcement of sentences and conditions of imprisonment

1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing treatment of prisoners.
2. The conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners; in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.
3. Communications between a sentenced person and the Court shall be unimpeded and confidential.

Article 107

Transfer of the person upon completion of sentence

1. Following completion of the sentence, a person who is not a national of the State of enforcement may, in accordance with the law of the State of enforcement, be transferred to a State which is obliged to receive him or her, or to another State which agrees to receive him or her, taking into account any wishes of the person to be transferred to that State, unless the State of enforcement authorizes the person to remain in its territory.
2. If no State bears the costs arising out of transferring the person to another State pursuant to paragraph 1, such costs shall be borne by the Court.
3. Subject to the provisions of article 108, the State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the person to a State which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence.

Article 108

Limitation on the prosecution or punishment of other offences

1. A sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment or to extradition to a third State for any conduct engaged in prior to that person's delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement.
2. The Court shall decide the matter after having heard the views of the sentenced person.
3. Paragraph 1 shall cease to apply if the sentenced person remains voluntarily for more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it.

Article 109

Enforcement of fines and forfeiture measures

1. States Parties shall give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law.
2. If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.
3. Property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be transferred to the Court.

Article 110

Review by the Court concerning reduction of sentence

1. The State of enforcement shall not release the person before expiry of the sentence pronounced by the Court.
2. The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person.
3. When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.
4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:
 - (a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;

- (b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or
 - (c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.
5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as provided for in the Rules of Procedure and Evidence.

Article 111

Escape

If a convicted person escapes from custody and flees the State of enforcement, that State may, after consultation with the Court, request the person's surrender from the State in which the person is located pursuant to existing bilateral or multilateral arrangements, or may request that the Court seek the person's surrender, in accordance with Part 9. It may direct that the person be delivered to the State in which he or she was serving the sentence or to another State designated by the Court.

Part XI Assembly of states parties

Article 112

Assembly of States Parties

1. An Assembly of States Parties to this Statute is hereby established. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. Other States which have signed this Statute or the Final Act may be observers in the Assembly.
2. The Assembly shall:
 - (a) Consider and adopt, as appropriate, recommendations of the Preparatory Commission;
 - (b) Provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;
 - (c) Consider the reports and activities of the Bureau established under paragraph 3 and take appropriate action in regard thereto;
 - (d) Consider and decide the budget for the Court;
 - (e) Decide whether to alter, in accordance with article 36, the number of judges;
 - (f) Consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation;
 - (g) Perform any other function consistent with this Statute or the Rules of Procedure and Evidence.
3.
 - (a) The Assembly shall have a Bureau consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms.
 - (b) The Bureau shall have a representative character, taking into account, in particular, equitable geographical distribution and the adequate representation of the principal legal systems of the world.
 - (c) The Bureau shall meet as often as necessary, but at least once a year. It shall assist the Assembly in the discharge of its responsibilities.
4. The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.
5. The President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly and of the Bureau.

6. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations once a year and, when circumstances so require, hold special sessions. Except as otherwise specified in this Statute, special sessions shall be convened by the Bureau on its own initiative or at the request of one third of the States Parties.
7. Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau. If consensus cannot be reached, except as otherwise provided in the Statute:
 - (a) Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting;
 - (b) Decisions on matters of procedure shall be taken by a simple majority of States Parties present and voting.
8. A State Party which is in arrears in the payment of its financial contributions towards the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.
9. The Assembly shall adopt its own rules of procedure.
10. The official and working languages of the Assembly shall be those of the General Assembly of the United Nations.

Part XII Financing

Article 113 Financial Regulations

Except as otherwise specifically provided, all financial matters related to the Court and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by this Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties.

Article 114 Payment of expenses

Expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court.

Article 115 Funds of the Court and of the Assembly of States Parties

The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

- (a) Assessed contributions made by States Parties;
- (b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.

Article 116 Voluntary contributions

Without prejudice to article 115, the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.

Article 117 Assessment of contributions

The contributions of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based.

Article 118 Annual audit

The records, books and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor.

Part XIII Final clauses

Article 119

Settlement of disputes

1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.
2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

Article 120

Reservations

No reservations may be made to this Statute.

Article 121

Amendments

1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.
2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.
3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.
4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.
5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

6. If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.
7. The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference.

Article 122

Amendments to provisions of an institutional nature

1. Amendments to provisions of this Statute which are of an exclusively institutional nature, namely, article 35, article 36, paragraphs 8 and 9, article 37, article 38, article 39, paragraphs 1 (first two sentences), 2 and 4, article 42, paragraphs 4 to 9, article 43, paragraphs 2 and 3, and articles 44, 46, 47 and 49, may be proposed at any time, notwithstanding article 121, paragraph 1, by any State Party. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations or such other person designated by the Assembly of States Parties who shall promptly circulate it to all States Parties and to others participating in the Assembly.
2. Amendments under this article on which consensus cannot be reached shall be adopted by the Assembly of States Parties or by a Review Conference, by a two-thirds majority of States Parties. Such amendments shall enter into force for all States Parties six months after their adoption by the Assembly or, as the case may be, by the Conference.

Article 123

Review of the Statute

1. Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.
2. At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations shall, upon approval by a majority of States Parties, convene a Review Conference.
3. The provisions of article 121, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment to the Statute considered at a Review Conference.

Article 124

Transitional Provision

Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.

Article 125

Signature, ratification, acceptance, approval or accession

1. This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October 1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.
2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.
3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 126

Entry into force

1. This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.
2. For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 127

Withdrawal

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

Article 128

Authentic texts

The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

Inwitness whereof, the undersigned, being duly authorized thereto by their respective Governments, have signed this Statute.

Done at Rome, this 17th day of July 1998.

Annex 750

Mahuika et al. v. New Zealand, Communication No. 547 / 1993, U.N. Doc.
CCPR/C/70/D/547/1993 (27 October 2000)



**Apirana Mahuika et al. v. New Zealand, Communication No. 547/1993,
U.N. Doc. CCPR/C/70/D/547/1993 (2000).**

Communication No. 547/1993*

Submitted by: Apirana Mahuika et al. (represented by Maori Legal Service)

Alleged victim: The authors

State party: New Zealand

Date of communication: 10 December 1992 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 October 2000

Having concluded its consideration of communication No. 574/1993 submitted to the Human Rights Committee by Apirana Mahuika et al. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are Apirana Mahuika and 18 other individuals, belonging to the Maori people of New Zealand. They claim to be victims of violations by New Zealand of articles 1, 2, 16, 18, 26 and 27 of the International Covenant on Civil and Political Rights. They are represented by counsel. The Covenant entered into force for New Zealand on 28 March 1979, and the Optional Protocol on 26 August 1989.

2. At its 55th session, the Human Rights Committee considered the admissibility of the communication and found that the requirements under article 5, paragraph 2, of the Optional Protocol did not preclude it from considering the communication. However, the Committee declared inadmissible the authors' claims under articles 16, 18 and 26 for failure to substantiate, for purposes of admissibility, that their rights under these articles were violated.

3. When declaring the authors' remaining claims admissible in so far as they might raise issues under articles 14(1) and 27 in conjunction with article 1, the Committee noted that only the consideration of the merits of the case would enable the Committee to determine the relevance of article 1 to the authors' claims under article 27.

4. In their submission on admissibility, both parties commented extensively on the merits of the claims before the Committee. After the communication was declared admissible, the State party presented additional observations, to which the authors did not comment.

The factual background

5.1 The Maori people of New Zealand number approximately 500,000, 70% of whom are affiliated to one or more of 81 iwi (1). The authors belong to seven distinct iwi (including two of the largest and in total comprising more than 140,000 Maori) and claim to represent these. In 1840, Maori and the predecessor of the New Zealand Government, the British Crown, signed the Treaty of Waitangi, which affirmed the rights of Maori, including their right to self-determination and the right to control tribal fisheries. In the second article of the Treaty, the Crown guarantees to Maori:

"The full exclusive and undisturbed possession of their lands, forests, fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession..." (2)

The Treaty of Waitangi is not enforceable in New Zealand law except insofar as it is given force of law in whole or in part by Parliament in legislation. However, it imposes obligations on the Crown and claims under the Treaty can be investigated by the Waitangi Tribunal. (3)

5.2 No attempt was made to determine the extent of the fisheries until the introduction of the Quota Management System in the 1980s. That system, which constitutes the primary mechanism for the conservation of New Zealand's fisheries resources and for the regulation of commercial fishing in New Zealand, allocates permanent, transferable, property rights in quota for each commercial species within the system.

5.3 The New Zealand fishing industry had seen a dramatic growth in the early 1960s with the expansion of an exclusive fisheries zone of nine, and later twelve miles. At that time, all New Zealanders, including Maori, could apply for and be granted a commercial fishing permit; the majority of commercial fishers were not Maori, and of those who were, the majority were part-time fishers. By the early 1980s, inshore fisheries were over-exploited and the Government placed a moratorium on the issue of new permits and removed part-time fishers from the industry. This measure had the unintended effect of removing many of the Maori fishers from the commercial industry. Since the efforts to manage the commercial fishery fell short of what was needed, in 1986 the Government amended the existing Fisheries Act and introduced a quota management system for the commercial use and exploitation of the country's fisheries. Section 88 (2) of the Fisheries Act provides "that nothing in this Act shall affect any Maori fishing rights". In 1987, the Maori tribes filed an application with the High Court of New Zealand, claiming that the implementation of the quota system would affect their tribal Treaty rights contrary to section 88(2) of the Fisheries Act, and obtained interim injunctions against the Government.

5.4 In 1988, the Government started negotiations with Maori, who were represented by four representatives. The Maori representatives were given a mandate to negotiate to obtain 50% of all New

Zealand commercial fisheries. In 1989, after negotiation and as an interim measure, Maori agreed to the introduction of the Maori Fisheries Act 1989, which provided for the immediate transfer of 10% of all quota to a Maori Fisheries Commission which would administer the resource on behalf of the tribes. This allowed the introduction of the quota system to go ahead as scheduled. Under the Act, Maori can also apply to manage the fishery in areas which had customarily been of special significance to a tribe or sub-tribe, either as a source of food or for spiritual reasons.

5.5 Although the Maori Fisheries Act 1989 was understood as an interim measure only, there were limited opportunities to purchase any more significant quantities of quota on the market. In February 1992, Maori became aware that Sealords, the largest fishing company in Australia and New Zealand was likely to be publicly floated at some time during that year. The Maori Fisheries Negotiators and the Maori Fisheries Commission approached the Government with a proposition that the Government provide funding for the purchase of Sealords as part of a settlement of Treaty claims to Fisheries. Initially the Government refused, but following the Waitangi Tribunal report of August 1992 on the Ngai Tahu Sea Fishing, in which the Tribunal found that Ngai Tahu, the largest tribe from the South Island of New Zealand, had a development right to a reasonable share of deep water fisheries, the Government decided to enter into negotiations. These negotiations led on 27 August 1992 to the signing of a Memorandum of Understanding between the Government and the Maori negotiators.

5.6 Pursuant to this Memorandum, the Government would provide Maori with funds required to purchase 50% of the major New Zealand fishing company, Sealords, which owned 26% of the then available quota. In return, Maori would withdraw all pending litigation and support the repeal of section 88 (2) of the Fisheries Act as well as an amendment to the Treaty of Waitangi Act 1975, to exclude from the Waitangi Tribunal's jurisdiction claims relating to commercial fishing. The Crown also agreed to allocate 20% of quota issued for new species brought within the Quota Management System to the Maori Fisheries Commission, and to ensure that Maori would be able to participate in "any relevant statutory fishing management and enhancement policy bodies." In addition, in relation to non-commercial fisheries, the Crown agreed to empower the making of regulations, after consultation with Maori, recognizing and providing for customary food gathering and the special relationship between Maori and places of customary food gathering importance.

5.7 The Maori negotiators sought a mandate from Maori for the deal outlined in the memorandum of understanding. The memorandum and its implications were debated at a national hui (4) and at hui at 23 marae (5) throughout the country. The Maori negotiators' report showed that 50 iwi comprising 208,681 Maori, supported the settlement (6). On the basis of this report, the Government was satisfied that a mandate for a settlement had been given and on 23 September 1992, a Deed of Settlement was executed by the New Zealand Government and Maori representatives. The Deed implements the Memorandum of Understanding and concerns not only sea fisheries but all freshwater and inland fisheries as well. Pursuant to the Deed, the Government pays the Maori tribes a total of NZ\$ 150,000,000 to develop their fishing industry and gives the Maori 20% of new quota for species. The Maori fishing rights will no longer be enforceable in court and will be replaced by regulations. Paragraph 5.1 of the Deed reads:

"Maori agree that this Settlement Deed, and the settlement it evidences, shall satisfy all claims, current and future, in respect of, and shall discharge and extinguish, all commercial fishing rights and interests of Maori whether in respect of sea, coastal or inland fisheries (including any commercial aspect of traditional fishing rights and interests), whether arising by statute, common law (including customary law and aboriginal title), the Treaty of Waitangi, or otherwise, and whether or not such rights or interests have been the subject of recommendation or adjudication by the Courts or the Waitangi Tribunal."

Paragraph 5.2 reads:

"The Crown and Maori agree that in respect of all fishing rights and interests of Maori other than commercial fishing rights and interests their status changes so that they no longer give rise to rights in Maori or obligations on the Crown having legal effect (as would make them enforceable in civil proceedings or afford defences in criminal, regulatory or other proceedings). Nor will they have legislative recognition. Such rights and interests are not extinguished by this Settlement Deed and the settlement it evidences. They continue to be subject to the principles of the Treaty of Waitangi and where appropriate give rise to Treaty obligations on the Crown. Such matters may also be the subject of requests by Maori to the Government or initiatives by Government in consultation with Maori to develop policies to help recognise use and management practices of Maori in the exercise of their traditional rights."

The Deed recorded that the name of the Maori Fisheries Commission would be changed to the "Treaty of Waitangi Fisheries Commission", and that the Commission would be accountable to Maori as well as to the Crown in order to give Maori better control of their fisheries guaranteed by the Treaty of Waitangi.

5.8 According to the authors the contents of the Memorandum of Understanding were not always adequately disclosed or explained to tribes and sub-tribes. In some cases, therefore, informed decision-making on the proposals contained in the Memorandum of understanding was seriously inhibited. The authors emphasize that while some of the Hui were supportive of the proposed Sealords deal, a significant number of tribes and sub-tribes either opposed the deal completely or were prepared to give it conditional support only. The authors further note that the Maori negotiators have been at pains to make clear that they had no authority and did not purport to represent individual tribes and sub-tribes in relation to any aspect of the Sealords deal, including the conclusion and signing of the Deed of Settlement.

5.9 The Deed was signed by 110 signatories. Among the signatories were the 8 Maori Fisheries Negotiators (the four representatives and their alternates), two of whom represented pan-Maori organisations (7); 31 plaintiffs in proceedings against the Crown relating to fishing rights, including representatives of 11 iwi; 43 signatories representing 17 iwi; and 28 signatories who signed the Deed later and who represent 9 iwi. The authors observe that one of the difficulties of ascertaining the precise number of tribes who signed the Deed of Settlement relates to verification of authority to sign on behalf of the tribes, and claim that it is apparent that a number of signatories did not possess such authority or that there was doubt as to whether they possessed such authority. The authors note that tribes claiming major commercial fisheries resources, were not among the signatories.

5.10 Following the signing of the Deed of Settlement, the authors and others initiated legal proceedings in the High Court of New Zealand, seeking an interim order to prevent the Government from implementing the Deed by legislation. They argued *inter alia* that the Government's actions amounted to a breach of the New Zealand Bill of Rights Act 1990 (8). The application was denied on 12 October 1992 and the authors appealed by way of interlocutory application to the Court of Appeal. On 3 November 1992, the Court of Appeal held that it was unable to grant the relief sought on the grounds that the Courts could not interfere in Parliamentary proceedings and that no issue under the Bill of Rights had arisen at that time.

5.11 Claims were then brought to the Waitangi Tribunal, which issued its report on 6 November 1992. The report concluded that the settlement was not contrary to the Treaty except for some aspects which could be rectified in the anticipated legislation. In this respect, the Waitangi Tribunal considered that the proposed extinguishment and/or abrogation of Treaty interests in commercial and non-commercial fisheries was not consistent with the Treaty of Waitangi or with the Government's fiduciary responsibilities. The Tribunal recommended to the Government that the legislation make no provision for the extinguishment of interests in commercial fisheries and that the legislation in fact affirm those interests and acknowledge that they have been satisfied, that fishery regulations and policies be reviewable in the courts against the Treaty's principles, and that the courts be empowered to have regard to the settlement in the event of future claims affecting commercial fish management laws.

5.12 On 3 December 1992, the Treaty of Waitangi (Fisheries Claims) Settlement Bill 1992 was introduced. Because of the time constraints involved in securing the Sealords bid, the Bill was not referred to the competent Select Committee for hearing, but immediately presented and discussed in Parliament. The Bill became law on 14 December 1992. It is recorded in the preamble to the Act that:

"The implementation of the Deed through legislation and the continuing relationship between the Crown and Maori would constitute a full and final settlement of all Maori claims to commercial fishing rights and would change the status of non-commercial fishing rights so that they no longer give rise to rights in Maori or obligations on the Crown having legal effect but would continue to be subject to the principles of the Treaty of Waitangi and give rise to Treaty obligations on the Crown."

The Act provides *inter alia* for the payment of NZ\$ 150,000,000 to Maori. The Act also states in section 9, that "all claims (current and future) by Maori in respect of commercial fishing are hereby finally settled" and accordingly:

"The obligations of the Crown to Maori in respect of commercial fishing are hereby fulfilled, satisfied, and discharged; and no court or tribunal shall have jurisdiction to inquire into the validity of such claims, the existence of rights and interests of Maori in commercial fishing, or the quantification thereof,"

"All claims (current and future) in respect of, or directly or indirectly based on, rights and interests of Maori in commercial fishing are hereby fully and finally settled, satisfied and discharged."

With respect to the effect of the settlement on non-commercial Maori fishing rights and interests, it is declared that these shall continue to give rise to Treaty obligations on the Crown and that regulations shall be made to recognise and provide for customary food gathering by Maori. The rights or interests of Maori in non-commercial fishing giving rise to such claims shall no longer have legal effect and accordingly are not enforceable in civil proceedings and shall not provide a defence to any criminal, regulatory or other proceeding, except to the extent that such rights or interests are provided for in regulations. According to the Act, the Maori Fisheries Commission was renamed to Treaty of Waitangi Fisheries Commission, and its membership expanded from seven to thirteen members. Its functions were also expanded. In particular, the Commission now has the primary role in safeguarding Maori interests in commercial fisheries.

5.13 The joint venture bid for Sealords was successful. After consultation with Maori, new Commissioners were appointed to the Treaty of Waitangi Fisheries Commission. Since then, the value of the Maori stake in commercial fishing has grown rapidly. In 1996, its net assets had increased to a book value of 374 million dollars. In addition to its 50% stake in Sealords, the Commission now controls also Moana Pacific Fisheries Limited (the biggest in-shore fishing company in New Zealand), Te Waka Huia Limited, Pacific Marine Farms Limited and Chatham Processing Limited. The Commission has disbursed substantial assistance in the form of discounted annual leases of quota, educational scholarships and assistance to Maori input into the development of a customary fishing regime. Customary fishing regulations have been elaborated by the Crown in consultation with Maori.

The complaint:

6.1 The authors claim that the Treaty of Waitangi (Fisheries Claims) Settlement Act confiscates their fishing resources, denies them their right to freely determine their political status and interferes with their right to freely pursue their economic, social and cultural development. It is submitted that the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 is in breach of the State party's obligations under the

Treaty of Waitangi. In this context, the authors claim that the right to self-determination under article 1 of the Covenant is only effective when people have access to and control over their resources.

6.2 The authors claim that the Government's actions are threatening their way of life and the culture of their tribes, in violation of article 27 of the Covenant. They submit that fishing is one of the main elements of their traditional culture, that they have present-day fishing interests and the strong desire to manifest their culture through fishing to the fullest extent of their traditional territories. They further submit that their traditional culture comprises commercial elements and does not distinguish clearly between commercial and other fishing. They claim that the new legislation removes their right to pursue traditional fishing other than in the limited sense preserved by the law and that the commercial aspect of fishing is being denied to them in exchange for a share in fishing quota. In this connection, the authors refer to the Committee's Views in communication No. 167/1984 (*Ominayak v. Canada*), where it was recognised that "the rights protected by article 27 include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong." (9)

6.3 The authors recall that the Quota Management System was found by the Waitangi Tribunal to be in conflict with the Treaty of Waitangi since it gave exclusive possession of property rights in fishing to non-Maori, and that the New Zealand High Court and Court of Appeal had in several decisions between 1987 and 1990 restrained the further implementation of the QMS on the basis that it was "clearly arguable" that the QMS unlawfully breached Maori fishing rights, protected by s 88(2) of the Fisheries Act 1983. With the enactment of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, QMS has been validated for all purposes. They state that by repealing s 88(2) of the Fisheries Act 1983, Maori fishing rights are no longer protected.

6.4 Some of the authors claim that no Notices of Discontinuance were signed on behalf of their tribes or sub-tribes in respect of fisheries claims that were pending before the courts and that these proceedings were statutorily discontinued without their tribes' or sub-tribes' consent by s 11(2)(g) and (i) of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. This is said to constitute a violation of their right under article 14(1) of the Covenant, to have access to court for the determination of their rights and obligations in a suit at law. In this context, the authors submit that Maori fishing rights are clearly "rights and obligations in a suit at law" within the meaning of article 14(1) of the Covenant because they are proprietary in nature. Prior to the enactment of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, Maori filed numerous fishing claims in the courts. The authors submit that article 14(1) of the Covenant guarantees the authors, and their tribes or sub-tribes, the right to have these disputes determined by a tribunal which complies with all of the requirements of article 14. In this context, it is submitted that although customary and aboriginal rights or interests can still be considered by the Waitangi Tribunal in the light of the principles of the Treaty of Waitangi, the Waitangi Tribunal's powers remain recommendatory only.

6.5 The authors submit that prior to the enactment of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, they had a right of access to a court or tribunal based on s 88 of the Fisheries Act to protect, determine the nature and extent, and to enforce their common law and Treaty of Waitangi fishing rights or interests. The repeal of this section by the 1992 Act interferes with and curtails their right to a fair and public hearing of their rights and obligations in a suit at law as guaranteed by article 14(1) of the Covenant, because there is no longer any statutory framework within which these rights or interests can be litigated.

The State party's observations

7.1 With regard to the authors' claim under Article 27, the State party accepts that the enjoyment of Maori culture encompasses the right to engage in fishing activities and it accepts that it has positive obligations to ensure that these rights are recognised. The Fisheries Settlement, it submits, has achieved this. According to the State party, the right to revenue through quota, together with Maori participation in the Sealords deal, is the modern day embodiment of Maori claims to the commercial fishery. The outcome of

the Fisheries Settlement is that Maori, who constitute approximately 15% of the population of New Zealand, now have effective control of New Zealand's largest deep water fishing fleet and over 40% of New Zealand's fishing quota. The Settlement is the vehicle that has ensured Maori participation in the commercial fishing industry - on terms set by Maori in a company in which Maori exercise effective control through their shareholding and their representatives on the Board of Directors. According to the State party, the Fisheries Settlement has placed Maori in an unprecedented position to expand their presence in the market through the acquisition of further quota and fishing assets, as well as through diversification in international catching, processing and marketing. This is a route that the Treaty of Waitangi Fisheries Commission and its companies, as well as individual tribes, are increasingly following. The Fisheries Settlement also specifically protects Maori non-commercial fishing rights and statutory regulations have been developed to ensure that provision is made for customary food gathering and that the special relationship between Maori and places of importance for customary food gathering is recognised.

7.2 Further, the State party notes that rights of minorities contained in Article 27 are not unlimited. They may be subject to reasonable regulation and other controls or limitations, provided that these measures have a reasonable and objective justification, are consistent with the other provisions of the Covenant and do not amount to a denial of the right. In the case of the Fisheries Settlement the State party had a number of important obligations to reconcile. It was necessary to balance the concerns of individual dissentients against its obligations to Maori as a whole to secure a resolution to fisheries claims and the need to introduce measures to ensure the sustainability of the resource.

7.3 Moreover, the State party emphasizes that it is evident from the Memorandum of Understanding that it was the common understanding of the Government and the Maori Fisheries Negotiators that the settlement was conditional on confirmation of the Negotiators' mandate to act on behalf of all Maori. Subject to this confirmation, the proposal stipulated that the Sealords purchase would result in the settlement of all Maori rights and interests in New Zealand's commercial fisheries, that the settlement would include the introduction of legislation to repeal section 88(2) of the Fisheries Act 1983 and all other legislation conferring legal entitlements to all Maori fisheries rights and interests, the discontinuance of all litigation in pursuit of Maori rights or interests in commercial fishing and Maori endorsement of the Quota Management System. The State party refers to the Court of Appeal's decision in Te Runanga o Wharekauri Rekohu v. Attorney-General, in which it was found that the proposal negotiated between the Government and the Maori Fisheries Negotiators was consistent with the Government's duty under the Treaty of Waitangi and that a failure to take the opportunity presented by the availability of Sealords for purchase would have been inconsistent with that duty. The State party further refers to similar sentiments expressed by the Waitangi Tribunal.

7.4 As regards the authors' statement that the settlement received only limited support from Maori, the State party recalls the process of consultation pursued by the Maori negotiators following the initialling of the memorandum of understanding, on the basis of which the Maori negotiators and subsequently the Crown concluded that there was a sufficient mandate for the negotiation and execution of the Deed of Settlement. The State party refers to the opinion of the Waitangi Tribunal that the report of the Maori negotiators conveyed the impression that there was indeed a mandate for the settlement, provided that the Treaty itself was not compromised, and that in the light of the report it was reasonable for the Crown to believe it was justified in proceeding. The State party also refers to the opinion of the Waitangi Tribunal, "that the settlement should proceed despite the inevitable compromise to the independent rangatiratanga **(10)** of the dissentients.... On the basis then that the settlement is to introduce new national policy for the benefit of tribes, to perfect rights rather than abrogate them and with protection for the customary position, we consider this settlement can be dealt with not just at an iwi level, but a pan iwi level, where the actual consent of each iwi is not a pre-requisite, and a general consensus can be relied upon". The State party emphasizes that responsibility for satisfying the Government that the proposal had the support of Maori lay with the Negotiators, and that the process of internal decision making within Maori was not a matter of direct concern to the Government which was entitled to rely on the report of the Negotiators. The State party further refers to the Committee's decision in Grand Chief Donald Marshall et al. v. Canada **(11)**

where the Human Rights Committee rejected a claim that all tribal groups should have a right to participate in consultations on aboriginal matters.

7.5 As to the authors' criticism of the Quota Management System, the State party states that the system was introduced out of the need for effective measures to conserve the depleted inshore fishery. In this context, the State party submits that it had a duty to all New Zealanders to conserve and manage the resource for future generations. The State party recalls that the decisions by the Waitangi Tribunal and the Court of Appeal, while criticising the initial implementation, recognised that the purpose and intention of the Quota Management System was not necessarily in conflict with the principles and terms of the Treaty of Waitangi. The State party emphasizes that while the Quota Management System imposed a new regime which changed the nature of the Maori commercial fishing interest, this was based on the reasonable and objective needs of overall sustainable management.

7.6 With regard to the Committee's statement when declaring the communication admissible that only at the determination of the merits of the case will the Committee be able to determine the relevance of Article 1 to the authors' claims under Article 27, the State party submits that it would be most concerned if the Committee were to depart from the position which has been accepted by States parties to the Covenant and by the Committee itself that the Committee has no jurisdiction to consider claims regarding the rights contained in Article 1. Those rights have long been recognised as collective rights. Therefore, they fall outside the Committee's mandate to consider complaints by individuals, and it is not within the ambit of the Optional Protocol procedures for individuals purporting to represent Maori to raise alleged violations of the collective rights contained in Article 1. The State party further argues that the rights in Article 1 attach to "peoples" of a state in their entirety, not to minorities, whether indigenous or not, within the borders of an independent and democratic state. Moreover, the State party challenges the authors' authority to speak on behalf of the majority of the members of their tribes.

7.7 With respect to the authors' claim that they are victims of a violation of Article 14(1) of the Covenant, the State party submits that the authors' complaint is fundamentally misconceived and amounts to an attempt to import into the Article a content which is not consistent with the language of the Article and which was not intended at the time the Covenant was drafted. According to the State party, Article 14 does not provide a general right of access to courts in the absence of rights and jurisdiction recognised by law. Rather Article 14 sets out procedural standards which must be upheld to ensure the proper administration of justice. The requirements of Article 14 do not arise in a vacuum. The State party submits that the introductory words of the Article make it clear that the guarantee of those procedural standards arises only when criminal or civil proceedings are in prospect; that is, when there is a legal cause of action to be tried in a court of competent jurisdiction. The consequence of the position put forward by the authors would be that a State's legislature could not determine the jurisdiction of its Courts and the Committee would be involved in making substantive decisions on the justiciability of rights in domestic legal systems which extend far beyond the guarantees in the Covenant.

7.8 The State party adds that the authors' complaint seeks to obscure the central element of the 1992 Settlement. In the State party's opinion, the authors' argument that the Settlement extinguished a right to go to court in respect of pre-existing claims ignores the fact that the Settlement in fact settled those claims by transforming them into a guaranteed entitlement to participate in the commercial fisheries. Since those claims had been settled, by definition there could no longer be a right to go to court to seek a further expansion of those rights. The State party explains, however, that while any pre-existing claims can no longer found a cause of action, Maori fisheries issues do remain within the jurisdiction of the courts. Decisions of the Treaty of Waitangi Fisheries Commission regarding the allocation of the benefits of the Settlement are subject to review by the courts in the same manner as decisions of any other statutory body. Likewise the regulations regarding customary fishing rights and decisions taken pursuant to these regulations are reviewable by the courts and the Waitangi Tribunal. Recent litigation before the New Zealand courts, including that before the Court of Appeal regarding the extent to which urban Maori who are unaffiliated with iwi structures have the right to benefit from the Settlement and regarding a proposed

allocation of benefit of the Settlement, demonstrate conclusively that access to the courts remains. In addition, Maori who are engaged in fishing activities have exactly the same rights as any other New Zealander to go to court to challenge decisions of the Government which affect those rights or to seek protection of those rights from encroachment by others.

7.9 In conclusion, the State party asserts that the Fisheries Settlement has not breached the rights of the authors, or of any other Maori, under the Covenant. On the contrary, the State party submits that the Settlement should be regarded as one of the most positive achievements in recent years in securing the recognition of Maori rights in conformity with the principles of the Treaty of Waitangi. The State party states that it is committed to resolve and settle Maori grievances in an honourable and equitable manner. It acknowledges that any such settlements, which require a degree of compromise and accommodation on both sides, are unlikely to attract unanimous support from Maori. In this context, it states that the Settlement did not have unanimous support from non-Maori New Zealanders either. Indeed, it was evident from public reaction at the time that a significant proportion of non-Maori New Zealanders were opposed to the Settlement and did not accept that Maori should be accorded distinctive rights to the New Zealand fisheries. However, the State party observes that it cannot allow itself to be paralysed by a lack of unanimity, and it will not use the withholding of agreement by some dissentients, Maori or non-Maori, as an excuse for failing to take positive action to redress Maori grievances in circumstances where such action has the clear support of the majority of interested Maori. The State party therefore submits that the Committee should dismiss the authors' complaints.

Authors' comments on the State party's submission:

8.1 The authors argue that article 27 of the Covenant requires the Government of New Zealand to adduce convincing and cogent evidence which establishes the necessity and proportionality of its interferences with the rights and freedoms of the authors, and their tribes or sub-tribes, as guaranteed by article 27. The authors submit that the State party has not advanced any reasons why, nor provided any empirical evidence to substantiate that ss 9, 10, 11, 33, 34, 37 and 40 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 are "reasonable or necessary" to achieve the objectives of ensuring proper management of fisheries, including meeting international obligations for the conservation and management of marine living resources. The authors further submit that "if the Government of New Zealand wishes to arrogate to itself the power to regulate Maori fisheries without the consent of the authors, and their tribes or sub-tribes who are recognised as having rangatiratanga and dominion over, and property interests in, those fisheries pursuant to the Treaty of Waitangi, article 27 of the Covenant requires the Government of New Zealand to adduce convincing and cogent evidence which established the necessity and proportionality of its interferences with the rights and freedoms of the authors, and their tribes or sub-tribes, as guaranteed by article 27." The authors submit that the State party has not adduced any such evidence.

8.2 Furthermore, the authors submit that article 27 of the Covenant requires the State party to take positive steps to assist Maori to enjoy their own culture. They argue that, far from fulfilling this aspect of its obligations under article 27 of the Covenant, the State party has, by its enactment of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, seriously interfered with the enjoyment by the authors, and their tribes or sub-tribes, of their rights or freedoms under article 27. The authors also submit that article 27 of the Covenant requires the Government of New Zealand to implement the Treaty of Waitangi. The authors emphasize that fishing is a fundamental aspect of Maori culture and religion. As an articulation of this close relationship they refer to the following passage in the Muriwhenua Fishing Report by the Waitangi Tribunal. (12)

"To understand the significance of such key Treaty words as "taonga" and "tino rangatiratanga" each must be seen within the context of Maori cultural values. In the Maori idiom "taonga" in relation to fisheries equates to a resource, to a source of food, an occupation, a source of goods for gift-exchange, and is a part of the complex relationship between Maori and their ancestral lands and water. The fisheries taonga contains a vision stretching back into the past, and encompasses 1,000 years of history and legend, incorporates the mythological significance of the gods and taniwha, and of the tipuna and kaitiaki. The taonga endures through fluctuations in the occupation of tribal areas and the possession of resources over periods of time, blending into one, the whole of the land, waters, sky, animals, plants and the cosmos itself, a holistic body encompassing living and non-living elements.

This taonga requires particular resource, health and fishing practices and a sense of inherited guardianship of resources. When areas of ancestral land and adjacent fisheries are abused through over-exploitation or pollution, the tangata whenua and their values are offended. The affront is felt by present-day kaitiaki (guardians) not just for themselves but for their tipuna in the past.

The Maori "taonga" in terms of fisheries has a depth and a breadth which goes beyond quantitative and material questions of catch volumes and cash incomes. It encompasses a deep sense of conservation and responsibility to the future, which colours their thinking, attitude and behaviour towards their fisheries.

The fisheries taonga includes connections between the individual and tribe, and fish and fishing grounds in the sense not just of tenure, or "belonging", but also of personal or tribal identity, blood and genealogy, and of spirit. This means that a "hurt" to the environment or to the fisheries may be felt personally by a Maori person or tribe, and may hurt not only the physical being, but also the prestige, the emotions and the mana.

The fisheries taonga, like other taonga, is a manifestation of a complex Maori physico-spiritual conception of life and life's forces. It contains economic benefits, but it is also a giver of personal identity, a symbol of social stability, and a source of emotional and spiritual strength.

This vision provided the mauri (life-force) which ensured the continued survival of the iwi Maori. Maori fisheries include, but are not limited to a narrow physical view of fisheries, fish, fishing ground, fishing methods and the sale of those resources, for monetary gain; but they also embrace much deeper dimensions in the Maori mind."

8.3 In this context, the authors refer to the Committee's General Comment on article 27 and submit that article 27 of the Covenant clearly protects Maori enjoyment of their fishing rights. They contest the State party's position that the right of Maori to engage in fisheries activities has been "secured" by the provisions of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and the Maori Fisheries Act 1989. Indeed, they claim that these rights have been effectively extinguished and/or abrogated and that the benefits provided to Maori under the legislation do not constitute lawful satisfaction. It is submitted that the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 imposes an artificial division upon their fishing rights or interests in their fisheries without regard to the sacred nature of the relationship which exists between the authors (both personal and tribal) and their fisheries; it effectively curtails the ability of the authors, and their tribes or sub-tribes, to protect their fisheries for future generations; it extinguishes and/or effectively abrogates their common law and Treaty of Waitangi rights or interests; it affects their ability to harvest and manage their fisheries in accordance with their cultural and religious customs and traditions; and it imposes a regime which relocates regulatory power over Maori fisheries in the hands of the Director-General of Fisheries.

8.4 They also argue that the Waitangi Tribunal clearly expressed the view that the acceptability of any "inevitable compromise to the independent rangatiratanga of the dissentients" was predicated upon the modification of the implementing legislation by the Government of New Zealand in accordance with the

Waitangi Tribunal's recommendations. The authors further argue that their case is distinguishable from the case of Grand Chief Donald Marshall et al. v. Canada, since that case did not concern the necessity of obtaining a minority group's consent to the extinguishment and/or effective abrogation of its property rights and denial of access to the courts to enforce those rights.

8.5 With respect to the discontinuance of the legal proceedings in the Court, five authors argue that the notices of discontinuance signed on behalf of their tribe were not signed by those who had the authority to do so. Another five authors state that no notice of discontinuance was signed on behalf of their tribes.

Issues and proceedings before the Committee

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee observes that the Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the Covenant, articles 6 to 27, inclusive. **(13)** As shown by the Committee's jurisprudence, there is no objection to a group of individuals, who claim to be commonly affected, to submit a communication about alleged breaches of these rights. Furthermore, the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27.

9.3 The first issue before the Committee therefore is whether the authors' rights under article 27 of the Covenant have been violated by the Fisheries Settlement, as reflected in the Deed of Settlement and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. It is undisputed that the authors are members of a minority within the meaning of article 27 of the Covenant; it is further undisputed that the use and control of fisheries is an essential element of their culture. In this context, the Committee recalls that economic activities may come within the ambit of article 27, if they are an essential element of the culture of a community. **(14)** The recognition of Maori rights in respect of fisheries by the Treaty of Waitangi confirms that the exercise of these rights is a significant part of Maori culture. However, the compatibility of the 1992 Act with the treaty of Waitangi is not a matter for the Committee to determine.

9.4 The right to enjoy one's culture cannot be determined in abstracto but has to be placed in context. In particular, article 27 does not only protect traditional means of livelihood of minorities, but allows also for adaptation of those means to the modern way of life and ensuing technology. In this case the legislation introduced by the State affects, in various ways, the possibilities for Maori to engage in commercial and non-commercial fishing. The question is whether this constitutes a denial of rights. On an earlier occasion, the Committee has considered that:

" A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his own culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27." **(15)**

9.5 The Committee recalls its general comment on article 27, according to which, especially in the case of indigenous peoples, the enjoyment of the right to one's own culture may require positive legal measures of protection by a State party and measures to ensure the effective participation of members of minority

communities in decisions which affect them. **(16)** In its case law under the Optional Protocol, the Committee has emphasised that the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy. **(17)** The Committee acknowledges that the Treaty of Waitangi (Fisheries Settlement) Act 1992 and its mechanisms limit the rights of the authors to enjoy their own culture.

9.6 The Committee notes that the State party undertook a complicated process of consultation in order to secure broad Maori support to a nation-wide settlement and regulation of fishing activities. Maori communities and national Maori organizations were consulted and their proposals did affect the design of the arrangement. The Settlement was enacted only following the Maori representatives' report that substantial Maori support for the Settlement existed. For many Maori, the Act was an acceptable settlement of their claims. The Committee has noted the authors' claims that they and the majority of members of their tribes did not agree with the Settlement and that they claim that their rights as members of the Maori minority have been overridden. In such circumstances, where the right of individuals to enjoy their own culture is in conflict with the exercise of parallel rights by other members of the minority group, or of the minority as a whole, the Committee may consider whether the limitation in issue is in the interests of all members of the minority and whether there is reasonable and objective justification for its application to the individuals who claim to be adversely affected. **(18)**

9.7 As to the effects of the agreement, the Committee notes that before the negotiations which led to the Settlement the Courts had ruled earlier that the Quota Management System was in possible infringement of Maori rights because in practice Maori had no part in it and were thus deprived of their fisheries. With the Settlement, Maori were given access to a great percentage of quota, and thus effective possession of fisheries was returned to them. In regard to commercial fisheries, the effect of the Settlement was that Maori authority and traditional methods of control as recognised in the Treaty were replaced by a new control structure, in an entity in which Maori share not only the role of safeguarding their interests in fisheries but also the effective control. In regard to non-commercial fisheries, the Crown obligations under the Treaty of Waitangi continue, and regulations are made recognising and providing for customary food gathering.

9.8 In the consultation process, special attention was paid to the cultural and religious significance of fishing for the Maori, inter alia to securing the possibility of Maori individuals and communities to engage themselves in non-commercial fishing activities. While it is a matter of concern that the settlement and its process have contributed to divisions amongst Maori, nevertheless, the Committee concludes that the State party has, by engaging itself in the process of broad consultation before proceeding to legislate, and by paying specific attention to the sustainability of Maori fishing activities, taken the necessary steps to ensure that the Fisheries Settlement and its enactment through legislation, including the Quota Management System, are compatible with article 27.

9.9 The Committee emphasises that the State party continues to be bound by article 27 which requires that the cultural and religious significance of fishing for Maori must deserve due attention in the implementation of the Treaty of Waitangi (Fisheries Claims) Settlement Act. With reference to its earlier case law **(19)**, the Committee emphasises that in order to comply with article 27, measures affecting the economic activities of Maori must be carried out in a way that the authors continue to enjoy their culture, and profess and practice their religion in community with other members of their group. The State party is under a duty to bear this in mind in the further implementation of the Treaty of Waitangi (Fisheries Claims) Settlement Act.

9.10 The authors' complaints about the discontinuance of the proceedings in the courts concerning their claim to fisheries must be seen in the light of the above. While in the abstract it would be objectionable and in violation of the right to access to court if a State party would by law discontinue cases that are pending before the courts, in the specific circumstances of the instant case, the discontinuance occurred

within the framework of a nation wide settlement of exactly those claims that were pending before the courts and that had been adjourned awaiting the outcome of negotiations. In the circumstances, the Committee finds that the discontinuance of the authors' court cases does not amount to a violation of article 14(1) of the Covenant.

9.11 With regard to the authors' claim that the Act prevents them from bringing claims concerning the extent of their fisheries before the courts, the Committee notes that article 14(1) encompasses the right to access to court for the determination of rights and obligations in a suit at law. In certain circumstances the failure of a State party to establish a competent court to determine rights and obligations may amount to a violation of article 14(1). In the present case, the Act excludes the courts' jurisdiction to inquire into the validity of claims by Maori in respect to commercial fishing, because the Act is intended to settle these claims. In any event, Maori recourse to the Courts to enforce claims regarding fisheries was limited even before the 1992 Act; Maori rights in commercial fisheries were enforceable in the Courts only to the extent that s 88(2) of the Fisheries Act expressly provided that nothing in the Act was to affect Maori fishing rights. The Committee considers that whether or not claims in respect of fishery interests could be considered to fall within the definition of a suit at law, the 1992 Act has displaced the determination of Treaty claims in respect of fisheries by its specific provisions. Other aspects of the right to fisheries, though, still give the right to access to court, for instance in respect of the allocation of quota and of the regulations governing customary fishing rights. The authors have not substantiated the claim that the enactment of the new legislative framework has barred their access to court in any matter falling within the scope of article 14, paragraph 1. Consequently, the Committee finds that the facts before it do not disclose a violation of article 14, paragraph 1.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a breach of any of the articles of the Covenant.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden, Mr. Abdallah Zakhia. The text of an individual opinion signed by one Committee member is appended to the present document.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be translated into Arabic, Chinese and Russian as part of the Committee's Annual Report to the General Assembly.]

Appendix

Individual opinion by Mr. Martin Scheinin (partly dissenting)

I concur with the main findings of the Committee in the case, related to article 27 of the Covenant. However, I express my dissent on paragraph 9.10 of the Views. In my opinion, the fact that an overall settlement of fisheries claims is found to be compatible with article 27, provided that the conditions of effective consultation and securing the sustainability of culturally significant forms of Maori fishing are met, does not exempt the State party from its obligations under article 14, paragraph 1. In my opinion, there has been a violation of the rights of the authors under article 14, paragraph 1, to the extent that:

- the legislation in question had the effect of discontinuing pending lawsuits instituted by the same authors or persons duly representing them;
- such discontinuation was not approved by the authors or other persons duly authorised to withdraw the lawsuit in question; and
- the implementation of the Treaty of Waitangi (Fisheries Claims) Settlement Act or other measures provided by the State party have not resulted in those authors subject to discontinuation meeting the conditions above having received an effective remedy in accordance with article 2, paragraph 3, of the Covenant.

M. Scheinin [signed]

[Done in English, French and Spanish, the English text being the original version. Subsequently to be translated also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

1. Iwi: tribe, incorporating a number of constituent hapu (sub-tribes)
2. Counsel submits that the Maori text contains a broader guarantee than is apparent from a bare reading of the English text. He explains that one of the most important differences in meaning between the two texts relates to the guarantee, in the Maori text, of "te tino rangatiratanga" (the full authority) over "taonga" (all those things important to them), including their fishing places and fisheries. According to counsel, there are three main elements embodied in the guarantee of rangatiratanga: the social, cultural, economical and spiritual protection of the tribal base, the recognition of the spiritual source of taonga and the fact that the exercise of authority is not only over property, but of persons within the kinship group and their access to tribal resources. The authors submit that the Maori text of the Treaty of Waitangi is authoritative.
3. The Waitangi Tribunal is a specialized statutory body established by the Treaty of Waitangi Act 1975 having the status of a commission of enquiry and empowered inter alia to inquire into certain claims in relation to the principles of the Treaty of Waitangi.
4. Hui: assembly
5. Marae: area set aside for the practice of Maori customs.
6. The report showed also that 15 iwi representing 24,501 Maori, opposed the settlement and 7 iwi groups comprising 84,255 Maori were divided in their views.
7. The National Maori Congress, a non-governmental organisation comprising representatives from up to 45 iwi, and the New Zealand Maori Council, a body which represents district Maori councils throughout New Zealand.
8. Breaches were claimed of sections 13 (freedom of thought, conscience and religion), 14 (freedom of expression), 20 (rights of minorities) and 27 (right to justice).
9. Communication No. 167/1984, Views adopted on 26 March 1990, CCPR/C/38/D/167/1984, para. 32.2.
10. rangatiratanga: the ability to exercise authority over assets, both physical and intangible.

11. Communication No. 205/1986, Views adopted on 4 November 1991, CCPR/C/43/D/205/1986.
12. Waitangi Tribunal, *Muriwhenua Fishing Report*, pp 180-181, para 10.3.2.
13. See the Committee's Views in case no. 167/1984 (Ominayak v. Canada), Views adopted on 26 March 1990, CCPR/C/38/D/167/1984.
14. See *inter alia* the Committee's Views in Kitok v. Sweden, communication No. 197/1985, adopted on 27 July 1988, CCPR/C/33/D/197/1985, paragraph 9.2. See also the Committee's Views in the two Länsman cases, Nos. 511/1992, 26 October 1994 (CCPR/C/52/D/511/1992) and 671/1995, 30 October 1996 (CCPR/C/58/D/671/1995).
15. Committee's Views on case No. 511/1992, Lansmann et al. v. Finland, CCPR/C/52/D/511/1992, para. 9.4
16. General Comment No. 23, adopted during the Committee's 50th session in 1994, paragraph 3.2.
17. Committee's Views on case 511/1992, I. Länsman et al. v. Finland, paras. 9.6 and 9.8 (CCPR/C/52/D/511/1992).
18. See the Committee's Views in case No. 197/1985, Kitok v. Sweden, adopted on 27 July 1988, CCPR/C/33/D/197/1985.
19. Committee's Views on case 511/1992, I. Länsman et al. v. Finland, para. 9.8, CCPR/C/52/D/511/1992.

Annex 751

Althammer v. Austria, Communication No. 998/2001, U.N. Doc CCPR/C/78/D/998/2001 (22 September 2003)



**Mr. Rupert Althammer et al. v. Austria, Communication No. 998/2001,
U.N. Doc. CCPR/C/78/D/998/2001 (2003).**

Communication No 998/2001 : Austria. 22/09/2003.
CCPR/C/78/D/998/2001. (Jurisprudence)

Convention Abbreviation: CCPR

Human Rights Committee

Seventy-eighth session

14 July - 8 August 2003

Views of the Human Rights Committee under
the Optional Protocol to the International Covenant
on Civil and Political Rights*

- Seventy-eighth session -

Communication No. 998/2001

Submitted by: Mr. Rupert Althammer et al. (represented by counsel, Mr. Alexander H. E. Morawa)

Alleged victim: The author

State party: Austria

Date of communication: 22 April 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 8 August 2003,

Having concluded its consideration of communication No. 998/2001, submitted to the Human Rights Committee on behalf of Mr. Rupert Althammer et al. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are Mr. Rupert Althammer and 11 other Austrian citizens residing in Austria. They claim to be victims of a violation by Austria of article 26 of the Covenant. The authors are represented by counsel. (1) The Optional Protocol entered into force for Austria on 10 March 1988.

The facts as submitted by the authors

2.1 The authors are retired employees of the Social Insurance Board in Salzburg (Salzburger Gebietskrankenkasse). Counsel states that they receive retirement benefits under the relevant schemes of the Regulations A of Service for Employees of the Social Insurance Board (Dienstordnung A für die Angestellten bei den Sozialversicherungsträgern).

2.2 Amongst various monthly entitlements, the Regulations provided for monthly household entitlements of ATS 220 and children's entitlements of ATS 260 per child for those with children up to the age of 27. On 1 January 1996, an amendment to the regulations came into effect which abolished the monthly household entitlement and increased the children's benefits to ATS 380 per child.

2.3 On 8 February 1996, the authors filed a lawsuit in the Salzburg District Court seeking a declaratory judgement that the Salzburg Regional Social Insurance Board was under an obligation to continue paying them the household entitlement as part of their income as retired employees. The District Court dismissed the authors' claim on 11 June 1996. The Court stressed that retirement benefits are not rights protected against subsequent changes of the legal framework (wohlerworbene Rechte) provided that such changes are based on objective grounds and respecting the principle of proportionality. It concluded that the abolition of household entitlements did not concern essential aspects of retirement benefits but a supplementary allowance, was moderate in its extent (0,4 – 0.8 % of the retirement benefits), and justified by the fact that the decision to use, in times of financial constraints, the limited financial means for an increase of the children's benefits was based on legitimate motives of social policy. The authors' appeal was dismissed by the Appeals Court (Oberlandesgericht Linz) on 22 April 1997 in a judgment upholding this reasoning. The Supreme Court (Oberster Gerichtshof) rejected a further request for revision on 7 January 1998. All domestic remedies are thus said to be exhausted.

2.4 Counsel explains that Regional Social Insurance Boards are public law institutions and that the Regulation is a legislative decree (Verordnung) regulating almost all employment related matters of the Board, inter alia the amount of retirement benefits and their calculation, including increase or periodical adjustment. Counsel submits that many similarities exist between occupational pension schemes (Betriebsrenten) offered by private employers and the scheme based on the Regulation. However, the Regulation can be changed, unilaterally, by legislative decree of the State party.

The complaint

3.1 The authors allege that the amendment to the Regulations constitutes a violation of article 26 of the Covenant. The authors claim that although the amendment of the Regulations is objective on the face of it, it is discriminatory in effect, considering that most retirees are heads of households with a spouse as dependent and

no longer have children under the age of 27. The impact of the amendment is therefore greater for retired than for active employees as it effectively abolishes the supplement for retirees' dependents altogether. It is argued that this adverse effect was foreseeable and intended.

3.2 The authors recall that the amendment is the third step in a series of modifications aimed at reducing the income of retired employees (for the earlier modifications, see cases Nos. 608/1995 (2) and 803/1998 (3)). It is stated that the cumulative effect of the reductions brings the present case within the threshold of manifest arbitrariness, in violation of the principle of equality before the law. It is further stated that the courts' failure to take the cumulative effect of the amendments into consideration by limiting their review to the isolated amendment in each case, failed to ensure that the authors enjoyed equal and effective protection against discrimination within the meaning of article 26 of the Covenant.

3.3 Counsel states that the same facts are also the subject of an application which the authors presented to the European Commission of Human Rights claiming a violation of the right to property (article 1 of the First Additional Protocol to the European Convention). He claims that this does not preclude the admissibility of the communication as the Covenant does not contain the right to property and the European Convention does not contain a provision which corresponds to article 26 of the Covenant.

State party's observations on the admissibility of the communication

4.1 By submission of 25 September 2001, the State party objects to the admissibility of the communication. It notes that the present communication was already transmitted to it as part of communication No. 803/1998. It argues therefore that the communication is inadmissible for violation of the principle *ne bis in idem*.

4.2 The State party further notes the authors' applications to the European Commission on the basis of the same facts as before the Committee were transferred to the European Court pursuant to article 5(2) of Protocol No. 11 and that the Court declared them inadmissible on 12 January 2001 because they did not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

4.3 The State party recalls its reservation in relation to article 5 (2) (a) of the Optional Protocol (4), to the effect that it does not recognize the Committee's competence to consider any communication from an individual when the same matter has been examined by the European Commission of Human Rights. The State party explains that the purpose of the reservation was exactly to prevent successive consideration of the same facts by the Strasbourg organs and the Committee. In this connection, the State party points out that article 14 of the European Convention contains a discrimination ban which forms an integral part of all other rights and freedoms under the Convention. Even though the authors did not raise the breach of article 14 in conjunction with article 1 of the First Protocol, the State party asserts that the Court considers other provisions of the Convention *ex officio*. In this connection, the State party refers to the European Court's consideration in the authors' applications that they did not disclose any appearance of a violation of the rights and freedoms set out in the Convention. The State party concludes therefore that the authors in substance are presenting the same matter.

4.4 Furthermore, the State party argues that the European Court has examined the matter within the meaning of article 5(2)(a), as its decision of inadmissibility was not based on formal reasons but of reasons of merit. In this context, the State party refers to the Committee's prior jurisprudence. (5)

4.5 As to the mention in its reservation of the European Commission of Human Rights, the State party recalls that at the time it made the reservation in 1987, the European Commission was the only instrument of international investigation or settlement under the European Convention on Human Rights and Fundamental Freedoms to which an individual complainant could resort. Following the reorganisation of the Strasbourg organs through Protocol No. 11, the European Court has now taken over the tasks previously discharged by the Commission and should thus be seen as the successor of the Commission with regard to applications lodged by individuals. The State party concludes that its reservation is thus equally valid for applications now being examined by the European Court.

The authors' comments on the State party's submission

5.1 By letter of 15 October 2001 the authors respond to the State party's observations and submit that the present communication is not identical to communication No. 803/1998, even if it was initially considered jointly with this communication. Counsel submits that the authors of the communications are not identical and that the two communications concern two distinct alleged violations of the authors' rights under the Covenant.

5.2 As to the State party's objection under article 5(2)(a) of the Optional Protocol and its reservation in this respect, counsel argues that when applying or interpreting a reservation, one should first ascertain whether the terms used are in itself sufficiently clear and unambiguous, and only if they are not, one may examine the context, object and purpose of the reservation. The reservation invoked by the State party is unambiguous in the sense that it excludes communications examined by the European Commission of Human Rights. Counsel argues therefore that the reservation has lost its field of application following the entry into force of Protocol No. 11 to the ECHR and there is thus no obstacle under article 5(2)(a) of the Optional Protocol to the admissibility of the present communication.

5.3 Concerning the State party's arguments on the interpretation of the reservation, counsel argues that even at the time when the State party entered its reservation, it was the European Court of Human Rights or the Committee of Ministers that rendered final and binding decisions, that the individual was very much a party to the proceedings before the Court, and that the Commission was basically a fact-finding and screening body.

5.4 In reply to the State party's statement about the scope of its reservation, counsel argues that the Vienna Convention on the Law of Treaties prohibits resort to supplemental means of interpretation when the ordinary meaning, context and object and purpose are clear and claims that what the State party wanted to say cannot replace what it did say.

5.5 Counsel also argues that treaties safeguarding human rights, and even more so reservations, must be interpreted in favour of the individual and that any attempt to broaden the scope of a reservation must be categorically rejected.

5.6 With regard to the question whether or not the European Court has examined the same matter, counsel refers to the Committee's jurisprudence in this regard and concludes that the same matter is a petition that concerns the same individuals, facts and allegations of breaches of fundamental rights and freedoms. Counsel notes that the present case concerns the same facts and persons as in the application to the European Court of Human Rights but raises entirely different claims, since the communication to the Committee concerns rights that are protected exclusively by the Covenant (the right to equality) and the application under the European Convention concerns the right to property which is protected exclusively by that Convention and not by the Covenant. In this regard, counsel argues that article 14 of the ECHR does not provide for an independent right to material equality, but is an accessory right which does not offer the same protection as article 26 of the Covenant. Counsel refutes the State party's argument that the European Court considers other provisions ex officio when authors specify the provisions of the Convention. In this connection, counsel quotes from a letter received from the Secretariat of the Court pointing out objections to the admissibility of the applications on the ground of article 1 of the First Additional Protocol only without reference to article 14 of the Convention. He further argues that it appears from the letter that the Court rejected the admissibility of the application *ratione materiae* because the entitlements under pension schemes do not amount to property rights, and thus did not analyze the effect of the amendments.

State party's additional observations

6.1 By submission of 25 January 2002, the State party reiterates its arguments on the admissibility of the communication. With regard to its reservation concerning article 5(2)(a) of the Optional Protocol, the State party notes that it entered this reservation in accordance with a recommendation by the Committee of Ministers on 15 May 1970, in order to prevent the possibility of successive applications to the different bodies. Seen in this context, it cannot be concluded from the wording of the reservation that the State party meant to diverge from

the recommendation issued by the Committee of Ministers. The State party also refers to the domestic procedure concerning the ratification of the Optional Protocol: it recalls that the European Court is the legal successor to the European Commission and considers that counsel's argument about the role of the Commission has no bearing on the legal succession, especially since the State party's reservation was made in respect of the Commission's duty to decide on the admissibility of an application and to make a first assessment on the merits. The State party also rejects counsel's argument that its interpretation extends the scope of the reservation, as it has the same significance today as it had when entered. Moreover, the State party argues that it was by no means foreseeable in 1987 that the protection mechanism of the Convention would be modified.

6.2 With regard to the authors' argument that their applications were not examined by the ECHR within the meaning of the reservation, the State party argues that a rejection of a complaint by the ECHR pursuant to article 35, paragraphs 3 and 4, of the Convention presupposes an examination of the merits, so that the admissibility proceedings include, if only summary, a substantive assessment of a claim of a violation of the Convention. The State party reiterates therefore that the communication should be declared inadmissible in the light of its reservation to article 5 (2) (a).

6.3 With regard to the merits of the communication, the State party notes that the wording of the present communication is exactly the same as that of the communication which was sent to the State party as part of communication No. 803/1998, and it refers to its submissions in respect of the earlier communication. In these submissions, the State party argued that the effect of the amendments cannot be said to be of a discriminatory nature. The State party explains that the Regulations of Service is not a decree, but a collective agreement to which the authors are party and which is concluded between the Association of Social Insurance Institutions and the trade union.

6.4 The State party further argues that the cancellation of the household benefits does not constitute discrimination as this measure equally affects working and retired persons. The cancellation has been calculated to constitute a reduction of between 0.4 and 0.8% of the total pension payment, which according to the State party cannot be regarded as unreasonable.

Author's comments on the State party's additional observations

7.1 By letter of 3 March 2002, the authors reiterate that the present communication is distinct from the original communication No. 803/1998. They add that it is not their decision whether to add the communication to the file of case No. 803/1998 or to deal with it as a new case.

7.2 The authors challenge the State party's explanations of the *raison d'être* of its reservation and note that the recommendation of the Committee of Ministers was wider than the reservation actually made. The authors also point out that of the 35 States that are both party to the Optional Protocol and the European Convention only 17 States have made a reservation under article 5(2)(a) of the Optional Protocol. They argue that the reference to the State party's intent cannot absolve it from the text of its reservation. The authors also take issue with the State party's statement that the scope of the reservation is not extended by its wider interpretation, and argue that without such interpretation the reservation would not apply at all.

7.3 Counsel also takes issue with the State party's analysis of the functions of the European Commission and the European Court, and moreover submits that discussions about the merger of the Commission and the Court already were under way since 1982, that is before the date of the State party's reservation, and that modifications of the European human rights protection system were thus foreseeable at the time.

7.4 The authors reiterate that the abolition of the household benefits is discriminatory in effect, because it affects retired employees to a greater extent than active employees who are more likely to benefit from the increase in children's entitlements than retired employees. They note that the State party has not addressed these arguments in its submissions.

7.5 By further letter of 23 April 2002, counsel submits recent data on the financial effects of the amendments to the regulations. It is said that for retired employees, the loss of income caused by the cumulative effect of the 1992 amendment (subject of communication No. 608/1995), the 1994 amendment (subject of communication No. 803/1998) and the 1996 amendment, subject of the present communication, over the period 1994 – 2001 varies from ATS 34,916.00 to ATS 141,757.00. (6)

Issues and proceedings before the Committee

8.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has noted the State party's argument that the communication is inadmissible because it had earlier been transmitted as part of communication No. 803/1998. The Committee observes that its decision of 21 March 2002 declaring inadmissible communication No. 803/1998 does not relate in any way to the contents of the present communication. Consequently, the Committee has not yet considered the claim contained in the present communication and the State party's objection in this regard can therefore not be upheld.

8.3 The Committee notes that the State party has invoked the reservation it made under article 5, paragraph 2 (a), of the Optional Protocol, which precludes the Committee from considering claims that have previously been "examined" by the "European Commission on Human Rights". As to the author's argument that the application which he submitted to the European Commission was, in fact, never examined by that organ but declared inadmissible by the European Court of Human Rights, the Committee observes that the European Court, as a result of treaty amendment by virtue of Protocol No. 11, has legally assumed the former European Commission's tasks of receiving, deciding on the admissibility of, and making a first assessment on the merits of applications submitted under the European Convention. The Committee observes, for purposes of ascertaining the existence of parallel or, as the case may be, successive proceedings before the Committee and the Strasbourg organs, that the new European Court of Human Rights has succeeded to the former European Commission by taking over its functions.

8.4 Having concluded that the State party's reservation applies, the Committee needs to consider whether the subject matter of the present communication is the same matter as the one which was presented under the European system. In this connection, the Committee recalls that the same matter concerns the same authors, the same facts and the same substantive rights. The Committee on earlier occasions has already decided that the independent right to equality and non-discrimination embedded in article 26 of the Covenant provides a greater protection than the accessory right to non-discrimination contained in article 14 of the European Convention. The Committee has taken note of the decision taken by the European Court on 12 January 2001 rejecting the authors' application as inadmissible as well as of the letter from the Secretariat of the European Court explaining the possible grounds of inadmissibility. It notes that the authors' application was rejected because it did not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols as it did not raise issues under the right to property protected by article 1 of Protocol No. 1. As a consequence, in the absence of an independent claim under the Convention or its Protocols, the Court could not have examined whether the authors' accessory rights under article 14 of the Convention had been breached. In the circumstances of the present case, therefore, the Committee concludes that the question whether or not the authors' rights to equality before the law and non-discrimination have been violated under article 26 of the Covenant is not the same matter that was before the European Court.

8.5 The Committee has ascertained that the authors have exhausted domestic remedies for purposes of article 5, paragraph 2(b), of the Optional Protocol.

9. The Committee therefore decides that the communication is admissible.

Consideration of the merits

10.1 The Human Rights Committee has examined the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

10.2 The authors claim that that they are victims of discrimination because the abolition of the household benefits affects them, as retired persons, to a greater extent than it affects active employees. The Committee recalls that a violation of article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate.⁽⁷⁾ However, such indirect discrimination can only be said to be based on the grounds enumerated in Article 26 of the Covenant if the detrimental effects of a rule or decision exclusively or disproportionately affect persons having a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, rules or decisions with such an impact do not amount to discrimination if they are based on objective and reasonable grounds. In the circumstances of the instant case, the abolition of monthly household payments combined with an increase of children's benefits is not only detrimental for retirees but also for active employees not (yet or no longer) having children in the relevant age bracket, and the authors have not shown that the impact of this measure on them was disproportionate. Even assuming, for the sake of argument, that such impact could be shown, the Committee considers that the measure, as was stressed by the Austrian courts (paragraph 2.3 above), was based on objective and reasonable grounds. For these reasons, the Committee concludes that, in the circumstances of the instant case, the abolition of monthly household payments, even if examined in the light of previous changes of the Regulations of Service for Employees of the Social Insurance Board, does not amount to discrimination as prohibited in Article 26 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it do not disclose a violation of any of the rights contained in the International Covenant on Civil and Political Rights.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen and Mr. Roman Wieruszewski.

Notes

1. An earlier communication submitted by many of the same authors was registered under No. 803/1998 and declared inadmissible by the Committee on 21 March 2002.
2. See CCPR/C/57/D/608/1995, Committee's decision of 22 July 1996 declaring the communication inadmissible.
3. See CCPR/C/74/D/803/1998, Committee's decision of 21 March 2002 declaring the communication inadmissible.
4. When ratifying the Optional Protocol on 10 December 1987, the State party entered the following understanding: "On the understanding that, further to the provisions of article 5 (2) of the Protocol, the Committee provided for in Article 28 of the Covenant shall not consider any communication from an individual unless it has been ascertained that the same matter has not been examined by the European Commission on Human Rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms."
5. Communication No. 452/1991 (Glaziou v. France), declared inadmissible on 18 July 1994.
6. 1 euro is 13.7603 ATS
7. See the Committee's general comment No. 18 on non-discrimination and the Committee's Views adopted on 19 July 1995 in case No. 516/1992 (Simunek et al. v. the Czech Republic) (CCPR/C/54/D/516/1992, para. 11.7)

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Annex 752

Cecilia Derksen v. Netherlands, Communication No. 976/2001, U.N. Doc CCPR/C/D/976/2001
(1 April 2004)



**Cecilia Derksen v. Netherlands, Communication No. 976/2001,
U.N. Doc. CCPR/C/80/D/976/2001 (2004).**

Communication No. 976/2001 : Netherlands. 15/06/2004.
CCPR/C/80/D/976/2001. (Jurisprudence)

Convention Abbreviation: CCPR

Human Rights Committee
Eightieth session
15 March - 2 April 2004

Views of the Human Rights Committee under
the Optional Protocol to the International Covenant
on Civil and Political Rights*

- Eightieth session -

Communication No. 976/2001**

Submitted by: Cecilia Derksen, on her own behalf and on behalf of her daughter Kaya Marcelle Bakker
(represented by counsel, A.W.M. Willems)

Alleged victim: The author

State party: The Netherlands

Date of communication: 11 August 2000 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 April 2004,

Having concluded its consideration of communication No. 976/2001, submitted to the Human Rights Committee on behalf of Cecilia Derksen and her daughter Kaya Marcelle Bakker under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Cecilia Derksen, a Dutch national. She submits the communication on her own behalf and on behalf of her child Kaya Marcelle Bakker, born on 21 April 1995, and thus 5 years old at the time of the initial submission. She claims that she and her child are the victims of a violation by the Netherlands of article 26 of the International Covenant on Civil and Political Rights. The author is represented by counsel.

The facts as submitted by the author

2.1 The author shared a household with her partner Marcel Bakker from August 1991 to 22 February 1995. It is stated that Mr. Bakker was the breadwinner, whereas Ms. Derksen took care of the household and had a part-time job. They had signed a cohabitation contract and when Ms. Derksen became pregnant, Mr. Bakker recognized the child as his. The author states that they intended to marry. On 22 February 1995, Mr. Bakker died in an accident.

2.2 On 6 July 1995, the author requested benefits under the General Widows and Orphans Law (AWW, Algemene Weduwen en Wezen Wet). On 1 August 1995, her request was rejected because she had not been married to Mr. Bakker and therefore could not be recognized as widow under the AWW. Under the AWW, benefits for half-orphans were included in the widows' benefits.

2.3 On 1 July 1996, the Surviving Dependents Act (ANW, Algemene Nabestaanden Wet) replaced the AWW. Under the ANW, unmarried partners are also entitled to a benefit. On 26 November 1996 Ms. Derksen applied for a benefit under the ANW. On 9 December 1996, her application was rejected by the Social Insurance Bank (Sociale Verzekeringsbank) on the grounds that "(...) only those who were entitled to a benefit under the AWW on 30 June 1996 and those who became widow on or after 1 July 1996 are entitled to a benefit under the ANW".

2.4 Ms. Derksen's request for revision of the decision was rejected by the Board of the Social Insurance Bank on 6 February 1997. Her further appeal was rejected by the District Court Zutphen (Arrondissementsrechtbank Zutphen) on 28 November 1997. On 10 March 1999, the Central Council of Appeal (Centrale Raad van Beroep) declared her appeal unfounded. With this, all domestic remedies are said to be exhausted.

The complaint

3.1 According to the author, it constitutes a violation of article 26 of the Covenant to distinguish between half-orphans whose parents were married and those whose parents were not married. It is stated that the distinction between children born of married parents and children born of non-married parents cannot be justified on objective and reasonable grounds. With reference to the Human Rights Committee's decision in *Danning v. the Netherlands*, it is argued that the Committee's considerations do not apply in the present case, as the decision not to marry has no influence on the rights and duties in the parent-child relationship.

3.2 The author further points out that under the ANW, half-orphans whose parent died on or after 1 July 1996 do have an entitlement to a benefit, whether the parents were married or not, thereby eliminating the unequal treatment complained of above. According to the author it is unacceptable to maintain the unequal treatment for half-orphans whose parent died before 1 July 1996.

3.3 The author further claims that she herself is also a victim of discrimination. She accepts, on the basis of the Committee's decision in *Danning v. the Netherlands*, the decision not to grant her a benefit under the AWW,

since benefits under that law were limited to married partners. However, now that the law has changed and allows benefits for unmarried partners, she cannot accept that she is still being refused a benefit solely on the basis that her partner died before 1 July 1996. The author argues that once it is decided to treat married and unmarried partners equally this should apply to all regardless of the date of the death of the partner and that the failure to do so constitutes a violation of article 26 of the Covenant.

State party's observations

4.1 By submission of 23 November 2001, the State party accepts the facts as described by the author. It adds that the Central Council of Appeal, in rejecting the author's appeal, considered that provisions outlawing discrimination such as article 26 of the Covenant are not designed to offer protection from disadvantages which may be caused by time restraints inherent to amendments of legislation. In the opinion of the Council, when new rights are provided, no obligation exists to extend those rights to cases predating the change.

4.2 The State party explains that when the AWW was replaced by the ANW, the transitional regime was based on respect for prior rights, in the sense that existing rights under the AWW were respected and no new rights could be claimed resulting from a death prior to the entry into force of the ANW.

4.3 Concerning the admissibility of the communication, the State party points out that the author has not appealed the decision of 1 August 1995 by which her application under the AWW was rejected. The State party argues that to the extent that the communication relates to the distinctions made in the AWW, it should be declared inadmissible.

4.4 As to the merits, the State party refers to the Committee's prior jurisprudence in cases concerning social security, and seeks to infer from these decisions that it is for the State to determine what matters it wishes to regulate by law and under what conditions entitlement is granted, as long as the legislation adopted is not discriminatory in nature. From the earlier decisions in which the Committee has reviewed the Dutch social security legislation the State party concludes that the distinction between married and unmarried couples is based on reasonable and objective grounds. The State party recalls that the Committee has based its view on the fact that persons are free to choose whether or not to engage in marriage and accept the responsibilities and rights that go with it.

4.5 The State party rejects the author's opinion that the new legislation should be applied to old cases as well. It points out that the ANW was introduced to reflect the changes in the society where living together as partners otherwise than through marriage has become common. In the State's party's opinion, it is up to the national legislature to judge the need for a transitional regime. The State party emphasizes that those persons who are now entitled to benefits under the ANW are persons with established rights. This distinguishes them from persons who like the author do not have established rights. Before 1 July 1996, marriage was a relevant factor for benefits under the surviving dependants' legislation, and people were free to marry and thereby safeguard entitlement to the benefits, or not to marry and thereby choose to be excluded from such entitlement. The fact that the ANW has now abolished the differential treatment between married and unmarried cohabiting persons does not alter this pre-existing position. The State party concludes that the transitional regime does not constitute discrimination against the author.

4.6 To the extent that the communication relates to Ms. Derksen's daughter, the State party states that its above observations apply *mutatis mutandis* also to the claim of unequal treatment of half-orphans. The State party explains in this respect that, as was also the case under the old law, it is not the half-orphan herself who is entitled to the benefit but the surviving parent. Since neither the old nor the new legislation grants entitlements to half-orphans, the State party is of the opinion that there can be no question of discrimination within the meaning of article 26 of the Covenant.

4.7 Concerning the claim that the AWW made a prohibited distinction between children born out of wedlock and children born of a marriage, the State party argues first that the author has not exhausted domestic remedies in this respect. It further argues that the claim is groundless, because the status of the child was irrelevant to the

determination under the AWW whether or not a surviving spouse was entitled to a benefit as it was the status of the spouse that determined whether or not a benefit would be provided for the half-orphan.

The author's comments

5.1 By letter dated 25 January 2002, the author notes that the main question is whether or not equal cases may be treated differently because of the time factor, i.e. whether equal treatment between married and unmarried cohabitants may be restricted to those cases in which one of the partners died after 1 July 1996. The author remarks that the insurance scheme established by the ANW is a collective national scheme in which all taxpayers participate. The author refers to the history of other schemes (such as old age pensions, children's benefits) and states that these applied to all eligible residents and not just to those who became eligible only after the date of enactment. The author further argues that social insurance schemes cannot be compared with commercial insurance schemes and claims that profit considerations would deny the special character of social insurance schemes.

5.2 As to the transitional provisions of the ANW, the author points out that originally the law was enacted in order to provide for equality between men and women, and that the equality between married and unmarried partners was only added after debate in Parliament. The reason for the transitional scheme was that the new law established stricter requirements than the old law, but that for reasons of legal security all those who had been eligible under the old law would also be eligible under the new law, whereas the stricter requirements would apply to newly eligible persons. According to the author, the question whether surviving dependants of unmarried persons who had died before 1 July 1996 should be granted benefits was never posed, and there was thus no conscious decision in this respect. The author further argues that through changes in the calculation of benefits and earlier termination of benefits, the ANW was intended to lower the costs, as is borne out by the statistics over the years 1999, 2000 and 2001 which show that less people are entitled to benefits under the ANW than under the old AWW. In the opinion of the author, the extension to 'old' cases of unmarried dependants could thus be easily financed. Moreover, the author recalls that like all taxpaying residents she and her partner paid premiums under the AWW.

5.3 The author maintains that the transitional provisions are discriminatory and points out that if her partner had died 17 months later, she and the child would have been entitled to a benefit. They face the same circumstances as dependants whose partner/parent died after 1 July 1996. The unequal treatment of equally situated persons is clearly in violation of article 26 of the Covenant.

5.4 As to the author's daughter, the author notes that she is being treated differently than children whose father was married to their mother or whose father died after 1 July 1996. In the opinion of the author this amounts to prohibited discrimination as the child has no influence on the decision whether her parents marry or not. With reference to the jurisprudence of the European Court on Human Rights, the author argues that differential treatment between children born in and children born out of wedlock is not permissible.

5.5 The author recalls that differential treatment which is not based on objective and reasonable grounds and which does not have a legitimate aim constitutes discrimination. She also recalls that in March 1991 the Government had already introduced legislation abolishing the distinction between married and unmarried dependants, but that this proposal was withdrawn at the time. She argues that she and her daughter should not pay for the slow pace of enactment of these amendments. She submits that unmarried cohabitation has been accepted practice in the Netherlands for years before the law was changed. The author concludes that she and her daughter have been subjected to different treatment for which no objective and reasonable grounds exist, and which has no legitimate aim.

State party's further observations

6.1 By letter of 7 May 2002, the State party states that it does not share the author's view that article 26 of the Covenant envisages that new legislation must be applied to pre-existing cases. The State party refers to its previous observations and concludes that the transitional regime does not constitute discrimination.

6.2 The State party refers to the Committee's decision in the case of *Hoofdman v. the Netherlands* in which the Committee was of the opinion that the distinction between married and unmarried partners under the AWW did not constitute discrimination. The State party submits that different legal regimes applied to married and unmarried couples at the time the author decided to cohabit with her partner without marrying him and that the decision not to marry entailed legal consequences that were known to the author.

6.3 The State party also argues that the transitional regime cannot be considered discriminatory in itself, as it distinguishes between two different groups: surviving dependants who were entitled to a benefit under the AWW and those who were not. The distinction was made for reasons of legal security in order to guarantee the rights that people had acquired under the old legislation.

6.4 Furthermore, the State party argues that the ANW being a national insurance scheme to which all residents contribute, it obliges the government to keep the collective costs as low as possible. As to the author's reference to the introduction of other social security schemes, the State party points out that a distinction must be made between the introduction of such a scheme and the alteration of an existing scheme.

6.5 As to the status of half-orphans born outside marriage, the State party reiterates that the status of the child is not relevant to eligibility for benefits, under either the new or the old scheme. It is the surviving parent who cares for the child who is eligible for benefits. Therefore, the status of the parents was and still is the deciding factor. As long as the distinction between married and unmarried cohabiting parents was justified, as it is according to the Committee's Views in *Hoofdman v. the Netherlands*, the ANW can not be said to perpetuate discriminatory treatment.

Issues and proceedings before the Committee

7.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has noted the State party's objections to the admissibility of the communication on the grounds that the author has not exhausted available domestic remedies with regard to the refusal of a benefit under the AWW. The Committee considers that in so far as the communication relates to alleged violations resulting from the decision not to grant her a benefit under the AWW, this part of the communication is inadmissible under article 5, paragraph 2(a) of the Optional Protocol.

7.3 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2(a) of the Optional Protocol.

8. Accordingly, the Committee decides that the communication in so far as it relates to the refusal of benefit under the ANW is admissible and should be considered on its merits.

Consideration of the merits

9.1 The Human Rights Committee has examined the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 The first question before the Committee is whether the author of the communication is a victim of a violation of article 26 of the Covenant, because the new legislation which provides for equal benefits to married and unmarried dependants whose partner has died is not applied to cases where the unmarried partner has died before the effective date of the new law. The Committee recalls its jurisprudence concerning earlier claims of discrimination against the Netherlands in relation to social security legislation. The Committee reiterates that not every distinction amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria. The Committee recalls that it has earlier found that a differentiation between married and unmarried couples does not amount to a violation of article 26 of the Covenant, since married and unmarried couples are subject to different legal regimes and the decision whether or not to enter into a legal status by

marriage lies entirely with the cohabitating persons. By enacting the new legislation the State party has provided equal treatment to both married and unmarried cohabitants for purposes of surviving dependants' benefits. Taking into account that the past practice of distinguishing between married and unmarried couples did not constitute prohibited discrimination, the Committee is of the opinion that the State party was under no obligation to make the amendment retroactive. The Committee considers that the application of the legislation to new cases only does not constitute a violation of article 26 of the Covenant.

9.3 The second question before the Committee is whether the refusal of benefits for the author's daughter constitutes prohibited discrimination under article 26 of the Covenant. The State party has explained that it is not the status of the child that determines the allowance of benefits, but the status of the surviving parent of the child, and that the benefits are not granted to the child but to the parent. The author, however, has argued that, even if the distinction between married and unmarried couples does not constitute discrimination because different legal regimes apply and the choice lies entirely with the partners whether to marry or not, the decision not to marry cannot affect the parents' obligations towards the child and the child has no influence on the parents' decision. The Committee recalls that article 26 prohibits both direct and indirect discrimination, the latter notion being related to a rule or measure that may be neutral on its face without any intent to discriminate but which nevertheless results in discrimination because of its exclusive or disproportionate adverse effect on a certain category of persons. Yet, a distinction only constitutes prohibited discrimination in the meaning of article 26 of the Covenant if it is not based on objective and reasonable criteria. In the circumstances of the present case, the Committee observes that under the earlier AWW the children's benefits depended on the status of the parents, so that if the parents were unmarried, the children were not eligible for the benefits. However, under the new ANW, benefits are being denied to children born to unmarried parents before 1 July 1996 while granted in respect of similarly situated children born after that date. The Committee considers that the distinction between children born, on the one hand, either in wedlock or after 1 July 1996 out of wedlock, and, on the other hand, out of wedlock prior to 1 July 1996, is not based on reasonable grounds. In making this conclusion the Committee emphasizes that the authorities were well aware of the discriminatory effect of the AWW when they decided to enact the new law aimed at remedying the situation, and that they could have easily terminated the discrimination in respect of children born out of wedlock prior to 1 July 1996 by extending the application of the new law to them. The termination of ongoing discrimination in respect of children who had had no say in whether their parents chose to marry or not, could have taken place with or without retroactive effect. However, as the communication has been declared admissible only in respect of the period after 1 July 1996, the Committee merely addresses the failure of the State party to terminate the discrimination from that day onwards which, in the Committee's view, constitutes a violation of article 26 in regard of Kaya Marcelle Bakker in respect of whom half orphan's benefits through her mother was denied under the ANW.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it relating to Kaya Marcelle Bakker disclose a violation of article 26 of the International Covenant on Civil and Political Rights.

11. In accordance with article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide half orphans' benefits in respect of Kaya Marcelle Bakker or an equivalent remedy. The State party is also under an obligation to prevent similar violations

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

** Two separate individual opinions signed by Mr. Nisuke Ando and Sir Nigel Rodley are appended to the present document.

APPENDIX

Individual opinion of Committee member, Mr. Nisuke Ando

Unfortunately I cannot share the Committee's conclusion that the ANW violates article 26 of the Covenant in denying half orphan benefits to unmarried partners before 1 July 1996, while granting the same benefits to children of unmarried partners after that date.

The facts in the present case, as I see them, are the following: On 1 July 1996, the Surviving Dependents Act (ANW) replaced the General Widows and Orphans Law (AWW). Under the new law, unmarried partners are entitled to a benefit, to which only married couples were entitled under the old law. The author applied for the benefit under ANW but was rejected because her partner died on 22 February 1995, seventeen months before the new law was enacted, and since the law has no retroactive effect, she is not entitled to apply for the benefit. The author claims that, once it is decided to treat married couples and unmarried partners equally, this should apply to all regardless of the date of the death of their partner and that the failure to do so constitutes a violation of article 26 to the detriment not only of herself but also of her daughter. (3.3, 5.3 and 5.4)

It is unfortunate that the new law affects her as well as her daughter unfavourably in the present case. However, in interpreting and applying article 26, the Human Rights Committee must take into account the following three factors: First, the codification history of the Universal Declaration of Human Rights makes it clear that only those rights contained in the International Covenant on Civil and Political Rights are justiciable and the Optional Protocol is attached to that Covenant, while the rights contained in the International Covenant on Economic, Social and Cultural Rights are not justiciable. Second, while the principle of non-discrimination enshrined in article 26 of the former Covenant may be applicable to any field regulated and protected by public authorities, the latter Covenant obligates its States parties to realize rights contained therein only progressively. Third, the right to social security, the very right at issue in the present case, is provided not in the former Covenant but in the latter Covenant and the latter Covenant has its own provision on non-discriminatory implementation of the rights it contains.

Consequently, the Human Rights Committee needs to be especially prudent in applying its article 26 to cases involving economic and social rights, which States parties to the International Covenant on Economic, Social and Cultural Rights are to realize without discrimination but step-by-step through available means. In my opinion, the State party in the present case is attempting to treat married couples and unmarried partners equally but progressively, thus making the application of ANW not retroactive. To tell the State party that it is violating article 26 unless it treats all married couples and unmarried partners exactly on the same footing at once sounds like telling the State party not to start putting water in an empty cup if it cannot fill the cup all at once!

[Signed] Nisuke Ando

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Individual of Committee member, Sir Nigel Rodley (dissenting)

I do not consider that the Committee's finding of a violation in respect of Kaya Marcelle Bakker, the author's daughter (paragraph 9.3), withstands analysis. To comply with the Committee's interpretation of the Covenant, the State Party would have had to make the ANW retroactive. Indeed, it is the very absence of retroactivity that, according to the Committee, constitutes the violation. Since most legislation has the effect of varying people's rights as compared with the situation prior to the adoption of the legislation, the Committee's logic would imply that all legislation granting a new benefit must be retroactive if it is to avoid discriminating against those whose rights fall to be determined under the previous legislation.

Furthermore, I believe the Committee is straining beyond endurance the notion of victim in the present case. Whether under the AWW or the ANW, no person born out of wedlock had or has any independent right to a benefit. The mother, in this case the author, was and is free to dispose of the benefit without being obliged to apply it to her child's welfare. The already vulnerable doctrine of indirect discrimination that the Committee is here applying is being subjected to intolerable pressure in being asked to sustain the Committee's argument. After all, the asserted indirect discrimination between children of mothers who bore them before or after the ANW was adopted does not begin to compare with the direct discrimination between children born within and those born out of wedlock. Yet the Committee refrains from finding that discrimination to be incompatible with the Covenant, simply by deciding that the communication is admissible only in respect of the applicability of the ANW (paragraph 7.2). (In this connection I also note that, since the Committee's decision on the merits concerns a difference between the ANW and the AWW, then the logic of this is that the inadmissibility decision should have applied to both pieces of legislation; after all, a successful remedy in respect of the AWW would have resolved the apparent discrepancy in the application of the ANW.)

Accordingly, while regretting that the State Party could not have arranged to be more generous in its introduction of the ANW to benefit all those families in the position of Ms. Baakker and her daughter, I am unable to find a violation of the Covenant.

[Signed] Sir Nigel Rodley

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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Annex 753

Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General (pursuant to Security Council Resolution 1564 of 18 September 2004) (25 January 2005)

**Report of the International Commission of Inquiry on Darfur
to the United Nations Secretary-General**

Pursuant to Security Council Resolution 1564 of 18 September 2004

Geneva, 25 January 2005

International Commission of Inquiry on Darfur

Report to the Secretary-General

Executive Summary

Acting under Chapter VII of the United Nations Charter, on 18 September 2004 the Security Council adopted resolution 1564 requesting, *inter alia*, that the Secretary-General ‘rapidly establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable’.

In October 2004, the Secretary General appointed Antonio Cassese (Chairperson), Mohamed Fayek, Hina Jilani, Dumisa Ntsebeza and Therese Striggner-Scott as members of the Commission and requested that they report back on their findings within three months. The Commission was supported in its work by a Secretariat headed by an Executive Director, Ms. Mona Rishmawi, as well as a legal research team and an investigative team composed of investigators, forensic experts, military analysts, and investigators specializing in gender violence, all appointed by the Office of the United Nations High Commissioner for Human Rights. The Commission assembled in Geneva and began its work on 25 October 2004.

In order to discharge its mandate, the Commission endeavoured to fulfil four key tasks: (1) to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties; (2) to determine whether or not acts of genocide have occurred; (3) to identify the perpetrators of violations of international humanitarian law and human rights law in Darfur; and (4) to suggest means of ensuring that those responsible for such violations are held accountable. While the Commission considered all events relevant to the current conflict in Darfur, it focused in particular on incidents that occurred between February 2003 and mid-January 2005.

The Commission engaged in a regular dialogue with the Government of the Sudan throughout its mandate, in particular through meetings in Geneva and in the Sudan, as well as through the work of its investigative team. The Commission visited the Sudan from 7-21 November 2004 and 9-16 January 2005, including travel to the three Darfur States. The investigative team remained in Darfur from November 2004 through January 2005. During its presence in the Sudan, the Commission held extensive meetings with representatives of the Government, the Governors of the Darfur States and other senior officials in the capital and at provincial and local levels, members of the armed forces and police, leaders of rebel forces, tribal leaders, internally displaced persons, victims and witnesses of violations, NGOs and United Nations representatives.

The Commission submitted a full report on its findings to the Secretary-General on 25 January 2005. The report describes the terms of reference, methodology, approach and activities of the Commission and its investigative team. It also provides an overview of the historical and social background to the conflict in Darfur. The report then addresses in detail the four key tasks referred to above, namely the

Commission's findings in relation to: i) violations of international human rights and humanitarian law by all parties; ii) whether or not acts of genocide have taken place; iii) the identification of perpetrators; and iv) accountability mechanisms. These four sections are briefly summarized below.

I. Violations of international human rights law and international humanitarian law

In accordance with its mandate to 'investigate reports of violations of human rights law and international humanitarian law', the Commission carefully examined reports from different sources including Governments, inter-governmental organizations, United Nations bodies and mechanisms, as well as non-governmental organizations.

The Commission took as the starting point for its work two irrefutable facts regarding the situation in Darfur. Firstly, according to United Nations estimates there are 1,65 million internally displaced persons in Darfur, and more than 200,000 refugees from Darfur in neighbouring Chad. Secondly, there has been large-scale destruction of villages throughout the three states of Darfur. The Commission conducted independent investigations to establish additional facts and gathered extensive information on multiple incidents of violations affecting villages, towns and other locations across North, South and West Darfur. The conclusions of the Commission are based on the evaluation of the facts gathered or verified through its investigations.

Based on a thorough analysis of the information gathered in the course of its investigations, the Commission established that the Government of the Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law. In particular, the Commission found that Government forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur. These acts were conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity. The extensive destruction and displacement have resulted in a loss of livelihood and means of survival for countless women, men and children. In addition to the large scale attacks, many people have been arrested and detained, and many have been held *incommunicado* for prolonged periods and tortured. The vast majority of the victims of all of these violations have been from the Fur, Zaghawa, Massalit, Jebel, Aranga and other so-called 'African' tribes.

In their discussions with the Commission, Government of the Sudan officials stated that any attacks carried out by Government armed forces in Darfur were for counter-insurgency purposes and were conducted on the basis of military imperatives. However, it is clear from the Commission's findings that most attacks were deliberately and indiscriminately directed against civilians. Moreover even if rebels, or persons supporting rebels, were present in some of the villages – which the Commission considers likely in only a very small number of instances - the attackers did not take precautions to enable civilians to leave the villages or otherwise be shielded from attack. Even where rebels may have been present in villages, the impact of the attacks on civilians shows that the use of military force was manifestly disproportionate to any threat posed by the rebels.

The Commission is particularly alarmed that attacks on villages, killing of civilians, rape, pillaging and forced displacement have continued during the course of the Commission's mandate. The Commission considers that action must be taken urgently to end these violations.

While the Commission did not find a systematic or a widespread pattern to these violations, it found credible evidence that rebel forces, namely members of the SLA and JEM, also are responsible for serious violations of international human rights and humanitarian law which may amount to war crimes. In particular, these violations include cases of murder of civilians and pillage.

II. Have acts of genocide occurred?

The Commission concluded that the Government of the Sudan has not pursued a policy of genocide. Arguably, two elements of genocide might be deduced from the gross violations of human rights perpetrated by Government forces and the militias under their control. These two elements are, first, the *actus reus* consisting of killing, or causing serious bodily or mental harm, or deliberately inflicting conditions of life likely to bring about physical destruction; and, second, on the basis of a subjective standard, the existence of a protected group being targeted by the authors of criminal conduct. However, the crucial element of genocidal intent appears to be missing, at least as far as the central Government authorities are concerned. Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare.

The Commission does recognise that in some instances individuals, including Government officials, may commit acts with genocidal intent. Whether this was the case in Darfur, however, is a determination that only a competent court can make on a case by case basis.

The conclusion that no genocidal policy has been pursued and implemented in Darfur by the Government authorities, directly or through the militias under their control, should not be taken in any way as detracting from the gravity of the crimes perpetrated in that region. International offences such as the crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide.

III. Identification of perpetrators

The Commission has collected reliable and consistent elements which indicate the responsibility of some individuals for serious violations of international human rights law and international humanitarian law, including crimes against humanity or war crimes, in Darfur. In order to identify perpetrators, the Commission decided that there must be ‘a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime.’ The Commission therefore makes an assessment of likely suspects, rather than a final judgment as to criminal guilt.

Those identified as possibly responsible for the above-mentioned violations consist of individual perpetrators, including officials of the Government of Sudan, members of militia forces, members of rebel groups, and certain foreign army officers acting in their personal capacity. Some Government officials, as well as members of militia forces, have also been named as possibly responsible for joint criminal enterprise to commit international crimes. Others are identified for their possible involvement in planning and/or ordering the commission of international crimes, or of aiding and abetting the

perpetration of such crimes. The Commission also has identified a number of senior Government officials and military commanders who may be responsible, under the notion of superior (or command) responsibility, for knowingly failing to prevent or repress the perpetration of crimes. Members of rebel groups are named as suspected of participating in a joint criminal enterprise to commit international crimes, and as possibly responsible for knowingly failing to prevent or repress the perpetration of crimes committed by rebels.

The Commission has decided to withhold the names of these persons from the public domain. This decision is based on three main grounds: 1) the importance of the principles of due process and respect for the rights of the suspects; 2) the fact that the Commission has not been vested with investigative or prosecutorial powers; and 3) the vital need to ensure the protection of witnesses from possible harassment or intimidation. The Commission instead will list the names in a sealed file that will be placed in the custody of the UN Secretary-General. The Commission recommends that this file be handed over to a competent Prosecutor (the Prosecutor of the International Criminal Court, according to the Commission's recommendations), who will use that material as he or she deems fit for his or her investigations. A distinct and very voluminous sealed file, containing all the evidentiary material collected by the Commission, will be handed over to the High Commissioner for Human Rights. This file should be delivered to a competent Prosecutor.

IV. Accountability mechanisms

The Commission strongly recommends that the Security Council immediately refer the situation of Darfur to the International Criminal Court, pursuant to article 13(b) of the ICC Statute. As repeatedly stated by the Security Council, the situation constitutes a threat to international peace and security. Moreover, as the Commission has confirmed, serious violations of international human rights law and humanitarian law by all parties are continuing. The prosecution by the ICC of persons allegedly responsible for the most serious crimes in Darfur would contribute to the restoration of peace in the region.

The alleged crimes that have been documented in Darfur meet the thresholds of the Rome Statute as defined in articles 7 (1), 8 (1) and 8 (f). There is an internal armed conflict in Darfur between the governmental authorities and organized armed groups. A body of reliable information indicates that war crimes may have been committed on a large-scale, at times even as part of a plan or a policy. There is also a wealth of credible material which suggests that criminal acts were committed as part of widespread or systematic attacks directed against the civilian population, with knowledge of the attacks. In the opinion of the Commission therefore, these may amount to crimes against humanity.

The Sudanese justice system is unable and unwilling to address the situation in Darfur. This system has been significantly weakened during the last decade. Restrictive laws that grant broad powers to the executive have undermined the effectiveness of the judiciary, and many of the laws in force in Sudan today contravene basic human rights standards. Sudanese criminal laws do not adequately proscribe war crimes and crimes against humanity, such as those carried out in Darfur, and the Criminal Procedure Code contains provisions that prevent the effective prosecution of these acts. In addition, many victims informed the Commission that they had little confidence in the impartiality of the Sudanese justice system and its ability to bring to justice the perpetrators of the serious crimes committed in Darfur. In any event, many have feared reprisals in the event that they resort to the national justice system.

The measures taken so far by the Government to address the crisis have been both grossly inadequate and ineffective, which has contributed to the climate of almost total impunity for human rights violations in Darfur. Very few victims have lodged official complaints regarding crimes committed against them or their families, due to a lack of confidence in the justice system. Of the few cases where complaints have been made, most have not been properly pursued. Furthermore, procedural hurdles limit the victims' access to justice. Despite the magnitude of the crisis and its immense impact on civilians in Darfur, the Government informed the Commission of very few cases of individuals who have been prosecuted, or even disciplined, in the context of the current crisis.

The Commission considers that the Security Council must act not only against the perpetrators but also on behalf of the victims. It therefore recommends the establishment of a Compensation Commission designed to grant reparation to the victims of the crimes, whether or not the perpetrators of such crimes have been identified.

It further recommends a number of serious measures to be taken by the Government of the Sudan, in particular (i) ending the impunity for the war crimes and crimes against humanity committed in Darfur; (ii) strengthening the independence and impartiality of the judiciary, and empowering courts to address human rights violations; (iii) granting full and unimpeded access by the International Committee of the Red Cross and United Nations human rights monitors to all those detained in relation to the situation in Darfur; (iv) ensuring the protection of all the victims and witnesses of human rights violations; (v) enhancing the capacity of the Sudanese judiciary through the training of judges, prosecutors and lawyers; (vi) respecting the rights of IDPs and fully implementing the Guiding Principles on Internal Displacement, particularly with regard to facilitating the voluntary return of IDPs in safety and dignity; (vii) fully cooperating with the relevant human rights bodies and mechanisms of the United Nations and the African Union; and (viii) creating, through a broad consultative process, a truth and reconciliation commission once peace is established in Darfur.

The Commission also recommends a number of measures to be taken by other bodies to help break the cycle of impunity. These include the exercise of universal jurisdiction by other States, re-establishment by the Commission on Human Rights of the mandate of the Special Rapporteur on human rights in Sudan, and public and periodic reports on the human rights situation in Darfur by the High Commissioner for Human Rights.

INTRODUCTION	9
I. THE ROLE OF THE COMMISSION OF INQUIRY	9
1. <i>Establishment of the Commission</i>	9
2. <i>Terms of reference</i>	9
3. <i>Working methods</i>	11
4. <i>Principal constraints under which the Commission has operated</i>	12
5. <i>Brief account of the Commission’s visits to the Sudan</i>	13
6. <i>Cooperation of the Sudanese authorities and the rebels</i>	14
II. THE HISTORICAL AND SOCIAL BACKGROUND	17
1. <i>The Sudan</i>	17
2. <i>Darfur</i>	19
3. <i>The Current Conflict in Darfur</i>	22
SECTION I	26
THE COMMISSION’S FINDINGS OF VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND HUMANITARIAN LAW BY THE PARTIES	26
I. INTRODUCTION	26
II. THE NATURE OF THE CONFLICT IN DARFUR	26
III. CATEGORIES OF PERSONS OR GROUPS PARTICIPATING IN THE ARMED CONFLICT	27
1. <i>Government Armed Forces</i>	27
2. <i>Government supported and/or controlled militias – The Janjaweed</i>	31
3. <i>Rebel movement groups</i>	37
IV. THE INTERNATIONAL LEGAL OBLIGATIONS INCUMBENT UPON THE SUDANESE GOVERNMENT AND THE REBELS	40
1. <i>Relevant Rules of International Law Binding the Government of the Sudan</i>	41
2. <i>Rules binding rebels</i>	51
V. CATEGORIES OF INTERNATIONAL CRIMES	51
VI. VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW – THE COMMISSION’S FACTUAL AND LEGAL FINDINGS.	53
1. <i>Overview of violations of international human rights and humanitarian law reported by other bodies.</i>	53
2. <i>Information provided by the Government of the Sudan</i>	57
3. <i>Information provided by the rebel groups</i>	59
4. <i>The task of the Commission</i>	60
5. <i>Two Irrefutable Facts: Massive displacement and large-scale destruction of villages.</i>	61
6. <i>Violations committed by the parties</i>	63
VI. ACTION OF SUDANESE BODIES TO STOP AND REMEDY VIOLATIONS	108
1. <i>Action by the police</i>	108
2. <i>Action by the Judiciary</i>	110
3. <i>Sudanese Laws Relevant to the Present Inquiry</i>	113
4. <i>Action by Other Bodies</i>	115
VII. ACTION BY THE REBELS TO REMEDY THE VIOLATIONS THEY COMMITTED	123
SECTION II	124
HAVE ACTS OF GENOCIDE OCCURRED?	124
I. THE NOTION OF GENOCIDE	124
II. DO THE CRIMES PERPETRATED IN DARFUR CONSTITUTE ACTS OF GENOCIDE?	129
SECTION III	133
IDENTIFICATION OF THE POSSIBLE PERPETRATORS OF INTERNATIONAL CRIMES	133
I. GENERAL	133
II. MODES OF CRIMINAL LIABILITY FOR INTERNATIONAL CRIMES	135
1. <i>Perpetration or co-perpetration of international crimes</i>	135
2. <i>Joint criminal enterprise to commit international crimes</i>	136
3. <i>Aiding and abetting international crimes</i>	139
4. <i>Planning international crimes</i>	140
5. <i>Ordering international crimes</i>	140
6. <i>Failing to prevent or repress the perpetration of international crimes (superior responsibility)</i>	141
SECTION IV	144

POSSIBLE MECHANISMS TO ENSURE ACCOUNTABILITY FOR THE CRIMES COMMITTED IN DARFUR	144
I.GENERAL: THE INADEQUACIES OF THE SUDANESE JUDICIAL CRIMINAL SYSTEM AND THE CONSEQUENT NEED TO PROPOSE OTHER CRIMINAL MECHANISMS	144
II. MEASURES TO BE TAKEN BY THE SECURITY COUNCIL	145
1. <i>Referral to the International Criminal Court</i>	145
2. <i>Establishment of a Compensation Commission</i>	149
III. POSSIBLE MEASURES BY OTHER BODIES.....	153
1. <i>Possible role of national courts of States other than Sudan</i>	153
2. <i>Truth and Reconciliation Commission</i>	156
3. <i>Strengthening the Sudanese Criminal Justice System</i>	157
SECTION V	158
CONCLUSIONS AND RECOMMENDATIONS	158
I. FACTUAL AND LEGAL FINDINGS	158
II. DO THE CRIMES PERPETRATED IN DARFUR CONSTITUTE ACTS OF GENOCIDE?	160
III. WHO ARE THE PERPETRATORS?	161
IV. THE COMMISSION’S RECOMMENDATIONS CONCERNING MEASURES DESIGNED TO ENSURE THAT THOSE RESPONSIBLE ARE HELD ACCOUNTABLE	162
1. <i>Measures that should be taken by the Security Council</i>	162
2. <i>Action that should be taken by the Sudanese authorities</i>	163
3. <i>Measures That Could be Taken by Other Bodies</i>	164

INTRODUCTION

I. THE ROLE OF THE COMMISSION OF INQUIRY

1. Establishment of the Commission

1. The International Commission of Inquiry on Darfur (henceforth the Commission) was established pursuant to United Nations Security Council resolution 1564 (2004), adopted on 18 September 2004. The resolution, passed under Chapter VII of the United Nations Charter, requested the Secretary-General rapidly to set up the Commission. In October 2004 the Secretary-General appointed a five member body (Mr. Antonio Cassese, from Italy; Mr. Mohammed Fayek, from Egypt; Ms Hina Jilani, from Pakistan; Mr. Dumisa Ntsebeza, from South Africa, and Ms Theresa Striggner-Scott, from Ghana), and designated Mr. Cassese as its Chairman. The Secretary-General decided that the Commission's staff should be provided by the Office of the High Commissioner for Human Rights. Ms Mona Rishmawi was appointed Executive Director of the Commission and head of its staff. The Commission assembled in Geneva and began its work on 25 October 2004. The Secretary-General requested the Commission to report to him within three months, i.e. by 25 January 2005.

2. Terms of reference

2. In § 12, resolution 1564 (2004) sets out the following tasks for the Commission: "to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties"; "to determine also whether or not acts of genocide have occurred"; and "to identify the perpetrators of such violations"; "with a view to ensuring that those responsible are held accountable". Under the resolution, these tasks must be discharged "immediately".

3. The first of the above tasks implies that the Commission, rather than investigating alleged violations, must investigate "reports" of such violations committed by "all parties". This means that it is mandated to establish facts relating to possible violations of international human rights and humanitarian law committed in Darfur.. In this respect the Commission must act as a fact-finding body, beginning with an assessment of information contained in the various reports made by other bodies including Governments, United Nations bodies, organs of other intergovernmental organizations, as well as NGOs.

4. It also falls to the Commission to characterize, from the viewpoint of international criminal law, the violations of international human rights law and humanitarian law it may establish. This legal characterization is implicitly required by the further tasks of the Commission set out by the Security Council, namely (i) to establish whether those violations amount to genocide, and (ii) to identify the perpetrators. Clearly, the Commission may not be in a position to fulfil these tasks if it has not previously established (a) whether the violations amount to international crimes, and, if so, (b) under what categories of crimes they fall (war crimes, crimes against humanity, genocide, or other crimes). This classification is required not only for the purpose of determining whether those crimes amount to genocide, but also for the process of identifying the perpetrators. In order to name particular persons as suspected perpetrators, it is necessary to define the international crimes for which they might be held responsible.

5. The second task with which the Security Council entrusted the Commission is that of legally characterizing the reported violations with a view to ascertaining whether they amount to genocide.

6. The third task is that of “identifying the perpetrators of violations” “with a view to ensuring that those responsible are held accountable”. This requires the Commission not only to identify the perpetrators, but also to suggest possible mechanisms for holding those perpetrators accountable. The Commission therefore must collect a reliable body of material that indicate which individuals may be responsible for violations committed in Darfur and who should therefore be brought to trial with a view to determining their liability. The Commission has not been endowed with the powers proper to a prosecutor (in particular, it may not subpoena witnesses, or order searches or seizures, nor may it request a judge to issue arrest warrants against suspects). It may rely only upon the obligation of the Government of the Sudan and the rebels to cooperate. Its powers are therefore limited by the manner in which the Government and the rebels fulfil this obligation.

7. In order to discharge its mandate in conformity with the international law that it is bound to apply, the Commission has to interpret the word “perpetrators” as covering the executioners or material authors of international crimes, as well as those who may have participated in the commission of such crimes under the notion of joint criminal enterprise, or ordered their perpetration, or aided or abetted the crimes, or in any other manner taken part in their perpetration. The Commission has included in this inquiry those who may be held responsible for international crimes, under the notion of superior responsibility, because they failed to prevent or repress the commission of such crimes although they a) had (or should have had) knowledge of their commission, and b) wielded control over the persons who perpetrated them. This interpretation is justified by basic principles of international criminal law, which provide that individual criminal responsibility arises when a person materially commits a crime, as well as when he or she engages in other forms or modalities of criminal conduct.

8. Furthermore, the language of the Security Council resolution makes it clear that the request to “identify perpetrators” is “with a view to ensuring that those *responsible* are held accountable”. In § 7 the resolution reiterates its request to the Government of the Sudan “to end the climate of impunity in Darfur” and to bring to justice “*all those responsible, including* members of popular defence forces and Janjaweed militias” for violations of human rights law and international humanitarian law (emphasis added). Furthermore, the tasks of the Commission include that of “ensuring that *those responsible* are held accountable”. Thus, the Security Council has made it clear that it intends for the Commission to identify all those responsible for alleged international crimes in Darfur. This is corroborated by an analysis of the objective of the Security Council: if this body aimed at putting an end to atrocities, why should the Commission confine itself to the material perpetrators, given that those who bear the greatest responsibility normally are the persons who are in command, and who either plan or order crimes, or knowingly condone or acquiesce in their perpetration?

9. This interpretation is also in keeping with the wording of the same paragraph in other official languages (for instance, the French text speaks of “*auteurs de ces violations*” and the Spanish text of “*los autores de tales transgresiones*”). It is true that in many cases a superior may not be held to have taken part in the crimes of his or her subordinates, in which case he or she would not be regarded as a perpetrator or author of those crimes. In those instances where criminal actions by subordinates are isolated episodes, the superior may be responsible only for failing to “submit the matter to the competent

authorities for investigation and prosecution”¹. In such instances, unquestionably the superior may not be considered as the author of the crime perpetrated by his or her subordinates. However, when crimes are committed regularly and on a large scale, as part of a pattern of criminal conduct, the responsibility of the superior is more serious. By failing to stop the crimes and to punish the perpetrators, he or she in a way takes part in their commission.

10. The fourth task assigned to the Commission therefore is linked to the third and is aimed at ensuring that “those responsible are held accountable”. To this effect, the Commission intends to propose measures for ensuring that those responsible for international crimes in Darfur are brought to justice.

11. As is clear from the relevant Security Council resolution, the Commission is mandated to consider only the situation in the Darfur region of the Sudan. With regard to the time-frame, the Commission’s mandate is inferred by the resolution. While the Commission considered all events relevant to the current conflict in Darfur, it focused in particular on incidents that occurred between February 2003, when the magnitude, intensity and consistency of incidents noticeably increased, until mid-January 2005 just before the Commission was required to submit its report.

3. Working methods

12. As stated above, the Commission started its work in Geneva on 25 October 2004. It immediately discussed and agreed upon its terms of reference and methods of work. On 28 October 2004 it sent a Note Verbale to Member States and intergovernmental organizations, and on 2 November 2004 it sent a letter to non-governmental organizations, providing information about its mandate and seeking relevant information. It also posted information on its mandate, composition and contact details on the web-site of the Office of the High Commissioner for Human Rights (www.ohchr.org).

13. The Commission agreed at the outset that it would discharge its mission in strict confidentiality. In particular, it would limit its contacts with the media to providing factual information about its visits to the Sudan. The Commission also agreed that its working methods should be devised to suit each of its different tasks.

14. Thus, with regard to its first and second tasks, the Commission decided to examine existing reports on violations of international human rights and humanitarian law in Darfur, and to verify the veracity of these reports through its own findings, as well as to establish further facts. Although clearly it is not a judicial body, in classifying the facts according to international criminal law, the Commission adopted an approach proper to a judicial body. It therefore collected all material necessary for such a legal analysis.

15. The third task, that of “identifying perpetrators”, posed the greatest challenge. The Commission discussed the question of the standard of proof that it would apply in its investigations. In view of the limitations inherent in its powers, the Commission decided that it could not comply with the standards

¹ According to the language of Article 28 (a) (ii) of the Statute of the International Criminal Court, which codifies customary international law.

normally adopted by criminal courts (proof of facts beyond a reasonable doubt)², or with that used by international prosecutors and judges for the purpose of confirming indictments (that there must be a prima facie case)³. It concluded that the most appropriate standard was that requiring a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime.⁴ The Commission would obviously not make final judgments as to criminal guilt; rather, it would make an assessment of possible suspects⁵ that would pave the way for future investigations, and possible indictments, by a prosecutor.

16. The Commission also agreed that, for the purpose of “identifying the perpetrators”, it would interview witnesses, officials and other persons occupying positions of authority, as well as persons in police custody or detained in prison; examine documents; and visit places (in particular, villages or camps for IDPs, as well as mass grave sites) where reportedly crimes were perpetrated.

17. For the fulfilment of the fourth task the Commission deemed it necessary to make a preliminary assessment of the degree to which the Sudanese criminal justice system has been able and willing to prosecute and bring to trial alleged authors of international crimes perpetrated in Darfur, and then consider the various existing international mechanisms available. It is in the light of these evaluations that it has made recommendations on the most suitable measures.

4. Principal constraints under which the Commission has operated

18. There is no denying that while the various tasks assigned to the Commission are complex and unique, the Commission was called upon to discharge them under difficult conditions. First of all, it operated under serious *time constraints*. As pointed out above, given that the Security Council had

² See for instance Rule 87 of the ICTY Rules of Procedure and Evidence and Article 66 (3) of the Statute of the International Criminal Court.

³ Judge R. Sidhwa, of the ICTY, in his *Review of the Indictment against Ivica Rajić* (decision of 29 August 1995, case no. IT-95-12) noted that under Rule 47(A) of the Tribunal’s Rules of Procedure and Evidence (whereby the Prosecutor can issue an indictment whenever satisfied “that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal”), a prima facie case existed when the prosecutor had in his possession sufficient evidence providing reasonable grounds to believe that the suspect had committed the crime within the jurisdiction of the Tribunal. According to the distinguished Judge, “reasonable grounds point to such facts and circumstances as would justify a reasonable or ordinarily prudent man to believe that a suspect has committed a crime. To constitute reasonable grounds, facts must be such which are within the possession of the Prosecutor which raise a clear suspicion of the suspect being guilty of the crime....It is sufficient that the Prosecutor has acted with caution, impartiality and diligence as a reasonably prudent prosecutor would under the circumstances to ascertain the truth of his suspicions. It is not necessary that he has double checked every possible piece of evidence, or investigated the crime personally, or instituted an enquiry into any special matter...The evidence... need not be overly convincing or conclusive; it should be adequate or satisfactory to warrant the belief that the suspect has committed the crime. The expression “sufficient evidence” is thus not synonymous with “conclusive evidence” or “evidence beyond reasonable doubt.” (in ICTY, *Judicial Reports 1994-1995*, vol. II, The Hague-London-Boston, Kluwer, 1999, at 1065). According to Judge G. Kirk McDonald’s decision on the *Review of the Indictment against Dario Kordić and others* (10 November 1995, case no. IT—95-14), by *prima facie* case one refers to a credible case which would, if not contradicted by the defence, be a sufficient basis to convict the accused on the charge laid out against him (*ibidem*, p. 1123).

⁴ This standard is even lower than that laid down in Rule 40 bis (B) (iii) of the ICTY Rules of Procedure and Evidence (a Rule providing that, if “a reliable and consistent body of material which tends to show that the suspect may have committed a crime” is available, an ICTY Judge may order the transfer and provisional detention of a suspect).

⁵ See Rule 2 of the ICTY Rules of Procedure and Evidence, containing a definition of suspects (“Suspect: a person concerning whom the [ICTY] Prosecutor possesses reliable information which tends to show that the person may have committed a crime over which the Tribunal has jurisdiction”)

decided that the Commission must act urgently, the Secretary-General requested that the Commission report to him within three months of its establishment. The fulfilment of its complex tasks, in particular those concerning the finding of serious violations and the identification of perpetrators, required the Commission to work intensely and under heavy time pressure.

19. Furthermore, both its fact-finding mission and its task of identifying perpetrators would have benefited from the assistance of a great number of investigators, lawyers, military analysts and forensic experts. Given the scale and magnitude of incidents related to the conflict in Darfur, the establishment of facts and the collection of credible probative elements for the identification of suspected perpetrators are difficult tasks, which are not to be taken lightly. The Commission's budget did not allow for more than thirteen such experts. Having said this, the Commission nevertheless was able to gather a reliable and consistent body of material with respect to both the violations that occurred and the persons who might be suspected of bearing criminal responsibility for their perpetration. The Commission thus considers that it has been able to take a first step towards accountability.

5. Brief account of the Commission's visits to the Sudan

20. The Commission first visited the Sudan from 8 to 20 November 2004. It met with a number of high level officials including the First Vice-President, the Minister of Justice, the Minister for Foreign Affairs, the Minister of Interior, the Minister of Defence, the Minister of Federal Affairs, the Deputy Chief Justice, the Speaker of Parliament, the Deputy Head of the National Security and Intelligence Service, and members of the Rape Committees. It met with representatives of non-governmental organizations, political parties, and interested foreign government representatives in the Sudan. In addition, it held meetings with the United Nations Advance Mission in the Sudan (UNAMIS) and other United Nations representatives in the country. The Commission also visited Kober prison (See Annex 2 for a full list of meetings).

21. From 11 to 17 November 2004, the Commission visited Darfur. It divided itself into three teams, each focusing on one of the three states of Darfur. Each team met with the State Governor (*Wali*) and senior officials, visited camps of internally displaced persons, and spoke with witnesses and to the tribal leaders. In addition, the West Darfur team visited refugee camps in Chad and the South Darfur team visited the National Security Detention Center in Nyala.

22. The Commission's investigation team was led by a Chief Investigator and included four investigators, two female investigators specializing in gender violence, four forensic experts and two military analysts. Investigation team members interviewed witnesses and officials in Khartoum and accompanied the Commissioners on their field mission to the three Darfur States. The investigation team was then divided into three sub-teams which were deployed to North, South and West Darfur.⁶

23. One Commission member and Commission staff, acting on behalf of the Commission visited Eritrea from 25-26 November 2004. They met with representatives of two rebel groups: The Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM). They also met with former Sudanese officials who are now residing in Eritrea. Two members of the Commission,

⁶ See Annex IV for a detailed overview of the activities of the investigative team.

accompanied by two staff members, travelled to Addis Ababa from 30 November to 3 December 2004. The objectives were: to obtain a thorough assessment from the African Union (AU) on the situation in Darfur, the African Mission in the Sudan (AMIS) and the Inter-Sudanese talks in Abuja; and to discuss with the AU leadership ways and modalities for the Commission to strengthen its working cooperation. The delegation met with high level officials of the AU, including the newly appointed Special Representative for the Sudan. The delegation also had the opportunity to meet extensively with the Chair and some key members of the AU Integrated Task Force on Darfur.

24. A second visit to the Sudan took place between 9 and 16 January 2004. During this visit, the Commission focused on interviewing witnesses particularly in detention centres, and also met with some officials, members of civil society, and UN staff in Khartoum.

25. With the assistance of a team of five legal researchers and one political affairs officer, who were lead by the Executive Director, the Commission analysed the information provided. It reviewed and analysed published, public reports on Darfur, other reports that were brought to the attention of the Commission in response to its requests for information, as well as other types of information. In order to manage the more than 20,000 pages of material it received, the Commission developed a database in which it recorded bibliographic and evidentiary details. The incidents' analysis carried out by the research team also was recorded in the database as a way to facilitate swift access by the Commissioners and staff to resource material and source information.

6. Cooperation of the Sudanese authorities and the rebels

26. Security Council resolution 1564 (2004) was adopted under Chapter VII of the United Nations Charter. The Security Council (SC) had previously determined (already in resolution 1556 (2004), at preambular § 21) that the situation in the Sudan constitutes a “threat to international peace and security and to stability in the region” under Article 39 of the United Nations Charter.

27. § 12 of the resolution, which requests the Secretary-General to establish an international commission of inquiry, also “*calls on* all parties to cooperate fully with such a commission”. The Commission considers that, by the very nature of the Commission and its mandate, both the Government of the Sudan and the rebels are under a *bona fide obligation* to cooperate with it in the discharge of its various functions. In any event, both the Government of the Sudan and the rebel groups have willingly accepted to cooperate with the Commission.

(i.) Criteria for appraising cooperation

28. The Commission set forth the following criteria for evaluating the degree of cooperation of both the Government and the rebels: (i) freedom of movement throughout the territory of the Sudan; (ii) unhindered access to all places and establishments, and freedom to meet and interview representatives of governmental and local authorities, military authorities, community leaders, non-governmental organizations and other institutions, and any such person whose testimony is considered necessary for the fulfilment of its mandate; (iii) free access to all sources of information, including documentary material and physical evidence; (iv) appropriate security arrangements for the personnel and documents

of the Commission; (v) protection of victims and witnesses and all those who appear before the Commission in connection with the inquiry and, in particular, guarantee that no such person would, as a result of such appearance, suffer harassment, threats, acts of intimidation, ill-treatment and reprisals; and (vi) privileges, immunities and facilities necessary for the independent conduct of the inquiry. A letter was sent to the Government outlining these criteria.

(ii.) Cooperation of the Government

29. As mentioned above, since its inception the Commission has engaged in a constant dialogue with the Government of the Sudan through meetings in Geneva and the Sudan, and through the work of its investigative team.

30. Generally speaking the attitude of the Government authorities towards the Commission has been cooperative. The authorities appointed an efficient liaison official in Khartoum, Dr Abdelmonem Osman Taha organized all the meetings with senior Government officials requested by the Commission. In addition, the Minister of Interior as the President's representative on Darfur appointed a Committee presided over by Major-General Magzoub and consisted of six senior officials from the Ministries of Defence and Interior, as well as the National Security and Intelligence Service. The Commission met the Committee and received relevant documents about the Government's views on the conflict in Darfur.

31. Moreover, in his report dated 3 December 2004 (S/2004/947), the Secretary-General referred to a meeting of the Joint Implementation Mechanism (JIM) held on 12 November 2004, during which the Minister of Justice provided the following assurances regarding the work of the Commission: a) the Government would accept the report of the Commission, whatever its findings; b) witnesses of incidents would not be subjected to maltreatment; and c) following strict instruction from the President, Omer Hassan Al-Bashir, no Sudanese officials would obstruct the Commission's investigations.

32. Furthermore, the Government did not impede the conduct of the Commission's work in the Sudan. In November 2004, a middle-level officer of the National Security Services refused to allow the Commission to have access to a number of persons being held in detention in Nyala (South Darfur). The Commission's Chairman requested the assistance of the liaison officer in Khartoum, and, subsequently, the Commission was able to interview the detainees without any hindrance. The Commission underwent a similar experience in Khartoum in January 2005, during its second visit to the Sudan. When some middle-level authorities refused to allow the Commission access to the National Security's Detention Centre in Khartoum, the Chairman requested the immediate intervention of higher authorities and the Commission was eventually allowed access to the Centre.

33. However, one issue must be raised regarding the minutes of the meetings of the Security Committees at the locality and State levels. In a meeting with the First Vice-President Ali Osman Mohammed Taha held in Khartoum on 10 November 2004, the Commission asked to review the records of the various Government agencies in Darfur concerning decisions relating to the use of armed forces against rebels and measures concerning the civilian population. The Commission promised to keep its scrutiny of such records strictly confidential. During the same meeting, First Vice-President Taha assured the Commission that it would be able to have access to and examine the minutes of the meetings of the Security Committees in the three States of Darfur and their various localities. However, when

requested to produce those minutes, each of the Governors of the three States asserted that no such minutes existed and instead produced a selected list of final decisions on general issues. According to reliable sources, minutes and reports of such meetings are in fact produced by the Security Committees, and some of them relate to the operations conducted in Darfur to oppose the rebels or to deal with displaced persons. In spite of its requests, the Commission did not see copies of these documents.

34. An episode bearing on cooperation relates to another request by the Commission. In a meeting held on 9 November 2004 with Bakri Hassan Salih, Minister of Defence and other senior Ministry of Defence officials, the Commission requested access to records of the deployment of military aircraft and helicopter gunships in Darfur since February 2003. Again, the Commission undertook to treat such records confidentially. The Minister of Defence agreed to comply with the request and promised that the Commission would obtain the records in Darfur from the relevant authorities. When the Commission did not obtain copies of these records in Darfur, it reiterated its request in a meeting with the Committee on Darfur on 20 November 2004. The Chairman of the Committee promised to provide those records and subsequently provided the Commission with an incomplete file, promising that it would be supplemented with further information. After further requests by the Commission, a number of records related to the use of aircraft in Darfur between February 2003 and January 2005 were produced. However, a complete set of the records requests was never provided to the Commission.

35. The Commission also wishes to stress that there have been episodes indicative of pressure put by some regional or local authorities on prospective witnesses, or on witnesses already interviewed by the Commission. For instance, in the first week of November 2004, in El Fashir (North Darfur) a government official, reportedly the chief of the local office of the National Security and Intelligence Service, gave money to some IDPs and urged them not to talk to the Commission. It was also reported to the Commission that the Sudanese authorities had deployed infiltrators posing as internally displaced persons (IDPs) into some camps such as Abushouk. In the same camp various eyewitnesses reported an episode that could be taken to amount to witness harassment. On 19 December 2004, around 12.30 in the afternoon, approximately twenty vehicles and three trucks drove through the camp. They stopped in the centre of the camp and started shouting: "We killed the *Torabora* (a common word used for indicating the rebels). We killed your fathers, your brothers. You have to sleep forever." Women and children in the vicinity ran away, returning only after the soldiers had left the area. People in the camp were very worried about the safety of the entire camp.

36. In other instances, local authorities refused to allow the Commission's investigative team entry into a camp to interview witnesses. However these cases were settled in due course, after negotiations with the authorities.

(iii.) Cooperation of the Rebels

37. The Commission was in contact only with the two main rebel movements, the JEM and the SLM/A, and generally considers that both groups cooperated with the Commission. The Commission met with representatives and members of the two groups on a number of occasions in the Sudan, as well as outside the country. It met with the leadership of SLM/A and JEM in Asmara (Eritrea), including the Secretary-General and military commanders of the SLM/A, Minnie Arkawi Minawi, the chief negotiator of the SLM/A at the AU-sponsored talks, Dr. Sherif Harir, and the Chairman of the JEM, Dr. Khalil Ibrahim, as well as other senior officials of both groups. Discussions were open and frank, and both

organisations provided responses to queries presented by the Commission. In Darfur, the Commission met, on several occasions, with various representatives of the two rebel groups.

38. The Commission received a number of documents from both groups, which included information of a more general nature about Darfur and the Sudan, as well as detailed documentation on specific incidents including names of victims allegedly killed in attacks. However, the Commission was led to believe that the documentary information provided by the rebels would be more extensive and detailed than what in fact was obtained.

39. The Commission was never refused access to areas under the control of the rebels and was able to move freely in these areas. The rebel groups did not interfere with the Commission's investigations of reported incidents involving the rebels.

II. THE HISTORICAL AND SOCIAL BACKGROUND

1. The Sudan

40. In order to understand the current crisis in Darfur, it is important briefly to place the situation in Darfur within a broader context. The Sudan is the largest country in Africa with a territory covering about 2.5 million square kilometres bordering Egypt in the North, the Red Sea, Eritrea and Ethiopia in the East, Uganda, Kenya and the Democratic Republic of the Congo in the South, and the Central African Republic, Chad and Libya in the West. The Sudan has an estimated population of 39 million inhabitants. About 32% of the population are urban, 68% rural, and about 7% nomads. Islam is the predominant religion, particularly in the North, while Christianity and animist traditional religions are more prevalent in the South. The Sudan is a republic with a federal system of government. There are multiple levels of administration, with 26 States (Wilayaat) subdivided into approximately 120 localities (Mahaliyaat).

41. The elements that constitute national identity in the Sudan are complex. The population of the Sudan is made up of a multitude of tribes and its inhabitants speak more than 130 languages and dialects. An Islamic-African-Arab culture has emerged over the years and has become predominant in the North of the country. The Arabic language is now spoken throughout most of the country and constitutes a "lingua franca" for most Sudanese.

42. The Sudan is considered a Least Developed Country (LDC), and ranks 139 in the 2004 UNDP's Human Development Index.⁷ There is no adequate national road grid that connects the country, and large parts of the Sudan rely on an agricultural and pastoral subsistence economy. However, commercial agriculture, industrial development as well as limited exploitation of natural resources, in particular following the discovery of oil in the central/southern part of the country, have developed in recent years. From the time of British colonization to date the focus of attention has been on both the central region where the Blue and White Niles meet, since development and construction are centred in Khartoum, and on the fertile region of El Jezzira where long-fiber cotton has been cultivated as the country's main crop. With the exception of these regions, the rest of the Sudan's wide territories have remained largely

⁷ See 2004 UNDP Human Development Report, <http://www.undp.org>

marginalized and neglected, including Darfur and other regions like Kordofan, the Nuba mountains, the East of the Sudan and the South. Even the Northern region between the border with Egypt and Khartoum has remained a desolate, desert area.

43. The Sudan gained independence from British-Egyptian rule on 1 January 1956. Since independence, the country has fluctuated between military regimes and democratic rule. During its 49 years of national rule, the Sudan has experienced 10 years of democracy in the periods 1956 to 1958, 1965 to 1969, and 1985 to 1989. During the remaining time, the Sudan has been ruled by military regimes, which came to power through *coups d'état*.

44. After two years of democratic governance following independence in 1956, General Ibrahim Abbud came to power through a coup in November 1958. Abbud supported the spread of the Arabic language and Islam, a movement which was met with resistance in the South. Unrest in the South increased in 1962, and in 1963 an armed rebellion emerged. Repression by the Government throughout the country increased, and in 1964 student protests in Khartoum led to general public disorder, which soon spread. Abbud resigned as head of state and a transitional Government was appointed to serve under the provisional Constitution of 1956.

45. The transitional Government held elections in April and May 1965. A coalition Government headed by a leading politician of the Umma party, Mohammed Ahmed Mahjub, was formed in June 1965. However, the Mahjub Government failed to agree on and implement effective reform policies, and in May 1969 a group of officers led by Colonel Gaafar Mohamed Al-Nimeiri took power. They adopted a one-party socialist ideology, which later changed to political Islam. In February 1972 Nimeiri signed the so-called Addis Ababa agreement with rebels from the South, which provided for a kind of autonomy for the South. This agreement made peace possible for the next 11 years. However, during the last years of his rule, General Nimeiri took several measures to strengthen his grip on power. Following the discovery of oil in the South, Nimeiri implemented measures to ensure the incorporation into the North of the oil-rich areas in the South, and cancelled the grant of autonomy for the South. Furthermore, in September 1983 under the influence of Hassan Al Turabi, the then leader of the National Islamic Front and the Muslim Brotherhood, Nimeiri introduced Sharia rule. All of these steps led to strong reactions in the South, and eventually to the start of the second war with the South in 1983. Other key measures related to the laws governing land ownership and the local/tribal administration systems, as mentioned below.

46. Finally, in April 1985, after 16 years in power, the military Government of Nimeiri was overthrown in a military coup organized by army officers and a Transitional Military Council was put in place under the leadership of General Abed Rahman Siwar Al-Dahab. Elections were organized in 1986, which led to the victory of the Umma party's leader, Sadiq Al-Mahdi, who became Prime Minister. Al-Mahdi's Government lasted less than four years. During this period it started to take some important measures, but was faced with serious challenges, including the continuing war in the South as well as drought and desertification.

47. The current President of the Sudan, General Omar Hassan El-Bashir, assumed power in June 1989, following a military *coup d'état* organized in cooperation with the Muslim Brotherhood. Many Sudanese either were imprisoned or went into exile following the *coup*. Property was confiscated and political parties were banned. El-Bashir, like Nimeiri, was heavily influenced by the main ideologue of

the National Islamic Front, Hassan Al-Turabi. Beginning in 1989, the legal and judicial systems were significantly altered to fit the party's version of political Islam.

48. The ruling party's ideological base was modified in 1998 with the drafting and entry into force of a new Constitution on 1 July 1998 and the holding of elections in December the same year. The 1998 Constitution still reflects a strict ideology, provides for a federal system of government and guarantees some important basic rights. The December 1998 elections, which were boycotted by all major opposition parties, resulted in the election of President El-Beshir for a further five-year term, with his National Congress party assuming 340 of the 360 parliamentary seats. Turabi became the Speaker of Parliament. Party members continued to hold key positions and strong influence over the Government, army, security forces, judiciary, academic institutions and the media.

49. In 1999, an internal power struggle within the National Congress resulted in President El-Beshir declaring a state of emergency, dissolving the Parliament, and suspending important provisions of the Constitution, including those related to the structures of the local government in the states. In May 2000, Turabi led a split from the ruling National Congress, in effect establishing a new party called the Popular Congress. Many officials linked to Turabi were dismissed from Government and in May 2001, Turabi himself was placed under house arrest and was later accused of organizing a *coup d'état*. He remains in detention today. At least 70 key members of the Popular Congress presently are detained without charge or trial, and a number have fled the Sudan to exile.

50. Since it erupted in 1983, the internal conflict between the North and the South has had a significant impact on the Sudan in many ways. It is the longest conflict in Africa involving serious human rights abuses and humanitarian disasters. During the conflict, more than 2 million persons have died and 4.5 million persons have been forcibly displaced from their homes. However, following many years of war, and also as a result of heavy international pressure, the Government and the main rebel movement in the South, the Sudan People's Liberation Movement /Army (SPLM/A), initiated peace talks in 2002. The Sudan peace process, under the auspices of the Inter-Governmental Authority on Development (IGAD) and with the support of a *Troika* (The United States of America, the United Kingdom of Great Britain and Northern Ireland and Norway), made significant progress. In July 2002, the parties signed the Machakos Protocol, in which they reached specific agreement on a broad framework, setting forth principles of governance, a transitional process and structures of government as well as on the right to self-determination for the people of southern Sudan. They agreed to continue talks on the outstanding issues of power-sharing, wealth-sharing, and a cease-fire. The IGAD-brokered peace process advanced substantially with the signing in Naivasha (Kenya) of a series of framework protocols in 2003 and 2004. On 31 December 2004, the parties signed two protocols on the implementation modalities and a permanent ceasefire, marking the end of the talks and negotiations in Naivasha. The process culminated on 9 January 2005 when, during an official ceremony, First Vice-President Taha and SPLM/A Chairman John Garang signed the Comprehensive Peace Agreement (CPA), comprising all previously signed documents including the 31 December 2004 protocols. The CPA marks the end of two decades of civil war, calls for a six-month pre-interim period followed by a six-year interim period, which would end with a referendum on the right to self-determination in southern Sudan. The CPA provides for an immediate process leading to the formulation of a national interim constitution. The Committee, composed of seven members from each side, will have eight weeks to draft the Constitution which it then will submit to be submitted to a National Constitutional Review. This Committee will have two weeks to approve the Constitution.

2. Darfur

51. The Darfur region in the western part of the Sudan is a geographically large area comprising approximately 250 000 square kilometres with an estimated population of 6 million persons. Darfur borders with Libya, Chad and the Central African Republic. Since 1994 the region has been divided administratively into three states of North, South and West Darfur. Like all other states in the Sudan, each of the three states in Darfur is governed by a Governor (*Wali*), appointed by the central Government in Khartoum, and supported by a local administration. Major urban centres include the capitals of the three Darfur states, Nyala in South Darfur, El Geneina in West Darfur, and the capital of North Darfur, El Fashir, which is also the historical capital of the region. In addition, there are a few major towns spread out over the entire region which serve as local administrative and commercial centres. The majority of the population, however, lives in small villages and hamlets, often composed of only a few hundred families. The economy of the three Darfur states is based mainly on subsistence and limited industrial farming, as well as cattle herding.

52. Darfur was a sultanate that emerged in 1650 in the area of the Jebel Marrah plateau and survived with some interruptions until it fell to British hands in 1917 and was incorporated into the Sudan proper.⁸ The region is inhabited by tribal groups that can be classified in different ways. However, distinctions between these groups are not clear-cut, and tend to sharpen when conflicts erupt. Nevertheless, individual allegiances are still heavily determined by tribal affiliations. The historic tribal structure, which dates back many centuries, is still in effect in Darfur although it was weakened by the introduction of local government during the time of Nimeiri's rule. Some of the tribes are predominantly agriculturalist and sedentary, living mainly from crop production during and following the rainy season from July to September. Some of the sedentary tribes also include cattle herders. Among the agriculturalists, one finds the Fur, the Barni, the Tama, the Jebel, the Aranga and the Masaalit. Among the mainly sedentary cattle herders, one of the major groups is the southern Rhezehgat, as well as the Zaghawa. In addition, a number of nomadic and semi-nomadic tribes can also be traditionally found in Darfur herding cattle and camels in Darfur, which include the Taaysha, the Habaneya, the Beni Helba, the Mahameed and others. It should be pointed out that all the tribes of Darfur share the same religion (Islam), and while some of the tribes do possess their own language, Arabic is generally spoken.

53. The issue of land has for long been at the centre of politics in Darfur. Land-ownership in Darfur has been traditionally communal. The traditional division of the land into homelands – so-called “dar” - which are essentially areas to which individual tribes can be said to have a historical claim, is crucial in the local self-perception of the population. The traditional attribution of land to individual tribes in existence today dates back to the beginning of the 20th century when the last sultan of Darfur, Sultan Ali Dinar, decreed this division which was generally accepted by all tribes. While this traditional division of land is not geographically demarcated in an exact manner, some general observations are possible. For instance, in the northern parts of West Darfur and some western parts of North Darfur, the Zaghawa tribe predominates, and the area is also referred to as Dar Zaghawa – the homeland of the Zaghawa. In the area around and south of El Geneina, still in West Darfur, the Masaalit tribe has its homeland. While the name Darfur would mean the homeland of the Fur, the actual area where this tribe has its homeland, is located in the centre of the Darfur region, around the Jebel Marrah area, covering an area where the borders of the three states of Darfur meet, but also stretching further into all three states. The Rhezehgat are mainly found in the southern parts of South Darfur. As noted, some tribes, essentially most of the nomadic tribes, do not possess land and have traditionally transited through land belonging

⁸ Mohamad, Mohamed Suliman, *Darfur: New Perspective*, (Cambridge: Cambridge Academic Press, 2004) at 17 (Arabic edition).

to other tribes. Although this traditional division of land into homelands of different tribes has been in existence for many years, extensive intermarriage and socio-economic interconnectedness between the tribes have rendered a clear demarcation of both tribes and homelands less precise or accurate. Nevertheless, the self-perception of people as members of tribes and the social networks connected to the tribal structures remain a central feature of the demographics of Darfur.

54. Historically land was collectively owned by the members of the tribe and its use was determined by the tribal leadership. Tribal leaders had extensive powers to allocate parcels of land to its members for dwelling, grazing, agriculture, or other forms of use. During the 1970s, however, the land laws were changed and individual ownership became possible. Although the land ownership was now attributed to the State, those who possessed land for at least one year could claim legal title. Those who did not have land had additional incentive to demonstrate loyalty to the Government in order to acquire it.

55. In recent years both ecological and demographic transformations have had an impact on inter-tribal relations. Darfur is part of the Great Sahara region, and while it has some agricultural areas, particularly around the Jebel Marrah plateau, most of the region remains arid desert land. Drought and desertification had their impact in the 70s and 80s, and the fight for scarce resources became more intense. In particular, tensions between agriculturalists and cattle herders were affected. Cattle herders in search of pasture and water often invaded the fields and orchards of the agriculturalists, and this led to bloody clashes as described below. Corridors that were agreed upon amongst the tribes to facilitate the movements of cattle for many years were not respected. As fertile land became scarce, settled people's tolerance of the seasonal visitors diminished.⁹

56. Drought and desertification had its impact not only on Darfur but the entire region of the Sahara, which led to increased migration of nomadic groups from Chad, Libya, and other states into the more fertile areas of Darfur. It is generally not disputed that while this immigration was initially absorbed by the indigenous groups in Darfur, the increased influx combined with the tougher living conditions during the drought led to clashes and tensions between the newcomers and the locals.¹⁰

⁹ According to J.D.Fage and W.Tordoff, *A History of Africa*, 4th edn. (London and New York: Routledge, 2002), "there can be little doubt that the lands of the agricultural peoples of the Sudan immediately south of the Sahara have in fact been subject for centuries to raids, infiltration, conquest and settlement by nomadic pastoralists coming from the desert." (at 63-64).

¹⁰ As noted by A. Mosely Lesch, *The Sudan – Contested national Identities* (Bloomington and Indianapolis, Indiana University Press, 1998), "In the westernmost region of Dar Fur, many peoples resented control from Khartoum, and tension between Fur farmers and Rizaiqat Arab cattle herders escalated in 1984-5 as drought forced the nomads to encroach upon cultivated land. Fur were angry that the central government let Libyan troops deploy in northwest Dar Fur and permitted rebels from Chad to camp inside Dar Fur, where they joined with Zaghawa tribesmen to raid Fur villages. The SPLA claimed that 6,500 foreign troops were camped in Dar Fur by mid-1988, a number that grew as Libya and the rebels prepared to overthrow the Ndjama government in December 1999. The extent of destruction was indicated in a report in January 1989 that 57 villages had been burned in the Wadi Saleh agricultural district, where nearly 400 had died, 42,000 were displaced and 12,000 tons of food were destroyed. Further attacks by 3,000 *murahiliin* (Arab militias) on Jabal Marra in May 1989 burned 40 villages and left 80,000 homeless. Those government-armed *murahiliin* also attacked displaced persons from the south. In March 1987, in apparent revenge for the SPLA's killing of 150 Rizaiqat militiamen while they raided Dinka villages in western Bahr al-Ghazal, Rizaiqat *murahiliin* and Arab townspeople killed 1,000 destitute Dinka displaced persons in the largely Arab town of al-Da'ien. When police tried to shelter the Dinka women and children in the police station and on railway cars, the Rizaiqat torched the wagons and stormed the police station. The SPLA played no direct role in these conflicts, since the vast distance prevented the SPLA from aiding the Fur groups or protecting the displaced persons." (at 91-2).

57. It was customary for the Darfur tribes to solve their differences through traditional law, especially the many disputes which occur between nomadic tribes and sedentary tribes like murders and incidents related to cattle stealing, which can develop into inter-tribal conflicts. Traditionally, disputes between members of tribes were settled peacefully by the respective tribal leaders, who would meet to reach a mutually acceptable solution. The State was then seen as a neutral mediator. But President Nimeiri introduced new structures of local administration and formally abolished the tribal system. The administrators of the new structures, who were appointed by the central Government, had executive and judicial powers. Although the tribes continued to informally resort to the tribal system, this system was significantly weakened. Local leaders were often chosen on the basis of their political loyalty to the regime, rather than their standing in the community. They were sometimes financed and strengthened particularly through the State's security apparatus. This meant that when the State had to step in to resolve traditional conflicts, it was no longer seen as an impartial arbitrator.

58. Inter-tribal conflict was further aggravated by an increased access to weapons, through channels with Chad and Libya in particular. Libya aspired to have a friendly rule in Chad and the attempts to contain Libya's ambitions in the region led several foreign governments to pour arms into the region. In addition, several Chadian armed rebellions were launched from Darfur. The conflict in the South of the Sudan also had its impact on the region through easier access to weapons. As a consequence, each major tribe as well as some villages began to organize militias and villages defence groups, essentially a group of armed men ready to defend and promote the interests of the tribe or the village.

59. The tribal clashes in the latter part of the 1980's were essentially between sedentary and nomadic tribes, and in particular between the Fur and a number of Arab nomadic tribes, which had organized themselves in a sort of alliance named the Arab Gathering, while some members of the Fur tribe had created a group called the African Belt. The conflict was mediated by the Government and local tribal leaders in 1990, but tensions remained during the years to come, and clashes between these tribes continued. This further led to resentment among some Darfurians against the Government of El Beshir, which apparently was neither able nor willing effectively to address the unfolding situation in Darfur.

60. In the context of the present conflict in Darfur, and in the years preceding it, the distinction between so-called African and Arab tribes has come to the forefront, and the tribal identity of individuals has increased in significance. The distinction stems, to a large extent, from the cumulative effects of marginalization, competing economic interests and, more recently, from the political polarization which has engulfed the region. The 'Arab' and 'African' distinction that was always more of a passive distinction in the past has now become the reason for standing on different sides of the political divide. The perception of one's self and of others plays a key role in this context.

3. The Current Conflict in Darfur

61. The roots of the present conflict in Darfur are complex. In addition to the tribal feuds resulting from desertification, the availability of modern weapons, and the other factors noted above, deep layers relating to identity, governance, and the emergence of armed rebel movements which enjoy popular support amongst certain tribes, are playing a major role in shaping the current crisis.

62. It appears evident that the two rebel groups in Darfur, the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM) began organizing themselves in the course of 2001 and 2002 in opposition to the Khartoum Government, which was perceived to be the main cause of

the problems in Darfur. While only loosely connected, the two rebel groups cited similar reasons for the rebellion, including socio-economic and political marginalization of Darfur and its people. In addition, the members of the rebel movements were mainly drawn from local village defence groups from particular tribes, which had been formed as a response to increases in attacks by other tribes. Both rebel groups had a clearly stated political agenda involving the entirety of the Sudan, demanding more equal participation in government by all groups and regions of the Sudan. Initially the SLM/A, at that stage named the Darfur Liberation Front, came into existence with an agenda focused on the situation of the people of Darfur, and only later expanded its agenda to cover all of the Sudan. The Justice and Equality Movement based its agenda on a type of manifesto - the "Black Book", published in 2001 - which essentially seeks to prove the disparities in the distribution of power and wealth, by noting that Darfur and its populations, as well as some populations of other regions, have been consistently marginalized and not included in influential positions in the central Government in Khartoum. It is noteworthy that the two movements did not argue their case from a tribal point of view, but rather spoke on behalf of all Darfurians, and mainly directed their attacks at Government installations. It also appears that with regard to policy formulation, the *New Sudan* policy of the SPLM/A in the South had an impact on the SLM/A, while the JEM seemed more influenced by trends of political Islam. Furthermore, it is possible that the fact that the peace negotiations between the Government and the SPLM/A were advancing rapidly, did in some way represent an example to be followed by other groups, since armed struggle would apparently lead to fruitful negotiations with the Government. It should also be recalled that despite this broad policy base, the vast majority of the members of the two rebel movements came from essentially three tribes: The Fur, the Massalit and the Zaghawa.

63. It is generally accepted that the rebel movements began their first military activities in late 2002 and in the beginning of 2003 through attacks mainly directed at local police offices, where the rebels would loot Government property and weaponry. The Government seemed initially to be taken aback by these attacks, but was apparently in no position to retaliate, nor, it appears, did it initially consider the rebellion a serious military matter. Furthermore, for the Government the rebellion came at a particularly inopportune time, as it was in the process of intense peace negotiations with the SPLM/A, and negotiations were advancing rapidly.

64. There are indications that the Government initially was concerned that Chad was involved in the crisis. President El-Beshir travelled to El Fashir, the capital of North Darfur, in April 2003, to meet with the President of Chad, Idriss Deby, along with many local political and tribal leaders of Darfur, seeking to find a solution to the crisis. President Deby assured President El-Beshir that the Government of Chad was not involved in the conflict.

65. In March and April 2003 the rebels attacked Government installations in Kutum, Tine and El Fashir, including the military section of the airport in El Fashir where the rebels destroyed several military aircraft on the ground and killed many soldiers. An air-force commander was later captured by the rebels and was detained for about three months. Despite the efforts of the Government, he was only released following tribal mediation.

66. Most reports indicate that the Government was taken by surprise by the intensity of the attacks, as it was ill-prepared to confront such a rapid military onslaught. Furthermore, the looting by rebels of Government weaponry strengthened their position. An additional problem was the fact that the Government apparently was not in possession of sufficient military resources, as many of its forces were still located in the South, and those present in Darfur were mainly located in the major urban centres. Following initial attacks by the rebels against rural police posts, the Government decided to withdraw

most police forces to urban centres. This meant that the Government did not have *de facto* control over the rural areas, which was where the rebels were based. The Government was faced with an additional challenge since the rank and file of the Sudanese armed forces was largely composed of Darfurians, who were probably reluctant to fight “their own” people.

67. From available evidence and a variety of sources including the Government itself, it is apparent that faced with a military threat from two rebel movements and combined with a serious deficit in terms of military capabilities on the ground in Darfur, the Government called upon local tribes to assist in the fighting against the rebels. In this way, it exploited the existing tensions between different tribes.

68. In response to the Government’s call, mostly Arab nomadic tribes without a traditional homeland and wishing to settle, given the encroaching desertification, responded to the call. They perhaps found in this an opportunity to be allotted land. One senior government official involved in the recruitment informed the Commission that tribal leaders were paid in terms of grants and gifts on the basis of their recruitment efforts and how many persons they provided. In addition, the Government paid some of the Popular Defence Forces (PDF) staff their salaries through the tribal leaders,¹¹ with State budgets used for these purposes. The Government did not accept recruits from all tribes. One Masaalit leader told the Commission that his tribe was willing to provide approximately one thousand persons to the PDF but, according to this source, the Government did not accept, perhaps on the assumption that the recruits could use this as an opportunity to acquire weapons and then turn against the Government. Some reports also indicate that foreigners, from Chad, Libya and other states, responded to this call and that the Government was more than willing to recruit them.

69. These new “recruits” were to become what the civilian population and others would refer to as the “Janjaweed”, a traditional Darfurian term denoting an armed bandit or outlaw on a horse or camel. A more elaborate description of these actors will follow below.

70. Efforts aimed at finding a political solution to the conflict began as early as August 2003 when President Deby of Chad convened a meeting between representatives of the Government and rebel groups in Abeche. The talks, which the JEM refused to join because it considered the Chadian mediation to be biased, led to the signing on 3 September 2003 of an agreement which envisaged a 45-day cessation of hostilities. Several rounds of talks took place thereafter under Chadian mediation. On 8 April 2004, the Government and the SLM/A and JEM signed a humanitarian ceasefire agreement, and in N’Djamena on 28 May they signed an agreement on ceasefire modalities. Subsequent peace talks took place in Addis Ababa, Ethiopia, and in Abuja, Nigeria, under the mediation of the African Union. On 9 November in Abuja, the Government, the SLM/A and the JEM signed two Protocols, one on the improvement of the humanitarian situation and the second on the enhancement of the security situation in Darfur. In the context of further negotiations, the parties have not been able to overcome their differences and identify a comprehensive solution to the conflict.

71. Besides the political negotiations, the African Union also has been playing a leading role, through the African Mission in Sudan (AMIS), in seeking a solution to the conflict and in monitoring the ceasefire through the establishment of the AU Cease-Fire Commission in Darfur, including the deployment of monitors. In spite of all of these efforts and the signing of several protocols, fighting and violations of

¹¹ See section on the Popular Defence Forces below.

the ceasefire between the rebels and the Government and its militias were still being reported in January 2005.

72. Regardless of the fighting between the rebels on the one hand, and the Government and Janjaweed on the other, the most significant element of the conflict has been the attacks on civilians, which has led to the destruction and burning of entire villages, and the displacement of large parts of the civilian population.

SECTION I

THE COMMISSION'S FINDINGS OF VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND HUMANITARIAN LAW BY THE PARTIES

I. INTRODUCTION

73. In fulfilling its mandate the Commission had to establish whether reported violations of international human rights law and humanitarian law in Darfur had in fact occurred. In addition, the Commission had to determine whether other, more recent violations had occurred. Before setting out the results of its fact-finding, the Commission must address a few general and preliminary issues.

II. THE NATURE OF THE CONFLICT IN DARFUR

74. The first such issue relates to the nature of the armed conflict raging in Darfur. This determination is particularly important with regard to the applicability of the relevant rules of international humanitarian law. The distinction is between international armed conflict, non-international or internal armed conflict, and domestic situations of tensions or disturbances. The Geneva Conventions set out an elaborate framework of rules that are applicable to international armed conflict or 'all cases of declared war or of any armed conflict which may arise between two or more of the High Contracting Parties'.¹² Common Article 3 of the Geneva Conventions and Additional Protocol II set out the prerequisite of a non-international armed conflict. It follows from the above definition of an international conflict that a non-international conflict is a conflict without the involvement of two States. Modern international humanitarian law does not legally set out the notion of armed conflict. Additional Protocol II only gives a negative definition which, in addition, seems to narrow the scope of Article 3 common to the Geneva Conventions.¹³ The jurisprudence of the international criminal tribunals has explicitly elaborated on the notion: 'an armed conflict exists whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.¹⁴ Internal disturbances and tensions, 'such as riots, isolated and sporadic acts of violence and other acts of a similar nature' are generally excluded from the notion of armed conflict.¹⁵

75. The conflict in Darfur opposes the Government of the Sudan to at least two organized armed groups of rebels, namely the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM).¹⁶ As noted above, the first two groups of insurgents took up arms against the central authorities in or around 2002. However, the scale of rebel attacks increased noticeably in February 2003. The rebels exercise *de facto* control over some areas of Darfur. The conflict therefore does not merely

¹² Common Article 2 (1)

¹³ Article 1(2)

¹⁴ See ICTY Appeals Chamber, *Tadić, Interlocutory Appeal on Jurisdiction* (1995), § 70.

¹⁵ See Additional Protocol II, Art. 1 (2) and the ICC Statute, Article 8(2)(d) and (f).

¹⁶ A third rebel group recently emerged, namely the National Movement for Reform and Development, NMRD. According to a Report of the UN Secretary-General of 3 December 2004, on 2, 3 and 26 November 2004 the NMRD reportedly attacked four villages around the Kulbus area. It also clashed with armed militias in the Jebel Moon area (see UN doc. S/2004/947, at §10 (f)).

amount to a situation of internal disturbances and tensions, riots, or isolated and sporadic acts of violence. Rather, the requirements of (i) existence of organized armed groups fighting against the central authorities, (ii) control by rebels over part of the territory and (iii) protracted fighting, in order for this situation to be considered an internal armed conflict under common Article 3 of the Geneva Conventions are met.

76. All the parties to the conflict (the Government of the Sudan, the SLA and the JEM) have recognised that this is an internal armed conflict. Among other things, in 2004 the two rebel groups and the Government of the Sudan entered into a number of international agreements, *inter se*, in which they invoke or rely upon the Geneva Conventions.

III. CATEGORIES OF PERSONS OR GROUPS PARTICIPATING IN THE ARMED CONFLICT

77. This section will briefly review the various groups taking an active part in the armed conflict in Darfur. On the side of the Government, the various elements of the Sudan People's Armed Forces have played a key role in the armed conflict and therefore are described below. In addition, according to the Commission's findings, the National Security and Intelligence Service has a central role and is responsible for the design, planning and implementation of policies associated with the conflict. The Service is often referred to as the *de facto* State power and its influence appears to reach the highest levels of authority. Its mandate and structure are described below. The role of the Government-supported militia, commonly referred to as 'Janjaweed', is also set out below. Finally, the structure and role of the main rebel groups referred to above are explained here in further detail.

1. Government Armed Forces

(i) General features

78. The Sudanese armed force is a conventional armed force with a mandate to protect and to maintain internal security.¹⁷ It carries out its mandate through an army, including Popular Defence Force militia and Borders Intelligence, as well as an air force and navy. According to information received by the Commission, currently the army numbers approximately 200,000 in strength, although its logistical capacity was designed for an army of 60,000. Support, in particular air support, therefore goes primarily to priority areas and is re-deployed only after those areas have calmed down. The central command and control of armed forces operations are therefore imperative.

(ii) Structure

79. The Commander-in-Chief of the armed forces is the President, although for operational purposes he exercises this power through the Minister of Defence. The Minister appoints a Commander of the Armed Forces and Chief of General Staff who, together with five Deputy Chiefs of Staff (including Operations, Logistics, Administration, Training and Morale), form the 'Committee of the Joint Chiefs of Staff' or 'command group'.

¹⁷ Article 122, Part VII, Constitution of Sudan

(iii) Military Intelligence

80. While Military Intelligence (MI) was once a part of the ‘Operations’ branch within the armed forces, it now forms an independent branch with its own administration and command. MI has the power to arrest, detain and interrogate. With regard to communication and reporting, the MI branch passes information through the operational chain, as well as directly to the Presidency, through the Chief of the MI branch.

(iv) Popular Defence Forces

81. For operational purposes, the Sudanese armed forces can be supplemented by the mobilization of civilians or reservists into the Popular Defence Forces (PDF). The mandate of the PDF derives from the Popular Defence Forces Act of 1989, which defines the PDF as ‘Paramilitary forces’ made up of Sudanese citizens who meet certain criteria. Article 6 of the Act states that the functions of the PDF are to ‘assist the People’s Armed Forces and other regular forces whenever needed’, ‘contribute to the defence of the nation and help to deal with crises and public disasters’ and perform ‘any other task entrusted to them by the Commander-in-Chief himself or pursuant to a recommendation of the Council.’ According to the Act, a body known as ‘The Council of the Popular Defence Forces’ advises the Commander-in-Chief on matters affecting the PDF, including areas in which the PDF should be established, military training and education for PDF members, and other issues relating to the duties and activities of the PDF.

82. According to information gathered by the Commission, local government officials are asked by army Headquarters to mobilize and recruit PDF forces through tribal leaders and sheikhs.¹⁸ The *Wali* is responsible for mobilization in each State because he is expected to be familiar with the local tribal leaders. As one tribal leader explained to the Commission, ‘in July 2003 the State called on tribal leaders for help. We called on our people to join the PDF. They responded by joining, and started taking orders from the Government as part of the state military apparatus.’

83. The PDF provides arms, uniforms and training to those mobilized, who are then integrated into the regular army for operations. At that point, the recruits come under regular army command and normally wear the same uniform as the unit they are fighting with. One senior commander explained the recruitment and training of PDF soldiers as follows:

‘Training is done through central barracks and local barracks in each state. A person comes forward to volunteer. We first determine whether training is needed or not. We then do a security check and a medical check. We compose a list and give it to the military. This is done at both levels – Khartoum and state or local level. We give basic training (for example, on the use of weapons, discipline, ...) which can take two weeks or so, depending on the individual.’

‘A person may come with a horse or camel – we may send them into military operations on their camel or horse. [...] Recruits are given weapons and weapons are retrieved again at the end of training.’

¹⁸ See below for details on the relationship between the PDF and the ‘Janjaweed’.

84. According to another senior commander, most of the PDF recruits come ‘well-versed in firearms and are tough and fit’ but ‘need training in discipline’. He noted that uniforms, weapons and ammunition were not always returned by recruits following demobilisation, and that weapons and ammunition would at times be distributed through tribal leaders in order to ensure that they are returned on demobilization.

(v) Borders Intelligence

85. The armed forces also include an operational unit called the ‘Borders Intelligence’, the primary role of which is to gather information. Members of this unit are recruited from the local population. They are deployed to their areas of origin, according to their experience in the area, knowledge of the tribes, and ability to differentiate between people of different tribal and national origins based on local knowledge. Borders Intelligence guards are under the direct control of the Military Intelligence Officers in the particular Division where they are deployed and otherwise fall under the regular chain of command for the armed forces.

86. While initially Borders Intelligence officers were recruited in relation to the conflict in southern Sudan, the Government began recruiting them during the early stages of the armed conflict in Darfur in late 2002 and early 2003. Some consider this was done as a cover to recruit Janjaweed.¹⁹ According to a senior armed forces commander, Borders Intelligence soldiers are recruited directly into the army in the same way as regular soldiers. An advertisement is made through media channels for volunteers who meet certain criteria, in particular with regard to age, citizenship and fitness. Approximately 3,000 Borders Intelligence soldiers have been recruited in this way and deployed in Darfur.

(vi) Reporting and command structure

87. Planning for all military operations is done in Khartoum by the Committee of the Joint Chiefs of Staff. Orders in relation to a particular operation are passed from the Committee to the Director of Operations, who gives them to the Area Commander. The Area Commander then gives the orders to the Divisional Commander, who shares them with the Brigade Commander for implementation.

88. With regard to reporting, information flows from Battalion level, to the Brigade Commander, to the Divisional Commander, to the Area Commander, to the Director of Operations, and finally to the Deputy Chief of Staff and Command Group. The Command Group reports to the Chief of Staff who reports, if necessary, to the Minister of Defence and finally to the Presidency. Within the army, reporting and all other communications take place up and down the chain of command as with most conventional armed forces.

(vii) National Security and Intelligence Service

89. National Security forces are regular forces whose mission is to oversee the internal and external security of the Sudan, monitor relevant events, analyze the significance and dangers of the same, and recommend protection measures.²⁰ According to information received by the Commission, the National

¹⁹ See below for further details.

²⁰ Article 124, Part VII, Constitution of Sudan.

Security and Intelligence Service is one of the most powerful organs in the Sudan. Its derives from the National Security Force Act of 1999, as amended in 2001, which states that there shall be an Internal Security Organ in charge of internal security, and a Sudanese Intelligence Organ in charge of external security.²¹

90. National Security Forces act under the general supervision of the President.²² The direct responsibility of the Organ is assumed by the Director-General²³ who is appointed by the President.²⁴ The Director-General is responsible to the President for the execution of his functions and the overall performance of the Organ.²⁵

91. According to the Act, a body known as “The National Security Council” is to be established to oversee the implementation of the security plan of the country; to supervise the progress of security work; to co-ordinate between security organs; to follow-up on the implementation of security policies and programmes; to approve regulations related to the organization of work; and to constitute a technical committee from the organs forming the Council in order to assist in the progress of work.²⁶ The National Security Council is to be constituted of the President, the President’s advisor on security affairs, the Minister of Defence, the Minister of Foreign Relations, the Minister of Internal Affairs, the Minister of Justice, the Director of the Internal Security Organ, and the Director of the Sudanese Intelligence Organ.²⁷

92. The Act also provides for the establishment of the “High Technical Security Committee” which has a mandate to study the security plans presented by the states and the competent organs, submit the plans to the Council for approval, follow-up on implementation, and receive reports with respect thereto. The Committee is to co-ordinate the business of security committees in the various states, with regard to the security plans set out by the Council.²⁸

93. Major General Sallah Abdallah (also known as Sallah Gosh), the Director-General of the National Security and Intelligence Service, informed the Commission of a decision to create one unified service, comprising both the internal and external intelligence. This service was formed in February 2004 and is known as “the National Security and Intelligence Service.” The Director-General told the Commission that he reports at least every second day to the President and/or First Vice-President. While he co-operates with other organs of the Government, he is accountable directly to the President.

94. With regard to the Darfur crisis, the Director-General stated that the National Security and Intelligence Service would gather information and report to the President about the situation. Depending on the nature of the issue, it would also report to the Ministry of Defence, Ministry of Interior, Ministry of Foreign Affairs or Ministry of Humanitarian Affairs. Based on the information received, the President would then instruct the Cabinet. He further stated that the President formed a coordinating Committee in response to the crisis, which was headed by the Minister for Federal Affairs and included

²¹ Article 5(1) and 5(2), National Security Act.

²² Article 5(3), National Security Act.

²³ Article 5(4), National Security Act.

²⁴ Article 10(1), National Security Act.

²⁵ Article 10(3), National Security Act.

²⁶ Article 35, National Security Act.

²⁷ Article 34(1), National Security Act.

²⁸ Articles 38 and 39, National Security Act.

Minister of Defence, Minister of Interior, Director of Intelligence, Minister of Foreign Affairs and Minister of Humanitarian Affairs. However, according to the Director-General the Committee has not met in the last 12 months. Instead, each of the relevant Ministries or Organs have dealt individually or bilaterally with the matter under their competence.

95. As to the hierarchy within the National Security and Intelligence Service, the Director-General informed the Commission that he has a Deputy, with whom he shares his activities and functions, as well as four Directors. The Service has a desk specifically to address the situation in Darfur, which receives all information regarding the area, including external public information. This unit is responsible for producing and analyzing intelligence. Every unit reports up the chain of command and ultimately every action is reported to the Director-General.

96. The Commission noted that the National Security Force Act, as amended in 2001, gives the security forces wide-reaching powers, including the power to detain without charge or access to a judge for up to nine months. In Khartoum, the Commission interviewed detainees that were held incommunicado by the security forces in “ghost houses” under abhorrent conditions. In some cases, torture, beatings and threats were used during interrogations and so as to extract confessions. Some of the detainees had been held for 11 months without charge, access to a lawyer or communication with family.

97. The security forces collect information on all aspects of life in the three States of Darfur. This information is disseminated to the relevant Ministries for appropriate action. The Director-General confirmed that this information or intelligence may relate to matters such as the presence of rebels and whether or not they have arms. The military may use this information to make operational decisions. While the National Security and Intelligence Service does not give orders to the military, it provides it with information which is used as a basis for operational planning.

2. Government supported and/or controlled militias – the ‘Janjaweed’

98. A major question relates to the *militias* in Darfur, often referred to as *Janjaweed*, *fursan* (horsemen, knights), or *mujahedeen*. The term ‘Janjaweed’, in particular, has been widely used by victims of attacks to describe their attackers. The term has consequently also been used by many international organizations and the media in their reports on the situation in Darfur, and was used by the Security Council in resolution 1564. Victims of attacks have indicated that the Janjaweed were acting with and on behalf of Government forces. In contrast, senior Sudanese State authorities, in Khartoum and in the three Darfur States indicated to the Commission that any violations committed by the Janjaweed have no relationship to State actors. Given the allegedly central role played by the Janjaweed in the acts being investigated by the Commission and given the discrepancy in the understanding of the identity of the Janjaweed and their alleged link with the State, it was essential for the Commission to clarify the character and role of those actors to whom the term is being applied.

99. This section clarifies the concept of ‘Janjaweed’ and the implications for the determination of international criminal responsibility. As explained below, the Commission has gathered very substantial material which it considers substantiates use of the term ‘Janjaweed’, in the limited context of the Commission’s mandate, as a generic term to describe Arab militia acting, under the authority, with the

support, complicity or tolerance of the Sudanese State authorities, and who benefit from impunity for their actions. For this reason, the Commission has chosen to use the term ‘Janjaweed’ throughout this report, and also because it reflects the language used by the Security Council in the various resolutions concerning Darfur and, most of all, because it is constantly referred to by victims.

(i.) Emergence of the term janjaweed

100. In Darfur the term “Janjaweed” has been used in the past to describe bandits who prey on rural populations through, among other things, the stealing of cattle and highway robbery. The word “Janjaweed” is an Arabic colloquialism from the region, and generally means "a man (a devil) on a horse." The term was used in the tribal conflicts of the 1990s to specifically denote militias from mainly Arab tribes which would attack and destroy the villages of sedentary tribes.

101. The fact that the Janjaweed are described as Arab militias does not imply that all Arabs are fighting on the side of the Janjaweed. In fact, the Commission found that many Arabs in Darfur are opposed to the Janjaweed, and some Arabs are fighting with the rebels, such as certain Arab commanders and their men from the Misseriya and Rizeigat tribes²⁹. At the same time, many non-Arabs are supporting the Government and serving in its army. Thus, the term “Janjaweed” referred to by victims in Darfur certainly does not mean “Arabs” in general, but rather Arab *militias* raiding their villages and committing other violations.

102. The Commission found that when faced with the rebellion in Darfur launched by two rebel movements in early 2003, the Government called on a number of Arab tribes to assist in the fight. Some tribal leaders with relationships with both local and central Government officials played a key role in recruiting and organizing militia members and liaising with Government officials. One senior Government official, at provincial level, described how an initial Government recruitment of fighting men drew also upon Arab outlaws and, as other reports have described, the recruitment of convicted felons. The Commission also received credible evidence that the ranks of the Janjaweed include fighters from neighbouring countries, primarily Chad and Libya.

(ii.) Uses of the term in the context of current events in Darfur

103. Victims of attacks consistently refer to their attackers as Janjaweed, most often attacking with the support of Government forces. When asked to provide further details, victims report that the Janjaweed attackers are from Arab tribes and, in most instances, attacked on horseback or on camels and were armed with automatic weapons of various types.

104. With the exception of these two precisions, it is probably impossible to define the ‘Janjaweed’, as used in Darfur today, as a homogenous entity. In particular, actors to whom it has been applied can usually also be described with other terminology. For example, the Commission found that on numerous occasions the term ‘Janjaweed’ was used, by victims and members of the authorities, to describe particular men who they had named as leaders of attacks on villages in which civilians were killed and rapes were committed. The Commission was later able to confirm that these men were in fact members

²⁹ The Commission was informed of certain Rezeghat in Ed Daien, South Darfur, who had refused to answer the call to join other Arab tribes in the fight and instead joined the SLA.

of the PDF. Separately, the Commission was informed that a senior member of the local authorities had described one man as a local Janjaweed leader. The man was similarly identified by a victim of an attack as being a Janjaweed leader who had conducted attacks in which civilians were killed. Later, the Commission obtained an official Government letter in which Darfur provincial authorities referred to the same man as being a member of the 'Fursan'. Finally, this man himself showed the Commission evidence that he is a member of the PDF. By way of a further example, the Commission confirmed that PDF forces in one State conduct their attacks on horseback and on camels in a specific deployment configuration and using particular types of weapons. Many victims of attacks in the same area and who identified their attackers as Janjaweed, described for the Commission attackers wearing the same uniforms, using the same deployment during the attack and using the same weapons as those employed by local PDF forces. In a further instance, one victim was asked by the Commission to distinguish between Janjaweed, army and police who had allegedly attacked his village. He responded by saying that for himself and other victims they were all the same.

105. These are a few examples, among multiple testimonies and material evidence, confirming for the Commission that, in practice, the term 'Janjaweed' is being used interchangeably with other terms used to describe militia forces working with the Government. Where victims describe their attackers as Janjaweed, these persons might be from a tribal Arab militia, from the PDF or from some other entity, as described below.

(iii.) Organization and structure of Janjaweed

106. The Janjaweed are not organized in one single coherent structure, and the Commission identified three main categories of Janjaweed actor, determined according to their type of affiliation with the Government of Sudan. The first category includes militias which are only loosely affiliated with the Government and which have received weapons and other supplies from the State. These militias are thought to operate primarily under a tribal management structure³⁰. They are thought to undertake attacks at the request of State authorities, but are suspected by the Commission of sometimes also acting on their own initiative to undertake small scale actions to loot property for personal gain.

107. A second category includes militias which are organized in paramilitary structures and in parallel to regular forces, including groups known as "the Strike Force", the Mujahedeen or the Fursan (the horsemen). Some of these may be headed by officers in the regular army while also controlled by senior tribal leaders. While militias in this category are thought to operate within a defined command structure they do not have any legal basis.

108. A third category of militia includes members of the PDF³¹ and Border Intelligence³² which have a legislative basis under Sudanese law. The PDF fight alongside the regular armed forces.

³⁰ For instance some Rezeigat witnesses in West Darfur said they have been attacked near Kulbus by "Janjaweed Zaghawa". In this instance, it is clear that they refer to the Zaghawa tribal militias, who likely also attack on horses and camels.

³¹ President El-Bashir also confirmed that in order to rein the Janjaweed, they were incorporated in "other areas", such as the armed forces and the police: see interview on CNN on August 31, 2004, transcript at <http://edition.cnn.com/2004/WORLD/africa/08/31/amanpour.bashir/index.html>;

³² The existence of the Border Guard is supported by many witness testimonies. In an interview with the Commission, General El Fadil, Deputy-Director of Military Intelligence, said that his department was responsible for recruiting for the 'Border Guard', and made a distinction between them and the PDF.

109. There are links between all three categories. For example, the Commission has received independent testimony that the PDF has supplied uniforms, weapons, ammunition and payments to Arab tribal militia from the first category. The leaders of these tribes meet regularly with the PDF Civilian Coordinator, who takes their concerns to the Security Committee of the locality.

110. The Commission has gathered substantial material attesting to the participation of militia from all three categories in committing violations of international human rights and humanitarian law. The Commission has determined, further, that attackers from all 3 categories have been identified by victims and other witnesses as Janjaweed.

(iv) Links between the militias and the State

111. The Commission has established that clear links exist between the State and militias from all three categories. The close relationship between the militias and the PDF, a State institution established by law, demonstrates the strong link between these militias and the State as a whole. In addition, militias from all three categories have received weapons, and regular supplies of ammunition which have been distributed to the militias by the army, by senior civilian authorities at the locality level or, in some instances, by the PDF to the other militias.

112. The PDF take their orders from the army and conduct their attacks on villages under the direct leadership of an army officer with the rank of Captain or Lieutenant. Testimonies of victims consistently depict close coordination in raids between government armed forces and militia men who they have described as Janjaweed and the Commission has very substantial material attesting to the participation of all categories of militia in attacks on villages in coordination with attacks or surveillance by Sudanese military aircraft. Numerous sources have reported that Government of Sudan aircraft have been used to supply the Janjaweed with arms.

113. Members of the PDF receive a monthly salary from the State which is paid through the army. The Commission has reports of the tribal militia members, or their leaders, receiving payments for their attacks and one senior Government official involved in the recruitment of militia informed the Commission that tribal leaders were paid in terms of grants and gifts according to the success of their recruitment efforts. In addition, the Commission has substantial testimony that this category of militia has the tacit agreement of the State authorities to loot any property they find and to gain compensation for their attacks in this way. A consistent feature of attacks is the systematic looting of the possessions of villagers, including cash, personal valuable items and, above all, livestock. Indeed, all of these militias operate with almost complete impunity for attacks on villages and related human rights violations. For example, the Commission has substantial testimony indicating that police officers in one locality received orders not to register or investigate complaints made by victims against Janjaweed.

114. A Report of the Secretary-General, pursuant to paragraphs 6 and 13 to 16 of Security Council resolution 1556 (2004) of 30 August 2004³³, mentions that “the Government also accepted that the militias under its influence were not limited to those previously incorporated into the Popular Defence Forces, but also included militias that were outside and later linked with or mobilized to join those forces. This means

³³ S/2004/703

that the commitment to disarm refers both to the Popular Defence Forces and to militias that have operated in association with them”.

115. Confidential documents made available to the Commission further support the above conclusions on links between the militias and the Government, and identify some individuals within the governmental structure who would have had a role in the recruitment of the militias.

116. The Commission does not have exact figures of the numbers of active Janjaweed, however, most sources indicate that in each of Darfur's three states there is at least one large Janjaweed group as well as several smaller ones. One report identified at least 16 Janjaweed camps still active throughout Darfur with names of Janjaweed commanders. According to information obtained by the Commission, Misteria, in North Darfur, is one Janjaweed camp which continues to be used today and which incorporates a militia known as the Border Guards. It was set up as a base for Janjaweed from which they receive training, weapons, ammunition and can eventually be recruited into the PDF structure, into the police, or into the army. The Commission received evidence that civilians have been abducted by leaders of this camp and detained within the camp where they were tortured and used for labour. These civilians were taken out of the camp and hidden during 3 pre-arranged monitoring visits by AU forces. In the first half of 2004 the Misteria camp was populated by approximately 7,000 Janjaweed. By the end of 2004 most of these men had been registered as PDF or police and army regular forces. An army officer with the rank of Colonel was stationed in the camp throughout the year and was responsible for training, ammunition stores and paying salaries to the Janjaweed. Two military helicopters visited the camp roughly once a month bringing additional weapons and ammunition. On at least one occasion the camp was visited by an army Brigadier.

(v.) The position of the Government

117. Especially since the international community has become aware of the impact of the Janjaweed actions, responses of the Government of the Sudan to the use of the term seems to have been aimed at denying the existence of any links between the State and the Janjaweed; and most officials routinely attribute actions of the Janjaweed to "armed bandits", "uncontrolled elements", or even the SLA and JEM. The Government position has nevertheless been inconsistent, with different officials, both at national and Darfur levels, giving different accounts of the status of the Janjaweed and their links with the State.

118. The Minister of Defence during a press conference on 28 January 2004 invited the media to differentiate between the "rebels", the "Janjaweed", the "Popular Defence Forces (PDF)" and "tribal militias", such as the "militias" of the Fur tribe, and the "Nahayein" of the Zaghawa. He said the PDF are volunteers who aid the armed forces but the Janjaweed are "gangs of armed bandits" with which the government has no relations whatsoever.³⁴ President Bashir intended his pledge on 19 June 2004 to "disarm the Janjaweed" to apply only to the bandits, not the Popular Defence Forces, Popular Police or other tribesmen armed by the state to fight the rebels³⁵.

³⁴ "The Minister of Defence meets the media...", in Arabic, *al-Adwa*, 29 December 2003.

³⁵ See Akhbar al-Youm and other major newspapers of 23 June 2004. President Bashir said he used the term "Janjaweed" only because "malevolent powers" were employing it to "slander" the government; see the contradiction with the Report of the Secretary-General pursuant to paragraphs 6 and 13 to 16 of Security Council resolution 1556 (2004) of 30 August 2004 mentioned above, where the Government expresses its acceptance to disarm the PDF.

119. Contrasting with the above, some official statements confirm the relationship between the government and the militias. In a widely publicized comment addressed to the citizens of Kulbus, a town the rebels had failed to overrun in December 2003, the President said: "Our priority from now on is to eliminate the rebellion, and any outlaw element is our target ... We will use the army, the police, the mujahedeen, the horsemen to get rid of the rebellion".³⁶ The Minister of Justice told the ad hoc delegation of the Committee on Development and Cooperation of the European Parliament during its visit in February 2004 that "the Government made a sort of relationship with the Janjaweed. Now the Janjaweed abuse it. I am sure that the Government is regretting very much any sort of commitments between them and the Government. We now treat them as outlaws. The devastation they are doing cannot be tolerated at all".³⁷ On 24 April 2004, the Foreign Minister stated: "The government may have turned a blind eye toward the militias," he said. "This is true. Because those militias are targeting the rebellion."³⁸ The Commission has formally requested the Minister on three occasions to provide it with the above statement or any other statement related to the militias, but has not received it.

120. Despite Government statements regretting the actions of the Janjaweed, the various militias' attacks on villages have continued throughout 2004, with continued Government support.

(vi.) The question of legal responsibility for acts committed by the Janjaweed

121. The "Janjaweed" to whom most victims refer in the current conflict are Arab militias that raid the villages of those victims, mounted on horses or camels, and kill, loot, burn and rape. These militias frequently operate with, or are supported by, the Government, as evidenced both by consistent witness testimonies describing Government forces' support during attacks, the clear patterns in attacks conducted across Darfur over a period of a year, and by the material gathered by the Commission concerning the recruitment, arming and training of militias by the Government. Some militias may, as the Government alleges, sometimes act independently of the Government and take advantage of the general climate of chaos and impunity to attack, loot, burn, destroy, rape, and kill.

122. A major legal question arises with regard to the militias referred to above: who (in addition to the individual perpetrators) is criminally responsible for crimes allegedly committed by Janjaweed?

123. When militias attack jointly with the armed forces, it can be held that they act under the effective control of the Government, consistently with the notion of control set out in 1999 in *Tadić (Appeal)*, at §§ 98-145. Thus they are acting as *de facto* State officials of the Government of Sudan. It follows that, if it may be proved that all the requisite elements of effective control were fulfilled in each individual case, responsibility for their crimes is incurred not only by the individual perpetrators but also by the relevant officials of the army for ordering or planning, those crimes, or for failing to prevent or repress them, under the notion of superior responsibility.

124. When militias are incorporated in the PDF and wear uniforms, they acquire, from the viewpoint of international law the status of organs of the Sudan. Their actions and their crimes could be legally attributed to the Government. Hence, as in the preceding class, any crime committed by them involved

³⁶ "Sudanese president says war against outlaws is government priority", Associated Press, 31 December 2003.

³⁷ Report by ad hoc delegation of the Committee on Development and Cooperation of the European Parliament of its visit in February 2004.

³⁸ "Sudan Minister Hails U.N. Rights Vote," Associated Press, Khartoum, The Guardian (London), April 24, 2004.

not only the criminal liability of the perpetrator, but also the responsibility of their superior authorities of the Sudan if they ordered or planned those crimes or failed to prevent or repress such crimes (superior responsibility).

125. On the basis of its investigations, the Commission is confident that the large majority of attacks on villages conducted by the militia have been undertaken with the acquiescence of State officials. The Commission considers that in some limited instances militias have sometimes taken action outside of the direct control of the Government of Sudan and without receiving orders from State officials to conduct such acts. In these circumstances, only individual perpetrators of crimes bear responsibility for such crimes. However, whenever it can be proved that it was the Government that instigated those militias to attack certain tribes, or that the Government provided them with weapons and financial and logistical support, it may be held that (i) the Government incurs international responsibility (*vis-à-vis* all other member States of the international community) for any violation of international human rights law committed by the militias, and in addition (ii) the relevant officials in the Government may be held criminally accountable, depending on the specific circumstances of each case, for instigating or for aiding and abetting the violations of humanitarian law committed by militias.

126. The Commission wishes to emphasize that, if it is established that the Government used the militias as a “tactic of war”, even in instances where the Janjaweed may have acted without evidence of Government support, Government officials may incur criminal responsibility for joint criminal enterprise to engage in indiscriminate attacks against civilians and murder of civilians. Criminal responsibility may arise because although the Government may have intended to kill rebels and destroy villages for counter-insurgency purposes, it was foreseeable, especially considering the history of conflicts between the tribes and the record of criminality of the Janjaweed, that giving them authorization, or encouragement, to attack their long-term enemies, and creating a climate of total impunity, would lead to the perpetration of serious crimes. The Government of Sudan willingly took that risk.

3. Rebel movement groups

(i.) The Sudan Liberation Movement/Army (SLM/A)

127. The Sudan Liberation Movement/Army (SLM/A) is one of the two main rebel organizations in Darfur. By all accounts, it appears to be the largest in terms of membership and geographical activity. It is composed mainly of Zaghawa, Fur and Masaalit, as well as some members of Arab tribes. The SLM/A initially called itself the Darfur Liberation Front, and at the time was defending a secessionist agenda for Darfur. In a statement released on 14 March 2003, the Darfur Liberation Front changed its name to the Sudan Liberation Movement and the Sudan Liberation Army (SLM/A), and called for a “united democratic Sudan” and for separation between State and religion.

128. The SLM/A claims that all post-independence Governments of the Sudan have pursued policies of marginalization, racial discrimination, exclusion, exploitation and divisiveness, which in Darfur have disrupted the peaceful coexistence between the region’s African and Arab communities. As indicated in its policy statement released in March 2003, “the SLM/A is a national movement that aims along with other like-minded political groups to address and solve the fundamental problems of all of the Sudan. The objective of SLM/A is to create a united democratic Sudan on a new basis of equality, complete restructuring and devolution of power, even development, cultural and political pluralism and moral and

material prosperity for all Sudanese”³⁹. It called upon tribes of “Arab background” to join its struggle for democracy. At various occasion it has stated that it was seeking an equitable share for Darfur in the country’s distribution of wealth and political power.

129. The SLM/A emphasizes that it has a national agenda and does not argue its case from a tribal perspective, and underlines that its cause is directed against the Khartoum Government, and not the Arab tribes in Darfur: “The Arab tribes and groups are an integral and indivisible component of Darfur social fabric that have been equally marginalized and deprived of their rights to development and genuine political participation. SLM/A firmly opposes and struggles against the Khartoum government’s policies of using some Arab tribes and organization such as the Arab Alliance and Quresh to achieve its hegemonic devices that are detrimental both to Arabs and non-Arabs.”⁴⁰

130. In addition, it should also be noted that the SLM/A is part of the Sudanese opposition umbrella group, the National Democratic Alliance (NDA), which also includes the Sudan People’s Liberation Movement /Army (SPLM/A), the Umma party and other Sudanese opposition parties.

131. The SLM/A, as indicated by its name, is influenced in terms of agenda and structure by its southern counterpart, the SPLM/A. During the Commission’s meetings with the SLM/A leadership in Asmara, Eritrea, it was made clear that the group is divided into a political arm, the “Movement”, and a military arm, the “Army”. At the outset of the conflict, the structure of the SLM/A remained unclear. In October 2003, the SLM/A reportedly held a conference in North Darfur State during which changes in their structure were discussed and a clear division of work proposed between the military and the political wings. Nowadays, and following the discussion members of the Commission had with SLM/A representatives in Eritrea, it appears that the movement’s non-military chairman is Abdel Wahid Mohamad al Nur and that the main military leader and the group’s Secretary-General is Minnie Arkawi Minawi. The negotiation team in the peace talks with the Government is headed by Dr. Sherif Harir. Little is known about the detailed structure, or about the actual size of the military arm. According to information obtained by the Commission, the SLM/A has acquired most of its weapons through the looting of Government installations, in particular police stations as well as army barracks. Other sources claim that foreign support has also played an important role in the build-up of the SLM/A forces. The Commission, however, was not in a position to confirm this.

132. The Commission obtained little information about the areas controlled by the SLM/A in Darfur. While certain rural areas are said to be under the group’s control, given its operation as a mobile guerilla group, these areas of control are not fixed. In the beginning of the conflict most of the fighting seems to have taken place in North and northern West Darfur, while it gradually moved southward into South Darfur during the last months of 2004.

(ii) The Justice and Equality Movement (JEM)

³⁹ Press Release/Commentary by SLM/A of 14 March 2003, available at <http://www.sudan.net/news/press/postedr/214.shtml>

⁴⁰ Press Release/Commentary by SLM/A of 14 March 2003, available at <http://www.sudan.net/news/press/postedr/214.shtml>

133. Like the SLM/A, the Justice and Equality Movement (JEM) is a Darfur-based rebel movement, which emerged in 2001, and formed part of the armed rebellion against the Government launched in early 2003. In the field, it is difficult to make a distinction between JEM and SLM/A, as most often reports on actions by rebels do not distinguish between the two. It has been reported that members of the JEM have yellow turbans. It also appears that while SLM/A is the larger military actor of the two, the JEM is more political and has a limited military capacity, in particular following the reported split of the group and the ensuing emergence of the NMRD (see below).

134. The JEM is led by Dr. Khalil Ibrahim, a former State Minister who sided with Hassan El Turabi when the latter formed the Popular National Congress in 2000. Various sources of information have stated that the JEM have been backed by Turabi. While Turabi's role in and influence on the JEM remains unclear, after an initial release following two years' detention in October 2003, he reportedly admitted that his party has links with JEM. However during a meeting with the members of the Commission, Dr. Khalil Ibrahim denied such a link, and stated that in fact Turabi was the main reason for the atrocities committed in the Darfur.

135. The "Black Book" appears to be the main ideological base of the JEM. This manifesto, which appeared in 2001, seeks to prove that there has been a total marginalization of Darfur and other regions of the Sudan, in terms of economic and social development, but also of political influence. It presents facts that aim to show, "the imbalance of power and wealth in Sudan". It was meant to be an anatomy of Sudan that revealed the gaps and discrimination in contrast to the positive picture promoted by the Government. The Black Book seeks to show in a meticulous fashion how the Sudan's post-independence administrations have been dominated by three tribes all from the Nile valley north of Khartoum, which only represent about five per cent of the Sudan's population according to the official census. Despite this, the Black Book argues, these three tribes have held between 47 and 70 per cent of cabinet positions since 1956, and the presidency up until today. Persons from the North are also reportedly overwhelmingly dominant in the military hierarchy, the judiciary and the provincial administration. According to the Black Book, those leaders have attempted to impose a uniform Arab and Islamic culture on one of the continent's most heterogeneous societies⁴¹. The message is designed to appeal to all marginalized Sudanese - whether of Arab, Afro-Arab or African identity, Christian or Muslim. Based on this ideology, the JEM is not only fighting against the marginalization, but also for political change in the country, and has a national agenda directed against the present Government of the Sudan.

136. The Commission obtained very little information about the size and geographic location OF JEM forces in Darfur. Most of its members appear to belong to the Zaghawa tribe, and most JEM activity is reported in the northern parts of West Darfur. The Commission did find information about a number of incidents in which the JEM had been involved in attacks on civilians (see below).

137. In early May 2004, the JEM split into two factions: one group under the leadership of Dr. Khalil, while the other group comprises commanders in the field led by Colonel Gibril. The split reportedly occurred after the field commanders called a conference in Karo, near the Chadian border in North Darfur State, on 23 May 2004. The conference was organized by the commanders to discuss directly with the political leaders the future of the movement and their ideological differences.

(iii.)Other rebel groups

⁴¹ Sudan Tribune: Black book history, William Wallis, 21 August 2004

138. During 2004 a number of other rebel groups emerged. The Commission was not in a position to obtain detailed information about any of these groups nor did it meet with any persons openly affiliated with them.

139. One such group is the National Movement for Reconstruction/Reform and Development (NMRD). On 6 June, the NMRD issued a manifesto stating that it was not party to the ceasefire agreement concluded between the Government and the SLM/A and the JEM in April, and that it was going to fight against the Government. The commanders and soldiers of this movement are mainly from the Kobera Zaghawa sub-tribe, a distinct sub-tribe of the Wagi Zaghawa, who are prominent in the SLM/A. The NMRD is particularly active in the Chadian border town of Tine and in the Jabel Moun area in West Darfur state.

140. On 14 December 2004, talks between the Government of the Sudan and an NMRD delegation began in N'djamena, with Chadian mediation. On 17 December the parties signed two protocols, one on humanitarian access and another on security issues in the war zone. The Protocols underscored the N'Djamena Agreement of 8 April on cease-fire and the Addis Ababa Agreement of 28 May on the cease-fire committee and Abuja Protocols of 9 November. Under the protocols, both parties pledged to abide by a comprehensive ceasefire in Darfur, release war prisoners and organize voluntary repatriation for internally displaced persons, (IDPs) and refugees.

141. In addition to the NMRD, a small number of new armed groups have emerged, but only very little information is available about their political agenda, composition and activities. One of these groups is named *Korbaj*, which means “whip” in Arabic, and is supposedly composed of members of Arab tribes. Another group is named *Al Shahamah*, which in Arabic means “The Nobility Movement”, and was first heard of at the end of September 2004, and is supposedly located in Western Kordofan state, which borders Darfur in the East. The group seeks fair development opportunities for the region, a review of the power and wealth sharing agreement signed between the Government and the Sudan People's Liberation Movement (SPLM), and a revision of the agreement on administrative arrangements for the Nuba Mountains and the Southern Blue Nile regions. A third group, the Sudanese National Movement for the Eradication of Marginalisation emerged in December 2004 when it claimed responsibility for an attack on Ghubeish in Western Kordofan. Little is known of this groups, but some reports claim it is a splinter group from the SLM/A. None of these three groups are party to any of the agreements signed by the other rebel groups with the Government.

IV. THE INTERNATIONAL LEGAL OBLIGATIONS INCUMBENT UPON THE SUDANESE GOVERNMENT AND THE REBELS

142. In order to legally characterise the facts, the Commission must first determine the rules of international human rights law and humanitarian law against which these facts may be evaluated. It is important therefore to set out the relevant international obligations that are binding on both the Government and the rebels.

1. Relevant Rules of International Law Binding the Government of the Sudan

143. Two main bodies of law apply to the Sudan in the conflict in Darfur: international human rights law and international humanitarian law. The two are complementary. For example, they both aim to protect human life and dignity, prohibit discrimination on various grounds, and protect against torture or other cruel, inhuman and degrading treatment. They both seek to guarantee safeguards for persons subject to criminal justice proceedings, and to ensure basic rights including those related to health, food and housing. They both include provisions for the protection of women and vulnerable groups, such as children and displaced persons. The difference lies in that whilst human rights law protects the individual at all times, international humanitarian law is the *lex specialis* which applies only in situations of armed conflict.

144. States are responsible under international human rights law to guarantee the protection and preservation of human rights and fundamental freedoms at all times, in war and peace alike. The obligation of the State to refrain from any conduct that violates human rights, as well as the duty to protect those living within its jurisdiction, is inherent in this principle. Additional Protocol II to the Geneva Conventions evokes the protection of human rights law for the human person. This in itself applies the duty of the state to protect also to situations of armed conflict. International human rights law and humanitarian law are, therefore, mutually reinforcing and overlapping in situations of armed conflict.

145. Accountability for serious violations of both international human rights law and international humanitarian law is provided for in the Rome Statute of the International Criminal Court. The Sudan has signed but not yet ratified the Statute and therefore is bound to refrain from “acts which would defeat the object and purpose” of the Statute.⁴²

146. The following sections will address the particular provisions reflected in these two bodies of law that are applicable to the conflict in Darfur.

(i.) International human rights law

147. The Sudan is bound by a number of international treaties on human rights. These include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the Convention on the Rights of the Child (CRC). The Sudan has signed, but not yet ratified, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. In contrast, the Sudan has not ratified the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or the Convention on the Elimination of Discrimination Against Women. At regional level, the Sudan has ratified the African Charter on Human and Peoples’ Rights. As a State party to these various treaties, the Sudan is legally bound to respect, protect and fulfil the human rights of those within its jurisdiction.

⁴² Article 18, Vienna Convention on the Law of Treaties (1969). Ratified by Sudan on 18 April 1990.

148. A number of provisions of these treaties are of particular relevance to the armed conflict currently underway in Darfur. These include: (i) the right to life and to not be ‘arbitrarily deprived’ thereof⁴³; (ii) the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment⁴⁴; (iii) the right not to be subjected to arbitrary arrest or detention⁴⁵; (iv) the right of persons deprived of their liberty to be treated with humanity and with respect for their inherent dignity⁴⁶; (v) the right to freedom of movement, to choose one’s own residence and hence not to be displaced arbitrarily⁴⁷; (vi) the right to property,⁴⁸ to adequate housing and not to be subjected to forced eviction⁴⁹; (vii) the right to health⁵⁰; (viii) the right to adequate food⁵¹ and to water⁵²; (ix) the right to fair trial⁵³; (x) the right to effective remedy for any serious violations of human rights⁵⁴; (xi) the right to reparation for violations of human rights⁵⁵; and (xii) the obligation to bring to justice the perpetrators of human rights violations.⁵⁶

149. In the case of a state of emergency, international human rights law contains specific provisions which prescribe the actions of States. In particular, article 4 of the International Covenant on Civil and Political Rights sets out the circumstances under which a State party may derogate temporarily from part of its obligations under the Covenant. Two conditions must be met in order for this article to be invoked:

⁴³ Article 6(1) ICCPR, Article 4 AC. The Human Rights Committee rightly held that this right is laid down in international norms that are peremptory in nature, or *jus cogens* (General Comment 29, at §11). See CCPR/C/21/Rev.1/Add.11, 31 August 2001.

⁴⁴ Article 7 ICCPR, Article 5 AC. The Human Rights Committee rightly held that this right is recognized in norms that belong to the corpus of *jus cogens* (General Comment 29, § 11).

⁴⁵ Article 9 ICCPR, Article 6 AC. It is notable that the Human Rights Committee has stated that “the prohibitions against taking of hostages, abductions or unacknowledged detention are not subject to derogation. The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law” (General Comment 29, at § 13(b)).

⁴⁶ Article 10 ICCPR

⁴⁷ Article 12 ICCPR; Article 12(1) AC. The UN Human Rights Committee held this right so important that in its view even a State making a declaration of derogation under Article 4 UNC would not be entitled to engage in forcible deportation or transfer of persons.

⁴⁸ Article 14 AC

⁴⁹ Article 11, ICESCR.

⁵⁰ Article 12, ICESCR ; article 24, CRC ; article 5 (e) (iv), ICERD; AC article 16.

⁵¹ Article 11, ICESCR.

⁵² Articles 11 and 12, ICESCR. See General Comment 15, Committee on Economic, Social and Cultural Rights, which notes at § 22 that ‘during armed conflicts, emergency situations and natural disasters, the right to water embraces those obligations by which States parties are bound under international humanitarian law. This includes protection of objects indispensable for survival of the civilian population, including drinking water installations and supplies and irrigation works, protection of the natural environment against widespread, long-term and severe damage and ensuring that civilians, internees and prisoners have access to adequate water.’ (footnotes omitted)

⁵³ Article 14 ICCPR, Article 7 AC

⁵⁴ Article 2(3) of the ICCPR and Article 7(1)(a) of the AC. The UN Human Rights Committee rightly held in its aforementioned Comment no.29 that this right “is inherent in the Covenant as a whole” (§ 14) and therefore may not be derogated from, even if it is not expressly provided for in Article 4.

⁵⁵ Articles 2(3), 9(5) and 14 (6) ICCPR. According to General Comment 31, of 26 May 2004, of the UN Human Rights Committee, “Article 2(3) requires that State Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of the Article 2(3), is not discharged.” (UN doc. CCPR/C/21/Rev.1/Add.13, at § 16).

⁵⁶ Article 2(3) ICCPR. See General Comment 31 of the Human Rights Committee, which states that “A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy.”(at § 15) and “Where the investigations [of alleged violations of human rights] reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with the failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (Article 7), summary and arbitrary killing (Article 6) and enforced disappearance (Articles 7 and 9 and, frequently, 6).” (at § 18).

first, there must be a situation that amounts to a public emergency that threatens the life of the nation, and secondly, the state of emergency must be proclaimed officially and in accordance with the constitutional and legal provisions that govern such proclamation and the exercise of emergency powers.⁵⁷ The State also must immediately inform the other States parties, through the Secretary-General, of the provisions it has derogated from and of the reasons for such measures.⁵⁸ Even during armed conflict, measures derogating from the Covenant 'are allowed only if and to the extent that the situation constitutes a threat to the life of the nation'.⁵⁹ In any event, they must comply with requirements set out in the Covenant itself, including that those measures be limited to the extent strictly required by the exigencies of the situation. Moreover, they must be consistent with other obligations under international law, particularly the rules of international humanitarian law and peremptory norms of international law.⁶⁰

150. Article 4 of the ICCPR clearly specifies the provisions which are non-derogable and which therefore must be respected at all times. These include the right to life; the prohibition of torture or cruel, inhuman or degrading punishment; the prohibition of slavery, the slave trade and servitude; and freedom of thought, conscience and religion. Moreover, measures derogating from the Covenant must not involve discrimination on the ground of race, colour, sex, language, religion or social origin.

151. Other non-derogable 'elements' of the Covenant, as defined by the Human Rights Committee, include the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person; the prohibition against taking hostages, abductions or unacknowledged detention; certain elements of the rights of minorities to protection; the prohibition of deportation or forcible transfer of population; and the prohibition of propaganda for war and of advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence.⁶¹ The obligation to provide effective remedies for any violation of the provisions of article 2, paragraph 3, of the Covenant must be always complied with.⁶²

152. In addition, the protection of those rights recognized as non-derogable require certain procedural safeguards, including judicial guarantees. For example, the right to take proceedings before a court to enable the court to decide on the lawfulness of detention, and remedies such as *habeas corpus* or *amparo*, must not be restricted by derogations under article 4. In other words, 'the provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights.'⁶³

153. The Sudan has been under a continuous state of emergency since 1999 and, in December 2004, the Government announced the renewal of the state of emergency for one more year. According to the information available to the Commission, the Government has not taken steps legally to derogate from

⁵⁷ General Comment 29, para 2.

⁵⁸ See General Comment 29, para 17, where the Committee states that notification 'is essential not only for the discharge of the Committee's functions, in particular in assessing whether the measures taken by the State party were strictly required by the exigencies of the situation, but also to permit other States parties to monitor compliance with the provisions of the Covenant. [...] the Committee emphasizes that the notification by States parties should include full information about the measures taken and a clear explanation of the reasons for them, with full documentation attached regarding their law.'

⁵⁹ General Comment 29, para 3.

⁶⁰ General Comment 29, paras 9 and 11.

⁶¹ General Comment 29, para 13.

⁶² General Comment 29, para 14.

⁶³ General Comment 29, para 15.

its obligations under the ICCPR. In any event, whether or not the Sudan has met the necessary conditions to invoke article 4, it is bound at a minimum to respect the non-derogable provisions and ‘elements’ of the Covenant at all times.

(ii.) International humanitarian law

154. With regard to international humanitarian law, the Sudan is bound by the four Geneva Conventions of 1949, as well as the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, of 18 September 1997,⁶⁴ whereas it is not bound by the two Additional Protocols of 1977, at least *qua* treaties.⁶⁵ As noted above, the Sudan has signed, but not yet ratified, the Statute of the International Criminal Court and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, and is therefore bound to refrain from “acts which would defeat the object and purpose” of that Statute and the Optional Protocol.

155. The Sudan also has signed a number of legally binding international agreements concerning the armed conflict in Darfur, all of which entered into force upon signature. Six of these agreements were made with the two groups of rebels, one was entered into solely with the African Union, and two only with the United Nations.⁶⁶ Most of the Agreements contain provisions on international humanitarian law, in particular on the protection of civilians, as noted below.

156. In addition to international treaties, the Sudan is bound by customary rules of international humanitarian law. These include rules relating to internal armed conflicts, many of which have evolved as a result of State practice and jurisprudence from international, regional and national courts, as well as pronouncements by States, international organizations and armed groups.

157. The core of these customary rules is contained in Article 3 common to the Geneva Conventions. It encapsulates the most fundamental principles related to respect for human dignity, which are to be observed in internal armed conflicts. These principles and rules are thus binding upon any State, as well as any insurgent group that has attained some measure of organized structure and effective control over part of the territory. According to the International Court of Justice, the provisions of Article 3 common to the Geneva Conventions “constitute a minimum yardstick” applicable to any armed conflict “and reflect what the Court in 1949 [in the *Corfu Channel* case] called ‘elementary considerations of humanity’”⁶⁷.

158. Other customary rules crystallized in the course of diplomatic negotiations for the adoption of the two Additional Protocols of 1977, for the negotiating parties became convinced of the need to respect some fundamental rules, regardless of whether or not they would subsequently ratify the Second Protocol. Yet other rules were adopted at the 1974-77 Diplomatic Conference as provisions that spelled

⁶⁴ Ratified on 13 October 2003

⁶⁵ On this point see *infra*, §§....

⁶⁶ See the Humanitarian Cease Fire Agreement on the Conflict in Darfur, of 8 April 2004; the Protocol on the Establishment of Humanitarian Assistance in Darfur, of 8 April 2004; the Protocol on the Improvement of the Humanitarian Situation in Darfur, of 9 November 2004, and the Protocol on the Enhancement of the Security Situation in Darfur in Accordance with the N’Djamena Agreement, also of 9 November 2004.

⁶⁷ *Nicaragua (merits)*, (1986) at § 218

out general principles universally accepted by States. States considered that such provisions partly codified, and partly elaborated upon, general principles, and that they were therefore binding upon all States or insurgents regardless of whether or not the former ratified the Protocols. Subsequent practice by, or attitude of, the vast majority of States showed that over time yet other provisions of the Second Additional Protocol came to be regarded as endowed with a general purport and applicability. Hence they too may be held to be binding on non-party States and rebels.

159. That a body of customary rules regulating internal armed conflicts has thus evolved in the international community is borne out by various elements. For example, some States in their military manuals for their armed forces clearly have stated that the bulk of international humanitarian law also applies to internal conflicts.⁶⁸ Other States have taken a similar attitude with regard to many rules of international humanitarian law.⁶⁹

160. Moreover, in 1994 the Secretary-General, in proposing to the Security Council the adoption of the Statute of the International Criminal Tribunal for Rwanda, took what he defined as “an expansive approach” to Additional Protocol II. He suggested that the new Tribunal should also pronounce upon violations of Additional Protocol II which, as a whole, “has not yet been universally recognized as part of customary international law” and, in addition, “for the first time criminalize[d] common Article 3 of the four Geneva Conventions”.⁷⁰ Significantly, no member of the Security Council opposed the Secretary-General’s proposal, demonstrating consensus on the need to make headway in the legal regulation of internal conflict and to criminalize deviations from the applicable law. Thus the Tribunal’s Statute in Article 4 grants the Court jurisdiction over violations of common Article 3 of the Geneva Conventions and the Second Additional Protocol, thereby recognizing that those violations constitute international crimes.

⁶⁸ For instance see the German Manual (*Humanitarian Law in Armed Conflicts – Manual*, Federal Ministry of Defence of the Federal Republic of Germany, VR II 3, August 1992). In § 211, at p. 24, it is stated that “In a non-international armed conflict each party shall be bound to apply, as a minimum, the **fundamental humanitarian provisions of international law** embodied in the four 1949 Geneva Conventions (common Article 3), the 1954 Cultural Property Convention (article 19) and the 1977 Additional Protocol II. German soldiers like their Allies are required to comply with the rules of international humanitarian law in the conduct of military operations in all armed conflict however such conflicts are characterized”; emphasis in the original). See also the British Manual (*The Manual of the Law of Armed Conflict*, UK Ministry of Defence, Oxford, Oxford University Press, 2004). At pp. 384-98 it sets out what the UK Government considers to be “certain principles of customary international law which are applicable to internal armed conflicts” (§ 15.1, at p. 382).

⁶⁹ It is also significant that the United States also took the view that general rules or principles governing internal armed conflicts have evolved. Thus, for instance, before the adoption, in 1968, of General Assembly resolution 2444, which “affirmed” a set of principles to be complied with in any armed conflict, the US representative stated that these principles “constituted a reaffirmation of existing law” (see UN GAOR, 3rd Committee, 23rd Session, 1634th Mtg, at 2). (These principles were worded as follows: “(a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited; (b) That it is prohibited to launch attacks against the civilian populations as such; (c) That a distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible”). In 1972 the US Department of Defence noted that the resolution in question was “declaratory of existing customary international law” (see 67 *American Journal of International Law* (1973), at 124). Similarly, in 1987 the US Deputy Legal Adviser to the State Department stated that “the basic core of Protocol II is, of course, reflected in common Article 3 of the 1949 Geneva Conventions and therefore is, and should be, a part of generally accepted customary law. This specifically includes its prohibitions on violence towards persons taking no active part in hostilities, hostage taking, degrading treatment, and punishment without due process”(in 2 *American University Journal of International Law and Politics* (1987), at 430-1).

⁷⁰ See UN doc. S/1995/134 (13 February 1995), at § 12.

161. Furthermore, in 1995, in its judgment in *Tadić (Interlocutory appeal)* the ICTY Appeals Chamber held that the main body of international humanitarian law also applied to internal conflicts as a matter of customary law, and that in addition serious violations of such rules constitute war crimes.⁷¹

162. No less significantly, when the Statute of the International Criminal Court was drafted in Rome in 1998, some States expressly insisted that violations of international humanitarian law should also be regarded as war crimes.⁷² More importantly, no State participating in the Diplomatic Conference opposed the inclusion in the Statute of a set of provisions granting the Court jurisdiction over violations of humanitarian law in internal armed conflict that were held to constitute war crimes.⁷³ This is indicative of the attitude of the vast majority of the member States of the international community towards the international legal regulation of internal armed conflict. Similarly, it is significant that the Statute was signed by 120 States, including the Sudan. This signature, although from the viewpoint of the law of treaties it only produced the limited effect emphasized above is also material from the viewpoint of customary international law:⁷⁴ it proves that the general legal view evolved in the overwhelming majority of the international community (including the Sudan) to the effect that (i) internal armed conflicts are governed by an extensive set of general rules of international humanitarian law and (ii) serious violations of those rules may involve individual criminal liability.⁷⁵

163. The adoption of the ICC Statute, followed by the Statute of the Special Court for Sierra Leone, can be regarded as the culmination of a law-making process that in a matter of few years led both to the crystallization of a set of customary rules governing internal armed conflict and to the criminalization of serious breaches of such rules (in the sense that individual criminal liability may ensue from serious violations of those rules).

164. This law-making process with regard to internal armed conflict is quite understandable. As a result both of the increasing expansion of human rights doctrines and the mushrooming of civil wars, States came to accept the idea that it did not make sense to afford protection only in *international* wars to civilians and other persons not taking part in armed hostilities: civilians suffer from armed violence in the course of internal conflicts no less than in international wars. It would therefore be inconsistent to leave civilians unprotected in civil wars while protecting them in international armed conflicts. Similarly, it was felt that a modicum of legal regulation of the conduct of hostilities, in particular of the use of means and methods of warfare, was also needed when armed clashes occur not between two States but between a State and insurgents.⁷⁶

⁷¹ §§ 96-127 as well as 128-137

⁷² For instance, see the statement of the French Foreign Minister M.Védrine, in 44 *Annuaire Francais de Droit International* (1998), at 128-9.

⁷³ See Article 8(2) (c)-(f)

⁷⁴ In various decisions international criminal tribunals have attached importance to the adoption of the ICC Statute as indicative of the formation of new rules of customary law or as codifying existing rules. See for instance *Tadić (Appeal, 1999)*

⁷⁵ This legal view was restated in the Statute of the Special Court for Sierra Leone (2000), adopted following an Agreement between the United Nations and the Government of Sierra Leone pursuant to SC resolution 1315(2000). Article 3 of the Statute grants the Special Court jurisdiction over violations of common Article 3 and the Second Additional Protocol, and Article 4 confers on the Court jurisdiction over “other serious violations of international humanitarian law”, namely attacks on civilians or humanitarian personnel, as well as the conscription or enlistment of children under the age of 15.

⁷⁶ The powerful urge to apply humanitarian law to spare civilian from the horrors of civil wars was expressed in 2000 by the then US Ambassador at large for War Crimes David Scheffer, when he stated in 2000, if “the provisions of Protocol II were followed by rebel and government forces throughout the world, many of the most horrific human tragedies the world has documented within the past decade could have been avoided”. See text in S. Murphy (ed.), *United States Practice in International Law*, vol. 1, 1999-2001 (Cambridge, Cambridge University Press, 2002), at 370.

165. Customary international rules on internal armed conflict thus tend both to protect civilians, the wounded and the sick from the scourge of armed violence, and to regulate the conduct of hostilities between the parties to the conflict. As pointed out above, they basically develop and specify fundamental human rights principles with regard to internal armed conflicts.

166. For the purposes of this report, it is sufficient to mention here only those customary rules on internal armed conflict which are relevant and applicable to the current armed conflict in Darfur. These include:

(i) the distinction between combatants and civilians, and the protection of civilians, notably against violence to life and person, in particular murder⁷⁷ (this rule was reaffirmed in some agreements concluded by the Government of the Sudan with the rebels)⁷⁸;

(ii) the prohibition on deliberate attacks on civilians;⁷⁹

(iii) the prohibition on indiscriminate attacks on civilians,⁸⁰ even if there may be a few armed elements among civilians;⁸¹

⁷⁷ The rule is laid down in Common Article 3 of the 1949 Geneva Conventions, has been restated in many cases, and is set out in the 2004 *British Manual on the Law of Armed Conflict* (at § 15.6). It should be noted that in the Report made pursuant to § 5 of the UN Security Council resolution 837 (1993) on the investigation into the 5 June 1993 attack on UN Forces in Somalia, the UN Secretary-General noted that “The [Geneva] Conventions were designed to cover inter-State wars and large-scale civil wars. But the principles they embody have a wider scope. Plainly a part of contemporary international customary law, they are applicable wherever political ends are sought through military means. No principle is more central to the humanitarian law of armed conflict than the obligation to respect the distinction between combatants and non-combatants. That principle is violated and criminal responsibility thereby incurred when organizations deliberately target civilians or when they use civilians as shields or otherwise demonstrate a wanton indifference to the protection of non-combatants.” (UN doc. S/26351, 24 August 1993, Annex, § 12). According to a report of the Inter-American Commission on Human Rights on the human rights situation in Colombia issued in 1999, international humanitarian law prohibits “the launching of attacks against the civilian population and requires the parties to an armed conflict, at all times, to make a distinction between members of the civilian population and parties actively taking part in the hostilities and to direct attacks only against the latter and, inferentially, other legitimate military objectives.” (Third Report on the Human Rights Situation in Colombia, Doc OAS/Ser.L/V/II.102 Doc. 9 rev.1, 26 February 1999, § 40).⁷⁷

See also *Tadić* (ICTY Appeals Chamber), *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, (1995), §§ 98, 117, 132; *Kordić and Cerkez*, Case No. IT-95-14/2 (Trial Chamber III), *Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction based on the limited Jurisdictional Reach of Articles 2 and 3*, 2 March 1999, §§ 25-34 (recognizing that Articles 51(2) and 52(1) of Additional Protocol I and Article 13(2) of Additional Protocol II constitute customary international law).

⁷⁸ See Article 2 of the Humanitarian Cease Fire Agreement on the Conflict in Darfur, of 8 April 2004 (each Party undertakes to “refrain from any violence or any other abuse on civilian populations”) as well as Article 2(1) of the Protocol on the Improvement of the Humanitarian Situation in Darfur, of 9 November 2004 (the Parties undertake “to take all steps required to prevent all attacks, threats, intimidation and any other form of violence against civilians by any Party or group, including the Janjaweed and other militias”).

⁷⁹ See *Tadić* (*Interlocutory Appeal*), at §§100-102. As the International Court of Justice held in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons* (at § 78), “States must never make civilians the object of attack”. The general rule on the matter was restated and specified in Article 51(2) of the First Additional Protocol of 1977, whereby “The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited”. A similar provision is contained in Article 13(2) of the Second Additional Protocol of 1977. These provisions, in the part concerning the intention to spread terror, may be held to have turned into customary law, if only because they ultimately spell out a notion inherent in the customary law prohibition of any deliberate attack on civilians. See also Article 8(2)(e)(i) of the ICC Statute and Article 4 (a) of the Statute of the Special Court for Sierra Leone.

It should also be mentioned that in 1991, replying to a question in Parliament, the German Minister of Foreign affairs condemned “the continued military engagements of Turkish troops against the civilian population in Kurdish areas as a serious violation of international law” (in Bundestag, *Drucksache*, 12/1918, 14 January 1992, at 3). Furthermore, in a communiqué concerning Rwanda issued in 1994, the French Ministry of Foreign Affairs condemned “the bombardments against civilian populations who have fled to Goma in Zaire... The attacks on the security of populations are unacceptable” (Communiqué of the Ministry of Foreign Affairs on Rwanda, 17 July 1994, in *Politique étrangère de la France*, July 1994, p. 101).

(iv) the prohibition on attacks aimed at terrorizing civilians;⁸²

(v) the prohibition on intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;⁸³

(vi) the prohibition of attacks against civilian objects;⁸⁴

(vii) the obligation to take precautions in order to minimize incidental loss and damage as a result of attacks,⁸⁵ such that each party must do everything feasible to ensure that targets are military objectives⁸⁶ and to choose means or methods of combat that will minimise loss of civilians;⁸⁷

(viii) the obligation to ensure that when attacking military objectives, incidental loss to civilians is not disproportionate to the military gain anticipated.⁸⁸

⁸⁰This rule was held to be of customary nature in *Tadić (Interlocutory Appeal)*, at §§100-102, is restated and codified in Article 13 of Additional Protocol II, which is to be regarded as a provision codifying customary international law, and is also mentioned in the 2004 *British Manual of the Law of Armed Conflict*, at §§15.6.5 and 15.15-15.15.1.

⁸¹ In a press release concerning the conflict in Lebanon, in 1983 the ICRC stated that “the presence of armed elements among the civilian population does not justify the indiscriminate shelling of women, children and old people.” (ICRC, Press release no. 1474, Geneva, 4 November 1983).

In 1997 in *Tadić* and ICTY Trial Chamber held that “it is clear that the targeted population [of a crime against humanity] must be of predominantly civilian nature. The presence of certain non-civilian elements in the midst does not change the character of the population” (judgment of 7 May 1997, at § 638 and see also § 643).

⁸² See the 2004 *British Manual of the Law of Armed Conflict*, at § 15.8.

⁸³ See § 3 of the Security Council resolution 1502 (2003),⁸³ as well as Article (8)(2)(e)(iii) of the ICC Statute and Article 4 (b) of the Statute of the Special Court for Sierra Leone);

⁸⁴Pursuant to § 5 of General Assembly Resolution 2675 (XXV, of 9 December 1970), which was adopted unanimously and, according to the 2004 *British Manual of the Law of Armed Conflict*, “can be regarded as evidence of State practice” (§ 15-16.2), “dwellings and other installations that are used only by the civilian population should not be the object of military operations”. See also the 2004 *British Manual of the Law of Armed Conflict*, at §§15.9 and 15.9.1, 15.16 and 15.16.1-3);

⁸⁵ See the 2004 *British Manual of the Law of Armed Conflict*, at §§ 15.22-15.22.1.

⁸⁶ See *Zoran Kupreškić and others*, ICTY Trial Chamber, judgment of 14 January 2000, at § 260

⁸⁷ See for instance the Military Manual of Benin (*Military Manual*, 1995, Fascicule III, pp. 11 and 14 (“Precautions must be taken in the choice of weapons and methods of combat in order to avoid civilian losses and damage to civilian objects...The direction and the moment of an attack must be chosen so as to reduce civilian losses and damage to civilian objects as much as possible”), of Germany (*Military Manual*, 1992, at §457), of Kenya (*Law of Armed Conflict Manual*, 1997, *Precis* no. 4, pp. 1 and 8), of Togo (*Military Manual*, 1996, Fascicule III, pp. 11 and 14), as well as the *Joint Circular on Adherence to International humanitarian Law and Human Rights* of the Philippines (1992, at §2 (c)). See also *Zoran Kupreškić and others*, ICTY Trial Chamber, judgment of 14 January 2000, at § 260.

⁸⁸In *Zoran Kupreškić and others*, an ICTY Trial Chamber held in 2000 that “Even if it can be proved that the Muslim population of Ahmici [a village in Bosnia and Herzegovina] was not entirely civilians but comprised some armed elements, still no justification would exist for widespread and indiscriminate attacks against civilians. Indeed, even in a situation of full-scale armed conflict, certain fundamental norms still serve to unambiguously outlaw such conduct, such as rules pertaining to proportionality.” (judgment of 14 January 2000, at § 513).

See also some pronouncements of States. For instance, in 2002, in the House of Lords the British Government pointed out that, with regard to the civil war in Chechnya, it had stated to the Russian Government that military “operations must be proportionate and in strict adherence to the rule of law.” (in 73 *British Yearbook of International Law*” 2002, at 955). The point was reiterated by the British Minister for trade in reply to a written question in the House of Lords (*ibidem*, at 957). See also the 2004 *British Manual of the Law of Armed Conflict*, at § 15.22.1. In 1992, in a joint memorandum submitted to the UN, Jordan and the US stated that “the customary rule that prohibits attacks which reasonably may be expected at the time to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, are prohibited” (UN doc. A/C.6/47/3, 28 September 1992, at § 1(h)). In a judgment of 9 December 1985, an Argentinean Court of Appeals held in the *Military Junta case* that the principle of proportionality constitutes a customary international norm on account of its repeated doctrinal approbation. Spain insisted on the principle of proportionality in relation to the internal armed conflicts in Chechnya and in Bosnia and Herzegovina (see the statements in the Spanish Parliament of the Spanish Foreign Minister, in *Actividades, Textos y Documentos de la Política Exterior Española*, Madrid 1995, at 353, 473.

- (ix) the prohibition on destruction and devastation not justified by military necessity;⁸⁹
- (x) the prohibition on the destruction of objects indispensable to the survival of the civilian population;⁹⁰
- (xi) the prohibition on attacks on works and installations containing dangerous forces;⁹¹
- (xii) the protection of cultural objects and places of worship;⁹²
- (xiii) the prohibition on the forcible transfer of civilians;⁹³
- (xiv) the prohibition on torture and any inhuman or cruel treatment or punishment;⁹⁴
- (xv) the prohibition on outrages upon personal dignity, in particular humiliating and degrading treatment, including rape and sexual violence;⁹⁵
- (xvi) the prohibition on declaring that no quarter will be given;⁹⁶
- (xvii) the prohibition on ill-treatment of enemy combatants *hors de combat* and the obligation to treat captured enemy combatants humanely;⁹⁷
- (xviii) the prohibition on the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees recognized as indispensable by the world community;⁹⁸
- (xix) the prohibition on collective punishments;⁹⁹
- (xx) the prohibition on the taking of hostages;¹⁰⁰
- (xxi) the prohibition on acts of terrorism;¹⁰¹
- (xxii) the prohibition on pillage;¹⁰²

In addition, see the 1999 Third Report on Colombia of the Inter-American Commission on Human Rights (Doc. OAS/Se.L/V/II.102 Doc.9, rev.1, 26 February 1999, at §§ 77 and 79). See also the 1999 UN Secretary-General's *Bulletin*, § 5.5 (with reference to UN forces)

⁸⁹ Rome Statute, at Article 8(2)(e)(xii). See also the 2004 *British Manual of the Law of Armed Conflict*, at §§ 15.17- 15.17.2). Under Article 23(g) of the Hague Regulations, it is prohibited "to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war". The grave breaches provisions in the Geneva Conventions also provide for the prohibition of extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (see First Geneva Convention, Article 50 in fine; Second Geneva Convention, Article 51 in fine; Fourth Geneva Convention, Article 147 in fine; Additional Protocol I, Article 51(1) in fine.

⁹⁰ Article 14 of the Second Additional Protocol; as rightly stated in the 2004 *British Manual of the Law of Armed Conflict*, at § 15.19.1, "the right to life is a non-derogable human right. Violence to the life and person of civilians is prohibited, whatever method is adopted to achieve it. It follows that the destruction of crops, foodstuffs, and water sources, to such an extent that starvation is likely to follow, is also prohibited.");

⁹¹ Article 15. Additional Protocol II; see also the 2004 *British Manual of the Law of Armed Conflict*, at § 15.21.

⁹² Article 16, Additional Protocol II.

⁹³ Article 17, Additional Protocol II, Article 8(2)(e)(viii) of the Rome Statute, and referred to in the 2004 *British Manual of the Law of Armed Conflict*, at §§ 15.14, 15.14.1-2).

⁹⁴ See common Article 3 (1) (a).

⁹⁵ See common Article 3, (1) (c).

⁹⁶ See Article 8 (2) (e) (x) of the ICC Statute.

⁹⁷ See common Article 3(1) as well as the 2004 *British Manual of the Law of Armed Conflict*, at § 15.6.4.

⁹⁸ See common Article 3 (1) (d); see also General Comment 29 of the Human Rights Committee, at § 16.

⁹⁹ See Article 4(b) of the Statute of the ICTR and Article 3 (b) of the Statute of the Special Court for Sierra Leone; see also General Comment 29 of the Human Rights Committee, at § 11, according to which any such punishment is contrary to a peremptory rule of international law.

¹⁰⁰ See common Article 3 (1) (b) of the 1949 Geneva Conventions as well as Article 4 (c) of the Statute of the ICTR and Article 3 (c) of the Statute of the Special Court for Sierra Leone)

¹⁰¹ Article 4 (2)(d), Additional Protocol II; Article 4 (d) of the Statute of the ICTR and Article 3 (d) of the Statute of the Special Court. In his Report on the establishment of the Special Court for Sierra Leone, the Secretary-General stated that violations of Article 4 of Additional Protocol II have long been considered crimes under customary international law. See also *Galić*, ICTY Trial Chamber, judgment of 5 December 2003, at § 769.

(xxiii) the obligation to protect the wounded and the sick,¹⁰³

(xxiv) the prohibition on the use in armed hostilities of children under the age of 15;¹⁰⁴

167. It should be emphasized that the international case law and practice indicated above show that serious violations of any of those rules have been criminalized, in that such violations entail individual criminal liability under international law.

168. Having surveyed the relevant rules applicable in the conflict in Darfur, it bears stressing that to a large extent the Government of the Sudan is prepared to consider as binding some general principles and rules laid down in the two Additional Protocols of 1977 and to abide by them, although formally speaking it is not party to such Protocols. This is apparent, for instance, from the Protocol on the Establishment of Humanitarian Assistance in Darfur, signed on 8 April 2004 by the Government of the Sudan with the SLA and JEM, stating in Article 10 (2) that the three parties undertook to respect a corpus of principles, set out as follows:

“The concept and execution of the humanitarian assistance in Darfur will be conform [sic] to the international principles with a view to guarantee that it will be credible, transparent and inclusive, notably: the 1949 Geneva Conventions *and its two 1977 Additional Protocols*; the 1948 Universal Declaration on Human Rights, the 1966 International Convention [sic] on Civil and Public[sic] Rights, the 1952 Geneva Convention on Refugees [sic], the Guiding Principles on Internal Displacement (Deng Principles) and the provisions of General Assembly resolution 46/182” (emphasis added).

169. The reference to the two Protocols clearly implies that the parties to the Agreement intended to accept at least the general principles they lay down. The same implicit recognition of those principles can be inferred from the third preambular paragraph of the Protocol on the Enhancement of the Security Situation in Darfur in Accordance with the N’Djamena Agreement, of 9 November 2004, whereby the three parties condemn “all acts of violence against civilians and violations of human rights and international humanitarian law”. A similar preambular paragraph is also contained in the Protocol on the Improvement of the Humanitarian Situation in Darfur, also of 9 November 2004, where in addition preambular paragraph 10 states that the parties are “*aware* of the need to adhere to the humanitarian principles embodied in the United Nations Charter and other relevant international instruments”.

¹⁰² Article 4 (2) (g), Additional Protocol II and Article 8(2)(e)(v) of the Rome Statute; see also the 2004 *British Manual of the Law of Armed Conflict*, at §§ 15.23-15.23.1.

¹⁰³ Common Article 3 (2) of the Geneva Conventions.

¹⁰⁴ There are two treaty rules that ban conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities (see Article 8 (2) (e)(vii) of the ICC Statute and Article 4 (c) of the Statute of the Special Court for Sierra Leone). The Convention on the Rights of the Child, at Article 38,¹⁰⁴ and the Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts raise the minimum age of persons directly participating in armed conflicts to 18 years, although not in mandatory terms (Article 1 of the Protocol provides that “States Parties shall take *all feasible measures* to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities”(emphasis added); Article 4 (1) contains a similar provision concerning rebels¹⁰⁴; Articles 2 and 3 regulate the recruitment of children under 18). It may perhaps be held that a general consensus has evolved in the international community on a minimum common denominator: children *under 15* may not take an active part in armed hostilities.

170. Significantly, in Article 8(a) of the Status of Mission Agreement (SOMA) on the Establishment and Management of the Cease Fire Commission in the Darfur Area of the Sudan (CFC), of 4 June 2004, between the Sudan and the African Union, it is provided that ‘The African Union shall ensure that the CFC conducts its operation in the Sudan with full respect for the principles and rules of international Conventions *applicable to the conduct of military* and diplomatic personnel. These international Conventions include the four Geneva Conventions of 12 August 1949 and their *Additional Protocols of 8 June 1977* and the UNESCO Convention of 14 May 1954 on the Protection of Cultural property in the event of armed conflict and the Vienna Convention on Diplomatic Relations of 18 April 1961” (emphasis added). Article 9 then goes on to provide that “The CFC and the Sudan shall therefore ensure that members of their respective military and civilian personnel are *fully acquainted with the principles and rules of the above mentioned international instruments.*” (emphasis added)

171. The above provisions clearly, albeit implicitly, evince the will of the contracting parties to abide by the various treaties on humanitarian law, including the two Additional Protocols, although these Protocols per se are not binding *qua* treaties on the Sudan.

2. Rules binding rebels

172. The SLM/A and JEM, like all insurgents that have reached a certain threshold of organization, stability and effective control of territory, possess international legal personality and are therefore bound by the relevant rules of customary international law on internal armed conflicts referred to above. The same is probably true also for the NMRD.

173. Furthermore, as with the implied acceptance of general international principles and rules on humanitarian law by the Government of the Sudan, such acceptance by rebel groups similarly can be inferred from the provisions of some of the Agreements mentioned above.

174. In addition, the SLM/A and the JEM possess under customary international law the power to enter into binding international agreements (so called *jus contrahendum*), have entered various internationally binding Agreements with the Government. In these Agreements the rebels have undertaken, among other things, to comply with humanitarian law. The NMRD concluded two Agreements with the Government of the Sudan on 17 December 2004, one on humanitarian access and the other on security issues in the war zone. In these Agreements the parties pledged to release prisoners of war and organize the voluntary repatriation of internally displaced persons and refugees.

V. CATEGORIES OF INTERNATIONAL CRIMES

175. Serious violations of human rights law and humanitarian law may amount to international crimes, subject to the conditions set out by the ICTY in *Tadić (Interlocutory Appeal)* and largely codified in the ICC Statute. In other words, these violations may entail the individual criminal liability of their author or authors. These violations may also involve the international responsibility of the State or of the international non-state entity to which those authors belong as officials (or for which they acted as *de facto* organs), with the consequence that the State or the non-state-entity may have to pay compensation to the victims of those violations.

176. It is now necessary briefly to mention the various categories of crimes that might be involved in this process of legal classification.

177. *War crimes.* This class of international crimes embraces any serious violation of international humanitarian law committed in the course of an international or internal armed conflict (whether against enemy civilians or combatants) which entails the individual criminal responsibility of the person breaching that law (see *Tadić (Interlocutory Appeal)*, at § 94). War crimes comprise, for instance, indiscriminate attacks against civilians, ill-treatment or torture of prisoners of war or of detained enemy combatants, rape of civilians, use of unlawful methods or means of warfare, etc.

178. *Crimes against humanity.* These are particularly odious offences constituting a serious attack on human dignity or a grave humiliation or degradation of one or more human beings (for instance, murder, extermination, enslavement, deportation or forcible transfer of population, torture, rape and other forms of sexual violence, persecution, enforced disappearance of persons). What distinguishes this category of crime from that of war crimes is that it is not concerned with isolated or sporadic breaches, but rather with violations, which (i) may occur either in time of peace or of armed conflict, and (ii) constitute part of a *widespread or systematic practice of atrocities (or attacks) committed against the civilian population.*

179. With respect to the objective or material element of crimes against humanity, it should first be noted that “The attack must be either widespread or systematic in nature.”¹⁰⁵ Also, “only the attack, not the individual acts of the accused, must be ‘widespread or systematic.’”¹⁰⁶ As to the meaning of “widespread”, an ICTY Trial Chamber held in *Kordić and Cerkez* that “[A] crime may be widespread or committed on a large scale by the ‘cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.’”¹⁰⁷ It can also consider the number of victims¹⁰⁸. As for the requirement that the attack be “systematic”, it “requires an organised nature of the acts and the improbability of their random occurrence.”¹⁰⁹ With regard to the factors to consider in assessing “widespread or systematic”, the ICTY Appeals Chamber rules that a Trial Chamber must “first identify the population which is the object of the attack and, in light of the means, methods, resources and result of the attack upon the population, ascertain whether the attack was indeed widespread or systematic.” “The consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes, could be taken into account to determine whether the attack satisfies either or both requirements of a ‘widespread’ or ‘systematic’ attack.”¹¹⁰ It is not necessary, but it may be relevant, to prove the attack is “the result of the existence of a policy or plan.”¹¹¹

¹⁰⁵ See, e.g., *Naletilić and Martinović*, (ICTY Trial Chamber), 31 March 2003, § 236; *Akayesu*, (ICTR Trial Chamber), 2 September 1998, § 579, n. 144.

¹⁰⁶ See *Kunarac, Kovac and Vuković*, (ICTY Trial Chamber), 22 February 2001, § 431.

¹⁰⁷ See *Kordić and Cerkez*, (ICTY Trial Chamber), 26 February 2001, § 179.

¹⁰⁸ See, e.g., *Blaskić*, (ICTY Trial Chamber), 3 March 2000, § 206; *Naletilić and Martinović*, (Trial Chamber), 31 March 2003, § 236; *Kayishema and Ruzindana*, (ICTR Trial Chamber), 21 May 1999, § 123.

¹⁰⁹ *Naletilić and Martinović* (ICTY Trial Chamber), 31 March 2003, § 236; see also *Kunarac, Kovac and Vuković*, (ICTY Appeals Chamber), 12 June 2002, § 94.

¹¹⁰ *Kunarac, Kovac and Vuković* (Appeals Chamber), 12 June 2002, § 95; see also *Jelisić* (Trial Chamber), 14 December 1999, § 53: “The existence of an acknowledged policy targeting a particular community, the establishment of parallel institutions meant to implement this policy, the involvement of high-level political or military authorities, the employment of considerable financial, military or other resources and the scale or the repeated, unchanging and continuous nature of the

180. The subjective element or *mens rea* required for this category of crime is twofold: (a) the criminal intent or recklessness required for the underlying crime (murder, extermination, rape, torture, etc.), and (b) knowledge that the offence is part of a widespread or systematic practice. A specific sub-category of crimes against humanity, namely persecution, requires in addition a further mental element: a persecutory or discriminatory animus or intent, namely to subject a person or a group to discrimination, ill-treatment or harassment on religious, racial, political, ethnic, national or other grounds, so as to bring about great suffering or injury to that person or group (see in particular the judgment of an ICTY Trial Chamber in *Zoran Kupreškić and others*, at §§ 616-27).

181. *Genocide*. Considering that Security Council resolution 1556 singled out this category of crime for a specific inquiry of the Commission into whether crimes perpetrated in Darfur can be classified as genocide, it is appropriate to devote a special section, *infra*, to this crime. At this juncture, suffice it to say that, both under the 1948 Convention and the corresponding rules of customary law, genocide comprises various acts against members of a national, ethnic, racial or religious group (killing members of a group, causing serious bodily or mental harm to members of a group; deliberately inflicting on a group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of a group to another group), committed with the intent to destroy, in whole or in part, the group.

VI. VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW – THE COMMISSION’S FACTUAL AND LEGAL FINDINGS.

1. Overview of violations of international human rights and humanitarian law reported by other bodies.

182. In accordance with its mandate set out by the Security Council, requesting the Commission to “investigate reports of violations of human rights law and international humanitarian law”, the

violence committed against a particular civilian population are among the factors which may demonstrate the widespread or systematic nature of an attack.”

¹¹¹ *Kunarac, Kovac and Voković*, cit, § 98; *Semanza*, (ICTR Trial Chamber), 15 May 2003, § 329; but see earlier case law: *Blaskić*, (ICTY Trial Chamber), 3 March 2000, § 204; *Kayishema and Ruzindana*, (ICTR Trial Chamber), 21 May 1999, §§ 123, 124, 581.

Commission carefully studied reports from different sources including Governments, inter-governmental organizations, various United Nations mechanisms or bodies, as well as non-governmental organizations. Immediately following the establishment of the Commission, a *Note Verbale* was sent out to Member States and international and regional organizations on 28 October 2004, requesting that any relevant information be submitted to the Commission. A similar letter was sent to non-governmental organizations on 2 November 2004. The Commission subsequently received a great number of documents and other material from a wide variety of sources, including the Government of the Sudan. These materials were organized in a database and analyzed by the Commission. The following is a brief account of these reports, which serves to clarify the context of the fact finding and the investigations conducted by the Commission. In the sections following this overview, individual incidents are presented according to the type of violation or international crime identified.

183. Information presented in the earlier reports examined by the Commission is mainly based on witness accounts compiled through interviews of IDPs and refugees. Some of the later reports are based on a broader inquiry drawing from other sources and methods to gather information, including satellite imagery to detect destruction and burning of villages as well as field visits to Darfur itself. These reports have also relied upon findings of researchers and observers from different organizations monitoring the situation in Darfur.

184. Most reports note a pattern of indiscriminate attacks on civilians in villages and communities in all three Darfur states beginning in early 2003. Attacks also took place in 2001 and 2002,¹¹² however the magnitude, intensity and consistency of the attacks increased noticeably beginning in early 2003. It is generally agreed that this escalation coincides with the intensification of the internal armed conflict between the Government and the two rebel movements, the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM). A large part of the information relates to the impact of this conflict on the civilian population, including reference to the methods of combat employed by the parties, and the counter-insurgency policies of the Government.

185. A common conclusion is that, in its response to the insurgency, the Government has committed acts against the civilian population, directly or through surrogate armed groups, which amount to gross violations of human rights and humanitarian law. While there has been comparatively less information on violations committed by the rebel groups, some sources have reported incidents of such violations. There is also information that indicates activities of armed elements who have taken advantage of the total collapse of law and order to settle scores in the context of traditional tribal feuds, or to simply loot and raid livestock.

186. There are consistent accounts of a recurrent pattern of attacks on villages and settlements, sometimes involving aerial attacks by helicopter gunships or fixed-wing aircraft (Antonov and MIG), including bombing and strafing with automatic weapons. However, a majority of the attacks reported are ground assaults by the military, the Janjaweed, or a combination of the two. Hundreds of incidents have been reported involving the killing of civilians, massacres, summary executions, rape and other forms of sexual violence, torture, abduction, looting of property and livestock, as well as deliberate destruction and torching of villages. These incidents have resulted in the massive displacement of large parts of the

¹¹² For example, the Commission heard evidence of Government armed forces and Janjaweed attacks on Kabkabiya, North Darfur, in April 2001 and April 2002. According to witness testimonies, on 2 April 2001 the village of Shuba was attacked and looted, and 13 people were killed. On 28 April 2002, 217 houses were burned and 17 people were killed. See case study 2 below.

civilian population within Darfur as well as to neighbouring Chad. The reports indicate that the intensity of the attacks and the atrocities committed in any one village spread such a level of fear that populations from surrounding villages that escaped such attacks also fled to areas of relative security.

187. Except in a few cases, these incidents are reported to have occurred without any military justification in relation to any specific activity of the rebel forces. This has strengthened the general perception amongst observers that the civilian population has been knowingly and deliberately targeted to achieve common or specific objectives and interests of the Government and the Janjaweed.

188. Eye-witness accounts of many incidents published in these reports mention that the assailant forces are in uniform, but make a distinction between the uniforms worn by the regular military and the Janjaweed. A variety of explanations have been offered for this distinction in the reports, including that the Government's Popular Defence Forces (PDF), largely recruited from within the Arab tribes, are included in the term Janjaweed as it is commonly used in the context of this conflict. Others allege that the Government provides the militia with these uniforms as well as weapons and see this as a confirmation of their affiliation and association with the Government.

189. Some reports also contain accounts of military engagements between Government and rebel forces which have resulted in severe violations of the rights of civilian populations, and which demonstrate a complete disregard by the warring parties for their obligations regarding the security of civilians. It is reported that wanton acts of destruction, far exceeding any military imperative, were committed, mostly by Government forces. Janjaweed have featured in some of these incidents contributing to the destruction, particularly by inflicting harm on civilian populations and through wide scale looting in the course of, or following, the battle.

190. Although there is little information on violations committed by the *rebel forces*, there are some reports that they have engaged in indiscriminate attacks resulting in civilian deaths and injuries and destruction of private property. There are further reports of the killing of wounded and imprisoned soldiers, attacking or launching attacks from protected buildings such as hospitals, abduction of civilians and humanitarian workers, enforced disappearances of Government officials, looting of livestock, commercial vehicles and goods. There are also allegations of the use of child soldiers by the rebels. However, it should be noted that the number of reported violations allegedly committed by the Government forces and the Janjaweed by far exceeds the number of cases reported on rebels.

191. While a majority of the reports are consistent in the description of events and the violations committed, the crimes attributed to the Government forces and Janjaweed have varied according to the differences in the interpretation of the events and the context in which they have occurred. Analyses of facts by most of the observers, nevertheless, suggest that the most serious violations of human rights and humanitarian law have been committed by militias, popularly termed "Janjaweed", at the behest of and with the complicity of the Government, which recruited these elements as a part of its counter-insurgency campaign.

192. Various reports and the media claim to have convincing evidence that areas have been specifically targeted because of the proximity to or the *locus* of rebel activity, but more importantly because of the ethnic composition of the population that inhabits these areas. Almost all entities that have reported on the situation in Darfur have noted that the populations subjected to violations are

Darfurians who identify themselves as Africans, distinguishable from the Arab tribes in the region, which are also reported to constitute the majority of the Janjaweed.

193. It is reported that amongst the African tribes, members of the Zaghawa, Fur and Masaalit tribes, which have a marked concentration of population in some areas, have been particularly targeted. This is generally attributed to the fact that the two main rebel groups in Darfur are ethnically African and are largely drawn from these three tribes. It is for this reason that some observers have concluded that a major objective of destruction and depopulation of targeted areas is to eliminate or pre-empt any possibility of support for the rebels.

194. Some reports take into account the historical context of ethnic and tribal politics in Darfur, and differences in the way of life and means of livelihood¹¹³ that have resulted in competing claims over control and utilization of natural resources and land. On this basis, some reports conclude that elements of persecution and ‘ethnic cleansing’ are present in the pattern of destruction and displacement.

195. This reading of the information by some sources has given an added dimension to the conflict. Reports of deliberate destruction of the very means of survival of these populations have been seen as a design towards their permanent expulsion from their places of habitation. Many of the sources have suggested that the acts of killings, destruction and forced displacement, taken as a whole, amount to extermination. Some reports have implied, and a few have determined, that the elements of the crime of genocide are present in the patterns and nature of violations committed by the Government and its militias.

196. According to recent reports, even though military offensives and large-scale displacement of civilians in North and West Darfur have diminished in the past few months, probably because large parts of the rural areas under Government control have been emptied of their rural inhabitants, violence there has not ceased. In Government-controlled areas, displaced civilians have remained largely at the mercy of the Janjaweed. Observers have reported that displaced civilians living under Government control in these areas remain virtual prisoners—confined to camps and settlements with inadequate food, shelter and humanitarian assistance, at constant risk of further attacks, rape and looting of their remaining possessions. Even if incidents are reported to the police or other Government officials, little or no action is taken to arrest perpetrators. Government-backed Janjaweed raids on new areas in South Darfur have also been reported. There have also been reports of unidentified “militia incursions” along the border into Chad, often with the apparent aim of raiding cattle and other livestock.

197. Concerns have been expressed that despite the Government’s assurances to the international community, the security situation has not improved. Most IDPs remain afraid to return to their places of origin out of fear of renewed attacks and due to the prevailing situation of impunity for acts of violence committed against the civilian population. Some more recent reports note that Arab populations have begun to settle in a few areas previously occupied by the displaced populations.

198. One report noted that the situation in Darfur was being distorted by international organizations and international media. According to this source, the humanitarian situation was being blown out of

¹¹³ Most reports note that the Arab tribes in Darfur are generally associated with a nomadic lifestyle and the vast majority of the African tribes are sedentary farmers, settled on land allotted to the tribes.

proportion by most observers. The cause of the conflict should be mainly ascribed to tribal animosities, while the Government had responded to a rebellion and was also providing humanitarian assistance to the displaced and affected populations.

2. Information provided by the Government of the Sudan

199. As was stated earlier, the Commission met with numerous officials, representing various Governmental sectors, including the Presidency, foreign affairs, justice, defence, interior, local Government, and national security. The meetings took place in Khartoum and in the three states of Darfur. The officials presented the Government's point of view and policies with regard to the conflict in Darfur. While there are some variations in the views presented, there is a common thread that runs through the official version. In addition, the Government provided the Commission with a considerable amount of material, including documents and video tapes. Some material was also provided in response to specific questions raised by the Commission.

200. The most coherent Governmental perspective on the conflict was presented by a Committee established by the Minister of Interior in his capacity as the President's representative on Darfur. The Committee is composed of six senior officials from the Ministries of Defence and Interior, and the National Security and Intelligence Service and is presided over by a major-general from the army. During three meetings that lasted over 6 hours, the Committee shared with the Commission views, statistics and documents. Most views presented by this Committee were echoed by many other high-ranking officials. Other officials, particularly some working with the Advisory Council on Human Rights, the National Security and Intelligence Service, and the three Governments in the three states of Darfur also presented documents that are reflected below.

201. Like many other Government organs, the Committee asserted that the conflict is tribal. It reported that while the region of Darfur has a history of co-existence between the various tribes in Darfur, there is also a history of tribal conflicts. These conflicts were often resolved through traditional reconciliation conferences, which the Government is now trying to promote. With regard to the identity of various groups and whether they are Arab or African, the Committee maintained that there is no Arab-African divide as inter-marriage amongst the various tribes is common. They also said that "the Sudanese are considered Africans by the Arabs and Arabs by the Africans." Therefore there is no ethnic dimension to the conflict.

202. The Committee also argued that the existence of armed rebellion in Darfur is not new. It listed a number of armed opposition groups in Darfur since 1956. In fact it listed eight different armed movements that emerged in Darfur from independence until today.

203. The Committee attributed the current conflict to seven factors. The first factor is the competition between various tribes, particularly between the sedentary tribes and nomadic tribes over natural resources as a result of desertification. The second factor is the weakening of local administration after it was dissolved by former President Nimeri. This administration was established on the basis of the traditional tribal structures and was in the past capable of containing and mediating conflicts. The third factor is the weak presence of the police. The fourth factor is the interference of foreign actors in the situation in Darfur. The fifth factor is the wide availability of weapons and military uniforms due to other previous conflicts in the region, particularly the Libya-Chad war, and the war in the South. The

sixth factor is the politicization of issues and their exploitation by various political opposition parties in the Sudan. The seventh is the scant development and the relative lack of infrastructure of Darfur.

204. The Committee also listed all the tribal conflicts and all the peace agreements that were concluded between the tribes between 1932 and 2004. The list demonstrated that these conflicts were sometimes between so called Arab tribes and African tribes; sometimes between different Arab tribes and sometimes between different African tribes. They were resolved in the traditional ways by the *Ajaweed* (wise men) that were selected by the concerned tribes to mediate amongst them. The common feature of these conflicts was that they were often between sedentary and the nomadic groups.

205. With regard to the current conflict, the Committee blamed the rebels, particularly the SLA and JEM, for most of the atrocities that took place in Darfur. Its view was that the rebels initiated attacks and that the Government was acting only in a defensive mode. It asserted that the Government sustained serious casualties, particularly highlighting the repeated attacks against the police, the local administration and other law enforcement agents. The Committee stated that 100 such attacks were documented and that they presented a pattern. Documents in police stations were burnt by rebels and criminals were released. The Committee alleged that this led to the phenomena of the Janjaweed. The Committee said that when the Government captured rebel weapons during these attacks, they found that they included types of weapon that do not normally exist in the Sudan, implying that there is foreign sponsorship of the rebellion.

206. The Committee also presented statistics concerning attacks against civilians by the rebels from January 2003 until November 2004. It stated that there were 67 attacks in North Darfur, 60 in South Darfur, and 83 in West Darfur. It highlighted that Kulbus was attacked 27 times by the rebels. It charged the rebels with targeted killings, restriction of movement, levying taxes, obstructing education, looting hospitals, and attacks on humanitarian workers.

207. With regard to attacks on the armed forces during the same period, the Committee stated that from January 2003 until November 2004, there were 19 attacks in North Darfur; 16 in South Darfur; and 8 in West Darfur. The Committee claimed that in Buram some soldiers as well as 13 civilians were killed by rebels inside the hospital. It claimed that most attacks were jointly carried out by SLA and JEM.

208. The Committee provided the Commission with numbers of casualties incurred and of weapons stolen between January 2003 and November 2004. With regard to the army, it was claimed that 937 were killed, 2264 injured, and 629 were missing, and 934 weapons were stolen. With regard to the police, it was claimed that 685 were killed, 500 were injured, 62 were missing, and 1247 weapons were looted. With regard to the security and intelligence apparatus, it was claimed that 64 were killed, 1 was injured, 26 were missing, and 91 weapons were looted. As for civilians, it was claimed that 1990 were killed, 112 were injured and 402 were missing. Significantly, the Committee stated that no weapons were looted from civilians.

209. With regard to population displacement, the Committee maintained that rebels force people out of their homes, who then seek protection in areas controlled by the Government. It further stated that the rebels inhibit IDP's from returning. Some other officials noted that the destruction of villages was a normal consequence of the conflict where civilians had been caught in cross-fire. Some officials even

admitted that the Government would track rebels into villages, since this is where they would hide, and that the destruction was caused by the ensuing fighting.

210. With regard to figures on displacement, the Committee said that the Government does not possess accurate figures, but it relies on the figures given by the international organizations. It claimed that the displaced were unwilling to cooperate and attacked Government officials, and that some leaders of the displaced exaggerate figures because they are benefiting from the situation. The Committee said that the Government tries to protect the civilian population, that it does not launch military operations against civilians and only targets rebels. It stated that the IDP camps are now used as places from which to launch attacks against the Government.

211. The Committee maintained that the Government took several initiatives to solve the conflict peacefully, including a conference in El-Fashir held in 2001 to address the roots of problems particularly in and around Jabel Murra, as well as the establishment by the President of a Committee to mediate between the tribes.

212. With regard to the Janjaweed, the Committee, and other officials did not provide a consistent view. While some asserted that they are bandits that come from all tribes, other officials admitted that the Government sought the help of certain tribes and mobilized them. In particular, some interlocutors acknowledged that the Government had provided arms to the non-rebellious tribes and that there was cooperation with some tribal leaders who would receive financial grants to assist in the fight against the rebels. Some openly acknowledged that there had been a process of recruitment into the PDF in the context of the fight with the rebels.

213. The Government also asserted that it had taken measures to compensate those who, in its determination, were the subject of wrongful bombardment. It also stated that it had established an independent national commission of inquiry to examine the reports of violations. The effectiveness of such bodies are discussed in the course of this report.

3. Information provided by the rebel groups

214. As noted above, the Commission met with the leadership of the two main rebel movements, the SLM/A and the JEM in Asmara, Eritrea, as well as with other representatives in Darfur. With regard to the origins of the conflict and the incidents during the conflict both groups had very similar positions.

215. Both argued that since the independence of the Sudan in 1956, Darfur has been marginalized and underdeveloped. The JEM noted that the central Government has been dominated by essentially three Arab tribes from the North of the country, who had consistently marginalized the other main regions (the South, the East, the Nuba Mountains, Kordofan, Blue Nile and Darfur), most of which have raised arms against the Government in response to the oppression, marginalization, “internal colonization” and neglect. The imbalance was illustrated by the fact that the North only represented 4 % of the population, but had by far the greatest influence and power in the central Government. According to the rebel groups, the main strategy of the central Governments has been to maintain power by keeping the other regions underdeveloped, divided and powerless. The war in the South with more than 2 million dead was an example of the Government’s oppression.

216. The SLM/A, in particular, noted the emergence in Darfur in the mid 1980's of an alliance of Arab tribes, the Arab Gathering, which had subsequently also been supported by the "Salvation" Government of El-Beshir against the African tribes. In this context, tribes were seen to be either as "pro-Salvation", or "anti Salvation", and a political and racist agenda in a sense emerged. An important issue was the question of control over land. Since some tribes do not have traditional land allotted to them, and with the conflict over natural resources growing, there was a systematic attempt to evict tribes viewed as "non-Salvation" from their land.

217. In this sense, both rebel movements noted that they had started their activities as a response to the discriminatory and divisive policies of the Government in Khartoum. Both groups noted that their agenda was not tribal and was not directed against the Arab tribes. For this reason, the rebels had directed their attacks against Government installations, and had on purpose avoided attacking Arab tribes.

218. The JEM underlined that its internal regulations contained strong commitments to respect international humanitarian law and international human rights law, and that no civilian targets had been nor would be attacked. The JEM underlined that all its military assets had been procured independently through its own means or acquired by looting from the Government.

219. Both rebel groups stated that the Government supported by Arab militia, the Janjaweed, had attacked civilians throughout Darfur. The Government had created the Janjaweed by training and arming them. The rebel groups stated further that members of the Janjaweed had been recruited from those tribes without a traditional homeland, including Mohameed, Ireigat (Northern Reizegat), Iteifat, Zabalat and Maairiyha, as well as from outside the Sudan from Chad, Cameroon, Mauritania and Algeria. The proof that the Government was linked to the Janjaweed was the fact that attacks were conducted jointly. The main reward for the Janjaweed was the promise of owning land, which also explained the massive forced displacement of the civilian population.

220. According to the JEM, the Government and the Janjaweed have committed genocide by specifically targeting people from African tribes, and specifically the Fur, Masaalit, Zaghawa, Birgit, Aranga, Jebel and Tama. The Government armed forces, the PDF, the National Security and Intelligence Service, the Police and the Janjaweed have, since the beginning of the war, allegedly killed more than 70,000 persons, burned more than 3200 villages and displaced more than 2 million persons. The JEM claimed that the Government had issued an order to the police not to accept or investigate any complaints from African tribes.

221. According to the JEM, extensive rape has been committed by the Government and the Janjaweed, including an alleged mass rape of 120 women in July 2003 in Tawilah. The JEM noted that the fact that no Arab woman had been raped and no Arab village had been destroyed was evidence that the Government was specifically targeting African tribes. In addition, the Government and the Janjaweed have repeatedly abducted women and children, and systematically looted property, including livestock, cash and utensils.

4. The task of the Commission

222. Taking these reports into account the Commission conducted independent investigations to establish the facts. The conclusions of the Commission are based on the evaluation of the facts gathered or verified through these investigations. However, reports from other sources are relied upon for analysis where the facts reported are consistent with the results of the Commission's own inquiry.

223. It was not possible for the Commission to investigate all of the many hundreds of individually documented incidents reported by other sources. The Commission, therefore, selected incidents and areas that were most representative of acts, trends and patterns relevant to the determination of violations of international human rights and humanitarian law and with greater possibilities of effective fact-finding. In making this selection, access to the sites of incidents, protection of witnesses and the potential for gathering the necessary evidence were, amongst others, of major consideration.

224. In addition to the material collected by the Commission during its visit to Darfur, the team of investigators working under its direction investigated a large number of incidents covering all three Darfur States (see Annex 4 for details).

5. Two Irrefutable Facts: Massive displacement and large-scale destruction of villages.

225. Results of the fact finding and investigations are presented in the next sections of the report and are analysed in the light of the applicable legal framework as set out in the preceding Section. However, before proceeding, two uncontested facts must be highlighted.

226. At the time of the establishment of the Commission and, subsequently, upon its arrival in the Sudan in November 2004, two irrefutable facts about the situation in Darfur were immediately apparent. Firstly, there were more than one million internally displaced persons (IDPs) inside Darfur (1,65 million according to the United Nations) and more than 200,000 refugees from Darfur in neighbouring Chad to the East of the Sudan. Secondly, there were several hundred destroyed and burned villages and hamlets throughout the three states of Darfur. While the exact number of displaced persons and the number of villages destroyed remain to be determined, the massive displacement and the destruction of villages are facts beyond dispute. All observers and actors agree on this, and it was also confirmed to the Commission during its mission in November by all its interlocutors, be it the Government in Khartoum, the local administration in the three Darfur states, tribal leaders, international organizations and others.

227. The Commission has used these undisputed realities as the starting point for discharging its task to determine what actions led to the situation depicted by these two undeniable realities, and in particular which crimes resulting from violations of international humanitarian law and human rights were committed in the course of these events, as well as determining the actors responsible for them.

228. Before proceeding with the presentation of the results of the Commission's fact-finding as well as the legal appraisal of these facts, it is worth providing some facts on both the displacement and the destruction, so as to give a clear picture of the magnitude and scale of the situation.

(i.) Displacement

229. In its *Darfur Humanitarian Profile No. 8* of November 2004, the Office of Deputy Special Representative of the United Nations Secretary-General for Sudan and the United Nations Resident and Humanitarian Co-ordinator noted that: “The total conflict-affected population in Darfur is estimated at 2.27 million people, one third of the estimated pre-conflict population of 6.3 million. The total number of IDPs in Darfur is estimated at 1.65 million, while the number of affected residents accessed by humanitarian agencies is about 627,000. [...] The numbers are highest in West Darfur with a total of 833,036 affected people, which is half of the pre-conflict West Darfur population of 1.6 million. The West Darfur figure includes 652,509 IDPs. South Darfur has 761,030 conflict-affected people, including 595,594 IDPs. North Darfur, registering the lowest number of the three Darfur States, has an estimated 685,200 conflict affected people, of which 403,000 are IDPs.” It is also noted that “In addition, [...] in the three state capitals—Nyala, El Fashir and Geneina—none of the resident populations are included in the category of conflict affected, in part because their number is relatively large as compared to the IDP population that they are hosting. They are not yet judged to be in need of humanitarian assistance, although many of them may be increasingly vulnerable.”¹¹⁴ It is noted that there are 101 locations, most of them camps, throughout the Darfur region hosting IDPs, which include 22 locations in North Darfur, 42 locations in South Darfur and 37 locations in West Darfur. Some camps host up to 70,000 persons while others are more “modest” in size and are host to “only” a few thousand IDPs.

230. In a meeting with the Commissioner-General of the Government Humanitarian Aid Commission, Mr. Hassabo Mohammed Abdelrahman, on 12 January 2005, the Government of the Sudan confirmed to the Commission that the total number of IDPs amounted to 1,651 million, and the total number of conflict affected persons was 627,000. The Commissioner-General noted that the Government was generally in agreement with the figures noted in the *Humanitarian Profile* released by the United Nations (quoted above). It was noted that the 1,65 million IDPs were hosted in 81 camps and safe areas, with 300,000 hosted in actual camps. The Commissioner-General further stated that a total of 400,000 IDPs had returned home; a figure the United Nations could not confirm.

231. In addition, as of 15 November 2004, the Office of the United Nations High Commissioner for Refugees (UNHCR) reported that 203,051 persons from the Darfur region were living in eleven camps and other locations as refugees in eastern Chad, along the border with the Sudan¹¹⁵.

232. The estimated number of conflict-affected populations in Darfur combined with the refugees in Chad (1,65 million IDPs, 627,000 otherwise conflict affected persons, and 203, 051 refugees) reaches the staggering figure of almost 2,5 million persons affected in one way or another – the vast majority by being displaced from their homes.

(ii.) Destruction of villages

233. While the massive displacement of population in Darfur became the face of the humanitarian crisis in the region, the widespread destruction of villages constitutes another irrefutable fact.

234. During its visit to Darfur the Commission was able to make a visual estimate of the extent of destruction that had been caused in the course of the current conflict in all three Darfur states. The

¹¹⁴ *Darfur Humanitarian Profile, No. 8*, November 2004, available at <http://www.unsudanig.org>

¹¹⁵ UNHCR data, <http://www.unhcr.ch/cgi-bin/texis/vtx/publ/opedoc.pdf?tbl=MEDIA&id=401159eca&page=publ>

Commission saw destroyed and partially destroyed villages in aerial exploration over some of the affected areas such as those surrounding Mornei, Habila and Garsila in West Darfur, parts of the Jebel Marrah plateau in South Darfur, and the Tawilah and Kutum area in North Darfur. Many of these villages were abandoned and there were areas comprising several villages which were completely deserted. To verify the facts, the Commission also visited some of the villages regarding which it had received specific information of attacks and destruction, including villages in the localities of Shataya and Masteri which were completely destroyed and abandoned.

235. There is an abundance of sites with evidence of villages burnt, completely or partially, with only shells of outer walls of the traditional circular houses left standing. Water pumps and wells have been destroyed, implements for food processing wrecked, trees and crops were burnt and cut down, both in villages and in the *wadis*¹¹⁶, which are a major source of water for the rural population. Rural areas in Darfur are not the only scenes of destruction. Several towns also show signs of damage to homes and essential infrastructure such as hospitals, schools, and police stations.

236. The exact number of villages burnt and destroyed has not been counted, but several sources have estimated the extent of destruction through verbal accounts, site inspections and other evidence. According to some estimates over 700 villages in all the three states of Darfur have been completely or partially destroyed¹¹⁷. The Commission further received information that the police had made an assessment of the destruction and recorded the number of destroyed villages at over 2000. The Government did not provide any official figures despite several requests in this regard from the Commission. The Commission nevertheless received credible accounts and itself visited some sites where hundreds of homes were burnt in a single location.

6. Violations committed by the parties

237. The individual sections below give an account of the Commissions factual findings, organized according to the type of violation and the resulting international crime committed. In each section, initially a summary and analysis of the findings reported by other sources is presented. This is followed by an account of the findings made and information collected by the Commission on some individual incidents. Each section deals with the crimes committed by the three categories of actors identified, namely, the Government, the Janjaweed and the rebels. A legal appraisal of the factual findings is then provided.

(i). Indiscriminate attacks on civilians

(a.) Factual findings

238. The Commission reviewed numerous reports of indiscriminate attacks on civilians. An analysis of all accounts by other sources reveals a pattern of indiscriminate attacks on civilians in villages and communities in all three Darfur states beginning in early 2003. Attacks are also reported to have taken

¹¹⁶ Wadi: A mainly dry water course in arid regions through which water flows only after heavy rainfalls.

¹¹⁷ Most sources assess that 600 villages and hamlets have been completely destroyed, while an additional 100 to 200 villages have been partially destroyed

place in 2001 and 2002. However the magnitude, intensity and consistency of the attacks increased noticeably beginning in early 2003, in particular following the attack by rebel forces on the airport in El Fashir in April 2003. Attacks on civilians were still ongoing at the time of writing the present report.

239. The Commission also met with and received first hand witness accounts of attacks on civilians from individuals and communities throughout the three Darfur states, as well as in Khartoum and in refugee sites in Chad. Reports received by the Commission were verified wherever possible through the work of the judicial investigators, forensic experts and military analysts assigned to work with the Commission. The Commission also received and verified numerous additional incidents involving attacks on civilians, based on information and evidence it received during the course of its work. These are illustrated through several case studies outlined in the sections below.

240. From all accounts the Commission finds that the vast majority of attacks on civilians in villages have been carried out by Government of the Sudan armed forces and Janjaweed, either acting independently or jointly. Although attacks by rebel forces have also taken place, the Commission has found no evidence that these are widespread or that they have been systematically targeted against the civilian population. Incidents of rebel attacks are mostly against military targets, police or security forces. Nevertheless, there are a few incidents in which rebel attacks have been carried out against civilians and civilian structures, as well as humanitarian convoys. The following sections provide a description of the Commission's factual findings in relation to the patterns of attacks on civilians in the three Darfur states.

(1). Attacks by Government armed forces and the Janjaweed

241. Based on its analysis of other sources and its own investigative work, the Commission found that attacks on villages in Darfur conducted by Government of the Sudan armed forces and the Janjaweed took place throughout the conflict with peaks in intensity during certain periods. Most often the attacks began in the early morning, just before sunrise between 04:30 AM and 08:00 AM when villagers were either asleep or at prayer. In many cases the attacks lasted for several hours. Some villages were attacked repeatedly over the course of several days and months.¹¹⁸

242. In many cases a ground attack began with soldiers appearing in Land Cruisers and other vehicles, followed by a large group of Janjaweed on horses and camels, all with weapons such as AK47s, G3s and rocket-propelled grenades. Many of the attacks involved the killing of civilians, including women and children, the burning of houses, schools and other civilian structures, as well as the destruction of wells, hospitals and shops. Looting and theft of civilian property, in particular livestock, invariably followed the attacks and in many instances every single item of moveable property was either stolen or destroyed by the attackers. Often the civilians were forcibly displaced as a result of the attack.

243. Several of the attacks on villages were carried out with the support of Government of the Sudan including the air force, involving air bombardments and regular aerial surveillance. The Commission received credible evidence of the use of Mi-8 helicopters, Mi-24 helicopters and Antonov aircraft during

¹¹⁸ For example, the village of Shuba, North Darfur was attacked by Janjaweed in April 2001 and April 2002, and by Government armed forces and Janjaweed in July 2003. The village of Amaki Sara, South Darfur reportedly was attacked by Janjaweed in September 2002, and by Government armed forces and Janjaweed on 30 October 2004, while rebel forces attacked a school in the village where police had established its headquarters on 2 October 2004.

air attacks on villages. Ground attacks frequently were preceded by the presence of aircraft near or directly above the villages, which would either bomb the village or surrounding areas, or circle over the village and retreat.¹¹⁹ In some cases, aircraft were used for reconnaissance purposes or to control and inform troops on the ground, while in other cases air support was used to supply ground troops with additional weapons and ammunition.¹²⁰ Several incidents involved aerial bombardment of areas surrounding the villages and/or bombing of civilians and civilian structures within villages themselves. The fact that some of the attacks received aerial support presents a clear indication of the link between the Janjaweed and the Government of the Sudan.

244. The effect of the repeated attacks on villages and the manner in which they were carried out, including regular aerial surveillance at dawn, hovering of helicopter gun-ships and frequent bombing, was to terrorise civilians and force them to flee the villages. Those who managed to find refuge in IDP camps or host communities often refused to return to their villages out of fear of further attacks.

245. In a majority of cases, victims of the attacks belonged to African tribes, in particular the Fur, Masaalit and Zaghawa tribes. When asked why they believed they were attacked, some witnesses stated 'because they want our land and cattle' or 'they want to eliminate us from the area'. Other witnesses referred to statements made by their aggressors during some of the attacks, such as 'you are *Tora Bora*, the SLA are your families', 'the Fur are slaves, we will kill them', 'we are here to eradicate blacks (*nuba*)', 'we will drive you into poverty', 'this is not your land' or 'you are not from here'¹²¹. When asked about the presence of armed groups within the villages, most witnesses denied the existence of rebels in their villages at the time they were attacked. In a few cases witnesses said that villagers had weapons to protect their livestock and families.

246. While in many cases witnesses clearly identified the attackers as Government soldiers or Janjaweed, the exact identity of individual perpetrators was difficult to ascertain. In most cases the attackers wore uniforms, similar to military uniforms, and either military caps or turbans, and were mounted on camels or horses. In at least one incident, witnesses identified Janjaweed by a horse-like sign worn on the shoulder (reportedly the emblem of the PDF). Victims were able in some cases to identify individual perpetrators as either neighbours or recognized leaders of particular Arab tribes. A few incidents seem to have involved the police acting together with Government armed forces and Janjaweed.¹²² One of the cases reported to the Commission explicitly referred to the involvement in the

¹¹⁹ For example, the Commission verified evidence of an attack on Amaki Sara, South Darfur, on 30 October, 2004. At 1300hrs that day, soldiers on foot attacked from the south-west of the village. At 1400hrs, the soldiers were joined by an air attack by two helicopters, both identified by witnesses from sketches as Mi-24, and 2 fixed-wing aircraft (1 x 4-prop Antonov and 1 x 2-prop Antonov, both had white upper fuselage with a black belly). The attack started from the direction of the large hill in the south-west of the village and circled it. The helicopters shot the people who were working in the fields but did not fire on the village. The fixed-wing aircraft only circled without firing weapons. As soon as the attack started, the villagers rapidly evacuated the area splitting to the north and south. Continuing to circle, the helicopters fired 57mm rockets at the escaping villagers who the witnesses insist were unarmed. The helicopters appeared to deliberately target people hiding beneath trees and bushes south of the village. Two rockets hit an area beneath some trees and injured several persons. Similarly, two more rockets hit an area of bushes where villagers were attempting to hide, injuring several more. Janjaweed later looted the village.

¹²⁰ On 22nd August 2003 at 0500hrs, a joint force of Government armed forces and Janjaweed, approx 300-400 in strength, attacked the villages of Namai, Bogah and Debsa in North Darfur. Government soldiers used six Toyota pick-ups, camouflage green in colour with machine guns fitted to them, while the Janjaweed rode on horses and camels. An Mi-8 helicopter landed twice to the rear of the attackers, unloading ammunition on both occasions.

¹²¹ See also Section II on Genocide.

¹²² On 5 October 2003 the village of Haloof in South Darfur reportedly was attacked by Government armed forces and Janjaweed. According to witness testimony, the Janjaweed included two 'policemen'. 24 civilians were killed and

attacks of the PDF, together with regular Government armed forces and Janjaweed. In most cases, however, victims did not differentiate between Government armed forces on the one hand, and militias, and other groups acting, or perceived to be acting, with the support of Government authorities, on the other. When asked whether the perpetrators were Government armed forces or Janjaweed, one victim stated that ‘for us, these are one and the same’.¹²³

247. It should also be noted that the Commission found no evidence of any warnings being issued to civilians prior to the attacks on villages.

248. Many of the ground and air attacks on villages resulted in the indiscriminate killing of civilians.¹²⁴ In most cases of ground attacks, men were directly targeted to be killed and in some cases there is evidence of efforts by the perpetrators to spare the lives of women. However women and children were also victims of killings in the course of many attacks. Several of the attacks also involved sexual violence including rape of women as part of the attack on civilians.¹²⁵ In most cases, victims named Janjaweed as perpetrators of sexual violence; however several incidents allegedly involved Government soldiers acting together with Janjaweed.

249. In this context, the Commission also noted the comments made by Government officials in meetings with the Commission. The Minister of Defence clearly indicated that he considered the presence of even one rebel sufficient for making the whole village a legitimate military target. The Minister stated that once the Government received information that there were rebels within a certain village, ‘it is no longer a civilian locality, it becomes a military target.’ In his view, ‘a village is a small area, not easy to divide into sections, so the whole village becomes a military target.’ It is also worth noting that the West Darfur Minister of Social Affairs (who is also the Deputy Wali of the State of West Darfur) considered the villagers responsible for the destruction that led to their massive displacement on the grounds that they allowed their sons to join the rebels and to use their own villages for insurgent activities.

250. The indiscriminate nature of attacks by Government armed forces and the Janjaweed on civilians and civilian objects in villages is illustrated in the case studies below.

Case Study 1: Anka village, North Darfur

251. The Commission investigated the scene of an attack in and around Anka village in North Darfur. The following facts were established through witness interviews and forensic investigations:

At about 9 am on or about the 17 or 18 February 2004 the village of Barey, situated about 5 kilometres from the village of Anka, was attacked by a combined force of Government

several others injured. In a separate incident on 22 May 2004, the village of Abqa Rajil in South Darfur was attacked by Government armed forces and police just before sunrise. Subsequently the Commission obtained information that 6 persons, including 2 policemen, were tried and convicted.

¹²³ Witness testimony regarding the attack on Haloof village, South Darfur, 5 October 2003, as received by members of the Commission during visit to South Darfur.

¹²⁴ Section xx below contains more detailed information on killings as a result of attacks.

¹²⁵ Section xx below contains more detailed information on sexual violence during the course of attacks.

soldiers and Janjaweed. A witness from Barey then alerted the villagers of Anka of a possible imminent attack.

At about 5 PM on the same day, witnesses from Anka observed between 300 and 400 Janjaweed on foot, and another 100 Janjaweed on camels and horseback, advancing towards Anka from the direction of Barey. The attackers were described as wearing the same khaki uniforms as the Government soldiers, and were armed with Kalashnikovs G3s and rocket-propelled grenades (RPGs).

Witnesses observed about 18 vehicles approaching from behind the Janjaweed forces, including four heavy trucks and eighteen Toyota pickup vehicles. Some of the vehicles were green and others were coloured navy blue. The pickups had Dushka (12.7mm tripod mounted machine guns) fitted onto the back, and one had a Hound rocket launcher system which was used to fire rockets into, and across, the village. The trucks carried Government armed forces and were later used to transport looted property from the village.

According to witnesses, villagers fled the village in a northerly direction, towards a wooded area about 5 kilometers from the village.

Before the Janjaweed entered the village, the Government armed forces bombed the area around the village with Antonov aircraft. One aircraft circled the village while the other one bombed. The first one was coloured white and had a black underside, while the second one was completely white. The bombing lasted for about two hours, during which time 20 to 35 bombs were dropped around the outskirts of the village. A hospital building was hit during the bombardment.

After the bombing the Janjaweed and Government soldiers moved in and looted the village including bedding, clothes and livestock. Remaining buildings were then destroyed by burning. Janjaweed also fired RPGs into the village from the top of the hill overlooking Anka. The bombing of the areas around the village appear to have been conducted in order to facilitate the looting and destruction of the village by Janjaweed and Government armed forces on the ground.

According to witnesses, approximately 30 SLM/A members were present in the village at the time of the attack, apparently to defend the village following the announcement of the imminent attack.

15 civilians were killed in Anka as a result of shrapnel injuries during and after the attack. 8 others were wounded. While some have recovered, others reportedly are disabled as a result of their injuries. The village is now totally deserted.

Case Study 2: Shuba, Kabkabya

252. The Commission received credible information from witnesses in relation to three separate attacks on civilians in villages in the Shoba area, Kabkabya, North Darfur¹²⁶:

¹²⁶ This information was corroborated by reported investigations by other independent sources.

The first attack began at 08h30 on 2 April 2001, a market day. Arab militia reportedly attacked Shoba West and Shoba Karika with the intention of looting animals. However, 15 people were killed and nine were wounded as a result of the attack. Approximately 55 Arab militia, wearing camouflage green uniforms and armed with AK47s, G3s and RPGs, attacked the villages on horses and camels. The leader of the attack and the identity of several other attackers were known to the victims and were reported to the police station nearby. The police investigated the incident and arrested four suspected perpetrators, who were still in the village at the time. According to witnesses, no rebels were present in the village either at the time of the attack or at any other time.

Approximately 100 Arab militia attacked Shoba West and Shoba Karika from the north in a second incident on 28 April 2002. The perpetrators of the second attack matched the profile of those responsible for the first attack, and were led this time by two senior leaders of the Arab militia. 24 people were killed during the attack and another 23 were injured. 338 houses were burned, and the north and east of the village were completely destroyed. Property belonging to villagers, including all livestock, food and medicine, was looted. According to witnesses, the attack took place from 04:15 AM until about 09:30 AM when Government forces arrived. Villagers identified the perpetrators, who were about 500 meters from the village with the looted goods. However, the Government soldiers reportedly refused to pursue them and one officer told a witness that he was under instructions not to pursue the attackers. Government armed forces later confiscated the villagers' weapons. Some time following the attack the Minister of Interior visited the area, together with the Walis of the three Darfur states, to appraise the situation and later sent food and support to rebuild the village.

A third attack took place from 05:00 AM to 06:00 PM on 25 July 2003, this time on Shoba East and Shoba West. According to reports, the attack was led by the two senior Janjaweed leaders and involved approximately 400 Janjaweed and Government armed forces using camels, horses and Land Cruisers armed with 12.7mm machine guns. The villages were totally destroyed during the attack. 42 people were killed, 10 were injured and every item of moveable property in the villages was looted.

Case study 3: Adwa

253. The Commission investigated reports of a recent attack by Government armed forces and Janjaweed on the village of Adwa in South Darfur:

According to witnesses, on 23 November 2004 at 06:00 AM Government of the Sudan armed forces in complicity with Janjaweed launched an attack on Adwa. Rebel forces reportedly held a base on top of the mountains near Adwa, and a battle between Government soldiers and rebel forces ensued. Two helicopter gun-ships and an Antonov plane were used during the attack, possibly for reconnaissance purposes. Ground forces used various weapons including AK47, G3, G4 assault rifles, RPG7, machine guns, and Doshka 12,7mm machine gun mounted on vehicles. According to witness reports, civilians including women, children and elderly persons were targeted during the attack. Many were forced to flee to a nearby mountain where they remained for several days. There are reports that Government and Janjaweed armed forces instructed women not to flee and told them that they were not

targets. However, some women were captured and several were detained by the attackers for two days. Men were summarily shot, as was anyone who attempted to escape. Young girls were taken by the attackers to another location and many were raped in the presence of other women. The attackers looted the village. While in the mountains, several of the victims reportedly were shot by Government soldiers and Janjaweed. Many people were killed and more than 100 persons were injured. Following the attack, representatives of an international organization searched the village and found several injured women and children, whom they escorted to hospital. They also found the bodies of between 20 and 30 civilians who had been killed during the attack, including women and children. All of the victims were reportedly from Adwa and belonged to the Fur tribe. It is also alleged that many are still to be found in the mountains.

2. Attacks by rebel forces

254. The Commission also found that rebel forces have been responsible for attacks, in most cases against military targets, police or security forces. In West Darfur, for example, rebel forces attacked a police station in Tongfuka in October 2003. In South Darfur, according to witnesses, rebels attacked and looted a police station and Government offices in Yassin in January 2004. In North Darfur, rebel forces attacked a police station in Tawila, killing 28 policemen. According to witness reports, most attacks against military targets by rebel forces have been conducted by the SLM/A, acting either independently or together with rebel forces of the JEM.

255. The Commission also received information from witnesses of a number of attacks by rebel forces on villages and individual civilians. In three separate incidents in West Darfur, members of the JEM attacked the town of Kulbus. During the first attack the JEM arrived around 3:00 PM on 4 October 2003 in 35 Land Cruisers, surprising Government armed forces in the town. Some were wearing military desert camouflage uniforms and others were in civilian clothing, riding horses and camels, and carrying weapons such as RPGs, Garinov, Kalashnikov, GM4, Katyoucha Hawn 106, Hawn 120 and machine guns. Forty-two soldiers and seventeen civilians, all male, were killed along with one child. Fifty civilians were injured. On the 25 and 26 December 2003, more than forty vehicles loaded with JEM soldiers again attacked Kulbus. However, the attackers were held back by Government armed forces and could not get into the town. 28 Government soldiers were killed along with four male civilians.

256. Rebel forces reportedly have been responsible also for attacks reportedly carried out against civilian convoys, including vehicles carrying humanitarian supplies. The Commission received information in relation to attacks and looting by rebels of commercial vehicles, trucks carrying humanitarian supplies, cargo trains or passenger buses. However, the Commission was not able to verify these reports through its own investigations. The Government of the Sudan presented the Commission with a document listing attacks on humanitarian convoys.

Case study – Buram¹²⁷

¹²⁷ See references to killings during these incidents in the section below.

257. In one particularly serious series of incidents, rebel forces conducted attacks in Buram, South Darfur on three separate occasions:

During the first attack, at 06h00 AM on 13 March 2004, rebels arrived in Buram from the north in eight Land Cruisers, each containing nine or ten soldiers. The attackers wore a variety of different military uniforms. They attacked the local office of the National Security and Intelligence Service setting it alight and then proceeded to shoot at the Sudan Telecommunications office. They then attacked the police station, killing two policemen and removing weapons and ammunition. From there they went to the offices of the local administration where they stole two safes and destroyed official documents. They went to the Zakat (religious tax) office where they destroyed documents, stole the safe and a Mitsubishi pickup truck. They went to the bank where they removed two safes and set fire to the building. They also stole a truck belonging to a civilian. A crowd of people witnessed the incident and followed the attackers. They were apparently unafraid because the rebels had announced that they were not going to hurt anyone other than the targets that they had chosen, including certain officials. The rebels went to the house of the security manager, who reportedly had already fled with his family, set fire to the house and stole the security manager's vehicle. The following morning at 05:00 AM the rebels left town towards Shurab. At Wadi Haggam they stole weapons from the police. At Hufirat-an-Nahas they attacked a military contingent and killed 17 Government soldiers.

A second attack took place a week later, reportedly by the same perpetrators driving the same vehicles as were used in the first attack. After arriving in the village at 02:00 PM, the attackers went to the prison and released all prisoners. The rebels invited the prisoners to join them, which some did. The attackers set fire to the prison, killed one prison guard and beat another. They then left the village, taking with them the prisoners who had joined them. After the attack, the rebels stated publicly that they had come to liberate the people by force and that they wanted popular support.

Later the rebels became involved in a battle with Government military forces in a location nearby. In that battle, soldiers who had been injured were brought to Baram for medical attention. Rebels fired shots at the hospital buildings and killed both soldiers and civilians. The Commission could not confirm a claim by the Government that injured soldiers and civilians had been killed inside the hospital building.

(b.) Legal appraisal

258. As stated above, various provisions of human rights and international humanitarian law are relevant to the protection of civilians in armed conflict. International law prohibits any attack deliberately directed at civilians, that is, persons that do not take a direct part in armed hostilities. International law also prohibits indiscriminate attacks on civilians, that is, any attack on areas or places where both civilians and combatants may be found, which is not directed at a specific military objective, or employs methods or means of combat which cannot be directed at a specific military objective. Parties to the conflict therefore must at all times distinguish civilians from those taking a direct part in the hostilities, as well as differentiating civilian objects from military objectives. Deliberate attacks on

civilian objects are prohibited. The notion of ‘civilian objects’ embraces all objects (houses, private dwellings, orchards, schools, shelters, hospitals, churches, mosques, synagogues, museums, works of art, and so on) that do not serve, nor are used for, military purposes.

259. To ensure that attacks on places or areas where both civilians and combatants may be found, do not unlawfully jeopardize civilians, international law imposes two fundamental obligations, applicable both in international and internal armed conflicts. First the obligation to take precautions for the purpose of sparing civilians and civilian objects as much as possible. Such precautions, laid down in customary international law, are as follows: a belligerent must (i) do everything feasible to verify that the objectives to be attacked are not civilian in character; (ii) take all feasible precautions in the choice of means and methods of combat with a view to avoiding or at least minimizing incidental injury to civilians or civilian objects; (iii) refrain from launching attacks which may be expected to cause incidental loss of civilian life or injury to civilians or civilian objects, which would be excessive in relation to the concrete and direct military advantage anticipated; (iv) give effective advance warning of attacks which may affect the civilian population, except “in cases of assault” (as provided for in Article 26 of the Hague Regulations of 1907) or (as provided for in Article 57(2)(C)) “unless circumstances do not permit” (namely when a surprise attack is deemed indispensable by a belligerent). Such warnings may take the form of dropping leaflets from aircraft or announcing on the radio that an attack will be carried out. According to the Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (ICRC, Y. Sandoz and others eds., 1987, at § 2224) a warning can also be given by sending aircraft that fly at very low altitude over the area to be attacked, so as to give civilians the time to evacuate the area.

260. The second fundamental obligation incumbent upon belligerents (or, more broadly, on any party to an international or internal armed conflict) is to respect the principle of proportionality when conducting attacks on military objectives that may entail civilian losses. Under this principle a belligerent, when attacking a military objective, shall not cause incidental injury to civilians disproportionate to the concrete and direct military advantage anticipated. In the area of combat operations the principle of proportionality remains a largely subjective standard, based on a balancing between the expectation and anticipation of military gain and the actual loss of civilian life or destruction of civilian objects. It nevertheless plays an important role, first of all because it must be applied in good faith, and secondly because its application may involve the prohibition of at least the most glaringly disproportionate injuries to civilians. One can therefore appreciate statements such as that of Judge R. Higgins in her Dissenting Opinion appended to the Advisory Opinion delivered in *Legality of the Threat or Use of Nuclear Weapons*. She pointed out that “The principle of proportionality... is reflected in many provisions of Additional Protocol I to the Geneva Conventions of 1949. Thus even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack.” (§ 20, at p. 587).

261. Intentionally directing attacks against the civilian population as such, or against civilians not taking direct part in hostilities, is a serious violation of international humanitarian law and amounts to a war crime.¹²⁸ The components of this war crime are identical whether the acts take place in the course of an international or non-international armed conflict.¹²⁹

¹²⁸ Article 8(2)(e)(i), ICC Statute.

¹²⁹ They include:

- the perpetrator directing an attack;
- the object of the attack being a civilian population or individual civilians not taking direct part in hostilities;

262. The Commission's factual findings in relation to attacks on civilians in Darfur must be analysed from the perspective of the prohibition of indiscriminate attacks on civilians. In this regard, it is necessary to consider whether: i) precautions were taken to ensure the protection of civilians and civilian objects, and ii) the attacks were proportionate to the military objectives.

263. As noted above, one justification given for the attacks by Government of the Sudan armed forces and Janjaweed on villages is that rebels were present at the time and had used the villages as a base from which to launch attacks – or, at the very least, that villagers were providing support to the rebels in their insurgency activities. Government officials therefore suggested that the villagers had lost their legal status as protected persons.

264. The ICTY has held that “a wide definition of civilian population ... is justified”, in the context of crimes against humanity, and that “the presence of those actively involved in the conflict should not prevent the characterization of a population as civilian ...”¹³⁰ In another case, the ICTY again considered the different elements of an attack directed against a civilian population as part of the definition of crimes against humanity. According to a Trial Chamber, ‘as a minimum, the perpetrator must have known or considered the possibility that the victim of his crime was a civilian’ and stressed that ‘in case of doubt as to whether a person is a civilian, that person shall be considered to be civilian’.¹³¹ Similarly, the ICTR held that “[w]here there are certain individuals within the civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character”.¹³² Drawing on this reasoning, it is clear that the mere presence of a member or members of rebel forces in a village would not deprive the rest of the village population of its civilian character.

265. Furthermore, as pointed out above, and contrary to assertions made to the Commission by various Government officials, it is apparent from consistent accounts of reliable eyewitnesses that no precautions have ever been taken by the military authorities to spare civilians when launching armed attacks on villages. No eyewitnesses reported that leaflets had been launched, or that warnings had been given on the radio or through the tribal chiefs, or that aircraft had flown low over villages to warn civilians of an imminent attack. Moreover, the mode and pattern of aerial flights preceding attacks can in no way be construed as warning signals, as these were clearly part of the attack. Even the Government has not used this as a defence of its position on aerial attacks or support of ground forces during attacks.

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- the perpetrator intending the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack;
 - the conduct taking place in the context of and being associated with a non-international armed conflict ; and
 - the perpetrator being aware of factual circumstances that established the existence of an armed conflict.

The mental element of an attack on a civilian population is inferred where ‘the civilian character of the objects damaged was known or should have been known’, and ‘the attack was wilfully directed at civilian objects’. Article 8(2)(e)(i), ICC Statute. See also ICTY, Review of the Indictment, *The Prosecutor v Milan Martić*, IT-95-11-R61, 108 ILR 39 at 45, which states “there exists, at present, a corpus of customary international law applicable to all armed conflicts irrespective of their characterization as international or non-international armed conflicts. This corpus includes general rules or principles designed to protect the civilian population as well as rules governing means and methods of warfare. As the Appeals Chamber affirmed ... the prohibition on attacking the civilian population as such, or individual civilians, are both undoubtedly part of this corpus of customary law.”

¹³⁰ *Tadić*, op. cit., Trial Chamber II Judgement of 7 May 1997, para. 643.

¹³¹ Kunarac et al, case Nos. IT-96-23-T and IT-96-23/1-T, Judgement of 22 February 2001, para 435.

¹³² *Akayesu*, Case No. ICTR-96-4-T, Trial Chamber Decision of 2 September 1998, para. 582.

266. The issue of proportionality did obviously not arise when no armed groups were present in the village, as the attack exclusively targeted civilians. However, whenever there might have been any armed elements present, the attack on a village would not be proportionate, as in most cases the whole village was destroyed or burned down and civilians, if not killed or wounded, would all be compelled to flee the village to avoid further harm. The civilian losses resulting from the military action would therefore be patently excessive in relation to the expected military advantage of killing rebels or putting them *hors de combat*.

267. *Concluding observations.* It is apparent from the Commission's factual findings that in many instances Government forces and militias under their control attacked civilians and destroyed and burned down villages in Darfur contrary to the relevant principles and rules of international humanitarian law. Even assuming that in all the villages they attacked there were rebels present or at least some rebels were hiding there, or that there were persons supporting rebels - an assertion that finds little support from the material and information collected by the Commission - the attackers did not take the necessary precautions to enable civilians to leave the villages or to otherwise be shielded from attack.¹³³ The impact of the attacks shows that the military force used was manifestly disproportionate to any threat posed by the rebels. In fact, attacks were most often intentionally directed against civilians and civilian objects. Moreover, the manner in which many attacks were conducted (at dawn, preceded by the sudden hovering of helicopter gun ships and often bombing) demonstrates that such attacks were also intended to spread terror among civilians so as to compel them to flee the villages. In a majority of cases, victims of the attacks belonged to African tribes, in particular the Fur, Masaalit and Zaghawa tribes. From the viewpoint of international criminal law these violations of international humanitarian law no doubt constitute large-scale war crimes.

268. From the Commission's findings it is clear that the rebels are responsible for attacks on civilians, which constitute war crimes. In general, the Commission has found no evidence that attacks by rebels on civilians have been widespread, or that rebel attacks have systematically targeted the civilian population.

(ii.) Killing of civilians

(a.) Factual findings

1. Killing by Government forces and/or militias

269. The Commission has had access to a vast number of reports from various sources which document extensive killings of civilians throughout Darfur, from the beginning of 2003 up to the time of publication of this report. These reports note that the great majority of the killings were committed by people who witnesses described as Janjaweed, in most cases uniformed and on horses or camels. It is reported that the killings are generally committed during attacks on villages or hamlets. The reports further note that the killings are often the result of gunfire. Witness testimonies reflected in these reports

¹³³ Statements to the contrary were made to members of the Commission by some Government officials, however in spite of repeated requests by the Commission to provide evidence of warnings these statements were never corroborated.

describe attackers with Kalashnikovs and other automatic weapons shooting either indiscriminately or targeting specific people, usually men of military age. The use of other weapons, such as swords, has also been noted, albeit less frequently. In some of these cases, killings are reported to have occurred on a massive scale with hundreds of civilians being killed in the course of an attack. Incidents of confinement of the civilian population, accompanied by arbitrary executions have also been reported, as well as civilian deaths as a result of indiscriminate air attacks by Government forces. The reports note that killings have continued during displacement in camps at the hand of the militias surrounding the camps, and that some IDPs have also been the victims of indiscriminate police shooting inside camps, in response to alleged rebel presence.

270. The description of killings found in these reports corresponds to the findings made by the Commission during its missions to the Sudan, through credible witness testimonies and investigations. It is impossible to describe in this report all the incidents of killings which the Commission has documented. However, a few cases are presented here which are characteristic of the pattern of killings noted by the Commission,

271. The Commission found that while all parties involved in the conflict have committed crimes against the civilian population, the Government of the Sudan and the Janjaweed bear responsibility for an overwhelming majority of the murders¹³⁴ of civilians committed during the conflict in Darfur. Furthermore, most of the civilians killed at the hands of the Government or the militias are, in a strikingly consistent manner, from the same tribes, namely Fur, Massalit, Zaghawa and, less frequently, other African tribes, in particular the Jebel and the Aranga in West Darfur.

a. Killing in joint attacks by Government forces and Janjaweed

272. As an example of a case of mass killing of civilians documented by the Commission, the attack on Surra, a village with a population of over 1700, east of Zalingi, South Darfur, in January 2004, is revealing. Witnesses interviewed in separate groups gave a very credible, detailed and consistent account of the attack, in which more than 250 persons were killed, including women and a large number of children. An additional 30 people are missing. The Janjaweed and Government forces attacked jointly in the early hours of the morning. The military fired mortars at unarmed civilians. The Janjaweed were wearing camouflage military uniform and were shooting with rifles and machine guns. They entered the homes and killed the men. They gathered the women in the mosque. There were around ten men hidden with the women. They found those men and killed them inside the mosque. They forced women to take off their *maxi* (large piece of clothing covering the entire body) and if they found that they were holding their young sons under them, they would kill the boys. The survivors fled the village and did not bury their dead.

¹³⁴ The Commission uses ‘murder’ and ‘killing’ interchangeably. ‘Wilful killing’ is the language used in the grave breaches provisions of the Geneva Conventions of 1949 (respectively Articles 50, 51, 130 and 147) and reproduced in the war crimes provisions (grave breaches) in the various statutes of international criminal tribunals (see e.g. Article 2 of the ICTY Statute; Art. 8(2)(a)(i) of the ICC Statute). ‘Murder’ is used in Common Article 3 of the Geneva Conventions and in the provisions of the various statutes of the international tribunals referring to war crimes other than grave breaches (serious violations of the laws and customs of war in ICTY; violations of Common Article 3 for ICC and ICTR) and crimes against humanity (see Art. 7 and 8(2)(c)(i) of the ICC Statute; Art. 3 and 4 of ICTR Statute, Article 3 of ICTY Statute). In short, the ICTY has held that the elements of the crime for murder and wilful killing are similar: *Kordić and Cerkez*, (Trial Chamber), February 26, 2001, para. 233, confirmed by the Appeals Chamber on 17 December 2004, at §. 38, *Delalic*, §. 422.

273. The Commission was able to find various elements to corroborate witness accounts and confirm the occurrence of mass killings of civilians by Government forces and militias. For instance, the Commission visited Kailek, a village in South Darfur mainly populated by people belonging to the Fur tribe, and confirmed what eyewitnesses had told the Commission. This case illustrates not only the occurrence of mass killings of civilians, but also of wrongful confinement accompanied by summary executions, rape and other abuses. During the first attack described in the previous section, 9 villages around Shataya, a town in the vicinity, were destroyed and 85 people were killed, including five women and three children. After the attack, the whole population of the area went to Kailek. There were still Janjaweed present in the surrounding villages, and people who attempted to return to these villages came under attack and some were killed. The Commission found elements to corroborate reports according to which 28 unarmed men who attempted to surrender themselves at the Kailek police station were all shot - only one man survived. In addition, 17 policemen were also killed in this attack, all of whom belonged to African tribes.

274. A second attack occurred in March 2004. Government forces and Janjaweed attacked at around 15h00, supported by aircraft and military vehicles. Again, villagers fled west to the mountains. Janjaweed on horses and camels commenced hunting the villagers down, while the military forces remained at the foot of the mountain. They shelled parts of the mountains with mortars, and machine-gunned people as well. People were shot when, suffering from thirst, they were forced to leave their hiding places to go to water points. There are consistent reports that some people who were captured and some of those who surrendered to the Janjaweed were summarily shot and killed. One woman claimed to have lost 17 family members on the mountain. Her sister and her child were shot by a Janjaweed at close range. People who surrendered or returned to Kailek were confined to a small open area against their will for a long period of time (possibly over 50 days). Many people were subjected to the most horrific treatment, and many were summarily executed. Men who were in confinement in Kailek were called out and shot in front of everyone or alternatively taken away and shot. Local community leaders in particular suffered this fate. There are reports of people being thrown on to fires to burn to death. There are reports that people were partially skinned or otherwise injured and left to die.

275. The case of Kailek is not isolated. It is similar to other incidents in which similar patterns are reported. For example, after months of consistent attacks of villages in the area, many persons gathered in Deleig after having fled their villages. In March 2004, Janjaweed and Government forces surrounded the town of Deleig, and then went from house to house looking for specific individuals. Many men were arrested and taken to the police station. They were separated into different groups and some were transported in a truck, allegedly to the Garsila area. The truck would come back empty and leave again with a new group of men. Most of those taken away were executed. According to highly reliable eyewitnesses, over 120 men were killed (reportedly mainly intellectuals and leaders). This was another instance of planned and organized joint attack by the Government forces and the Janjaweed, during which mass killings and summary executions were committed. The most recent such incident, although at a relatively smaller scale, occurred in Adwa in November 2004. The Commission does not consider it a coincidence that such brutal forms of killings have largely been committed against the Fur population.

276. The Commission considers that almost all of the hundreds of attacks that were conducted in Darfur by Janjaweed and Government forces involved the killing of civilians.

b. Killing in attacks by Janjaweed

277. Multiple killings have been committed by the Janjaweed during attacks. Several incidents of this nature were verified by the Commission. One attack in Molli in West Darfur in April 2003 left 64 people dead including a seven year old girl. The dead are buried in 8 multiple graves in the market area of the village. A significant fact noted by the Commission was that the incident was reported to the police and seven people were arrested, detained and eventually released three months later. The village of Nurei close to the town of Mornei in West Darfur was attacked by Janjaweed and the Government forces in December 2003. This attack was supported by helicopter cover. 67 civilians were killed in deliberate and indiscriminate shooting by the assailants. All the houses in the village were burnt. Bodies of the victims were buried in mass graves near the village. In another case, the Janjaweed attacked Mallaga village in October 2004. Eighteen men were killed and four men and two women injured. The Commission verified the presence of two grave sites in the village - one said to contain the bodies of two men, and another with the bodies of seven men, all of whom died during the attack. In El Geneina the team also visited one of the areas used as a public cemetery, where according to witnesses nine victims of the attack on Mallaga were buried in a multiple grave, after the villagers brought the bodies to the town's hospital.

278. The Commission also notes that Janjaweed have, on a number of occasions, specifically targeted and killed children including in Kailek and Surra referred to above. The Commission received many reports of random and/or targeted killing of children, sometimes in horrific circumstances such as by burning or mutilation.

279. Several incidents of this nature were verified by the Commission. In short, the Commission has collected very substantial material and testimony which tend to confirm, in the context of attacks on villages, the killing of *thousands* of civilians.

c. Killing as a result of air bombardment

280. Other cases of killings are directly attributable to the armed forces of the Government of the Sudan, and especially killings caused by indiscriminate air attacks. For instance, the village of Amika Sara, South Darfur was reportedly bombed by helicopter gun-ships, in an attack supported by Antonov aircraft and with ground support from Janjaweed, in October 2004. The site was visited on three occasions by the Commission. The evidence found was consistent with the testimony given by witnesses, according to whom 17 civilians were killed. The remains of rockets fired from helicopters were clearly identified. Crater analysis suggests that the helicopter attacks involved either multiple passes or multiple aircraft, or both. The Commission verified the presence of fresh graves in the area.

281. A further example of many such attacks documented by the Commission is the attack on Habila town in West Darfur in August 2003 when six bombs were dropped by an Antonov aircraft on the town and the market, killing 30 civilians. The Commission's investigators verified witness testimonies, inspected sites showing evidence of bombardment, and saw graves where 27 of the 30 victims are buried. Habila is mainly populated by the Massalit tribe. The Commission found no evidence that there was any rebel activity or structures in the vicinity that could have been the target of this attack. The Government acknowledged the attack and offered to compensate the victims.

282. In another case investigated by the Commission and referred to in the previous section, Antonov aircraft bombed Anka village and the surroundings, in February 2004. After the bombing, Janjaweed attacked, destroying houses and looting property. As a result of the attack, fifteen people were killed by shrapnel injury while others were wounded, houses were burned and property was lost. Some of the survivors now have physical disabilities as a result of their injuries.

283. Based on its investigations and the pattern of air attacks which it has established, the Commission is of the view that the military bears responsibility for a very large number of indiscriminate air attacks which resulted in the death of numerous civilians.

d. Killing following displacement

284. Civilians have also been killed after they have reached IDP sites following displacement. On some occasions, they have been killed as they ventured out of the camp, either to go back to their village or for any other reason. For instance, different witnesses told the Commission of the recent killing of three persons who had left an IDP camp in Kass to go and see their nearby village. The perpetrators were unidentified, but the people interviewed said they were “probably Janjaweed”. They said that the militias stayed around the camps and the village in case anyone tried to return. In another instance in Kalma camp in South Darfur in November 2004, at a time when the Commission was present in Nyala, a number of IDPs were reportedly killed and injured when police shot into the camp, allegedly in response to attacks from rebels hiding in the camp.

2. Killing by Rebel Groups

a. Killing of civilians

285. The Commission also has found that rebels have killed civilians, although the incidents and number of deaths have been few.

286. The Commission documented some rebel attacks and verified witness testimonies with thorough investigations in the field. For instance, the Commission has investigated a JEM attack on the town of Kulbus, West Darfur, on 4 October 2003, and on 25 and 26 December 2003. During the first attack in Kulbus 42 soldiers and 17 male civilians including one child were killed. The Commission’s forensic experts have been able to verify that some of the military were buried in the trenches which existed around the military camp, and all civilians were buried in multiple graves in the town cemetery. In a second attack on 25 and 26 December 28 Government soldiers were killed, as well as four male civilians. Arguably, the town of Kulbus was a military target, evidenced by the military camp there. It would need further investigation to determine whether civilians were caught in cross-fire, or whether they were attacked in an indiscriminate or disproportionate manner, or killed wilfully.

287. These attacks were preceded by an attack described to the Commission by some eyewitnesses, where members of the nomadic Rezeigat tribe were attacked while in the Kulbus area by members of the SLA and JEM. The attackers killed forty eight persons including women and children and stole property and livestock from the market and then destroyed it. The victims were buried many days after the attack in areas surrounding Kulbus.

288. The Commission has been unable to confirm reports it has received, especially from the Government, concerning abductions, targeted killings and executions of civilians carried out by the rebels primarily because the rebels suspect them of being Government spies. While the Commission does not exclude that this may have happened, it has not been able to verify whether it had in fact occurred.

b. Killing of humanitarian workers

289. The Commission was provided with a number of reports of incidents where humanitarian workers were the victims of attacks. Although the Commission was not in a position to verify the identity of perpetrators itself in the course of its work, credible sources attributed most of these instances to the different groups of rebels. For instance, the new rebel movement NMRD (National Movement for Reform and Development) is accused of an incident that occurred in October 2004 in Umbarro, North Darfur, where two international workers were killed in a mine incident.

290. In another incident involving the same international humanitarian organization, two of its staff members working with a mobile health clinic were brutally killed while travelling in a clearly marked humanitarian convoy on the main road between Mershing and Duma in South Darfur. The circumstances of the killings remain unclear.

(b.) Legal Appraisal

291. As stated above murder contravenes the provisions of the International Covenant on Civil and Political Rights and of the African Charter on Human and People's Rights, which protect the right to life and to not be "arbitrarily deprived of his life"¹³⁵. As for international humanitarian law, murder of civilians who do not take active part in hostilities in an internal armed conflict, is prohibited both by common Article 3 of the 1949 Geneva Conventions and by the corresponding rule of customary international law, as codified in Article 4(2)(a) of Additional Protocol II. It is also criminalized either as a war crime or, depending upon the circumstances, as a crime against humanity, as proved by case law and by the Statutes of the various international tribunals. It is crucial to stress again at this point that when considering if the murder of civilians amounts to a war crime or crime against humanity, the presence of non-civilians does not deprive a population of its civilian character¹³⁶. Therefore, even if it were proved that rebels were present in a village under attack, or that they generally used the civilian population as a 'shield', nothing would justify the murder of civilians who do not take part in the hostilities.

¹³⁵ Article 6(1)ICCPR, Article 4 of the African Charter. As mentioned above (§.), the UN Human Rights Committee held that this right is laid down in international norms that are peremptory in nature, or norms of jus cogens (General Comment no.29, at §11). See CCPRT/C/21/Rev.1/Add.11, 31 August 2001.

¹³⁶ *Akayesu*, (ICTR Trial Chamber), September 2, 1998, para. 582: "Where there are certain individuals within the civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character." See also *Rutaganda*, (ICTR Trial Chamber), December 6, 1999, para. 72; *Musema*, (ICTR Trial Chamber), January 27, 2000, para. 207. See also *Kayishema and Ruzindana*, (ICTR Trial Chamber), May 21, 1999, para. 128: "[T]he targeted population must be predominantly civilian in nature but the presence of certain non-civilians in their midst does not change the character of that population." See also *Bagilishema*, (ICTR Trial Chamber), June 7, 2001, para. 79; *Semanza*, (ICTR Trial Chamber), May 15, 2003, para. 330.

292. A particular feature of the conflict in Darfur should be stressed. Although in certain instances victims of attacks have willingly admitted having been armed, it is important to recall that most tribes in Darfur possess weapons, which are often duly licensed, to defend their land and cattle. Even if it were the case that the civilians attacked possessed weapons, this would not necessarily be an indication that they were rebels, hence lawful targets of attack, or otherwise taking active part in the hostilities. In addition, it should be noted that the Government of the Sudan did not claim to have found weapons in the villages that were attacked. Furthermore, many attacks occurred at times when civilians were asleep, or praying, and were then not in a position to “take direct part in the hostilities”. The mere presence of arms in a village is not sufficient to deprive civilians of their protected status as such.

293. In light of the above factual findings, the Commission considers that there is a consistent and reliable body of material which tends to show that numerous murders of civilians not taking part in the hostilities were committed both by the Government of the Sudan and the Janjaweed. It is undeniable that mass killing occurred in Darfur and that the killings were perpetrated by the Government forces and the Janjaweed in a climate of total impunity and even encouragement to commit serious crimes against a selected part of the civilian population. The large number of killings, the apparent pattern of killing described above, including the targeting of persons belonging to African tribes and the participation of officials or authorities are amongst the factors that lead the Commission to the conclusion that killings were conducted in both a widespread and systematic manner. The mass killing of civilians in Darfur is therefore likely to amount to a crime against humanity.

294. Considering the limits of its inherent functions, the Commission has been unable to assert with certainty the number of civilian victims in Darfur. The Commission leaves it to the competent court that will pronounce on these alleged crimes to determine whether the mass killings may amount to extermination as a crime against humanity.¹³⁷

295. In addition, given the discriminatory character on political grounds of the systematic and widespread murder of civilians, these acts may very well amount to the crime of *persecution* as a crime against humanity. In *Zoran Kupreškić and others*, the ICTY Trial Chamber defined persecution as “the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5.”¹³⁸ In Article 7 (2) (g) of the ICC statute persecution is defined as “The intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”. What is important to note here is that persecution can involve the violation of a number of fundamental

¹³⁷ Murder can amount to extermination as a crime against humanity. Extermination is primarily concerned with the mass destruction of a group of individuals, the emphasis being placed on the scale of the destruction, unlike murder which may comprise a singular incident. Extermination generally involves “the destruction of a numerically significant part of the population concerned.” Although conceptually what differentiates murder and extermination is the element of mass killing involved in the latter, the perpetrator must not necessarily have committed mass killings himself, but must have been involved in the killings of civilians on a large scale. Furthermore, “extermination may be retained when the crime is directed against an entire group of individuals even though no discriminatory intent or intention to destroy the group as such on national, ethnic, racial or religious grounds has been demonstrated; or where the targeted population does not share any common national, ethnical, racial or religious characteristics”. The perpetrator must however have “intended the killing” or was “reckless or grossly negligent as to whether the killing would result,” and was “aware that his act(s) or omission(s) form[] part of a mass killing event Nahimana, Barayagwiza and Ngeze, (ICTR Trial Chamber), December 3, 2003, para. 1061; Kayishema and Ruzindana, (ICTR Trial Chamber), May 21, 1999, note 8 to para. 645 and para. 144; Krstic, (ICTY Trial Chamber), August 2, 2001, para. 500; Vasiljevic, (ICTY Trial Chamber), November 29, 2002, para. 228-229

¹³⁸ See *Zoran Kupreškić and others*, ICTY Trial Chamber, judgment of 14 January 2000, at § 621.

rights and that it must be committed on discriminatory grounds. The fact that the killings committed by the Government and the Janjaweed appear to have been systematically targeted against the Fur, Massalit, Zaghawa and other African tribes on political grounds is indicative of the discriminatory character of the killing and may thus amount to persecution as a crime against humanity. .

296. As for the killing of civilians by the rebels, each individual violation must be considered as a very serious war crime. The Commission is, however, unable to conclude that they form part of a 'systematic' or 'widespread' attack against the civilian population.

(iii.) Killing of detained enemy servicemen

(a.) Factual findings

297. Some cases of death in detention were reported to the Commission by all parties, although these incidents are not thought to have occurred on a widespread basis. The Commission itself noted, *inter alia*, the events that occurred in Kailek and Deleig where Government forces and members of militias detained persons who they claimed were rebels hiding as civilians. Based on its substantial body of information on events in both places, the Commission notes, firstly, that very few, if any, of the thousands of people detained in Kailek and Deleij were rebels. Secondly, even if, as the Government alleges, the young men who were killed were indeed members of the rebel groups, their summary execution would contravene international law and the perpetrators should be held responsible for war crimes. As for killing of detained servicemen by the rebels, the Commission has received reports, especially from the Government, concerning executions of detained soldiers carried out by the rebels. Such executions would constitute war crimes, however, the Commission has not received independent information to corroborate reports received.

(b) Legal Appraisal

298. International humanitarian law prohibits ill-treatment of detained enemy combatants, in particular violence to life and person, including murder of all kinds (see common Article 3(1)(a) of the Geneva Conventions). It also specifically prohibits the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples (see Article 3(1) (d) of the Geneva Conventions). Wilful killing of a detained combatant amounts to a war crime.

(iv.) Killing of wounded enemy servicemen

(a) Factual findings

299. While there have been allegations of murder of wounded soldiers, very few cases were in fact brought to the attention of the Commission and it was unable to verify these reports.

(b) Legal Appraisal

300. The wilful killing of wounded servicemen is strictly prohibited by international humanitarian law (see Article 23 (b) and (c) of the Hague Regulations and common Article 3 (1)(a) of the Geneva Conventions). It amounts to a war crime.

(v.) Wanton destruction of villages or devastation not justified by military necessity

(a.) Factual findings

1. Destruction by armed forces and Janjaweed

301. The Commission has received and examined a great number of reports which document both the systematic and widespread destruction of entire villages and hamlets in the three states of Darfur. A number of reports have presented satellite imagery clearly documenting this widespread destruction. Some reports estimate that more than 600 villages and hamlets have been completely destroyed, while an additional 100 to 200 villages have been partially destroyed. Other sources, based on Sudanese police reports, indicate that more than 2000 villages were destroyed. As noted above, the destruction of villages has been irrefutably established which is clearly acknowledged by the Government of the Sudan.

302. The Commission examined detailed reports of the destruction of almost 140 villages in the three states of Darfur. While some reports have noted a few incidents of destruction of villages and private property committed by the rebel groups, most of the reports contain witness accounts indicating that the majority of villages were destroyed during attacks by Janjaweed, often under the direction and with the participation and the support of the armed forces of the Government of the Sudan.

303. There are many incidents reported in which Government forces are said to have surrounded villages and stood guard as the Janjaweed burnt and pillaged and committed other atrocities against the population. Many villages are said to have been attacked more than once, until they were completely destroyed.

304. Many reports also note that villages were burnt even after these had been abandoned by the inhabitants who fled to IDP camps in larger urban centres in Darfur, or to neighbouring Chad. This has led many observers to fear that this is a part of the policy executed through the Janjaweed to expel the population from the targeted areas and to prevent the immediate or, possibly, long-term return of the inhabitants. This concern is expressed because the villages reported to have been burnt and destroyed in this manner are almost exclusively inhabited by African tribes, mostly Fur, Masaalit and Zaghawa.

305. Many of the villages were reportedly completely destroyed by deliberate demolition of structures and more frequently by burning down the whole village. Straw-roofs of the traditional circular houses were torched, as well as all other inflammable material, and vegetation inside and in the immediate vicinity of the village was destroyed by burning. Some of these villages had hundreds of homes that

were torched and burnt to the ground. During the attacks Janjaweed are reported to have destroyed utensils, equipment for processing food, water containers and other household items essential for the survival of the inhabitants. Wells were reportedly poisoned by dropping the carcasses of cattle into the wells. In addition, as noted below, the destruction seems to have been consistently combined with looting of personal valuables, cash and, above all, live-stock.

306. The Commission witnessed first-hand the extensive nature of the destruction, and subsequently carried out detailed fact-finding at several sites in all the three states of Darfur to verify and establish acts that resulted in the destruction, the methods employed, the forces responsible and the patterns that indicate the intent behind these acts.

307. The Commission found that the witness testimonies previously reported were in conformity with what was discovered as a result of its own inquiries and investigations. It can be confirmed that most destruction has been caused by the Janjaweed with the support of the Government of the Sudan.

308. The trends and patterns are best illustrated in the case of West Darfur where the widespread destruction is most visible. The Commission found 35 destroyed villages in only four localities (El Geneina, Habila, Kulbus and Wadi Saleh). These are only a small number of the scores that are reported to have been destroyed in the same area and are in addition to the ones that were damaged as a result of aerial strikes by Government forces that the Commission has verified.

309. Of these 13 were destroyed in raids by the Janjaweed and 18 in combined attacks by Government forces and the Janjaweed, who were wearing uniforms similar to those of the military. The manner of destruction of most villages seems to follow a clear systematic pattern. Most of the destruction was carried out by Janjaweed who set entire villages afire and destroyed any private property which was not looted. Often the armed forces of the Government of the Sudan were present, either in aircraft or in vehicles outside the village, but did not, except in a few cases, take part in the actual destruction, unless destruction was caused by aerial bombardment.

310. From the material collected it is evident that the majority of the destroyed or damaged villages belong either to the Masaalit, the Zaghawa, the Fur, or other African tribes. In West Darfur, for instance, out of the 35 completely or partially destroyed villages investigated by the Commission, 31 belonged to African tribes who had clearly been systematically targeted, while the remaining 4 belonged to two Arab tribes who had been attacked by either the JEM or the SLA. This is further illustrated by the fact that most other tribes have not been targeted in this way, if targeted at all. The Commission observed, for instance, that in an area of 50 km between Al Geneina and Masteri inhabited mostly by Arab tribes, no signs of destruction were recorded. Similar patterns have been noted in North and South Darfur in areas where there is a concentration of Zaghawa and Fur populations, whose villages had been targeted.

311. The Commission heard credible accounts showing that the acts of destruction were wanton and deliberate, and that in addition to homes all essential structures and implements for the survival of the population were also destroyed. Oil presses, flour mills, water sources such as wells and pumps, crops and vegetation and almost all household utensils were found scorched or smashed at the sites inspected by the Commission team. The Commission has also noted the destruction of schools, health centres, markets and other civilian objects.

312. Such a pattern of destruction can only be interpreted as having the objective of driving out the population through violence and preventing their return by destroying all means of survival and livelihood. The Commission has also verified that a number of villages previously inhabited by the Fur in South Darfur and Masaalit in West Darfur are now being populated by Arab tribes.

313. The Commission did not find any evidence of military activity by the rebels in the major areas of destruction that could in any way justify the attacks on military grounds.

314. In some instances, such as around Kornoï and Tine in the northern parts of West Darfur and some parts of North Darfur, destruction is mainly linked to aerial bombardment, but has been only partial, with only a few structures destroyed.

315. In conclusion, the Commission finds that there is large-scale destruction of villages in all the three states of Darfur. This destruction has been deliberately caused, by and large, by the Janjaweed during attacks, independently or in combination with Government forces. Even though in most of the incidents the Government forces may not have participated directly in the destruction, their complicity in the attacks during which the destruction was conducted and their presence at the scene are sufficient to make them jointly responsible. The destruction was targeted at the areas of habitation of African tribes, in particular the Fur, Zaghawa and Massalit. There was no military necessity for the destruction and devastation caused as a joint venture by the Janjaweed and the Government forces. The targets of destruction during the attacks under discussion were exclusively civilian objects; and objects indispensable to the survival of civilian population were deliberately and wantonly destroyed.

2. Destruction by rebels

316. In addition, the Commission has recorded incidents in North Darfur in which the SLA is reported to have burnt houses as well as a police station during its attacks on the towns of Tawilah and Korma.

317. The Commission found no information or evidence which would indicate that the rebel groups are responsible for causing widespread destruction. However, there are a few incidents in which they have destroyed houses and buildings in towns and villages. This is particularly notable in the JEM attacks on Kulbus town in West Darfur, and villages in this locality between October and December 2003. The Commission has heard credible testimony describing the partial destruction of a school, the hospital and the market, deliberately inflicted by the rebel group during the attack on the town. There are also credible accounts of the destruction of at least one village in the locality.

(b.) Legal appraisal

318. Article 11 of the International Covenant on Economic, Social and Cultural Rights provides, inter alia, that “the States Parties to the present Covenant recognize the right of everyone to [...] adequate food, clothing and housing,”¹³⁹. Furthermore, customary international law prohibits and criminalizes the

¹³⁹ Committee on Economic, Social and Cultural Rights, General Comment no.4 on the right to adequate housing, of 13 December 1991, and General Comment No. 7, on the right to adequate housing (art. 11.1 of the Covenant): Forced evictions, of 20 May 1997.

destruction of property of a hostile party carried out by a belligerent in the course of an international or internal armed conflict, and not justified by military need.

319. It is apparent that the massive destruction of villages by the Government forces and the Janjaweed was not justified by military necessity. Those villages were inhabited by civilians and, if some rebels were living there or taking shelter in some homes, it was not warranted to destroy the whole village by setting it afire. The destruction of so many civilian villages thus amounts to a very serious war crime.

320. In addition to constituting a war crime¹⁴⁰, destruction of property, if part of a systematic or widespread attack on part of the civilian population, may amount to the crime of persecution as a crime against humanity if carried out on discriminatory grounds. However, not all destruction of property *per se* amounts to persecution. It must further be established that the destruction of property will have a detrimental effect on the liberty and livelihood of those people in that area. As an ICTY Trial Chamber held in *Zoran Kupreškić and others*¹⁴¹, such destruction should be akin to “the same inhumane consequences as a forced transfer or deportation”. Another ICTY Trial Chamber held in *Blaskić* that the “destruction of property must be construed to mean the destruction of towns, villages and other public or private property not justified by military necessity and carried unlawfully, wantonly and discriminatorily.”¹⁴²

321. The destruction of property in Darfur was clearly part of a systematic and widespread attack on the civilian population; it clearly had a detrimental effect on the liberty and livelihood of those people, being deprived of all necessities of life in the villages; and it almost consistently involved the forced displacement of persons. The destruction was clearly carried out “unlawfully and wantonly”, and the fact that the vast majority of villages destroyed belonged to African tribes would also indicate that it is carried out “discriminatorily”. In view of these facts, the Commission is led to the conclusion that this destruction may well amount to the crime of persecution, as a crime against humanity.

(vi.) Forcible transfer of civilian populations

(a.) Factual findings

322. As noted above, the displacement of a very large part of the population of Darfur is a fact beyond dispute. All reports examined by the Commission agree that the displacement has been forced and widespread, affecting more than 1,85 million persons (1,65 million IDPs in Darfur, and more than 200,000 refugees in Chad)¹⁴³. The magnitude of displacement caused at the outset of the crisis is still problematic to determine, as there were practically no assessments or estimates carried out, since there were no humanitarian organizations present in Darfur to conduct such an estimate, nor did the Government put forward figures. Humanitarian access was also seriously hampered until mid-2004

¹⁴⁰ See, e.g., *Kordić and Cerkez*, (ICTY Trial Chamber), February 26, 2001, §. 346-347

¹⁴¹ Judgment of 14 January 2000, §. 631 (see also §. 621)

¹⁴² *Blaskić*, Judgment of 3 March 2000, §. 234.

¹⁴³ Office of UN Deputy Special Representative of the UN Secretary-General for Sudan, & UN Resident and Humanitarian Co-ordinator, *Darfur Humanitarian Profile*, No. 8, November 2004. UNHCR refugee statistics provided by UNHCR Chad.

when the Government finally agreed to a more flexible and expeditious procedure for granting access to humanitarian workers. Most reports argue that the displacement has been a major feature and, it would appear, even an objective for some actors during the conflict.

323. Most official United Nations reports note that the number of displaced persons grew quite dramatically over a relatively short period. For instance, as noted above, the Office of the Deputy Special Representative of the United Nations Secretary-General for the Sudan and United Nations Resident and Humanitarian Co-ordinator in its *Humanitarian Profile of November 2004*, noted that the total number of IDPs exceeded 1,65 million persons. However when the United Nations first began to estimate the number of displaced in September 2003, the number was less than 300,000.¹⁴⁴

324. The Commission and its team witnessed ample evidence of the displacement and conducted a great number of interviews with both IDPs in Darfur and refugees in Chad. In South Darfur the teams visited IDPs in Kalma Camp, Otash, Zalingi, Kass and other sites. In North Darfur the teams interviewed IDPs in Abushouk, Zam Zam and Fatoborno camp near El Fashir, as well as IDPs in Kutum. The West Darfur team interviewed refugees across the border in Chad, including in the Bredjing camps, and also spoke to IDPs in Mornei and Masteri.

325. As noted in the sections on attacks, killings and destruction above, the Commission found that most of the internal displacement as well as the displacement to Chad occurred as a direct result of attacks by Janjaweed and/or Government forces. Following the destruction of their villages, and also as a result of direct threats and other violations committed by the attackers, the villagers decided to leave their homes to seek security in large urban areas inside Darfur, or across the border in Chad. Others fled out of fear of attacks, since they had received information about atrocities in the vicinity. Practically all of the displaced had been unable to return to their villages due to continued insecurity caused by threats from and presence of Janjaweed. The Commission was able to confirm that in the area between Kulbus and Tina most of the villages were deserted, the original inhabitants having fled to Chad or other areas inside the country. Only a few settlements were still inhabited, but by nomadic herders who were observed to be settled around or in the villages. The presence of these herders was also noticed by the Commission around the otherwise deserted villages around Sirba and Abu Surug in West Darfur. The Commission spoke to some displaced persons who had sought to return but had again faced attacks.

326. A typical account involving displacement and the inability to return due to continued threat from the Janjaweed is represented by the following interview with a refugee, a member of the Masaalit tribe, in Chad, originally from a village in the Masteri area:

“The village was attacked by Government soldiers and Janjaweed in October 2003. It was a Wednesday and fifth or sixth day of Ramadan. Women had gone to fetch water and at about 7 AM I saw people approaching the village. It was Government soldiers and Arabs coming on horses and cars. There was a plane behind these people. There were about 200 people with guns. They were shouting “This is not your land”, and were hitting the children with whips. I ran towards my cow and untied it. One of the attackers, who was wearing khaki, saw me from the hillock on which he was standing and shot me. I was wounded in the groin and ran and hid in the cow shed. I came out only after they had left about 15-20 minutes later. People were fleeing from the village. Some people carried me with them to Masteri,

¹⁴⁴ *Darfur Humanitarian Profile, No. 8*, November 2004, available at <http://www.unsudanig.org>

where I was treated in the hospital for my injury. I was later told that my father and younger brother had been killed. Four other people were also killed. I was also told that the soldiers and Janjaweed had looted all the cattle and livestock. 15 days later some people went back to the village, but the Arabs were still around the village. If they saw anyone they whipped the women and killed the men. We first stayed near an IDP Camp in Masteri, and after three months I crossed over to Chad. There were people from 20 villages in the place where we stayed before coming to the Sudan.”

327. The Commission also found that, following displacement, the IDPs who remained inside Darfur were still faced with a number of threats and largely confined to remain inside the camps or urban areas, since venturing outside would involve risks of attacks and other violations, in particular rape, as described below.

328. With regard to specific patterns in the displacement, the Commission notes that it appears that one of the objectives of the displacement was linked to the counter-insurgency policy of the Government, namely to remove the actual or potential support base of the rebels. The displaced population belongs predominantly to the three tribes known to make up the majority in the rebel movements, namely the Masaalit, the Zaghawa and the Fur, who appear to have been systematically targeted and forced off their lands. The areas of origin of the displaced coincide with the traditional homelands of the three tribes, while it is also apparent that other tribes have practically not been affected at all.

329. At the same time, it seems very possible that the Janjaweed, who are composed of tribes traditionally opposing the three displaced tribes, also benefited from this displacement as they would gain access to land. The Commission found evidence indicating that Arab tribes had begun to settle in areas previously inhabited by the displaced, thus further preventing an eventual return of the displaced.

(b) Legal Appraisal

330. Under Article 12 of the International Covenant on Civil and Political Rights “Everyone lawfully within the territory of a State shall, within that territory, have the [...] freedom to choose his residence.” This provision thus protects freedom of movement and the right *not to be displaced arbitrarily*. The Human Rights Committee has clearly enunciated this right in its General Comment No. 27.¹⁴⁵ On several occasions the United Nations Committee on Economic, Social and Cultural Rights has stated that forced evictions are *prima facie* incompatible with the requirements of the Covenant on Economic, Social and Cultural Rights¹⁴⁶.

331. International customary law prohibits the forcible transfer of civilian populations both in time of peace and in time of war. As clarified in Article 7 (2) (d) of the Statute of the International Criminal Court, which may be held to codify customary international law on the matter, “deportation or forcible transfer of population means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law”. The forced dislodgement of civilians from the area where they traditionally and

¹⁴⁵ See Human Rights Committee, General Comment No. 27 of 2 November 1999, UN Doc CCPR/C/21/Rev.1/Add.9

¹⁴⁶ General Comment No. 7, on the right to adequate housing (art. 11.1 of the Covenant): Forced evictions, of 20 May 1997

legally live, resulting from unlawful indiscriminate attacks on their dwellings and the scorching of their villages, falls within the scope of the prohibition at issue.

332. Given the systematic and widespread character of the forced displacement of persons in Darfur, the Commission finds that such action may well amount to a crime against humanity. The requisite subjective element (awareness of the systematic nature of the forced displacement) would be inherent in the fact that such displacement clearly amounted to a Government policy consistently pursued by the relevant Government authorities and the Janjaweed. Furthermore, given the discriminatory character of the displacement, these actions would amount to the crime of persecution as a crime against humanity.

(vii.) Rape and other forms of sexual violence

(a.) Factual findings

333. Various sources reported widespread rape and other serious forms of violence committed against women and girls in all three states of Darfur. According to these sources, the rape of individual victims was often multiple, carried out by more than one man, and accompanied by other severe forms of violence, including beating and whipping. In some cases, women were reportedly raped in public, and in some incidents, the women were further berated and called “slaves” or “Tora Bora.”

334. The following patterns have been reported: First, deliberate aggressions against women and girls, including gang rapes, occurred during the attacks on the villages. Second, women and girls were abducted, held in confinement for several days and repeatedly raped during that time. Third, rape and other forms of sexual violence continued during flight and further displacement, including when women left towns and IDP sites to collect wood or water. In certain areas, rapes also occurred inside towns. Some women and girls became pregnant as a result of rape.

335. In most of the cases, the involvement of Janjaweed was reported. In many cases, the involvement of soldiers was also alleged. There were few cases reported of rebels committing rape and sexual violence.

336. In general, the findings of the Commission confirmed the above reported patterns. However, the Commission considers that it is likely that many cases went unreported due to the sensitivity of the issue and the stigma associated with rape. On their part, the authorities failed to address the allegations of rape adequately or effectively.

1. Rape and other forms of sexual violence committed by the Janjaweed and/or Government soldiers

a. Rape and other forms of sexual violence during attacks on villages

337. According to the information reported by various organizations, cases of rape and sexual violence took place during attacks on villages. In South Darfur, during the two month period from August to September 2004, out of 120 victims of rape treated by medical professionals, at least 100 cases occurred during attacks on the victim's villages. In a survey conducted in the Mornei camp in West Darfur, medical teams treated around 20 victims of sexual violence from April to June 2004. Most of the cases reportedly occurred during attacks on villages. Further cases of rape were reported during the Government and Janjaweed attacks on Tawila and its surrounding villages during the first half of 2004. During March 2004 attacks by the Government troops and Janjaweed on Korma, North Darfur, more than 20 women and young girls were reportedly raped. Further rapes of women were reported during attacks around Miski, Disa and Um Baru in North Darfur; Azerni, Kornoï, Nertete, and Mukjar in West Darfur. It has been also reported that 18 women were raped during the attack on Adwa, South Darfur, at the beginning of December 2004. There are reports that women and girls continue to be subject to sexual violence during attacks on their villages, including the report of a recent attack on Hamada on 13 January 2005 in which women were subjected to rape.

338. The findings of the Commission confirm that rape and sexual abuse were perpetrated during attacks by Janjaweed and soldiers. This included the joint attacks by Government soldiers and Janjaweed attacks on Dobo, North Darfur, around March 2004; Badi, North Darfur, around February 2004; and Adwa, South Darfur, in December 2004. It further includes attacks by soldiers on Kalokitting village, South Darfur and on villages in the Wadi Saleh area, West Darfur, around August 2004, as well as attacks by Janjaweed on Mongue, North Darfur, around August 2004; Gukor, West Darfur at the end of 2004; Kolonga, West Darfur, around March 2004; Goz Badeen, West Darfur, around August 2003; Um Naima, West Darfur, in July 2003; and Nabagai, South Darfur, around March 2004. The Commission interviewed several victims and eye-witnesses who confirmed that during the attacks on Tawila and its surrounding villages in North Darfur, in February and March 2004, rape and other forms of sexual violence committed by Janjaweed were prevalent. The Commission spoke with several victims and eye-witnesses, and conducted on-site examinations which confirmed that many girls were raped by Janjaweed during the attack on Tawila boarding school. The Commission also found that women were gang-raped in public following the joint attack by Government soldiers and Janjaweed on Kanjew village, West Darfur, in January 2004. In another case, the Commission found that the Janjaweed raped five girls in public during the attack on Abdeika, West Darfur, in October 2003.

Case Study: Attack on a school in Tawila, North Darfur

339. One of the victims of rape during the attack on a boarding school in February 2004, a young girl, told the Commission that:

At about 6:00 in the morning, a large number of Janjaweed attacked the school. She knew that they were Janjaweed because of their "red skin", a term she used for Arabs. They were wearing camouflage Government uniforms. They arrived in a pickup truck of the same colour as the uniforms they were wearing. On the day before, she noticed that the Government soldiers had moved in position to surround the school. When they attacked the boarding house, they pointed their guns at the girls and forced them to strip naked, took their money, valuables and all of their bedding. There were around 110 girls at the boarding school. All the events occurred in the sleeping quarters of the school.

The victim was taken from the group, blindfolded, pushed down to the ground on her back and raped. She was held by her arms and legs. Her legs were forced and held apart. She was raped twice. She confirmed that penetration occurred. The rape lasted for about one hour. Nothing was said by the perpetrators during the rape. She heard other girls screaming and

thought that they were also being raped. After the rape, the Janjaweed started burning and looting. (She confirmed the presence of the military in the area, as she had seen military helicopters used by the army on the same day.)

The victim became pregnant as a result of this rape and later gave birth to a child.

Case Study: Attack on Terga, West Darfur

340. The Commission interviewed another victim who provided information about multiple rapes of women during an attack on Terga, West Darfur. This was how she described the attack and what followed:

The village of Terga was attacked in January 2003. A plane bombed the village and then about 40 cars and men on horses arrived. They covered the entire area around Terga. The attackers in the cars and on the horses were shooting the villagers. They were stealing from the houses. Four young boys were executed in front of the villagers. The attack was conducted mainly by the military. The Arab people did the stealing. Soldiers also committed rapes together with the Janjaweed.

When the attack occurred, the women ran to a *wadi*, where the army surrounded them. The victim stated that she knew 19 of the women who were raped but that there were many more. She believed there were around 50 in total. The young girls were raped first. The victim was raped by nine men. Other women were also raped by many men. The women were kept for six days at the wadi.

b. Abductions and sexual slavery

341. Other sources reported that women and girls were abducted, held in confinement for several days and repeatedly raped by Janjaweed and soldiers in villages under attack, military camps and hideouts. Further, torture was reportedly used to prevent women from escaping. In March 2004, Janjaweed and 150 soldiers reportedly abducted and raped 16 young girls in Kutum, North Darfur. During the attacks on Tawila and its surrounding villages in North Darfur in February 2004, around 35 female students were allegedly abducted and raped by Janjaweed. Further abductions of women were reported in the area surrounding El Geneina, West Darfur. Alarming reports were received of mass rape and sexual violence against women and girls who were confined in Mukjar, West Darfur and Kailek, South Darfur. Additional abductions and rape of women were reported, amongst others, in the surroundings of Disa and Silea in West Darfur.

342. The Commission's findings confirmed the above reported pattern. For instance, the Commission found that women who went to market or were in search of water in Tarne, North Darfur, were abducted, held for two to three days and raped by members of the military around March 2003. Notably, the Government of Sudan had established a large military camp in the vicinity. During the Janjaweed attack on Mengarassa village, West Darfur, in November 2003, twenty girls were abducted and taken to the 'Ammar' camp. The Commission further found that twenty-one women were abducted during the joint Government armed forces and Janjaweed attack on Kanjew, West Darfur, in January 2004. The women were held for three months by Janjaweed and some of them became pregnant as a result of rape during their confinement. During the attack on Mallaga village, West Darfur, in October 2004, the Janjaweed abducted four girls, one of them only twelve years old. The girls were held for three days, raped and then released. Women were also abducted and raped in three Janjaweed camps following the attacks on Korma, North Darfur, in March 2003. The Commission also confirmed that following the attack on Tawila in February 2004 a group of around 30 female students was abducted by Janjaweed and

held in an encampment where they were repeatedly raped. Several other women from villages surrounding Tawila were also brought to this camp by the Janjaweed after their abduction following attacks on their villages.

Case study: Kailek, South Darfur

343. The Commission interviewed several eyewitnesses who confirmed that following the joint attacks by Government soldiers and Janjaweed in the area, up to 30,000 people were confined in Kailek, South Darfur, for about 50 days. Women and children were separated from the men, confined in an area around the Mosque, and later taken away by their captors to be raped. They were subjected to gang rapes which lasted for protracted periods of time. Girls as young as 10 years old were raped.

344. One of the female witnesses described the terror of confinement in the area designated by captors for women and children in Kailek as follows:

“We stayed in one place, we were not allowed to move around. The old women were allowed to go and get water, and also to go and get food. We were forced to urinate in front of everybody. We were afraid to use the toilet at night because we were surrounded by the attackers, and they were on the look-out for women to rape.”

After being raped, some of the women did not have their clothes returned to them and they were forced to remain naked. An independent source, who witnessed the situation in Kailek told the Commission: “There were more than 80 cases of rape reported to us by the women and children kept in the walled area. We also found four women with no clothes. They covered themselves with a grass mat and were imploring us not to remove it. They said that if they needed water or food, one of them had to borrow clothes from the other women to go and fetch water or food.”

Anyone who attempted to assist the victims was either beaten or killed. On one occasion, a husband attempted to assist his wife. He was so severely beaten that he is now permanently paralysed and is in Khartoum hospital. These testimonies are fully corroborated by the entire body of material collected by the Commission, including information obtained through independent observers who witnessed the situation of the women in Kailek.

Case study: Wadi Tina, North Darfur

345. The Commission interviewed a victim who described how she and her six sisters were abducted and held in confinement at the Janjaweed camp in Wadi Tina, after the attack on Tawila and the surrounding villages. The victim, who has been raped 14 times over the period of one week provided the following information:

At about 6h00 in the morning on 7 January 2003, she was at her home in the village of Tarna. Around 3,000 Janjaweed riding horses and camels attacked the village. Some of them were in vehicles. Some were wearing khaki uniforms and some were wearing civilian clothing with white scarves on their heads. There were around 50 Land Cruisers and pick-up vehicles. All of the vehicles

had guns on them. The men on the vehicles were wearing army uniforms. They were wearing the same uniforms as the Janjaweed were wearing. They were soldiers of the Sudanese army.

The victim saw women were being taken, people being killed, cattle being stolen, and food being burnt. She further described the following: “Ten Janjaweed came into my house. They took me and my six sisters who were 15, 16, 17, 19, 20 and 24 years old. They said ‘why are you staying here, you slaves.’ We did not reply. They were armed and all of them were pointing their guns at us. While they were in our house, they shot my two brothers. They took us outside and beat us with the leather straps which they use to control the camels. The beating lasted for 20 minutes.

After being beaten, we were taken to Wadi Tina. They made us walk while they rode their camels. It took us three hours to get there. During this time they beat us and threatened to kill us. When we arrived at Wadi Tina, I saw at least 95 women there. We were left in the Wadi with a large group of women and were guarded by at least 100 armed Janjaweed. All the women were naked. Soon after our arrival we were forced at gun point to take off our clothing.

Around 8h00 in the morning on the second day at the Wadi, I was raped for the first time. A very large group of Janjaweed arrived at the Wadi. They selected a woman each and raped them. Over a period of a week, I was raped 14 times by different Janjaweed. I told them to stop. They said ‘you are women of Tora Bora and we will not stop this.’ We were called slaves and frequently beaten with leather straps, punched and slapped. I feared for my life if I do not have sex with them. We were humiliated in front of other women and were forced to have sex in front of them. Other Janjaweed were watching”

After a week, she was released with four other girls and went back to Tarna village. She has not seen her sisters since. She did not know the identity of any other women at the Wadi but stated that three women died there as a result of being raped. The victim did not know the identity of the perpetrators.

c. Rape and other forms of sexual violence during flight and further displacement

346. Rape and other forms of sexual abuse were widely reported to continue during flight and further displacement, including outside as well as inside of various IDP sites. The impact of the violence committed outside the IDP sites is exacerbated by the fact that women and their families depended on the collection of firewood for their livelihood and survival. In most of the cases, it was the women and girls who went outside the camps to search for firewood and water, since they had a better chance to survive attacks than the men and boys who risked being killed. According to one report, a family from Magarsa, West Darfur, abandoned their house in February 2004 because of the conflict. The father of the family stated that during the attempt to flee from their home, they had encountered six Arab men who raped his 25 year old daughter in front of him, his wife and the young children. He was unable to defend his daughter as the men threatened him with a weapon. According to another report, two women were reportedly raped in the IDP camp in Kassab, North Darfur, in June 2004. In April 2004, a group of 40 IDP women went to collect wood outside of Mukjar, West Darfur and was reportedly attacked by six armed Janjaweed. Some women were badly beaten and at least one woman was raped by four Janjaweed. During the first week of July 2004, a medical team in Mukjar treated 15 women for serious injuries sustained in eight separate incidents. In two of these incidents, beatings were followed by rape. On 22 July 2004, around thirteen women were reportedly raped by Janjaweed when searching for firewood around the IDP camp near Kass, South Darfur. In July 2004, around 20 women were reportedly raped by Janjaweed when searching for firewood around the Sisi camp, West Darfur. Further rapes of women venturing outside IDPs locations, such as Abu Shouk in North Darfur, Ardamata,

Azarni, Garsila, Mornei, Krinding and Riyadh in West Darfur, and Al Jeer, Derej, Kalma, Kass and Otash in South Darfur have been reported.

347. The Commission's findings confirmed that rape and sexual violence continue to be perpetrated against women and girls during flight and in areas of displacement. Rape by Janjaweed and Government soldiers surrounding IDP sites have occurred in sufficient numbers to instil fear of such incidents amongst women and girls, and has led to their virtual confinement inside these sites. The Commission interviewed victims who have been raped and sexually abused outside the Abu Shouk and Zam Zam camps in North Darfur, Habillah, Krinding, Masteri, Mornei and Sisi camps in West Darfur, and Kalma and Derej camps in South Darfur.

348. In one instance, the Commission interviewed two young girls, 12 and 14 years old, who had gone to collect wood with another five children in November 2004 outside the Abu Shouk camp. The soldiers raped the two girls, called the children daughters and sons of "Tora Bora," beat the other children and threatened to kill them. Following the incident, the children went to complain to a nearby military camp and described the perpetrators. The two girls went for a medical examination in the El Fashir hospital and an official complaint was submitted to the local police. The initial response of the local authorities was inadequate. Upon the insistence of the Commission, the local police investigated the incident and informed the Commission that nine suspects were detained and that the case is currently with a prosecutor. Furthermore, the Commission found that there was a prevalent sense of insecurity among the IDPs in Kabkabiya, North Darfur. In particular, the women and girls collecting firewood feared leaving Kabkabiya as they had been subjected to rape and sexual violence by the Janjaweed. Even if the incidents had been reported to the police, the perpetrators appeared to enjoy impunity and the attacks against women continued. The Commission also interviewed four young women who related two incidents that occurred in June 2004 during which they were detained on the road from the Kutum market, North Darfur, while they were returning back to their villages. In each incident, women were forced to strip at gunpoint, raped by Janjaweed and later were left naked on the road. The circumstances of the crime indicate that the same perpetrators committed the crimes.

Case study: Flight from Kalokitting, South Darfur

349. The Commission interviewed several eyewitnesses in relation to rapes of three women, one of whom was killed, while fleeing the attack on their village Kalokitting, South Darfur, around March 2004. The Commission received the following information regarding this incident:

The village was attacked around four in the morning. Men with weapons, wearing khaki and covering their faces, entered houses. There were many weapons, including Kalashnikov, Dushka, and GM, as well as green vehicles. The army was there and everybody was wearing khaki. There were around two to three white and green planes, which came very low. One white plane was attacking. One of the victims stated as follows: "It was around 04h00 when I heard the shooting. Three of us ran together. We were neighbours. Then we realised that we did not bring our gold. When we returned, we saw soldiers. They said stop, stop. They were several. The first gave his weapon to his friend and said to me to lie down. He pulled me and threw me on the floor. He took off his trousers. He ripped my dress and there was one person holding my hands. Then he "entered" [a word for intercourse]. Then the second "entered", and the third "entered." I could not stand afterwards. There was another girl. When he said lie

down, she said no. Kill me. She was young. She was a virgin. She was engaged. He killed her.” The third woman who was also there stated that she was raped in the same way.

Case study: outside the Zam Zam IDP camp in North Darfur

350. The Commission also interviewed eyewitnesses of another incident that involved groups of women who went to sell firewood in the market in El Fashir around October 2004. The Commission obtained the following information:

Three separate groups of women were returning in the evening from El Fashir to the Zam Zam camp in North Darfur. One witness was in the first group, which was stopped at a checkpoint outside El Fashir, held there for some time, and then allowed to proceed. The witness left with her group which included four other women and two children, and headed towards the Zam Zam camp. Approximately, two kilometres after the checkpoint, around 20 soldiers dressed in camouflage uniforms drove up to the group of women and ordered them to stop, while firing some gunshots. The women were told to get down off their donkeys and lie on the ground. The witness was holding her sister-in-law's one year old child who started to cry. One of the soldiers grabbed the child and threw it away on the side of the road. When one of the older women in the group asked the soldier why did he do that, he kicked her in the head. Other soldiers started to beat the other four women, including the witness. Some soldiers held one of the other women down and started raping her. At the same time, the witness was held down on the ground by soldiers who also pulled her clothing over her head. Four soldiers then had vaginal intercourse with her, one after the other. At the time this was occurring, one of the soldiers said: “You are the women of the war.” The other three women, including the older one, were also raped in this incident. The soldiers were about finished raping the five women, when the second group of women who went to El Fashir to sell wood arrived at the same location. The first group of women was allowed to leave. The witness heard that the women in the second group were also raped.

Case study: outside the Krinding IDP camp, West Darfur

351. The Commission interviewed two sisters who were raped while cutting firewood in Gribi, outside the Krinding IDP camp, West Darfur, around September 2004. The Commission obtained the following credible information:

Three months before Ramadan, a group of women, three of them young, were cutting firewood in Gribi, outside the Krinding IDP camp where they have been living for the past ten months. Around 11h00, four Arab men came to them and told them to sit down. The older man was wearing khaki and three younger men were wearing Jallabia. The older man hit the witness, who is 17 years old, six times on her back and eight times on her legs. She still had marks from the incident [which were verified by the Commission]. The older man then took the witness away from the other girls and raped her. The three young men were raping other girls. The witness stated the following: “He took off only my underwear. He took his penis out of his pants. He did not say anything, he just kept beating me while he raped me. After I was so hurt and tired, I could not move and others took me to the doctor in Geneina big hospital. I was bleeding a little. The doctor did a report that I was raped. He also told me that I have something

broken inside. My eight year old sister was also with me that day and was also raped but not beaten. I have injuries on my back and leg.”

352. In conclusion, while the Commission was not in a position to ascertain the precise number of rapes perpetrated, it found that a sufficient number of such crimes have been committed during the attacks and in the aftermath of the attacks on villages, that these attacks have created fear among women and girls which has forced them to stay in or to return to their villages of origin, and that this can be taken as one of the factors that led to their displacement. Particularly outrageous cases of abductions, confinement and multiple rapes over protracted periods of time have further contributed to spreading fear. Similarly, the Commission found sufficient evidence that rape and sexual violence continued to be systematically perpetrated against women during their displacement, so as to perpetuate the feeling of insecurity among them and fear of leaving the IDP sites.

353. The above patterns appear to indicate that rape and sexual violence have been used by the Janjaweed and Government soldiers (or at least with their complicity) as a deliberate strategy with a view to achieve certain objectives, including terrorizing the population, ensuring control over the movement of the IDP population and perpetuating its displacement. Cases like Kailek demonstrate that rape was used as a means to demoralize and humiliate the population.

2. Rape and other forms of sexual violence committed by rebels

354. Fewer cases of rape and sexual violence were reportedly committed by the rebels. In November 2004, the SLA allegedly hijacked and for three days held five girls from the Gimir tribe near Kulbus, West Darfur. During these three days, four of the girls were allegedly raped and one was sexually abused. Furthermore, there have been allegations that around 60 women and girls from the Beni Mansour tribe were allegedly raped or assaulted by rebels in the Malam area between February and July 2004.

355. The Commission was unable to investigate the above reports. However, during its own investigations of incidents involving rebels, the Commission did not find any cases of rape committed by the rebels.

(b.) Legal Appraisal

356. Cruel, inhuman or degrading treatment or punishment (as well as torture) are prohibited by several international human rights instruments to which Sudan is a party, including the International Covenant on Civil and Political Rights,¹⁴⁷ the Convention on the Rights of the Child,¹⁴⁸ and the African Charter on Human and Peoples' Rights.¹⁴⁹ The Convention on the Rights of the Child further requires “State Parties to undertake to protect the child from all forms of sexual exploitation and sexual

¹⁴⁷ Article 7.

¹⁴⁸ Article 37.

¹⁴⁹ Article 5.

abuse.”¹⁵⁰ Furthermore, the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, including sexual and reproductive health is guaranteed by the International Covenant on Economic, Social and Cultural Rights.¹⁵¹

357. Common article 3 to the Geneva Conventions binds all parties to the conflict and, inter alia, prohibits “violence to life and person, in particular... cruel treatment and torture”¹⁵² and “outrages upon personal dignity, in particular, humiliating and degrading treatment.”¹⁵³ While Sudan is not a party to the Additional Protocol II to the Geneva Conventions, some of its provisions constitute customary international law binding on all parties to the conflict. This includes prohibition of “rape, enforced prostitution and any form of indecent assault,”¹⁵⁴ and “slavery”¹⁵⁵.

358. Rape may be either a war crime, when committed in time of international or internal armed conflict, or a crime against humanity (whether perpetrated in time of war or peace), if it is part of a widespread or systematic attack on civilians; it may also constitute genocide. Rape has been defined in international case law (*Akayesu*, at § 597-598; *Delalić and others*, at § 479; *Furundžija* at §185, and *Kunarac and others* (at §§ 438-60), in the judgment of the European Court of Human Rights in *M.C. v. Bulgaria* (judgment of 4 December 2003, at §§ 88-108 and 148-187) and in the “Elements of Crimes” adopted by the International Criminal Court. In short, rape is any physical invasion of a sexual nature perpetrated without the consent of the victim, that is by force or coercion, such as that caused by fear of violence, duress, detention or by taking advantage of a coercive environment.¹⁵⁶

359. In addition to rape, international law also prohibits and criminalizes, as either a war crime or a crime against humanity, any serious act of *gender violence* causing the victim to engage in an act of sexual nature by force, or by threat of force or coercion against the victim or another person, or by taking advantage of a coercive environment. The rationale for the criminalization of gender violence even when it does not take the form of coercive penetration of the human body is that such acts constitute an extreme form of humiliation and debasement of the victim, contrary to the most elementary principles of respect for human dignity.

360. It is apparent from the information collected and verified by the Commission that rape or other forms of sexual violence committed by the Janjaweed and Government soldiers in Darfur was widespread and systematic and may thus well amount to a *crime against humanity*. The awareness of the perpetrators that their violent acts were part of a systematic attack on civilians may well be inferred from, among other things, the fact that they were cognizant that they would in fact enjoy impunity. The Commission finds that the crimes of sexual violence committed in Darfur may amount to the crime of

¹⁵⁰ Article 34(a).

¹⁵¹ Article 12.

¹⁵² Article 3(1)(a).

¹⁵³ Article 3(1)(c).

¹⁵⁴ Article 4(2)(e).

¹⁵⁵ Article 4(2)(f).

¹⁵⁶ See *Akayesu*, at §§ 597-598, 686-688: “[R]ape is a form of aggression and . . . the central elements of the crime of rape cannot be captured in a mechanical description of object and body parts . . . Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity. . . .” “The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.” “Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.”

rape as a crime against humanity, and it further finds that some in some instances the crimes committed in Darfur may amount to the crime of sexual slavery as a crime against humanity. Furthermore, the Commission finds that the fact that rape and other forms of sexual violence were conducted mainly against three “African” tribes is indicative of the discriminatory intent of the perpetrators. The Commission therefore finds that the elements of persecution as a crime against humanity may also be present.

361. The Commission, as noted, did not find any case of rape committed by the rebels. However, if rapes by rebel actors did in fact did take place, they would constitute war crimes.

(viii.) Torture, outrages upon personal dignity and cruel, inhuman or degrading treatment.

(a.) Factual findings

362. Incidence of torture and inhuman and degrading treatment of civilians in Darfur has been reported by several organizations. Rape, burning and beating, stripping women of their clothes, verbal abuse and humiliation of civilians were reported to have occurred frequently during attacks by the Janjaweed and the Government forces. Cruel and inhuman methods of killings, such as two cases of killing by crucifixion were reported by one organization. Acts of torture and cruel, inhuman and degrading treatment of civilians placed under forced confinement by Janjaweed and Government forces following attacks on villages were also reported. Some sources have reported torture of captured enemy combatants by both the Government and the rebels.

363. Some organizations have also reported cases of torture of individuals, arrested in connection with the conflict in Darfur, during their detention by officials of the National Intelligence and Security Services. It was reported that physical and mental suffering was systematically inflicted on the detainees as punishment for their suspected affiliation with or support of rebels, and with the purpose of obtaining information or confessions.

1. Torture and other cruel, inhuman or degrading treatment committed by the Government of the Sudan and/or Janjaweed

(a.) Torture and other cruel, inhuman or degrading treatment during attacks

364. The Commission has established facts through its own investigations that confirm torture, cruel and degrading treatment, and inhumane acts committed as a part of the systematic and widespread attacks directed at the civilian population conducted by the Janjaweed and Government forces. Although Government forces did not generally participate directly in the commission of such acts, the Janjaweed committed the acts mostly in their presence, under their protection and with their acquiescence.

365. Inhumane acts such as throwing people, including children, into fire were committed by the Janjaweed during several attacks. Five such incidents were reported from Ubatete, Tarabebe, Tanako,

Mangarsa and Kanjew villages in West Darfur. In most of these incidents victims were burnt to death. Extreme mental torture was inflicted on many mothers who saw their children burn alive after they were snatched from their arms by the Janjaweed and thrown into the fire. Houses were set on fire with the inhabitants still inside. Most of the victims in such incidents were children. Inhumane forms of killings used by the Janjaweed include crucifixion of victims during the attack on the village of Hashab in North Darfur in January 2004. In one case reported from Deleba in West Darfur, the victim was beaten to death.

366. The persons under attack, predominantly from African tribes, were commonly subjected to beatings and whipping by the Janjaweed. These included women and young girls. In many incidents victims were subjected to severe beatings as a form of torture. The Commission has seen several victims who still bear scars of these beatings, and some who suffered permanent physical damage as a result. Stripping women of their clothes and the use of derogatory language as a means of humiliation and mental torture were also common to many incidents.

367. Particularly shocking were the acts of torture and cruel and degrading treatment that accompanied other serious crimes committed by Government forces and the Janjaweed against the civilian population during the Kailek incident in South Darfur. During the attack as well as the subsequent forced confinement of the population, several persons were subjected to severe torture in order to extract information about rebels, as punishment or to terrorize the people. The Commission has heard credible accounts that those captured by the assailants were dragged along the ground by horses and camels from a noose placed around their necks. Witnesses described how a young man's eyes were gouged out. Once blinded, he was forced to run and then shot dead. The victim population was watched over by guards who used the whips they carried to control and humiliate them. Several witnesses have testified that abusive and insulting terms were used against the detainees, often calling them "slaves". Their suffering was compounded by the scarcity of food and water, and the unhygienic conditions in which they were confined in the small, controlled spaces, within which they were forced to relieve themselves, because of restrictions on their movements. Several hundred children are reported to have died during the internment from an outbreak of disease.

(b) Torture and other cruel, inhuman or degrading treatment of detainees by the National Security and Intelligence Service and by the Military Intelligence.

368. The Commission gathered substantial evidence of the systematic use of torture by both the National Security and Intelligence Service as well as the Military Intelligence against detainees in their custody. In addition to other reliable information, the Commission has recorded testimony of those arrested in relation to the conflict in Darfur and currently under detention in Khartoum regarding torture and inhuman and degrading treatment to which they have been subjected. These include detainees kept by the National Security and Intelligence Service in a secret place of detention in Khartoum which the Commission discovered and inspected.

369. The Commission heard shocking accounts of physical and mental torture and cruel and degrading treatment to which these detainees had been subjected, and the inhuman conditions of detention in which they were kept. Most of them were repeatedly beaten, whipped, slapped and, in one case, kept under the scorching sun for four days. Three of the persons were suspended from the ceiling and beaten, one of them continuously for ten days. The Commission also met with another individual who had been

tortured by the National Security and Intelligence Service for three days after his arrest from an IDP camp in West Darfur. He stated that he had been suspended from the ceiling and beaten repeatedly. The Commission saw the scars left on the bodies of these detainees and prisoners as signs of the torture inflicted on them. In most of these cases torture, including threats to life and physical integrity, were used to coerce information or extract confessions. They were blindfolded with their hands tied whenever they were transported from one place of detention to another, and sometimes food was denied to them for long periods of time.

370. The detainees kept in the secret place of detention, mentioned above, had been confined in cells with barred windows 24 hours a day, without any outdoor exercise (the cells were occupied by a varying number of detainees, ranging from 1 to 11). The detainees were not allowed regularly to use an outside toilet, situated on the same floor, and were thus, among other things, forced to use bottles to urinate inside their cells. Proper medical treatment or diet had not been made available to some of those who were suffering from serious health problems.

371. The Commission was also able to visit a Military Intelligence Detention Unit situated within the Army Headquarters in Khartoum. The Commission had been granted access to visit some military officers held in a section of the detention centre, but it soon discovered the existence of another section in the same detention centre, where no less than 40 detainees were held, most of them soldiers and non-commissioned officers (corporal, sergeant, etc). All were held in custody in connection with the conflict in Darfur (some were from Darfur, others had allegedly been arrested because they had talked critically of the Government's policy in Darfur). The detainees were held in 20 cells (a 21st cell was empty) facing a corridor in a closed area. The cells are very cramped (their size being of about 1m by 2 m., or 1 m by 2.5-3m), with very high ceilings and some narrow openings at the top. Thirteen cells contained two detainees each, while 7 cells had only one detainee each. Most detainees were soldiers but a few cells contained soldiers and civilians. The cells have no lights, and the metal 'window' of the door is kept shut for most of the day, only to be opened for 10-15 minutes during prayer time (five times a day). The detainees therefore live in almost complete darkness for most of the day and night, and for periods reaching months. The cells, with concrete walls and floor, often contain no mattress or blanket, but only a mat. No exercise in the open air is allowed to the detainees. They hardly ever go out of their cell except for relieving themselves in four latrines at the end of the corridor. A urine bottle is hung on the door knob. The detainees had been given soap and/or tooth paste the day of the visit of the Commission, for the first time in months.¹⁵⁷

372. One detainee showed some scars on his back and arm, the result of beatings. Other witnesses mentioned that they often heard screams coming from that other, secret, section of the Centre.

373. Other detainees, mainly officers, were held in larger cells, and seemed to have access to a small prayer area. Similarly to what has been described above, none of the detainees met at the Military Intelligence Detention Centre had been provided with any required medical treatment. Their families do not know of their whereabouts.

¹⁵⁷ At the end of the visit of this area of the Detention Centre, an officer that accompanied the Commission when it did not interview inmates in private, insisted that Commissioners should visit a new sets of rooms ready to be used with a view to replacing in part the sets of tiny cells. The Commission visited this new area, consisting of relatively spacious rooms where up to 19 detainees could be held, and expressed the hope that the transfer should occur as soon as possible, so that at least 19 detainees of the 31 currently held in the tiny cells could be accommodated there.

2. Torture and other cruel, inhuman or degrading treatment committed by the rebels

374. As noted, some sources have reported torture of captured enemy combatants by the rebels. The Commission, however obtained no information indicating that this had taken place.

(b.) Legal appraisal

375. A number of international human rights instruments prohibit the use of torture. The Universal Declaration of Human Rights, the ICCPR, the Convention on the Rights of the Child and the African Charter on Human and Peoples' Rights contain provisions prohibiting torture. The Sudan is party to the last three instruments, and as such is legally bound by them. The prohibition contained in the above mentioned international instruments is absolute and non-derogable in any circumstances. Furthermore, under the International Covenant on Civil and Political Rights, even in situation of public emergency no derogation from the prohibition of the use of torture can be made.

376. In addition, the prohibition on torture is also considered a peremptory norm of international law, or in other words a norm of *jus cogens*. As such it cannot be derogated from by contrary international agreement and *a fortiori* by a national law. That the prohibition of torture in customary international law has such a legal nature was held by the ICTY in *Furundžija* (at §144, and § 153-157), by the House of Lords in *Pinochet*,¹⁵⁸ and also affirmed by the United Nations Special Rapporteur for Torture¹⁵⁹

377. Torture and cruel treatment are prohibited under common article 3 of the Geneva Conventions. Torture is absolutely prohibited by the Geneva Conventions, both in internal and international armed conflicts.

378. In addition to torture practised in the form of beating and severely and inhumanely ill-treating detainees, mentioned above, the Commission considers, that conditions in the Military Intelligence Detention Centre witnessed in Khartoum described above amounts to torture. To compel persons in military custody to live 24 hours a day in extremely small cells similar to cages, in pitch dark, and no outdoor exercise at all, in itself amounts to torture and thus constitutes a serious violation of international human rights and humanitarian law

379. In connection with the conflict in Darfur, torture has been carried out on such a large scale and in such widespread and systematic manner not only during attacks on the civilian population, where it was inextricably linked with these attacks, but also in detention centres under the authority of the National Security and Intelligence Service and the Military Intelligence. The Commission finds that the occurrences of torture may therefore amount to a *crime against humanity* and, given the discriminatory nature of the attacks, may also involve the crime of *persecution* as a crime against humanity.

¹⁵⁸ *Pinochet* (Third), speeches by Lord Browne Wilkinson (in 38 *International Legal Materials*, 1999, at p. 589), Lord Hope of Craighead (ibid., p. 626), Lord Millet (ibid, p. 649-50).

¹⁵⁹ E/CN.4/1986/15, §3.

(ix.) Plunder

(a.) Factual findings

380. The Commission has noted that the majority of the reports it has examined provide very similar accounts of systematic and widespread looting and plunder of the property of civilians by Janjaweed, in particular in the context of attacks as described above. These reports refer to witness accounts about Arabs or Janjaweed who attack, often with the support of Government troops. Looting itself is generally ascribed only to the Janjaweed, Arab or unspecified “men in uniform”, while there are no incidents of looting clearly reported to have been committed by Government forces alone. The majority of the reported incidents involve the looting of cattle, food and other private property and occur during attacks on villages which often involve the killing of civilians and the destruction of the villages themselves. The looting of the property of IDPs in places to which they have been displaced has also been recorded, involving the looting of plastic sheeting, food and other household items by Janjaweed.

381. In addition, a few incidents of looting have been reported by other sources where victims have identified the perpetrators as the SLM/A, JEM or simply as rebels. These incidents have mainly been directed against vehicles, either individual vehicles or vehicles in a convoy, and have mostly involved the looting of food and supplies. In a very few cases it was also reported that the rebels committed acts of looting during an attack on a village, in particular in West Darfur. There were a number of looting incidents of humanitarian vehicles and other type of banditry where the perpetrators were not identified by witnesses.

382. In the incidents reported, there seems to be no other specific geographic or temporal pattern connected to the looting of property, other than the patterns identified under the sections dealing with the crimes of destruction of villages and attacks, namely that the victims predominantly belong to the Fur, Massalit, Zaghawa and other African tribes.

383. During its missions to the Sudan and Darfur, the Commission’s findings were very much in conformity with the reports examined by the Commission. Practically all of the incidents investigated by the Commission involved the looting of private property of civilians by Janjaweed in the context of combined Janjaweed and Government attacks against villages.

384. Cases of armed banditry were also reported, involving the looting of civilians in vehicles and other civilian targets. Most often, the perpetrators were unidentified.

385. A particular pattern recorded by the Commission was the fact that the IDPs and refugees interviewed would place great emphasis on the crime of looting, and explain that the Janjaweed had taken everything these persons had owned, involving all goods necessary to sustain life in the difficult conditions in Darfur, including pans, cups and clothes, as well as livestock, representing the key source of income of the affected people. Often, the IDPs and refugees had compiled detailed lists of the items looted which were presented to the Commission.

386. As examples of the witness testimonies collected by the Commission, the following two incidents are typical:

On Saturday 27 December 2003, in the village of Domai Tamait in South Darfur: “We were attacked in the early morning around the time of morning prayer which is around 05.30. [witness shows bullet wound in leg]. The attackers were on horses and camels some with uniforms. They killed 17 people, including 2 women and 2 boys, and 18 persons were injured. They looted about 1,150 cattle and about 800 sheep and goats”.

In March 2004, in Dobo village in North Darfur: “They started burning everything and stealing our belongings. We were attacked the same day the plane came, they bombed 5 cars and the Janjaweed looted the village. They took away our cattle and belongings”.

387. The Commission also investigated looting in the context of attacks by Janjaweed during August and September 2003, in the Masteri locality (West Darfur), where 47 villages had been attacked and Janjaweed had committed acts of looting. In one of the incidents, in Korcha - Turgu village, early in the morning, sometime in August 2003, hundreds of Janjaweed Arabs attacked the village. They were wearing green army uniforms and riding horses and camels. They surrounded the village and started shooting at men and boys. Six (6) men were killed and buried in single graves. The day before the attack a helicopter and an Antonov were seen flying above the village. The attackers stole all livestock. The village was burned and people sought refuge in Masteri town.

388. The Commission also found cases of looting committed by the rebel movements. In particular during attacks against police stations and other Government installations, where rebels looted arms from the Government. Usually these attacks were specifically targeted at the Government installations so as to obtain weapons and ammunition, which the rebels needed in their fight. The rebels themselves confirmed this practice to the Commission. In addition, the Commission found a few cases of looting of private property committed by the rebels. For instance, in October and December 2003 the JEM attacked Kulbus in West Darfur as described above, where they looted shops in the market. A number of cases of looting of humanitarian convoys were also noted by the Commission, although it was not possible to confirm the identity of the perpetrators.

389. In conclusion, and in conformity with most of the incidents reported by other sources, the Commission found that the majority of cases involving looting were carried out by the Janjaweed and in a few cases by the Government forces. Looting was mainly carried out against African tribes and usually targeted property necessary for the survival and livelihood of these tribes. The rebel movements also engaged in acts of looting, mainly targeting police stations so as to obtain weapons; on a few occasions the rebels also targeted private property.

(b.) Legal Appraisal

390. As noted above under customary international law the crime of plunder or pillage is a war crime. It consists of depriving the owner, without his or her consent, of his or her property in the course of an internal or international armed conflict, and appropriating such goods or assets for private or personal use, with the criminal intent of depriving the owner of his or her property.

391. The pillage of villages and the appropriation of livestock, crops, household goods and other personal belongings of the inhabitants by the Government forces or the militias under their control no doubt amounts to a *war crime*.

392. Based on the information available to the Commission, it would appear that the looting carried out mainly by the Janjaweed in the context of attacks against villages, has been conducted on a large scale and has been condoned by the Government of the Sudan through the propagation of a culture of impunity and the direct support of the Janjaweed.

393. In addition, as is the case with the destruction of villages, the Commission finds that pillaging, being conducted on a systematic as well as widespread basis mainly against African tribes, was discriminatory and calculated to bring about the destruction of livelihoods and the means of survival of the affected populations. Hence, it could very well constitute a form of *persecution as a crime against humanity*.

394. The Commission also finds it plausible that the *rebel movements* are responsible for the commission of the war crime of plunder, albeit on a limited scale.

(x.) Unlawful confinement, *incommunicado* detentions and enforced disappearances

(a.) Factual findings

395. Reports from other sources reviewed by the Commission contained information on abductions, unlawful confinement and detention of civilians occurring during and after attacks by the Janjaweed or Government forces, as well as by the rebels. Many of the reports pertain to the abduction of women. While incidents were reported, very few of the accounts contained much detail.

396. However, through its own investigations the Commission was able to gather more substantial information on enforced disappearances. This information confirms the abduction and enforced disappearances conducted by Janjaweed following attacks on villages. In many of the cases women and men were abducted or disappeared, many without any trace. The Commission has also established that Government armed forces, the state security apparatus and military intelligence are responsible for unlawful confinement and detention of civilians. Furthermore, the Commission has received credible information which demonstrates a pattern of unlawful confinement of individuals within IDP camps. Many IDPs with whom the Commission met were unable to move even a few meters from their camp for fear of attacks, including rape and killing, by Janjaweed. The Commission heard credible testimonies from women who had been attacked, beaten and in some cases raped, while fetching firewood or water outside the camp. In some cases, IDPs were prevented from accessing their cattle and crops nearby, due to the threat of attacks outside the camps by Janjaweed. This pattern is reflected in the following witness testimony from Fato Barno, North Darfur:

The people from all surrounding villages of Fato Barno are now living in Fato Barno IDP camp in very distressed condition. We want to go back to villages and live there. But the villages are not safe to live. The Janjaweed are still very active on the outskirts of our IDP camp. The people living in our IDP camp often face attack from Janjaweed when they go out of the camp. There is

a Government police camp nearby our camp but the police have failed to protect our people from the Janjaweed attack. Two months ago, Janjaweed attacked my uncle and his sister when they went outside Fato Barno IDP camp towards the village of Krene. Janjaweed killed my uncle's sister and shot my uncle in his right shoulder and right leg.

397. Abduction of women by Janjaweed was also found to be a part of some of the incidents of attacks investigated by the Commission, including in Tawila, North Darfur, and Mallaga, Mangarsa and Kanjew in West Darfur. Those who escaped or were eventually released were able to relate the enforced confinement, sexual slavery, rape and torture that they had to suffer. As a general pattern, women were forcibly taken from their villages and kept at Janjaweed camps for a period of time, some times as long as three months, before they were either released or managed to escape captivity.

398. In some incidents of attacks by Janjaweed men and boys were also abducted and, in many of these cases are still missing. The Commission received evidence that civilians have been abducted by leaders of the Janjaweed and detained in camps that the Commission has identified where they were tortured and used for labour. During pre arranged monitoring visits of independent observers, these civilians were taken out of the camp and hidden. The Commission has credible evidence that the military is in control of these camps and army officers were aware of the illegal detention of civilians in the camp. In one case a civilian was seized by the Janjaweed after an attack on his village, was kept in captivity in a Janjaweed camp and later shifted to military camp in the area.

399. The most serious cases of enforced disappearances involved the disappearance of civilians by security and intelligence apparatus, both civil and military. The Commission received credible information that several individuals were taken away by military intelligence or security operators. While some of these individuals subsequently returned, many remain unaccounted for. Those who did return have given credible testimony of the presence of many of those missing in unofficial and secret places of detention maintained by the security apparatus in different locations in the Darfur region.

400. In one case, during a joint attack in March 2004 by the Janjaweed and Government armed forces on several villages around Deleij in the Wadi Saleh area of West Darfur, 300 people were seized and taken away by the Government forces. Almost half of these persons are still missing and many are feared to have been killed.

401. Illegal arrest and detention of individuals appears to be common practice in operations by the state security apparatus relating to the conflict in Darfur. The Commission met with persons held in secret detention. These detainees included students, lawyers and traders. In many of these cases their families were unaware of their arrest or of their whereabouts. Amongst them was one 15 year old boy who had been arrested in Nyala, North Darfur, in November 2004 when he was returning home from work. His family did not know of his arrest or of his whereabouts. He was epileptic, and had not received any medical help since his detention. All of the detainees were held incommunicado. Except for the case mentioned above, all had been detained for more than three months, and in one case for almost a year, without any charge. They had never been produced before a court, nor allowed to see a lawyer.

402. The Commission has also received credible information on cases of abduction by the rebels. In one case of rebel attack on Kulbus, towards the end of 2003, 13 men were abducted and are still missing. In another attack on a village in Zalatia area in West Darfur, three children were abducted by a rebel

group. These children are still missing. The Commission received further information on the abduction by rebels of individuals from Fata Borno, Magla, and Kulkul. The rebels accused these persons of collaborating with Government and Arab tribes. The Commission received credible information that these persons were tortured and subjected to cruel, inhuman and degrading treatment. In other cases individuals were abducted after their vehicles were seized and taken by the rebel groups. Both the SLA and JEM have been named as those responsible for these incidents.

(b.) Legal appraisal

403. The right to liberty and security of person is protected by Article 9 of the ICCPR. The provisions of this Article are to be necessarily read in conjunction with the other rights recognized in the Covenant, particularly the prohibition of torture in Article 7, and article 10 that enunciates the basic standard of humane treatment and respect for the dignity of all persons deprived of their liberty. Any deprivation of liberty must be done in conformity with the provisions of Article 9: it must not be arbitrary; it must be based on grounds and procedures established by law; information on the reasons for detention must be given; and court control of the detention must be available, as well as compensation in the case of a breach. These provisions apply even when detention is used for reasons of public security.

404. An important guarantee laid down in paragraph 4 of Article 9 is the right to control by a court of the legality of detention. In its General Comments the Human Rights Committee has stated that safeguards which may prevent violations of international law are provisions against incommunicado detention, granting detainees suitable access to persons such as doctors, lawyers and family members. In this regard the Committee has also stressed the importance of provisions requiring that detainees should be held in places that are publicly recognized and that there must be proper registration of the names of detainees and places of detention. It follows from the Comments of the Committee that for the safeguards to be effective, these records must be available to persons concerned, such as relatives, or independent monitors and observers.

405. Even in situations where a State has lawfully derogated from certain provisions of the Covenant, the prohibition against unacknowledged detention, taking of hostages or abductions is absolute. Together with the human right of all persons to be treated with humanity and with respect for the inherent dignity of the human person, these norms of international law are not subject to derogation.

406. The ultimate responsibility for complying with obligations under international law rests with the States. The duty of States extends to ensuring the protection of these rights even when they are violated or are threatened by persons without any official status or authority. States remain responsible for all violations of international human rights law that occur because of failure of the State to create conditions that prevent, or take measures to deter, as well as by any acts of commission including by encouraging, ordering, tolerating or perpetrating prohibited acts.

407. The importance of determining individual criminal responsibility for international crimes whether committed under the authority of the State or outside such authority stands in addition to State responsibility and is a critical aspect of the enforceability of rights and of protection against their violation. International human rights law and humanitarian law provide the necessary linkages for this process of determination.

408. With regard to international humanitarian law, common Article 3 of the Geneva Conventions prohibits acts of violence to life and person, including cruel treatment and torture, taking of hostages and outrages upon personal dignity, in particular, humiliating and degrading treatment.

409. According to the Statute of the International Criminal Court, enforced disappearance means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.¹⁶⁰ When committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, these acts may amount to a crime against humanity.¹⁶¹

410. The abduction of women by Janjaweed may amount to enforced disappearance as a crime against humanity. The incidents investigated establish that these abductions were systematic, were carried out with the acquiescence of the State, as the abductions followed combined attacks by Janjaweed and Government forces and took place in their presence and with their knowledge. The women were kept in captivity for a sufficiently long period of time, and their whereabouts were not known to their families throughout the period of their confinement. The Commission also finds that the restraints placed on the IDP population in camps, particularly women, by terrorizing them through acts of rape or killings or threats of violence to life or person by the Janjaweed, amount to severe deprivation of physical liberty in violation of rules of international law.

¹⁶⁰ Rome Statute of the International Criminal Court, article 7(2)(i). Similarly, the Declaration on the Protection of All Persons from Enforced Disappearances defines an enforced disappearance as when ‘persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups, or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law.’

¹⁶¹ The elements of the crime of enforced disappearance relevant to the Commissions findings are that the perpetrator

- (a) Arrested, detained or abducted one or more persons; or
 - (b) Refused to give information on the fate or whereabouts of such person or persons.
2. Such refusal was preceded or accompanied by the deprivation of freedom.
 3. The perpetrator was aware that such refusal was preceded or accompanied by that deprivation of freedom.
 4. Such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization.
 5. The refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such State or political organization.
 6. The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time.
 7. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
 8. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population

411. The Commission also finds that the arrest and detention of persons by the State security apparatus and the Military intelligence, including during attacks and intelligence operations against villages, apart from constituting serious violations of international human rights law, may also amount to the crime of enforced disappearance as a crime against humanity. These acts were both systematic and widespread.

412. Abduction of persons during attacks by the Janjaweed and their detention in camps operated by the Janjaweed, with the support and complicity of the Government armed forces amount to gross violations of human rights, and to enforced disappearances. However, the Commission did not find any evidence that these were widespread or systematic so as to constitute a crime against humanity. Nevertheless, detainees were subjected to gross acts of violence to life and person. They were tortured or subjected to cruel and humiliating and degrading treatment. The acts were committed as a part of and were directly linked to the armed conflict. As serious violations of Common Article 3 of the Geneva Conventions, binding on the Sudan, the Commission, finds that the acts constitute war crimes.

413. Abduction of persons by the rebels also constitute serious and gross violations of human rights, and amount to enforced disappearance, but the Commission did not find any evidence that they were either widespread or systematic in order to constitute a crime against humanity. The Commission, nevertheless, has sufficient information to establish that acts of violence to life and person of the detainees were committed in the incidents investigated by the Commission. They were also subjected to torture and cruel, inhuman and degrading treatment. The acts were committed as a part of and directly linked to the armed conflict and, therefore, constitute war crimes as serious violations of the Common Article 3 of the Geneva Conventions.

(xi.) Recruitment and use of children under the age of 15 in armed hostilities

(a.) Factual findings

414. There have been some reports by other sources of the use of child soldiers by the two rebel groups JEM and SLA. These reports, however, contained no details regarding, for instance, the manner of their recruitment or the area of their deployment. The Government of the Sudan also made this allegation against the rebels, but did not produce any concrete information or evidence that could assist the Commission in making a finding of fact on this issue.

415. Inquiries made by the Commission indicate that both JEM and SLA have recruited children as soldiers. There is, however, no indication that these are forced recruitments. These children have been seen in uniforms and carrying weapons in and around the rebel camps. Independent observers confirmed the presence of child soldiers in areas of conflict. While the Commission cannot rule out their participation in combat, it did not receive credible information on deployment of child soldiers in armed combat.

416. In its meetings with leaders of both rebel groups, the Commission did confront them with these allegations. Both groups deny the use of children in armed combat. The SLA leadership does not deny

that children are living in some of their camps. However, they deny that these are child soldiers or take any part in armed hostilities. According to them, these children were orphaned as a result of the conflict and the SLA takes care of them. The Commission does not find this explanation convincing. As stated above, different sources have confirmed that the children are in uniform and carry weapons. The Commission, therefore, cannot rule out their engagement in combat.

(b.) Legal appraisal

417. As stated above, an international customary rule has evolved on this matter to the effect that it is prohibited to use children under 15 in armed hostilities. The Sudan has also ratified Convention 182 of the International Labour Organization concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, which prohibits the “forced or compulsory recruitment of children for use in armed conflict”. The Convention defines children as all persons under the age of 18. Furthermore, the rebels, like the Government of the Sudan, are bound by Article 8 of the Protocol on the Enhancement of the Security Situation in Darfur in Accordance with the N’Djamena Agreement, of 9 November 2004. Under this provision, “The Parties shall refrain from recruiting children as soldiers or combatants, consistent with the African Charter on the Rights and Welfare of Children, the Convention on the Rights of the Child (CRC) and the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict”.

418. It follows that if it is convincingly proved that the Government or the rebels have recruited and used children under 15 in active military hostilities, they may be held accountable for such a crime.

VI. ACTION OF SUDANESE BODIES TO STOP AND REMEDY VIOLATIONS

419. The Government of the Sudan was put on notice concerning the alleged serious crimes that are taking place in Darfur. It was requested not only by the international community, but more importantly by its own people, to put an end to the violations and to bring the perpetrators to justice. While several Government officials acknowledged that serious violations of human rights and humanitarian law took place in Darfur, they maintained however that they have been acting responsibly and in good faith to stop the violence and address the crisis. Some argued that while it was sometimes argued that the Government was unable to deal with all the problems, nobody could claim that it was unwilling.

420. The section below assesses the effectiveness of the measures taken by the Government of the Sudan particularly to investigate these crimes and to bring their perpetrators to justice. It focuses on the role of law enforcement agencies in particular, particularly the police, examines some aspects of the legal and judicial system, and assesses some extra-judicial mechanisms such as the National Commission of Inquiry and the Rape Commissions.

1. Action by the police

421. The role of the police in the current conflict is far from clear. The Government claims that this institution was weakened as a result of the conflict in Darfur. Attacks on police stations and garrisons and looting of weapons by the rebels have been an important feature of this insurgency. In fact, the Government claims that between January 2003 and November 2004, 685 policemen were killed by rebels, 500 were injured, 62 were missing, and 1247 weapons were looted from police stations.¹⁶² It states that this resulted in a breakdown of law and order and encouraged banditry and crime.

422. Normally, in an international armed conflict the civil police force does not formally take part in the hostilities and can, at least theoretically, be considered as a non-combatant benefiting from the safeguards and protections against attack. However, in the particular case of the internal conflict in Darfur, the distinction between the police and the armed forces is often blurred. There are strong elements indicating occurrences of the police fighting alongside Government forces during attacks or abstaining from preventing or investigating attacks on the civilian population committed by the Janjaweed. There are also widespread and confirmed allegations that some members of the Janjaweed have been incorporated into the police. President El-Bashir confirmed in an interview with international media that in order to rein in the Janjaweed, they were incorporated in “other areas”, such as the armed forces and the police.¹⁶³ Therefore, the Commission is of the opinion that the ‘civilian’ status of the police in the context of the conflict in Darfur is questionable.¹⁶⁴

423. Victims, however, sometimes also attributed a positive role to the police. They told the Commission that the police were indeed targeted during the attacks on villages, but they mainly blamed the Janjaweed for these actions. Also while victims often express lack of confidence in the ability and

¹⁶² Figures provided by a Ministry of Interior Committee to the Commission on 19 November 2004.

¹⁶³ See interview on CNN of 31 August 2004, transcript at <http://edition.cnn.com/2004/WORLD/africa/08/31/amanpour.bashir/index.html>; accessed on 2 January 2005.

¹⁶⁴ The situation is different for the few reported cases where the Janjaweed are alleged to have killed police officers. In these cases, no legal justification can be found in international humanitarian law. The Janjaweed engaging in the armed conflict are siding with the Government, and thus with the police.

willingness of the Government to protect them, the police was often cited as an exception to this trend. The reason is perhaps that apart from its leaders, most of the police in Darfur were Darfurians. Some witnesses informed the Commission that during attacks by the Janjaweed, the police, often small in numbers, attempted to protect the villagers, but were often ill-equipped and heavily outnumbered. One example was an attack on Molli (Masaalit tribe) by the Janjaweed on 23 April 2003 - a market day. Market stalls were totally destroyed and livestock looted. Police made arrests of seven Janjaweed, but they were released by a court order, ostensibly for lack of evidence.

424. That the Janjaweed overpower the police is a trend that started even before the current crisis and could be detected from information provided by the Government itself. For instance, the judgment in a case known as *Jagre al-Hadi al Makbul and others* describes how a combination of the police and armed popular forces numbering 39 left the inhabitants of Thabit at the mercy of a large contingent of 'Fursan' attackers.¹⁶⁵ The case involves the two Arab tribes of Maalia and Rizigat. The facts of the case are that a Rizigat member of the national security was killed in a fight with two Maalia policemen. Forty days after the event, 700 to 800 Fursan in uniform and equipped with weapons gathered to revenge his death. They attacked and killed 54, wounding another 24 and burning houses before retreating with looted cattle and household property. According to the judgment, the 39 official forces, including police and the popular forces, requested their headquarters to allow them to engage the attackers, however the headquarters refused because of the disparity in numbers. The official forces then withdrew.

425. With the escalation of the crisis and the ineffectiveness of the police to address the crisis, the people in Darfur appear to have no faith in this institution. A number of victims informed the Commission that they would not go to the police to submit complaints against actions by the official forces or the Janjaweed. They did not think that the police would pursue the complaint and they feared reprisals. In fact, when officials in the three states of Darfur were requested to submit information on the number of registered complaints, they mainly provided lists of complaints registered as a result of attacks by the rebels. As for attacks by Janjaweed, little information was provided. The most extensive list of complaints against the Janjaweed was provided by the Governor of North Darfur. It included 93 complaints registered between February 2003 and November 2004. The list was, however, silent on the measures taken by the police to pursue these complaints.

426. The Government claimed that there were between 9,000 and 12,000 policemen deployed in Darfur to protect the IDPs. The impact of this presence was, however, not felt by the IDPs, as the situation at the Fata Burno IDP camp illustrates. The inhabitants there were confined in an area defined by a reddish rock and a riverbed (Wadi). Any attempt by the IDPs to venture beyond the confined area was met with shots from the Janjaweed in their nearby mountainous hideout. The police, located at the edge of the camp, showed no interest in confronting the Janjaweed. It stands to reason to assume that the police presence is more for political reasons than any form of protection. Also, between 27 September 2003 and May 2004, seven villages¹⁶⁶ near Nyala were persistently attacked by the Janjaweed. It resulted in the displacement of over 1000 civilians. No action was taken by police against the Janjaweed.

¹⁶⁵ The case was decided by the Special Court of Nyala – South Darfur which describes events that took place on 18 May 2002 involving 96 defendants, and where the court sentenced 88 persons to death, 1 for 10 years, as well as the confiscation of weapons and return of property.

¹⁶⁶ Umalhairan, Rahad Alnabag, Faralch Oldalyba, Draib alrech, Umbaouda, Baba, Kashlango

427. Several procedural hurdles prevented the police from acting effectively. An example was the practice whereby victims of certain crimes in Darfur, such as rape, required what was termed 'Form 8' from the police before they would be able to receive medical examination and treatment. A directive titled "The Minister of Justice Criminal decree 1/2004", effective from 21 August 2004, was adopted to dispense with that requirement. However, it was clear from interviews conducted by the Commission with rape victims, including in Zam Zam IDP camp in North Darfur, that the police still applied the Form 8 rule. The prosecutor's office and the police were hesitant when asked about their knowledge of the decree and it was clear to the Commission that they were not aware of the existence of the decree. Similarly, judicial officials in Khartoum were unaware of both the August 2004 decree and of a subsequent decree on the same subject matter, which was effective from 11 December 2004.

2. Action by the Judiciary

428. The Commission repeatedly requested the Government to provide information on judicial action taken to bring to justice the perpetrators of the alleged crimes committed in Darfur. Despite repeated requests from the Commission, the Government continued to cite just one case relevant to the Commission's mandate and on which the judicial system had taken action in 2003. This was the case of *Jamal Suliman Mohamad Shayeb* in the village of Halouf regarding the killing of 24 individuals, some of them women and children, looting of property, and the burning of the village. Two other cases referred to the Commission as evidence of action by the judiciary were firstly, the case of *Jagre al-Hadi al Makbul and others* before the Special Court of Nyala mentioned above, and secondly the case of *Hafedh Mohammed Dahab and others* regarding the attacks on the village of Jugma and Jabra which resulted in the killing of 4 people, including the burning of one individual, injuring others, as well as the looting and burning of houses. However, both of these cases concerned events that occurred in 2002. The Commission thus considers that Government failed to demonstrate that it had taken measures to prosecute those involved in the attacks that had taken place since February 2003.

429. The Government also cited its acknowledgement of three cases of mistaken bombings. It stated that it compensated the victims of Habila, Um Gozin, and Tulo. The head of the military committee that was established to compensate the victims in Habila briefed the Commission. He claimed that the victims were reluctant to receive compensation. The Commission learnt from other sources, however, that the real reason was that the victims were insisting that a comprehensive investigation into the alleged mistake take place.

430. The Government charged that the rebels attacked court buildings and personnel, implying that this had weakened their effectiveness. Citing an example, the Commission was informed that during an attack on Kutum, North Darfur on 1 August 2003, the rebels attacked the criminal court and the houses of the judges, looting their contents. Documents, evidentiary material and files were also burned. During an attack on 10 July 2004 on the village of Alliet, which has been the subject of frequent attacks by the SLM/A and the JEM, as well as Government forces, a judge was abducted by the rebels. He was later released on 13 of August 2004. In another attack on the same village on 20 September 2004, the Government claimed that rebels attacked the court and destroyed furniture and documents. The house of the judge was apparently also looted.

431. According to the Commission's findings, it is unlikely that the legal and judicial systems in Sudan in their present form are capable of addressing the serious challenges resulting from the crisis in Darfur. Victims often expressed lack of confidence in the ability of the judiciary to act independently and in an impartial manner. Having some senior judges in Darfur involved in the design and implementation of

controversial policies such as the return of IDPs, weakened the credibility of the judiciary in the public eye. A brief description of the judicial system and an assessment of its ability to do justice in accordance with international human rights standards are provided below.

(i.) An Overview of the Sudanese Judicial System

432. The 1998 Constitution asserts the independence of the Judiciary. However, the Judiciary appears to have been manipulated and politicised during the last decade. Judges disagreeing with the Government often suffered harassment including dismissals.

433. Article 103 of the Constitution spells out the structure of the country's judicial system which includes the Supreme Court, Courts of Appeal and Courts of first instance. In a hierarchical fashion, the Supreme Court, a three-member Bench and the highest and final judicial authority, is positioned at the apex. Its decisions on appeals from the Court of Appeal on criminal, civil, personal and administrative matters are final and may only be interfered with by the Chief Justice, if in his view a particular Shari'a law has been infringed.

434. Each of the state capitals has a Court of Appeal presided over by three judges. Appeals on criminal, civil and personal matters from the public courts lie to the Court of Appeal. The court can review its own decisions and has a single-judge-first-instance jurisdiction to review matters of administrative authority.

435. The Public Courts are set up under the 1991 Code of Criminal Procedure, which allows the Chief Justice to constitute them but also to determine their jurisdiction. The courts' jurisdiction is partly appellate and partly courts of first instance. Appeals from the District Courts lie to the Public Courts. The original jurisdiction of the courts lies in the adjudication of cases with commercial bias, as well as cases involving personal status of non-muslims.

436. District Courts have original and appellate jurisdictions to hear appeals on civil (Civil Procedure Act 1983) and criminal matters (Criminal Act 1991) from the Town Courts. The pecuniary powers of the courts in civil cases as well as their penal powers as regards the imposition of fines in criminal matters are defined by the Chief Justice.

437. The Town Courts are the lowest courts in the Sudan. Decisions rendered by the Town Courts may be appealed to the District Courts. They are popular courts whose members are chosen from among citizens of good conduct. A distinctive feature of these courts is their application of customs, not inconsistent with general law or with public policy. In most cases they resort to conciliation and accord in solving disputes over areas of pasture, water and cultivation. They are established under a warrant issued by the Chief Justice.

438. In addition, a Constitutional Court established by *Article 105* of the Constitution basically considers and adjudicates on matters relating to the interpretation of articles of the constitution and among others, "claims by the aggrieved for protection of freedoms, sanctities or rights guaranteed by the Constitution". As the President suspended significant provisions in the Constitution in 1999 and granted wide powers to the security apparatus, there is little proof that this court is effective.

439. Despite the above structure, a system of special and Specialized Courts has been established, particularly in Darfur. Cases of interest to the Government appear to be referred to these courts. In addition to these courts described below, the President has established some extraordinary courts to try specific cases. For instance, a case involving 72 army officers, mostly from Darfur, was referred to such an extraordinary court in Khartoum. A judge was brought from Kordofan to specially try the case.

440. On 12 January 2005, the Commission observed one session in a trial of a group of 28 individuals from Darfur. They included a number of air force pilots who had refused to participate in bombing areas in Darfur. Although the session was tense, the Commission was told that it was the first time that the trial had been conducted in accordance with the regular proceedings. In previous sessions, even questions on legal issues by the defence were refused. The defence team was dismissed by the court at one stage. During that period, witnesses were examined and confessions against the defendants were obtained. When a witness changed his statement during the trial session following the intervention of defence lawyers, the court started perjury proceedings against him. He collapsed in the court.

(ii.)The Specialised Courts

441. Initially established as Special Courts by decrees under the State of Emergency in Darfur in 2001, the courts were in 2003 transformed into Specialised Courts. A decree issued by the Chief Justice on 28 March 2003 first established the Specialized Court in West Darfur, and later did the same in North and South Darfur. They failed, however, to remedy certain flaws in the Special Courts which were passed down to the Specialised Courts.

442. The Specialised Courts inherited the functions and jurisdiction of the Special Courts. Thus, as its predecessor, the new courts try charges of armed robbery, banditry, offences against the State, possession of unlicensed firearms, attacks against the State, disturbing public order, and any other crimes that the Chief Justice or the head of the Judiciary may include in the court's jurisdiction. The majority of those tried under these courts for possession of arms are said to be from farming communities and practically never from nomadic tribes.

443. Special courts were headed by a judge sitting with a member of the police and a member of the army. However, since a single judge sitting alone now heads a Specialised Court, the Sudanese authorities argue that these courts are an improvement compared to the previous courts. A further argument is that they have been established for reasons of expediency.

444. The specialised criminal courts were created in particular for Darfur and Kordofan, apparently to help expedite the hearing of certain cases. However, the reason for their establishment may be described as 'fast tracking' rather than 'expediency', particularly in light of the fact that, according to reports, the hearing of a charge punishable by death penalty may take no more than one hour.

445. One flaw inherent in the 2003 Decree which established the courts, is its failure to ensure that confessions extracted under torture or other forms of duress are excluded from the evidence. It is fundamental to the principles of due process that an accused must not be compelled to testify against himself or herself or to confess to guilt (*article 14,3(g) ICCPR*). Therefore, when an accused challenges in court that his alleged confession was extracted under torture, the court is put on notice to investigate

the challenge and to rule, giving reasons, for the admissibility or otherwise of the alleged confession before continuing. There are several examples however to demonstrate that the specialized courts do not proceed in this manner. It has been reported that an individual was arrested in January 2004 on charges relating to banditry. He was said to have been tortured by security forces resulting from which he confessed to the charge. At his appearance in court in June 2004, he told the judge he had confessed under torture and sought to withdraw the confession. The judge summarily declined the withdrawal and the case proceeded against the accused. Any law which ignores the procedure of investigating a challenged confession and so allows a judge to summarily refuse the withdrawal of the confession, is contrary to the rights of the accused.

446. The Special Courts decree allowed the accused to be represented by “friends” only. In other words the accused could not exercise the right to be represented by a counsel of choice. Though the 2003 decree allows for legal representation, it lacks fullness. Counsel has limited time to cross examine prosecution witnesses and to examine defence witnesses and there are restrictions for visiting the accused in detention to facilitate the preparation of his defence.

447. The trials are still conducted summarily, as was done by the Special Courts and the death penalty may be pronounced by the court for a wide-range of offences. According to the decree, an appeal must be filed within seven days to the head of the judiciary, who delegates the case to members of the Court of Appeal. This is a rather short period, considering that court records and grounds for appeal need to be prepared before completing filing. Also interlocutory decisions are not subject to any appeal. One cannot but believe that there is an element here to discourage convicted persons from appealing against their convictions. Save for sentences of death, amputations, or life imprisonment, which are heard by a panel of judges, the appeals are heard by one judge. There is no possibility of further judicial review. In a situation where the right of appeal is limited, the likelihood that innocent persons may be put to death is increased.

448. The court does not appear to draw a distinction between adult and minor offenders. Minors are therefore at risk of receiving the death sentence, particularly so when they are charged and stand trial together with adults. On a reliable account a trial of seven persons arrested at the Kalma IDP camp included two persons under the age of 18. All seven denied the charge and have alleged police brutality. At the Nyala Specialised Court where they were standing trial for murder, they faced the death penalty if convicted.

449. The fact that the Specialised Courts apply principally to the Darfurs and Kordovan, rather than to the whole of the Sudan, calls into question the credibility and reliability of these Courts. The purpose of the courts is too glaring to miss. The Government would do a great service to its judicial system if it took steps to repeal the decree that established the Courts. The Commission recommends that the Government ensure the closure of the Courts.

3. Sudanese Laws Relevant to the Present Inquiry

450. A number of serious flaws prevent the justice system in Sudan from acting swiftly and appropriately to address abuses. Much could be said about the compatibility of Sudanese laws with international standards. A state of emergency was declared in Sudan in 1999 and has been consistently renewed since then. Important constitutional guarantees are suspended. In effect, Sudan is still mainly ruled by decrees. An example is the Specialised Court decree. Judicial officials tried to explain off the

passing of decrees as an interim measure taken when Parliament is in recess, which Parliament may retain or repeal when it reconvenes. Asked what would be the fate of a suspect convicted under the decree before a Parliamentary action to repeal the law, one response was, “it’s not reversible”. The other was that the conviction may be quashed on appeal. One cannot but view the continued parallel use of decrees and laws as tending to make the parliamentary process a charade.

451. Furthermore, the Sudanese criminal laws do not adequately proscribe war crimes and crimes against humanity. Also the 1991 Criminal Procedure Code contains provisions that prevent the effective prosecution of these acts. The law provides wide powers to the executive and grants immunity from prosecution to many state agents. To illustrate some of these problems, the provisions of the National Security Forces Act of 1999, are presented below as an example.

452. By Section 31 of the National Security Law, an order issued by the Director General, a security agent can carry out an arrest, a search, detain and investigate an individual. He has three days within which to furnish the detainee with reasons for his arrest and detention. The period may be extended for 3 months by the Director General and may, with the approval of the attorney general, be renewed for a further 3 months. If it is deemed necessary, the Director General may request the national Security Council to renew the detention for a further 3 months. A detainee may appeal this decision before a judge. There are no guarantees, however, for immediate access to counsel. The prescribed period of detention under Section 31 is frequently ignored. The Commission met numerous detainees in security detention centres who were detained for longer periods without access to a lawyer nor an appearance in court.

453. Section 9 of the Act gives certain powers to a member of the organ designated by the Director General to execute particular functions. It empowers seizure of property of detainees “in accordance with law”. A right under section 32(2) allows the detainee to communicate with his family “where the same does not prejudice the progress of the interrogation, inquiry and investigation of the case”. These qualifying phrases negate clarity and only succeed in bringing vagueness and inferiority into the law. Even if members of the detainee’s family are aware of the right to communicate or from where the family may apply for permission to make contact with their relatives, it is doubtful that they will have the courage to brave the aura of fear that surrounds the security apparatus. Investigations conducted by the Commission disclose that more often than not, the permission when sought by the courageous few, is not granted. In the result the detainee becomes an *incomunicado* detainee, his detention sometimes exceeding a 12-month period, without charges, with no access to counsel, no appearance in court and not permitted visitors. At Kobar prison in Khartoum the Commission interviewed a number of such detainees. Others have been detained at a North Khartoum prison since January 2004 in similar circumstances. A gross violation of the rights of the detainees and a contravention of *Article 14.3(c)* of ICCPR. In addition, the National Security apparatus violates section 31 of its own law which indicates that after the prescribed period of detention, that is to say a maximum of 9 months, the detainee must be tried or released.

454. Section 33 gives wide immunities to members of the National Security and Intelligence Services and their collaborators. None of them shall be compelled to give information about the organisation’s activities which they have come by in the course of their duty. Except with the approval of the Director, no civil or criminal action shall lie against either of them for any acts they may have committed in connection with their work, which approval the Director will grant only if the action is unrelated to their duties. Their right to institute action for compensation against the State is however preserved. Where the Director approves that an action proceeds against a member of the force and his collaborators, and

the action is based on acts done in the course of official work, be it during or after termination of employment, the trial will take place in an ordinary court but will be heard in secret. Again, this is contrary to Article 14,1 of ICCPR which sets down “public hearing” as a basic standard for a fair trial. When confronted with trials in “secret”, Mr. Sallah Abdallah, also known as Mr. Sallah Gosh, (the Director General of National Security and Intelligence Service) described the English translation as inaccurate. Since then the Commission has had the Arabic text translated, and it is clear that the trial in “secret” is part of the law. The clear inference from section 33, is that a security member can, under the umbrella of the law, torture a suspect, even to death, if his acts are done in the course of duty. The Commission strongly recommends the abolition of this law.

455. Based on the above, the Commission considers that in view of the impunity which reigns in Darfur today, the judicial system has demonstrated that it lacks adequate structures, authority, credibility, and willingness to effectively prosecute and punish the perpetrators of the alleged crimes that continue to exist in Darfur.

4. Action by Other Bodies

(i.)The Sudanese Commission of Inquiry

456. The President set up a National Commission of Inquiry (hereinafter “the National Commission”) on 8 May 2004. This ten member body was mandated to collect information of alleged violations of human rights by armed groups in the Darfur states, inquire into allegations against armed groups in the area and the possible resulting damage to lives and property and to determine the causes of the violations when established. The Commission was provided a copy of the final report of the National Commission on 16 January 2005.

457. The final report indicates the National Commission’s method of work. It met 65 times, listened to 228 witnesses, and visited the three states of Darfur several times. It visited 30 incident locations and met with the local authorities, particularly the armed forces. It requested documents from various governmental bodies and reviewed the reports of the organizations that visited Sudan, including the United Nations, the Organization of African Unity and the Organization of the Islamic Conference, as well various human rights groups, particularly Amnesty International and Human Rights Watch, as well as reports by some Governments, particularly the United States and the European Union. In other words, the National Commission was fully aware of the serious allegations of the crimes committed in Darfur.

458. The report starts with providing an overview of Darfur. It devotes a major part to the crime of genocide. It discusses five crimes: bombing civilians in the context of the Geneva Conventions; killings; extra-judicial killings, rape as a crime against humanity, and forcible transfer, and ethnic cleansing.

459. Below is an unofficial translation of the main findings of the National Commission, as they appear in its Executive Summary:

Serious violations of human rights were committed in the three Darfur States. All parties to the conflict were involved, in varying degrees, in these violations which led to much human suffering that obliged the people of Darfur to migrate to State capitals and to take refuge in Chad.

What happened in Darfur, despite its gravity, does not constitute the crime of genocide because of the unavailability of the genocide determination conditions. The National Commission had no proof that any of the protected ethnic, religious, racial or national groups was subjected, in bad faith, to bodily or mental harm or to living conditions targeted at its total or partial extermination. The Darfur incidents are not similar to what happened in Rwanda, Bosnia or Cambodia. In those precedents, the State concerned pursued a host of policies leading to the extermination of a protected group.

The National Commission had proof that the Darfur incidents were caused by the factors mentioned in the report and the explained circumstances. It also had proof that describing the incidents as genocide was based on exaggerated unascertained figures relating to the numbers of persons killed .

The National Commission had proof that the Armed Forces bombarded certain areas in which some opposition members sought shelter. As a result of that bombardment, some civilians were killed. The Armed Forces investigated the incident and indemnified those who sustained damage or loss in the areas of Habilah, Umm Kazween and Tolo. The Wad Hagam incident is still being investigated.

The National Commission had proof that the armed opposition groups committed similar acts killing unarmed citizens as well as wounded military personnel in Buram hospital and burning some of them alive.

The National Commission also had proof that many of the killing incidents were committed by various tribes against each other in the context of the conflict going on in certain areas such as Sania Deleiba, Shattaya etc.

The killing of citizens in all the aforementioned cases constitutes a violation of Common Article 3 of the 1949 Geneva Conventions

The killing incidents committed by all the armed conflict parties, which, under their various circumstances, may come up to a violation of Common Article 3 of the 1949 Geneva Conventions, do not, in the opinion of the National Commission, constitute a genocide crime because of the unavailability of the elements of this crime, particularly the absence of any proof that any protected group was targeted and the absence of a criminal intent.

Allegations of summary executions were received from all parties. However, some of these allegations were not proved beyond any doubt. Therefore, the National Commission recommended that an independent judicial investigation should be conducted ... The rationale in this respect is that any testimony before the National Commission should not be accepted as evidence before any court in implementation of Article 12 of the 1954 Law on Investigation Committee which stipulates that “any testimony given during any investigation conducted under this Law shall not be accepted as evidence before any civil or criminal court”.

As regards the crimes of rape and sexual violence which received much attention in the international media, the National Commission investigated them in all the States of Darfur at various levels and heard a number of witnesses under oath, including the victims who were referred by the National Commission to the concerned medical services for medical examination. The National Commission had on hand the detailed reports of the judicial committees which visited the various areas of Darfur, including displaced persons' camps.

All these measures proved to the National Commission that rape and sexual violence crimes had been committed in the States of Darfur. They also proved that crimes had not been systematic or widespread constituting a crime against humanity as mentioned in the allegations. The National Commission also had proof that most of the rape crimes were filed against unknown persons, but investigations led to accusing a number of persons, including ten members of the regular forces. The Minister of Justice lifted their immunity and they are being tried now. Most of these crimes were committed individually in the context of the prevailing security chaos. The National Commission noticed that the word “rape”, with its legal and linguistic meanings, was not known to the women of Darfur in general. They believed that the meaning of the word “rape” was to use violence to compel a person to do something against that person’s will, and not specifically to rape Unfortunately, scenes of a group rape were shot and were shown outside the Sudan. Later on it was found out that they were fictitious. Some of the persons who took part in this confessed that they were given sums of money as an incitement to play roles in those scenes

Forced displacement as one of the components of ethnic cleansing, which implies forced or violent displacement of an ethnic group or a group which speaks one language or has a dominant culture, from a land on which it settled legally to another area, and which has been associated throughout history with the idea of forming the “Nation State”, is a crime against humanity.

In the light of the above, the National Commission visited several areas in the Darfur States where, according to some allegations, forced displacement or ethnic cleansing was practised. The Commission interrogated the inhabitants of those areas and was ascertained that some Arab tribal groups had attack the Abram area, specifically the Meraya and Umm Shukah villages, displacing some non-Arab groups and settling in the area. However, the authorities, as reported by the Kas Locality Commissioner, initiated measures to rectify this situation and return properties to their owners. The acts of some Arab groups led to the forced displacement of those non-Arab groups. The National Commission, therefore, believes that a judicial investigation should be conducted in order to know the conditions and circumstances which led to this situation. If the forced displacement crime is proved, legal measures should be taken against these groups because this incident constitutes a serious precedent violating customary practices and triggers similar acts worsening the problem

The National Commission visited many of the villages which were burned in Kulbus, El Geneina, Wadi Saleh and Kas localities. The National Commission found most of them uninhabited which rendered it impossible for the National Commission to question their inhabitants. The National Commission found there some of the police forces which were deployed after the incidents in preparation for the voluntary return of the displaced persons. However, the information given by the Shartai and Omdahs who accompanied the National Commission, and the evidence available, indicate that all parties were responsible, under the circumstances of the blazing conflict, for the burning of the villages. The National Commission had proof that the acts of burning were the direct cause of the displacement of the villages’ inhabitants of various tribes, the majority of whom were Fur, to camps, e.g. Deleig and Kalma, near safe areas where the various services were available. Accordingly, the Commission believes that, with the exception of the above incident concerning which the Commission recommended that an investigation be conducted, the forced displacement crime was not proved.

The incidents which occurred led to the displacement of big numbers of citizens. Citizens were terrified and frightened. This situation caused many citizens to leave their villages and go to the camps. The National Commission had proof that the Darfur tribes, regardless of their ethnic origin, hosted the displaced persons seeking accommodation and that no tribe settled by force in the quarters of another tribe. This was confirmed by the Nazer of Albani Helba and the Nazer of Al Habania”

460. In its recommendations, the National Commission suggested administrative and judicial measures, in particular that the causes of the conflict “should be studied and the administrative deficiency, which was one of the factors worsening the conflict, should be rectified”. It further recommended that judicial investigation committees concerned with the following items be established:

- a. Allegations of extrajudicial executions at Deleig and Tenko, because there are evidences which the National Commission believes should be subject of a detailed judicial investigation leading to trial of the persons proven to have committed the acts they are accused of, particularly as there are accusations against certain persons.
- b. Allegations that some Arab groups captured two villages of the Fur tribe in Kas Locality. The Commission knew that an administrative investigation was being conducted by a committee established by the Wali of the South Darfur Sate in view of the seriousness of the accusation and its consequences which necessitate acceleration of the relevant measures.
- c. Investigating the incidents of Buram, Meleit and Kulbus, i.e. killing wounded persons in the hospitals and burning some of them alive, and taking the necessary action against perpetrators, particularly as certain names known to citizens were mentioned in the testimonies of witnesses.”

461. To summarise, the Executive Summary states that serious violations of human rights were committed in the three Darfur States. All parties to the conflict were involved. What happened did not constitute genocide. Numbers of persons killed were exaggerated: losses of life incurred by all parties, including the armed forces and police, did not exceed a few thousands. Rape and crimes of sexual violence were committed but were not widespread or systematic to amount to a crime against humanity. The National Commission recommends judicial investigations into some specific incidents and a setting up of a judicial committee to investigate property losses.

462. The Commission finds that while it is important for the National Commission to acknowledge some wrong-doings, its findings and recommendations are insufficient and inappropriate to address the gravity of the situation. Simply put, they provide too little too late. The massive scale of alleged crimes committed in Darfur is hardly captured by the report of the National Commission. As a result, the report attempts to justify the violations rather than seeking effective measures to address them. While this is disappointing particularly to the victims of these violations, the Commission is not taken by surprise by the tone and content of the report. The Commission is aware that the National Commission was under enormous pressure to present a view that is close to the Government’s version of events. The report of the National Commission provides a glaring example of why it is impossible under the current circumstances in Sudan for a national body to provide an impartial account of the situation in Darfur, let alone recommend effective measures.

(ii.) The Parliamentary Committee of Inquiry

463. A parliamentary committee to enhance peace, security and development in the Darfur States was established in accordance with National Assembly resolution 38 of December 2003, with a membership of some 59 people. It was to meet with responsible authorities, executive bodies and other relevant personalities, as well as interview parties to the conflict. Its findings, inter alia, expressed concerns in relation to under-development in Darfur and contained recommendation to improve the conditions for the IDP's.

464. The committee made recommendations in the areas of security, humanitarian aid, social structure enhancement, services and development, opening up of police posts with adequate logistics for speedy response to crises and seizure of arms in the wrong hands. To date, there has been no indication of the government complying with the recommendations of the Parliamentary Committee to improve the conditions of the IDP's, to develop social structure and generally improve services in Darfur, nor compliance with its recommendation to seize arms in the wrong hands. Seizure of arms would naturally mean seizure from the SLA and JEM as well as the Janjaweed, who had otherwise been given Government support.

(iii.) The committees against rape

465. In the Joint Communiqué issued by the Government and the United Nations during the visit of the United Nations Secretary-General on 3 July, 2004, on the situation in Darfur, the Government of the Sudan committed to undertake concrete measures to end impunity for human rights violations in the region. Towards this end, the Government had undertaken to immediately investigate all cases of violations, including those brought to its attention by the United Nations, AU, and other sources.

466. Allegations of rape and other incidents of sexual abuse of women were prominent amongst the serious violations of human rights in the region reported by multiple sources. The Minister of Justice, under powers vested in him by Section 3 (2) of the Commissions of Inquiry Act, 1954, issued a decree on 28 July 2004, establishing separate Rape Committees for the three Darfur states, North, South and West Darfur.

467. The Committees were composed of three members each, comprising a judge of the Appeal Court as the Chair, a legal counsel from the Ministry of Justice and a police officer. All members of the Committees were women.

468. The mandate of the Committees was "to investigate the crimes of rape in the three states of Darfur". The Committees were delegated the powers of the office of the district prosecutor to carry out their mandate¹⁶⁷. The Committees were required to report to the Minister of Justice within two weeks of the commencement of their work.

469. Before commenting on the working of the Committees, the inadequacies of the mandate need to be addressed. The mandate of the rape Committees was too narrow to address the serious allegations of

¹⁶⁷ Article 20 of the Criminal Procedure Act, 1991 empowers the Minister of Justice to grant the powers of the office of the Prosecution Attorney to any person or Commission whenever he deems it to be in the interest of justice. Under Article 19 of the Criminal Procedure Act, 1991, the office of the Prosecution Attorney has the powers to direct the investigation in a criminal complaint, to frame charges, to file prosecutions and to supervise the progress of the case in the court.

violence against women. Reports of abuse suffered by women include, but are not limited to rape¹⁶⁸. Excluding other forms of sexual abuse from the scope of the inquiry left a vast number of allegations unaddressed. Further, means of redress and reparation for the victims was not brought within the scope of the mandate. This limited the effectiveness of the initiative in providing comprehensive justice to victims. International law not only requires States to address violations of human rights and take measures to prevent their occurrence, but also imposes the obligation to provide an effective remedy for violations¹⁶⁹.

470. The Committees were not given any guidelines to ensure that methods of investigation were suited to the objective of ending impunity and facilitating the victims in reporting the crimes committed against them. The Sudan Criminal Act and the Criminal Procedure Act do not contain substantive and procedural provisions that can be applied to the special situation of crimes committed during an armed conflict. The absence of such guidelines, including the determination of criteria for selection of cases for investigation and prosecution, left the Committees without guidance as to the proper methods for investigating crimes constituting serious violations of human rights. This omission on the part of the Ministry of Justice affected the work of the Committees and their ability to achieve their objectives.

471. The time allotted to the Committees within which to carry out their work was grossly inadequate considering the immensity of the task. This indicates a lack of any serious commitment on the part of the Government to investigate the allegations of widespread rape and to end impunity for this crime.

472. During its first mission to Sudan the Commission met the Chairpersons and members of the three rape committees in Khartoum. The Commission thanks the Government for allowing this opportunity and to the members of the Committees for making themselves available for the two meetings with the Commission.

473. Members of the Commission were told that the Committees began their work in the states under their respective jurisdiction on 11 August 2004. All the three committees adopted a common methodology. The establishment of the Committees and their arrival in the different states was announced publicly through the electronic media. The Committees arranged for this announcement to be made in all the IDP camps in the province and visited the camps to receive complaints of rape. They also visited police stations and the office of the district attorney in order to obtain information on any cases of rape already registered.

474. In the camps the Committees met with the managers of the camp and the tribal and local leaders of the population residing in the camp. Small committees were constituted in each of the camps they visited to explain the mandate of the Committees and to elicit information from the IDPs.

475. During the course of the Rape Committees' work, a decree was issued by the Minister of Justice on 21 August, 2004, removing the requirement of registering a complaint of rape with the police before the victim could be medically examined or receive any medical treatment.

¹⁶⁸ Give figures on incidents of sexual violence from section on rape in Section 1 of the report.

¹⁶⁹ Article 2 of the ICCPR. Sudan is a party to the Covenant.

476. It is evident from their accounts that the Committees received only a few complaints. Many of the cases they processed were already registered in the police stations before their arrival, or occurred during the period that they were conducting their inquiry in the respective provinces. The approach adopted by the Committees in proceeding with the inquiry, as explained by the three Chairpersons, was to hear a complaint, interrogate the victim to ascertain if the elements of the crime of rape as defined in the Criminal Act, 1991, were present¹⁷⁰, and then require the victim to be medically examined. If the medical report corroborated the victim's allegations the case would be sent to the police for further investigation. In cases where the perpetrators were unnamed or unknown, no further investigation was conducted. Where such corroboration was available, and the perpetrator/s was identified by the victim the cases were recommended for prosecution and sent to the office of the district prosecutor.

477. The Chairpersons of the Committees informed the Commission that in North Darfur the Committee did not process any case in which it had received the complaint directly. This Committee had completed investigation of 8 cases and sent these to the prosecutor for further action. In West Darfur three cases were registered by the Committee on direct complaints from victims. These, together with other cases (already registered with the police before the Committee started work) investigated by the Committee were sent to the prosecutor. In South Darfur the Committee investigated cases that had already been registered at the police station in Nyala. The Chairpersons did not remember the total number of cases investigated by the Committees in West and South Darfur. The members of the Committees had no documents giving the details of the cases.

478. The Advisory Council on Human Rights handed a document to the Commission in which it is stated that the three investigation committees had ended a three week visit to the region and had submitted their interim report to the Minister of Justice in September. Together the committees had registered 50 cases, 29 in West, 10 in North and 11 in south Darfur. Of these 35 were against unknown perpetrators. There is no information on how many of the identified accused in cases investigated by the Committees were prosecuted or convicted. Details of the cases were also not made available to the Commission. Information on action taken to end impunity, provided by the ACHR lists 7 cases of rape in which the accused were arrested and tried; one case in which 13 accused were tried and convicted for producing fake video implicating the military in the commission of rape; two cases in which the district prosecutor, on reports made by United Nations monitors, visited IDP camps and recorded statements of victims and initiated proceedings; and one case of abduction and rape was registered against unknown armed opposition groups.

479. The Commission was made aware of the difficulties that the Rape Committees confronted in implementing their mandate and the severe constraints they experienced because of the lack of resources and technical assistance. However, the approach adopted by the Committees in conducting their work could not be conducive to achieving the objectives for which they were established. The Committees failed to give due consideration to the context in which they were working and to adopt an approach suitable to the circumstances. The incidents of rape they were called upon to investigate had occurred over a period of eighteen months, and the affected population had been displaced, probably more than once. All the Committees admitted having received complaints of rape which occurred during attacks on villages. None of these complaints was recorded or investigated. The reasons given for not taking action on such cases were non-production of victims before the Committee, absence of witnesses and failure of

¹⁷⁰ Article 145 (2) of the Criminal Act, 1991 makes "penetration" essential to constitute the act of "sexual intercourse". Article 149 defines rape as an act of sexual intercourse committed on another person without her/his consent. Where the victim is in the custody or under the authority of the offender, consent shall not be relevant.

victims to present themselves for a medical examination, or to produce a report of any earlier examination by a competent authority.

480. The Committees placed undue burden on the affected population to produce evidence and did not exercise their powers to activate relevant authorities to investigate in order to overcome the gaps in information made available by victims and witnesses. The reliance on medical evidence, for instance, to initiate investigation seems highly misplaced when a majority of the complaints pertained to rape that had occurred some time back, or where the victim was a married woman.

481. The lack of sufficient commitment to achieving their goals is apparent in several aspects of the Committees' work. The first indication of the Committees' failure is the lack of public response to their invitation to bring complaints. The Commission has personally received several accounts from victims in IDP camps alleging rape and other forms of sexual abuse suffered by women during attacks on their villages, while fleeing the villages and, more recently, around the camps where they have taken shelter¹⁷¹. The fact that people were generally hesitant to approach the Committees with their complaints indicates a lack of trust in the Government.

482. The Committees could not mitigate this distrust by adopting an approach that inspired more confidence in their ability to provide redress to the victims. Those who did approach the Committees with complaints or information on rape did not receive a response that would encourage them to believe in a meaningful outcome of the investigation. In many of the cases they did not find sufficient merit in the complaint to proceed any further. Others were considered too short on evidence to proceed with the investigation. Several of the complaints they heard were against unknown persons. Some complaints were registered with the police, but many were not registered because the complainants became disinterested when they heard that these complaints could not be pursued because of the lack of identification of an accused or a suspect.

483. The Committees rejected too many cases for the reason that their interrogation of the victims revealed that the crime complained of did not amount to rape, as penetration had not occurred or that the complainants had confused the Arabic term for oppression with the term for rape and had mistakenly come forward with complaints of other forms of abuse or violence, such as beatings.

484. In their discussions with the Commission on the methodology of the Rape Committees, the wide publicity of the mandate of the Committees was greatly emphasized. In addition small committees were said to have been constituted in the camps to explain the purpose of the investigation to the affected population. In view of this the presumption that women were confused and that their complaint was not that of rape is not understandable. From its own experience of interviews with victims and witnesses, the Commission does not find this explanation convincing. Women, who had given accounts to the Commission of violence committed upon them, could fully understand the nature of the abuse that they had suffered, including rape.

485. It is disappointing that the Committees confined themselves to the crime of rape and did not process cases in which other forms of sexual abuse, including attempt to rape, were reported. The Committees lost a valuable opportunity of gathering important information on crimes committed against

¹⁷¹ Reference to cases in the Section on rape collected during COI mission.

women by failing to record the information brought to its attention and confining the registration of cases only to those complaints which, in their assessment, could be further investigated.

486. The Committees were delegated the powers to direct investigations, frame charges, file prosecutions and to supervise the progress of cases in the court. The Committees limited their task only to receiving complaints and to sending the cases for further investigations to the police. Where the police did not pursue the investigation the Committees took no action. In cases that they recommended for prosecution the Committees had no information if these cases were filed or if these had resulted in conviction. They ended their work in three weeks and presented their reports to the Ministry of Justice through the Advisory Council on Human Rights. There was no involvement of the Committees in any follow-up to their reports. They had not received any comments on their reports from the ministry nor were they involved in any follow-up to their reports.

487. If the intention of the Government was to end impunity and to establish a mechanism for facilitating victims in reporting crime of rape with a view to ensuring that perpetrators are held accountable, the initiative was poorly designed and lacked the potential for achieving this objective. The Government created the Committees as an immediate measure, but failed to make them effective or of any remedial value to the victims. An appraisal of the working methodology of the Committees and the details of the work received from the Chairpersons reveals several lacunas. The Commission can not agree with the Government's position that the statistics representing the work of the Committees indicate a much lower incidence of the crime of rape than is reported by sources such as the United Nations, AU and other national and international organizations. The work of the Rape Committees does not provide a sound basis for any conclusions with regard to the incidence of rape in Darfur nor does it satisfy the requirement of state responsibility to investigate cases of serious violations of human rights and of accountability of those responsible

VII. ACTION BY THE REBELS TO REMEDY THE VIOLATIONS THEY COMMITTED

488. Both the Government and the rebels themselves have reported to the Commission that the rebels have taken no action whatsoever to investigate and repress the international crimes committed by their members. The justifications offered by the rebels for such failure is either that no such crimes have been perpetrated, or else that they may have been committed by members of military units who were acting on their own and outside or beyond the instructions given by the political and military leaders.

SECTION II

HAVE ACTS OF GENOCIDE OCCURRED?

I. THE NOTION OF GENOCIDE

489. The second task assigned to the Commission is that of establishing whether the crimes allegedly perpetrated in Darfur may be characterized as acts of genocide, or whether they instead fall under other categories of international crimes.

490. As stated above, the Genocide Convention of 1948 and the corresponding customary international rules require a number of specific objective and subjective elements for individual criminal responsibility for genocide to arise. The objective element is twofold. The first, relating to the *prohibited conduct*, is as follows: (i) the offence must take the form of (a) killing, or (b) causing serious bodily or mental harm, or (c) inflicting on a group conditions of life calculated to bring about its physical destruction; or (d) imposing measures intended to prevent birth within the group, or (e) forcibly transferring children of the group to another group. The second objective element relates to the *targeted group*, which must be a “national, ethnical, racial or religious group”. Genocide can be charged when the prohibited conduct referred to above is taken against one of these groups or *members* of such group.

491. Also the subjective element or *mens rea* is twofold: (a) the criminal intent required for the underlying offence (killing, causing serious bodily or mental harm, etc.) and, (b) “the intent to destroy, in whole or in part” the group as such. This second intent is an aggravated criminal intention or *dolus specialis*: it implies that the perpetrator consciously desired the prohibited acts he committed to result in the destruction, in whole or in part, of the group as such, and knew that his acts would destroy in whole or in part, the group as such.

492. As clarified by international case law, the intent to destroy a group “in part” requires the intention to destroy “a considerable number of individuals”¹⁷² or “a substantial part”¹⁷³, but not necessarily a “very important part”¹⁷⁴ of the group.¹⁷⁵ Instances mentioned in either case law or the legal literature include, for example, the intent to kill all Muslims of Bosnia-Herzegovina, or all Muslims living in a region of that country,¹⁷⁶ or, for example, to destroy all the Jews living in Italy or the Armenians living in France.¹⁷⁷

¹⁷² See *Kayishema and Ruzindana* (ICTR, Trial Chamber, 21 May 1999), at § 97.

¹⁷³ See *Jelisić* (ICTY Trial Chamber, 14 December 1999, at §§ 82), *Bagilishema* (ICTR, Trial Chamber, 7 June 2001, at § 64) and *Semanza* (ICTR, Trial Chamber, 15 May 2003, at § 316).

¹⁷⁴ See *Jelisić* (ICTY, Trial Chamber, 14 December 1999), at §§ 81-2.

¹⁷⁵ According to B. Whitaker, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, UN Doc. E/CN.4/Sub.2/1985/6, at § 29, the expression “in part” indicates “a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group such as its leadership”. Interestingly, the United States, in its domestic legislation implementing the Genocide Convention, defined “substantial part” as “a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such group is a part.” (*Genocide Convention Implementation Act 1987*, sec. 1093 (8)).

¹⁷⁶ *Krstić*, (ICTY Trial Chamber), August 2, 2001, § 590: “[T]he physical destruction may target only a part of the geographically limited part of the larger group because the perpetrators of the genocide regard the intended destruction as

493. Of course, this special intent must not be confused with motive, namely the particular reason that may induce a person to engage in criminal conduct. For instance, in the case of genocide a person intending to murder a set of persons belonging to a protected group, with the specific intent of destroying the group (in whole or in part), may be motivated, for example, by the desire to appropriate the goods belonging to that group or set of persons, or by the urge to take revenge for prior attacks by members of that groups, or by the desire to please his superiors who despise that group. From the viewpoint of criminal law, what matters is not the motive, but rather whether or not there exists the requisite special intent to destroy a group¹⁷⁸.

494. *The definition of protected groups.* While they specify the classes of prohibited conduct, international rules on genocide use a broad and loose terminology when indicating the various groups against which one can engage in acts of genocide, including references to notions that may overlap (for instance, “national” and “ethnic”). This terminology is criticised for referring to notions such as ‘race’, which are now universally regarded as outmoded or even fallacious. Nevertheless, the principle of interpretation of international rules whereby one should give such rules their maximum effect (principle of effectiveness, also expressed by the Latin maxim *ut res magis valeat quam pereat*) suggests that the rules on genocide should be construed in such a manner as to give them their maximum legal effects. It follows that by “national groups”, one should mean those sets of individuals which have a distinctive identity in terms of nationality or of national origin. On the other hand, “racial groups” comprise those sets of individuals sharing some hereditary physical traits or characteristics. “Ethnic groups” may be taken to refer to sets of individuals sharing a common language, as well as common traditions or cultural heritage. The expression “religious groups” may be taken to encompass sets of individuals having the same religion, as opposed to other groups adhering to a different religion.

495. *Are tribal groups protected by international rules proscribing genocide?* In 1996 the United Nations International Law Commission in its report on the “Draft Code of Crimes Against Peace and Security of Mankind” stated that “The Commission was of the view that the present article [17 of the Draft Code] covered the prohibited acts when committed with the necessary intent against members of a *tribal group*” (p. 33, at § 9; emphasis added). According to anthropologists a “tribe” constitutes a territorial division of certain large populations, based on kinship or the belief that they descend from one ancestor: these aggregates have a chief and call themselves by one name and speak one language.¹⁷⁹

sufficient to annihilate the group as a distinct entity in the geographic area at issue.”; confirmed by the Appeals Chamber, judgement of 19 April 2004, §§ 6-23.

¹⁷⁷ W. Schabas, *Genocide in International Law* (Cambridge, Cambridge University Press, 2000), at 235, notes that the term “in part” is intended “to undermine pleas from criminals who argue that they did not intend the destruction of the group as a whole”. He then notes that the Turkish Government targeted in 1915 the Armenians “within its borders, not those of the Diaspora”; the Nazis intended to destroy all the Jews living in Europe; the Rwandan extremists did not intend to eliminate “Tutsi population beyond the country’s borders”.

¹⁷⁸ See e.g. *Jelisić* (Appeals Chamber), July 5, 2001, § 49.

¹⁷⁹ See for instance L. Mair, *Primitive Government* (London, Penguin Books, 1970), pp. 7-16. Under an authoritative definition, “In its primary sense, the tribe is a community organized in terms of kinship, and its subdivisions are the intimate kindred groupings of moieties, gentes, and totem groups. Its territorial basis is rarely defined with any precision, and its institutions are typically the undifferentiated and intermittent structures of an omnifunctional social system. The leadership of the tribe is provided by the group of adult males, the lineage elders acting as tribal chiefs, the village headmen, or the shamans, or tribal magicians. These groups and individuals are the guardians of the tribal customs and of an oral tradition of law.” (*The New Encyclopedia Britannica* (2003), XXV, at 1008).

496. The aforementioned view about “tribal groups”, which has remained isolated,¹⁸⁰ may be accepted on condition that the “tribal group” should also constitute a distinct “racial, national, ethnical or religious” group. In other words, tribes as such do not constitute a protected group.¹⁸¹

497. It is apparent that the international rules on genocide are intended to protect from obliteration groups targeted not on account of their constituting a territorial unit linked by some community bonds (such as kinship, language and lineage), but only those groups --whatever their magnitude-- which show the particular hallmark of sharing a religion, or racial or ethnic features, and are targeted precisely on account of their distinctiveness. In sum, tribes may fall under the notion of genocide set out in international law only if, as stated above, they also exhibit the characteristics of one of the four categories of group protected by international law.

498. *The question of genocidal acts against groups that do not perfectly match the definitions of the four above mentioned groups.* The genocide perpetrated in 1994 in Rwanda vividly showed the limitations of current international rules on genocide and obliged the Judges of the ICTR to place an innovative interpretation on those rules. The fact is that the Tutsi and the Hutu do not constitute at first glance distinct ethnic, racial religious or national groups. They have the same language, culture and religion, as well as basically the same physical traits. In *Akayesu* the ICTR Trial Chamber emphasized that the two groups were nevertheless distinct because (i) they had been made distinct by the Belgian colonizers when they established a system of identity cards differentiating between the two groups (§ 702), and (ii) the distinction was confirmed by the self-perception of the members of each group. As the Trials Chamber pointed out, “all the Rwandan witnesses who appeared before it invariably answered spontaneously and without hesitation the questions of the Prosecutor regarding their ethnic identity” (*ibidem*). The Trial Chamber also insisted on the fact that what was required by the international rules on genocide was that the targeted group be “a stable and permanent group”, “constituted in a permanent fashion and membership of which is determined by birth”, and be identifiable as such (§§ 511 and 702). The objective criterion of a “stable and permanent group”, which, if considered per se, could be held to be rather questionable, was supplemented in the ICTR case law (and subsequently in that of the ICTY) by the subjective standard of perception and self-perception as a member of a group.¹⁸² According to this case law, in case of doubt one should also establish whether (i) a set of persons are perceived and in fact

¹⁸⁰ W. Schabas (*Genocide in International Law*, Cambridge, Cambridge University Press, 2000), after citing the statement of the International Law Commission, argues that “It is not difficult to understand why tribal groups fit within the four corners of the domain, whereas political and gender groups do not” (at p. 112). This proposition is not however supported by any legal argument.

¹⁸¹ That, for the purpose of the legal notion of genocide, a tribe or a group of tribes may be regarded as the target of genocide only if it also constitutes a racial, ethnic or religious group, is borne out by the ruling of the Australian Federal Court in 1999 in *Nulyarimma v. Thompson and Buzzacott v. Hill*, with regard to Aboriginal groups or tribes. Some Aboriginal persons had claimed that conduct engaged in by certain Ministers of the Commonwealth or Commonwealth parliamentarians were contributing to the destruction of the Aboriginal people as an ethnic or racial group. The Court dismissed the claim. The majority of Judges held that the legal ground for dismissal was that the legal notion of genocide could not be acted upon in the Australian legal system for lack of the necessary domestic legislation. Judge Merkel opined instead that genocide could be acted upon within the domestic legal system of Australia, although in his view *in casu* the claim was nevertheless groundless on its merits, because “cultural genocide” is not covered either by customary international law or the 1948 Convention. What is interesting for our purposes is, however, that none of the three judges held that the Aboriginals could not be legitimately held to be a target-group under the proper notion of genocide. In other words, the three Judges implicitly supported the view that Australian aboriginal tribes or units do constitute a racially and ethnically distinct group, on account of their ethnicity, religion, culture, language, and colour.

According to *The Encyclopedia Britannica*, vol. 1, at pp. 714-5, and vol. 14, at pp. 434-9, the Australian aboriginal society is divided up in tribes or language-named groups based on land ownership and kinship.

¹⁸² See *Kayishema and Ruzindana*, § 98, *Musema*, at § 161, *Rutaganda*, § 56, as well as, before the ICTY, *Jelisić* (Trial Chamber), at §§70-71 and *Krstić* (Trial Chamber), at §§ 556-7 and 559-60).

treated as belonging to one of the protected groups, and in addition (ii) they consider themselves as belonging to one of such groups.¹⁸³

499. In short, the approach taken to determine whether a group is a (fully) protected one has evolved from an objective to a subjective standard to take into account that “collective identities, and in particular ethnicity, are by their very nature social constructs, “imagined” identities entirely dependent on variable and contingent perceptions, and *not* social facts, which are verifiable in the same manner as natural phenomena or physical facts”.¹⁸⁴

500. It would seem that the subjective test may usefully supplement and develop, or at least elaborate upon the standard laid down in the 1948 Convention and the corresponding customary rules on genocide. Indeed, the criteria initially used by courts to interpret and apply those treaty provisions and customary rules have proved either too loose or too rigid; in short, they were unable to take account of situations where manifestly there existed a stark opposition and conflict between two distinct sets of persons, one of which carried out the *actus reus* typical of genocide with the intent to destroy the other in whole or in part. Moreover, it would be erroneous to underestimate one crucial factor: the process of formation of a perception and self-perception of another group as distinct (on ethnic, or national, or religious or racial ground). While on historical and social grounds this may begin as a subjective view, as a way of regarding the others as making up a different and opposed group, it gradually hardens and crystallizes into a real and factual opposition. It thus leads to an objective contrast. The conflict, thus, from subjective becomes objective. It ultimately brings about the formation of two conflicting groups, one of them intent on destroying the other.

501. What matters from a legal point of view is the fact that the interpretative expansion of one of the elements of the notion of genocide (the concept of protected group) by the two International Criminal Tribunals is in line with the object and scope of the rules on genocide (to protect from deliberate annihilation essentially stable and permanent human groups, which can be differentiated on one of the grounds contemplated by the Convention and the corresponding customary rules). In addition, this expansive interpretation does not substantially depart from the text of the Genocide Convention and the corresponding customary rules, because it too hinges on four categories of groups which, however, are no longer identified only by their objective connotations but also on the basis of the subjective perceptions of members of groups. Finally, and perhaps more importantly, this broad interpretation has not been challenged by States. It may therefore be safely held that that interpretation and expansion has become part and parcel of international customary law.

¹⁸³ In *Kayishema and Ruzindana* the subjective test was only held to be applicable to the notion of ethnic group (“An ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself, as such (self-identification); or a group identified as such by others, including perpetrators of crimes (identification by others)”; at § 98). The subjective test was instead considered applicable to any group protected by the Convention (and customary law) by the ICTY Trial Chamber in *Jelisić* (at §§ 70-71: “A group may be stigmatised [...] by way of positive or negative criteria. A “positive approach” would consist of the perpetrators of the crime distinguishing a group by the characteristics which they deem to be particular to a national, ethnical, racial or religious group. A “negative approach” would consist of identifying individuals as not being part of the group to which the perpetrators of the crime consider that they themselves belong and which to them displays specific national, ethnical, racial or religious characteristics. Thereby, all individuals thus rejected would, by exclusion, make up a distinct group.”), as well as by an ICTR Trial Chamber in *Musema* (at § 161), and *Rutaganda* (at § 56).

¹⁸⁴ G. Verdiramé, “The Genocide Definition in the jurisprudence of the *ad hoc* tribunals”, 49 *International and Comparative Law Quarterly* (2000), at 592.

502. *Proof of genocidal intent.* Whenever direct evidence of genocidal intent is lacking, as is mostly the case, this intent can be inferred from many acts and manifestations or factual circumstances.¹⁸⁵ In *Jelisić* the Appeals Chamber noted that “as to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts” (§ 47).

503. Courts and other bodies charged with establishing whether genocide has occurred must however be very careful in the determination of the subjective intent. As the ICTY Appeals Chamber rightly put it in *Krstić (Appeal)*, “Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirements of specific intent. Convictions for genocide can be entered only where intent has been unequivocally established”(Judgment of 19 April 2004, at § 134). On this ground the Appeals Chamber, finding that the Trial Chamber had erred in demonstrating that the accused possessed the genocidal intent, reversed the Trial Chamber’s conviction of genocide and sentenced Krstić for complicity in genocide.

504. Similarly, States have shown caution when defining genocidal intent with regard to particular events, as is shown, for instance, by the position the Canadian authorities took in 1999 with regard to the question of mass killing of Kosovar Albanians by the armed forces of the central authorities of the Federal Republic of Yugoslavia (FRY) in the internal armed conflict between Kosovo and the Government of the FRY.¹⁸⁶

505. *Is genocide graver than other international crimes?* It has widely been held that genocide is the most serious international crime. In *Kambanda* (§ 16) and *Serushago* (§15) the ICTR defined it as “the crime of crimes” (but see below). In *Krstić* the ICTY Appeals Chamber stated that “Among the grievous crimes this Tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium. The crime is horrific in its scope; its perpetrators identify entire human groups for extinction. Those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide. This is a crime against all

¹⁸⁵ See *Jelisić* (Appeals Chamber), at § 47; *Rutaganda* (Appeals Chamber), at § 528; *Krstić* (Appeals Chamber), at § 34. A number of factors from which intent may be inferred were mentioned in *Akayesu* (§§523-4: “the general context of the perpetration of other culpable acts systematically directed against that same group, whether . . . committed by the same offender or by others”; “the scale of atrocities committed”; the “general nature” of the atrocities committed “in a region or a country” ; “the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups”; “the general political doctrine which gave rise to the acts” ; “the repetition of destructive and discriminatory acts” or “the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group—acts which are not in themselves covered by the list...but which are committed as part of the same pattern of conduct.”), in *Musema* (§ 166) as well as *Kayishema and Ruzindana* (§§ 93 and 527: “the number of group members affected” ; “the physical targeting of the group or their property”; “the use of derogatory language toward members of the targeted group”; “the weapons employed and the extent of bodily injury”; “the methodical way of planning”; “the systematic manner of killing” and “the relative proportionate scale of the actual or attempted destruction of a group.”).

¹⁸⁶ In a Memorandum of 30 March 1999, the Legal Bureau of the Canadian Department of Foreign Affairs pointed out first that in the case of the Kosovar Albanians one element of genocide was present (“targeting a group on the basis of ethnicity”). Then, after noting that so-called ethnic cleansing has been expressly excluded from the Genocide Convention in the 1948 negotiations, it pointed out that such notion (namely the forcible expulsion of person from their homes in order to escape the threat of subsequent ill-treatment), showed an intent different from the “intent to destroy”. It went on to note that “Ethnic Albanians are being killed and injured *in order to drive them from their homes*, not in order to *destroy them as a group, in whole or in part*” (in *37 Canadian Yearbook of International Law* 1999, at 328; emphasis in the original).

humankind, its harm being felt not only by the group targeted for destruction, but by all of humanity.” (§36).

506. It is indisputable that genocide bears a special stigma, for it is aimed at the *physical obliteration* of human groups. However, one should not be blind to the fact that some categories of crimes against humanity may be similarly heinous and carry a similarly grave stigma. In fact, the Appeals Chamber of the ICTR reversed the view that genocide was the “crime of crimes”. In *Kayishema and Ruyindana*, the accused alleged “that the Trial Chamber erred in finding that genocide is the “crime of crimes” because there is no such hierarchical gradation of crimes”. The Appeals Chamber agreed: “The Appeals Chamber remarks that there is no hierarchy of crimes under the Statute, and that all of the crimes specified therein are “serious violations of international humanitarian law”, capable of attracting the same sentence.” (§ 367).¹⁸⁷

II. DO THE CRIMES PERPETRATED IN DARFUR CONSTITUTE ACTS OF GENOCIDE?

507. *General.* There is no doubt that some of the objective elements of genocide materialized in Darfur. As discussed above, the Commission has collected substantial and reliable material which tends to show the occurrence of systematic killing of civilians belonging to particular tribes, of large-scale causing of serious bodily or mental harm to members of the population belonging to certain tribes, and of massive and deliberate infliction on those tribes of conditions of life bringing about their physical destruction in whole or in part (for example by systematically destroying their villages and crops, by expelling them from their homes, and by looting their cattle). However, two other constitutive elements of genocide require a more in depth analysis, namely whether (a) the target groups amount to one of the group protected by international law, and if so (b) whether the crimes were committed with a genocidal intent. These elements are considered separately below.

508. *Do members of the tribes victims of attacks and killing make up objectively a protected group?* The various tribes that have been the object of attacks and killings (chiefly the Fur, Massalit and Zaghawa tribes) do not appear to make up ethnic groups distinct from the ethnic group to which persons or militias that attack them belong. They speak the same language (Arabic) and embrace the same religion (Muslim).¹⁸⁸ In addition, also due to the high measure of intermarriage, they can hardly be distinguished in their outward physical appearance from the members of tribes that allegedly attacked them. Furthermore, inter-marriage and coexistence in both social and economic terms, have over the years tended to blur the distinction between the groups. Apparently, the sedentary and nomadic character of the groups constitutes one of the main distinctions between them. It is also notable that members of the African tribes speak their own dialect in addition to Arabic, while members of Arab tribes only speak Arabic.

509. *If not, may one hold that they subjectively make up distinct groups?* If objectively the two sets of persons at issue do not make up two distinct protected groups, the question arises as to whether they may nevertheless be regarded as such subjectively, in that they perceive each other and themselves as constituting distinct groups.

¹⁸⁷ Note however that the Appeals Chamber concluded that the Trial Chamber had made no reversible error: “The Appeals Chamber finds that the Trial Chamber’s description of genocide as the “crime of crimes” was at the level of general appreciation, and did not impact on the sentence it imposed.” (§ 367). See also *Semanya*, ICTR Trial Chamber, § 555.

¹⁸⁸ See section above, ‘Historical and social background ...’

510. As noted above, in recent years the perception of differences has heightened and has extended to distinctions that were earlier not the predominant basis for identity. The rift between tribes, and the political polarization around the rebel opposition to the central authorities, has extended itself to issues of identity. Those tribes in Darfur who support rebels have increasingly come to be identified as “African” and those supporting the government as the “Arabs”. A good example to illustrate this is that of the Gimmer, a pro-government African tribe and how it is seen by the African tribes opposed to the government as having been “Arabized”. Clearly, not all “African” tribes support the rebels and not all “Arab” tribes support the Government. Some “Arab” tribes appear to be either neutral or even support the rebels. Other measures contributing to a polarization of the two groups include the 1987-1989 conflict over access to grazing lands and water sources between nomads of Arab origin and the sedentary Fur. The Arab-African divide has also been fanned by the growing insistence on such divide in some circles and in the media. All this has contributed to the consolidation of the contrast and gradually created a marked polarisation in the perception and self-perception of the groups concerned. At least those most affected by the conditions explained above, including those directly affected by the conflict, have come to perceive themselves as either “African” or “Arab”.

511. There are other elements that tend to show a self-perception of two distinct groups. In many cases militias attacking “African” villages tend to use derogatory epithets, such as “slaves”, “blacks”, *Nuba*”, or “*Zurga*” that might imply a perception of the victims as members of a distinct group. However, in numerous other instances they use derogatory language that is not linked to ethnicity or race.¹⁸⁹ As for the victims, they often refer to their attackers as *Janjaweed*, a derogatory term that normally designates “a man (a devil) with a gun on a horse.” However, in this case the term *Janjaweed* clearly refers to “militias of *Arab* tribes on horseback or on camelback.” In other words, the victims perceive the attackers as persons belonging to another and hostile group.

512. For these reasons it may be considered that the tribes who were victims of attacks and killings subjectively make up a protected group.

513. *Was there a genocidal intent?* Some elements emerging from the facts including the scale of atrocities and the systematic nature of the attacks, killing, displacement and rape, as well as racially motivated statements by perpetrators that have targeted members of the African tribes only, could be indicative of the genocidal intent. However, there are other more indicative elements that show the lack of genocidal intent. The fact that in a number of villages attacked and burned by both militias and Government forces the attackers refrained from exterminating the whole population that had not fled, but instead selectively killed groups of young men, is an important element. A telling example is the attack of 22 January 2004 on Wadi Saleh, a group of 25 villages inhabited by about 11 000 Fur.

¹⁸⁹ Epithets that eyewitnesses or victims reported to the Commission include the following: “This is your end. The Government armed me.” “You are Massalit, why do you come here, why do you take our grass? You will not take anything today.” “You will not stay in this country.” Destroy the *Torabora*.” “You are Zaghawa tribes, you are slaves.” “Where are your fathers, we would like to shoot and kill them”. “Take your cattle, go away and leave the village.” In an attack of 1 November 2003 on the village of Bir-Saliba (in the region of Sirba, Kulbus), a witness heard the attackers yell “Allah Akbar, we are going to evict you Nyanya” and explained that “Nyanya” in their dialect is the name of the poison used to kill insects (however, probably this derogatory term was also used as a reference to the rebel organization in the South that existed before the establishment of the SPLA, and was called NYANYA).

During rape: “You are the mother of the people who are killing our people.” “Do not cut the grass because the camels use it.” “You sons of *Torabora* we are going to kill you.” “You do not have the right to be educated and must be *Torabora*” (to an 18 year old student of a boarding school); “You are not allowed to take this money to fathers that are real *Torabora*” (to a girl from whom the soldier that raped her also took all her money); “You are very cheap people, you have to be killed”.

According to credible accounts of eye witnesses questioned by the Commission, after occupying the villages the Government Commissioner and the leader of the Arab militias that had participated in the attack and burning, gathered all those who had survived or had not managed to escape into a large area. Using a microphone they selected 15 persons (whose name they read from a written list), as well as 7 *omdas*, and executed them on the spot. They then sent all elderly men, all boys, many men and all women to a nearby village, where they held them for some time, whereas they executed 205 young villagers, who they asserted were rebels (*Torabora*). According to male witnesses interviewed by the Commission and who were among the survivors, about 800 persons were not killed (most young men of those spared by the attackers were detained for some time in the Mukjar prison).

514. This case clearly shows that the intent of the attackers was not to destroy an ethnic group as such, or part of the group. Instead, the intention was to murder all those men they considered as rebels, as well as forcibly expel the whole population so as to vacate the villages and prevent rebels from hiding among, or getting support from, the local population.

515. Another element that tends to show the Sudanese Government's lack of genocidal intent can be seen in the fact that persons forcibly dislodged from their villages are collected in IDP camps. In other words, the populations surviving attacks on villages are not killed outright, so as to eradicate the group; they are rather forced to abandon their homes and live together in areas selected by the Government. While this attitude of the Sudanese Government may be held to be in breach of international legal standards on human rights and international criminal law rules, it is not indicative of any intent to annihilate the group. This is all the more true because the living conditions in those camps, although open to strong criticism on many grounds, do not seem to be calculated to bring about the extinction of the ethnic group to which the IDPs belong. Suffice it to note that the Government of Sudan generally allows humanitarian organizations to help the population in camps by providing food, clean water, medicines and logistical assistance (construction of hospitals, cooking facilities, latrines, etc.)

516. Another element that tends to show the lack of genocidal intent is the fact that in contrast with other instances described above, in a number of instances villages with a mixed composition (African and Arab tribes) have not been attacked. This for instance holds true for the village of Abaata (north-east of Zelingi, in Western Darfur), consisting of Zaghawa and members of Arab tribes.

517. Furthermore, it has been reported by a reliable source that one inhabitant of the Jabir Village (situated about 150 km from Abu Shouk Camp) was among the victims of an attack carried out by Janjaweed on 16 March 2004 on the village. He stated that he did not resist when the attackers took 200 camels from him, although they beat him up with the butt of their guns. Instead, prior to his beating, his young brother, who possessed only one camel, had resisted when the attackers had tried to take his camel, and had been shot dead. Clearly, in this instance the special intent to kill a member of a group to *destroy the group as such* was lacking, the murder being only motivated by the desire to appropriate cattle belonging to the inhabitants of the village. Irrespective of the motive, had the attackers' intent been to annihilate the group, they would not have spared one of the brothers.

518. *Conclusion.* On the basis of the above observations, the Commission concludes that the Government of Sudan has not pursued a policy of genocide. Arguably, two elements of genocide might be deduced from the gross violations of human rights perpetrated by Government forces and the militias under their control. These two elements are: first, the *actus reus* consisting of killing, or causing serious bodily or mental harm, or deliberately inflicting conditions of life likely to bring about physical

destruction; and, second, on the basis of a subjective standard, the existence of a protected group being targeted by the authors of criminal conduct. Recent developments have led to the perception and self-perception of members of African tribes and members of Arab tribes as making up two distinct ethnic groups. However, one crucial element appears to be missing, at least as far as the central Government authorities are concerned: genocidal intent. Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare.

519. However, as pointed out above, the Government also entertained the intent to drive a particular group out of an area on persecutory and discriminatory grounds for political reasons. In the case of Darfur this discriminatory and persecutory intent may be found, on many occasions, in some Arab militias, as well as in the central Government: the systematic attacks on villages inhabited by civilians (or mostly by civilians) belonging to some “African” tribes (Fur, Masaalit and Zaghawa), the systematic destruction and burning down of these villages, as well as the forced displacement of civilians from those villages attest to a manifestly persecutory intent. In this respect, in addition to *murder* as a crime against humanity, the Government may be held responsible for *persecution as a crime against humanity*. *This would not affect the conclusion of the Commission that the Government of Sudan has not pursued the policy of genocide in Darfur.*

520. One should not rule out the possibility that in some instances *single individuals*, including Government officials, may entertain a genocidal intent, or in other words, attack the victims with the specific intent of annihilating, in part, a group perceived as a hostile ethnic group.¹⁹⁰ If any single individual, including Governmental officials, has such intent, it would be for a competent court to make such a determination on a case by case basis. Should the competent court determine that in some instances certain individuals pursued the genocidal intent, the question would arise of establishing any possible criminal responsibility of senior officials either for complicity in genocide or for failure to investigate, or repress and punish such possible acts of genocide.

521. Similarly, it would be for a competent court to determine whether some individual members of the militias supported by the Government, or even single Government officials, pursued a policy of *extermination* as a crime against humanity, or whether murder of civilians was so widespread and systematic as to acquire the legal features proper to *extermination* as a crime against humanity.

522. The above conclusion that no genocidal policy has been pursued and implemented in Darfur by the Government authorities, directly or through the militias under their control, should not be taken as in any way detracting from, or belittling, the gravity of the crimes perpetrated in that region. As stated above genocide is not necessarily the most serious international crime. Depending upon the circumstances, *such international offences as crimes against humanity or large scale war crimes may be no less serious and heinous than genocide*. This is exactly what happened in Darfur, where massive atrocities were perpetrated on a very large scale, and have so far gone unpunished.

¹⁹⁰ As the ICTR Appeals Chamber rightly noted in *Kayishema and Ruzindana*, “genocide is not a crime that can only be committed by certain categories of persons. As evidenced by history, it is a crime which has been committed by the low-level executioner and the high-level planner or instigator alike.”(at § 170).

SECTION III

IDENTIFICATION OF THE POSSIBLE PERPETRATORS OF INTERNATIONAL CRIMES

I. GENERAL

523. The Commission has satisfied itself, on the basis of credible probative information which it has collected or has been rendered to it, and which is consistent with reports from various reliable sources, that a number of persons may be suspected to bear responsibility for crimes committed in Darfur. Although the heads of responsibility may vary, the probative elements (both documentary and testimonial) the Commission has gathered are sufficient to indicate a number of persons as possibly responsible for those crimes.

524. As mentioned earlier in this report, to “identify perpetrators”, the Commission has decided that the most appropriate standard was that of requiring “*a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime.*” The Commission does not therefore make final judgments as to criminal *guilt*; rather, it makes an assessment of possible suspects that will pave the way for future investigations, and possible indictments, by a prosecutor, and convictions by a court of law.

525. The Commission has however decided to withhold the names of these persons from the public domain. It will instead list them in a sealed file that will be placed in the custody of the United Nations Secretary-General. The Commission recommends that this file be handed over to a competent Prosecutor (the ICC Prosecutor, according to the Commission’s recommendations), who will use that material as he or she deems fit for his or her investigations. A distinct and voluminous sealed file, containing all the evidentiary material collected by the Commission, will be handed over to the High Commissioner for Human Rights. This file should be delivered to a competent Prosecutor..

526. The decision to keep confidential the names of the persons who may be suspected to be responsible for international crimes in Darfur is based on three main grounds. First, it would be contrary to elementary principles of due process or fair trial to make the names of these individuals public. In this connection, it bears emphasizing Article 14 of the ICCPR and Article 55 (2) of the ICC Statute,¹⁹¹ which concern the rights of persons under investigation and which may be reasonably held to codify customary

¹⁹¹ “Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have [in addition to the rights enumerated in Article 55(1)] the following rights of which he or she shall be informed prior to being questioned:

- (a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;
- (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;
- (c) To have legal assistance of the person’s choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it;
- (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.”

international law. These rights include the right to be informed that there are grounds to believe that the person has committed a crime, the right to remain silent and to have legal assistance. The publication of the names would be done without granting the possible perpetrators the fundamental rights that any suspect must enjoy.

527. The aforementioned ground for withholding the names of the persons suspected responsible is particularly valid considering that the situation in Darfur is currently subject to intense scrutiny by the international community. Were the Commission to name those persons, the world media might indeed be inclined to jump to conclusions and hold that such persons were outright guilty, and not simply suspected of bearing responsibility.

528. The second and related ground for which the Commission deems it indispensable to withhold names is linked to the nature of the mission discharged by the Commission. As pointed out above, the Commission has not been vested with prosecutorial or investigative functions proper. It has therefore confined itself to collecting reliable information about the persons that might be suspected to be responsible for crimes in Darfur. Most of the persons the Commission has interviewed took part on the basis of assurances of confidentiality. The Commission therefore did not take signed witness statements, but rather made careful accounts of the testimony given by witnesses. In addition to witness accounts, it collected police reports, judicial decisions, hospital records, etc. It also made crime scene verification (checking for consistency with witness version, photographing and mapping, and assessing located grave sites). The Commission has thus gathered information that allows it to take a first step in the direction of ensuring accountability for the crimes committed in Darfur, by pointing to the appropriate prosecutorial and judicial authorities those who deserve thorough investigation. However, the information it has gathered would be misused if names were to be published, as this could lead to premature judgements about criminal guilt that would not only be unfair to the suspect, but would also jeopardize the entire process undertaken to fight impunity.

529. The third ground for confidentiality is the need to protect witnesses heard by the Commission (as well as prospective witnesses). In many instances it would not be difficult for those who may be suspected of bearing responsibility to identify witnesses who have spoken to the Commission, and intimidate, harass or even kill those witnesses. It is for this reason that not only the name of the possible perpetrator will be withheld, but also the list of witnesses questioned by the Commission, as well as other reliable sources of probative material. These will be included in the sealed file, which, as stated above, shall only be handed over to the Prosecutor.

530. To render any discussion on perpetrators intelligible, two legal tools are necessary: the *categories of crimes* for which they may be suspected to be responsible, and the enumeration of the various *modes of participation in international crimes* under which the various persons may be suspected of bearing responsibility. As the categories of international crimes have been listed elsewhere in the report, it may suffice here to recall briefly the various modes of participation in international crimes giving rise to individual criminal responsibility. In this context, the Commission's findings on possible perpetrators is presented in the most anonymous yet comprehensive way possible.

531. The Commission notes at the outset that it has identified ten (10) high-ranking central Government officials, seventeen (17) Government officials operating at the local level in Darfur, fourteen (14) members of the Janjaweed, as well as seven (7) members of the different rebel groups and

three (3) officers of a foreign army (who participated in their individual capacity in the conflict), who may be suspected of bearing individual criminal responsibility for the crimes committed in Darfur.

532. The Commission's mention of the number of individuals it has identified should not however be taken as an indication that the list is exhaustive. First, the Commission has collected numerous names of other possible Janjaweed perpetrators, who have been identified by one eyewitness as participants or leaders of an attack. The names of these individuals will be listed and can be found in the sealed body of evidentiary material handed over to the High Commissioner for Human Rights, for transmittal to the judicial accountability mechanism decided by the Security Council. Furthermore, and importantly, the Commission has gathered substantial material on different influential individuals, institutions, groups of persons, or committees, which have played a significant role in the conflict in Darfur, including on planning, ordering, authorizing, and encouraging attacks. These include, but are not limited to, the military, the National Security and Intelligence Service, the Military Intelligence and the Security Committees in the three States of Darfur. These institutions should be carefully investigated so as to determine the possible criminal responsibility of individuals taking part in their activities and deliberations.

II. MODES OF CRIMINAL LIABILITY FOR INTERNATIONAL CRIMES

1. *Perpetration or co-perpetration of international crimes*

533. Under international criminal law, all those who, individually or jointly, take a conduct considered prohibited and criminalized, bear individual criminal liability for their conduct, if the requisite *mens rea* is present. Furthermore, a person may "commit" a crime by omission, where he or she has a duty to act.¹⁹²

(i.) The Government of the Sudan

534. The Commission has identified six (6) officials of the Government of the Sudan who participated directly in the commission of an international crime in Darfur. Five of these individuals, members of the armed forces operating in Darfur or civilian officials of the local Government in one of the three Darfur States, have led or otherwise participated in attacks against civilians, leading to forcible displacement of the affected villagers from their homes. These individuals may be responsible, under the doctrine of joint criminal enterprise, for the crimes committed by others during attacks. However, these individuals can be suspected of having committed indiscriminate attacks on civilians as a war crime. Finally, one official is suspected of having committed the crime of torture as a crime against humanity, on the persons of various detained individuals suspected of rebel activities.

(ii.) Janjaweed

¹⁹² See *Rutaganda*, ICTR Trial Chamber, § 41; *Kunarac, Kovac & Vuković*, ICTY Trial Chamber, § 390, citing *Tadić*, ICTY Appeals Chamber, §188.

535. The Commission has collected reliable material tending to show that fourteen (14) members of the Janjaweed have participated directly in the commission of an international crime in Darfur. These individuals have been identified by eyewitnesses when participating in an attack on a village, which often involved burning, looting, killing and sometimes rape. These individuals may be responsible, under the doctrine of joint criminal enterprise, for the crimes committed by others during attacks. However, they may be held responsible as direct perpetrators for the crimes they undeniably committed. Some of them are suspected of having committed various crimes simultaneously. Of these Janjaweed identified as perpetrators by the Commission, all of them are suspected of having committed indiscriminate attacks on civilians as a war crime. In addition, one (1) is also suspected of having participated in illegal detention of civilians and two (2) in the murder of civilians as crimes against humanity.

(iii.) Rebels

536. Three (3) members of the rebel groups have been seen by eyewitnesses as having participated in an attack on a village, where looting, abduction, destruction and killing occurred. These individuals may be responsible, under the doctrine of joint criminal enterprise, for the crimes committed by others during attacks. However, they may be held responsible as direct perpetrators for the crimes they undeniably committed. In this case, they can be suspected of having committed indiscriminate attacks on civilians as a war crime.

(iv.) Foreign army officers (participating in their personal capacity)

537. Three (3) foreign army officers have been seen by eyewitnesses as having participated in an attack on a village, where looting, destruction and killing occurred. These individuals may be responsible, under the doctrine of joint criminal enterprise, for the crimes committed by others during attacks. However, they may be held responsible as direct perpetrators for the crimes they undeniably committed. In this case, they can be suspected of having committed indiscriminate attacks on civilians as a war crime.

2. Joint criminal enterprise to commit international crimes

538. *The notion of joint criminal enterprise in international criminal law.* As most national penal systems, also international criminal law does not hold criminally liable only those persons who, either alone or jointly with other persons, physically commit international crimes. International law also criminalizes conduct of all those who participated, although in varying degrees, in the commission of crimes, without performing the same acts. We will discuss below the notions of planning, ordering, instigating, aiding and abetting. International law, as was held in various cases,¹⁹³ also upholds the notion of joint criminal enterprise or of “common purpose” or “common design” and thus criminalizes the acts of a multitude of individuals who undertake actions that could not be carried out singly but perforce require the participation of more than one person. Indeed, in international criminal law the

¹⁹³ See *Tadić Appeals judgment* (1999), at §§ 185-229, the Trial Chamber decision in *Brđianin and Talić (Decision on Form of Further Amended Indictment and Prosecution Application to Amend)*, of 26 June 2001, at 22-49. See also the Trial Chamber judgment in *Kordić and Čerkez*, (judgment of 26 February 2001), at §§ 393-400, *Krstić* (judgment of 2 August 2001, at §§ 611-46), *Kvočka and others* (judgment of 2 November 2001, at §§ 265-318), *Vasiljević* (judgment of 29 November 2002), at §§ 63-9.

notion of joint criminal enterprise acquires greater significance than in most national legal systems, for most international crimes (crimes against humanity, genocide and most war crimes) are offences where the final criminal result may only be achieved through the involvement of many persons. This being the case, it would be illogical and inconsistent only to punish the person who is at the end of the chain, the man who pulls the trigger. All those who, although in varying degrees, participate in the accomplishment of the final result, must bear responsibility, or, as an ICTY Trial Chamber put it: "If the agreed crime is committed by one or other of the participants in the joint criminal enterprise, all of the participants in that enterprise are guilty of the crime regardless of the part played by each in its commission".¹⁹⁴

539. The necessary requirements for there arising criminal liability for joint criminal enterprise are the following: (i) a plurality of persons; (ii) the existence of a common plan involving the commission of an international crime (this plan need, design or purpose need not be previously arranged or formulated, but "may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise"¹⁹⁵); (iii) participation of the accused persons in the execution of the common plan.

540. There may be two principal modalities of participation in a joint criminal enterprise to commit international crimes.¹⁹⁶ First, there may be a multitude of persons participating in the commission of a crime, who share from the outset a common criminal design (to kill civilians indiscriminately, to bomb hospitals, etc.). In this case, all of them are equally responsible under criminal law, although their role and function in the commission of the crime may differ (one person planned the attack, another issued the order to the subordinates to take all the preparatory steps necessary for undertaking the attack, others physically carried out the attack, and so on). The crucial factor is that the participants voluntarily took part in the common design and intended the result. Of course, depending on the importance of the role played by each participant, their position may vary at the level of sentencing, and international judges may pass different sentences. Nevertheless, they are all equally liable under criminal law.¹⁹⁷

541. There may be another major form of joint criminal liability. It may happen that while a multitude of persons share from the outset the same criminal design, one or more perpetrators commit a crime that had not been agreed upon or envisaged at the beginning, neither expressly nor implicitly, and therefore did not constitute part and parcel of the joint criminal enterprise. For example, a military unit, acting under superior orders, sets out to detain, contrary to international law, a number of enemy civilians; however, one of the servicemen, in the heat of military action, kills or tortures one of those civilians. If this is the case, the problem arises of whether the participants in the group other than the one who committed the crime not previously planned or envisaged, also bear criminal responsibility for such crime. As held in the relevant case law,¹⁹⁸ "the responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group, and (ii) the accused *willingly took that risk*." In the example given above, and dependent upon the circumstances of each case, a court would have to determine whether it was foreseeable that detention at gunpoint of enemy servicemen might result in death or torture.

¹⁹⁴ *Krnjelac*, ICTY Trial Chamber, 15 March 2002, § 82.

¹⁹⁵ See *Tadić (Appeal)*, 1999, at § 227.

¹⁹⁶ Although the ICTY Appeals Chamber, in *Tadić (Appeal)*, 1999 (at §§ 196, 202-204) found that the case law points to three different categories, in fact they boil down to two, for the first two are similar.

¹⁹⁷ On this class of joint criminal enterprise see *Tadić (Appeals)*, 1999, at §§, 196; *Krstić* (judgment of 2 August 2001, at §§ 611-46); *Kvočka and others* (judgment of 2 November 2001, at §§ 265-318), *Vasiljević* (judgment of 29 November 2002, at §§ 63-9).

¹⁹⁸ See the ICTY Appeals Chamber's judgment in *Tadić (Appeal)*, 1999, at § 228.

(i.) The Government of the Sudan

542. The Commission has identified six (6) members of the central Government of the Sudan who can be suspected of having committed an international crime under the notion of joint criminal enterprise. Some are members of the Sudan armed forces and some are high officials of the central Government in Khartoum. Considering that the crimes committed in Darfur were widespread and based on a overall policy, these persons have, in their official capacity and in the exercise of their functions, taken actions that have contributed to the commission of crimes in Darfur. Depending on the circumstances of each case, these individuals can thus be suspected, through the doctrine of joint criminal enterprise, of having committed murder of civilians as a crime against humanity; indiscriminate attacks on civilians as a war crime; forced displacement as a crime against humanity; and destruction of civilian objects as a war crime. Three (3) of them are also suspected of being responsible under the doctrine of joint criminal enterprise for the crime of enforced disappearance, a crime against humanity.

543. The Commission has also identified eight (8) local Government officials or members of the armed forces operating in Darfur who can be suspected of international crimes under the doctrine of joint criminal enterprise. Three (3) have contributed by their actions in the detention and execution of civilians. The five (5) others, as noted above, have been identified by eyewitnesses when participating in an attack on a village, which often involved burning, looting, and killing. Depending on the circumstances of each case, these individuals can thus be suspected, through the doctrine of joint criminal enterprise, of having committed murder of civilians as a crime against humanity; forcible confinement of civilians as a crime against humanity, forced displacement as a crime against humanity; destruction of civilian objects as a war crime.

(ii.) Janjaweed

544. The Commission has identified fourteen (14) Janjaweed who can be suspected of having committed an international crime under the notion of joint criminal enterprise. These individuals have been identified by eyewitnesses when participating in an attack on a village, which often involved burning, looting, killing and sometimes rape. Depending on the circumstances of each case, these individuals can thus be suspected, through the doctrine of joint criminal enterprise, of having committed murder of civilians as a crime against humanity; indiscriminate attacks on civilians as a war crime; destruction of civilian objects and looting as war crimes; and rape, torture and forcible displacement of civilians as crime against humanity.

(iii.) Rebels

545. Three (3) members of the rebel groups have been seen by eyewitnesses as having participated in an attack on a village, where looting, abduction, destruction and killing occurred. These individuals, depending of the circumstances, may be responsible, under the doctrine of joint criminal enterprise, for the crimes committed during these attacks, namely murder of civilians, destruction of civilian objects, unlawful detention of civilians and looting as war crimes.

(iv.) Foreign army officers (acting in their personal capacity)

546. Three (3) foreign army officers have been seen by eyewitnesses as having participated in an attack on a village, where looting, destruction and killing occurred. These individuals may be responsible, under the doctrine of joint criminal enterprise, for the crimes committed during these attacks, namely murder of civilians, destruction of civilian objects and looting as war crimes.

3. Aiding and abetting international crimes

547. *The notion of aiding and abetting in international criminal law.* As pointed by international case law,¹⁹⁹ aiding and abetting a crime involves that a person (the accessory) gives practical assistance (including the provision of arms), encouragement or moral support to the author of the main crime (the principal), and such assistance has a substantial effect on the perpetration of the crime. The subjective element or *mens rea* resides in the accessory having knowledge that his actions assist the perpetrator in the commission of the crime.²⁰⁰

(i.) The Government of the Sudan

548. The Commission has identified six (6) central Government officials who may be suspected of aiding and abetting international crimes in Darfur, by recruiting, arming, providing financial support or otherwise aiding and abetting the crimes committed by the Janjaweed, which include murder of civilians as a crime against humanity; indiscriminate attacks on civilians and destruction of civilian objects as war crimes, forced displacement as a crime against humanity; as well as looting as war crime and rape as crime against humanity. The Commission notes that a pattern of looting and rape by the Janjaweed has clearly emerged during the conflict in Darfur, a fact which could not have been ignored by those identified by the Commission. By continuing their actions nonetheless, they may be suspected of having aided and abetted the Janjaweed to loot and rape.

¹⁹⁹ See the decisions by the ICTR in *Akayesu* (§§ 704-5), *Musema* (§126) and by the ICTY in *Furundžija* (§§ 190-249) and *Kunarac and others* (§391).

²⁰⁰ The distinction between responsibility for aiding and abetting and responsibility for joint criminal enterprise was explained in *Tadić*, Appeals Chamber, §. 229:

“(i) The aider and abettor is always an accessory to a crime perpetrated by another person, the principal.

(ii) In the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice’s contribution.

(iii) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose.

(iv) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required (i.e., either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed), as stated above.”

549. For the same reasons, the Commission has identified seven (7) local Government officials or members of the armed forces operating in Darfur who may be suspected of aiding and abetting the Janjaweed to commit the crimes noted above.

(ii.) Janjaweed

550. The Commission has identified four (4) Janjaweed who may be suspected of aiding and abetting international crimes in Darfur, by recruiting, arming, providing financial support or otherwise aiding and abetting the crimes committed by the Janjaweed, including murder of civilians as a crime against humanity; indiscriminate attacks on civilians and destruction of civilian objects as war crimes, forced displacement as a crime against humanity; as well as looting as war crime and rape as crime against humanity. The Commission notes that a pattern of looting and rape by the Janjaweed has clearly emerged during the conflict in Darfur, a fact which could not have been ignored by those identified by the Commission. By continuing their actions nonetheless they may be suspected of having aided and abetted the Janjaweed to loot and rape.

4. Planning international crimes

551. Planning consists of devising, agreeing upon with others, preparing and arranging for the commission of a crime. As held by international case law, planning implies that “one or several persons contemplate designing the commission of a crime at both the preparatory and executory phases.”²⁰¹

552. It is apparent from the exposition of violations set out in Section I of this Report that serious violations of human rights and humanitarian law were perpetrated on a large scale by Government forces or militias under Government control. Such violations as deliberate attacks on civilians, or indiscriminate attacks on civilians and civilian objects, or attacks on villages hiding or sheltering rebels, which caused disproportionate harm to civilians, or mass executions, as well as forced displacement of civilians from their homes were widespread and systematic, and amounted to crimes against humanity. In addition, they were so frequent and repeated, that they made up a systematic pattern of criminal conduct. In other words, these attacks manifestly resulted from a centrally planned and organized policy.

553. Thus, it can safely be said that the magnitude and large-scale nature of some crimes against humanity (indiscriminate attacks in civilians, forced transfer of civilians), as well as their consistency over a long period of time (February 2003 to the present), necessarily imply that these crimes result from a central planning operation.

554. Against this background, the Commission has found reliable material which tends to show that two (2) high officials of the local authorities in Darfur have been involved in the planning of crimes against humanity and large-scale war crimes in Darfur, including indiscriminate attacks on civilians and destruction of civilian objects as war crimes; and murder of civilians as crime against humanity.

5. Ordering international crimes

²⁰¹ See the rulings of an ICTR Trial Chamber in *Akayesu* (§480) and ICTY Trials Chambers in *Blaškić* (at §279) and *Kordić and Čerkez* (at § 386).

555. As held by international case law, the order to commit an international crime need not be given in writing or in any particular form. Furthermore, the existence of an order may be proved through circumstantial evidence.²⁰² Ordering implies however a superior-subordinate relationship between the person giving the order and the one executing it. The ‘superior’ must be in a position where he or she possesses the authority to order²⁰³.

(i.) The Government of the Sudan

556. By reason of the official position in the chain of command, or by description of eyewitnesses in the battlefield, the Commission has gathered reliable material and information which tend to show that two (2) members of the central Government of the Sudan and two (2) members of the military operating in Darfur can be suspected of having ordered the commission of crimes against humanity and large-scale war crimes in Darfur, including indiscriminate attacks on civilians and destruction of civilian objects as war crimes; and forced displacement as crime against humanity.

(ii.) Janjaweed

557. The Commission has collected reliable information which allows it to point to two (2) members of the Janjaweed who have directly ordered the men under their control to execute civilians. They may be suspected of having ordered the murder of civilians, a crime against humanity.

6. Failing to prevent or repress the perpetration of international crimes (superior responsibility)

558. *The notion of superior responsibility (or command responsibility) in international criminal law.* In international law persons who hold positions of command may be held criminally responsible if they knowingly fail to prevent and repress international crimes committed by their subordinates. Command responsibility is a well-established principle of international law that reflects the hierarchical structure of disciplined forces.²⁰⁴ This responsibility for omission, set out in a number of national and international cases,²⁰⁵ arises under the following cumulative conditions: (i) the person exercises effective command, control or authority over the perpetrators; it is not necessary for a formal hierarchical structure to exist, for a de facto position of authority or control may suffice; in addition, the superior may be either a military commander or a politician or a civilian leader; moreover, the authority or control need not be exercised directly over the perpetrators of the crimes, but may be wielded through the chain of command; (ii) the superior knew, or should have known, or had information which should have enabled

²⁰² See *Blaškić*, ICTY Trial Chamber, § 281.

²⁰³ See *Kordić and Cerkez*, ICTY Trial Chamber, § 380, confirmed by the Appeals Chamber, 17 December 2004, § 28..

²⁰⁴ See 72 *British Yearbook of International Law* 2001, at 699.

²⁰⁵ They start with *Yamashita*, brought before the US Supreme Court in 1946 (judgment of 4 February 1946, 327 US 1, 66 S. Ct. 340, 90 L. Ed. 499 (1946)) and upheld in some cases brought before the US Court sitting in Nuremberg (see *US v. Pohl and others*, judgment of 3 November 1947, in *Trials of War Criminals before the Nürnberg Military Tribunals under Control Council Law no. 10* (Washington, DC: US Govt. Print. Office, 1950, vol. V at 1011 and 1055); *US v. von List and others*, judgment of 19 February 1948 (*ibidem*, vol. XI, at 512-515, 1230, 1244, 1256-1271, 1299, 1303); *US v. von Leeb and others*, judgment of 28 October 1948 (*ibidem*, vol. XI, at 510-550, 631), *US v. von Weizsäcker*, judgment of 12 December 1949 (*ibidem*, vol. XIV, at 487, 517, 671), , as well as in *Delalić and others* (§§ 354-8), in *Blaškić* (§§295-303), in *Kordić and Cerkez* (§ 405-17).

him to conclude in the circumstances prevailing at the time, that crimes were being or had been committed, and consciously disregarded such information or knowledge; (iii) the superior failed to take the necessary action to prevent or repress the crimes; in particular, he failed to take all the measures necessary to prevent the perpetration of the crimes; or he failed to stop the crimes while they were being committed; or failed to report to the relevant authorities that his subordinates had engaged in criminal conduct, or else failed to order the punishment of the perpetrators, if such punishment fell within his remit.

559. Depending on the circumstances of each case, the subjective element required by international law is knowledge (that is awareness that crimes are being committed or are about to be committed) and intent (the desire or will not to take action) or at least recklessness (awareness that failure to prevent the action of subordinates risks bringing about certain harmful consequences, and nonetheless ignoring such risk). Instead, when the superior should have known that crimes were being committed or had been committed, culpable negligence seems to be sufficient. Finally, when the superior knows that crimes have been committed and fails to act to repress them, what is required, in addition to knowledge, is intent not to take action (or at least culpable negligence)

560. It is necessary to add that the notion of superior responsibility also applies to internal armed conflicts, as authoritatively held by international criminal tribunals.²⁰⁶ The legal opinion of States is to the same effect.²⁰⁷

561. With regard to the position of rebels, it would be groundless to argue (as some rebel leaders did when questioned by the Commission) that the two groups of insurgents (SLA and JEM) were not tightly organized militarily, with the consequence that often military engagements conducted in the field had not been planned, directed or approved by the military leadership. Even assuming that this was true, commanders must nevertheless be held accountable for actions of their subordinates. The notion is widely accepted in international humanitarian law that each army, militia or military unit engaging in fighting either in an international or internal armed conflict must have a commander charged with holding discipline and ensuring compliance with the law. This notion is crucial to the very existence as well as enforcement of the whole body of international humanitarian law, because without a chain of command and a person in control of military units, anarchy and chaos would ensue and no one could ensure respect for law and order.

562. There is another and more specific reason why the political and military leadership of SLA and JEM may not refuse to accept being held accountable for any crime committed by their troops in the field, if such leadership refrained from preventing or repressing these crimes. This reason resides in the signing by that leadership of the various agreements with the Government of the Sudan. By entering into those agreements on behalf of their respective “movements” the leaders of each “movement” assumed full responsibility for conduct or misconduct of their combatants. More specifically, in the Protocol on

²⁰⁶ See the rulings by an ICTY Trial Chamber in *Hadzihasanović and others (Decision on joint challenge to jurisdiction)*, 12 November 2002, §§ 9-179) and by the ICTY Appeals Chamber in the same case (*Decision on interlocutory appeal challenging jurisdiction in relation to command responsibility*, 16 July 2003, at §§ 11-36).

²⁰⁷ For instance, in a Memorandum of 21 January 2000 the Canadian Foreign Department’s Legal Bureau, after stating that Articles 25 and 28 of the ICC Statute (respectively on responsibility for ordering, soliciting, etc. crimes and responsibility of commanders or superiors) “codify international customary law with respect to criminal responsibility” (in 38 *Canadian Yearbook of International Law* 2000, at 336), the legal Bureau goes on to note that “In internal armed conflicts, a non-state leader could also be convicted of war crimes, if the prosecutor proved that the leader was part of an ‘organized armed group.’” (*ibidem*, at 337).

the Establishment of Humanitarian Assistance in Darfur, of 8 April 2004, the rebels undertook to respect the general principles of international humanitarian law, and these principle no doubt include that of superior responsibility.

(i.) The Government of the Sudan

563. The Commission has gathered reliable information which allows it to identify eight (8) senior central Government officials and military commanders and six (6) local Government officials or members of the armed forces operating in Darfur who may be suspected of being responsible for knowingly failing to prevent or repress the perpetration of crimes, i.e. for superior responsibility. A consistent body of credible material collected by the Commission suggests that these officials were cognisant of the situation in Darfur, and the large-scale perpetration of violations of international human rights law and international humanitarian law in the region, from their own sources and from other sources, or at the very least, should have known what was happening in Darfur, but failed to take any action to stop the atrocities being perpetrated. Furthermore, they failed to punish those under their control who committed serious crimes. Depending on the circumstances of each case, they may be suspected of bearing superior responsibility for the crimes committed by the men under their effective control, which included murder of civilians as a crime against humanity; indiscriminate attacks on civilians as a war crime and forced displacement as a crime against humanity; destruction of civilian objects and looting as war crimes; and torture as war crime.

(ii.) Rebels

564. In keeping with the comment made above concerning the structure of the rebel groups in mind, the Commission has gathered sufficient reliable material to point to four (4) individuals holding positions of importance within the different rebel groups who may be suspected of being responsible for knowingly failing to prevent or repress the perpetration of crimes committed by rebels. Having effective overall control over military personnel fighting for the rebel groups, there is information that they were aware of some crimes committed by such military personnel or at the very least, should have known what was happening, but failed to take any action to stop the atrocities being perpetrated. Furthermore, they failed to punish those under their control who committed serious crimes. These individuals may thus be suspected to be responsible, under the doctrine of superior responsibility, for the crimes committed by the rebels under their authority, namely murder of civilians, destruction of civilian objects, forced disappearances and looting as war crimes.

SECTION IV

POSSIBLE MECHANISMS TO ENSURE ACCOUNTABILITY FOR THE CRIMES COMMITTED IN DARFUR

I.GENERAL: THE INADEQUACIES OF THE SUDANESE JUDICIAL CRIMINAL SYSTEM AND THE CONSEQUENT NEED TO PROPOSE OTHER CRIMINAL MECHANISMS

565. *The need to do justice.* The magnitude and serious nature of the crimes committed against the civilian population in Darfur, both by the Government forces and the Janjaweed, and by the rebels, demand immediate action by the international community to end these atrocities. Authors of these crimes must be brought to justice. At the same time measures to bring relief and redress to the victims must be initiated to complete the process of accountability.

566. It is notable that not only the United Nations Security Council, in its resolutions 1556 and 1564, emphasized the urgent need for justice, but also the very parties to the conflict in Darfur insisted on the principle of accountability. Thus, in the Protocol on the Improvement of the Humanitarian Situation in Darfur, of 9 November 2004, the parties “[*stressed*] the need to restore and uphold the rule of law, including investigating all cases of human rights violations and bringing to justice those responsible, in line with the AU’s expressed commitment to fight impunity” (preambular § 7). Moreover, the parties to the conflict, at Article 2(8), committed themselves to “[e]nsure that all forces and individuals involved or reported to be involved in violations of the rights of the IDPs, vulnerable groups and other civilians will be transparently investigated and held accountable to the appropriate authorities”. The question however arises as to whether these are meaningless commitments, having only cosmetic value.

567. *The inaction of both the Sudanese authorities and the rebels.* The failure of both the Government and the rebels to prosecute and try those allegedly responsible for the far too numerous crimes committed in Darfur is conspicuous and unacceptable. As pointed out above, the Government has taken some steps, which however constitute more a window-dressing operation than a real and effective response to large scale criminality linked to the armed conflict. The rebels have failed to take any investigative or punitive action whatsoever.

568. The normal and ideal response to atrocities is to bring the alleged perpetrators to justice in the courts of the State where the crimes were perpetrated, or of the State of nationality of the alleged perpetrators. There may indeed be instances where a domestic system operates in an effective manner and is able to deal appropriately with atrocities committed within its jurisdiction. However, the very nature of most international crimes implies, as a general rule, that they are committed by State officials or with their complicity; often their prosecution is therefore better left to other mechanisms. Considering the nature of the crimes committed in Darfur and the shortcomings of the Sudanese criminal justice system, which have led to effective impunity for the alleged perpetrators, the Commission is of the opinion that the Sudanese courts are unable and unwilling to prosecute and try the alleged offenders.. Other mechanisms are needed to do justice.

569. The Commission is of the view that two measures should be taken by the Security Council to ensure that justice is done for the crimes committed in Darfur, keeping in mind that any justice mechanism must adhere to certain recognized principles: it must be impartial, independent, and fair. With regard to the judicial accountability mechanism, the Commission recommends the referral of the situation of Darfur to the International Criminal Court (ICC) by the United Nations Security Council. As stated above, the Sudanese judicial system has proved incapable, and the authorities unwilling, of ensuring accountability for the crimes committed in Darfur. The international community cannot stand idle by, while human life and human dignity are attacked daily and on so large a scale in Darfur. The international community must take on the responsibility to protect the civilians of Darfur and end the rampant impunity currently prevailing there.

570. The other measure is designed to provide for compensation to the victims of so many gross violations of human rights, most of them amounting to international crimes. It is therefore proposed that a Compensation Commission be established by the Security Council.

II. MEASURES TO BE TAKEN BY THE SECURITY COUNCIL

1. Referral to the International Criminal Court

(i.) Justification for suggesting the involvement of the ICC

571. The ICC is the first international permanent court capable of trying individuals accused of serious violations of international humanitarian law and human rights law, namely war crimes, crimes against humanity and genocide. The treaty that established the ICC, the Rome Statute²⁰⁸, entered into force on July 1, 2002. The Commission holds the view that the International Criminal Court should be drawn upon. Resort to the ICC would present at least six major merits.

572. The Commission holds the view that resorting to the ICC would have at least six major merits. First, the International Criminal Court was established with an eye to crimes likely to threaten peace and security. This is the main reason why the Security Council may trigger the Court's jurisdiction under Article 13 (b). The investigation and prosecution of crimes perpetrated in Darfur would have an impact on peace and security. More particularly, it would be conducive, or contribute to, peace and stability in Darfur, by removing serious obstacles to national reconciliation and the restoration of peaceful relations. Second, as the investigation and prosecution in the Sudan of persons enjoying authority and prestige in the country and wielding control over the State apparatus, is difficult or even impossible, resort to the ICC, the only truly international institution of criminal justice, which would ensure that justice be done. The fact that trials proceedings would be conducted in the Hague, the seat of the ICC, far away from the community over which those persons still wield authority and where their followers live, might ensure a neutral atmosphere and prevent the trials from stirring up political, ideological or other passions. Third, only the authority of the ICC, backed up by that of the United Nations Security Council, might compel both leading personalities in the Sudanese Government and the heads of rebels to submit to investigation and possibly criminal proceedings. Fourth, the Court, with an entirely international composition and a

²⁰⁸ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, accessible at: <http://www.un.org/law/icc/statute/rome.htm>

set of well-defined rules of procedure and evidence, is the best suited organ for ensuring a veritably fair trial of those indicted by the Court Prosecutor. Fifth, the ICC could be activated immediately, without any delay (which would be the case if one were to establish ad hoc tribunals or so called mixed or internationalized courts). Sixth, the institution of criminal proceedings before the ICC, at the request of the Security Council, would not necessarily involve a significant financial burden for the international community.²⁰⁹

(ii.) Inadvisability of other mechanisms

573. The Commission considers that the ICC is the only credible way of bringing alleged perpetrators to justice. It strongly advises against other measures.

(a.) The inadvisability of setting up an ad hoc International Criminal Tribunal

574. Given that international action is urgently needed, one might consider opportune to establish an ad hoc International Criminal Tribunal, as was the case for previous armed conflicts such as those in the former Yugoslavia and in Rwanda, when the ICC did not exist yet. However, at least two considerations militate against such a solution. First, these Tribunals, however meritorious, are very expensive. Secondly, at least so far, on a number of grounds they have been rather slow in the prosecution and punishment of the indicted persons. It would seem that it is primarily for these reasons that at present no political will appears to exist in the international community to set up yet another ad hoc International Criminal Tribunal (another major reason being that now a permanent and fully-fledged international criminal institution is available).

(b.) The inadvisability to expand to mandate of one of the existing Ad Hoc Criminal Tribunals

575. The same reasons hold true against the possible expansion, by the Security Council, of the mandate of the ICTY or the ICTR, so as to also include jurisdiction over crimes committed in Darfur. First, this expansion would be time-consuming. It would require, after a decision of the Security Council, the election of new judges and new prosecutors as well as the appointment of Registry staff. Indeed, at present the Tribunals are overstretched, for they are working very hard to implement to “completion strategy” elaborated and approved by the Security Council. Consequently, any new task for either Ad Hoc Criminal Tribunal would require new personnel, at all levels. In addition, the allocation of new tasks and the election or appointment of new staff would obviously require new financing. Thus, the second disadvantage of this option is that it would be very expensive. It should be added the conferment of a new mandate on one of the existing Tribunals would exhibit a third drawback: such expansion could end up creating great confusion in the Tribunal, which all of sudden would have to redesign its priorities and reconvert its tasks so as to accommodate the new functions.

²⁰⁹ Under Article 115 of the ICC Statute “The expenses of the Court... shall be provided by the following sources: (a) assessed contributions made by States Parties; (b) Funds provided by the United Nations, subject to the approval of the General Assembly, *in particular in relation to the expenses incurred due to referrals by the Security Council*” (emphasis added). Thus, a referral by the Security Council may entail some expenses for the United Nations, chiefly for financing investigations. Nevertheless, no financial burden will be borne by the United Nations for the most expensive part of the functioning of international criminal tribunals, namely the establishment of the court, the payment for the seat of the court, as well as payment of Judges, the Prosecutor’s office and the Registry staff.

(c.) The inadvisability of establishing mixed courts

576. Where, as in Sudan, States are faced with emergency situations involving the commission of large-scale atrocities, an option may be not to resort to national or international criminal courts, but rather to establish courts that are mixed in their composition, that is consisting of both international judges and prosecutors and of judges and prosecutors having the nationality of the State where the trials are held.

577. The mixed courts established in other conflicts have followed two similar but distinct models. First, the mixed courts can be organs of the relevant State, being part of its judiciary, as in Kosovo, East Timor, Bosnia and Cambodia. Alternatively, the courts may be international in nature, that is, freestanding tribunals not part of the national judiciary, as in Sierra Leone. The latter, for instance, is an international criminal court, but some of its judges and other officials are nationals of Sierra Leone, giving it a hybrid character which makes it different from other international criminal courts, such as the ICC, the ICTY and the ICTR. It also differs from these international criminal courts in that it is located in the country where the crimes occurred and it is funded by voluntary contributions (not assessed contributions from the United Nations budget or, as is the case for the ICC, by the States parties).

578. One obvious drawback for the creation of a special court for the crimes committed in Darfur is its financial implications. The special court for Sierra Leone, with its voluntary contributions, is hardly coping with the demands of justice there. Another major drawback can be seen in the time-consuming process for establishing these courts by means of an agreement with the United Nations. The ICC offers the net advantage, as noted above, to impose no significant financial burden on the international community and to be immediately available.

579. Thirdly, the investigation and prosecution would relate to persons enjoying authority and prestige in the country and wielding control over the State apparatus. The establishment of a special court by agreement between the actual Government and the United Nations for the investigation and prosecution of members of that very Government seems unlikely. Moreover, the situation of the national judges who would sit on courts dealing with crimes which may have been committed by leaders would not only be uncomfortable, but unbearable and dangerous.

580. Fourthly, many of the Sudanese laws are grossly incompatible with international norms. To establish mixed courts with the possibility for them of relying upon the national legal system would give rise to serious problems, particularly with regard to the 1991 Sudanese criminal procedural law. In contrast, the ICC constitutes a self-contained regime, with a set of detailed rules on both substantive and procedural law that are fully attuned to respect for the fundamental human rights all those involved in criminal proceedings before the Court.

581. Furthermore, and importantly, the situation of Sudan is distinguishable in at least one respect from most situations where a special court has been created in the past. The impugned crimes *are* within the jurisdiction *rationae temporis* of the ICC, i.e. the crimes discussed in this Report were committed after 1 July 2002²¹⁰.

²¹⁰ See ICC Statute, article 11.

582. Based on all of the above, the Commission strongly holds the view that resort to the ICC, the only truly international criminal institution, is the single best mechanism to allow justice to be made for the crimes committed in Darfur.

(iii.) Modalities of activation of the ICC jurisdiction

583. Sudan signed the Rome Statute of the ICC on 8 September 2000, but has not yet ratified it and is thus not a State party²¹¹. The prosecution of nationals of a State that is *not* party to the Rome Statute is possible under limited circumstances. First, it is possible if the crime occurred on the territory of a State party (Rome Statute, art. 12 (2) (a)). This is obviously not applicable in this case since the crimes occurred in the Sudan and were allegedly committed by Sudanese nationals²¹². Secondly, the ICC's jurisdiction can be triggered by a referral to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations (Rome Statute, art. 13 (b)). Finally, the Sudan may, by declaration lodged with the Court's Registrar, accept the exercise of jurisdiction by the Court with respect to the crimes in question (Rome Statute, art. 12 (3)).

584. The Commission strongly recommends to the Security Council to immediately refer to the ICC the situation of Darfur and the crimes perpetrated there since the beginning of the internal armed conflict in Darfur. The Security Council's referral would be fully warranted, for indisputably the situation of Darfur constitutes a threat to the peace, as the Security Council determined in its resolutions 1556 (2004) and 1564 (2004). The prosecution by the ICC of persons allegedly responsible for the most serious crimes in Darfur would no doubt contribute to the restoration of peace in that region. Recourse to the Court would have the numerous major merits emphasized above.

585. There is little doubt that the alleged crimes that have been documented in Darfur meet the thresholds of the Rome Statute as defined in articles 7 (1), 8 (1) and 8 (f). As was stated earlier, today there is a protracted armed conflict not of an international nature in Darfur between the governmental authorities and organized armed groups. As the factual findings demonstrate, a body of reliable information indicates that war crimes may have been committed on a large-scale, at times even as part of a plan or a policy. There is also a wealth of credible material which suggests that criminal acts which constitute widespread or systematic attacks directed against the civilian population were committed with knowledge of the attacks. These may amount to crimes against humanity.

586. The Sudanese justice system is unable and unwilling to address the situation in Darfur. This system has been significantly weakened during the last decade. Restrictive laws that grant broad powers to the executive particularly undermined the effectiveness of the judiciary. In fact, many of the laws in force in Sudan today contravene basic human rights standards. The Sudanese criminal laws do not adequately proscribe war crimes and crimes against humanity such as those carried out in Darfur and the Criminal Procedure Code contains provisions that prevent the effective prosecution of these acts. In

²¹¹ See ICC's official website: <http://www.icc-cpi.int/statesparties.html#S>, retrieved on November 2, 2004, updated as of September 27, 2004

²¹² If crimes under the jurisdiction of the ICC were proved to have been committed in Chad or by Chad nationals, the situation would remain the same so far as the Court's jurisdiction is concerned: Chad has signed the Rome Statute on October 20, 1999 but has not yet ratified it. See ICC website: <http://www.icc-cpi.int/statesparties.html#S>, retrieved on November 2, 2004, updated as of September 27, 2004.

addition, many victims informed the Commission that they had little confidence in the impartiality of the Sudanese justice system and its ability to bring to justice the perpetrators of the serious crimes committed in Darfur. In any event, many feared reprisals if they resorted to the national justice system.

587. The measures taken so far by the Government to address the crisis have been both grossly inadequate and ineffective. As is stated elsewhere in this report, very few victims lodged official complaints regarding crimes committed against them or their families due to a lack of confidence in the justice system. Of the few cases where complaints were made, most of the cases were not properly pursued. Further procedural hurdles limited the victims' access to justice, such as a requirement of medical examination for victims of rape. A Minister of Justice Decree relaxing this requirement for registering rape complaints is not known to most law enforcement agencies in Darfur. The Rape Commissions established by the Minister of Justice have been ineffective in investigating this crime. The Ministry of Defence established one Committee to compensate the victims of three incidents of bombing by mistake in Habila, Um Gozin and Tulo. While the report of the National Commission of Inquiry established by the President acknowledged some wrong-doings on the part of the Government, most of the report is devoted to justifying and rationalizing the actions taken by the Government in relation to the conflict. The reality is that, despite the magnitude of the crisis and its immense impact on civilians in Darfur, the Government informed the Commission of very few cases of individuals who have been prosecuted or even simply disciplined in the context of the current crisis.

588. Referring the situation in Darfur to the ICC in a resolution adopted under Chapter VII of the United Nations Charter would have a mandatory effect. In this way, the Government of Sudan could not deny the Court's jurisdiction under any circumstances. The Commission recommends that the resolution should empower the ICC prosecutor to investigate on his own initiative any individual case that is related to the current conflict in Darfur. As for the temporal scope of these investigations, the Commission suggests that the resolution should not limit the investigations to a specific time frame. As is clear from this report, while there was escalation in the attacks after February 2003, the Commission received information regarding events that took place in 2002 and even before. As pursuant to Article 1(1) of its Statute the ICC has temporal jurisdiction as from 1 July 2002, the Prosecutor could investigate crimes committed after that date.

589. In the opinion of the Commission, it would be fully appropriate for the Security Council to submit the situation of Darfur to the ICC. The Security Council has repeatedly emphasized, in resolutions 1556 and 1564, that the Government of Sudan has committed serious violations of human rights against its own nationals, and that serious breaches of human rights are also being committed by the rebels. To this consistent pattern of large scale violations of human rights not only individual States, but the whole world community through its most important political organ should energetically react. Moreover, the Security Council also stressed in its aforementioned resolutions the need to put a stop to impunity in Darfur, for the end of such impunity would contribute to restoring security in the region, thereby allowing the hundreds of thousands of internally displaced persons to return to their homes or to any other place of their choosing (see in particular its resolutions 1556 and 1564). It would thus be consistent for the Security Council, the highest body of the international community responsible for maintaining peace and security, to refer the situation of Darfur and the crimes perpetrated there, to the highest criminal judicial institution of the world community.

2. Establishment of a Compensation Commission

590. For the reasons that will be set out below, the Commission also proposes to the Security Council the establishment of a Compensation Commission, not as an alternative, but rather as a measure complementary to the referral to the ICC. States have the obligation to act not only against perpetrators but also on behalf of victims. While a Compensation Commission does not constitute a mechanism for ensuring that those responsible are held accountable, its establishment would be vital to redressing the rights of the victims of serious violations committed in Darfur.

(i.) Justification for suggesting the establishment of a Compensation Commission

591. Given the magnitude of damage caused by the armed conflict to civilian populations, it proves necessary to envisage granting reparation to victims of crimes committed during such conflict, whether or not the perpetrators of international crimes have been identified.

592. This proposal is based on practical and moral grounds, as well as on legal grounds. As for the former, suffice it to mention that in numerous instances, particularly in rape cases, it will be very difficult for any judicial mechanism to establish who perpetrated such crimes. In other words, judicial findings and retribution by a court of law may prove very difficult or even impossible. In such cases it would be necessary at least to make good the material and moral damage caused to the victims. Although the perpetrators will in fact continue to enjoy impunity, the international community may not turn a blind eye to the victims' plight. It should as a minimum attenuate their suffering by obliging the Sudanese State to make reparation for their harm.

593. Serious violations of international humanitarian law and human rights law can entail not only the individual criminal liability of the perpetrator but also the international responsibility of the State (or state-like entity) on whose behalf the perpetrator was acting. This international responsibility involves that the State (or the state-like entity) must pay compensation to the victim.²¹³

594. At the time this international obligation was first laid down, and perhaps even in 1949, when the Geneva Conventions were drafted and approved, the obligation was clearly conceived of as an obligation of each contracting State towards any other contracting State concerned. In other words, it was seen as an obligation between States, with the consequence that (i) each relevant State was entitled to request reparation or compensation from the other State concerned, and (ii) its nationals could concretely be granted compensation for any damage suffered only by lodging claims with national courts or other organs of the State. National case law in some countries²¹⁴ has held that the obligation at issue

²¹³ The international obligation to pay compensation was first laid down in Article 3 of the 1907 Hague Convention on Land Warfare, whereby "A belligerent party which violates the provisions of the said Regulations [the Regulations annexed to the Convention, also called Hague Regulations] shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces". This obligation was restated, with regard to grave breaches of the 1949 Geneva Conventions, in each Convention, where it was provided that "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding article [on grave breaches]" (common Article on grave breaches, found respectively at 51/52 /131/148). The same obligation, although worded in the terms of Article 3 of the 1907 Hague Convention, was laid down in Article 91 of the First Additional Protocol.

²¹⁴ See the Japanese cases mentioned by Shin Hae Bong, "Compensation for Victims of Wartime Atrocities – Recent Developments in Japan's Case Law", in 3 *Journal of International Criminal Justice* (2005), at 187-206.. See also the German cases referred to in A.Gattini, *Le Riparazioni di Guerra nel Diritto Internazionale* (Padova: Cedam, 2003), 249 ff. However, on 11 March 2004 the Italian Court of cassation delivered in *Ferrini* an elaborate judgment in which the Court, based among other things on *jus cogens*, held that a an Italian deported to Germany for slave labour in 1944 was entitled to compensation for

was not intended directly to grant rights to individual victims of war crimes or grave breaches. In addition, the international obligation was to be considered as fulfilled any time, following the conclusion of a peace treaty, the responsible State had agreed to pay to the other State or States war reparations or compensation for damages caused to the nationals of the adversary, regardless of whether actual payment was ever made.

595. The emergence of human rights doctrines in the international community and the proclamation of human rights at the universal and national level since the adoption of the United Nations Charter in 1945 had a significant impact on this area as well. In particular, the right to an effective remedy for any serious violation of human rights has been enshrined in many international treaties.²¹⁵ Furthermore, the United Nations Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly in 1985, provides that States should develop and make readily available appropriate rights and remedies for victims.²¹⁶

596. The right to an effective remedy also involves the right to reparation (including compensation), if the relevant judicial body satisfies itself that a violation of human rights has been committed; indeed, almost all the provisions cited above mention the right to reparation as the logical corollary of the right to an effective remedy.

597. As the then President of the ICTY, Judge C. Jorda, rightly emphasized in his letter of 12 October 2000 to the United Nations Secretary-General²¹⁷, the universal recognition and acceptance of the right to an effective remedy cannot but have a bearing on the interpretation of the international provisions on State responsibility for war crimes and other international crimes. These provisions may now be construed to the effect that the obligations they enshrine are assumed by States not only towards other contracting States but also vis-à-vis the victims, i.e. the individuals who suffered from those crimes. In other words, there has now emerged in international law a right of victims of serious human rights abuses (in particular, war crimes, crimes against humanity and genocide) to reparation (including compensation) for damage resulting from those abuses.

598. In light of the above, and based on the aforementioned body of law on human rights, the proposition is warranted that at present, whenever a gross breach of human rights is committed which

this war crime, because the international norms on compensation, given their peremptory nature, overrode the customary rules on foreign State immunity (text in Italian in 87 *Rivista di diritto internazionale* (2004), 540-551)).

²¹⁵ See Article 2 (3) of the UN Covenant on Civil and Political Rights, Article 6 of the 1965 Convention on the Elimination of Racial Discrimination, Article 14 of the 1984 Convention Against Torture, Article 39 of the 1989 Convention on the Rights of the Child, as well as Articles 19 (3) and 68 (3) of the Statute of the International Criminal Court. See also Article 8 of the 1948 Universal Declaration of Human Rights.

²¹⁶ Article 21 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted on 29 November 1985 by the UN General Assembly (resolution 40/34). See also the “Basic Principles and Guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law” which are currently under consideration by the Commission on Human Rights upon proposals by Mr T. van Boven and Mr C. Bassiouni .

²¹⁷ “The emergence of human rights under international law has altered the traditional State responsibility concept, which focused on the State as the medium of compensation. The integration of human rights into State responsibility has removed the procedural limitation that victims of war could seek compensation only through their own Governments, and has extended the right to compensation to both nationals and aliens. There is a strong tendency towards providing compensation not only to States but also to individuals based on State responsibility. Moreover, there is a clear trend in international law to recognize a right to compensation in the victim to recover from the individual who caused his or her injury. This right is recognized in the Victims Declaration [adopted by the GA], the Basic Principles [adopted by the Commission on Human Rights], other international human rights instruments and, most specifically, in the ICC Statute, which is indicative of the state of the law at present.”(in UN doc. S/2000/1063, at p. 11, § 20 of the Annex).

also amounts to an international crime, customary international law not only provides for the criminal liability of the individuals who have committed that breach, but also imposes an obligation on States of which the perpetrators are nationals, or for which they acted as *de jure* or *de facto* organs, to make reparation (including compensation) for the damage made.

599. Depending on the specific circumstances of each case, reparation may take the form of *restitutio in integrum* (restitution of the assets pillaged or stolen), monetary compensation, rehabilitation including medical and psychological care as well as legal and social services, satisfaction including a public apology with acknowledgment of the facts and acceptance of responsibility, or guarantees of non-repetition.²¹⁸ As rightly stressed by the U.N. Secretary-General in 2004, it would also be important to combine various mechanisms or forms of reparation.²¹⁹

600. It is in light of this international legal regulation that the obligation of the Sudan to pay compensation for all the crimes perpetrated in Darfur by its agents and officials or *de facto* organs must be seen. A similar obligation is incumbent upon rebels for all crimes they may have committed, whether or not the perpetrators are identified and punished.

(ii.) Establishment of a Compensation Commission

601. It is therefore proposed to establish an International Compensation Commission, consisting of fifteen (15) members, ten (10) appointed by the United Nations Secretary-General and five (5) by an independent Sudanese body. This Commission, to be chaired by an international member, should be composed of persons with an established international reputation, some specialising in law (in particular international law, torts, or commercial law), others in accounting, loss adjustment and environmental damage. The Commission should split into five chambers, each of three members; it should sit in Darfur and have a three year mandate. Four Chambers should deal with compensation for any international crime perpetrated in Darfur. A special fifth Chamber should deal specifically with compensation for victims of rape. Such chamber is necessary considering the widespread nature of this crime in Darfur and the different nature of the damage suffered by the victims. Compensation also takes a special meaning here considering that, for rape in particular, as stated above it is very difficult to find the actual perpetrators. Many victims will not benefit from seeing their aggressor held accountable by a court of law. Hence a special scheme may be advisable to ensure compensation (or, more generally, reparation) for the particularly inhumane consequences suffered by the numerous women raped in Darfur.

²¹⁸ The various forms of compensation and their respective advantages were aptly set out by the UN Secretary-General in his Report to the SC of 23 August 2004 on “The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies”. There the Secretary-General stated the following: “reparations sometimes include non-monetary elements, such as restitution of victims’ legal rights, programmes of rehabilitation for victims and symbolic measures, such as official apologies, monuments and commemorative ceremonies. The restoration of property rights, or just compensation where this cannot be done, is another common aspect of reparations in post-conflict countries. Material forms of reparation present perhaps the greatest challenges, especially when administered through mass government programmes. Difficult questions include who is included among the victims to be compensated, how much compensation is to be rewarded, what kinds of harm are to be covered, how harm is to be quantified, how different kinds of harm are to be compared and compensated and how compensation is to be distributed.” (UN doc. S/2004/616, at p. 18-9, § 54).

²¹⁹ “No single form of reparation is likely to be satisfactory to victims. Instead, appropriately conceived combinations of reparation measures will usually be required, as a complement to the proceedings of criminal tribunals and truth commissions. Whatever mode of transitional justice is adopted and however reparations programmes are conceived to accompany them, both the demands of justice and the dictates of peace require that something be done to compensate victims. Indeed, the judges of the tribunals for Yugoslavia and Rwanda have themselves recognized this and have suggested that the United Nations consider creating a special mechanism for reparations that would function alongside the tribunals.” (*ibidem*, p. 19, § 55).

602. The Commission should pronounce upon claims to compensation made by all victims of crimes, that is (under the terms of the GA Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted on 29 November 1995), persons that “individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights” as a result of international crimes in Darfur, committed by either Government authorities or any de facto organ acting on their behalf or by rebels, whether or not the perpetrator has been identified and brought to trial.

603. Funding for payment of compensation to victims of crimes committed by Government forces or de facto agents of the Government should be provided by the Sudanese authorities, which should be requested by the United Nations Security Council to place the necessary sum into an escrow account. Funding for compensation of victims of crimes committed by rebels (whether or not the perpetrators have been identified and brought to trial) should be afforded through a Trust Fund to be established on the basis of international voluntary contributions.

III. POSSIBLE MEASURES BY OTHER BODIES

604. While referral to the ICC is the main immediate measure to be taken to ensure accountability, the Commission wishes to highlight some other available measures, which are *not* suggested as possible *substitutes* for the referral of the situation of Darfur to the ICC.

1. Possible role of national courts of States other than Sudan

605. Courts of States other than Sudan may play an important role in bringing to justice persons suspected or accused of international crimes in Darfur. In this respect the question however arises of whether and to what extent this is compatible with the activation of the ICC. It is therefore fitting briefly to discuss the issue of the respective role of national courts and the ICC in cases where a situation has been referred by the Security Council to the ICC.

(i.) Referral by the Security Council and the principle of complementarity

606. The question to be addressed is that of whether the principle of complementarity on which the ICC is based, i.e. the principle whereby the Court only steps in when the competent national courts prove to be unable or unwilling genuinely to try persons accused of serious international crimes falling under the Court’s jurisdiction, should apply in the case under discussion. In other words, the question arises whether, when the Security Council refers a “situation” to the ICC under Article 13 (b) of the ICC Statute, the Court must apply the principle of complementarity and therefore first see whether there is any competent national court willing and able to prosecute the crimes emerging in the “situation”.

607. The Commission notes that while it is true that under Article 18 (1) of the ICC Statute the Prosecutor is bound to notify all States Parties that a State has referred to him a “situation” or that he has decided to initiate investigations *proprio motu*, no such duty of notification to States Parties exists with regard to Security Council referrals. However, from these rules on notifications it does not follow that

complementarity becomes inapplicable in the case of Security Council referrals. Indeed, it would seem that the fact that the Prosecutor is not obliged to notify States Parties of a Security Council referral is justified by the fact that in such case all States are presumed to know of such referral, given that acts of that body are public and widely known. This is further evidenced by the fact that the Security Council is the supreme body of the Organization and all members of the United Nations are bound by its decisions pursuant to Article 25 of the United Nations Charter. In contrast, without the Prosecutor's notification it would be hard for States immediately to become cognizant of his decision to initiate an investigation *proprio motu* or following the referral by a State. Complementarity therefore also applies to referrals by the Security Council.

608. However, a referral by the Security Council is normally based on the assumption that the territorial State is not administering justice because it is unwilling or unable to do so.²²⁰ Therefore, the principle of complementarity will not usually be invoked *in casu* with regard to that State.

609. The Commission's recommendation for a Security Council referral to the ICC is based on the correct assumption that Sudanese courts are unwilling and unable to prosecute the numerous international crimes perpetrated in Darfur since 2003. The Commission acknowledges that the final decision in this regard lies however with the ICC Prosecutor.

(ii.)The notion of “universal jurisdiction”

610. The Commission wishes to emphasise that the triggering of the ICC jurisdiction by the Security Council should be without prejudice to the role that the national criminal courts of *other* States can play. Indeed, other states might exercise the so-called universal jurisdiction over crimes allegedly committed in Darfur. The Commission sees the exercise of universal jurisdiction, subject to the conditions set out below, as a complementary means of ensuring accountability for the crimes committed in Darfur, which could indeed help to alleviate the burden of the ICC.

611. The traditional way to bring to trial alleged perpetrators of international crimes to justice is for States to rely on one of two unquestionable principles: territoriality (the crime has been committed on the State's territory) and active nationality (the crime has been committed abroad, but the perpetrator is a national of the prosecuting State). In addition, extraterritorial jurisdiction over international crimes committed by non-nationals has been exercised and is generally accepted on the basis of passive personality (the victim is a national of the prosecuting State).

612. In the absence of any of these accepted jurisdictional links at the time of the commission of the offence, the principle of universality empowers any State to bring to trial persons accused of international crimes, regardless of the place of commission of the crime, and the nationality of the perpetrator or the victim. This principle is justified by the notion that international crimes constitute attacks on the whole international community and infringe on values shared by all members of that community.

²²⁰ The Commission however acknowledges that the final decision in this regard remains that of the ICC Prosecutor.

613. It seems indisputable that a general rule of international law exists authorising States to assert universal jurisdiction over war crimes, as well as crimes against humanity and genocide. The existence of this rule is proved by the convergence of States' pronouncements, national pieces of legislation,²²¹ as well as by case law.²²²

614. However, the customary rules in question, construed in the light of general principles currently prevailing in the international community, arguably make the exercise of universal jurisdiction subject to two major conditions. First, the person suspected or accused of an international crime must be present on the territory of the prosecuting State. Second, before initiating criminal proceedings this State should request the territorial State (namely, the State where the crime has allegedly been perpetrated) or the State of active nationality (that is, the State of which the person suspected or indicted is a national) whether it is willing to institute proceedings against that person and hence prepared to request his or her extradition. Only if the State or States in question refuse to seek the extradition, or are patently unable or unwilling to bring the person to justice, may the State on whose territory the person is present initiate proceedings against him or her.

615. In the case of Darfur the second condition would not need to be applied, for, as pointed out above, Sudanese courts and other judicial authorities have clearly shown that they are unable or unwilling to exercise jurisdiction over the crimes perpetrated in Darfur.

(iii.) Exercise of universal jurisdiction and the principle of complementarity of the ICC

616. The issue of Security Council referrals and the principle of complementarity has been discussed above. The Commission takes the view that complementarity would also apply to the relations between the ICC and those national courts of countries other than Sudan. In other words, the ICC should defer to national courts other than those of Sudan which genuinely undertake proceedings on the basis of universal jurisdiction. While, as stated above, a referral by the Security Council will normally be based on the assumption that the *territorial* State is not administering justice because it is unwilling or unable to do so²²³, there is instead no reason to doubt *a priori* the ability or willingness of any other State asserting either universal jurisdiction or jurisdiction based on any of the basis for extra-territorial jurisdiction mentioned above. The principle of complementarity, one of the mainstays of the ICC system, should therefore operate fully in cases of assertion of universal jurisdiction over a crime which had been referred to the ICC by the Security Council.

²²¹ See for instance the legislation of such countries as Spain (Article 23 of the 1985 General law on the Judiciary), Austria (Article 65.1.2 of the Criminal Code), Switzerland (Articles 108 and 109 of the Military Penal Code), and Germany (Article 6.9 of the Criminal Code).

²²² For instance, see the decision the Spanish Constitutional Court delivered on 10 February 1997 in the *Panamanian Ship* case (in *El Derecho*, cdrom, 2002, Constitutional decisions); the decision (*auto*) the Spanish *Audiencia nacional* handed down on 4 November 1998 in *don Alfonso Francisco Scilingo* (ibidem., Criminal cases), the decisions of the same *Audiencia nacional* in *Pinochet* (decision of 24 September 1999, ibidem), *Fidel Castro* (decision of 4 March 1999, ibidem), as well as the judgment of 21 February 2001 handed down by the German Supreme Court (*Bundesgerichtshof*) in *Sokolović* (3 StR 372/00),.

²²³ As stated above, the Commission however acknowledges that the final decision in this regard lies with the ICC Prosecutor.

2. Truth and Reconciliation Commission

617. The Commission considers that a Truth and Reconciliation Commission could play an important role in ensuring justice and accountability. Criminal courts, by themselves, may not be suited to reveal the broadest spectrum of crimes that took place during a period of repression, in part because they may convict only on proof beyond a reasonable doubt. In situations of mass crime, such as have taken place in Darfur, a relatively limited number of prosecutions, no matter how successful, may not completely satisfy victims' expectations of acknowledgement of their suffering. What is important, in Sudan, is a full disclosure of the whole range of criminality.

618. The Commission has looked at several accountability mechanisms that formed part of certain Truth and Reconciliation Commissions (TRC). In one of these, amnesties were granted to perpetrators of serious violations of human rights and humanitarian law. Even though these amnesties were granted in exchange for public confessions by the perpetrators, they generally -- and correctly so in the Commission's opinion-- have been considered unacceptable in international law. They have also been widely considered a violation of the accepted United Nations position that there should be no amnesty for genocide, war crimes and crimes against humanity. However, in the same TRC (and in another one) some witnesses who were summoned under subpoena, and were compelled to testify against themselves, were granted "*use immunity*", in terms whereof they were assured that such information as they disclosed to the TRC would not be used against them in any criminal proceedings. "Use immunity" may be held to be acceptable in international law, at least in the circumstances of a TRC: it contributes to the revelation of truth. Perpetrators are constrained to reveal all, albeit on the limited assurance that their testimonies at the TRC will not be used against them in criminal proceedings. Nevertheless, society can hold them accountable for the crimes they admit to have committed, and they may still be prosecuted, the only evidence not usable against them being the one they gave at the TRC hearings.

619. In another TRC, criminal and civil liability for non-serious crimes (excluding murder and rape for example) could be extinguished, provided the perpetrators made a full disclosure of all their crimes, made apologies to their victims, and agreed to fulfil community service or paid reparations or compensation to the victims. All this happened in circumstances where the courts oversaw the whole process. This measure is a variant of the accountability mechanisms; it ensures that as many perpetrators as possible are revealed because they come forward, but they also pay some price to society - particularly to the victims. It is not an amnesty process as such; it is not unlike a plea bargaining arrangement between the State and the offender. The additional benefit of such an arrangement at the initiative of the TRC is that it becomes a process in which the community, and particularly the victims, become very directly involved.

620. In many contexts, therefore, TRCs have played an important role in promoting justice, uncovering truth, proposing reparations, and recommending reforms of abusive institutions.

621. Whether a TRC would be appropriate for Sudan, and at what stage it should be established, is a matter that only the Sudanese people should decide through a truly participatory process. These decisions should ideally occur (i) once the conflict is over and peace is re-established; (ii) as a complementary measure to criminal prosecution, which instead should be set in motion as soon as possible, even if the conflict is underway, with a view to having a deterrent effect, that is, stopping

further violence; and (iii) on the basis of an informed discussion among the broadest possible sections of Sudanese society which takes into account international experience and, on this basis, assesses the likely contribution of a TRC to Sudan. Recent international experience indicates that TRC's are likely to have credibility and impact only when their mandates and composition are determined on the basis of a broad consultative process, including civil society and victim groups. TRCs established for the purpose of substituting justice or producing a distorted truth should be avoided.

3. Strengthening the Sudanese Criminal Justice System

622. In the face of the rampant impunity in Darfur and in the Sudan it is essential that the Sudanese legal and judicial system be strengthened so as to be able to render justice in a manner that is consistent with human rights law.

623. It would first be advisable for Sudan to abolish the “specialized courts”, which have not proved in the least efficient in fighting impunity for crimes arising out of the state of emergency declared by the President. Sudan should also consider passing legislation designed to ensure the full independence and impartiality of the judiciary and provide it with adequate powers enabling it to address human rights violations.

624. Moreover, Sudan should consider providing training to its judges, prosecutor and investigators, to be given by international experts with an appropriate experience in training. Special emphasis should be laid on human rights law, humanitarian law, as well as international criminal. Special legislation and training should also be envisaged to improve the independence and impartiality of the judiciary.

625. It would also be important to recommend to the Sudanese authorities to repeal Article 33 of the National Security Force Act 1999, granting immunity from prosecution to any “member” or “collaborator” “for any act connected with the official work” of such persons. While the authorities have assured the Commission that immunity was automatically lifted where serious violations of international human rights or humanitarian law were committed, the Commission has not been able to verify, despite numerous formal requests, that this had indeed been the case. To the contrary, the Commission can only infer from the absence of any real prosecution of those responsible for the numerous crimes committed in Darfur that the aforementioned provision granting immunity has been, at least *de facto*, applied. This provision is in any case contrary to international law, at least if applied to serious violations of international human rights law and crimes against humanity. Immunities currently accruing to other public officials, such as members of the police, for human rights violations, should also be abolished.

SECTION V

CONCLUSIONS AND RECOMMENDATIONS

626. The people of Darfur have suffered enormously during the last few years. Their ordeal must remain at the centre of international attention. They have been living a nightmare of violence and abuse that has stripped them of the very little they had. Thousands were killed, women were raped, villages were burned, homes destroyed, and belongings looted. About 1,8 million were forcibly displaced and became refugees or internally-displaced persons. They need protection.

627. Establishing peace and ending the violence in Darfur are essential for improving the human rights situation. But real peace cannot be established without justice. The Sudanese justice system has unfortunately demonstrated that it is unable or unwilling to investigate and prosecute the alleged perpetrators of the war crimes and crimes against humanity committed in Darfur. It is absolutely essential that those perpetrators be brought to justice before a competent and credible international criminal court. It is also important that the victims of the crimes committed in Darfur be compensated.

628. The Sudan is a sovereign state and its territorial integrity must be respected. While the Commission acknowledges that the Sudan has the right to take measures to maintain or re-establish its authority and defend its territorial integrity, sovereignty entails responsibility. The Sudan is required not only to respect international law, but also to ensure its respect. It is regrettable that the Government of the Sudan has failed to protect the rights of its own people. The measures it has taken to counter the insurgency in Darfur have been in blatant violation of international law. The international community must therefore act immediately and take measures to ensure accountability. Those members of rebel groups that have committed serious violations of human rights and humanitarian law must also be held accountable.

629. Measures taken by all parties to the internal conflict in the Sudan must be in conformity with international law.

I. FACTUAL AND LEGAL FINDINGS

630. In view of the findings noted in the various sections above, the Commission concludes that the Government of the Sudan and the Janjaweed are responsible for a number of violations of international human rights and humanitarian law. Some of these violations are very likely to amount to war crimes, and given the systematic and widespread pattern of many of the violations, they would also amount to crimes against humanity. The Commission further finds that the rebel movements are responsible for violations which would amount to war crimes.

631. In particular, the Commission finds that in many instances Government forces and militias under their control attacked civilians and destroyed and burned down villages in Darfur contrary to the relevant principles and rules of international humanitarian law. Even assuming that in all the villages they

attacked there were rebels present, or at least some rebels were hiding there, or that there were persons supporting rebels - a fact that the Commission has been unable to verify for lack of reliable evidence - the attackers did not take the necessary precautions to enable civilians to leave the villages or to otherwise be shielded from attack. The impact of the attacks on civilians shows that the use of military force was manifestly disproportionate to any threat posed by the rebels. In addition, it appears that such attacks were also intended to spread terror among civilians so as to compel them to flee the villages. From the viewpoint of international criminal law these violations of international humanitarian law no doubt constitute large-scale war crimes.

632. The Commission finds that large scale destruction of villages in Darfur has been deliberately caused, by and large, by the Janjaweed during attacks, independently or in combination with Government forces. Even though in most of the incidents the Government may not have participated in the destruction, their complicity in the attacks during which the destruction was conducted and their presence at the scene of destruction are sufficient to make them jointly responsible for the destruction. There was no military necessity for the destruction and devastation caused. The targets of destruction during the attacks under discussion were exclusively civilian objects. The destruction of so many civilian villages is clearly a violation of international human rights law and international humanitarian law and amounts to a very serious war crime.

633. The Commission considers that there is a consistent and reliable body of material which tends to show that numerous murders of civilians not taking part in the hostilities were committed both by the Government of the the Sudan and the Janjaweed. It is undeniable that mass killing occurred in Darfur and that the killings were perpetrated by the Government forces and the Janjaweed in a climate of total impunity and even encouragement to commit serious crimes against a selected part of the civilian population. The large number of killings, the apparent pattern of killing and the participation of officials or authorities are amongst the factors that lead the Commission to the conclusion that killings were conducted in both a widespread and systematic manner. The mass killing of civilians in Darfur is therefore likely to amount to a crime against humanity.

634. It is apparent from the information collected and verified by the Commission that rape or other forms of sexual violence committed by the Janjaweed and Government soldiers in Darfur was widespread and systematic and may thus well amount to a *crime against humanity*. The awareness of the perpetrators that their violent acts were part of a systematic attack on civilians may well be inferred from, among other things, the fact that they were cognizant that they would in fact enjoy impunity. The Commission finds that the crimes of sexual violence committed in Darfur may amount to rape as a crime against humanity, or sexual slavery as a crime against humanity.

635. The Commission considers that torture has formed an integral and consistent part of the attacks against civilians by Janjaweed and Government forces. Torture and inhuman and degrading treatment can be considered to have been committed in both a widespread and systematic manner, amounting to a crime against humanity. In addition, the Commission considers, that conditions in the Military Intelligence Detention Centre witnessed in Khartoum clearly amount to torture and thus constitute a serious violation of international human rights and humanitarian law.

636. It is estimated that more than 1,8 million persons have been forcibly displaced from their homes, and are now hosted in IDP sites throughout Darfur, as well as in refugee camps in Chad. The

Commission finds that the forced displacement of the civilian population was both systematic and widespread, and such action would amount to a crime against humanity.

637. The Commission finds that the Janjaweed have abducted women, conduct which may amount to enforced disappearance as a crime against humanity. The incidents investigated establish that these abductions were systematic and were carried out with the acquiescence of the State, as the abductions followed combined attacks by Janjaweed and Government forces and took place in their presence and with their knowledge. The women were kept in captivity for a sufficiently long period of time, and their whereabouts were not known to their families throughout the period of their confinement. The Commission also finds that the restraints placed on the IDP population in camps, particularly women, by terrorizing them through acts of rape or killings or threats of violence to life or person by the Janjaweed, amount to severe deprivation of physical liberty in violation of rules of international law. The Commission also finds that the arrest and detention of persons by the State security apparatus and the Military Intelligence, including during attacks and intelligence operations against villages, apart from constituting serious violations of international human rights law, may also amount to the crime of enforced disappearance as a crime against humanity, as these acts were both systematic and widespread.

638. In a vast majority of cases, victims of the attacks belonged to African tribes, in particular the Fur, Masaalit and Zaghawa tribes, who were systematically targeted on political grounds in the context of the counter-insurgency policy of the Government. The pillaging and destruction of villages, being conducted on a systematic as well as widespread basis in a discriminatory fashion appears to have been directed to bring about the destruction of livelihoods and the means of survival of these populations. The Commission also considers that the killing, displacement, torture, rape and other sexual violence against civilians was of such a discriminatory character and may constitute persecution as a crime against humanity.

639. While the Commission did not find a systematic or a widespread pattern to violations committed by rebels, it nevertheless found credible evidence that members of the SLA and JEM are responsible for serious violations of international human rights and humanitarian law which may amount to war crimes. In particular, these violations include cases of murder of civilians and pillage.

II. DO THE CRIMES PERPETRATED IN DARFUR CONSTITUTE ACTS OF GENOCIDE?

640. The Commission concluded that the Government of the Sudan has not pursued a policy of genocide. Arguably, two elements of genocide might be deduced from the gross violations of human rights perpetrated by Government forces and the militias under their control. These two elements are, first, the *actus reus* consisting of killing, or causing serious bodily or mental harm, or deliberately inflicting conditions of life likely to bring about physical destruction; and, second, on the basis of a subjective standard, the existence of a protected group being targeted by the authors of criminal conduct. Recent developments have led members of African and Arab tribes to perceive themselves and others as two distinct ethnic groups. The rift between tribes, and the political polarization around the rebel opposition to the central authorities has extended itself to the issues of identity. The tribes in Darfur supporting rebels have increasingly come to be identified as “African” and those supporting the Government as “Arabs”. However, the crucial element of genocidal intent appears to be missing, at least as far as the central Government authorities are concerned. Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would

seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare.

641. The Commission does recognize that in some instances, individuals, including Government officials, may commit acts with genocidal intent. Whether this was the case in Darfur, however, is a determination that only a competent court can make on a case-by-case basis.

642. The conclusion that no genocidal policy has been pursued and implemented in Darfur by the Government authorities, directly or through the militias under their control, should not be taken as in any way detracting from the gravity of the crimes perpetrated in that region. Depending upon the circumstances, such international offences as crimes against humanity or large scale war crimes may be no less serious and heinous than genocide. This is exactly what happened in Darfur, where massive atrocities were perpetrated on a very large scale, and have so far gone unpunished.

III. WHO ARE THE PERPETRATORS?

643. As requested by the Security Council, to “identify perpetrators” the Commission decided that the most appropriate standard was that requiring that there must be “a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime.” The Commission therefore has not made final judgments as to criminal guilt; rather, it has made an assessment of possible suspects that will pave the way for future investigations, and possible indictments, by a prosecutor, and convictions by a court of law.

644. Those identified as possibly responsible for the above-mentioned violations consist of individual perpetrators, including officials of the Government of the Sudan, members of militia forces, members of rebel groups, and certain foreign army officers acting in their personal capacity. Some Government officials, as well as members of militia forces, have also been named as possibly responsible for joint criminal enterprise to commit international crimes. Others are identified for their possible involvement in planning and/or ordering the commission of international crimes, or of aiding and abetting the perpetration of such crimes. The Commission also has identified a number of senior Government officials and military commanders who may be responsible, under the notion of superior (or command) responsibility, for knowingly failing to prevent or repress the perpetration of crimes. Members of rebel groups are named as suspected of participating in a joint criminal enterprise to commit international crimes, and as possibly responsible for knowingly failing to prevent or repress the perpetration of crimes committed by rebels. The Commission has collected sufficient and consistent material (both testimonial and documentary) to point to numerous (51) suspects. Some of these persons are suspected of being responsible under more than one head of responsibility, and for more than one crime.

645. The Commission decided to withhold the names of these persons from the public domain. This decision is based on three main grounds: 1) the importance of the principles of due process and respect for the rights of the suspects; 2) the fact that the Commission has not been vested with investigative or prosecutorial powers; and 3) the vital need to ensure the protection of witnesses from possible harassment or intimidation. The Commission instead will list the names in a sealed file that will be placed in the custody of the United Nations Secretary-General. The Commission recommends that this file be handed over to a competent Prosecutor (the Prosecutor of the International Criminal Court, according to the Commission’s recommendations), who will use that material as he or she deems fit for

his or her investigations. A distinct and very voluminous sealed file, containing all the evidentiary material collected by the Commission, will be handed over to the High Commissioner for Human Rights. This file should be delivered to a competent Prosecutor

646. The Commission's mention of the number of individuals it has identified should not, however, be taken as an indication that the list is exhaustive. Numerous names of other possible perpetrators, who have been identified on the basis of insufficient evidence to name them as suspects can be found in the sealed body of evidentiary material handed over to the High Commissioner for Human Rights. Furthermore, the Commission has gathered substantial material on different influential individuals, institutions, groups of persons, or committees, which have played a significant role in the conflict in Darfur, including on planning, ordering, authorizing, and encouraging attacks. These include, but are not limited to, the military, the National Security and Intelligence Service, the Military Intelligence and the Security Committees in the three States of Darfur. These institutions should be carefully investigated so as to determine the possible criminal responsibility of individuals taking part in their activities and deliberations.

IV. THE COMMISSION'S RECOMMENDATIONS CONCERNING MEASURES DESIGNED TO ENSURE THAT THOSE RESPONSIBLE ARE HELD ACCOUNTABLE

1. Measures that should be taken by the Security Council

647. With regard to the judicial accountability mechanism, the Commission strongly recommends that the Security Council should refer the situation in Darfur to the International Criminal Court, pursuant to Article 13(b) of the Statute of the Court. Many of the alleged crimes documented in Darfur have been widespread and systematic. They meet all the thresholds of the Rome Statute for the International Criminal Court. The Sudanese justice system has demonstrated its inability and unwillingness to investigate and prosecute the perpetrators of these crimes.

648. The Commission holds the view that resorting to the ICC would have at least six major merits. First, the International Court was established with an eye to crimes likely to threaten peace and security. This is the main reason why the Security Council may trigger the Court's jurisdiction under Article 13 (b). The investigation and prosecution of crimes perpetrated in Darfur would have an impact on peace and security. More particularly, it would be conducive, or contribute to, peace and stability in Darfur, by removing serious obstacles to national reconciliation and the restoration of peaceful relations. Second, as the investigation and prosecution in the Sudan of persons enjoying authority and prestige in the country and wielding control over the State apparatus, is difficult or even impossible, resort to the ICC, the only truly international institution of criminal justice, which would ensure that justice be done. The fact that trials proceedings would be conducted in The Hague, the seat of the ICC, far away from the community over which those persons still wield authority and where their followers live, might ensure a neutral atmosphere and prevent the trials from stirring up political, ideological or other passions. Third, only the authority of the ICC, backed up by that of the United Nations Security Council, might impel both leading personalities in the Sudanese Government and the heads of rebels to submit to investigation and possibly criminal proceedings. Fourth, the Court, with an entirely international composition and a set of well-defined rules of procedure and evidence, is the best suited organ for ensuring a veritably fair trial of those indicted by the Court Prosecutor. Fifth, the ICC could be activated immediately, without any delay (which would be the case if one were to establish ad hoc tribunals or so called mixed or internationalized

courts). Sixth, the institution of criminal proceedings before the ICC, at the request of the Security Council, would not necessarily involve a significant financial burden for the international community.

649. The Security Council should, however, act not only against the perpetrators but also on behalf of victims. In this respect, the Commission also proposes the establishment of an International Compensation Commission, consisting of fifteen (15) members, ten (10) appointed by the United Nations Secretary-General and five (5) by an independent Sudanese body.

2. Action that should be taken by the Sudanese authorities

650. Government of the Sudan was put on notice concerning the alleged serious crimes that are taking place in Darfur. It was requested not only by the international community, but more importantly by its own people, to put an end to the violations and to bring the perpetrators to justice. It must take serious measures to address these violations. The Commission of Inquiry therefore recommends the Government of the Sudan to:

- (i) end the impunity for the war crimes and crimes against humanity committed in Darfur. A number of measures must be taken in this respect. It is essential that Sudanese laws be brought in conformity with human rights standards through *inter alia* abolishing the provisions that permit the detention of individuals without judicial review, the provisions granting officials immunity from prosecution as well as the provisions on specialized courts;
- (ii) respect the rights of IDPs and fully implement the Guiding Principles on Internal Displacement, particularly with regard to facilitating their voluntary return in safety and dignity;
- (iii) strengthen the independence and impartiality of the judiciary and to confer on courts adequate powers to address human rights violations;
- (iv) grant the International Committee of the Red Cross and the United Nations human rights monitors full and unimpeded access to all those detained in relation to the situation in Darfur;
- (v) ensure the protection of all the victims and witnesses of human rights violations, particularly those who were in contact with the Commission of Inquiry and ensure the protection of all human rights defenders;
- (vi) with the help of international community, enhance the capacity of the Sudanese judiciary through the training of judges, prosecutors and lawyers. Emphasis should be laid on human rights law, humanitarian law, as well as international criminal law;

- (vii) fully cooperate with the relevant human rights bodies and mechanisms of the United Nations and the African Union, particularly, the special representative of the United Nations Secretary-General on human rights defenders; and
- (viii) create through a broad consultative process, including civil society and victim groups, a truth and reconciliation commission once peace is established in Darfur.

3. Measures That Could be Taken by Other Bodies

651. The Commission also recommends that measures designed to break the cycle of impunity should include the exercise by other States of universal jurisdiction, as outlined elsewhere in this report.

652. Given the seriousness of the human rights situation in Darfur and its impact on the human rights situation in the Sudan, the Commission recommends that the Commission on Human Rights consider the re-establishment of the mandate of the Special Rapporteur on human rights in the Sudan.

653. The Commission recommends that the High Commissioner for Human Rights should issue public and periodic reports on the human rights situation in Darfur.

Annex 1. Curricula vitae of Commission's members

Antonio Cassese (Chairman)

Professor Cassese was a Judge (1993-2000) and the first President (1993-97) of the International Criminal Tribunal for the Former Yugoslavia. He also served as a member of the Italian delegation to the United Nations Commission on Human Rights, the Council of Europe Steering Committee on Human Rights, and was President of the Council of Europe Committee Against Torture (1989-93).

He has taught international law at the University of Florence and the European University Institute in Florence. In 2002, he was the recipient of the prize granted by the *Academie Universelle des Cultures* presided over by Nobel Peace Prize winner, Elie Wiesel, 'for his exceptional contribution to the protection of human rights in Europe and the world'. Professor Cassese has published extensively on issues of international human rights and international criminal law and is the author of *International Law*, 2nd edn. (Oxford University Press, 2005) and *International Criminal Law* (Oxford University Press, 2003). He is the co-founder and co-editor of the *European Journal of International Law*, and founder and editor-in-chief of the *Journal of International Criminal Justice*. He has been granted Doctorates *honoris causa* by the Erasmus University at Rotterdam, Paris XIII University and the University of Geneva, and is a member of the *Institut de droit international*.

Mohammed Fayek

Mohammed Fayek is the Secretary-General of the Arab Organization for Human Rights, a non-governmental organization which defends human rights in the Arab region. He is a member of the National Council for human rights in Egypt and the Egyptian Council for Foreign Affairs, and is Vice-President of the Egyptian Committee for Afro-Asian Solidarity. He is the owner and director-general of Dar El-Mustaqbal El-Arabi publishing house.

Mr Fayek has previously served in Egypt as Minister of Information, Minister of State for Foreign Affairs, Minister of National Guidance, and Chef de Cabinet and Advisor to the President for African and Asian Affairs. He was an elected member of the Egyptian Parliament for two consecutive terms for the Kasr El-Nil constituency in Cairo.

Hina Jilani

Hina Jilani has been the Special Representative of the Secretary-General on Human Rights Defenders since the establishment of the mandate in 2000. She is an Advocate of the Supreme Court of Pakistan and has been a human rights defender for many years, working in particular in favour of the rights of women, minorities and children. She was a co-founder of the first all-women law firm in Pakistan in 1980 and founded the country's first legal aid center in 1986.

Ms Jilani is the Secretary-General of the Human Rights Commission of Pakistan. She has been a member of the Council and Founding Board of International Council of Human Rights Policy; the Steering Committee of the Asia Pacific Forum for Women Law and Development; the International Human Rights Council at the Carter Centre; and the Women's Action Forum in Pakistan. She is a member of the District High Court and Supreme Court Bar Associations of Pakistan.

Dumisa Ntsebeza

In 1995, Dumisa Ntsebeza was appointed as a Commissioner on the Truth and Reconciliation Commission in South Africa. He led the Commission's Investigative Unit, was the Head of its Witness Protection Programme and served occasionally as Deputy and Acting Chair. Mr Ntsebeza is the founder and former president of the South African National Association of Democratic Lawyers, and a past President of South Africa's Black Lawyers Association. He has served as acting judge on the High Court of South Africa, as well as the South African Labour Court.

Mr Ntsebeza has lectured at the University of Transkei and chaired the institution's governing body, the University of Transkei Council. He has been a visiting Professor of Political Science and Law at the University of Connecticut. He is an advocate of the High Court of South Africa and a member of the Cape Bar, and currently holds chambers in Cape Town.

Therese Striggner-Scott

Ms Striggner-Scott is a barrister and principal partner with a legal consulting firm in Accra, Ghana. She has served as Judge of the High Courts of Ghana and Zimbabwe, and was the Executive Chairperson of the Ghana Law Reform Commission from January 2000 to February 2004. She was a member of the Standing Commission of Inquiry Regarding Public Violence and Intimidation in South Africa ('the Goldstone Commission').

Ms Striggner-Scott has held various diplomatic titles including Ambassador of Ghana to France (with accreditations to Spain, Portugal, Greece and the Holy See, as well as UNESCO) and to Italy (with accreditations to Turkey, Croatia, Slovenia and Greece as well as the FAO, WFP and IFAD). She has served as a member of UNESCO's Legal Commission and was an elected member of the organization's Executive Board. She was also a member of the Conventions and Recommendations Committee, the Executive Board's human rights body, and served as Chair of the Committee at the Executive Board's 140th session.

Annex 2. List of official meetings with the Government of the Sudan and the SLM/A and the JEM

I. Sudanese Governmental Representatives

A. Khartoum

- First Vice President, H.E. Ali Uthman Muhammad Taha
- Director General, National Security and Intelligence Service: Major General Sallah Gosh
- Minister of Justice: H.E. Ali Mohamed Osman Yasin
- Minister of Foreign Affairs: H.E. Mr. Mustafa Osman Ismail
- Minister of Interior and Special Representative of the President to Darfur: H.E. Mr. Abdel Rahim Mohammed Hussein
- State Minister for the Interior, H.E. Mr. Ahmed Mohammed Haroon
- Minister of Federal Affairs, H.E. Mr. Nafi Nafi
- Minister of International Cooperation: H.E. Mr. Yusuf Takana
- Minister of Defence: H.E. Mr. General Bakri Hassan Saleh
- Deputy Chief Justice and other Members of the Judiciary
- Deputy Director of Military Intelligence, General El Fadil
- Speaker of Parliament and Other Members
- Members of the National Commission of Inquiry in Darfur: Chairman Professor Dafa Allah Elhadj Yousuf
- Rapporteur of the Advisory Council for Human Rights: Mr. Abdelmonem Osman Mohamed Taha
- Members of the Rape Committee
- Members of the Committee on Darfur to assist the International Commission on Darfur, Chairman Major General Magzoub

B. North Darfur

- Governor – Wali of North Darfur: Mr. Kibul
- Army; Major General Ismat Abdulrahim Zeimat Abidi Director of operations in the ministry of Defence in Khartoum.
- Chief Prosecutor, Mr. Moulana El Gadi
- Chief Justice, Mr. Hisham Mohamed Youssef
- Police, Mr. Hassan Mohamed Ibrahim
- National Security, Deputy Director, Mr. Saleh Saddiq Mohamed

C. South Darfur

- Wali of South Darfur; Engineer Ata Al-AlMoneim
- General-Secretary of Government
- Chief Justice of South Darfur;
- Judge of Nyala Specialized Court, Mr. Murtar Ibrahim
- Director of National Security for South Darfur State, Colonel Abdel Razim
- Chief of Police of Nyala, Adedin El Taher Al Haj
- Chief of Police of Zalinguei
- Head of the 16th division in charge of South Darfur; Bridagier Abdallah Abdo,
- Head of military intelligence; Colonel Hoseith Abdelmelik Ahmedelsheik,

- Capt. Adel Youssif, legal adviser, head of the judiciary branch of the military;
- Members of the SLA and one of JEM, who are representatives of their movement to the AUCFC: Mohammed Adam and Ahmed Fadi, SLA and Magil Hassin, JEM

D. West Darfur

- Wali of West Darfur, Mr. Sulieman Abdalla Adam
- Chief Justice and members of the judiciary and the Specialized Courts, Court of Appeal, Public Court and District Court. A so-called “Legal Adviser to the Wali”
- Attorney General / Chief Prosecutor and the Legal adviser of the Wali.
- Minister of Cultural and Social Affairs and acting as Minister of Health; Deputy Wali; Mr. Jaffar Abdul Hakam,.
- Military Commander of West Darfur, 22nd Division - Name recorded as Brig-General Samsadin
- Deputy Commissioner of Police, El Geineina
- Meeting with the Head of National Security, West Darfur, El Geneina

II. SLM/A and JEM Representatives:

1. SLM/A

- Mr. Minawi Minnie Arkou, Chairman of Sudanese Liberation Movement/ Army (SLM/A).
- Military Commander and humanitarian Director Suleiman Jamos.
- Representative of the SLM/A in the AU CFC in three areas; El Fashir, El Geneina and Nyala

2. JEM

- Dr. Khalil Ibrahim Mohammed, Chairman of the Justice and Equality Movement (JEM),

Annex 3: Places visited in the Sudan

I. Cities, towns, villages and sites

- Abu Shok Camp
- Adwa
- Amika Sara
- Buram
- Deleig
- El Fashir
- El Geneina
- Fato Borno camp
- Garzila
- Habila
- Habilah
- Haloof
- Kabkabiya
- Kabkabiya
- Kass
- Khartoum
- Kulbus
- Kutum
- Mornei
- Nyala
- Shataya
- Taisha
- Tawila
- Towing
- Wadi Saleh
- Zalinguei
- Zalinguei
- Zam zam camp

- “School” IDP camp Kass
- Abeche, Chad
- Bredjing Refugee camp
- Camp of Kalma
- Camp of Nyala
- Camp of Otash
- Camp of Zalinguei
- Hamadiya camp Zalinguei

D. Detention centers

- National Security Detention center in Khartoum
- National Security Detention Centre in Nyala

- National Intelligence Detention Center in Khartoum
- Kober prison in Khartoum

Places visited outside the Sudan

- A. Eritrea, Asmara
- B. Ethiopia, Addis Ababa
- C. Chad, Abeche and Adré

Annex 3. List of public reports on Darfur consulted by the Commission

The International Commission of Inquiry reviewed numerous reports, from both public and confidential sources, in relation to the conflict in Darfur. The following is a non exhaustive list of the public reports consulted by the Commission. The titles of non public reports are not listed for confidentiality purposes.

UNITED NATIONS

1. United Nations: Darfur Region: Incidents of Violence Against Civilians Reported to the United Nations, February – September 2004
2. United Nations Inter-Agency Fact Finding and Rapid Assessment Mission, Kailek Town, South Darfur 25 April 2004,
3. Joint Communiqué between the Government of the Sudan and the Secretary General to the Sudan, 29 June – 3 July 04.
4. Report of the Secretary General pursuant to paragraphs 6 and 13 to 16 of the Security Council resolution 1556 (2004). S/2004/703
5. Report of the Secretary-General on the Sudan pursuant to paragraphs 6, 13 and 16 of Security Council resolution 1556 (2004), paragraph 15 of Security Council resolution 1564 (2004), and paragraph 17 of Security Council resolution 1574 (2004). S/2004/947
6. Report of the Secretary-General on Sudan pursuant to paragraph 15 of Security Council Resolution 1564 of 18 September 2004, and paragraphs 6, 13 and 16 of Security Council resolution 1556 of 30 July 2004. October 2004
7. UN High Level Mission to Darfur, the Sudan, 27 April – 02 May 04
8. Security Council resolution 1547, S/RES/1547
9. Security Council resolution 1556, S/RES/1556
10. Security Council resolution 1564, S/RES/1564

OHCHR

11. OHCHR Fact finding Mission to Darfur Report E/CN.4/2005/3
12. OHCHR October, November and December 2004 reports.
13. The Final Report of the First African Regional Consultation on Violence Against Women With the Special Rapporteur Of the United Nations Commission on Human Rights On Violence Against Women And the Special Rapporteur of the African Commission on Human and Peoples' Rights on Women Rights; Khartoum 25 -16 September 2004.
14. [Report of the UN HR Commission on extrajudicial, summary or arbitrary executions in S. & W. Sudan](#), E/CN.4/2005/7/Add.2, 6 August 2004
15. Report of the Representative of the Secretary-General on internally displaced persons, Francis M. Deng. E/CN.4/2005/8, 27 September 2004.

OCHA

16. Deteriorating security threatens to plunge Darfur into 'Chaos', Under-Secretary-General (OCHA) warns Security Council, SC/8262.

Sudan - UNCT

17. Weekly Round up of current Developments UNCT (31 May-5 June)
18. Office of the UN Resident and Humanitarian Co-ordinator for the Sudan; 6 December 2003, 22 March 2004,
19. UNCT Darfur Update 26 July 2003

UNHCR

20. UNHCR; The Darfur Crisis and Chad Mediation

UNICEF

21. UNICEF reports; Challenges of socio-cultural reconstruction and unity in Southern Sudan, 7 Jan 2004

WHO

22. Restrospective Mortality Survey; Among the Internally Displaced Population, Greater Darfur Sudan, August 2004.

African Union Reports

22. Cease Fire Agreement and Protocol 08 April 2004
23. CFC Commission Agreement 28 May 2004
24. Conference Agreement 25 April 2004
25. Humanitarian Protocol 09 November 2004
26. Press Release 02 December 2004
27. Security Protocol 09 November 2004
28. Status of Mission Agreement 04 June 2004
29. Commission Ceasefire Report on the Incident in Dar Essalam and Wada General Area
30. Report of the Ceasefire Commission on the Situation in Darfur Conflict at the Joint Commission Meeting Held in N'Djamena, Tchad by Brigadier General Fo Okonkwo Chairman Ceasefire Commission on 4 October 2004
31. Brief for the members of the joint Commission for the Darfur Peace Talks in Abuja Nigeria by Brigadier General Fo Okonkwo, Chairman Ceasefire Commission, 23 August 2004

Inter Governmental organizations reports

33. Arab League report on its mission to Darfur
34. Report of the Organization of Islamic Conference on its mission to Darfur
35. Report of the ad hoc delegation of the Committee on Development and Cooperation on its mission to Sudan from 19 to 24 February 2004, CR/528901EN.doc

Governmental reports

36. US Department of State Report Documenting Atrocities in Darfur, September 2004
37. CRS Report for Congress. Sudan: The Darfur Crisis and the Status of North-South Negotiations, 22 October 2004
38. The Use of Rape as a Weapon of War in the Conflict in Darfur Sudan, October 2004

List of Media and Press articles

68. Open-Range Management and Property Rights in Pastoral Africa - A Case of Spontaneous Range Enclosure in South Darfur, Sudan, by Roy H. Behnke jr, August 1985.
69. Pastoral Land Tenure and Agricultural Expansion: Sudan and the Horn of Africa
70. Transcript of the Panorama Programme from 14 November 2004
71. Arabizing an Africa Capital: What if government brings up the African face of Sudan? Mahgoub El-Tigani, December 11, 2004
72. Feature-Darfur 'A hundred days of failure', Wednesday December 15th, 2004 02:43. By Jim Lobe
73. (EU) EU/SUDAN: EU to mobilise extra 80 million EUR to support enlarged African Union mission to make Darfur safe
39. Violence against women: The unacknowledged casualties of war, Irene Khan International Herald Tribune, Saturday, December 18, 2004
40. Presidents of Chad and Sudan Meet to Discuss Rebellion in Western Sudan, 04/13/03 Presidents of Chad and Sudan Meet to Discuss Rebellion in Western Sudan, 04/13/03, AP.

List of International NGO reports

41. Sudanese Organization Against Torture
 - Human Rights Report on Darfur May- October 04
 - Darfur - The Tragedy Continues; 28 November 2004
 - Alternative Report to the African Commission- May 2004
42. Sudanese Human Rights Organization
 - Sudanese Human Rights Quarterly. Issue 17, February 2004.
 - Issue N°.16 - October 2003
 - [Quarterly Issue N°. 15, June 2003](#)
 - [Quarterly Issue N°.14, October 2002](#)
 - [Quarterly Issue N°. 12, January 2002](#)
 - [The Situation of Human Rights in Sudan](#), 26 March 2003
 - [Report on the situation of Human Rights in Sudan](#), October 1, 2003 – January 31, 2004, 5 February 2004

43. Amnesty International

- Sudan, Darfur “Too Many people killed for no reason”, 3 February 2004
- Darfur: Extrajudicial execution of 168 men, April 2004
- Darfur Incommunicado detention, torture and special courts 8 June 2004
- Sudan: At the mercy of killers – destruction of villages in Darfur, June 2004
- Sudan, Darfur Rape as a weapon of war Sexual violence and its consequences, July 2004
- Sudan: Arming the perpetrators of grave abuses in Darfur, 16 November 2004
- Sudan: Intimidation and denial, Attacks on freedom of expression in Darfur, August 2004
- Sudan No one to complain to: No respite for the victims, impunity for the perpetrators. 2 December 2004.
- Sudan, who will answer for the crimes? January 2005

44. Human Rights Watch

- Sudan, Darfur in Flames: Atrocities in Western Sudan April 2004, Vol. 16, No. 5 (a)
- Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan May 2004, Vol. 16, No. 6 (a)
- Darfur Documents Confirm Government Policy of Militia Support, A Human Rights Watch Briefing Paper, 19 July 2004
- Empty Promises? Continuing Abuses in Darfur Sudan, A Human Rights Watch Briefing Paper, 11 August 2004
- Sudan Janjaweed Camps Still Active, Human Rights Watch 27 August 2004
- Addressing crimes against humanity and "ethnic cleansing" in Darfur, Sudan, Human Rights Watch, May 24, 2004
- "If we return we will be killed" Consolidated Ethnic Cleansing in Darfur, Sudan November 2004

45. International Crisis Group

- Darfur Deadline: A New International Action Plan, Africa report No83, 23 August 2004
- Darfur Rising: Sudan's New Crisis, ICG Africa Report No76, 25 March 2004
- Sudan: Now or Never in Darfur, Africa Report No80, 23 May 2004
- Sudan: Towards an Incomplete Peace, ICG Africa Report No73, 11 December 2003
- Sudan's Dual Crises: Refocusing on IGAD, Africa Briefing, 05 October 2004

46. AEGIS

- Darfur: Management of a Genocidal Crisis, November 2004, Report 201/04

Annex 4. Overview of the activities by the investigative teams of the Commission

The Commission's investigation team was led by a Chief Investigator and included four judicial investigators, two female investigators specializing in gender violence, four forensic experts from the Argentine Forensic Anthropology Team and two military analysts.

Investigation team members interviewed witnesses and officials in Khartoum and accompanied the Commissioners on their field mission to the three Darfur States. The investigation team was then split into three sub-teams which were deployed to North, South and West Darfur.

West Darfur Team

The team for West Darfur was composed of two investigators, a military analyst and supported by one or two forensic experts, according to requirements. The team also had two interpreters working for it. The team was based in Al-Geneina for a total of 36 days, first from 27 November to 18 December 2004, and, in 2005, between 5 and 18 January. One of the investigators also accompanied the Commissioners during their visit to West Darfur and Chad, in early November 2004.

The West Darfur team conducted thirteen visits to towns and villages outside of Al-Geneina, for a total of 16 days, mostly through travel by road but also by way of 4 helicopter trips to more distant locations. The areas covered by the team included most of Al-Geneina, Kulbus and Habilah localities, while parts of Wadi Salih locality were also visited.

In all, the team collected information concerning attacks on 51 towns or villages and 11 cases of rapes, through interviews from 116 eyewitnesses and 12 circumstantial witnesses.

Through that process, members of the team met with representatives from most of the tribal groups in West Darfur, including Arab nomads. The team also held meetings with government officials, including representatives from the military, police, judiciary and administration, as well as meetings with representatives from the rebel groups (SLA and JEM). In addition to meetings with witnesses, the team further held discussions with representatives from international NGOs, United Nations Agencies and the AU.

North Darfur Team

The team in North Darfur was composed of two investigators, one analyst and members of the Forensic Team, used on a shared basis with the West and South teams. The team also employed interpreters and drivers to facilitate the mission.

The initial mission into El Fashir took place with the Commissioners on 11 November 2004. During this mission, government officials, witnesses, NGO's and other individuals were interviewed. The team returned to Khartoum with the Commissioners on the 17 November 2004. The team was due to redeployed into El Fashir on the 27 November 2004, however at this time a State of Emergency in North Darfur was declared by the Government because of continued fighting between the SLA and GOS and due to this and security concerns, deployment was not possible. The team was assigned to assist the West Darfur Team in their investigation, until such time the security situation eased.

The team was later diverted to South Darfur where it assisted in ongoing investigations. The team spent from the 1 December 2004 to 6 December 2004 based in Nyala and then the team redeployed to El Fashir until 19 December. During this period it carried out enquiries at specific targeted locations, such as IDP camps, SLA contacts, destroyed villages and government officials. A close liaison was also formed with the African Union mission. The final deployment for the team was from 4 January 2005 to 19 January 2005, during which time it concentrated on specific targets that could not be reached during the first mission. Places such as Tawila village, Kutum and Fato Bourno IDP camp are examples. A number of Government officials (military) were interviewed at length.

In total the North Darfur team interview 141 witness, covering 98 separate incidents, thirteen involving GoS only, twenty-one involving Janjaweed only and 37 involving a combination of GoS and Janjaweed. Twenty six witness were interview regarding incidents involving SLA and JEM. Seven crime scenes were visited.

South Darfur Team

The Investigative Team for South Darfur (Nyala) was composed of three investigators. Earlier the team was supported by forensic experts and investigators from other teams for several days. In addition the team had two male interpreters working for it. An international female interpreter joined the team in the final stages of the investigation to assist - particularly in sexual assault matters.

The team was based in Nyala for a total of 36 days, first from 27 November to 18 December 2004, and, in the 2005, between 5 and 18 January.

The South Darfur team conducted seven visits to towns and villages outside Nyala and Kass through travel by road but also by way of four helicopter trips to areas when road were closed for security reasons.

The South Darfur Team concentrated mainly on six case studies – namely the Kailek group of towns and villages, Hallof, Taisha, Adwa, Ami Kasara and Buram collecting detailed information on each of these cases - including the versions of the suspected parties. The team also collected information on a very recent attack on a village which occurred on 14 January 2005.

In addition the team collected information concerning 39 rape and sexual assault cases. A number of interviews were conducted with Government officials. The team also interviewed representatives from JEM and SLA. Finally the team held discussions with representatives from international NGOs, United Nations Agencies and the AU.

The Forensic team conducted crime scene examinations in 16 areas.

Annex 754

CESCR General Comment No. 16, The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights, E/C.12/2005/4 (11 August 2005)



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Agenda item 5

**SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF
THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL
AND CULTURAL RIGHTS**

General comment No. 16 (2005)

**The equal right of men and women to the enjoyment of all economic, social
and cultural rights (art. 3 of the International Covenant on Economic,
Social and Cultural Rights)**

Introduction

1. The equal right of men and women to the enjoyment of all human rights is one of the fundamental principles recognized under international law and enshrined in the main international human rights instruments. The International Covenant on Economic, Social and Cultural Rights (ICESCR) protects human rights that are fundamental to the dignity of every person. In particular, article 3 of this Covenant provides for the equal right of men and women to the enjoyment of the rights it articulates. This provision is founded on Article 1, paragraph 3, of the United Nations Charter and article 2 of the Universal Declaration of Human Rights. Except for the reference to ICESCR, it is identical to article 3 of the International Covenant on Civil and Political Rights (ICCPR), which was drafted at the same time.
2. The *travaux préparatoires* state that article 3 was included in the Covenant, as well as in ICCPR, to indicate that beyond a prohibition of discrimination, “the same rights should be expressly recognized for men and women on an equal footing and suitable measures should be taken to ensure that women had the opportunity to exercise their rights Moreover, even if article 3 overlapped with article 2, paragraph 2, it was still necessary to reaffirm the equality

rights between men and women. That fundamental principle, which was enshrined in the Charter of the United Nations, must be constantly emphasized, especially as there were still many prejudices preventing its full application".¹ Unlike article 26 of ICCPR, articles 3 and 2, paragraph 2, of ICESCR are not stand-alone provisions, but should be read in conjunction with each specific right guaranteed under part III of the Covenant.

3. Article 2, paragraph 2, of ICESCR provides for a guarantee of non-discrimination on the basis of sex among other grounds. This provision, and the guarantee of equal enjoyment of rights by men and women in article 3, are integrally related and mutually reinforcing. Moreover, the elimination of discrimination is fundamental to the enjoyment of economic, social and cultural rights on a basis of equality.

4. The Committee on Economic, Social and Cultural Rights (CESCR) has taken particular note of factors negatively affecting the equal right of men and women to the enjoyment of economic, social and cultural rights in many of its general comments, including those on the right to adequate housing,² the right to adequate food,³ the right to education,⁴ the right to the highest attainable standard of health,⁵ and the right to water.⁶ The Committee also routinely requests information on the equal enjoyment by men and women of the rights guaranteed under the Covenant in its list of issues in relation to States parties' reports and during its dialogue with States parties.

5. Women are often denied equal enjoyment of their human rights, in particular by virtue of the lesser status ascribed to them by tradition and custom, or as a result of overt or covert discrimination. Many women experience distinct forms of discrimination due to the intersection of sex with such factors as race, colour, language, religion, political and other opinion, national or social origin, property, birth, or other status, such as age, ethnicity, disability, marital, refugee or migrant status, resulting in compounded disadvantage.⁷

I. CONCEPTUAL FRAMEWORK

A. Equality

6. The essence of article 3 of ICESCR is that the rights set forth in the Covenant are to be enjoyed by men and women on a basis of equality, a concept that carries substantive meaning. While expressions of formal equality may be found in constitutional provisions, legislation and policies of Governments, article 3 also mandates the equal enjoyment of the rights in the Covenant for men and women in practice.

7. The enjoyment of human rights on the basis of equality between men and women must be understood comprehensively. Guarantees of non-discrimination and equality in international human rights treaties mandate both *de facto* and *de jure* equality. *De jure* (or formal) equality and *de facto* (or substantive) equality are different but interconnected concepts. Formal equality assumes that equality is achieved if a law or policy treats men and women in a neutral manner. Substantive equality is concerned, in addition, with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience.

8. Substantive equality for men and women will not be achieved simply through the enactment of laws or the adoption of policies that are, prima facie, gender-neutral. In implementing article 3, States parties should take into account that such laws, policies and practice can fail to address or even perpetuate inequality between men and women because they do not take account of existing economic, social and cultural inequalities, particularly those experienced by women.

9. According to article 3, States parties must respect the principle of equality in and before the law. The principle of equality in the law must be respected by the legislature when adopting laws, by ensuring that those laws further equal enjoyment of economic, social and cultural rights by men and women. The principle of equality before the law must be respected by administrative agencies, and courts and tribunals, and implies that those authorities must apply the law equally to men and women.

B. Non-discrimination

10. The principle of non-discrimination is the corollary of the principle of equality. Subject to what is stated in paragraph 15 below on temporary special measures, it prohibits differential treatment of a person or group of persons based on his/her or their particular status or situation, such as race, colour, sex, language, religion, political and other opinion, national or social origin, property, birth, or other status, such as age, ethnicity, disability, marital, refugee or migrant status.

11. Discrimination against women is “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”.⁸ Discrimination on the basis of sex may be based on the differential treatment of women because of their biology, such as refusal to hire women because they could become pregnant; or stereotypical assumptions, such as tracking women into low-level jobs on the assumption that they are unwilling to commit as much time to their work as men.

12. Direct discrimination occurs when a difference in treatment relies directly and explicitly on distinctions based exclusively on sex and characteristics of men or of women, which cannot be justified objectively.

13. Indirect discrimination occurs when a law, policy or programme does not appear to be discriminatory, but has a discriminatory effect when implemented. This can occur, for example, when women are disadvantaged compared to men with respect to the enjoyment of a particular opportunity or benefit due to pre-existing inequalities. Applying a gender-neutral law may leave the existing inequality in place, or exacerbate it.

14. Gender affects the equal right of men and women to the enjoyment of their rights. Gender refers to cultural expectations and assumptions about the behaviour, attitudes, personality traits, and physical and intellectual capacities of men and women, based solely on their identity as men or women. Gender-based assumptions and expectations generally place women at a disadvantage with respect to substantive enjoyment of rights, such as freedom to act and to be recognized as autonomous, fully capable adults, to participate fully in economic, social and

political development, and to make decisions concerning their circumstances and conditions. Gender-based assumptions about economic, social and cultural roles preclude the sharing of responsibility between men and women in all spheres that is necessary to equality.

C. Temporary special measures

15. The principles of equality and non-discrimination, by themselves, are not always sufficient to guarantee true equality. Temporary special measures may sometimes be needed in order to bring disadvantaged or marginalized persons or groups of persons to the same substantive level as others. Temporary special measures aim at realizing not only de jure or formal equality, but also de facto or substantive equality for men and women. However, the application of the principle of equality will sometimes require that States parties take measures in favour of women in order to attenuate or suppress conditions that perpetuate discrimination. As long as these measures are necessary to redress de facto discrimination and are terminated when de facto equality is achieved, such differentiation is legitimate.⁹

II. STATES PARTIES' OBLIGATIONS

A. General legal obligations

16. The equal right of men and women to the enjoyment of economic, social and cultural rights is a mandatory and immediate obligation of States parties.¹⁰

17. The equal right of men and women to the enjoyment of economic, social and cultural rights, like all human rights, imposes three levels of obligations on States parties - the obligation to respect, to protect and to fulfil. The obligation to fulfil further contains duties to provide, promote and facilitate.¹¹ Article 3 sets a non-derogable standard for compliance with the obligations of States parties as set out in articles 6 through 15 of ICESCR.

B. Specific legal obligations

1. Obligation to respect

18. The obligation to respect requires States parties to refrain from discriminatory actions that directly or indirectly result in the denial of the equal right of men and women to their enjoyment of economic, social and cultural rights. Respecting the right obliges States parties not to adopt, and to repeal laws and rescind, policies, administrative measures and programmes that do not conform with the right protected by article 3. In particular, it is incumbent upon States parties to take into account the effect of apparently gender-neutral laws, policies and programmes and to consider whether they could result in a negative impact on the ability of men and women to enjoy their human rights on a basis of equality.

2. Obligation to protect

19. The obligation to protect requires States parties to take steps aimed directly at the elimination of prejudices, customary and all other practices that perpetuate the notion of inferiority or superiority of either of the sexes, and stereotyped roles for men and women. States parties' obligation to protect under article 3 of ICESCR includes, inter alia, the respect and adoption of constitutional and legislative provisions on the equal right of men and women to

enjoy all human rights and the prohibition of discrimination of any kind; the adoption of legislation to eliminate discrimination and to prevent third parties from interfering directly or indirectly with the enjoyment of this right; the adoption of administrative measures and programmes, as well as the establishment of public institutions, agencies and programmes to protect women against discrimination.

20. States parties have an obligation to monitor and regulate the conduct of non-State actors to ensure that they do not violate the equal right of men and women to enjoy economic, social and cultural rights. This obligation applies, for example, in cases where public services have been partially or fully privatized.

3. Obligation to fulfil

21. The obligation to fulfil requires States parties to take steps to ensure that in practice, men and women enjoy their economic, social and cultural rights on a basis of equality. Such steps should include:

- To make available and accessible appropriate remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition, declarations, public apologies, educational programmes and prevention programmes;
- To establish appropriate venues for redress such as courts and tribunals or administrative mechanisms that are accessible to all on the basis of equality, including the poorest and most disadvantaged and marginalized men and women;
- To develop monitoring mechanisms to ensure that the implementation of laws and policies aimed at promoting the equal enjoyment of economic, social and cultural rights by men and women do not have unintended adverse effects on disadvantaged or marginalized individuals or groups, particularly women and girls;
- To design and implement policies and programmes to give long-term effect to the economic, social and cultural rights of both men and women on the basis of equality. These may include the adoption of temporary special measures to accelerate women's equal enjoyment of their rights, gender audits, and gender-specific allocation of resources;
- To conduct human rights education and training programmes for judges and public officials;
- To conduct awareness-raising and training programmes on equality for workers involved in the realization of economic, social and cultural rights at the grass-roots level;
- To integrate, in formal and non-formal education, the principle of the equal right of men and women to the enjoyment of economic, social and cultural rights, and to promote equal participation of men and women, boys and girls, in schools and other education programmes;

- To promote equal representation of men and women in public office and decision-making bodies;
- To promote equal participation of men and women in development planning, decision-making and in the benefits of development and all programmes related to the realization of economic, social and cultural rights.

C. Specific examples of States parties' obligations

22. Article 3 is a cross-cutting obligation and applies to all the rights contained in articles 6 to 15 of the Covenant. It requires addressing gender-based social and cultural prejudices, providing for equality in the allocation of resources, and promoting the sharing of responsibilities in the family, community and public life. The examples provided in the following paragraphs may be taken as guidance on the ways in which article 3 applies to other rights in the Covenant, but are not intended to be exhaustive.

23. Article 6, paragraph 1, of the Covenant requires States parties to safeguard the right of everyone to the opportunity to gain a living by work which is freely chosen or accepted and to take the necessary steps to achieve the full realization of this right. Implementing article 3, in relation to article 6, requires *inter alia*, that in law and in practice, men and women have equal access to jobs at all levels and all occupations and that vocational training and guidance programmes, in both the public and private sectors, provide men and women with the skills, information and knowledge necessary for them to benefit equally from the right to work.

24. Article 7 (a) of the Covenant requires States parties to recognize the right of everyone to enjoy just and favourable conditions of work and to ensure, among other things, fair wages and equal pay for work of equal value. Article 3, in relation to article 7 requires, *inter alia*, that the State party identify and eliminate the underlying causes of pay differentials, such as gender-biased job evaluation or the perception that productivity differences between men and women exist. Furthermore, the State party should monitor compliance by the private sector with national legislation on working conditions through an effectively functioning labour inspectorate. The State party should adopt legislation that prescribes equal consideration in promotion, non-wage compensation and equal opportunity and support for vocational or professional development in the workplace. Finally, the State party should reduce the constraints faced by men and women in reconciling professional and family responsibilities by promoting adequate policies for childcare and care of dependent family members.

25. Article 8, paragraph 1 (a), of the Covenant requires States parties to ensure the right of everyone to form and join trade unions of his or her choice. Article 3, in relation to article 8, requires allowing men and women to organize and join workers' associations that address their specific concerns. In this regard, particular attention should be given to domestic workers, rural women, women working in female-dominated industries and women working at home, who are often deprived of this right.

26. Article 9 of the Covenant requires that States parties recognize the right of everyone to social security, including social insurance, and to equal access to social services. Implementing article 3, in relation to article 9, requires, *inter alia*, equalizing the compulsory retirement age for

both men and women; ensuring that women receive the equal benefit of public and private pension schemes; and guaranteeing adequate maternity leave for women, paternity leave for men, and parental leave for both men and women.

27. Article 10, paragraph 1, of the Covenant requires that States parties recognize that the widest possible protection and assistance should be accorded to the family, and that marriage must be entered into with the free consent of the intending spouses. Implementing article 3, in relation to article 10, requires States parties, inter alia, to provide victims of domestic violence, who are primarily female, with access to safe housing, remedies and redress for physical, mental and emotional damage; to ensure that men and women have an equal right to choose if, whom and when to marry - in particular, the legal age of marriage for men and women should be the same, and boys and girls should be protected equally from practices that promote child marriage, marriage by proxy, or coercion; and to ensure that women have equal rights to marital property and inheritance upon their husband's death. Gender-based violence is a form of discrimination that inhibits the ability to enjoy rights and freedoms, including economic, social and cultural rights, on a basis of equality. States parties must take appropriate measures to eliminate violence against men and women and act with due diligence to prevent, investigate, mediate, punish and redress acts of violence against them by private actors.

28. Article 11 of the Covenant requires States parties to recognize the right of everyone to an adequate standard of living for him/herself and his/her family, including adequate housing (para. 1) and adequate food (para. 2). Implementing article 3, in relation to article 11, paragraph 1, requires that women have a right to own, use or otherwise control housing, land and property on an equal basis with men, and to access necessary resources to do so. Implementing article 3, in relation to article 11, paragraph 2, also requires States parties, inter alia, to ensure that women have access to or control over means of food production, and actively to address customary practices under which women are not allowed to eat until the men are fully fed, or are only allowed less nutritious food.¹²

29. Article 12 of the Covenant requires States parties to undertake steps towards the full realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The implementation of article 3, in relation to article 12, requires at a minimum the removal of legal and other obstacles that prevent men and women from accessing and benefiting from health care on a basis of equality. This includes, inter alia, addressing the ways in which gender roles affect access to determinants of health, such as water and food; the removal of legal restrictions on reproductive health provisions; the prohibition of female genital mutilation; and the provision of adequate training for health-care workers to deal with women's health issues.¹³

30. Article 13, paragraph 1, of the Covenant requires States parties to recognize the right of everyone to education and in paragraph 2 (a) stipulates that primary education shall be compulsory and available free to all. Implementing article 3, in relation to article 13, requires, inter alia, the adoption of legislation and policies to ensure the same admission criteria for boys and girls at all levels of education. States parties should ensure, in particular through information and awareness-raising campaigns, that families desist from giving preferential treatment to boys when sending their children to school, and that curricula promote equality and non-discrimination. States parties must create favourable conditions to ensure the safety of children, in particular girls, on their way to and from school.

31. Article 15, paragraph 1 (a) and (b), of the Covenant require States parties to recognize the right of everyone to take part in cultural life and to enjoy the benefits of scientific progress. Implementing article 3, in relation to article 15, paragraph 1 (a) and (b), requires, *inter alia*, overcoming institutional barriers and other obstacles, such as those based on cultural and religious traditions, which prevent women from fully participating in cultural life, science education and scientific research, and directing resources to scientific research relating to the health and economic needs of women on an equal basis with those of men.

III. IMPLEMENTATION AT THE NATIONAL LEVEL

A. Policies and strategies

32. The most appropriate ways and means of implementing the right under article 3 of the Covenant will vary from one State party to another. Every State party has a margin of discretion in adopting appropriate measures in complying with its primary and immediate obligation to ensure the equal right of men and women to the enjoyment of all their economic, social and cultural rights. Among other things, States parties must, integrate into national plans of action for human rights appropriate strategies to ensure the equal right of men and women to the enjoyment of economic, social and cultural rights.

33. These strategies should be based on the systematic identification of policies, programmes and activities relevant to the situation and context within the State, as derived from the normative content of article 3 of the Covenant and spelled out in relation to the levels and nature of States parties' obligations referred to in paragraphs 16 to 21 above. The strategies should give particular attention to the elimination of discrimination in the enjoyment of economic, social and cultural rights.

34. States parties should periodically review existing legislation, policies, strategies and programmes in relation to economic, social and cultural rights, and adopt any necessary changes to ensure that they are consonant with their obligations under article 3 of the Covenant.

35. The adoption of temporary special measures may be necessary to accelerate the equal enjoyment by women of all economic, social and cultural rights and to improve the *de facto* position of women.¹⁴ Temporary special measures should be distinguished from permanent policies and strategies undertaken to achieve equality of men and women.

36. States parties are encouraged to adopt temporary special measures to accelerate the achievement of equality between men and women in the enjoyment of the rights under the Covenant. Such measures are not to be considered discriminatory in themselves as they are grounded in the State's obligation to eliminate disadvantage caused by past and current discriminatory laws, traditions and practices. The nature, duration and application of such measures should be designed with reference to the specific issue and context, and should be adjusted as circumstances require. The results of such measures should be monitored with a view to being discontinued when the objectives for which they are undertaken have been achieved.

37. The right of individuals and groups of individuals to participate in decision-making processes that may affect their development must be an integral component of any policy, programme or activity developed to discharge governmental obligations under article 3 of the Covenant.

B. Remedies and accountability

38. National policies and strategies should provide for the establishment of effective mechanisms and institutions where they do not exist, including administrative authorities, ombudsmen and other national human rights institutions, courts and tribunals. These institutions should investigate and address alleged violations relating to article 3 and provide remedies for such violations. States parties, for their part, should ensure that such remedies are effectively implemented.

C. Indicators and benchmarks

39. National policies and strategies should identify appropriate indicators and benchmarks on the right to equal enjoyment by men and women of economic, social and cultural rights in order to effectively monitor the implementation by the State party of its obligations under the Covenant in this regard. Disaggregated statistics, provided within specific time frames, are necessary to measure the progressive realization of economic, social and cultural rights by men and women, where appropriate.

IV. VIOLATIONS

40. States parties must fulfil their immediate and primary obligation to ensure the equal right of men and women to the enjoyment of economic, social and cultural rights.

41. The principle of equality between men and women is fundamental to the enjoyment of each of the specific rights enumerated in the Covenant. Failure to ensure formal and substantive equality in the enjoyment of any of these rights constitutes a violation of that right. Elimination of de jure as well as de facto discrimination is required for the equal enjoyment of economic, social and cultural rights. Failure to adopt, implement and monitor effects of laws, policies and programmes to eliminate de jure and de facto discrimination with respect to each of the rights enumerated in articles 6 to 15 of the Covenant constitutes a violation of those rights.

42. Violations of the rights contained in the Covenant can occur through the direct action of, failure to act or omission by States parties, or through their institutions or agencies at the national and local levels. The adoption and undertaking of any retrogressive measures that affect the equal right of men and women to the enjoyment of the all the rights set forth in the Covenant constitutes a violation of article 3.

Notes

¹ Draft International Covenants on Human Rights Report of the Third Committee. A/53/65 (17 December 1962), para. 85.

² Committee on Economic, Social and Cultural Rights (hereinafter CESCR), general comment No. 4 (1991): The right to adequate housing (article 11, paragraph 1 of the Covenant) para. 6; general comment No. 7 (1997): The right to adequate housing (article 11, paragraph 1 of the Covenant): Forced evictions, para. 10.

³ CESCR, general comment No. 12 (1999): The right to adequate food (article 11 of the Covenant), para. 26.

⁴ CESCR, general comment No. 11 (1999): Plans for primary education (article 14 of the Covenant), para. 3; general comment No. 13 (1999): The right to education (article 13 of the Covenant), paras. 6 (b), 31 and 32.

⁵ CESCR, general comment No. 14 (2000): The right to the highest attainable standard of health (article 12 of the Covenant), paras. 18-22.

⁶ CESCR, general comment No. 15 (2000): The right to water (articles 11 and 12 of the Covenant), paras. 13 and 14.

⁷ Cf. Committee on the Elimination of Racial Discrimination, general comment XXV (2000): Gender-related dimensions of racial discrimination.

⁸ As defined in article 1 of the Convention on the Elimination of All Forms of Discrimination against Women.

⁹ However, there is one exception to this general principle: reasons specific to an individual male candidate may tilt the balance in his favour, which is to be assessed objectively, taking into account all criteria pertaining to the individual candidates. This is a requirement of the principle of proportionality.

¹⁰ CESCR, general comment No. 3 (1990): The nature of States parties obligations (art. 2, para. 2).

¹¹ According to CESCR general comment Nos. 12 and 13, the obligation to fulfil incorporates an obligation to facilitate and an obligation to provide. In the present general comment, the obligation to fulfil also incorporates an obligation to promote the elimination of all forms of discrimination against women.

¹² Other examples of obligations and possible violations of article 3 in relation to article 11 (1) and (2) are further discussed in CESCR general comment No. 12, para. 26.

¹³ CESCR general comment No. 14, paras. 18-21.

¹⁴ Reference is made in this regard to general recommendation No. 25 on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women adopted by the Committee on the Elimination of Discrimination against Women (CEDAW), CESCR general comment No. 13 and the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights.

Annex 755

CESCR General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights,
E/C.12/GC/20 (2 July 2009)



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GENERAL COMMENT No. 20

**Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the
International Covenant on Economic, Social and Cultural Rights)**

I. INTRODUCTION AND BASIC PREMISES

1. Discrimination undermines the fulfilment of economic, social and cultural rights for a significant proportion of the world's population. Economic growth has not, in itself, led to sustainable development, and individuals and groups of individuals continue to face socio-economic inequality, often because of entrenched historical and contemporary forms of discrimination.
2. Non-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights. Article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights (the Covenant) obliges each State party "to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".
3. The principles of non-discrimination and equality are recognized throughout the Covenant. The preamble stresses the "equal and inalienable rights of all" and the Covenant expressly recognizes the rights of "everyone" to the various Covenant rights such as, inter alia, the right to work, just and favourable conditions of work, trade union freedoms, social security, an adequate standard of living, health and education and participation in cultural life.

4. The Covenant also explicitly mentions the principles of non-discrimination and equality with respect to some individual rights. Article 3 requires States to undertake to ensure the equal right of men and women to enjoy the Covenant rights and article 7 includes the “right to equal remuneration for work of equal value” and “equal opportunity for everyone to be promoted” in employment. Article 10 stipulates that, inter alia, mothers should be accorded special protection during a reasonable period before and after childbirth and that special measures of protection and assistance should be taken for children and young persons without discrimination. Article 13 recognizes that “primary education shall be compulsory and available free to all” and provides that “higher education shall be made equally accessible to all”.

5. The preamble, Articles 1, paragraph 3, and 55, of the Charter of the United Nations and article 2, paragraph 1, of the Universal Declaration of Human Rights prohibit discrimination in the enjoyment of economic, social and cultural rights. International treaties on racial discrimination, discrimination against women and the rights of refugees, stateless persons, children, migrant workers and members of their families, and persons with disabilities include the exercise of economic, social and cultural rights,¹ while other treaties require the elimination of discrimination in specific fields, such as employment and education.² In addition to the common provision on equality and non-discrimination in both the Covenant and the International Covenant on Civil and Political Rights, article 26 of the International Covenant on Civil and Political Rights contains an independent guarantee of equal and effective protection before and of the law.³

6. In previous general comments, the Committee on Economic, Social and Cultural Rights has considered the application of the principle of non-discrimination to specific Covenant rights relating to housing, food, education, health, water, authors’ rights, work and social security.⁴

¹ See the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention relating to the Status of Refugees; the Convention relating to the Status of Stateless Persons; the Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; and the Convention on the Rights of Persons with Disabilities.

² ILO Convention No. 111 concerning Discrimination in Respect of Employment and Occupation (1958); and the UNESCO Convention against Discrimination in Education.

³ See general comment No. 18 (1989) of the Human Rights Committee on non-discrimination.

⁴ The Committee on Economic, Social and Cultural Rights (CESCR), general comment No. 4 (1991): The right to adequate housing; general comment No. 7 (1997): The right to adequate housing: forced evictions (art. 11, para. 1); general comment No. 12 (1999): The right to adequate food; general comment No. 13 (1999): The right to education (art. 13); general comment No. 14 (2000): The right to the highest attainable standard of health (art. 12); general comment No. 15 (2002): The right to water (arts. 11 and 12); general comment No. 17 (2005):

Moreover, general comment No. 16 focuses on State parties' obligations under article 3 of the Covenant to ensure equal rights of men and women to the enjoyment of all Covenant rights, while general comments Nos. 5 and 6 respectively concern the rights of persons with disabilities and older persons.⁵ The present general comment aims to clarify the Committee's understanding of the provisions of article 2, paragraph 2, of the Covenant, including the scope of State obligations (Part II), the prohibited grounds of discrimination (Part III), and national implementation (Part IV).

II. SCOPE OF STATE OBLIGATIONS

7. Non-discrimination is an immediate and cross-cutting obligation in the Covenant. Article 2, paragraph 2, requires States parties to guarantee non-discrimination in the exercise of each of the economic, social and cultural rights enshrined in the Covenant and can only be applied in conjunction with these rights. It is to be noted that discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights.⁶ Discrimination also includes incitement to discriminate and harassment.

8. In order for States parties to "guarantee" that the Covenant rights will be exercised without discrimination of any kind, discrimination must be eliminated both formally and substantively:⁷

(a) **Formal discrimination:** Eliminating formal discrimination requires ensuring that a State's constitution, laws and policy documents do not discriminate on prohibited grounds; for example, laws should not deny equal social security benefits to women on the basis of their marital status;

(b) **Substantive discrimination:** Merely addressing formal discrimination will not ensure substantive equality as envisaged and defined by article 2, paragraph 2.⁸ The effective

The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (art. 15, para. 1 (c)); general comment No. 18 (2005): The right to work (art. 6); and general comment No. 19 (2008): The right to social security.

⁵ CESCR, general comment No. 5 (1994): Persons with disabilities; and general comment No. 6 (1995): The economic, social and cultural rights of older persons.

⁶ For a similar definition see art. 1, ICERD; art. 1, CEDAW; and art. 2 of the Convention on the Rights of Persons with Disabilities (CRPD). The Human Rights Committee comes to a similar interpretation in its general comment No. 18, paragraphs 6 and 7. The Committee has adopted a similar position in previous general comments.

⁷ CESCR, general comment No. 16 (2005): The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3).

⁸ See also CESCR general comment No. 16.

enjoyment of Covenant rights is often influenced by whether a person is a member of a group characterized by the prohibited grounds of discrimination. Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination. For example, ensuring that all individuals have equal access to adequate housing, water and sanitation will help to overcome discrimination against women and girl children and persons living in informal settlements and rural areas.

9. In order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved. Such positive measures may exceptionally, however, need to be of a permanent nature, such as interpretation services for linguistic minorities and reasonable accommodation of persons with sensory impairments in accessing health-care facilities.

10. Both direct and indirect forms of differential treatment can amount to discrimination under article 2, paragraph 2, of the Covenant:

(a) **Direct discrimination** occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground; e.g. where employment in educational or cultural institutions or membership of a trade union is based on the political opinions of applicants or employees. Direct discrimination also includes detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation (e.g. the case of a woman who is pregnant);

(b) **Indirect discrimination** refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination. For instance, requiring a birth registration certificate for school enrolment may discriminate against ethnic minorities or non-nationals who do not possess, or have been denied, such certificates.

Private sphere

11. Discrimination is frequently encountered in families, workplaces, and other sectors of society. For example, actors in the private housing sector (e.g. private landlords, credit providers and public housing providers) may directly or indirectly deny access to housing or mortgages on the basis of ethnicity, marital status, disability or sexual orientation while some families may refuse to send girl children to school. States parties must therefore adopt measures, which should include legislation, to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds.

Systemic discrimination

12. The Committee has regularly found that discrimination against some groups is pervasive and persistent and deeply entrenched in social behaviour and organization, often involving unchallenged or indirect discrimination. Such systemic discrimination can be understood as legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups.

Permissible scope of differential treatment

13. Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects. A failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification unless every effort has been made to use all resources that are at the State party's disposition in an effort to address and eliminate the discrimination, as a matter of priority.

14. Under international law, a failure to act in good faith to comply with the obligation in article 2, paragraph 2, to guarantee that the rights enunciated in the Covenant will be exercised without discrimination amounts to a violation. Covenant rights can be violated through the direct action or omission by States parties, including through their institutions or agencies at the national and local levels. States parties should also ensure that they refrain from discriminatory practices in international cooperation and assistance and take steps to ensure that all actors under their jurisdiction do likewise.

III. PROHIBITED GROUNDS OF DISCRIMINATION

15. Article 2, paragraph 2, lists the prohibited grounds of discrimination as "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The inclusion of "other status" indicates that this list is not exhaustive and other grounds may be incorporated in this category. The express grounds and a number of implied grounds under "other status" are discussed below. The examples of differential treatment presented in this section are merely illustrative and they are not intended to represent the full scope of possible discriminatory treatment under the relevant prohibited ground, nor a conclusive finding that such differential treatment will amount to discrimination in every situation.

Membership of a group

16. In determining whether a person is distinguished by one or more of the prohibited grounds, identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned. Membership also includes association with a group characterized by one of the prohibited grounds (e.g. the parent of a child with a disability) or perception by others that an individual is part of such a group (e.g. a person has a similar skin colour or is a supporter of the rights of a particular group or a past member of a group).

Multiple discrimination⁹

17. Some individuals or groups of individuals face discrimination on more than one of the prohibited grounds, for example women belonging to an ethnic or religious minority. Such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying.

A. Express grounds

18. The Committee has consistently raised concern over formal and substantive discrimination across a wide range of Covenant rights against indigenous peoples and ethnic minorities among others.

“Race and colour”

19. Discrimination on the basis of “race and colour”, which includes an individual’s ethnic origin, is prohibited by the Covenant as well as by other treaties including the International Convention on the Elimination of Racial Discrimination. The use of the term “race” in the Covenant or the present general comment does not imply the acceptance of theories which attempt to determine the existence of separate human races.¹⁰

Sex

20. The Covenant guarantees the equal right of men and women to the enjoyment of economic, social and cultural rights.¹¹ Since the adoption of the Covenant, the notion of the prohibited ground “sex” has evolved considerably to cover not only physiological characteristics but also the social construction of gender stereotypes, prejudices and expected roles, which have created obstacles to the equal fulfilment of economic, social and cultural rights. Thus, the refusal to hire a woman, on the ground that she might become pregnant, or the allocation of low-level or part-time jobs to women based on the stereotypical assumption that, for example, they are unwilling to commit as much time to their work as men, constitutes discrimination. Refusal to grant paternity leave may also amount to discrimination against men.

⁹ See para. 27 of the present general comment on intersectional discrimination.

¹⁰ See the outcome document of the Durban Review Conference, para. 6: “*Reaffirms* that all peoples and individuals constitute one human family, rich in diversity, and that all human beings are born free and equal in dignity and rights; and strongly rejects any doctrine of racial superiority along with theories which attempt to determine the existence of so-called distinct human races.”

¹¹ See art. 3 of the Covenant, and CESCR general comment No. 16.

Language

21. Discrimination on the basis of language or regional accent is often closely linked to unequal treatment on the basis of national or ethnic origin. Language barriers can hinder the enjoyment of many Covenant rights, including the right to participate in cultural life as guaranteed by article 15 of the Covenant. Therefore, information about public services and goods, for example, should also be available, as far as possible, in languages spoken by minorities, and States parties should ensure that any language requirements relating to employment and education are based on reasonable and objective criteria.

Religion

22. This prohibited ground of discrimination covers the profession of religion or belief of one's choice (including the non-profession of any religion or belief), that may be publicly or privately manifested in worship, observance, practice and teaching.¹² For instance, discrimination arises when persons belonging to a religious minority are denied equal access to universities, employment, or health services on the basis of their religion.

Political or other opinion

23. Political and other opinions are often grounds for discriminatory treatment and include both the holding and not-holding of opinions, as well as expression of views or membership within opinion-based associations, trade unions or political parties. Access to food assistance schemes, for example, must not be made conditional on an expression of allegiance to a particular political party.

National or social origin

24. "National origin" refers to a person's State, nation, or place of origin. Due to such personal circumstances, individuals and groups of individuals may face systemic discrimination in both the public and private sphere in the exercise of their Covenant rights. "Social origin" refers to a person's inherited social status, which is discussed more fully below in the context of "property" status, descent-based discrimination under "birth" and "economic and social status".¹³

Property

25. Property status, as a prohibited ground of discrimination, is a broad concept and includes real property (e.g. land ownership or tenure) and personal property (e.g. intellectual property, goods and chattels, and income), or the lack of it. The Committee has previously commented that

¹² See also the General Assembly's Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by the General Assembly in its resolution 36/55 of 25 November 1981.

¹³ See paras. 25, 26 and 35, of the present general comment.

Covenant rights, such as access to water services and protection from forced eviction, should not be made conditional on a person's land tenure status, such as living in an informal settlement.¹⁴

Birth

26. Discrimination based on birth is prohibited and article 10, paragraph 3, of the Covenant specifically states, for example, that special measures should be taken on behalf of children and young persons "without any discrimination for reasons of parentage". Distinctions must therefore not be made against those who are born out of wedlock, born of stateless parents or are adopted or constitute the families of such persons. The prohibited ground of birth also includes descent, especially on the basis of caste and analogous systems of inherited status.¹⁵ States parties should take steps, for instance, to prevent, prohibit and eliminate discriminatory practices directed against members of descent-based communities and act against the dissemination of ideas of superiority and inferiority on the basis of descent.

B. Other status¹⁶

27. The nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of "other status" is thus needed in order to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognized grounds in article 2, paragraph 2. These additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization. The Committee's general comments and concluding observations have recognized various other grounds and these are described in more detail below. However, this list is not intended to be exhaustive. Other possible prohibited grounds could include the denial of a person's legal capacity because he or she is in prison, or is involuntarily interned in a psychiatric institution, or the intersection of two prohibited grounds of discrimination, e.g. where access to a social service is denied on the basis of sex and disability.

Disability

28. In its general comment No. 5, the Committee defined discrimination against persons with disabilities¹⁷ as "any distinction, exclusion, restriction or preference, or denial of reasonable

¹⁴ See CESCR general comments Nos. 15 and 4 respectively.

¹⁵ For a comprehensive overview of State obligations in this regard, see general comment No. 29 (2002) of the Committee on the Elimination of All Forms of Racial Discrimination on art. 1, para. 1, regarding descent.

¹⁶ See para. 15 of the present general comment.

¹⁷ For a definition, see CRPD, art. 1: "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."

accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights”.¹⁸ The denial of reasonable accommodation should be included in national legislation as a prohibited form of discrimination on the basis of disability.¹⁹ States parties should address discrimination, such as prohibitions on the right to education, and denial of reasonable accommodation in public places such as public health facilities and the workplace,²⁰ as well as in private places, e.g. as long as spaces are designed and built in ways that make them inaccessible to wheelchairs, such users will be effectively denied their right to work.

Age

29. Age is a prohibited ground of discrimination in several contexts. The Committee has highlighted the need to address discrimination against unemployed older persons in finding work, or accessing professional training or retraining, and against older persons living in poverty with unequal access to universal old-age pensions due to their place of residence.²¹ In relation to young persons, unequal access by adolescents to sexual and reproductive health information and services amounts to discrimination.

Nationality

30. The ground of nationality should not bar access to Covenant rights,²² e.g. all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care. The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.²³

¹⁸ See CESCR general comment No. 5, para. 15.

¹⁹ See CRPD, art. 2: “‘Reasonable accommodation’ means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”

²⁰ See CESCR general comment No. 5, para. 22.

²¹ See, further, CESCR general comment No. 6.

²² This paragraph is without prejudice to the application of art. 2, para. 3, of the Covenant, which states: “Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.”

²³ See also general comment No. 30 (2004) of the Committee on the Elimination of All Forms of Racial Discrimination on non-citizens.

Marital and family status

31. Marital and family status may differ between individuals because, inter alia, they are married or unmarried, married under a particular legal regime, in a de facto relationship or one not recognized by law, divorced or widowed, live in an extended family or kinship group or have differing kinds of responsibility for children and dependants or a particular number of children. Differential treatment in access to social security benefits on the basis of whether an individual is married must be justified on reasonable and objective criteria. In certain cases, discrimination can also occur when an individual is unable to exercise a right protected by the Covenant because of his or her family status or can only do so with spousal consent or a relative's concurrence or guarantee.

Sexual orientation and gender identity

32. "Other status" as recognized in article 2, paragraph 2, includes sexual orientation.²⁴ States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor's pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace.²⁵

Health status

33. Health status refers to a person's physical or mental health.²⁶ States parties should ensure that a person's actual or perceived health status is not a barrier to realizing the rights under the Covenant. The protection of public health is often cited by States as a basis for restricting human rights in the context of a person's health status. However, many such restrictions are discriminatory, for example, when HIV status is used as the basis for differential treatment with regard to access to education, employment, health care, travel, social security, housing and asylum.²⁷ States parties should also adopt measures to address widespread stigmatization of persons on the basis of their health status, such as mental illness, diseases such as leprosy and women who have suffered obstetric fistula, which often undermines the ability of individuals to

²⁴ See CESCR general comments Nos. 14 and 15.

²⁵ For definitions, see the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.

²⁶ See CESCR general comment No. 14, paras. 12(b), 18, 28 and 29.

²⁷ See the guidelines published by the Office of the High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS (UNAIDS) (2006), "International Guidelines on HIV/AIDS and Human Rights, 2006 Consolidated Version". Available online at: http://data.unaids.org/Publications/IRC-pub07/JC1252-InternGuidelines_en.pdf.

enjoy fully their Covenant rights. Denial of access to health insurance on the basis of health status will amount to discrimination if no reasonable or objective criteria can justify such differentiation.

Place of residence

34. The exercise of Covenant rights should not be conditional on, or determined by, a person's current or former place of residence; e.g. whether an individual lives or is registered in an urban or a rural area, in a formal or an informal settlement, is internally displaced or leads a nomadic lifestyle. Disparities between localities and regions should be eliminated in practice by ensuring, for example, that there is even distribution in the availability and quality of primary, secondary and palliative health-care facilities.

Economic and social situation

35. Individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society. A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places.

IV. NATIONAL IMPLEMENTATION

36. In addition to refraining from discriminatory actions, States parties should take concrete, deliberate and targeted measures to ensure that discrimination in the exercise of Covenant rights is eliminated. Individuals and groups of individuals, who may be distinguished by one or more of the prohibited grounds, should be ensured the right to participate in decision-making processes over the selection of such measures. States parties should regularly assess whether the measures chosen are effective in practice.

Legislation

37. Adoption of legislation to address discrimination is indispensable in complying with article 2, paragraph 2. States parties are therefore encouraged to adopt specific legislation that prohibits discrimination in the field of economic, social and cultural rights. Such laws should aim at eliminating formal and substantive discrimination, attribute obligations to public and private actors and cover the prohibited grounds discussed above. Other laws should be regularly reviewed and, where necessary, amended in order to ensure that they do not discriminate or lead to discrimination, whether formally or substantively, in relation to the exercise and enjoyment of Covenant rights.

Policies, plans and strategies

38. States parties should ensure that strategies, policies, and plans of action are in place and implemented in order to address both formal and substantive discrimination by public and

private actors in the area of Covenant rights. Such policies, plans and strategies should address all groups distinguished by the prohibited grounds and States parties are encouraged, among other possible steps, to adopt temporary special measures in order to accelerate the achievement of equality. Economic policies, such as budgetary allocations and measures to stimulate economic growth, should pay attention to the need to guarantee the effective enjoyment of the Covenant rights without discrimination. Public and private institutions should be required to develop plans of action to address non-discrimination and the State should conduct human rights education and training programmes for public officials and make such training available to judges and candidates for judicial appointments. Teaching on the principles of equality and non-discrimination should be integrated in formal and non-formal inclusive and multicultural education, with a view to dismantling notions of superiority or inferiority based on prohibited grounds and to promote dialogue and tolerance between different groups in society. States parties should also adopt appropriate preventive measures to avoid the emergence of new marginalized groups.

Elimination of systemic discrimination

39. States parties must adopt an active approach to eliminating systemic discrimination and segregation in practice. Tackling such discrimination will usually require a comprehensive approach with a range of laws, policies and programmes, including temporary special measures. States parties should consider using incentives to encourage public and private actors to change their attitudes and behaviour in relation to individuals and groups of individuals facing systemic discrimination, or penalize them in case of non-compliance. Public leadership and programmes to raise awareness about systemic discrimination and the adoption of strict measures against incitement to discrimination are often necessary. Eliminating systemic discrimination will frequently require devoting greater resources to traditionally neglected groups. Given the persistent hostility towards some groups, particular attention will need to be given to ensuring that laws and policies are implemented by officials and others in practice.

Remedies and accountability

40. National legislation, strategies, policies and plans should provide for mechanisms and institutions that effectively address the individual and structural nature of the harm caused by discrimination in the field of economic, social and cultural rights. Institutions dealing with allegations of discrimination customarily include courts and tribunals, administrative authorities, national human rights institutions and/or ombudspersons, which should be accessible to everyone without discrimination. These institutions should adjudicate or investigate complaints promptly, impartially, and independently and address alleged violations relating to article 2, paragraph 2, including actions or omissions by private actors. Where the facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or other respondent, the burden of proof should be regarded as resting on the authorities, or the other respondent, respectively. These institutions should also be empowered to provide effective remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition and public apologies, and State parties should ensure that these measures are effectively implemented.

Domestic legal guarantees of equality and non-discrimination should be interpreted by these institutions in ways which facilitate and promote the full protection of economic, social and cultural rights.²⁸

Monitoring, indicators and benchmarks

41. States parties are obliged to monitor effectively the implementation of measures to comply with article 2, paragraph 2, of the Covenant. Monitoring should assess both the steps taken and the results achieved in the elimination of discrimination. National strategies, policies and plans should use appropriate indicators and benchmarks, disaggregated on the basis of the prohibited grounds of discrimination.²⁹

²⁸ See CESCR general comments Nos. 3 and 9. See also the practice of the Committee in its concluding observations on reports of States parties to the Covenant.

²⁹ See CESCR general comments Nos. 13, 14, 15, 17 and 19, and its new reporting guidelines (E/C.12/2008/2).

Annex 756

Consideration of Reports Submitted by States Parties under Article 40 of the Covenant,
Concluding Observations Report Regarding Russia's Compliance with the ICCPR, Russian
Federation, 1.CCPR/C/RUS/CO/6 (24 November 2009)



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on civil and
political rights**

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**CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES
UNDER ARTICLE 40 OF THE COVENANT**

Concluding observations of the Human Rights Committee

RUSSIAN FEDERATION

1. The Committee considered the sixth periodic report of the Russian Federation (CCPR/C/RUS/6) at its 2663rd, 2664th and 2665th meetings (CCPR/C/SR.2663-2665), held on 15 and 16 October 2009, and adopted the following concluding observations at its 2681st meeting (CCPR/C/SR.2681), held on 28 October 2009.

A. Introduction

2. The Committee welcomes the sixth periodic report of the Russian Federation, and the inclusion in the report of information on a number of measures taken to address the concerns expressed in the Committee's previous concluding observations (CCPR/CO/79/RUS). It also welcomes the dialogue with the delegation, the detailed written replies (CCPR/C/RUS/Q/6/Add.1) submitted in response to the Committee's list of issues, and the additional information and clarifications provided orally.

B. Positive aspects

3. The Committee welcomes the various constitutional amendments, as well as legislative, administrative and practical measures taken to improve the promotion and protection of human rights in the State party since the examination of the fifth periodic report, in particular:

(a) The judicial reform in the context of the 2007-2011 Federal Special-Purpose Programme for the Development of the Judicial System in the Russian Federation, the establishment of the National Working Group on Judicial Reform and the adoption in 2009 of the Law “On the securing of access to information on the activities of the courts of the Russian Federation”;

(b) The adoption in 2008 of the National Plan on Countering Corruption and the enactment of the Federal Law on Counteraction of Corruption;

(c) The upgrade of the accreditation status of the Federal Commissioner for Human Rights (“Ombudsman”) following its review by the International Coordinating Committee of National Institutions (ICC) in January 2009;

(d) The establishment of the Office of the Ombudsman for Children, in September 2009 and the ratification, in 2008, of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict;

(e) The adoption and entry into force of two administrative regulations relating to the granting of political asylum and refugee status in the Russian Federation.

C. Principal subjects of concern and recommendations

4. The Committee notes with concern that many of its recommendations adopted following the consideration of the State party’s fifth periodic report (CCPR/CO/79/RUS) have not yet been implemented, and regrets that most subjects of concern remain. (art. 2)

The State party should re-examine, and take all necessary measures to give full effect to the recommendations adopted by the Committee in its previous concluding observations.

5. While acknowledging the information provided by the State party, the Committee expresses once again its concern at the State party’s restrictive interpretation of, and continuing failure to implement the Views adopted by the Committee under the Optional Protocol to the Covenant. The Committee further recalls that, by acceding to the Optional Protocol, the State party has recognized its competence to receive and examine complaints from individuals under the its jurisdiction, and that failure to give effect to its Views would call into question the State party’s commitment to the Optional Protocol. (art. 2)

The Committee urges the State party once again to review its position in relation to Views adopted by the Committee under the Optional Protocol to the Covenant and to implement all of those Views.

6. The Committee regrets the lack of information on instances where the Federal Commissioner for Human Rights and the regional ombudsmen initiated the drafting of legislation, or referred individual cases to courts. The Committee is also concerned that recommendations made by the the Federal Commissioner for Human Rights are not always duly implemented. (art. 2)

The State party should strengthen the legislative mandate of the Federal Commissioner for Human Rights and the regional ombudsmen and provide them with additional resources, so that they may be in a position to fulfil their mandate efficiently. The State party should provide the Committee with detailed information on the number and the outcome of complaints received and determined by the Federal Commissioner for Human Rights and the regional ombudsmen, as well as on the recommendations and the concrete action taken by the authorities in each case. Such detailed information should be made publicly available through accessible means, such as the annual report of the Federal Commissioner for Human Rights.

7. While taking note of the State party's assurance that counter-terrorism measures are in compliance with the Covenant, the Committee is nevertheless concerned about several aspects of the 2006 Federal Law "on counteracting terrorism", which imposes a wide range of restrictions on Covenant rights that, in the Committee's view, are comparable to those permitted only under a state of emergency under the State party's Constitution and the State of Emergency law, and in particular: (a) the lack of precision in the particularly broad definitions of terrorism and terrorist activity; (b) the counter-terrorism regime established by the 2006 Law is not subject to any requirement of justification on grounds of necessity or proportionality, or to procedural safeguards or judicial or parliamentary oversight; and (c) that the Law does not place limits on the derogations that may be made from the provisions of the Covenant and does not take into account the obligations imposed by article 4 of the Covenant. The Committee also regrets that the Law lacks a provision explicitly outlining the obligation of the authorities to respect and protect human rights in the context of a counter-terrorist operation. (art. 2)

The State party should review the relevant provisions of the 2006 Federal Law "On counteracting terrorism" to bring it into line with the requirements of article 4 of the Covenant, taking into account pertinent considerations set out in the Committee's general comment No. 29 (2001) on derogations during a state of emergency and general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant. In particular, the State party should:

(a) Adopt a narrower definition of crimes of terrorism limited to offences that can justifiably be equated with terrorism and its serious consequences, and ensure that the procedural guarantees established in the Covenant are fulfilled;

(b) Consider establishing an independent mechanism to review and report on laws related to terrorism;

(c) Provide information on measures taken in this regard, including information on which Covenant rights can be suspended during a counter-terrorist operation and under what conditions.

8. The Committee expresses concern about the large number of convictions for terrorism-related charges, which may have been handed down by courts in Chechnya on the basis of confessions obtained through unlawful detention and torture. (arts. 6, 7, and 14)

The State party should consider carrying out a systematic review of all terrorism-related sentences pronounced by courts in Chechnya to determine whether the trials concerned were conducted in full respect for the standards set forth in article 14 of the Covenant and ensure that no statement or confession made under torture has been used as evidence.

9. The Committee is concerned about the large number of stateless and undocumented persons in the State party, in particular former Soviet citizens who were unable to acquire citizenship or nationality subsequent to the break-up of the USSR, and to regularize their status in the Russian Federation or in any other State with which they have a significant connection, and consequently remain stateless or with undetermined nationality. The Committee also notes that members of certain ethnic groups from varying regions, in particular individuals from Central Asia and the Caucasus, face problems acquiring citizenship due to complex legislation governing naturalization and obstacles posed by strict residence registration requirements. (arts. 2, 3, 20 and 26)

The State party should take all necessary measures to regularize the status of stateless persons on its territory by granting them a right to permanent residence and the possibility of acquiring Russian citizenship. Furthermore, the State party should consider acceding to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness and undertake the legislative and administrative reform necessary to bring its laws and procedures in line with these standards.

10. While noting the information provided by the State party on preventive measures taken to address violence against women, in particular domestic violence, the Committee remains concerned about the continued prevalence of domestic violence in the State party and the lack of shelters available to women. The Committee regrets that it did not receive sufficient information relating to the prosecution of authors of domestic violence, and also notes that the State party has not adopted any special legislation with regard to domestic violence within the legal system. The Committee is also concerned about allegations of honour killings in Chechnya of eight women whose bodies were discovered in November 2008. (arts. 3, 6, 7 and 26)

The Committee urges the State party to strengthen its efforts to combat violence against women, including by adopting specific criminal legislation in this regard. The State party should promptly investigate complaints related to domestic violence and other acts of violence against women, including honour killings, and ensure that those responsible are prosecuted and adequately punished. Sufficient funding should be

allocated for victim assistance programmes, including those run by non-governmental organizations, and additional shelters should be made available across the country. The State party should also ensure mandatory training for the police to sensitize them with regard to all forms of violence against women.

11. The Committee expresses its concern at reports of an increasing number of hate crimes and racially motivated attacks against ethnic and religious minorities, as well as persistent manifestations of racism and xenophobia in the State party, including reports of racial profiling and harassment by law enforcement personnel targeting foreigners and members of minority groups. The Committee is also concerned about the failure on the part of the police and judicial authorities to investigate prosecute and punish hate crimes and racially motivated attacks against ethnic and religious minorities, often qualified merely as “hooliganism”, with charges and sentences that are not commensurate with the gravity of the acts. (arts. 6,7, 20 and 26)

The State party should make a sustained effort to improve the application of laws punishing racially motivated crimes and ensure adequate investigation and prosecution of all cases of racial violence and incitement to racially motivated violence. Adequate reparation, including compensation, should be provided to the victims of hate crimes. The State party is also encouraged to pursue public education campaigns to sensitize the population to the criminal nature of such acts, and to promote a culture of tolerance. Furthermore, the State party should intensify its sensitization efforts among law enforcement officials, and ensure that mechanisms to receive complaints of racially motivated police misconduct are readily available and accessible.

12. The Committee notes with concern that the death penalty has yet to be abolished de jure in the State party despite the welcome moratorium on the execution of death sentences in force since 1996, which the State party describes as solid. The Committee is also concerned that the current moratorium will expire in January 2010. (art. 6)

The State party should take the necessary measures to abolish the death penalty de jure at the earliest possible moment, and consider acceding to the Second Optional Protocol to the Covenant.

13. Notwithstanding the position of the State party that no crimes were committed by Russian military forces or other military groups against the civilian population on the territory of South Ossetia (para. 264, CCPR/C/RUS/Q/6/Add.1), and that the State party does not take responsibility for possible crimes by armed groups (para. 266), the Committee remains concerned about allegations of large-scale, indiscriminate abuses and killings of civilians in South Ossetia during the military operations by Russian forces in August 2008. The Committee recalls that the territory of South Ossetia was under the de facto control of an organized military operation of the State party, which therefore bears responsibility for the actions of such armed groups. The Committee notes with concern that, to date, the Russian authorities have not carried out any independent and exhaustive appraisal of serious violations of human rights by members of Russian forces and armed groups in South Ossetia and that the victims have received no reparations. (arts. 6, 7, 9, 13 and 14)

The State party should conduct a thorough and independent investigation into all allegations of involvement of members of Russian forces and other armed groups under their control in violations of human rights in South Ossetia. The State party should ensure that victims of serious violations of human rights and international humanitarian law are provided with an effective remedy, including the right to compensation and reparations.

14. The Committee is concerned about ongoing reports of torture and ill-treatment, enforced disappearance, arbitrary arrest, extrajudicial killing and secret detention in Chechnya and other parts of the North Caucasus committed by the military, security services and other State agents, and that the authors of such violations appear to enjoy widespread impunity due to a systematic lack of effective investigation and prosecution. The Committee is particularly concerned that the number of disappearances and abduction cases in Chechnya has increased in the period 2008-2009, and about allegations of mass graves in Chechnya. While noting the establishment of a special unit aimed at ensuring implementation of the judgments of the European Court of Human Rights and payment of compensation to victims, the Committee regrets that the State party has yet to bring to justice the perpetrators of the human rights violations in the cases concerned, even though the identity of these individuals is often known. The Committee also notes with concern the reports of collective punishment for relatives of terrorist suspects, such as the burning of family homes, and harassment, threats and reprisals against judges and victims and their families and regrets the failure on the part of the State party to provide effective protection to the persons concerned. (arts. 6, 7, 9 and 10)

The State party is urged to implement fully the right to life and physical integrity of all persons on its territory and should:

(a) Take stringent measures to put an end to enforced disappearances, extrajudicial killings, torture, and other forms of ill-treatment and abuse committed or instigated by law enforcement officials in Chechnya and other parts of the North Caucasus;

(b) Ensure prompt and impartial investigation by an independent body of all human rights violations allegedly committed or instigated by State agents and suspend or reassign the agents concerned during the process of investigation;

(c) Prosecute perpetrators and ensure that they are punished in a manner proportionate to the gravity of the crimes committed, and grant effective remedies, including redress, to the victims;

(d) Take effective measures, in law and in practice, to protect victims and their families, as well as their lawyers and judges, whose lives are under threat due to their professional activities;

(e) Provide information on investigations launched, convictions and penalties including those by military courts in relation to human rights violations

committed by State agents against the civilian population in Chechnya and other parts of the North Caucasus, disaggregated by type of crime.

15. The Committee is concerned about the continuing substantiated reports of acts of torture and other cruel, inhuman or degrading treatment or punishment committed by law enforcement personnel and other State agents, including of persons who are in police custody, pretrial detention and prison. The Committee is concerned about the extremely low rate of conviction of the State agents concerned, initiated under section 117 (cruel treatment) of the Criminal Code, and that most prosecutions for cases of torture are under section 286 (abuse of power) and section 302 (extorting confessions) of the Criminal Code. While noting the establishment of investigative committees pursuant to the decree of 2 August 2007, the Committee notes that these committees are attached to the Prosecutor's Office and thus may lack the necessary independence when examining allegations of torture by public officials. The Committee also expresses concern about reports that investigations and prosecutions of alleged perpetrators of acts of torture and ill-treatment are frequently marked by undue delays and/or suspensions, and that in practice, the burden of proof rests on the victims. Furthermore, while welcoming the adoption of the 2008 Federal Law on Public Control of Monitoring of Human Rights in Places of Detention, the Committee notes with concern the lack of a functioning national system with fully trained professionals to review all places of detention and cases of alleged abuses of persons while in custody. (arts. 6, 7, and 14)

The State party should:

(a) Consider amending the Criminal Code in order to criminalize torture as such;

(b) Take all necessary measures for a fully functioning independent human rights monitoring body to review all places of detention and cases of alleged abuses of persons while in custody, ensuring regular, independent, unannounced and unrestricted visits to all places of detention, and to initiate criminal and disciplinary proceedings against those found responsible;

(c) Ensure that all alleged cases of torture, ill-treatment and disproportionate use of force by law enforcement officials are fully and promptly investigated by an authority independent of ordinary prosecutorial and police organs, that those found guilty are punished under laws that ensure that sentences are commensurate with the gravity of the offence, and that compensation is provided to the victims or their families.

16. The Committee expresses its concern at the alarming incidence of threats, violent assaults and murders of journalists and human rights defenders in the State party, which has created a climate of fear and a chilling effect on the media, including for those working in the North Caucasus, and regrets the lack of effective measures taken by the State party to protect the right to life and security of these persons. (arts. 6, 7, and 19)

The State party is urged to:

(a) Take immediate action to provide effective protection to journalists and human rights defenders whose lives and security are under threat due to their professional activities;

(b) Ensure the prompt, effective, thorough, independent, and impartial investigation of threats, violent assaults and murders of journalists and human rights defenders and, when appropriate, prosecute and institute proceedings against the perpetrators of such acts.

(c) Provide the Committee with detailed information on developments in all cases of criminal prosecutions relating to threats, violent assaults and murders of journalists and human rights defenders in the State party covering the period between 2003 and 2009.

17. The Committee is concerned about reports of extraditions and informal transfers by the State party to return foreign nationals to countries in which the practice of torture is alleged while relying on diplomatic assurances, notably within the framework of the 2001 Shanghai Convention on Combating Terrorism, Separatism and Extremism. In particular, the Committee notes with concern the return to Uzbekistan of persons suspected of involvement in the Andijan protests of 2005. (arts. 6, 7, and 13)

The State party should ensure that no individual, including persons suspected of terrorism, who are extradited or subjected to informal transfers, whether or not in the context of the Shanghai Cooperation Organisation, is exposed to the danger of torture or cruel, inhuman or degrading treatment or punishment. Furthermore, the State party should recognise that, the more systematic the practice of torture or cruel, inhuman or degrading treatment, the less likely it will be that a real risk of such treatment can be avoided by diplomatic assurances, however stringent any agreed follow-up procedure may be. The State party should exercise the utmost care in the use of such assurances and adopt clear and transparent procedures allowing review by adequate judicial mechanisms before individuals are deported, as well as effective means to monitor the fate of the affected individuals.

18. While the Committee welcomes the various measures taken by the State party to combat trafficking in persons, in particular through legislation and international cooperation, the Committee is concerned about the notable lack of recognition of the rights and interests of trafficking victims in the counter-trafficking efforts of the State party. (art. 8)

The State party should, as a matter of priority, take all necessary measures to ensure that victims of trafficking in human beings are provided with medical, psychological, social and legal assistance. Protection should be provided to all witnesses and victims of trafficking so that they may have a place of refuge and an opportunity to give evidence against those held responsible. The State party should also continue to reinforce international cooperation as well as existing measures to combat trafficking in persons

and the demand for such trafficking, by devoting sufficient resources to prosecuting perpetrators and imposing sanctions on those found responsible.

19. The Committee expresses concern about the significant number of persons with mental disabilities who are deprived of their legal capacity in the State party and the apparent lack of adequate procedural and substantive safeguards against disproportionate restrictions in their enjoyment of rights guaranteed under the Covenant. In particular, the Committee is concerned that there are no procedural safeguards and no recourse to appeal against the judicial decision based on the mere existence of a psychiatric diagnosis to deprive an individual of his/her legal capacity, as well as against the decision to institutionalize the individual which often follows legal incapacitation. The Committee is also concerned that persons deprived of legal capacity have no legal recourse to challenge other violations of their rights, including ill-treatment or abuse by guardians and/or staff of institutions they are confined to, which is aggravated by the lack of an independent inspection mechanism regarding mental health institutions. (arts. 9 and 10)

The State party should:

(a) Review its policy of depriving persons with mental disabilities of their legal capacity and establish the necessity and proportionality of any measure on an individual basis with effective procedural safeguards, ensuring in any event that all persons deprived of their legal capacity have prompt access to an effective judicial review of the original decision, and, when applicable, of the decision to subject them to institutionalization;

(b) Ensure that persons with mental disabilities are able to exercise the right to an effective remedy against violations of their rights and consider providing less restrictive alternatives to forcible confinement and treatment of persons with mental disabilities;

(c) Take appropriate measures to prevent all forms of ill-treatment in psychiatric institutions, including through the establishment of inspection systems that take into account the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (adopted by the General Assembly in resolution 46/119).

20. While welcoming the adoption of the Federal Special-Purpose Programme for the Development of the Penal Correction System for 2007-2016, pursuant to Government decision No. 540 of September 2006, as well as the overall reduction of the prison population to conform to institutional capacity and the allocation of necessary resources, the Committee remains concerned about overcrowding in prisons which continues to be a problem in some areas, as acknowledged by the State party. (art. 10)

The State party should continue to take measures to improve conditions of detention of persons deprived of their liberty through its Federal Special-Purpose Programme,

particularly in relation to the problem of overcrowding in prisons, with a view to achieving full compliance with requirements of article 10.

21. The Committee is concerned about the lack of independence of judges in the State party. In particular, the Committee is concerned about the appointment mechanism for judges that exposes them to political pressure and about the lack of an independent disciplinary mechanism, particularly in cases of corruption. The Committee is also concerned about the relatively low rate of acquittal for criminal cases. (arts. 2 and 14)

The State party should amend the relevant domestic legal provisions in order to ensure the full independence of the judiciary from the executive branch of government and consider establishing, in addition to the collegiate corpus of judges, an independent body responsible for matters relating to the appointment and promotion of judges, as well as their compliance with disciplinary regulations.

22. The Committee expresses concern about the potential impact of the proposed draft law on lawyers' activity and the Bar on the independence of the legal profession and the right to a fair trial as stipulated in article 14 of the Covenant. In particular, it notes with concern that the bill proposes to enable the State Registration Agency to remove a lawyer's licence to practise through a court action without prior approval of the Chambers of Lawyers under certain circumstances, and to obtain access to the legal files of lawyers under investigation and demand information on any case in which they are involved. (art. 14)

The State party should review the compatibility of the proposed draft law on lawyers' activity and the Bar with its obligations under article 14 of the Covenant, as well as article 22 of the Basic Principles on the Role of Lawyers and refrain from taking any measures that constitute harassment or persecution of lawyers and unnecessarily interfere with their defence of clients.

23. While welcoming the reduction, in 2008, of the prescribed length of civilian service for conscientious objectors from 42 months to 21 months, the Committee notes with concern that it is still 1.75 times longer than military service, and that the State party maintains the position that the discrimination suffered by conscientious objectors is due to such alternative service amounting to "preferential treatment" (para. 151, CCPR/C/RUS/6). The Committee notes with regret that the conditions for alternative service are punitive in nature, including the requirement to perform such services outside places of permanent residence, the receipt of low salaries, which are below the subsistence level for those who are assigned to work in social organizations, and the restrictions in freedom of movement for the persons concerned. The Committee is also concerned that the assessment of applications, carried out by a draft panel for such service, is under the control of the Ministry of Defence. (arts. 18, 19, 21, 22 and 25)

The State party should recognize fully the right to conscientious objection, and ensure that the length and the nature of this alternative to military service do not have a punitive character. The State party should also consider placing the assessment of applications for conscientious objector status entirely under the control of civilian authorities.

24. The Committee is concerned that media professionals continue to be subjected to politically motivated trials and convictions, and in particular, that the practical application of the Mass Media Act as well as the arbitrary use of defamation laws has served to discourage critical media reporting on matters of valid public interest, adversely affecting freedom of expression in the State party. (arts. 9, 14, and 19)

The State party should ensure that journalists can pursue their profession without fear of being subjected to prosecution and libel suits for criticizing Government policy or Government officials. In doing so, the State party should:

(a) Amend its Criminal Code to reflect the principle that public figures should tolerate a greater degree of criticism than ordinary citizens;

(b) Decriminalise defamation and subject it only to civil lawsuits, capping any damages awarded;

(c) Provide redress to journalists and human rights activists subjected to imprisonment in contravention of articles 9 and 19 of the Covenant;

(d) Bring relevant provisions of the Mass Media Act into line with article 19 of the Covenant by ensuring a proper balance between the protection of a person's reputation and freedom of expression.

24. In light of numerous reports that the extremism laws are being used to target organizations and individuals critical of the Government, the Committee regrets that the definition of "extremist activity" in the Federal Law on Combating Extremist Activity remains vague, allowing for arbitrariness in its application, and that the 2006 amendment to this law has made certain forms of defamation of public officials an act of extremism. The Committee also notes with concern that some provisions of article 1 of the Federal Law on Combating Extremist Activity include acts that are not sanctioned in the Criminal Code and are only punishable under the Code of Administrative Offences, such as mass dissemination of extremist materials, the application of which may not be subject to judicial review. The Committee is also concerned about the loose manner in which the definition of "social groups" in article 148 of the Criminal Code has been interpreted by the courts and their reliance on various experts in this respect, granting protection for State organs and agents against "extremism". (arts. 9 and 19)

The Committee reiterates its previous recommendation (CCPR/CO/79/RUS, paragraph 20) that the State party should revise the Federal Law on Combating Extremist Activity with a view to making the definition of "extremist activity" more precise so as to exclude any possibility of arbitrary application, and consider repealing the 2006 amendment. Moreover, in determining whether written material constitutes "extremist literature", the State party should take all measures to ensure the independence of experts upon whose opinion court decisions are based and guarantee the right of the defendant to counter-expertise by an alternative expert. The State party should also define the concept of "social groups" as stipulated in section 148 of the Criminal Code in a manner that does not include organs of the State or public officials.

25. The Committee is concerned about the reports of excessive use of force by the police during demonstrations, in particular in the context of the 2007 Duma elections and the 2008 presidential elections, and regrets that it did not receive any information from the State party on any investigation or prosecution measures taken in relation to members of the police in connection with the excessive use of force. (art. 21)

The State party should provide detailed information on the results of any investigation, prosecution and disciplinary measures taken vis-à-vis members of the police in connection with the alleged cases of excessive use of force in the context of the Duma elections in 2007 and the presidential elections in 2008. The State party should establish an independent body with authority to receive, investigate and adjudicate all complaints of excessive use of force and other abuses of power by the police.

26. The Committee notes with concern that, despite the amendments of July 2009, the restrictions on the registration and operation of associations, non-governmental organizations and political parties under the 2006 Non-Profit Organizations Act continue to pose a serious threat to the enjoyment of the rights to freedom of expression, association and assembly in the State party. The Committee also notes with regret that the measures taken by the State party to reduce the number of international donors benefiting from tax exemption in the Russian Federation has significantly limited the availability of foreign funding to non-governmental organizations. (arts. 19, 21, and 22)

The State party should ensure that any restriction on the activities of non-governmental organizations under the 2006 Non-Profit Organizations Act is compatible with the provisions of the Covenant by amending the law as necessary. The State party should refrain from adopting any policy measures that directly or indirectly restrict or hamper the ability of non-governmental organizations to operate freely and effectively.

27. The Committee is concerned about acts of violence against lesbian, gay, bisexual and transgender (LGBT) persons, including reports of harassment by the police and incidents of people being assaulted or killed on account of their sexual orientation. The Committee notes with concern the systematic discrimination against individuals on the basis of their sexual orientation in the State party, including hate speech and manifestations of intolerance and prejudice by public officials, religious leaders and in the media. The Committee is also concerned about discrimination in employment, health care, education and other fields, as well as the infringement of the right to freedom of assembly and association and notes the absence of legislation that specifically prohibits discrimination on the basis of sexual orientation. (art. 26)

The State Party should:

(a) Provide effective protection against violence and discrimination based on sexual orientation, in particular through the enactment of comprehensive anti-discrimination legislation that includes the prohibition of discrimination on grounds of sexual orientation;

(b) Intensify its efforts to combat discrimination against LGBT persons, including by launching a sensitization campaign aimed at the general public as well as providing appropriate training to law enforcement officials;

(c) Take all necessary measures to guarantee the exercise in practice of the right to peaceful association and assembly for the LGBT community.

28. While welcoming decree No. 132 of 4 February 2009 on the sustainable development of indigenous peoples in the North, Siberia and the Far East, and the corresponding action plan for 2009-2011, the Committee expresses concern about the alleged adverse impact upon indigenous peoples of: (a) the 2004 amendment to article 4 of the Federal Law on Guarantees of the Rights of Numerically Small Indigenous Peoples; (b) the process of consolidation of the constituent territories of the Russian Federation through absorption of national autonomous areas; and (c) the exploitation of lands, fishing grounds and natural resources traditionally belonging to indigenous peoples through granting of licenses to private companies for development projects such as the construction of pipelines and hydroelectric dams. (art.27)

The State party should provide, in its next periodic report, detailed information on the impact of these measures upon the traditional habitat, way of life and economic activities of indigenous peoples in the State party, as well as on their enjoyment of rights guaranteed under article 27 of the Covenant.

29. The Committee requests the State party to publish its sixth periodic report and these concluding observations, making them widely available to the general public and to the judicial, legislative and administrative authorities. Printed copies should be distributed to universities, public libraries, the library of the parliament, lawyers' associations, and other relevant places. The Committee also requests the State party to make the sixth periodic report and these concluding observations available to civil society and to the non-governmental organizations operating in the State party. In addition to Russian, the Committee recommends that the report and the concluding observations be translated into the main minority languages spoken in the Russian Federation.

30. In accordance with rule 71, paragraph 5, of the Committee's rules of procedure, the State party should provide, within one year, relevant information on its implementation of the recommendations in paragraphs 13, 14, 16 and 17 above.

31. The Committee requests the State party to include in its seventh periodic report, due to be submitted by 1 November 2012, specific, up-to-date information on follow-up action taken on all the recommendations made and on the implementation of the Covenant as a whole. The Committee also requests that the seventh periodic report be prepared in consultation with civil society organizations operating in the State party.

Annex 757

CESCR General Comment No. 21, Right of Everyone to Take Part in Cultural Life, E/C.12/GC/21
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Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)

I. Introduction and basic premises

1. Cultural rights are an integral part of human rights and, like other rights, are universal, indivisible and interdependent. The full promotion of and respect for cultural rights is essential for the maintenance of human dignity and positive social interaction between individuals and communities in a diverse and multicultural world.

2. The right of everyone to take part in cultural life is closely related to the other cultural rights contained in article 15: the right to enjoy the benefits of scientific progress and its applications (art. 15, para. 1 (b)); the right of everyone to benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which they are the author (art. 15, para. 1 (c)); and the right to freedom indispensable for scientific research and creative activity (art. 15, para. 3). The right of everyone to take part in cultural life is also intrinsically linked to the right to education (arts. 13 and 14), through which individuals and communities pass on their values, religion, customs, language and other cultural references, and which helps to foster an atmosphere of mutual understanding and respect for cultural values. The right to take part in cultural life is also interdependent on other rights enshrined in the Covenant, including the right of all peoples to self-determination (art. 1) and the right to an adequate standard of living (art. 11).

3. The right of everyone to take part in cultural life is also recognized in article 27, paragraph 1, of the Universal Declaration of Human Rights, which states that “everyone has the right freely to participate in the cultural life of the community”. Other international instruments refer to the right to equal participation in cultural activities;¹ the right to participate in all aspects of social and cultural life;² the right to participate fully in cultural

¹ International Convention on the Elimination of All Forms of Racial Discrimination, art. 5 (e) (vi).

² Convention on the Elimination of All Forms of Discrimination against Women, art. 13 (c).

and artistic life;³ the right of access to and participation in cultural life;⁴ and the right to take part on an equal basis with others in cultural life.⁵ Instruments on civil and political rights,⁶ on the rights of persons belonging to minorities to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public,⁷ and to participate effectively in cultural life,⁸ on the rights of indigenous peoples to their cultural institutions, ancestral lands, natural resources and traditional knowledge,⁹ and on the right to development¹⁰ also contain important provisions on this subject.

4. In the present general comment, the Committee addresses specifically the right of everyone under article 15 paragraph 1 (a), to take part in cultural life, in conjunction with paragraphs 2, 3 and 4, as they relate to culture, creative activity and the development of international contacts and cooperation in cultural fields, respectively. The right of everyone to benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which they are the author, as provided for in article 15, paragraph 1 (c), was the subject of general comment No. 17 (2005).

5. The Committee has gained long experience on this subject through its consideration of reports and dialogue with States parties. In addition, it has twice organized a day of general discussion, once in 1992 and again in 2008, with representatives of international organizations and civil society with a view to preparing the present general comment.

II. Normative content of article 15, paragraph 1 (a)

6. The right to take part in cultural life can be characterized as a freedom. In order for this right to be ensured, it requires from the State party both abstention (i.e., non-interference with the exercise of cultural practices and with access to cultural goods and services) and positive action (ensuring preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods).

7. The decision by a person whether or not to exercise the right to take part in cultural life individually, or in association with others, is a cultural choice and, as such, should be recognized, respected and protected on the basis of equality. This is especially important for all indigenous peoples, who have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law, as well as the United Nations Declaration on the Rights of Indigenous Peoples.

³ Convention on the Rights of the Child, art. 31, para. 2.

⁴ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 43, para. 1 (g).

⁵ Convention on the Rights of Persons with Disabilities, art. 30, para. 1.

⁶ In particular the International Covenant on Civil and Political Rights, arts. 17, 18, 19, 21 and 22.

⁷ International Covenant on Civil and Political Rights, art. 27.

⁸ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, art. 2, paras. 1 and 2. See also Framework Convention for the Protection of National Minorities (Council of Europe, ETS No. 157), art. 15.

⁹ United Nations Declaration on the Rights of Indigenous Peoples, in particular arts. 5, 8, and 10–13 ff. See also ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, in particular arts. 2, 5, 7, 8, and 13–15 ff.

¹⁰ Declaration on the Right to Development (General Assembly resolution 41/128), art. 1. In its general comment No. 4, paragraph 9, the Committee considers that rights cannot be viewed in isolation from other human rights contained in the two international Covenants and other applicable international instruments.

A. Components of article 15, paragraph 1 (a)

8. The content or scope of the terms used in article 15, paragraph 1 (a), on the right of everyone to take part in cultural life, is to be understood as set out below:

“Everyone”

9. In its general comment No. 17 on the right to benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which one is the author,¹¹ the Committee recognizes that the term “everyone” in the first line of article 15 may denote the individual or the collective; in other words, cultural rights may be exercised by a person (a) as an individual, (b) in association with others, or (c) within a community or group, as such.

“Cultural life”

10. Various definitions of “culture” have been postulated in the past and others may arise in the future. All of them, however, refer to the multifaceted content implicit in the concept of culture.¹²

11. In the Committee’s view, culture is a broad, inclusive concept encompassing all manifestations of human existence. The expression “cultural life” is an explicit reference to culture as a living process, historical, dynamic and evolving, with a past, a present and a future.

12. The concept of culture must be seen not as a series of isolated manifestations or hermetic compartments, but as an interactive process whereby individuals and communities, while preserving their specificities and purposes, give expression to the culture of humanity. This concept takes account of the individuality and otherness of culture as the creation and product of society.

13. The Committee considers that culture, for the purpose of implementing article 15 (1) (a), encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food,

¹¹ See definition of “author” in general comment No. 17 (2005), paras. 7 and 8.

¹² Culture is (a) “the set of distinctive spiritual, material, intellectual and emotional features of a society or a social group, [which] encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs” (UNESCO Universal Declaration on Cultural Diversity, fifth preambular paragraph); (b) “in its very essence, a social phenomenon resulting from individuals joining and cooperating in creative activities [and] is not limited to access to works of art and the human rights, but is at one and the same time the acquisition of knowledge, the demand for a way of life and need to communicate” (UNESCO recommendation on participation by the people at large in cultural life and their contribution to it, 1976, the Nairobi recommendation, fifth preambular paragraph (a) and (c)); (c) “covers those values, beliefs, convictions, languages, knowledge and the arts, traditions, institutions and ways of life through which a person or a group expresses their humanity and meanings that they give to their existence and to their development” (Fribourg Declaration on Cultural Rights, art. 2 (a) (definitions)); (d) “the sum total of the material and spiritual activities and products of a given social group which distinguishes it from other similar groups [and] a system of values and symbols as well as a set of practices that a specific cultural group reproduces over time and which provides individuals with the required signposts and meanings for behaviour and social relationships in everyday life”. (Rodolfo Stavenhagen, “Cultural Rights: A social science perspective”, in H. Niec (ed.), *Cultural Rights and Wrongs: A collection of essays in commemoration of the 50th anniversary of the Universal Declaration of Human Rights*, Paris and Leicester, UNESCO Publishing and Institute of Art and Law).

clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives. Culture shapes and mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities.

“To participate” or “to take part”

14. The terms “to participate” and “to take part” have the same meaning and are used interchangeably in other international and regional instruments.

15. There are, among others, three interrelated main components of the right to participate or take part in cultural life: (a) participation in, (b) access to, and (c) contribution to cultural life.

(a) *Participation* covers in particular the right of everyone — alone, or in association with others or as a community — to act freely, to choose his or her own identity, to identify or not with one or several communities or to change that choice, to take part in the political life of society, to engage in one’s own cultural practices and to express oneself in the language of one’s choice. Everyone also has the right to seek and develop cultural knowledge and expressions and to share them with others, as well as to act creatively and take part in creative activity;

(b) *Access* covers in particular the right of everyone — alone, in association with others or as a community — to know and understand his or her own culture and that of others through education and information, and to receive quality education and training with due regard for cultural identity. Everyone has also the right to learn about forms of expression and dissemination through any technical medium of information or communication, to follow a way of life associated with the use of cultural goods and resources such as land, water,¹³ biodiversity, language or specific institutions, and to benefit from the cultural heritage and the creation of other individuals and communities;

(c) *Contribution to cultural life* refers to the right of everyone to be involved in creating the spiritual, material, intellectual and emotional expressions of the community. This is supported by the right to take part in the development of the community to which a person belongs, and in the definition, elaboration and implementation of policies and decisions that have an impact on the exercise of a person’s cultural rights.¹⁴

B. Elements of the right to take part in cultural life

16. The following are necessary conditions for the full realization of the right of everyone to take part in cultural life on the basis of equality and non-discrimination.

(a) *Availability* is the presence of cultural goods and services that are open for everyone to enjoy and benefit from, including libraries, museums, theatres, cinemas and sports stadiums; literature, including folklore, and the arts in all forms; the shared open spaces essential to cultural interaction, such as parks, squares, avenues and streets; nature’s gifts, such as seas, lakes, rivers, mountains, forests and nature reserves, including the flora and fauna found there, which give nations their character and biodiversity; intangible cultural goods, such as languages, customs, traditions, beliefs, knowledge and history, as

¹³ General comment No. 15 (2002), paras. 6 and 11.

¹⁴ UNESCO Universal Declaration on Cultural Diversity, art. 5. See also Fribourg Declaration on Cultural Rights, art. 7.

well as values, which make up identity and contribute to the cultural diversity of individuals and communities. Of all the cultural goods, one of special value is the productive intercultural kinship that arises where diverse groups, minorities and communities can freely share the same territory;

(b) *Accessibility* consists of effective and concrete opportunities for individuals and communities to enjoy culture fully, within physical and financial reach for all in both urban and rural areas, without discrimination.¹⁵ It is essential, in this regard, that access for older persons and persons with disabilities, as well as for those who live in poverty, is provided and facilitated. Accessibility also includes the right of everyone to seek, receive and share information on all manifestations of culture in the language of the person's choice, and the access of communities to means of expressions and dissemination.

(c) *Acceptability* entails that the laws, policies, strategies, programmes and measures adopted by the State party for the enjoyment of cultural rights should be formulated and implemented in such a way as to be acceptable to the individuals and communities involved. In this regard, consultations should be held with the individuals and communities concerned in order to ensure that the measures to protect cultural diversity are acceptable to them;

(d) *Adaptability* refers to the flexibility and relevance of strategies, policies, programmes and measures adopted by the State party in any area of cultural life, which must be respectful of the cultural diversity of individuals and communities;

(e) *Appropriateness* refers to the realization of a specific human right in a way that is pertinent and suitable to a given cultural modality or context, that is, respectful of the culture and cultural rights of individuals and communities, including minorities and indigenous peoples.¹⁶ The Committee has in many instances referred to the notion of cultural appropriateness (or cultural acceptability or adequacy) in past general comments, in relation in particular to the rights to food, health, water, housing and education. The way in which rights are implemented may also have an impact on cultural life and cultural diversity. The Committee wishes to stress in this regard the need to take into account, as far as possible, cultural values attached to, inter alia, food and food consumption, the use of water, the way health and education services are provided and the way housing is designed and constructed.

C. Limitations to the right to take part in cultural life

17. The right of everyone to take part in cultural life is closely linked to the enjoyment of other rights recognized in the international human rights instruments. Consequently, States parties have a duty to implement their obligations under article 15, paragraph 1 (a), together with their obligations under other provisions of the Covenant and international instruments, in order to promote and protect the entire range of human rights guaranteed under international law.

18. The Committee wishes to recall that, while account must be taken of national and regional particularities and various historical, cultural and religious backgrounds, it is the duty of States, regardless of their political, economic or cultural systems, to promote and protect all human rights and fundamental freedoms.¹⁷ Thus, no one may invoke cultural

¹⁵ See general comment No. 20 (2009).

¹⁶ Fribourg Declaration on Cultural Rights, art. 1 (e).

¹⁷ Vienna Declaration and Programme of Action, para. 5.

diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.¹⁸

19. Applying limitations to the right of everyone to take part in cultural life may be necessary in certain circumstances, in particular in the case of negative practices, including those attributed to customs and traditions, that infringe upon other human rights. Such limitations must pursue a legitimate aim, be compatible with the nature of this right and be strictly necessary for the promotion of general welfare in a democratic society, in accordance with article 4 of the Covenant. Any limitations must therefore be proportionate, meaning that the least restrictive measures must be taken when several types of limitations may be imposed. The Committee also wishes to stress the need to take into consideration existing international human rights standards on limitations that can or cannot be legitimately imposed on rights that are intrinsically linked to the right to take part in cultural life, such as the rights to privacy, to freedom of thought, conscience and religion, to freedom of opinion and expression, to peaceful assembly and to freedom of association.

20. Article 15, paragraph 1 (a) may not be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized in the Covenant or at their limitation to a greater extent than is provided for therein.¹⁹

D. Special topics of broad application

Non-discrimination and equal treatment

21. Article 2, paragraph 2, and article 3 of the Covenant prohibit any discrimination in the exercise of the right of everyone to take part in cultural life on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²⁰

22. In particular, no one shall be discriminated against because he or she chooses to belong, or not to belong, to a given cultural community or group, or to practise or not to practise a particular cultural activity. Likewise, no one shall be excluded from access to cultural practices, goods and services.

23. The Committee emphasizes that the elimination of all forms of discrimination in order to guarantee the exercise of the right of everyone to take part in cultural life can, in many cases, be achieved with limited resources²¹ by the adoption, amendment or repeal of legislation, or through publicity and information. In particular, a first and important step towards the elimination of discrimination, whether direct or indirect, is for States to recognize the existence of diverse cultural identities of individuals and communities on their territories. The Committee also refers States parties to its general comment No. 3 (1990), paragraph 12, on the nature of States parties' obligations, which establishes that, even in times of severe resource constraints, the most disadvantaged and marginalized individuals and groups can and indeed must be protected by the adoption of relatively low-cost targeted programmes.

¹⁸ Universal Declaration on Cultural Diversity, art. 4.

¹⁹ International Covenant on Economic, Social and Cultural Rights, art. 5, para. 1.

²⁰ See general comment No. 20 (2009).

²¹ See general comment No. 3 (1990); statement by the Committee: an evaluation of the obligation to take steps to the "maximum of available resources" under an optional protocol to the Covenant (E/C.12/2007/1).

24. The adoption of temporary special measures with the sole purpose of achieving de facto equality does not constitute discrimination, provided that such measures do not perpetuate unequal protection or form a separate system of protection for certain individuals or groups of individuals, and that they are discontinued when the objectives for which they were taken have been achieved.

E. Persons and communities requiring special protection

1. Women

25. Ensuring the equal right of men and women to the enjoyment of economic, social and cultural rights is a mandatory and immediate obligation of States parties.²² Implementing article 3 of the Covenant, in relation to article 15, paragraph 1 (a), requires, inter alia, the elimination of institutional and legal obstacles as well as those based on negative practices, including those attributed to customs and traditions, that prevent women from participating fully in cultural life, science education and scientific research.²³

2. Children

26. Children play a fundamental role as the bearers and transmitters of cultural values from generation to generation. States parties should take all the steps necessary to stimulate and develop children's full potential in the area of cultural life, with due regard for the rights and responsibilities of their parents or guardians. In particular, when taking into consideration their obligations under the Covenant and other human rights instruments on the right to education, including with regard to the aims of education,²⁴ States should recall that the fundamental aim of educational development is the transmission and enrichment of common cultural and moral values in which the individual and society find their identity and worth.²⁵ Thus, education must be culturally appropriate, include human rights education, enable children to develop their personality and cultural identity and to learn and understand cultural values and practices of the communities to which they belong, as well as those of other communities and societies.

27. The Committee wishes to recall in this regard that educational programmes of States parties should respect the cultural specificities of national or ethnic, linguistic and religious minorities as well as indigenous peoples, and incorporate in those programmes their history, knowledge and technologies, as well as their social, economic and cultural values and aspirations. Such programmes should be included in school curricula for all, not only for minorities and indigenous peoples. States parties should adopt measures and spare no effort to ensure that educational programmes for minorities and indigenous groups are conducted on or in their own language, taking into consideration the wishes expressed by communities and in the international human rights standards in this area.²⁶ Educational programmes should also transmit the necessary knowledge to enable everyone to participate fully and on an equal footing in their own and in national communities.

²² General comment No. 16 (2005), para. 16.

²³ *Ibid.*, para. 31.

²⁴ In particular articles 28 and 29 of the Convention on the Rights of the Child.

²⁵ World Declaration on Education for All: Meeting Basic Learning Needs, art. I-3.

²⁶ In particular the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the Declaration on the Rights of Indigenous Peoples and the International Labour Organization Convention concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169).

3. Older persons

28. The Committee is of the view that States parties to the Covenant are obligated to pay particular attention to the promotion and protection of the cultural rights of older persons. The Committee emphasizes the important role that older persons continue to play in most societies by reason of their creative, artistic and intellectual abilities, and as the transmitters of information, knowledge, traditions and cultural values. Consequently, the Committee attaches particular importance to the message contained in recommendations 44 and 48 of the Vienna International Plan of Action on Aging, calling for the development of programmes featuring older persons as teachers and transmitters of knowledge, culture and spiritual values, and encouraging Governments and international organizations to support programmes aimed at providing older persons with easier physical access to cultural institutions (such as museums, theatres, concert halls and cinemas).²⁷

29. The Committee therefore urges States parties to take account of the recommendations contained in the United Nations Principles for Older Persons, and in particular of principle 7, that older persons should remain integrated in society, participate actively in the formulation and implementation of policies that directly affect their well-being and share their knowledge and skills with younger generations; and principle 16, that older persons should have access to the educational, cultural, spiritual and recreational resources of society.²⁸

4. Persons with disabilities

30. Paragraph 17 of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities provides that States should ensure that persons with disabilities have the opportunity to utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of their community, be they in urban or rural areas, and that States should promote accessibility to and availability of places for cultural performances and services.²⁹

31. In order to facilitate participation of persons with disabilities in cultural life, States parties should, *inter alia*, recognize the right of these persons to have access to cultural material, television programmes, films, theatre and other cultural activities, in accessible forms; to have access to places where cultural performances or services are offered, such as theatres, museums, cinemas, libraries and tourist services and, to the extent possible, to monuments and places of national cultural importance; to the recognition of their specific cultural and linguistic identity, including sign language and the culture of the deaf; and to the encouragement and promotion of their participation, to the extent possible, in recreational, leisure and sporting activities.³⁰

5. Minorities

32. In the Committee's view, article 15, paragraph 1 (a) of the Covenant also includes the right of minorities and of persons belonging to minorities to take part in the cultural life of society, and also to conserve, promote and develop their own culture.³¹ This right entails the obligation of States parties to recognize, respect and protect minority cultures as an essential component of the identity of the States themselves. Consequently, minorities have

²⁷ General comment No. 6 (1995), paras. 38 and 40.

²⁸ General comment No. 6 (1995), para. 39.

²⁹ General Assembly resolution 48/96, annex.

³⁰ Convention on the Rights of Persons with Disabilities, art. 30.

³¹ International Covenant on Civil and Political Rights, art. 27; Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, para. 1 (1).

the right to their cultural diversity, traditions, customs, religion, forms of education, languages, communication media (press, radio, television, Internet) and other manifestations of their cultural identity and membership.

33. Minorities, as well as persons belonging to minorities, have the right not only to their own identity but also to development in all areas of cultural life. Any programme intended to promote the constructive integration of minorities and persons belonging to minorities into the society of a State party should thus be based on inclusion, participation and non-discrimination, with a view to preserving the distinctive character of minority cultures.

6. Migrants

34. States parties should pay particular attention to the protection of the cultural identities of migrants, as well as their language, religion and folklore, and of their right to hold cultural, artistic and intercultural events. States parties should not prevent migrants from maintaining their cultural links with their countries of origin.³²

35. As education is intrinsically related to culture, the Committee recommends that States parties adopt appropriate measures to enable the children of migrants to attend, on a basis of equal treatment, State-run educational institution and programmes.

7. Indigenous peoples

36. States parties should take measures to guarantee that the exercise of the right to take part in cultural life takes due account of the values of cultural life, which may be strongly communal or which can only be expressed and enjoyed as a community by indigenous peoples.³³ The strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.³⁴ Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity.³⁵ States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories.

37. Indigenous peoples have the right to act collectively to ensure respect for their right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports and traditional games, and visual and performing arts.³⁶ States parties should respect the principle of free,

³² International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 31.

³³ See Declaration on the Rights of Indigenous Peoples, art. 1. See also ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169), art. 1, para. 2.

³⁴ United Nations Declaration on the Rights of Indigenous Peoples, art. 26 (a).

³⁵ Convention No. 169, arts. 13–16. See also the United Nations Declaration on the Rights of Indigenous Peoples, arts. 20 and 33.

³⁶ ILO Convention No. 169, arts. 5 and 31. See also the United Nations Declaration on the Rights of Indigenous Peoples, arts. 11–13.

prior and informed consent of indigenous peoples in all matters covered by their specific rights.³⁷

8. Persons living in poverty

38. The Committee considers that every person or group of persons is endowed with a cultural richness inherent in their humanity and therefore can make, and continues to make, a significant contribution to the development of culture. Nevertheless, it must be borne in mind that, in practice, poverty seriously restricts the ability of a person or a group of persons to exercise the right to take part in, gain access and contribute to, on equal terms, all spheres of cultural life, and more importantly, seriously affects their hopes for the future and their ability to enjoy effectively their own culture. The common underlying theme in the experience of persons living in poverty is a sense of powerlessness that is often a consequence of their situation. Awareness of their human rights, and particularly the right of every person to take part in cultural life, can significantly empower persons or groups of persons living in poverty.³⁸

39. Culture as a social product must be brought within the reach of all, on the basis of equality, non-discrimination and participation. Therefore, in implementing the legal obligations enshrined in article 15, paragraph 1 (a), of the Covenant, States parties must adopt, without delay, concrete measures to ensure adequate protection and the full exercise of the right of persons living in poverty and their communities to enjoy and take part in cultural life. In this respect, the Committee refers States parties to its statement on poverty and the International Covenant on Economic, Social and Cultural Rights.³⁹

F. Cultural diversity and the right to take part in cultural life

40. The protection of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, and requires the full implementation of cultural rights, including the right to take part in cultural life.⁴⁰

41. Cultures have no fixed borders. The phenomena of migration, integration, assimilation and globalization have brought cultures, groups and individuals into closer contact than ever before, at a time when each of them is striving to keep their own identity.

42. Given that globalization has positive and negative effects, States parties must take appropriate steps to avoid its adverse consequences on the right to take part in cultural life, particularly for the most disadvantaged and marginalized individuals and groups, such as persons living in poverty. Far from having produced a single world culture, globalization has demonstrated that the concept of culture implies the coexistence of different cultures.

43. States parties should also bear in mind that cultural activities, goods and services have economic and cultural dimensions, conveying identity, values and meanings. They must not be treated as having solely a commercial value.⁴¹ In particular, bearing in mind article 15 (2) of the Covenant, States parties should adopt measures to protect and promote

³⁷ ILO Convention No. 169, art. 6 (a). See also the United Nations Declaration on the Rights of Indigenous Peoples, art. 19.

³⁸ See E/C.12/2001/10, para. 5.

³⁹ *Ibid.*, para. 14.

⁴⁰ See the Universal Declaration on Cultural Diversity, arts. 4 and 5.

⁴¹ UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, preamble, para. 18. See also the Universal Declaration on Cultural Diversity, art. 8.

the diversity of cultural expressions,⁴² and enable all cultures to express themselves and make themselves known.⁴³ In this respect, due regard should be paid to human rights standards, including the right to information and expression, and to the need to protect the free flow of ideas by word and image. The measures may also aim at preventing the signs, symbols and expressions of a particular culture from being taken out of context for the sole purpose of marketing or exploitation by the mass media.

III. States parties' obligations

A. General legal obligations

44. The Covenant imposes on States parties the immediate obligation to guarantee that the right set out in article 15, paragraph 1 (a), is exercised without discrimination, to recognize cultural practices and to refrain from interfering in their enjoyment and development.⁴⁴

45. While the Covenant provides for the "progressive" realization of the rights set out in its provisions and recognizes the problems arising from limited resources, it imposes on States parties the specific and continuing obligation to take deliberate and concrete measures aimed at the full implementation of the right of everyone to take part in cultural life.⁴⁵

46. As in the case of the other rights set out in the Covenant, regressive measures taken in relation to the right of everyone to take part in cultural life are not permitted. Consequently, if any such measure is taken deliberately, the State party has to prove that it was taken after careful consideration of all alternatives and that the measure in question is justified, bearing in mind the complete set of rights recognized in the Covenant.⁴⁶

47. Given the interrelationship between the rights set out in article 15 of the Covenant (see paragraph 2 above), the full realization of the right of everyone to take part in cultural life also requires the adoption of steps necessary for the conservation, development and dissemination of science and culture, as well as steps to ensure respect for the freedom indispensable to scientific research and creative activity, in accordance with paragraphs 2 and 3, respectively, of article 15.⁴⁷

B. Specific legal obligations

48. The right of everyone to take part in cultural life, like the other rights enshrined in the Covenant, imposes three types or levels of obligations on States parties: (a) the obligation to respect; (b) the obligation to protect; and (c) the obligation to fulfil. The

⁴² UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, art. IV-5.

⁴³ See the Universal Declaration on Cultural Diversity, art. 6.

⁴⁴ See general comment No. 20 (2009).

⁴⁵ See general comments No. 3 (1990), para. 9, No. 13 (1999), para. 44, No. 14 (2000), para. 31, No. 17 (2005), para. 26 and No. 18 (2005), para. 20. See also the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, para. 21.

⁴⁶ See general comments No. 3 (1990), para. 9, No. 13 (1999), para. 45, No. 14 (2000), para. 32, No. 17 (2005), para. 27 and No. 18 (2005), para. 21.

⁴⁷ See general comments No. 13 (1999), paras. 46 and 47, No. 14 (2000), para. 33, No. 17 (2005), para. 28 and No. 18 (2005), para. 22.

obligation to respect requires States parties to refrain from interfering, directly or indirectly, with the enjoyment of the right to take part in cultural life. The obligation to protect requires States parties to take steps to prevent third parties from interfering in the right to take part in cultural life. Lastly, the obligation to fulfil requires States parties to take appropriate legislative, administrative, judicial, budgetary, promotional and other measures aimed at the full realization of the right enshrined in article 15, paragraph 1 (a), of the Covenant.⁴⁸

49. The obligation to respect includes the adoption of specific measures aimed at achieving respect for the right of everyone, individually or in association with others or within a community or group:

(a) To freely choose their own cultural identity, to belong or not to belong to a community, and have their choice respected;

This includes the right not to be subjected to any form of discrimination based on cultural identity, exclusion or forced assimilation,⁴⁹ and the right of all persons to express their cultural identity freely and to exercise their cultural practices and way of life. States parties should consequently ensure that their legislation does not impair the enjoyment of these rights through direct or indirect discrimination.

(b) To enjoy freedom of opinion, freedom of expression in the language or languages of their choice, and the right to seek, receive and impart information and ideas of all kinds and forms including art forms, regardless of frontiers of any kind;

This implies the right of all persons to have access to, and to participate in, varied information exchanges, and to have access to cultural goods and services, understood as vectors of identity, values and meaning.⁵⁰

(c) To enjoy the freedom to create, individually, in association with others, or within a community or group, which implies that States parties must abolish censorship of cultural activities in the arts and other forms of expression, if any;

This obligation is closely related to the duty of States parties, under article 15, paragraph 3, “to respect the freedom indispensable for scientific research and creative activity”.

(d) To have access to their own cultural and linguistic heritage and to that of others;

In particular, States must respect free access by minorities to their own culture, heritage and other forms of expression, as well as the free exercise of their cultural identity and practices. This includes the right to be taught about one’s own culture as well as those of others.⁵¹ States parties must also respect the rights of indigenous peoples to their culture and heritage and to maintain and strengthen their spiritual relationship with their ancestral lands and other natural resources traditionally owned, occupied or used by them, and indispensable to their cultural life.

⁴⁸ See general comments No. 13 (1990), paras. 46 and 47, No. 14 (2000), para. 33, No. 17 (2005), para. 28 and No. 18 (2005), para. 22. See also the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, para. 6.

⁴⁹ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 31

⁵⁰ Universal Declaration on Cultural Diversity, para. 8.

⁵¹ Fribourg Declaration on Cultural Rights, arts. 6 (b) and 7 (b).

(e) To take part freely in an active and informed way, and without discrimination, in any important decision-making process that may have an impact on his or her way of life and on his or her rights under article 15, paragraph 1 (a).

50. In many instances, the obligations to respect and to protect freedoms, cultural heritage and diversity are interconnected. Consequently, the obligation to protect is to be understood as requiring States to take measures to prevent third parties from interfering in the exercise of rights listed in paragraph 49 above. In addition, States parties are obliged to:

(a) Respect and protect cultural heritage in all its forms, in times of war and peace, and natural disasters;

Cultural heritage must be preserved, developed, enriched and transmitted to future generations as a record of human experience and aspirations, in order to encourage creativity in all its diversity and to inspire a genuine dialogue between cultures. Such obligations include the care, preservation and restoration of historical sites, monuments, works of art and literary works, among others.⁵²

(b) Respect and protect cultural heritage of all groups and communities, in particular the most disadvantaged and marginalized individuals and groups, in economic development and environmental policies and programmes;

Particular attention should be paid to the adverse consequences of globalization, undue privatization of goods and services, and deregulation on the right to participate in cultural life.

(c) Respect and protect the cultural productions of indigenous peoples, including their traditional knowledge, natural medicines, folklore, rituals and other forms of expression;

This includes protection from illegal or unjust exploitation of their lands, territories and resources by State entities or private or transnational enterprises and corporations.

(d) Promulgate and enforce legislation to prohibit discrimination based on cultural identity, as well as advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, taking into consideration articles 19 and 20 of the International Covenant on Civil and Political Rights and article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.

51. The obligation to fulfil can be subdivided into the obligations to facilitate, promote and provide.

52. States parties are under an obligation to facilitate the right of everyone to take part in cultural life by taking a wide range of positive measures, including financial measures, that would contribute to the realization of this right, such as:

(a) Adopting policies for the protection and promotion of cultural diversity, and facilitating access to a rich and diversified range of cultural expressions, including through, inter alia, measures aimed at establishing and supporting public institutions and the cultural infrastructure necessary for the implementation of such policies; and measures aimed at enhancing diversity through public broadcasting in regional and minority languages;

(b) Adopting policies enabling persons belonging to diverse cultural communities to engage freely and without discrimination in their own cultural practices and those of others, and to choose freely their way of life;

⁵² Universal Declaration on Cultural Diversity, art. 7.

- (c) Promoting the exercise of the right of association for cultural and linguistic minorities for the development of their cultural and linguistic rights;
- (d) Granting assistance, financial or other, to artists, public and private organizations, including science academies, cultural associations, trade unions and other individuals and institutions engaged in scientific and creative activities;
- (e) Encouraging scientists, artists and others to take part in international scientific and cultural research activities, such as symposiums, conferences, seminars and workshops;
- (f) Taking appropriate measures or programmes to support minorities or other communities, including migrant communities, in their efforts to preserve their culture;
- (g) Taking appropriate measures to remedy structural forms of discrimination so as to ensure that the underrepresentation of persons from certain communities in public life does not adversely affect their right to take part in cultural life;
- (h) Taking appropriate measures to create conditions conducive to a constructive intercultural relationship between individuals and groups based on mutual respect, understanding and tolerance;
- (i) Taking appropriate measures to conduct public campaigns through the media, educational institutions and other available channels, with a view to eliminating any form of prejudice against individuals or communities, based on their cultural identity.

53. The obligation to promote requires States parties to take effective steps to ensure that there is appropriate education and public awareness concerning the right to take part in cultural life, particularly in rural and deprived urban areas, or in relation to the specific situation of, *inter alia*, minorities and indigenous peoples. This includes education and awareness-raising on the need to respect cultural heritage and cultural diversity.

54. The obligation to fulfil requires that States parties must provide all that is necessary for fulfilment of the right to take part in cultural life when individuals or communities are unable, for reasons outside their control, to realize this right for themselves with the means at their disposal. This level of obligation includes, for example:

- (a) The enactment of appropriate legislation and the establishment of effective mechanisms allowing persons, individually, in association with others, or within a community or group, to participate effectively in decision-making processes, to claim protection of their right to take part in cultural life, and to claim and receive compensation if their rights have been violated;
- (b) Programmes aimed at preserving and restoring cultural heritage;
- (c) The inclusion of cultural education at every level in school curricula, including history, literature, music and the history of other cultures, in consultation with all concerned;
- (d) Guaranteed access for all, without discrimination on grounds of financial or any other status, to museums, libraries, cinemas and theatres and to cultural activities, services and events.

C. Core obligations

55. In its general comment No. 3 (1990), the Committee stressed that States parties have a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights set out in the Covenant. Thus, in accordance with the Covenant and other international instruments dealing with human rights and the protection

of cultural diversity, the Committee considers that article 15, paragraph 1 (a), of the Covenant entails at least the obligation to create and promote an environment within which a person individually, or in association with others, or within a community or group, can participate in the culture of their choice, which includes the following core obligations applicable with immediate effect:

(a) To take legislative and any other necessary steps to guarantee non-discrimination and gender equality in the enjoyment of the right of everyone to take part in cultural life;

(b) To respect the right of everyone to identify or not identify themselves with one or more communities, and the right to change their choice;

(c) To respect and protect the right of everyone to engage in their own cultural practices, while respecting human rights which entails, in particular, respecting freedom of thought, belief and religion; freedom of opinion and expression; a person's right to use the language of his or her choice; freedom of association and peaceful assembly; and freedom to choose and set up educational establishments;

(d) To eliminate any barriers or obstacles that inhibit or restrict a person's access to the person's own culture or to other cultures, without discrimination and without consideration for frontiers of any kind;

(e) To allow and encourage the participation of persons belonging to minority groups, indigenous peoples or to other communities in the design and implementation of laws and policies that affect them. In particular, States parties should obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk.

D. International obligations

56. In its general comment No. 3 (1990), the Committee draws attention to the obligation of States parties to take steps, individually and through international assistance and cooperation, especially through economic and technical cooperation, with a view to achieving the full realization of the rights recognized in the Covenant. In the spirit of Article 56 of the Charter of the United Nations, as well as specific provisions of the International Covenant on Economic, Social and Cultural Rights (art. 2, para. 1, and arts. 15 and 23), States parties should recognize and promote the essential role of international cooperation in the achievement of the rights recognized in the Covenant, including the right of everyone to take part in cultural life, and should fulfil their commitment to take joint and separate action to that effect.

57. States parties should, through international agreements where appropriate, ensure that the realization of the right of everyone to take part in cultural life receives due attention.⁵³

58. The Committee recalls that international cooperation for development and thus for the realization of economic, social and cultural rights, including the right to take part in cultural life, is an obligation of States parties, especially of those States that are in a position to provide assistance. This obligation is in accordance with Articles 55 and 56 of

⁵³ See general comment No. 18 (2005), para. 29.

the Charter of the United Nations, as well as articles 2, paragraph 1, and articles 15 and 23 of the Covenant.⁵⁴

59. In negotiations with international financial institutions and in concluding bilateral agreements, States parties should ensure that the enjoyment of the right enshrined in article 15, paragraph 1 (a), of the Covenant is not impaired. For example, the strategies, programmes and policies adopted by States parties under structural adjustment programmes should not interfere with their core obligations in relation to the right of everyone, especially the most disadvantaged and marginalized individuals and groups, to take part in cultural life.⁵⁵

IV. Violations

60. To demonstrate compliance with their general and specific obligations, States parties must show that they have taken appropriate measures to ensure the respect for and protection of cultural freedoms, as well as the necessary steps towards the full realization of the right to take part in cultural life within their maximum available resources. States parties must also show that they have guaranteed that the right is enjoyed equally and without discrimination, by men and women.

61. In assessing whether States parties have complied with obligations to take action, the Committee looks at whether implementation is reasonable or proportionate with respect to the attainment of the relevant rights, complies with human rights and democratic principles, and whether it is subject to an adequate framework of monitoring and accountability.

62. Violations can occur through the direct action of a State party or of other entities or institutions that are insufficiently regulated by the State party, including, in particular, those in the private sector. Many violations of the right to take part in cultural life occur when States parties prevent access to cultural life, practices, goods and services by individuals or communities.

63. Violations of article 15, paragraph 1 (a), also occur through the omission or failure of a State party to take the necessary measures to comply with its legal obligations under this provision. Violations through omission include the failure to take appropriate steps to achieve the full realization of the right of everyone to take part in cultural life, and the failure to enforce relevant laws or to provide administrative, judicial or other appropriate remedies to enable people to exercise in full the right to take part in cultural life.

64. A violation also occurs when a State party fails to take steps to combat practices harmful to the well-being of a person or group of persons. These harmful practices, including those attributed to customs and traditions, such as female genital mutilation and allegations of the practice of witchcraft, are barriers to the full exercise by the affected persons of the right enshrined in article 15, paragraph 1 (a).

65. Any deliberately retrogressive measures in relation to the right to take part in cultural life would require the most careful consideration and need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.

⁵⁴ General comment No. 3 (1990), para. 14. See also general comment No. 18 (2005), para. 37.

⁵⁵ See general comment No. 18 (2005), para. 30.

V. Implementation at the national level

A. Legislation, strategies and policies

66. While States parties have a wide margin of discretion in selecting the steps they consider most appropriate for the full realization of the right, they must immediately take those steps intended to guarantee access by everyone, without discrimination, to cultural life.

67. States parties must take the necessary steps without delay to guarantee immediately at least the minimum content of the core obligations (see paragraph 56 above). Many of these steps, such as those intended to guarantee non-discrimination *de jure*, do not necessarily require financial resources. While there may be other steps that require resources, these steps are nevertheless essential to ensure the implementation of that minimum content. Such steps are not static, and States parties are obliged to advance progressively towards the full realization of the rights recognized in the Covenant and, as far as the present general comment is concerned, of the right enshrined in article 15, paragraph 1 (a).

68. The Committee encourages States parties to make the greatest possible use of the valuable cultural resources that every society possesses and to bring them within the reach of everyone, paying particular attention to the most disadvantaged and marginalized individuals and groups, in order to ensure that everyone has effective access to cultural life.

69. The Committee emphasizes that inclusive cultural empowerment derived from the right of everyone to take part in cultural life is a tool for reducing the disparities so that everyone can enjoy, on an equal footing, the values of his or her own culture within a democratic society.

70. States parties, in implementing the right enshrined in article 15, paragraph 1 (a), of the Covenant, should go beyond the material aspects of culture (such as museums, libraries, theatres, cinemas, monuments and heritage sites) and adopt policies, programmes and proactive measures that also promote effective access by all to intangible cultural goods (such as language, knowledge and traditions).

B. Indicators and benchmarks

71. In their national strategies and policies, States parties should identify appropriate indicators and benchmarks, including disaggregated statistics and time frames that allow them to monitor effectively the implementation of the right of everyone to take part in cultural life, and also to assess progress towards the full realization of this right.

C. Remedies and accountability

72. The strategies and policies adopted by States parties should provide for the establishment of effective mechanisms and institutions, where these do not exist, to investigate and examine alleged infringements of article 15, paragraph 1 (a), identify responsibilities, publicize the results and offer the necessary administrative, judicial or other remedies to compensate victims.

VI. Obligations of actors other than States

73. While compliance with the Covenant is mainly the responsibility of States parties, all members of civil society — individuals, groups, communities, minorities, indigenous peoples, religious bodies, private organizations, business and civil society in general — also have responsibilities in relation to the effective implementation of the right of everyone to take part in cultural life. States parties should regulate the responsibility incumbent upon the corporate sector and other non-State actors with regard to the respect for this right.

74. Communities and cultural associations play a fundamental role in the promotion of the right of everyone to take part in cultural life at the local and national levels, and in cooperating with States parties in the implementation of their obligations under article 15, paragraph 1 (a).

75. The Committee notes that, as members of international organizations such as United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Intellectual Property Organization (WIPO), the International Labour Organization (ILO), the Food and Agriculture Organization of the United Nations (FAO), the World Health Organization (WHO) and the World Trade Organization (WTO), States parties have an obligation to adopt whatever measures they can to ensure that the policies and decisions of those organizations in the field of culture and related areas are in conformity with their obligations under the Covenant, in particular the obligations contained in article 15 article 2, paragraph 1, and articles 22 and 23, concerning international assistance and cooperation.

76. United Nations organs and specialized agencies, should, within their fields of competence and in accordance with articles 22 and 23 of the Covenant, adopt international measures likely to contribute to the progressive implementation of article 15, paragraph 1 (a). In particular, UNESCO, WIPO, ILO, FAO, WHO and other relevant agencies, funds and programmes of the United Nations are called upon to intensify their efforts to take into account human rights principles and obligations in their work concerning the right of everyone to take part in cultural life, in cooperation with the Office of the United Nations High Commissioner for Human Rights.

Annex 758

CEDAW General Recommendation No. 28 on the Core Obligations of State Parties under Article
2. CEDAW/C/GC/28 (16 December 2010)



Convention on the Elimination of All Forms of Discrimination against Women

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Committee on the Elimination of Discrimination against Women

General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women

I. Introduction

1. Through this general recommendation, the Committee on the Elimination of Discrimination against Women (“the Committee”) aims to clarify the scope and meaning of article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (“the Convention”), which provides ways for States parties to implement domestically the substantive provisions of the Convention. The Committee encourages States parties to translate this general recommendation into national and local languages and to disseminate it widely to all branches of Government, civil society, including the media, academia and human rights and women’s organizations and institutions.² The Convention is a dynamic instrument that accommodates the development of international law. Since its first session in 1982, the Committee on the Elimination of Discrimination against Women and other actors at the national and international levels have contributed to the clarification and understanding of the substantive content of the Convention’s articles, the specific nature of discrimination against women and the various instruments required for combating such discrimination.

3. The Convention is part of a comprehensive international human rights legal framework directed at ensuring the enjoyment by all of all human rights and at eliminating all forms of discrimination against women on the basis of sex and gender. The Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Convention on the Rights of Persons with Disabilities contain explicit provisions guaranteeing women equality with men in the enjoyment of the rights they enshrine, while other international human rights treaties, such as the International Convention on the Elimination of All Forms of Racial Discrimination, are implicitly grounded in the concept of non-discrimination on the basis of sex and gender. The International Labour Organization (ILO) Conventions No. 100 (1951) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, No. 111 (1958) concerning Discrimination in Respect of Employment and Occupation and No. 156 (1981) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, the Convention against Discrimination in Education, the Declaration on

the Elimination of Discrimination against Women, the Vienna Declaration and Programme of Action, the Cairo Programme of Action and the Beijing Declaration and Platform for Action also contribute to an international legal regime of equality for women with men and non-discrimination. Likewise, the obligations of States entered into under regional human rights systems are complementary to the universal human rights framework.

4. The objective of the Convention is the elimination of all forms of discrimination against women on the basis of sex. It guarantees women the equal recognition, enjoyment and exercise of all human rights and fundamental freedoms in the political, economic, social, cultural, civil, domestic or any other field, irrespective of their marital status, and on a basis of equality with men.

5. Although the Convention only refers to sex-based discrimination, interpreting article 1 together with articles 2 (f) and 5 (a) indicates that the Convention covers gender-based discrimination against women. The term “sex” here refers to biological differences between men and women. The term “gender” refers to socially constructed identities, attributes and roles for women and men and society’s social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women. This social positioning of women and men is affected by political, economic, cultural, social, religious, ideological and environmental factors and can be changed by culture, society and community. The application of the Convention to gender-based discrimination is made clear by the definition of discrimination contained in article 1. This definition points out that any distinction, exclusion or restriction which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women of human rights and fundamental freedoms is discrimination, even where discrimination was not intended. This would mean that identical or neutral treatment of women and men might constitute discrimination against women if such treatment resulted in or had the effect of women being denied the exercise of a right because there was no recognition of the pre-existing gender-based disadvantage and inequality that women face. The views of the Committee on this matter are evidenced by its consideration of reports, its general recommendations, decisions, suggestions and statements, its consideration of individual communications and its conduct of inquiries under the Optional Protocol.

6. Article 2 is crucial to the full implementation of the Convention, since it identifies the nature of the general legal obligations of States parties. The obligations enshrined in article 2 are inextricably linked with all other substantive provisions of the Convention, as States parties have the obligation to ensure that all the rights enshrined in the Convention are fully respected at the national level.

7. Article 2 of the Convention should be read in conjunction with articles 3, 4, 5 and 24 and in the light of the definition of discrimination contained in article 1. In addition, the scope of the general obligations contained in article 2 should also be construed in the light of the general recommendations, concluding observations, views and other statements issued by the Committee, including the reports on the inquiry procedures and the decisions of individual cases. The spirit of the Convention covers other rights that are not explicitly mentioned in the Convention, but that have an impact on the achievement of equality of women with men, which impact represents a form of discrimination against women.

II. Nature and scope of obligations of States parties

8. Article 2 calls on States parties to condemn discrimination against women in “all its forms”, while article 3 refers to appropriate measures that States parties are expected to take in “all fields” to ensure the full development and advancement of women. Through these

provisions, the Convention anticipates the emergence of new forms of discrimination that had not been identified at the time of its drafting.

9. Under article 2, States parties must address all aspects of their legal obligations under the Convention to respect, protect and fulfil women's right to non-discrimination and to the enjoyment of equality. The obligation to respect requires that States parties refrain from making laws, policies, regulations, programmes, administrative procedures and institutional structures that directly or indirectly result in the denial of the equal enjoyment by women of their civil, political, economic, social and cultural rights. The obligation to protect requires that States parties protect women from discrimination by private actors and take steps directly aimed at eliminating customary and all other practices that prejudice and perpetuate the notion of inferiority or superiority of either of the sexes, and of stereotyped roles for men and women. The obligation to fulfil requires that States parties take a wide variety of steps to ensure that women and men enjoy equal rights de jure and de facto, including, where appropriate, the adoption of temporary special measures in line with article 4, paragraph 1, of the Convention and general recommendation No. 25 on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures. This entails obligations of means or conduct and obligations of results. States parties should consider that they have to fulfil their legal obligations to all women through designing public policies, programmes and institutional frameworks that are aimed at fulfilling the specific needs of women leading to the full development of their potential on an equal basis with men.

10. States parties have an obligation not to cause discrimination against women through acts or omissions; they are further obliged to react actively against discrimination against women, regardless of whether such acts or omissions are perpetrated by the State or by private actors. Discrimination can occur through the failure of States to take necessary legislative measures to ensure the full realization of women's rights, the failure to adopt national policies aimed at achieving equality between women and men and the failure to enforce relevant laws. Likewise, States parties have an international responsibility to create and continuously improve statistical databases and the analysis of all forms of discrimination against women in general and against women belonging to specific vulnerable groups in particular.

11. The obligations of States parties do not cease in periods of armed conflict or in states of emergency resulting from political events or natural disasters. Such situations have a deep impact on and broad consequences for the equal enjoyment and exercise by women of their fundamental rights. States parties should adopt strategies and take measures addressed to the particular needs of women in times of armed conflict and states of emergency.

12. Although subject to international law, States primarily exercise territorial jurisdiction. The obligations of States parties apply, however, without discrimination both to citizens and non-citizens, including refugees, asylum-seekers, migrant workers and stateless persons, within their territory or effective control, even if not situated within the territory. States parties are responsible for all their actions affecting human rights, regardless of whether the affected persons are in their territory.

13. Article 2 is not limited to the prohibition of discrimination against women caused directly or indirectly by States parties. Article 2 also imposes a due diligence obligation on States parties to prevent discrimination by private actors. In some cases, a private actor's acts or omission of acts may be attributed to the State under international law. States parties are thus obliged to ensure that private actors do not engage in discrimination against women as defined in the Convention. The appropriate measures that States parties are obliged to take include the regulation of the activities of private actors with regard to education, employment and health policies and practices, working conditions and work

standards, and other areas in which private actors provide services or facilities, such as banking and housing.

III. General obligations contained in article 2

A. Introductory sentence of article 2

14. The introductory sentence of article 2 reads: “States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women”.

15. The first obligation of States parties referred to in the chapeau of article 2 is the obligation to “condemn discrimination against women in all its forms”. States parties have an immediate and continuous obligation to condemn discrimination. They are obliged to proclaim to their population and the international community their total opposition to all forms of discrimination against women to all levels and branches of Government and their determination to bring about the elimination of discrimination against women. The term “discrimination in all its forms” clearly obligates the State party to be vigilant in condemning all forms of discrimination, including forms that are not explicitly mentioned in the Convention or that may be emerging.

16. States parties are under an obligation to respect, protect and fulfil the right to non-discrimination of women and to ensure the development and advancement of women in order that they improve their position and implement their right of de jure and de facto or substantive equality with men. States parties shall ensure that there is neither direct nor indirect discrimination against women. Direct discrimination against women constitutes different treatment explicitly based on grounds of sex and gender differences. Indirect discrimination against women occurs when a law, policy, programme or practice appears to be neutral in so far as it relates to men and women, but has a discriminatory effect in practice on women because pre-existing inequalities are not addressed by the apparently neutral measure. Moreover, indirect discrimination can exacerbate existing inequalities owing to a failure to recognize structural and historical patterns of discrimination and unequal power relationships between women and men.

17. States parties also have an obligation to ensure that women are protected against discrimination committed by public authorities, the judiciary, organizations, enterprises or private individuals, in the public and private spheres. This protection shall be provided by competent tribunals and other public institutions and enforced by sanctions and remedies, where appropriate. States parties should ensure that all Government bodies and organs are fully aware of the principles of equality and non-discrimination on the basis of sex and gender and that adequate training and awareness-raising programmes are set up and carried out in this respect.

18. Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them. They also need to adopt and pursue policies and programmes designed to eliminate such occurrences, including, where appropriate, temporary special measures in accordance with article 4, paragraph 1, of the Convention and general recommendation No. 25.

19. Discrimination against women on the basis of sex and gender comprises, as stated in general recommendation No. 19 on violence against women, gender-based violence, namely, violence that is directed against a woman because she is a woman or violence that affects women disproportionately. It is a form of discrimination that seriously inhibits women's ability to enjoy and exercise their human rights and fundamental freedoms on the basis of equality with men. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty, the violence that occurs within the family or domestic unit or within any other interpersonal relationship, or violence perpetrated or condoned by the State or its agents regardless of where it occurs. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence. States parties have a due diligence obligation to prevent, investigate, prosecute and punish such acts of gender-based violence.

20. The obligation to fulfil encompasses the obligation of States parties to facilitate access to and provide for the full realization of women's rights. The human rights of women shall be fulfilled by the promotion of de facto or substantive equality through all appropriate means, including through concrete and effective policies and programmes aimed at improving the position of women and achieving such equality, including where appropriate, through the adoption of temporary special measures in accordance with article 4, paragraph 1, and general recommendation No. 25.

21. States parties in particular are obliged to promote the equal rights of girls since girls are part of the larger community of women and are more vulnerable to discrimination in such areas as access to basic education, trafficking, maltreatment, exploitation and violence. All these situations of discrimination are aggravated when the victims are adolescents. Therefore, States shall pay attention to the specific needs of (adolescent) girls by providing education on sexual and reproductive health and carrying out programmes that are aimed at the prevention of HIV/AIDS, sexual exploitation and teenage pregnancy.

22. Inherent to the principle of equality between men and women, or gender equality, is the concept that all human beings, regardless of sex, are free to develop their personal abilities, pursue their professional careers and make choices without the limitations set by stereotypes, rigid gender roles and prejudices. States parties are called upon to use exclusively the concepts of equality of women and men or gender equality and not to use the concept of gender equity in implementing their obligations under the Convention. The latter concept is used in some jurisdictions to refer to fair treatment of women and men, according to their respective needs. This may include equal treatment, or treatment that is different but considered equivalent in terms of rights, benefits, obligations and opportunities.

23. States parties also agree to "pursue by all appropriate means" a policy of eliminating discrimination against women. This obligation to use means or a certain way of conduct gives a State party a great deal of flexibility for devising a policy that will be appropriate for its particular legal, political, economic, administrative and institutional framework and that can respond to the particular obstacles and resistance to the elimination of discrimination against women existing in that State party. Each State party must be able to justify the appropriateness of the particular means it has chosen and demonstrate whether it will achieve the intended effect and result. Ultimately, it is for the Committee to determine whether a State party has indeed adopted all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the Convention.

24. The main element of the introductory phrase of article 2 is the obligation of States parties to pursue a policy of eliminating discrimination against women. This requirement is an essential and critical component of a State party's general legal obligation to implement the Convention. This means that the State party must immediately assess the de jure and de facto situation of women and take concrete steps to formulate and implement a policy that

is targeted as clearly as possible towards the goal of fully eliminating all forms of discrimination against women and achieving women's substantive equality with men. The emphasis is on movement forward: from the evaluation of the situation to the formulation and initial adoption of a comprehensive range of measures, to building on those measures continuously in the light of their effectiveness and new or emerging issues, in order to achieve the Convention's goals. Such a policy must comprise constitutional and legislative guarantees, including an alignment with legal provisions at the domestic level and an amendment of conflicting legal provisions. It must also include other appropriate measures, such as comprehensive action plans and mechanisms for monitoring and implementing them, which provide a framework for the practical realization of the principle of formal and substantive equality of women and men.

25. The policy must be comprehensive in that it should apply to all fields of life, including those which are not explicitly mentioned in the text of the Convention. It must apply to both public and private economic spheres, as well as to the domestic sphere, and ensure that all branches of Government (executive, legislative and judicial branches) and all levels of Government assume their respective responsibilities for implementation. It should incorporate the entire range of measures that are appropriate and necessary in the particular circumstances of the State party.

26. The policy must identify women within the jurisdiction of the State party (including non-citizen, migrant, refugee, asylum-seeking and stateless women) as the rights-bearers, with particular emphasis on the groups of women who are most marginalized and who may suffer from various forms of intersectional discrimination.

27. The policy must ensure that women, as individuals and groups, have access to information about their rights under the Convention and are able to effectively promote and claim those rights. The State party should also ensure that women are able to participate actively in the development, implementation and monitoring of the policy. To this end, resources must be devoted to ensuring that human rights and women's non-governmental organizations are well-informed, adequately consulted and generally able to play an active role in the initial and subsequent development of the policy.

28. The policy must be action- and results-oriented in the sense that it should establish indicators, benchmarks and timelines, ensure adequate resourcing for all relevant actors and otherwise enable those actors to play their part in achieving the agreed benchmarks and goals. To this end, the policy must be linked to mainstream governmental budgetary processes in order to ensure that all aspects of the policy are adequately funded. It should provide for mechanisms that collect relevant sex-disaggregated data, enable effective monitoring, facilitate continuing evaluation and allow for the revision or supplementation of existing measures and the identification of any new measures that may be appropriate. Furthermore, the policy must ensure that there are strong and focused bodies (national women's machinery) within the executive branch of the Government that will take initiatives, coordinate and oversee the preparation and implementation of legislation, policies and programmes necessary to fulfil the obligations of the State party under the Convention. These institutions should be empowered to provide advice and analysis directly to the highest levels of Government. The policy should also ensure that independent monitoring institutions, such as national human rights institutes or independent women's commissions, are established or that existing national institutes receive a mandate to promote and protect the rights guaranteed under the Convention. The policy must engage the private sector, including business enterprises, the media, organizations, community groups and individuals, and enlist their involvement in adopting measures that will fulfil the goals of the Convention in the private economic sphere.

29. The words "without delay" make it clear that the obligation of States parties to pursue their policy, by all appropriate means, is of an immediate nature. This language is

unqualified, and does not allow for any delayed or purposely chosen incremental implementation of the obligations that States assume upon ratification of or accession to the Convention. It follows that a delay cannot be justified on any grounds, including political, social, cultural, religious, economic, resource or other considerations or constraints within the State. Where a State party is facing resource constraints or needs technical or other expertise to facilitate the implementation of its obligations under the Convention, it may be incumbent upon it to seek international cooperation in order to overcome these difficulties.

B. Subparagraphs (a)–(g)

30. Article 2 expresses the obligation of States parties to implement the Convention in a general way. Its substantive requirements provide the framework for the implementation of the specific obligations identified in article 2, subparagraphs (a)–(g), and all other substantive articles of the Convention.

31. Subparagraphs (a), (f) and (g) establish the obligation of States parties to provide legal protection and to abolish or amend discriminatory laws and regulations as part of the policy of eliminating discrimination against women. States parties must ensure that, through constitutional amendments or by other appropriate legislative means, the principle of equality between women and men and of non-discrimination is enshrined in domestic law with an overriding and enforceable status. They must also enact legislation that prohibits discrimination in all fields of women's lives under the Convention and throughout their lifespan. States parties have an obligation to take steps to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. Certain groups of women, including women deprived of their liberty, refugees, asylum-seeking and migrant women, stateless women, lesbian women, disabled women, women victims of trafficking, widows and elderly women, are particularly vulnerable to discrimination through civil and penal laws, regulations and customary law and practices. By ratifying the Convention or acceding to it, States parties undertake to incorporate the Convention into their domestic legal systems or to give it otherwise appropriate legal effect within their domestic legal orders in order to secure the enforceability of its provisions at the national level. The question of direct applicability of the provisions of the Convention at the national level is a question of constitutional law and depends on the status of treaties within the domestic legal order. The Committee takes the view, however, that the rights to non-discrimination and equality in all fields of women's lives throughout their lifespan, as enshrined in the Convention, may receive enhanced protection in those States where the Convention is automatically or through specific incorporation part of the domestic legal order. The Committee urges those States parties in which the Convention does not form part of the domestic legal order to consider incorporation of the Convention to render it part of domestic law, for example through a general law on equality, in order to facilitate the full realization of Convention rights as required by article 2.

32. Subparagraph (b) contains the obligation of States parties to ensure that legislation prohibiting discrimination and promoting equality of women and men provides appropriate remedies for women who are subjected to discrimination contrary to the Convention. This obligation requires that States parties provide reparation to women whose rights under the Convention have been violated. Without reparation the obligation to provide an appropriate remedy is not discharged. Such remedies should include different forms of reparation, such as monetary compensation, restitution, rehabilitation and reinstatement; measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition; changes in relevant laws and practices; and bringing to justice the perpetrators of violations of human rights of women.

33. According to subparagraph (c), States parties must ensure that courts are bound to apply the principle of equality as embodied in the Convention and to interpret the law, to the maximum extent possible, in line with the obligations of States parties under the Convention. However, where it is not possible to do so, courts should draw any inconsistency between national law, including national religious and customary laws, and the State party's obligations under the Convention to the attention of the appropriate authorities, since domestic laws may never be used as justification for failures by States parties to carry out their international obligations.

34. States parties must ensure that women can invoke the principle of equality in support of complaints of acts of discrimination contrary to the Convention, committed by public officials or by private actors. States parties must further ensure that women have recourse to affordable, accessible and timely remedies, with legal aid and assistance as necessary, to be settled in a fair hearing by a competent and independent court or tribunal, where appropriate. Where discrimination against women also constitutes an abuse of other human rights, such as the right to life and physical integrity in, for example, cases of domestic and other forms of violence, States parties are obliged to initiate criminal proceedings, bring the perpetrator(s) to trial and impose appropriate penal sanctions. States parties should financially support independent associations and centres providing legal resources for women in their work to educate women about their rights to equality and assist them in pursuing remedies for discrimination.

35. Subparagraph (d) establishes an obligation of States parties to abstain from engaging in any act or practice of direct or indirect discrimination against women. States parties must ensure that State institutions, agents, laws and policies do not directly or explicitly discriminate against women. They must also ensure that any laws, policies or actions that have the effect or result of generating discrimination are abolished.

36. Subparagraph (e) establishes an obligation of States parties to eliminate discrimination by any public or private actor. The types of measures that might be considered appropriate in this respect are not limited to constitutional or legislative measures. States parties should also adopt measures that ensure the practical realization of the elimination of discrimination against women and women's equality with men. This includes measures that: ensure that women are able to make complaints about violations of their rights under the Convention and have access to effective remedies; enable women to be actively involved in the formulation and implementation of measures; ensure Government accountability domestically; promote education and support for the goals of the Convention throughout the education system and in the community; encourage the work of human rights and women's non-governmental organizations; establish the necessary national human rights institutions or other machineries; and provide adequate administrative and financial support to ensure that the measures adopted make a real difference in women's lives in practice. The obligations incumbent upon States parties that require them to establish legal protection of the rights of women on an equal basis with men, ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination and take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise also extend to acts of national corporations operating extraterritorially.

IV. Recommendations to States parties

A. Implementation

37. In order to satisfy the requirement of “appropriateness”, the means adopted by States parties must address all aspects of their general obligations under the Convention to respect, protect, promote and fulfil women’s right to non-discrimination and to the enjoyment of equality with men. Thus the terms “appropriate means” and “appropriate measures” used in article 2 and other articles of the Convention comprise measures ensuring that a State party:

- (a) Abstains from performing, sponsoring or condoning any practice, policy or measure that violates the Convention (respect);
- (b) Takes steps to prevent, prohibit and punish violations of the Convention by third parties, including in the home and in the community, and to provide reparation to the victims of such violations (protect);
- (c) Fosters wide knowledge about and support for its obligations under the Convention (promote);
- (d) Adopts temporary special measures that achieve sex non-discrimination and gender equality in practice (fulfil).

38. States parties should also adopt other appropriate measures of implementation such as:

- (a) Promoting equality of women through the formulation and implementation of national plans of action and other relevant policies and programmes in line with the Beijing Declaration and Platform for Action, and allocating adequate human and financial resources;
- (b) Establishing codes of conduct for public officials to ensure respect for the principles of equality and non-discrimination;
- (c) Ensuring that reports of court decisions applying the provisions of the Convention on the equality and non-discrimination principles are widely distributed;
- (d) Undertaking specific education and training programmes about the principles and provisions of the Convention directed to all Government agencies, public officials and, in particular, the legal profession and the judiciary;
- (e) Enlisting all media in public education programmes about the equality of women and men, and ensuring in particular that women are aware of their right to equality without discrimination, of the measures taken by the State party to implement the Convention, and of the concluding observations by the Committee on the reports of the State party;
- (f) Developing and establishing valid indicators of the status of and progress in the realization of human rights of women, and establishing and maintaining databases disaggregated by sex and related to the specific provisions of the Convention.

B. Accountability

39. The accountability of the States parties to implement their obligations under article 2 is engaged through the acts or omissions of acts of all branches of Government. The decentralization of power, through devolution and delegation of Government powers in both unitary and federal States, does not in any way negate or reduce the direct

responsibility of the State party's national or federal Government to fulfil its obligations to all women within its jurisdiction. In all circumstances, the State party that ratified or acceded to the Convention remains responsible for ensuring full implementation throughout the territories under its jurisdiction. In any process of devolution, States parties have to make sure that the devolved authorities have the necessary financial, human and other resources to effectively and fully implement the obligations of the State party under the Convention. The Governments of States parties must retain powers to require such full compliance with the Convention and must establish permanent coordination and monitoring mechanisms to ensure that the Convention is respected and applied to all women within their jurisdiction without discrimination. Furthermore, there must be safeguards to ensure that decentralization or devolution does not lead to discrimination with regard to the enjoyment of rights by women in different regions.

40. Effective implementation of the Convention requires that a State party be accountable to its citizens and other members of its community at both the national and international levels. In order for this accountability function to work effectively, appropriate mechanisms and institutions must be put in place.

C. Reservations

41. The Committee considers article 2 to be the very essence of the obligations of States parties under the Convention. The Committee therefore considers reservations to article 2 or to subparagraphs of article 2 to be, in principle, incompatible with the object and purpose of the Convention and thus impermissible under article 28, paragraph 2. States parties that have entered reservations to article 2 or to subparagraphs of article 2 should explain the practical effect of those reservations on the implementation of the Convention and should indicate the steps taken to keep the reservations under review, with the goal of withdrawing them as soon as possible.

42. The fact that a State party has entered a reservation to article 2 or to subparagraphs of article 2 does not remove the need for that State party to comply with its other obligations under international law, including its obligations under other human rights treaties that the State party has ratified or to which it has acceded and under customary international human rights law relating to the elimination of discrimination against women. Where there is a discrepancy between reservations to provisions of the Convention and similar obligations under other international human rights treaties ratified by a State party or to which it has acceded, it should review its reservations to the Convention with a view to withdrawing them.

Annex 759

OHCHR, Situation of Human Rights in the Temporarily Occupied Autonomous Republic of
Crimea and the City of Sevastopol (Ukraine) (22 February 2014 to 12 September 2017)

**Office of the United Nations
High Commissioner for Human Rights**

**Situation of human rights in the temporarily
occupied Autonomous Republic of Crimea and the
city of Sevastopol (Ukraine)**



Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Executive summary.....	1–19	1
II. Introduction.....	20–29	3
III. Methodology.....	30–35	5
IV. Application of international law.....	36–45	5
1. International human rights law.....	37–41	6
2. International humanitarian law.....	42–45	6
V. Population data and movements.....	46–54	7
VI. Civil and Political Rights.....	55–169	8
A. Right to nationality.....	55–72	8
1. Ukrainian citizens having Crimean residency registration who rejected Russian Federation citizenship.....	58–63	8
2. Ukrainian citizens without Crimean residency registration who are excluded from Russian Federation citizenship.....	64–70	9
3. Ukrainian citizens who were made to renounce Ukrainian citizenship.....	71–72	10
B. Administration of justice and fair trial rights.....	73–79	10
C. Right to life.....	80–83	11
D. Right to physical and mental integrity.....	84–92	12
E. Right to liberty and security.....	93–104	13
1. Arbitrary arrests and detentions.....	94–98	13
2. Enforced disappearances.....	99–104	14
F. Right to private and family life.....	105–110	15
G. Rights of detainees.....	111–119	15
1. Violations of the rights of prisoners in Crimea.....	112–115	16
2. Transfer of prisoners to the Russian Federation.....	116–119	16
H. Forced enlistment.....	120–122	17
I. Freedom of movement.....	123–135	17
1. Restrictions imposed by the Russian Federation.....	125–128	17
2. Restrictions imposed by Ukraine.....	129–135	18
J. Freedom of thought, conscience and religion.....	136–145	19
K. Freedom of peaceful assembly.....	146–153	20
L. Freedom of opinion and expression.....	154–161	21
M. Freedom of association.....	162–169	23
VII. Economic, Social and Cultural Rights.....	170–219	24
A. Property rights.....	170–181	24
1. Nationalization of property.....	171–176	24
2. Housing, land and property of formerly deported people.....	177–181	24

B.	Right to maintain one’s identity, culture and tradition	182–191	25
	1. Limitations of the right of Ukrainians and Crimean Tatars to express their culture and identity	183–186	25
	2. The ban of the Mejlis	187–193	26
C.	Right to education in one’s native language	194–201	27
D.	Right to health	202–214	28
	1. Medical staff deficit in public hospitals	204–208	28
	2. Impaired treatment of drug users	209–214	29
E.	Access to water and other essential services.....	215–219	29
VIII.	Conclusions and Recommendations	220–226	30
IX.	End notes		i

I. Executive Summary

1. On 14 March 2014, following a request of the Government of Ukraine addressed to the United Nations Secretary-General to establish a human rights mission in Ukraine, the Office of the United Nations High Commissioner for Human Rights (OHCHR) deployed a Human Rights Monitoring Mission in Ukraine (HRMMU). Since then, HRMMU has been collecting and analyzing information on the human rights situation throughout Ukraine, including in the Autonomous Republic of Crimea and the city of Sevastopol¹ on the basis of United Nations General Assembly resolutions 68/262, reaffirming the territorial integrity of Ukraine and 71/205 referring to the Crimean peninsula as Ukrainian territory temporarily occupied² by the Russian Federation. According to the Constitution of Ukraine, Crimea and the city of Sevastopol are separate administrative units of the Crimean peninsula having their own governing institutions.

2. The present report was developed based on the mandate of OHCHR and HRMMU, but also following a request by General Assembly resolution 71/205³ on the *“Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine)”* for a dedicated thematic report of OHCHR on the “situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol”. The report covers the period from 22 February 2014 to 12 September 2017. HRMMU has not been provided access to Crimea by Russian Federation authorities since its former Head of Mission accompanied the former Assistant Secretary-General for Human Rights, Ivan Šimonović, on 21-22 March 2014. As a result, it has been monitoring human rights developments in Crimea from mainland Ukraine.

3. Pro-Russian groups in Crimea rejected the ousting by Parliament of former President of Ukraine Viktor Yanukovich on 22 February 2014, criticizing it as an unconstitutional change of power. One of these groups was the ‘people’s militia’, a local paramilitary formation created on 23 February 2014, and commonly referred to as the ‘Crimean self-defence’.⁴ With the support of Russian Federation troops⁵, the Crimean self-defence-blocked key infrastructure, airports and military installations and took control of strategic facilities. It has been accused of committing numerous human rights abuses with impunity since the end of February 2014.

4. The President of the Russian Federation Vladimir Putin stated that in a meeting with heads of security agencies during the night of 22 and 23 February 2014 he took the decision to “start working on the return of Crimea to the Russian Federation”.⁶

5. On 27 February 2014, uniformed men without insignia took control of the Parliament of Crimea. On the same day, the Parliament of Crimea dismissed the Government of Crimea. On 11 March 2014, the Parliaments of Crimea and Sevastopol adopted a joint Declaration of Independence stating that Crimea and Sevastopol will unite to form an independent state - the “Republic of Crimea” - and seek integration into the Russian Federation if Crimean residents choose to join the Russian Federation at a referendum scheduled for 16 March.⁷ According to the pro-Russian authorities in Crimea, a large majority of voters backed Crimea’s “incorporation” into the Russian Federation. The referendum was declared invalid by the Government of Ukraine and the United Nations General Assembly. The United Nations Secretary-General Ban-Ki Moon expressed “deep concern and disappointment”, adding that the referendum would only exacerbate an “already complex and tense situation”.⁸ Subsequently, the Russian Federation and the “Republic of Crimea” signed on 18 March 2014 a “treaty of accession” effectively annexing the peninsula into the Russian Federation.

6. One consequence of this development was the imposition of Russian Federation citizenship on residents of Crimea. This has resulted in regressive effects on the enjoyment of human rights, particularly for those who refused to automatically adopt Russian

Federation citizenship, were ineligible to obtain it, or were required to forfeit their Ukrainian citizenship in order to remain employed.

7. Since the beginning of occupation, Ukrainian laws were substituted by Russian Federation laws, in violation of the obligation under international humanitarian law to respect the existing law of the occupied territory.⁹ Among other implications, this led to the arbitrary implementation of Russian Federation criminal law provisions designed to fight terrorism, extremism and separatism, which have restricted the right to liberty and security of the person and the space for the enjoyment of fundamental freedoms.

8. Laws and judicial decisions deriving from the implementation of the legal framework of the Russian Federation in Crimea have further undermined the exercise of fundamental freedoms. Mandatory re-registration requirements were imposed on NGOs, media outlets and religious communities in Crimea. Russian Federation authorities have denied a number of them the right to re-register, generally on procedural grounds, raising concerns about the use of legal norms and procedures to silence dissent or criticism.

9. Most affected by these restrictions were individuals opposed to the March 2014 referendum or criticizing Russian Federation control of Crimea, such as journalists, bloggers, supporters of the Mejlis,¹⁰ pro-Ukrainian and Maidan activists, as well as persons with no declared political affiliation but advocating strict compliance with the tenets of Islam, who are often accused of belonging to extremist groups banned in the Russian Federation, such as Hizb ut-Tahrir. The rights of these people to freedom of opinion and expression, association, peaceful assembly, movement, thought, conscience and religion, were obstructed through acts of intimidation, pressure, physical attacks, warnings as well as harassment through judicial measures, including prohibitions, house searches, detentions and sanctions.

10. Russian Federation justice system applied in Crimea often failed to uphold fair trial rights and due process guarantees. Court decisions have confirmed actions, decisions and requests of investigating or prosecuting bodies, seemingly without proper judicial oversight. Courts frequently ignored credible claims of human rights violations occurring in detention. Judges have applied Russian Federation criminal law provisions to a wide variety of peaceful assemblies, speech and activities, and in some cases retroactively to events that preceded the temporary occupation of Crimea or occurred outside of the peninsula in mainland Ukraine.

11. Grave human rights violations, such as arbitrary arrests and detentions, enforced disappearances, ill-treatment and torture, and at least one extra-judicial execution were documented. For a three-week period following the overthrow of Ukrainian authorities in Crimea, human rights abuses occurring on the peninsula were attributed to members of the Crimean self-defence and various Cossack groups. Following Crimea's temporary occupation, on 18 March 2014, representatives of the Crimean Federal Security Service of the Russian Federation (FSB) and police were more frequently mentioned as perpetrators.

12. While those human rights violations and abuses have affected Crimean residents of diverse ethnic backgrounds, Crimean Tatars were particularly targeted especially those with links to the Mejlis, which boycotted the March 2014 referendum and initiated public protests in favour of Crimea remaining a part of Ukraine. Intrusive law enforcement raids of private properties have also disproportionately affected the Crimean Tatars and interfered with their right to privacy under the justification of fighting extremism. Furthermore, the ban of the Mejlis, imposed in April 2016 by the Supreme Court of Crimea, has infringed on the civil, political and cultural rights of Crimean Tatars.

13. The Russian Federation authorities in Crimea have failed to effectively investigate most allegations of human rights violations committed by the security forces or armed groups acting under the direction or control of the State. Failure to prosecute these acts and ensure accountability has denied victims proper remedy and strengthened impunity, potentially encouraging the continued perpetration of human rights violations.

14. Since the beginning of the temporary occupation, all penitentiary institutions in Crimea have been integrated into the penitentiary system of the Russian Federation, leading to numerous transfers of detainees from Crimea to penal colonies in the Russian Federation, contrary to provisions of international humanitarian law.¹¹

15. Restrictions affecting freedom of movement to and from Crimea have been imposed by the Russian Federation and Ukraine on the grounds of security or pursuant to immigration rules. They include five-year exiles, deportations, prohibitions on entry of individuals and public transportation, non-recognition of documents, and restrictive regulations applicable to travel of children and transportation of personal belongings.

16. Large scale expropriation of public and private property has been conducted without compensation or regard for international humanitarian law provisions protecting property from seizures or destruction. Crimean Tatars who returned from deportation in the 1990s and built their houses on land plots without obtaining construction permits remain at risk of seeing their security of tenure contested and being forcibly evicted.

17. The space for public manifestation of Ukrainian culture and identity has shrunk significantly. Groups manifesting their attachment to national symbols, dates or historic figures have been issued warnings or sanctioned by courts for violating public order or conducting unauthorized rallies. Education in the Ukrainian language has almost disappeared from Crimea, jeopardizing one of the pillars of an individual's identity and cultural affiliation.

18. The availability of health services in free-of-charge State medical institutions has been impaired since March 2014 due to the numerous departures of doctors and other medical staff to more lucrative private sector institutions in Crimea. This has resulted in delayed treatment of the most economically disadvantaged, jeopardizing their right to life and health. Retrogressive measures stemming from the implementation of Russian Federation legislation have affected people suffering from drug dependence.

19. The right of the Crimean population to an adequate standard of living has been affected by measures taken by Ukrainian authorities or implemented on mainland Ukraine, including the interruption of water and energy supplies to the peninsula. Under international humanitarian law, the Russian Federation as the occupying power is obliged to ensure to the fullest extent of the means available to it sufficient hygiene and public health standards, as well as the provision of food and medical care to the population. At the same time, this does not exonerate Ukraine from its obligations under the International Covenant on Economic, Social and Cultural Rights not to interfere with the enjoyment of the rights it enshrines, and from respecting the requirement under international humanitarian law to ensure that the basic needs of the population continue to be met under conditions of occupation.

II. Introduction

20. The political events that marked the Maidan protests in Kyiv, and culminated in the departure, on 21 February 2014, of then President of Ukraine Viktor Yanukovich and the establishment of an interim Government of Ukraine on 23 February, affected Crimea. The Crimean peninsula had also been the theatre of pro- and larger anti-Maidan rallies since December 2013.¹²

21. The President of the Russian Federation Vladimir Putin stated that in a meeting with heads of security agencies during the night of 22 and 23 February 2014 he took the decision to "start working on the return of Crimea to the Russian Federation".¹³

22. On 23 February 2014, demonstrations in Sevastopol led to the resignation of the Kyiv-appointed authorities and the installation by the local parliament of a pro-Russian “People’s Mayor” on 24 February.¹⁴

23. In Simferopol, the capital of the Autonomous Republic of Crimea, supporters of Ukrainian unity, mainly Crimean Tatars, clashed on 26 February with pro-Russian residents in front of the parliament. A stampede left two people dead and some 70 injured. On the following night, armed groups without insignia took over the buildings of the local government and parliament. On 27 February, members of the Parliament of Crimea, in the presence of gunmen, dismissed the local Government and elected Sergey Aksenov as the Head of Crimea.¹⁵

24. On 6 March 2014, the Parliament of Crimea adopted a resolution calling for a referendum¹⁶ on the status of the peninsula, to be held on 16 March 2014, basing the decision on the “absence of legitimate State organs in Ukraine”.¹⁷ In an Opinion¹⁸ concerning the compatibility of this resolution with constitutional principles, the European Commission for Democracy through Law (Venice Commission) of the Council of Europe noted that the referendum violated the Constitution of Ukraine, and asserted that circumstances in Crimea did not allow for a referendum to be held in line with European democratic standards.¹⁹ On 17 March 2014, United Nations Secretary-General Ban-Ki Moon regretted that the referendum would only exacerbate an “already complex and tense situation”.²⁰ Furthermore, during his mission to Crimea on 21 and 22 March 2014, former UN Assistant Secretary-General for Human Rights Ivan Šimonović received information on alleged cases of non-Ukrainian citizens participating in the referendum, as well as individuals voting numerous times in different locations.²¹

25. According to the pro-Russian authorities in Crimea, an overwhelming majority of the Crimean population voted in favour of joining the Russian Federation. Opponents boycotted the poll, considering it as unlawful.²² The authorities of Ukraine declared these developments unconstitutional and terminated the powers of Crimean institutions.²³

26. On 18 March 2014 a “*Treaty on the Accession of the Republic of Crimea to the Russian Federation*” (“*Treaty on Accession*”) was signed in Moscow, and on 21 March 2014, the Parliament of the Russian Federation ratified a Constitutional Law “*On the Accession of the Republic of Crimea to the Russian Federation and the Creation of the New Constituent Entities of the Republic of Crimea and the City of Federal Importance Sevastopol within the Russian Federation*”.

27. On 15 April 2014, the Parliament of Ukraine passed a law designed to regulate legal aspects related to the temporary occupation of Crimea.²⁴ It defines principles applying to legal and property rights, economic activity, social rights and benefits, freedom of movement, and compensation for damages incurred from the temporary occupation.

28. The General Assembly of the United Nations adopted two resolutions on Crimea. Resolution 68/262²⁵ on the “*Territorial integrity of Ukraine*” of 27 March 2014 states that the March 2014 referendum has “no validity” and cannot form the basis for any alteration of the status of Crimea. Resolution 71/205 on the “*Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine)*”, adopted on 19 December 2016²⁶, refers to Crimea as being under the “temporary occupation” of the Russian Federation. It calls on the latter to abide by the Geneva Conventions. It also urges the Russian Federation to ensure proper and unimpeded access of international human rights monitoring missions and human rights non-governmental organizations (NGOs) to the peninsula, and requests the United Nations Secretary-General to seek ways and means to ensure safe and unfettered access to Crimea by established regional and international human rights monitoring mechanisms. In addition, it requests the Office of the United Nations High Commissioner for Human Rights (OHCHR) to prepare a dedicated thematic report on the human rights situation in Crimea.

29. The present report was developed pursuant to General Assembly Resolution 71/205, and covers the period between 22 February 2014 and 12 September 2017. Since the adoption of this resolution, OHCHR has been analyzing incidents occurring in Crimea based on an international humanitarian law framework, as well as against international human rights standards.

III. Methodology

30. HRMMU has a mandate *inter alia* to monitor and publicly report on the human rights situation in Ukraine through teams based in various locations, including through a presence in Crimea's capital, Simferopol.²⁷

31. Former Assistant Secretary-General for Human Rights Ivan Šimonović was the last United Nations official to visit the Crimean peninsula, on 21 and 22 March 2014.²⁸

32. On 18 September 2014, a letter addressed by HRMMU to the Head of Crimea requested the opportunity to establish a sub-office in Simferopol, in line with its mandate and General Assembly resolution 68/262. The response, received on 8 October 2014, stated that HRMMU had been deployed on the territory of Ukraine upon the invitation of the Government of Ukraine; that Crimea was part of the Russian Federation; and that questions of international relations were not within the competence of Crimean institutions.

33. On 20 April 2017, following consultations with the Government of Ukraine, OHCHR informed the Government of the Russian Federation of its intention to send a mission of HRMMU to Crimea in order to prepare the report on the human rights situation in Crimea requested by General Assembly resolution 71/205. While no formal response was received, OHCHR was notified informally that it would not be granted access to Crimea due to its mandate covering Ukraine and that any OHCHR mission would need to be agreed upon directly with the Russian Federation authorities. A second notification mentioning an OHCHR mission to Crimea, addressed to the Russian Federation on 13 June 2017, remained unanswered at the closing date of the present report.

34. In response, the Government of Ukraine, in its Notes Verbales of 30 March 2017, 19 July 2017, 28 July 2017 and 7 September 2017, reaffirmed its position on the need to ensure safe and unfettered access to the Autonomous Republic of Crimea and the city of Sevastopol by established regional and international human rights monitoring mechanisms to enable them to carry out their mandate, expressed its readiness to provide HRMMU with full freedom of movement throughout Ukraine, and confirmed its strong commitment to properly implement resolution 71/205 of the United Nations General Assembly.

35. Given the lack of access to Crimea, HRMMU has monitored the human rights situation in the peninsula from its presence in mainland Ukraine. HRMMU systematically collects and analyzes information gathered through direct interviews and fact-finding missions, including at the Administrative Boundary Line (ABL) between mainland Ukraine and Crimea. This report only describes allegations of human rights violations and abuses and violations of international humanitarian law that OHCHR could verify and corroborate in accordance with its methodology. OHCHR is committed to the protection of its sources and systematically assesses the potential risks of harm and retaliation against them.²⁹

IV. Application of International Law

36. International human rights and humanitarian law are complementary bodies of international law. In the case of occupation, humanitarian law and human rights law apply concurrently and place protection obligations both on the occupying power and the State whose territory is under occupation.

1. *International Human Rights Law*

37. Human rights are guaranteed by international treaties and agreements, as well as customary law, which apply at all times, regardless of peace or war.

38. Under international law, the Russian Federation must respect its obligations under international human rights law in Crimea from the moment it acquired “effective control” over the territory.³⁰

39. Ukraine considers that the occupation of Crimea started on 20 February 2014³¹ and denies having human rights obligations in relation to this territory from the moment it lost effective control over the peninsula. On 14 May 2015, the Parliament of Ukraine adopted a Declaration on Derogation³² stating that the Russian Federation “*shall bear full responsibility for observance of human rights and performance of the respective international obligations at the annexed and temporarily occupied territory.*”

40. On 19 April 2017, the Government of Ukraine established an Intergovernmental Commission on derogation in order to review periodically the territorial application of the derogation. Its mandate includes the review of the necessity and proportionality of derogation measures and making proposals to the Government on the continuation and scope of the derogation.

41. OHCHR notes that States are allowed, in exceptional circumstances, namely in times of public emergency threatening the life of the nation, to adjust their obligations temporarily under a treaty. However, under the International Covenant on Civil and Political Rights, States have a continuing obligation to ensure respect for the rights recognized in the Covenant in relation to the population of a territory controlled by *de facto* authorities or armed groups within the limits of their effective power.³³ Similarly, under the case law of the European Court of Human Rights, a State that has lost effective control over a part of its territory is nevertheless obliged under Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms to use all the legal and diplomatic means available to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention to those living there, as the region is recognized under public international law as part of its territory.³⁴

2. *International Humanitarian Law*

42. Both the Russian Federation and Ukraine are parties to the 1907 Hague Regulations, the Fourth Geneva Convention of 1949, and the 1977 Additional Protocol I to the 1949 Geneva Conventions. This body of international law provides the primary basis for rules governing occupation. The legal regime of an occupied territory is also regulated by international customary law.

43. An occupying power does not acquire sovereignty over the occupied territory. The occupying power must respect the laws in force in the occupied territory, unless they constitute a threat to its security or an obstacle to the application of the Fourth Geneva Convention.³⁵

44. Under international law, States are responsible for violations of international humanitarian law attributable to them, including: violations committed by their organs, including their armed forces; violations committed by persons or entities they have empowered to exercise elements of governmental authority; violations committed by persons or groups acting in fact on their instructions, or under their direction or control; and violations committed by private persons or groups which they acknowledge and adopt as their own.³⁶

45. In 2016, the Office of the Prosecutor of the International Criminal Court found Crimea to be under the occupation of the Russian Federation and stated it will apply an

international armed conflict legal framework to the analysis of facts and alleged crimes perpetrated there.³⁷

V. Population data and movements

46. According to the last census conducted in Ukraine, in 2001, 125 nationalities lived on the Crimean peninsula, which had a population of 2,401,209 (2,024,056 in Crimea and 377,153 in Sevastopol).³⁸ The census enumerated the population by ethnicity, finding the largest national groups in Crimea and Sevastopol to be Russians, numbering 1,450,394 (60.40 per cent); Ukrainians 576,647 (24.12 per cent); and Crimean Tatars 245,291 (12.26 per cent).

47. There were also 35,157 Belarussians; 13,602 Tatars; 10,088 Armenians; 5,531 Jews; 4,562 Moldovans; 4,459 Poles; 4,377 Azeri; 3,087 Uzbeks; 3,036 Greeks; 3,027 Koreans; 2,790 Germans; 2,679 Chuvash; 2,594 Mordovians; 2,282 Bulgarians 2,137 Georgians; 1,905 Roma; and 1,192 Maris. In addition, 17,298 persons did not declare themselves or belonged to ethnic groups numbering less than 1,000 individuals.

48. In September 2014, the Russian Federation conducted a census on the peninsula, which was not recognized by the Government of Ukraine.³⁹ According to its results, the population of Crimea and Sevastopol had decreased by 4.8 per cent since 2001, down to 2,284,769, albeit with differences between the two administrative units: in Crimea, the population decreased by 6.5 per cent, to 1,891,465, while that of Sevastopol grew by 4.1 per cent, to 393,304.

49. According to that same census, in the entire peninsula, the number of persons of Russian nationality increased to 1,492,078 (65.31 per cent), the Ukrainians dropped to 344,515 (15.08 per cent) and the Crimean Tatars decreased to 232,340 (10.17 per cent). The other communities diminished, except for the Tatars - a group culturally affiliated with the Volga Tatars and the Crimean Tatars - whose numbers rose from 13,602 to 44,996.

50. Since the beginning of the occupation, the displacement of residents of Crimea - mostly ethnic Ukrainians and Crimean Tatars - had multiple causes, notably the refusal to live under Russian Federation jurisdiction, fear of persecution on ethnic or religious grounds, threats or reported attacks, avoiding military conscription in the Russian Federation army and enrolling in Ukrainian education institutions.

51. In April 2017, the State Emergency Service of Ukraine estimated the number of internally displaced persons (IDPs) from Crimea living in mainland Ukraine at 22,822.⁴⁰ Ukrainian NGOs estimate that between 50,000 and 60,000 former Crimean residents could be displaced in mainland Ukraine.⁴¹

52. The demographic structure of Crimea continues to change, mainly as a result of a continuous influx of Russian Federation citizens into Crimea, which started after the 2014 referendum. Most of them are pensioners, public servants and servicemen with their families. Around 13,200 IDPs fleeing the conflict in eastern Ukraine had taken refuge in Crimea at the end of 2014.⁴²

53. According to the State Statistics Service of the Russian Federation, as of 1 January 2017, the population of the Crimean peninsula had increased by 56,152 since the September 2014 census, to 2,340,921.⁴³ During this period, the population of the city of Sevastopol, where the Black Sea Fleet is based, rose from 393,304 to 428,753, which constitutes an eight per cent increase.

54. OHCHR recalls that the 1949 Geneva Convention relative to the Protection on Civilian Persons in Time of War provides in Article 49 that “The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies”.

VI. Civil and Political Rights

A. Right to nationality

55. The adoption of the *Treaty on Accession* on 18 March 2014 had an immediate consequence for the status of residents of Crimea and rights attached to it: all Ukrainian citizens and stateless persons who were permanently residing on the peninsula, as evidenced by a residency registration stamp in the passport, were automatically recognized as citizens of the Russian Federation.⁴⁴ An exception was made for persons who, within one month of the entry into force of the treaty (i.e. by 18 April 2014), rejected Russian Federation citizenship in writing.

56. The automatic citizenship rule led to the emergence of three vulnerable groups: those who rejected in writing Russian Federation citizenship; those who, for lack of a residency registration in Crimea, did not meet the legal criteria to become Russian Federation citizens; and those who had to renounce their Ukrainian citizenship to keep their employment. As of May 2015, the High Commissioner for Human Rights of the Russian Federation (Ombudsperson) estimated that around 100,000 persons living in Crimea (about 4 per cent of the population) did not have Russian Federation citizenship.⁴⁵

57. Imposing citizenship on the inhabitants of an occupied territory can be equated to compelling them to swear allegiance to a power they may consider as hostile, which is forbidden under the Fourth Geneva Convention.⁴⁶ In addition to being in violation of international humanitarian law, the automatic citizenship rule raises a number of important concerns under international human rights law.

1. *Ukrainian citizens having Crimean residency registration who rejected Russian Federation citizenship*

58. The procedure for rejecting Russian Federation citizenship, which had to be completed by 18 April 2014, was marked by certain constraints: instructions from the Russian Federal Migration Service (FMS) on the refusal procedure were only made available on 1 April; information about FMS centres was not available until 4 April; only two FMS centres were functioning on 9 April 2014; and some requirements in the procedure evolved over time, such as the demand that both parents make the application on behalf of their child.⁴⁷

59. After 18 April 2014, FMS reported that 3,427 permanent residents of Crimea had applied to opt out of automatically obtaining Russian Federation citizenship.⁴⁸

60. Renouncing Russian Federation citizenship remains legally possible on the basis of the 2002 law *On Citizenship*, except for people who were indicted, sentenced, have outstanding obligations towards the Russian Federation, or have no other citizenship or guarantee for the acquisition thereof.⁴⁹

61. Residents of Crimea who opted out of Russian Federation citizenship became foreigners. They could obtain residency permits through a simplified procedure, giving them certain rights enjoyed by Russian Federation citizens, such as the right to pension, free health insurance, social allowances, and the right to exercise professions for which Russian Federation citizenship is not a mandatory requirement.⁵⁰

62. However, overall, persons holding a residency permit and no Russian Federation citizenship do not enjoy equality before the law and are deprived of important rights. They cannot own agricultural land,⁵¹ vote and be elected, register a religious community, apply to hold a public meeting, hold positions in the public administration and re-register their private vehicle on the peninsula.⁵²

63. OHCHR documented some cases of Crimean residents who had rejected Russian Federation citizenship and faced discrimination. For instance, a man from Simferopol was subjected to regular psychological harassment by his employer for having renounced Russian Federation citizenship. In 2016, after two years of being pushed by his employer to take back his formal rejection of Russian Federation citizenship, he was dismissed after being told that his “anti-Russian” position disqualified him from continued employment.⁵³ Two of his colleagues were also dismissed, including one who rejected Russian Federation citizenship, and another who took up Russian Federation citizenship but publicly expressed pro-Ukrainian views.

2. *Ukrainian citizens without Crimean residency registration who are excluded from Russian Federation citizenship*

64. Ukrainian citizens living in Crimea whose passport stamps indicated they were registered in mainland Ukraine could not become citizens of the Russian Federation. They assumed the status of a foreigner. As such, they could no longer legally remain in Crimea for more than 90 days within a period of 180 days from the moment they entered the peninsula, according to Russian Federation legislation applicable to foreigners.

65. Non-compliance with immigration regulations imposed by the Russian Federation can lead to court-ordered deportations. For instance, in 2016, a court in Sevastopol ordered a Ukrainian citizen who had overstayed to be deported to mainland Ukraine although he owned property in this city⁵⁴; another court deported a Ukrainian citizen who had a wife and children in Crimea.⁵⁵

66. Under international humanitarian law, deportation or transfer of protected persons from occupied territory to the territory of the occupying power or to that of any other country, occupied or not, is prohibited regardless of the motive.⁵⁶

67. Rules regulating stay were not consistently applied, sometimes favoring individuals who supported Crimea’s accession to the Russian Federation. For example, the Supreme Court of Crimea ruled not to deport a Ukrainian citizen who described himself as “an active participant of the Russian Spring in Sevastopol” and claimed his deportation to Ukraine would threaten his life and well-being.⁵⁷ The Court accepted the argument that he had a family in Crimea and that his deportation would interfere with his private and family life.

68. Employment of Ukrainian citizens lacking Crimean residency registration is prohibited. A quota system under Russian Federation law allows up to 5,000 foreigners to reside and work in Crimea but this only applies to foreigners with non-Ukrainian passports who were living in Crimea before March 2014 and held Ukrainian residence permits.⁵⁸

69. In 2016, police raids against private businesses were conducted, resulting in the opening of administrative proceedings against owners of catering institutions⁵⁹ and private entrepreneurs⁶⁰ who were illegally employing Ukrainian citizens. People illegally employed risk deportation and their employers face administrative sanctions of up to 800,000 RUB (nearly USD 13,200) or closure of their business for up to 90 days.

70. Ukrainian citizens without residency registration in Crimea are excluded from free health insurance and access to public hospitals. In one case documented by OHCHR, a Ukrainian woman who had lived in Crimea for 10 years, but was registered in Kharkiv, died in 2015 after a public hospital in Crimea refused to treat her due to the fact that she did not have health insurance.⁶¹ According to Russian Federation legislation, she was a foreigner and, as such, she did not have a Russian Federation passport affording the right to free health insurance and access to public hospitals. The refusal to provide life-saving medical treatment - including due to origin or status, such as citizenship - constitutes a grave violation of the right to the highest attainable level of physical and mental health, and

a violation of the obligation, under international humanitarian law, to ensure that the health system in place in an occupied territory continues to function adequately.

3. *Ukrainian citizens who were made to renounce Ukrainian citizenship*

71. Russian Federation law does not require Ukrainian citizens who apply for Russian Federation citizenship to surrender their Ukrainian passports or relinquish their Ukrainian citizenship. However, residents of Crimea who were employed in government and municipal jobs before the referendum were obliged by law to give up their Ukrainian citizenship no later than 18 April 2014, in addition to obtaining a passport of the Russian Federation if they wanted to retain their employment.⁶² A law adopted by the Parliament of Crimea further required them to possess “a copy of the document confirming denial of existing citizenship of another State and the surrender of a passport of another State.”⁶³

72. Before the Russian Federation occupied Crimea, 20,384 civil servants were employed on the peninsula.⁶⁴ According to the head of the FMS department for citizenship, asylum and readmission in Crimea, as of 21 May 2015, 19,000 Crimean residents had applied to renounce Ukrainian citizenship.⁶⁵ While no information is provided about their identity or profession, it is likely that civil servants constitute the bulk of this group. This is contrary to the Fourth Geneva Convention, which prohibits an occupying power from altering the status of public officials in the territories it occupies.⁶⁶

B. Administration of justice and fair trial rights

73. The *Treaty on Accession* provided for a transition period until 1 January 2015 to fully apply the legal framework of the Russian Federation in Crimea.⁶⁷ In practice, the gradual substitution of the Ukrainian legal system by that of the Russian Federation implied that both systems coexisted, regulating different spheres and consequently causing confusion for legal practitioners as well as legal uncertainty for rights-holders.⁶⁸

74. OHCHR recalls that in accordance with international humanitarian law, the penal laws in place in the occupied territory must remain in force and be applied by courts, with the exception of norms that constitute a threat to the security of the occupying power, or an obstacle to the application of relevant international humanitarian law provisions.⁶⁹

75. As documented by OHCHR, the judicial and law enforcement authorities of the Russian Federation in Crimea frequently violated the presumption of innocence; the right to information without delay of the nature and cause of charge; the right to defend oneself or be assisted by a lawyer of one’s own choice; the right to adequate time to prepare defence; the right to trial without undue delay; the right to appeal or review; the right to a hearing by an independent and impartial tribunal; and the right not to be compelled to testify against oneself or confess guilt.

76. OHCHR documented cases demonstrating that allegations of torture and ill-treatment in post-referendum Crimea committed by State agents of the Russian Federation during pre-trial investigations were often disregarded by courts. For instance, in March 2015, a court rejected the request of a defence lawyer to exclude evidence against his client reportedly obtained under duress. The judge stated that torture allegations should be examined together with other elements in order not to compromise the establishment of facts and responsibility.⁷⁰

77. Suspects were charged and some convicted in relation to acts which occurred before the application of Russian Federation legislation in Crimea, in disregard of the principle of non-retroactive application of criminal law enshrined in international human rights and humanitarian law treaties.⁷¹ On 11 September 2017, a court in Crimea sentenced a deputy chair of the Mejlis, Akhtem Chyigoz, to eight years of imprisonment on the basis of Russian Federation legislation, after it found the accused guilty of organizing mass protests, which were held on 26 February 2014 when the legal framework of Ukraine still

applied in Crimea. In addition, two individuals received prison sentences in 2015 and 2016 for allegedly injuring 'Berkut' police officers during the Maidan protests in Kyiv, on 18 February 2014.⁷² Their convictions were based on Russian Federation legislation introduced in Crimea after 18 March 2014.

78. Some judgments were passed in apparent disregard of the right to a hearing by a competent, independent and impartial tribunal. In 2017, 10 Crimean Tatars arrested for filming a police raid of the home of another Crimean Tatar man were judged in one day and sentenced to five days of administrative arrest. No representatives of the prosecution were present; two men were convicted in the absence of lawyers; and in at least one proceeding, the judge ignored the public retraction of a witness statement supporting the claim that the individuals were breaching public order and freedom of movement.⁷³

79. Instances of intimidation of defence lawyers representing clients opposed to the presence of the Russian Federation in Crimea have also been reported. On 25 January 2017, a lawyer from the Russian Federation defending one of the deputy chairmen of the Mejlis was forcefully brought to the FSB office in Simferopol for interrogation and asked to disclose details of the case concerning his client. Despite being pressed to cooperate, he refused, invoking his duty to uphold the attorney-client privilege, and was released after two and a half hours. On 14 February 2017, an appellate court upheld a first instance decision to enable the FSB investigator to interrogate him as a witness in a criminal case against one of his clients.⁷⁴ OHCHR reiterates that international administration of justice standards explicitly protect the freedom of exercise of the profession of lawyer.⁷⁵

C. Right to life

80. In February, March and April 2014, four persons were killed and two others died, as described in this chapter, during incidents related to Crimea's unrecognized accession to the Russian Federation. While other deaths, including murders, have occurred in Crimea in the three and a half years since the occupation began, OHCHR does not have credible circumstantial evidence that they could be attributed to State agents of the Russian Federation in Crimea.

81. In March 2014, a pro-Ukrainian Crimean Tatar activist, Mr. Reshat Ametov, was abducted, tortured and summarily executed by people believed to be members of the Crimean self-defence. He disappeared on 3 March after staging a one-man picket in front of Crimea's government building in Simferopol. Video footage shows him being led away by three men in military-style jackets. On 15 March, his body was found in a village of the Bilohirsk district, bearing signs of torture.⁷⁶ The Crimean police opened a criminal investigation. As of December 2014, more than 270 witnesses had been interrogated and over 50 forensic analyses and 50 examinations had been carried out.⁷⁷ OHCHR has serious doubts about the effectiveness of these investigations. The suspects, members of the Crimean self-defence, who were filmed abducting the victim, were only interrogated as witnesses and later released. In 2015, the investigation was suspended due to the fact that the individual suspected by the police to be the perpetrator was allegedly no longer in Crimea.⁷⁸ It resumed in 2016 but has since been conducted intermittently.⁷⁹

82. Three killings occurred during armed incidents. On 18 March 2014, one Ukrainian serviceman and one Crimean self-defence volunteer were killed during a shooting incident in Simferopol.⁸⁰ OHCHR does not have information about the investigation conducted in relation to this case. On 6 April 2014, a Ukrainian Army naval officer was killed by a Russian Federation serviceman in a dormitory in Novofedorivka.⁸¹ A Russian Federation military tribunal in Crimea sentenced the perpetrator to two years of imprisonment on 13 March 2015. The accused was convicted of homicide committed in excess of the requirements of justifiable defence. In addition, the victim's widow sued and obtained from the Ministry of Defence of the Russian Federation 500,000 RUB (about USD 8,000) in compensation for the harm incurred.⁸²

83. The impartiality of investigations carried out by the Crimean police is particularly questionable in relation to the violence that occurred on 26 February 2014. On that date, pro-Ukrainian and pro-Russian groups clashed in front of the parliament of Crimea, resulting in the death of two pro-Russian demonstrators.⁸³ The criminal proceedings identified pro-Ukrainian supporters belonging to the Crimean Tatar community as being the only suspects although the skirmishes involved representatives of pro-Russian groups as well.⁸⁴

D. Right to physical and mental integrity

84. The right to physical and mental integrity encompasses freedom from torture and other inhuman treatment. The Russian Federation and Ukraine have both ratified international conventions obliging them to prevent and redress torture, cruel and/or inhuman or degrading treatment.⁸⁵

85. Multiple and grave violations of the right to physical and mental integrity have been committed by state agents of the Russian Federation in Crimea since 2014. The absence of investigations suggests that their perpetrators have benefited from and continue to enjoy impunity.

86. Victims and witnesses have accused the Crimean self-defence of violence against pro-Ukrainian activists, mainly in 2014. Its members have reportedly been implicated in attacks, abductions, enforced disappearances, one summary execution, arbitrary detention, and torture and ill-treatment of individuals opposed to the March 2014 referendum, as well as of Maidan supporters, members and affiliates of the Mejlis, journalists and Ukrainian servicemen.⁸⁶ On 11 June 2014, the Parliament of Crimea legalized the Crimean self-defence by turning it into a civil group with powers to assist the police.⁸⁷

87. The Russian Federation has indicated that several criminal cases were opened in which the suspects were members of the Crimean self-defence. These cases are connected with a robbery, in April 2014, and incidents in which vehicles were taken illegally with the threat of the use of firearms.⁸⁸

88. Two legislative initiatives registered in the Crimean and Russian Federation Parliaments in August 2014 proposing immunity from prosecution for actions committed by the self-defence forces have not been pursued.

89. In view of the multiplicity of testimonies mentioning illicit acts committed by members of the self-defence with apparent impunity, OHCHR has serious doubts that the Russian Federation authorities have complied with their obligations to ensure accountability through effective and impartial investigations. The duty to investigate and prosecute is made more compelling by the fact that the existence of the self-defence group has been legalized, and its members have been recognized as agents of the State.⁸⁹

90. FSB and the Crimean police have also been accused of violating the right to physical and mental integrity of persons holding dissenting views, in particular Crimean Tatars and ethnic Ukrainians. Such violations have occurred prior to and during detention, in penitentiary institutions and in places where people were illegally kept *incommunicado*.

91. In two cases documented by OHCHR in 2016, pro-Ukrainian supporters were compelled by FSB officers to confess to terrorism-related crimes through torture with elements of sexual violence. The victims were kept *incommunicado*, tied, blindfolded, beaten up, subjected to forced nudity, electrocuted through electric wires placed on their genitals, and threatened with rape with a soldering iron and wooden stick.⁹⁰

92. Forced internment in a psychiatric institution has been used as a form of harassment against political opponents, which may amount to torture or ill-treatment. Procedurally, such placements are decided by a judge upon the request of the police or FSB investigator. A deputy Chairman of the Mejlis, Mr. Ilmi Umerov, underwent an imposed

court-ordered ‘psychiatric assessment’ for three weeks⁹¹ after being charged in May 2016 with calls to violate the territorial integrity of the Russian Federation. In November and December 2016 five Crimean Tatar men suspected of being members of Hizb ut-Tahrir, an organization banned for terrorism in the Russian Federation, were also placed in a psychiatric hospital for weeks. During the psychiatric assessment, doctors reportedly asked them unrelated questions, including on their religious practice and political views.⁹²

E. Right to liberty and security

93. The right to liberty and security of person exists to ensure that subjects of a State can pursue their daily activities without harassment or apprehension of being restrained without any lawful basis. It includes two key components: freedom from arbitrary arrest or detention; and protection from enforced disappearances. Arbitrary deprivation of liberty may amount to a violation of the requirement of common Article 3 of the Geneva Conventions and Additional Protocol I that all civilians and persons *hors de combat* should be treated humanely.

1. Arbitrary arrests and detentions

94. The Fourth Geneva Convention specifies that in an occupied territory, a civilian may only be interned or placed in assigned residence for “imperative reasons of security” (Article 78). Arbitrary detention is prohibited under customary international humanitarian law⁹³ and international human rights law protects individuals from arbitrary arrest and detention by the State, as well as by private individuals or entities empowered or authorized by the State to exercise powers of arrest or detention.⁹⁴ According to the United Nations Human Rights Committee, “*arbitrariness is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.*”⁹⁵ Any deprivation of liberty must therefore be lawful, reasonable and necessary.

95. OHCHR documented multiple allegations of violations of the right to liberty as a result of acts attributed to agents of the Russian Federation authorities in Crimea. While most of them occurred in 2014, fresh claims of unlawful deprivation of liberty are regularly recorded. Arbitrary arrests and detentions take different forms and appear to serve various purposes, from instilling fear, to stifling opposition, and inflicting punishment.

96. In many cases, victims are neither charged nor tried, but detained by the police, FSB or self-defence groups as a form of extra-judicial punishment or harassment. Detention under such circumstances would usually last from several hours to several days, exceeding the legal limits for temporary detention and ignoring procedural requirements, such as the establishment of a protocol of arrest. Many of the victims were journalists, land or business owners, and people arrested during so-called ‘prophylactic’ police operations at markets, mosques, cafés, restaurants or places of entertainment. OHCHR noted a prevalence of members of the Crimean Tatar community among people apprehended during police raids. They were typically taken to the police centre to fight extremism (“Center E”), photographed, fingerprinted and made to provide DNA samples before being released, usually without any charges being pressed.⁹⁶

97. In other cases, people deprived of liberty were charged with offences of extremism, terrorism, territorial integrity violations, detained and tried. This form of treatment has been commonly applied against political opponents, such as Crimean Tatar figures linked to the Mejlis, practising Muslims accused of belonging to banned Islamic groups, and journalists or individuals posting messages critical of the Russian Federation authorities or expressing dissent on social media. Prosecutions often seemed to be tainted by bias and a political agenda.⁹⁷ The initial arrests were usually carried out by FSB and followed by searches of victims’ houses and harassment of their families by law

enforcement. Victims were charged and subjected to lengthy pre-trial detention despite a general lack of sufficient evidence.

98. In the most egregious cases, unlawful detentions were accompanied by physical or psychological abuse amounting to torture. Many of the victims were people accused of spying and planning terrorist acts, as well as political and civic activists supporting the Maidan protests and pro-Ukrainian demonstrations in Crimea or seeking to assist Ukrainian soldiers stationed in Crimea. On 9 March 2014, two members of a pro-Ukrainian organization were abducted by the Crimean self-defence, detained in a secret location without the presence of a lawyer for 11 days - and one of them tortured - before being released.⁹⁸ The arrests were made without reasonable suspicion, proper motivation and court review, qualifying as violations of the right to liberty and security. In addition, the torture allegations were not investigated, in denial of the right to an effective remedy.

2. *Enforced disappearances*

99. Enforced disappearance, as defined by the International Convention for the Protection of All Persons from Enforced Disappearance,⁹⁹ violates, or threatens to violate, a range of international humanitarian law norms, most notably the prohibition of arbitrary deprivation of liberty,¹⁰⁰ torture and other cruel or inhuman treatment¹⁰¹ and murder.¹⁰² The duty to prevent enforced disappearances is further supported by the requirement to record the details of persons deprived of their liberty.¹⁰³ The obligations placed on States by the Convention arguably represent customary international law, which Ukraine (which has ratified the Convention) and the Russian Federation (which has not done so) are required to respect. OHCHR notes a precedent in the jurisprudence of the European Court of Human Rights for holding an occupying power liable for violation of the right to liberty and security arising from the failure of authorities to investigate the fate and whereabouts of missing persons in its occupied territory.¹⁰⁴

100. The first recorded case of enforced disappearance in Crimea occurred on 3 March 2014, less than a week after the establishment of a pro-Russian Government in Crimea, on 27 February.¹⁰⁵ Since then, dozens of persons have gone missing, mostly in 2014. While the majority of victims were released by perpetrators within hours or days, the whereabouts of others are still unknown.

101. The highest number of enforced disappearances in a single month occurred in March 2014, when at least 21 persons were abducted in Crimea. The victims included pro-Ukrainian and Maidan activists, journalists, Crimean Tatars and former and active Ukrainian servicemen. They were held *incommunicado* and often subjected to physical and psychological abuse by armed individuals allegedly belonging to the Crimean self-defence and one Cossack group. Most victims were released after being illegally held from a few hours to several days, with no contact with their relatives or lawyers.¹⁰⁶

102. OHCHR documented 10 cases of persons who disappeared and are still missing: six Crimean Tatars, three ethnic Ukrainians and one Russian-Tatar - all men. Seven went missing in 2014, two in 2015 and one in 2016.

103. On 1 October 2014, the Head of Crimea decided to create a 'contact group' focusing on the disappearances and other incidents involving Crimean Tatars. The group convened for the first time on 14 October 2014 in the presence of investigative authorities and the relatives of five missing Crimean Tatar men but achieved little beyond information-sharing and the decision to transfer the investigations to the central Investigation Department of the Russian Federation.¹⁰⁷ Of the 10 disappearances mentioned, criminal investigations were still ongoing in only one case as at 12 September 2017.¹⁰⁸ They were suspended in six cases due to the inability to identify suspects,¹⁰⁹ and in three cases no investigative actions have been taken as the disappearances were allegedly not reported.¹¹⁰

104. In five cases, the possible involvement of State agents was raised by witnesses who saw the victims being abducted by men dressed in uniform associated with the security forces or the Crimean self-defence. Circumstances which may suggest political motives in the other five cases include the profile of the victims who were pro-Ukrainian activists or had links to the Mejlis.

F. Right to private and family life

105. OHCHR estimates that up to 150 police and FSB raids of private houses, businesses, cafés, bars, restaurants, markets, schools, libraries, mosques and madrassas (Islamic religious schools) have taken place since the beginning of Crimea's occupation. These actions have usually been carried out with the justification to search for weapons, drugs or literature with extremist content forbidden under Russian Federation law.¹¹¹ Several interlocutors shared their conviction that the objective pursued by such operations was to instil fear, particularly in the Crimean Tatar community, in order to pre-empt or discourage actions or statements questioning the established order since March 2014.

106. The searches were conducted on the basis of the Russian Federation's anti-extremism law, which is very broad and has been used extensively in Crimea. The law gives wide discretion to law enforcement agencies to interpret and apply its provisions, which can be viewed as an infringement of the principles of legality, necessity and proportionality.¹¹² In her annual report for 2014, the Ombudsperson of the Russian Federation stated in relation to Crimea that law enforcement officers should *adopt "a well-balanced approach that rules out any arbitrary, excessively broad interpretation of the notion of 'extremism'"*.¹¹³

107. OHCHR documented raids, which at times took place without search warrants being presented, involved excessive use of force, and amounted to an arbitrary or unlawful interference with an individual's privacy, family and home, in violation of international human rights law. According to victims, materials considered illegal were planted in homes and false written testimonies declaring the presence of illegal substances were signed under duress.¹¹⁴ On 4 and 5 September 2014, at least 10 houses belonging to Crimean Tatars were searched by police officers and FSB officials in Simferopol, Nizhnegorsk, Krasnoperekopsk and Bakhchisaray.¹¹⁵ The police found no weapons or drugs but confiscated religious literature.

108. There are reports that some house raids were conducted at a time when only Crimean Tatar women were present and that the absence of female officers among those carrying out the search greatly disturbed them.¹¹⁶

109. As at 12 September 2017, 38 individuals from Crimea and the city of Sevastopol (35 men and three women) were on a special list of people 'believed to be involved in extremism or terrorism', administered by the Russian Federation Financial Monitoring Service.¹¹⁷ According to the laws of the Russian Federation on preventing financing of terrorism applied in Crimea, the bank accounts of individuals on this special list should be constantly monitored and most of their bank transactions are suspended.

110. In view of the excessively broad interpretation of the Russian Federation's anti-extremism law applying to Crimea, such limitations may amount to undue interference with the right to private and family life and to the right to the peaceful enjoyment of one's possessions.

G. Rights of detainees

111. According to the Ministry of Justice of Ukraine, on 20 March 2014, 1,086 individuals were detained at Crimea's only pre-trial detention facility in Simferopol, 1353 convicts were serving their sentences in a strict regime colony in Simferopol, 789 convicts

were held in a general regime colony in Kerch and 67 in a correction centre in Kerch. All four institutions have been integrated into the penitentiary system of the Russian Federation,¹¹⁸ which led to the transfer of hundreds of detainees held in Crimea to penitentiary institutions in the Russian Federation.

1. Violations of the rights of prisoners in Crimea

112. After the Russian Federation took control of Crimea, local courts discontinued all pending appeal proceedings under Ukrainian law, in violation of fair trial guarantees.¹¹⁹ Ukrainian penal legislation was repealed and prison sentences were requalified in accordance with Russian Federation law, sometimes to the detriment of detainees.

113. Former detainees in Crimea complained to OHCHR about overcrowding, which can amount to degrading treatment. Built for a maximum capacity of 817 people, the pre-trial detention centre in Simferopol had 1,066 detainees in March 2014,¹²⁰ 1,532 in December 2015,¹²¹ and a similar level of overcrowding in 2016.¹²²

114. Soon after the occupation started, correspondence between detainees in Crimea and mainland Ukraine was blocked by the administration of the penitentiary service and all family visits were denied violating the right of prisoners to be allowed to communicate with family and friends at regular intervals.¹²³

115. Pressure was exerted on detainees who refused to accept automatic Russian Federation citizenship as prison officials recorded those who did or did not take Russian Federation passports.¹²⁴ A female detainee who rejected Russian Federation citizenship complained that she was denied family visits and that sunflower oil was regularly poured over her personal belongings as a harassment technique.¹²⁵ Other detainees who refused Russian Federation citizenship were placed in smaller cells or in solitary confinement.¹²⁶

2. Transfer of prisoners to the Russian Federation

116. A sizeable number of Crimea's prison population was transferred to the Russian Federation.¹²⁷ A key factor explaining this situation is the lack of specialized penitentiary facilities in Crimea, which has led to the transfer of juveniles in conflict with the law, people sentenced to life imprisonment, and prisoners suffering from serious physical and mental illnesses. In addition, Crimea having no prisons for women, 240 female detainees convicted by Crimean courts were sent to the Russian Federation between 18 March 2014 and 15 June 2016 to serve their sentences.¹²⁸

117. Transfers of pre-trial detainees have also taken place. This is the case of Ukrainian filmmaker Mr. Oleh Sientsov, who was arrested in Simferopol on 11 May 2014 on suspicion of "plotting terrorist acts". On 23 May 2014, he was transferred to Moscow's Lefortovo prison and later to Rostov-on-Don (Russian Federation) where he was placed in remand detention. Following his trial and conviction on 25 August 2015,¹²⁹ he was incarcerated in a high security penal colony in the Siberian region of Yakutia.

118. OHCHR notes that international humanitarian law strictly prohibits forcible transfers of protected persons, including detainees, from occupied territory to the territory of the occupying power, regardless of the motives of such transfers.¹³⁰ In this regard, the imposition of Russian Federation citizenship to residents of an occupied territory does not alter their status as protected persons.

119. On 17 March 2017, negotiations between the Ombudspersons of Ukraine and the Russian Federation enabled the return to mainland Ukraine of 12 detainees (11 men and a woman) sentenced by Ukrainian courts before March 2014, and transferred from Crimea to various penitentiary institutions in the Russian Federation after that date. OHCHR interviewed each of them. Some detainees publicly expressing pro-Ukrainian sentiments reported having been ill-treated and placed in solitary confinement.¹³¹ Others complained of

the absence of medical treatment. OHCHR documented the death of at least three male prisoners transferred from Crimea to the penitentiary institution in Tlyustenkhabl, Adygea region, who were suffering from serious ailments and did not receive necessary medical care.¹³² Under international human rights and humanitarian law provisions, detainees must be provided with the medical attention required by their state of health.¹³³

H. Forced enlistment

120. Since the occupation began, residents of Crimea have been subjected to conscription in the armed forces of the Russian Federation. Until 31 December 2016, military service could only take place on the territory of the Crimean peninsula.¹³⁴ Since 2017, conscripts can also be sent to serve on the territory of the Russian Federation. On 25 May 2017, 30 conscripts from Sevastopol were sent to the Russian Federation after reportedly expressing the will to serve there.¹³⁵

121. OHCHR spoke to several Crimean Tatars who left the peninsula to avoid serving in the Russian Federation army. They stated they could not return to Crimea as they would be prosecuted for avoiding the draft.¹³⁶ On 12 April 2017, the Military Commissioner of the Russian Federation in Crimea announced that a criminal case had been opened against a resident of Crimea who refused to serve in the Russian Federation army.

122. OHCHR notes that under international humanitarian law, an occupying power is prohibited from compelling protected persons to serve in its armed or auxiliary forces or to exercise pressure or propaganda which aims at securing voluntary enlistment.¹³⁷

I. Freedom of movement

123. The introduction by the Russian Federation of a State border at the ABL between mainland Ukraine and Crimea, in violation of General Assembly resolution 68/262, has adversely affected freedom of movement between mainland Ukraine and the Crimean peninsula. Other legal restrictions, as per this section, have been imposed both by the Governments of the Russian Federation and Ukraine.¹³⁸

124. International human rights law guarantees freedom of movement to anyone lawfully within the borders of a State and the right to leave and enter their own country.¹³⁹ It also recognizes that a sovereign Government has the right to restrict freedom of movement provided such a measure is necessary, reasonable and proportionate.

1. Restrictions imposed by the Russian Federation authorities

125. On 25 April 2014, the Russian Federation authorities established its ‘border’ at the northern entrance to Crimea. Ukrainian activists, supporters and members of the Mejlis, in particular, have frequently faced infringements on their movement, including intrusive and lengthy interrogations whenever entering or leaving Crimea through the ABL.

126. In addition, citizens of Ukraine have been deported from Crimea for violating Russian Federation immigration rules, which, pursuant to resolution 68/262, should not apply to the territory of Crimea. For instance, the Crimea-born chairman of an NGO from Evpatoriia providing free legal aid was convicted in January 2017 of “illegal stay” by a Crimean court which ordered his deportation.¹⁴⁰ In 2012, his Crimean passport registration had been cancelled on procedural grounds, which disqualified him from obtaining Russian Federation citizenship in March 2014. The court which ordered his deportation found him to be a foreigner who violated immigration rules by staying in Crimea beyond the authorized 90-day period. Following the ruling, the man was transferred from Crimea to the region of Krasnodar (Russian Federation), detained for 27 days, and subsequently deported to mainland Ukraine where he currently lives as an IDP. He is banned from entering Crimea - where his wife and son live - until 19 December 2021, which violates his freedom

of movement and his right to family life.¹⁴¹ In addition, his forced transfer and deportation contravene international humanitarian law rules applying to protected persons in situations of occupation.¹⁴²

127. OHCHR has information that 20 to 25 other Ukrainian citizens were deported from Crimea to mainland Ukraine in 2016, and has reasons to believe that the total number since the beginning of the occupation of Crimea may be significantly higher.¹⁴³

128. Unlawful limitations to freedom of movement were also imposed against political opponents and individuals criticizing the human rights situation on the peninsula who were prohibited entry into the Russian Federation, consequently banning their access to Crimea. On 22 April 2014, a Russian Federation officer at the ABL handed the former leader of the Mejlis, Mr. Mustafa Dzhemilev, an unsigned document informing him of being banned from entering the territory of the Russian Federation for five years. On 5 July 2014, the current head of the Mejlis, Mr. Refat Chubarov, was issued an entry ban for allegedly inciting inter-ethnic hatred.¹⁴⁴ Other people subjected to similar prohibitions include in 2014 the director of Crimean Tatar news agency *QHA*, and in 2016 a Ukrainian journalist and a defence lawyer.¹⁴⁵

2. *Restrictions imposed by Ukraine*

129. Between March and December 2014, Ukraine suspended air, train and bus connections to the peninsula. Older persons, persons with disabilities and children were the most affected by the absence of public transportation. Some said they had no choice but to walk across the ABL for more than two kilometres, sometimes in adverse weather conditions.¹⁴⁶ The only means of transport remaining are private cars and taxis that operate between Ukraine's mainland and Crimea.

130. According to Ukrainian legislation, Ukrainian citizens have the right to free and unimpeded access to Crimea.¹⁴⁷ However, crossing into the peninsula is permitted – for Ukrainian citizens and foreigners alike – only through three crossing points located in the region of Kherson, namely Kalanchak, Chaplynka or Chonhar. Foreign citizens violating rules on access to Crimea are prohibited from entering Ukraine for a period of three years.¹⁴⁸

131. National legal requirements related to the travel of children have constricted freedom of movement. Children below 16 years of age, if accompanied by only one parent, must have notarized written consent of the other parent.¹⁴⁹ This has created problems for Crimean residents, as documents issued by the Russian Federation authorities in Crimea are not recognized in Ukraine.

132. Specific requirements also apply to foreigners and stateless persons who may only enter and leave Crimea with a special permission issued by Ukrainian authorities following a lengthy procedure.

133. Another freedom of movement restriction applied to limitations in the transportation of consumer goods and personal belongings to and from Crimea introduced by Government decree No. 1035 of 16 December 2015. A court decision issued in June 2017 found the restrictions to be unlawful, although OHCHR observed through monitoring of the ABL it conducted in August 2017 that posters informing travellers of transportation limitations under decree No. 1035 were still present at the Chonhar crossing point.¹⁵⁰

134. A so-called civil blockade of Crimea was initiated in September 2015 by the Crimean Tatar leadership in mainland Ukraine to prevent trade with the Russian Federation occupying Crimea and draw the attention of the international community to human rights violations on the peninsula. The enforcement of the blockade was accompanied by incidents, including physical attacks by blockade participants of people travelling from Crimea, as well as confiscation of goods and personal items, violating human rights and

impacting freedom of movement across the ABL.¹⁵¹ On 17 January 2015, the organizers of the ‘civil blockade’ of Crimea announced they had stopped enforcing their embargo.¹⁵²

135. OHCHR noticed security risks for travellers related to the presence of insufficiently marked minefields on both sides of the road leading to the Kalanchak and Chaplynka crossing points. Representatives of Ukraine’s State Border Guard Service said they had no maps with mine locations. Although small triangular mine signs are visible, the risk of accidentally walking into an ill-marked minefield remains.¹⁵³

J. Freedom of thought, conscience and religion

136. It is a norm of customary international humanitarian law that the convictions and religious practices of civilians and persons *hors de combat* must be respected.¹⁵⁴ Article 58 of the Fourth Geneva Convention provides that the occupying power must permit ministers of religion to give spiritual assistance to members of their religious communities, and Article 15 of the First Protocol to this Convention states that an occupying power should respect and protect civilian religious personnel. Furthermore, the International Covenant on Civil and Political Rights and the European Convention on the Protection of Human Rights and Fundamental Freedoms provide that everyone has the right to freedom of thought, conscience and religion, and that the right to manifest one’s religion and beliefs may only be subject to limitations, which are prescribed by law and are necessary to protect public safety, order, health, morals or the rights and freedoms of others.¹⁵⁵

137. After the start of the occupation, freedom of religion or belief in Crimea has been jeopardized by a series of incidents targeting representatives of minority confessions and religious facilities belonging to them. Limitations on religious freedom have also resulted from the imposition of legal re-registration requirements, legislation increasing restrictions on the activities of religious groups in the name of fighting extremism, and judicial decisions.

138. The Parliament of the Russian Federation adopted legal amendments - commonly referred to as the ‘Yarovaya package’ – which came into force on 20 July 2016 as an anti-terrorism measure allowing the authorities to monitor extremist groups. The amendments practically ban missionary groups and house prayers by making proselytizing, preaching, praying, or disseminating religious materials outside of “specially designated places”, like officially recognized religious institutions, a punishable crime.¹⁵⁶

139. In the first year after adoption of the ‘Yarovaya package’ eight persons from Crimea - including four Jehovah’s Witnesses, three Protestants and one Muslim – were fined 5,000 RUB each (USD 85) for conducting a missionary activity.¹⁵⁷ In addition, eight religious communities - two Jehovah’s Witness, one Catholic, one Lutheran, one Pentecostal and one Hare Krishna - were fined in amounts ranging from 30,000 RUB (USD 525) to 50,000 RUB (USD 875) for violating the prohibition for a religious organization to conduct activities “without indicating its official full name”.¹⁵⁸

140. The gravest and most frequent incidents involving representatives of minority confessions were reported in 2014. For instance, on 1 June, men in Russian Cossack uniforms broke into the local Ukrainian Orthodox Church of the Kyiv Patriarchate (UOC-KP) in the village of Perevalne, shouting and terrorizing churchgoers. The car of the priest was damaged. The police were called but did not investigate the incident.¹⁵⁹ On 21 July, a house in the village of Mramorne belonging to the UOC-KP was burnt to the ground.¹⁶⁰ A pastor of the Protestant Church from Simferopol and his family left the peninsula after reportedly being told by FSB officers that he could ‘disappear’.¹⁶¹ Greek-Catholic priests faced threats and persecution, resulting in four out of six of them leaving Crimea. A Polish citizen and the senior Roman Catholic priest in the Simferopol parish had to leave on 24 October, due to the non-renewal of Ukrainian residence permits. Most of the 23 Turkish Imams and teachers on the peninsula have left for the same reason.¹⁶² On 26 April, unknown persons threw Molotov cocktails at a mosque in the village of Skalyste, setting it

on fire. On 25 July, a Muslim cemetery in Otuz was damaged. Several mosques and madrassas (Islamic schools) belonging to the Spiritual Administration of the Muslims of Crimea (DUMK) were raided in 2014 by FSB officers searching for banned extremist materials and members of radical groups.¹⁶³ The raids have continued in the following years but their frequency diminished after the DUMK leadership started cooperating with the Russian Federation authorities in Crimea in 2015.

141. Pursuant to Russian Federation legislation imposed in Crimea, public organizations in Crimea, including religious communities, were subjected to the obligation to re-register to obtain legal status. The religious communities which applied for registration had to submit the statutes of the organization, two records of community meetings, a list of all the community members, and information on the “basis of the religious belief”. Only Russian Federation citizens are allowed to register a religious community.

142. Without registration, religious communities can congregate but cannot enter into contracts to rent State-owned property, open bank accounts, employ people or invite foreigners. The deadline for re-registration was extended twice and expired on 1 January 2016. The process has been lengthy and lacked transparency.¹⁶⁴

143. Before the occupation of Crimea, there were 2,083 religious organizations in Crimea and 137 in Sevastopol, both with and without legal entity status.¹⁶⁵ As of 4 September 2017, 722 religious communities were registered in Crimea and 96 in Sevastopol. They included the two largest religious organizations of the Christian Orthodox and Muslim communities, as well as various Protestant, Jewish, Roman-Catholic and Greek-Catholic communities, among other religious groups.

144. One of the religious communities registered in Crimea, the Jehovah’s Witnesses, was declared illegal in an April 2017 decision of the Supreme Court of the Russian Federation, which found that the group had violated the country’s anti-extremism law. On 1 June 2017, all 22 congregations in Crimea were de-registered, affecting the right to freedom of religion of an estimated 8,000 believers. On 9 June 2017, a Jehovah Witness was told at a military conscription centre in Crimea that he could not invoke his right to an alternative civilian service under Russian Federation legislation unless he renounced his faith and changed his religion.¹⁶⁶ On 27 June, the head of the Jehovah Witnesses community in Dzhankoy was summoned to court, charged with unlawful missionary activity, and died later that day of a heart attack.¹⁶⁷

145. The Ukrainian Orthodox Church of the Kyiv Patriarchate (UOC-KP) chose not to re-register under Russian Federation law and thus has no legal recognition. Since 2014, five UOC-KP churches have been either seized by paramilitary groups or closed due to non-renewal of their property leases.¹⁶⁸ The activities of another UOC-KP church, located in Simferopol, were disrupted on 31 August 2017, when court bailiffs stormed the building of the church. The action was undertaken pursuant to a judgment, upheld by the Supreme Court of the Russian Federation in February 2017, ordering to vacate premises in the building used by a daughter company of the UOC-KP as office space and a shop. As of 12 September 2017, worship services were still held but fewer parishioners attended them.¹⁶⁹

K. Freedom of peaceful assembly

146. Freedom of peaceful assembly guarantees the right of individuals to gather peacefully in order to express an aim or issue in public. It is protected by various international legal instruments and closely connected with other fundamental rights such as freedom of speech, thought and association. Limitations are permitted in accordance with international law, including administrative regulations, as long as they are proportionate and not used to oppress the nature of free assembly.

147. The possibility to peacefully gather or hold a rally in Crimea has been significantly reduced since March 2014. Restrictive legal measures placed additional obstacles to the exercise of the right to peaceful assembly. According to legislation adopted by the Parliament of Crimea in August 2014, the organizers of public assemblies must be Russian Federation citizens and must officially request permission to hold an assembly no more than 15 days and no fewer than 10 days prior to the planned event. In addition, a resolution of the Government of Crimea of 4 July 2016 reduced from 665 to 366 the number of locations throughout the ‘Republic of Crimea’ where public events could be organized, without explaining the motives of this decision.¹⁷⁰

148. Lengthy blanket prohibitions on holding public assemblies have been issued, including an indefinite one decided by the Simferopol city authorities. In March 2016, a ban on all public events on the territory of the city was decreed, with the exception of those organized by the republican and local authorities.¹⁷¹ This measure was not taken in response to a sudden deterioration of public order and clearly infringed on the freedom to hold peaceful public assemblies.

149. Public events initiated by groups or individuals not affiliated with the Russian Federation authorities in Crimea or which consider that Crimea remains a constituent part of Ukraine have systematically been prohibited and prevented. On 23 September 2014, the Prosecutor of Crimea issued a statement that “*all actions aimed at the non-recognition of Crimea as a part of the Russian Federation will be prosecuted.*”¹⁷² Consequently, any assembly demanding the return of Crimea to Ukraine or expressing loyalty to Ukraine has been effectively outlawed.

150. Requests to hold peaceful public assemblies have often been rejected on procedural technicalities, which appeared to be neither necessary to justify a ban nor proportionate and responding to a general public interest. For example, the Simferopol city authorities refused to grant permission for an assembly planned by the Crimean Tatar NGO *Kardashlyk* for 23 August 2014 near the memorial complex for the victims of the Crimean Tatar deportation. The motive provided was that the extremely high temperatures could negatively affect the health of participants. Yet, other outdoor events planned on the same day went ahead.¹⁷³

151. In some cases, refusals to authorize public events were based on unsubstantiated allegations that “extremist” or “separatist” messages would purportedly be disseminated during their conduct.¹⁷⁴

152. Spontaneous gatherings have been met with sanctions. Crimean Tatars taking part in unauthorized motorcades to commemorate the Crimean Tatar deportation were regularly arrested, interrogated for hours, and fined.¹⁷⁵ An elderly Crimean Tatar man holding a one-person picket in support of prosecuted Crimean Tatars was arrested in front of the building of the Supreme Court of Crimea on 8 August 2017. He was charged with carrying out an unauthorized public gathering and resisting police orders and sentenced by court to an administrative fine of 10,000 RUB (USD 175) and 10 days of detention.

153. The European Court of Human Rights has found that restrictions imposed on assemblies to prevent minor disorder are often disproportionate measures, and that incidents of violence are better dealt with by way of subsequent prosecution or disciplinary actions.¹⁷⁶ In relation to blanket legal provisions which ban assemblies at specific times or in particular locations, the Special Rapporteur on the rights to freedom of peaceful assembly and of association stated that they require greater justification than restrictions on individual assemblies.¹⁷⁷

L. Freedom of opinion and expression and the media

154. Human rights law guarantees the right to hold opinions without interference. Undue restrictions on the right to seek, receive and impart information and ideas of all

kinds gravely undermine freedom of expression, which is protected under Article 19 of the International Covenant on Civil and Political Rights and Article 10 of the European Convention on the Protection of Human Rights and Fundamental Freedoms.

155. The right to express one's view or opinion has been significantly curtailed in Crimea.¹⁷⁸ In March 2014, analogue broadcasts of Ukrainian television channels were shut off and the vacated frequencies started broadcasting Russian TV channels. Journalists were attacked or ill-treated without any investigation being conducted into these incidents.¹⁷⁹ In June 2014, the only Ukrainian language newspaper, *Krymska svitlytsia*, was banned from distribution and had to vacate its rented premises.

156. Official 'warnings' have often preceded the closing down of a media outlet. They applied to views, articles or programmes whose content were deemed 'extremist'. The editor of the weekly Mejlis newspaper *Avdet* received several written and oral warnings from FSB officers that the newspaper materials allegedly contained extremist content, such as use of the terms 'annexation', and 'temporary occupation' of Crimea.¹⁸⁰ The Crimean Tatar ATR television channel was warned by *Roskomnadzor*, the Russian Federation media regulatory body, against disseminating false rumours about repression on ethnic and religious grounds and promoting extremism.¹⁸¹

157. *ATR* and *Avdet* were among the Crimean Tatar media outlets which were denied re-registration according to Russian Federation legislation and had to cease operations on the peninsula. When the deadline for re-registration expired on 1 April 2015, *Roskomnadzor* reported that 232 media were authorized to work, a small fraction of the approximately 3,000 media outlets previously registered under Ukrainian regulations.¹⁸² In addition, other popular Crimean Tatar media outlets, such as *Lale* television channel, *Meydan* and *Lider* radio stations, *QHA* news agency and *15minut* Internet site, were denied licenses to work. Procedural violations were cited as the main reasons for rejection.¹⁸³

158. The minority language media that continued operating or registered as a new media entity, have no political content or support the official position on the status of Crimea. Crimean television has information and education programmes in the native languages of national minorities, including Armenian, Bulgarian, Crimean Tatar, German, Greek, and Ukrainian. Its programmes for the Crimean Tatar community include the Crimean Tatar news *Haberler*, *Netije*, and *Ekindi Subet*; the talk-show *Dilde, fikirde, işte birlik*; the educational programme *Eglenip-Ogrenem*; the cultural and religious programme *Selyam Aleykum*; and the informational and cultural programme *Tanysh-Belish*.¹⁸⁴

159. According to the United Nations Human Rights Committee "the penalization of a media outlet [including online media], publishers or journalists solely for being critical of the government or the political social system espoused by the government can never be considered to be a necessary restriction of the freedom of expression."¹⁸⁵ Yet, provisions of the Russian Federation penal code have regularly been used by the authorities in Crimea to criminalize free speech and dissenting opinions of journalists and non-journalists alike.

160. On 7 July 2017, a court in Crimea convicted a Crimean Tatar man from Sevastopol to one year and three months of prison for "publicly inciting hatred or enmity". During an eight months period in 2016, he had posted statements on *Facebook* mentioning the "oppression" of the Crimean Tatars, referring to Crimea being "occupied" and "annexed", and quoting a Crimean Tatar leader who had organized the food and trade blockade of Crimea in September 2015.¹⁸⁶

161. People have also been charged under the accusation of advocating separatism. In 2017, the trials of a journalist from Crimea and a deputy chairman of the Mejlis, started. Both men were charged with "public calls to violate the territorial integrity of the Russian Federation" in connection with an article and a televised interview, respectively.¹⁸⁷ If found guilty, they face prison sentences of up to five years.

M. Freedom of association

162. Following the occupation of Crimea, most human right groups ceased to exist or relocated elsewhere in Ukraine. Some did so in protest against the new situation, while others felt compelled to do so, on account of personal threats and physical violence faced by their members.

163. For instance, the director of the Yalta-based NGO *Almenda* left Crimea on 16 March 2014, one day after she was warned by members of the Crimean self-defence that her safety was “no longer guaranteed.”¹⁸⁸ Several members of the NGO *Ukrainian House* were tortured and forcibly disappeared in connection with their role in organizing Maidan events in Crimea and their subsequent opposition to Russian Federation presence.

164. Civic groups or non-governmental institutions which stayed but did not accept the policies of the new authorities faced systematic obstruction of their activities, intimidation and sometimes prosecution. In September 2014, the Crimean police organized searches, seized property, and evicted the charitable organization *Crimea Foundation* from its premises in Simferopol. The eviction also affected the central office of the Mejlis and the Mejlis weekly newspaper *Avdet*.¹⁸⁹

165. As other legal entities, NGOs were required to re-register under Russian Federation law, which involved a number of constraints. Application documents included *inter alia* a new version of the NGO statute and a formal decision by the NGO executive body to align its founding documents with legislative requirements. If the NGO was not registered at the local address of a founder who was a Crimean resident, applicants were required to provide a letter from the owners of the intended rental premises of the NGO guaranteeing that they did not object to such a registration.¹⁹⁰

166. The re-registration of NGOs was further stymied by implementation of the Russian Federation’s law on ‘foreign agents’ and ‘undesirable organizations’ in Crimea, both of which have had a chilling effect on civic groups.¹⁹¹ Some decided not to seek registration while others decided to forgo foreign funding rather than endure frequent inspections and stigmatization.

167. The restrictive conditions placed by the legislation of the Russian Federation on activities of civil society organizations have been reflected in the number of NGOs which currently operate on the peninsula. As of 4 September 2017, 1,852 NGOs were registered in Crimea and the city of Sevastopol¹⁹² compared to 4,090 in mid-March 2014.¹⁹³

168. While the Russian Federation authorities in Crimea attempted to silence the Mejlis, they selectively allowed the establishment of organizations representing the Crimean Tatars, including *Kyryym*, *Kyryym Birligi*, the *Crimean Tatar 'Inkishaf' Society* and the *Association of Crimean Tatar Businessmen*.

169. Four national-cultural associations representing Ukrainians have been registered in Crimea: the Simferopol-based *Renaissance in Unity*, *Ukrainians of Simferopol*, *Ukrainians of Yevpatoriia* and *Ukrainians of Yalta*. The members of the unregistered Simferopol-based *Ukrainian Cultural Centre*, which has been under constant surveillance since 2014, were regularly called by the police or FSB for ‘informal talks’. Their public activities, including paying tribute to Ukrainian literary, political or historic figures, were often disrupted or prohibited. In May 2017, the Centre closed due to the absence of funds to pay for the rent of its premises, and on 29 August 2017, its director left the peninsula for mainland Ukraine following anonymous text message threats and information that the FSB would arrest him.¹⁹⁴

VII. Economic, Social and Cultural Rights

A. Property rights

170. Following Crimea's occupation, the Russian Federation authorities proceeded with a large-scale nationalization of public and sometimes private property. Expropriation was done in disregard of ownership rights and without compensation. Proper regulation of housing, land and property issues are also central to the Crimean Tatars who, almost three decades after returning from deportation, have not obtained security of tenure guarantees.

1. *Property nationalization*

171. Since the March 2014 referendum, many of the most economically valuable assets in Crimea – from energy companies to mobile operators – have been expropriated, often by force.

172. On 24 August 2014, the Crimean self-defence took over the *Zaliv* shipbuilding company, preventing the management from entering the premises. A new administration from Zelenodolsk (Tatarstan) was subsequently imposed on the firm.¹⁹⁵ On 27 August 2014, members of the Crimean self-defence entered the headquarters of Ukrainian gas company *Krymgas* and seized all documents and stamps. The entrances were blocked and the employees were advised either to quit or to sign applications for transfer of their jobs to a newly created gas company.¹⁹⁶

173. Regulatory acts have been adopted to provide legitimacy to the nationalization process.¹⁹⁷ However, frequent amendments, which increased the number and nature of property to be nationalized, undermined legal certainty and guarantees against arbitrariness. For example, Resolution No. 2085-6/14, which originally focused on nationalization of property without ownership or belonging to the State of Ukraine, was amended to include 111 individual property assets listed in a separate Annex called "*List of property considered as the property of the Republic of Crimea*". During 2014-2016, hotels, private apartments, non-residential premises, markets, gas stations, land plots and movable property, were added to the Annex by new resolutions, which contained no criteria for the nationalization and, in most cases, no information on the owners of nationalized property.

174. On 27 February 2015 Crimea's Parliament adopted Resolution No. 505-1/15 declaring an end to the nationalization process and prohibiting the inclusion of new property into the Annex starting from 1 March 2015. However, this provision was subsequently amended on 16 September 2015, allowing inclusion of land plots and some new information in the List of nationalized property for "clarification purposes." As of 12 September 2017, the Annex with the list of nationalized property had been amended 56 times and now contains 4,618 "nationalized" public and private real estate assets.¹⁹⁸

175. Similar processes have taken place in the city of Sevastopol.¹⁹⁹ With the purpose of "restoring social fairness and maintaining public order", the city authorities nationalized 13 companies and 30 real estate assets between February 2015 and July 2016.²⁰⁰

176. OHCHR recalls that, according to international humanitarian law, private property, as well as the property of municipalities and institutions dedicated to religion, charity and education, the arts and science may not be confiscated,²⁰¹ and that immovable public property must be administered according to the rule of usufruct.²⁰²

2. *Housing, land and property of formerly deported people*

177. The question of housing, land and property in Crimea is sensitive, particularly for Crimean Tatars who returned from exile starting from the late 1980s. The unmanaged

return process and the perceived injustices in land allocation led to Crimean Tatars settling on unoccupied or public land.²⁰³

178. While successive Governments of Ukraine took steps to facilitate repatriation to Crimea and resolve some of the issues facing formerly deported persons, many problems remained. In a decree issued by former President Viktor Yanukovych in 2010, the need to solve “the burning problem of resettlement” of formerly deported persons was acknowledged.²⁰⁴

179. After taking control of the peninsula, the Russian Federation authorities in Crimea pledged to legalize the unauthorized appropriation of land or allocate alternative land plots to Crimean Tatars.²⁰⁵ In 2015, they adopted a law enabling Russian Federation citizens of Crimea who illegally built property on a seized plot of land to acquire this land.²⁰⁶ There is no information on how this law has been implemented. Crimean Tatars have expressed concern about the citizenship requirement prescribed by the law, which automatically excludes from the process of legalization formerly deported persons who were not residents of Crimea on 18 March 2014 or have returned from deportation after that date. Other obstacles, including resistance from title owners of land plots and competing interests among Crimean Tatar groups representing returnees have also adversely affected the process of acquisition.

180. Additional concerns rose after several cities in Crimea allowed the demolition of buildings constructed without necessary permits. The most recent decision applies to Simferopol²⁰⁷ and envisages that buildings constructed on land plots located in areas of restricted use, such as public areas and areas near utility facilities, will be torn down. The demolition of such buildings, to be ordered by local administrations and special “demolition commissions”, could result in evictions disproportionately affecting Crimean Tatars.

181. Forced evictions constitute a violation of a broad range of human rights, including the right to adequate housing and freedom from arbitrary interference with home and privacy.²⁰⁸ OHCHR recalls the importance of preventing forced evictions by *inter alia* repealing legislation which allows for such practice and taking measures to ensure the right to security of tenure for all residents.²⁰⁹

B. Right to maintain one’s identity, culture and tradition

182. The Russian Federation authorities in Crimea have denied various manifestations of Ukrainian and Crimean Tatar culture and identity by groups perceived as hostile to the Russian Federation and to Crimea’s status as a part of it. Pressure, intimidation and prohibitive administrative or court decisions have been applied. Such actions violate Article 15 of the International Covenant on Economic, Social and Cultural Rights, which guarantees the right of everyone to take part in cultural life, and Article 27 of the International Covenant on Civil and Political Rights, which provides that in States where ethnic, religious or linguistic minorities exist, persons belonging to such minorities should not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

1. Limitations of the right of Ukrainians and Crimean Tatars to express their culture and identity

183. Following Crimea’s occupation, the Ukrainian and Crimean Tatar communities have been constricted in their ability to display Ukrainian state and cultural symbols and publicly celebrate important dates for their communities. Festivities and assemblies organized by minority groups have only been allowed if those groups supported the position of the Russian Federation on the status of Crimea.

184. On 18 February 2015, the Bakhchysarai authorities prohibited the local Mejlis from carrying out a rally in commemoration of the anniversary of the death of Noman Çelebicihan, an important figure in Crimean Tatar history. On 11 March 2015, a court in Simferopol ordered 40 hours of corrective labour for three pro-Ukrainian activists and 20 hours for a fourth after they unfurled a Ukrainian flag bearing the inscription “Crimea is Ukraine” during a rally to commemorate the anniversary of the national poet of Ukraine, Taras Shevchenko, two days before.²¹⁰ In June 2015, the city of Simferopol rejected an application by the Mejlis’ to hold celebrations of the Crimean Tatar Flag Day.

185. Institutions promoting Ukrainian culture and traditions have been shut down. The Museum of Ukrainian Vyshyvanka - a traditional Ukrainian embroidery - was closed in February 2015, and books by contemporary Ukrainian authors have been removed from the *Franko* Library located in Simferopol.²¹¹

186. The recognition under the constitution of the “Republic of Crimea” of Ukrainian and Crimean Tatar as official languages on a par with the Russian language has been largely declaratory. A draft law on the use of Crimea’s official languages was registered in the Parliament of Crimea on 4 April 2017, but has yet to be discussed.²¹²

2. *The ban of the Mejlis*

187. In 2016, the Russian Federation authorities in Crimea outlawed the Mejlis, a development which many in the Crimean Tatar community perceived as an attack against their culture and identity. While it is not supported by all Crimean Tatars, the Mejlis is viewed by many as a self-governing body and traditional organ of an indigenous people. Its members, forming an executive body, were elected by the Kurultai, the Crimean Tatars’ assembly.

188. On 26 April 2016, the Supreme Court of Crimea declared the Mejlis to be an extremist organization and prohibited it from conducting any activities. The ruling was followed by an instruction, in May 2016, by the Vice Prime Minister of Crimea addressed to the heads of local governments in Crimea to report to the Prosecutor of Crimea any violations committed by Mejlis members or activists.²¹³

189. On 29 September 2016, the Supreme Court of the Russian Federation upheld the ban, and supported the Prosecution which argued that the Crimean Tatar leadership of the Mejlis had repeatedly violated Russian Federation legislation and caused prejudice to residents of Crimea by organizing a trade blockade in 2015. The Mejlis was also accused of orchestrating a cut-off in energy supplies to the peninsula - with adverse humanitarian consequences for the population - caused by the sabotage of electricity pylons in mainland Ukraine. OHCHR notes that the ruling confirms the significant restrictions already imposed by the Russian Federation authorities in Crimea on this institution since 2014. It appears to be based on prejudicial evidence and disregards the legitimate character of the Mejlis as an elected organ representing the Crimean Tatar community.

190. In addition to prohibiting any public activity by or on behalf of the Mejlis, the court decision implies that the estimated 2,500 members of the national and local Mejlis bodies can incur criminal liability and face up to eight years in prison for belonging to an organization recognized as extremist. While no criminal sanctions have been imposed so far, some members of the Mejlis have been subjected to administrative sanctions. On 28 September 2016, eight of them were fined by courts in amounts ranging from 750 RUB (USD 12) to 1,000 RUB (USD 15) for holding an “illegal meeting” of this organization.²¹⁴

191. On 19 April 2017, the International Court of Justice delivered an Order on provisional measures in proceedings brought by Ukraine against the Russian Federation, concluding that the Russian Federation must “*Refrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the Mejlis*”.²¹⁵

192. On 25 August 2017, the Committee on the Elimination of Racial Discrimination issued its Concluding Observations on the twenty-third and twenty-fourth periodic reports of the Russian Federation.²¹⁶ In these Concluding Observations, the Committee stated that it was “particularly concerned” about the ban on the Mejlis and the “strict limitations on the operation of Crimean Tatar representative institutions, such as the outlawing of the Mejlis and the closure of several media outlets.”

193. As of 12 September 2017, the Mejlis remains a banned organization pursuant to the decisions of the Supreme Courts of Crimea and the Russian Federation.

C. Right to education in native language

194. International human rights instruments ratified by both Ukraine and the Russian Federation guarantee the right to education.²¹⁷ States are obliged to prioritize the introduction of compulsory, free primary education and must “take steps” towards the realization of secondary, higher and fundamental education for all those within its jurisdiction.²¹⁸ Article 2 of the First Protocol to the European Convention on the Protection of Human Rights and Fundamental Freedoms provides that states should respect the right of parents to ensure education and teaching in conformity with their own religious and philosophical convictions. Article 50 of the Fourth Geneva Convention provides that the occupying power should, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children.

195. Shortly after the March 2014 referendum, schools and universities in Crimea started functioning in accordance with the curriculum and educational standards of the Russian Federation. The education and academic qualifications obtained in Ukrainian educational establishments were recognized while a large-scale in-training programme for over 20,000 Crimean teachers started in June 2014.²¹⁹

196. Overall, the introduction of Russian Federation education standards has limited the right of ethnic Ukrainians and Crimean Tatars to education in their native language. While under Russian Federation law minority language instruction is available from grades 1 to 9, in senior classes of secondary schools (grades 10 and 11) all subjects must be taught in Russian. Furthermore, there is no clear procedure regulating the education in a mother tongue and no legally defined numeric threshold for opening schools or classes.

197. The number of students undergoing instruction in Ukrainian language has dropped dramatically. In the 2013-2014 academic year, 12,694 students were educated in the Ukrainian language. Following the occupation of Crimea, this number fell to 2,154 in 2014-2015, 949 in 2015-2016, and 371 in 2016-2017. In April 2015, the long-time director of the only Ukrainian-language gymnasium in Simferopol left Crimea, allegedly due to threats and harassment. Between 2013 and 2017, the number of Ukrainian schools decreased from seven to one, and the number of classes from 875 to 28.²²⁰

198. OHCHR considers that the main reasons for this decrease include a dominant Russian cultural environment and the departure of thousands of pro-Ukrainian Crimean residents to mainland Ukraine. Pressure from some teaching staff and school administrations to discontinue teaching in Ukrainian language has also been reported.

199. At the university level, the Department of Ukrainian Philology in the Vernadskiy Taurida National University was closed down in September 2014 and the majority of its teaching staff laid off.²²¹ The departments of Ukrainian philology, culture of the Ukrainian language and theory and history of the Ukrainian language have been merged into one department. By the end of 2014, Ukrainian as a language of instruction had been removed from university-level education in Crimea.

200. On 19 April 2017, the International Court of Justice delivered an Order on provisional measures in proceedings brought by Ukraine against the Russian Federation, concluding unanimously that the Russian Federation must “*Ensure the availability of education in the Ukrainian language*”.²²²

201. The number of students receiving their instruction in Crimean Tatar language has remained stable, largely due to a high level of cultural awareness among the Crimean Tatars. In the 2013-2014 academic year, when Ukraine’s curriculum was last applied in Crimea, 5,551 Crimean Tatars were educated in their native language. In 2014-2015, the figure was 5,146, in 2015-2016 it was 5,334, and in 2016-2017, 5,330 children were educated in Crimean Tatar.²²³ Fifteen Crimean Tatar national schools were functioning in 2017, as in 2013.²²⁴

D. Right to health

202. The availability of health care treatment in Crimea has been affected by the departure of numerous doctors and medical staff from medical State institutions. Drug users have additionally suffered from a disruption in treatment caused by the implementation of Russian Federation legislation.

203. In General Comment No. 14, the United Nations Committee on Economic Social and Cultural Rights reminded all States parties to the International Covenant on Economic, Social and Cultural Rights of the “*minimum essential levels of each of the rights enunciated in the Covenant, including essential primary health care.*” Those minimum essential levels include “*the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups,*” including the provision of essential drugs. Similarly, international humanitarian law obliges an occupying power to ensure food, hygiene, public health and medical supplies for the inhabitants of occupied territories.

1. Medical staff deficit in public hospitals

204. Crimea is confronted with an acute lack of medical personnel, an enduring phenomenon which pre-dates the occupation by the Russian Federation but has been aggravated after March 2014 due to the departure of many doctors to the private sector.

205. Since 2014, many doctors in Crimea have left public health care institutions for private clinics on the peninsula, which provide higher salaries and better working conditions. A similar situation prevails in the city of Sevastopol, where salaries in private clinics in 2017 were two and a half times higher (40,000 RUB i.e. USD 660) than in public hospitals (16,000 RUB i.e. USD 265).²²⁵ Physicians in public hospitals also criticized what they viewed as excessive bureaucratic paperwork and a system of remuneration deriving from new Russian Federation regulations, with the payment of a full doctor’s salary depending on the result of multiple inspections and internal audits.²²⁶

206. In November 2016, 7,195 doctors and 17,283 other medical personnel were employed in public medical centres in Crimea, with only 62.3 per cent of physicians’ positions occupied.

207. The Minister of Health of Crimea publicly acknowledged a lack of physicians, pediatricians, general practitioners, emergency staff and laboratory technicians. For three months in 2016, the main public hospital in Crimea’s second most populated district, Kerch, had no doctor in its neurosurgical department. The situation is most worrying in the districts of Rozdolne, Nyzhnohirskiyi, Krasnoperekopsk, Pervomaysky and Armyansk, and in the countryside, where only 40 per cent of the medical staff positions are filled.²²⁷

208. The shortage of medical personnel has had an impact on the quality of free public health care services and created long waits, delaying treatment for the most economically-disadvantaged patients and jeopardizing their right to health.²²⁸

2. *Impaired treatment of drug users*

209. Retrogressive measures introduced in Crimea since the application of Russian Federation legislation have undermined the right to health for those suffering from drug dependence.

210. An estimated 21,100 injecting drug-users lived in Crimea in 2013. Substitution Maintenance Therapy (SMT) for Crimean patients was terminated after the peninsula was incorporated in the Russian Federation. The latter bans the medical use of methadone and buprenorphine in the treatment of drug dependence and does not have maintenance therapy programmes.²²⁹ Medicines given to patients in rehabilitation centres include benzodiazepines, barbiturates, neuroleptics and anti-psychotic drugs, which are not considered a reasonable alternative to the banned treatments among independent health care experts.

211. As a result, 803 registered heroin addicts previously receiving Opioid Substitution Therapy (OST) in Crimea no longer had access to this treatment.²³⁰ This has had major detrimental effects, including changes in treatment, breaches of patient confidentiality, and increased mandatory drug screening.²³¹

212. Without methadone, users often relapse into taking heroin and risk an overdose. The United Nations Special Envoy for HIV/AIDS evoked the possibility that by January 2015, up to 100 former OST recipients had died in Crimea due to complications related to overdose or suicide,²³² although in June 2014, Crimea's health authorities were denying any deaths.²³³

213. Comprehensive harm reduction strategies, which include OST, are essential to prevent and treat HIV, hepatitis and tuberculosis among people who inject drugs. The ban on OST opiates crippled Crimea's HIV prevention programmes, which included *inter alia* needle exchanges covering 14,000 people and OST for intravenous drug-users.

214. According to the Chief Doctor of Crimea's Centre for the prevention and control of AIDS, 1,417 newly diagnosed cases of HIV infection were recorded in Crimea for the first nine months of 2016, including 25 per cent resulting from drug injection.²³⁴

E. **Access to water and other essential services**

215. The right to an adequate standard of living including in particular access to food, water and other essential items, is included in several international human rights treaties.²³⁵ In addition, international humanitarian law prohibits the attack, destruction, removal, or rendering useless objects indispensable to the survival of the civilian population, such as foodstuffs, water installations and supplies and irrigation works.²³⁶

216. Until 2014, Crimea was 82 per cent dependent on water supplies via the North Crimean Canal that links the Dnepr river in mainland Ukraine and the peninsula. The eastern Crimean regions stretching from Sudak to Kerch have virtually no surface sources of water. On 13 May 2014, the Ukrainian State Water Resources Agency informed that Ukraine had shut off water supplies to Crimea via the North-Crimean Canal. While this situation had no negative implications on drinking water,²³⁷ agricultural lands were affected, and practically all rice plantations on the peninsula perished.²³⁸ According to the Federal target programme on the socioeconomic development of Crimea, until 2020 "*Crimea's dependence on supply of water via the North Crimean Canal can be eventually reduced or eliminated by searching for underground water sources, including manmade ones.*"²³⁹

217. Crimea was also dependent on supplies from mainland Ukraine for up to 85 per cent of the electricity it consumed. Access to energy is a component of the right to adequate housing, which is derived from the right to an adequate standard of living.²⁴⁰ On 21-22 November 2015, energy deliveries were disrupted after perpetrators believed to be supporting the blockade of Crimea damaged four transmission towers in the region of Kherson, which supplied electricity to Crimea. Although one of the power lines was later repaired, energy supplies from mainland Ukraine have since not resumed due to the non-renewal of the contract between Ukraine's energy company and the Russian Federation authorities in Crimea, which expired on 1 January 2016.²⁴¹

218. Following the power outage, for about three weeks, the interruption of energy deliveries to Crimea caused widespread disruptions, affecting food conservation, lighting, heating, public transportation and economic activity. Although the Russian Federation authorities in Crimea redirected available energy resources to the most critical social infrastructure, such as hospitals and schools, the impact of this situation has been acute, particularly for people with limited mobility and low income.

219. Pursuant to the International Covenant on Economic, Social and Cultural Rights, States parties must ensure the satisfaction of minimum essential levels of rights under the Covenant in all circumstances.²⁴² Under international humanitarian law, the Russian Federation as the occupying power is obliged to ensure to the fullest extent of the means available to it sufficient hygiene and public health standards, as well as the provision of food and medical care to the population. At the same time, this does not exonerate Ukraine from its obligations under the International Covenant not to interfere with the enjoyment of the rights it enshrines, and from respecting the requirement under international humanitarian law to ensure that the basic needs of the population continue to be met under conditions of occupation.²⁴³

VIII. Conclusions and Recommendations

220. The human rights situation in Crimea has significantly deteriorated since the beginning of its occupation by the Russian Federation. The imposition of a new citizenship and legal framework and the resulting administration of justice have significantly limited the enjoyment of human rights for the residents of Crimea. The Russian Federation has extended its laws to Crimea in violation of international humanitarian law. In many cases, they have been applied arbitrarily.

221. Russian Federation authorities in Crimea have supported groups and individuals loyal to the Russian Federation, including among national and religious minorities, while preventing any criticism or dissent and outlawing organized opposition, such as the Mejlis. The space for civil society to operate, criticize or advocate has considerably shrunk. Media outlets have been shut down, disproportionately affecting the Crimean Tatar and Ukrainian communities, their right to information and to maintain their culture and identity.

222. Grave human rights violations affecting the right to life, liberty and security have not been effectively investigated. The judiciary has failed to uphold the rule of law and exercise proper administration of justice. There is an urgent need for accountability for human rights violations and abuses and providing the victims with redress.

223. Moreover, the freedom of movement between mainland Ukraine and Crimea has been restricted and the ABL has acquired many attributes of a State border.

224. Since the attempted alteration of the status of Crimea by the Russian Federation, a development which was denounced by General Assembly resolution 68/262 and later qualified as occupation in General Assembly resolution 71/205, the forcible integration of the peninsula into the political, legal, socio-economic, educational, informational, cultural and security spheres of the Russian Federation has been actively pursued, deepening the divide between this territory of Ukraine and the rest of the country.

225. In July 2016, Crimea was administratively attached to the Southern Federal District of the Russian Federation, further strengthening implementation of policies from the central level and coordination with neighboring regions of the Russian Federation. The peninsula has been integrated into the energy grid of the Russian Federation, which is also building a rail-and-road bridge through the Kerch strait, creating a land corridor to Crimea. This intensified integration is further compounded by population movements - from the Russian Federation to Crimea and from Crimea to mainland Ukraine - which tend to favour and strengthen pro-Russia sentiments on the peninsula.

226. In order to improve the human rights situation in Crimea, OHCHR recommends:

To the Government of the Russian Federation to:

- a) **Uphold human rights in Crimea for all and respect obligations that apply to an occupying power pursuant to international humanitarian law provisions;**
- b) **Ensure proper and unimpeded access of international human rights monitoring missions and human rights non-governmental organizations to Crimea, pursuant to General Assembly resolution 71/205;**
- c) **Apply Ukrainian laws in Crimea, pursuant to General Assembly resolutions 68/262 and 71/205;**
- d) **Ensure accountability for human rights violations and abuses through effective investigations of allegations of ill-treatment, torture, abductions, disappearances and killings involving members of the security forces and the Crimean self-defence; bring perpetrators to justice and provide redress for victims;**
- e) **Comply with the international humanitarian law prohibition to compel residents of the occupied territory of Crimea to serve in the armed forces of the Russian Federation and to deport or transfer parts of the civilian population of the Russian Federation into Crimea; return to Crimea all protected persons transferred to the territory of the Russian Federation;**
- f) **Ensure independent and impartial administration of justice, including due process and fair trial rights, and that persons deprived of liberty benefit from all legal guarantees, including equal treatment before the law, the right not to be arbitrarily detained, the presumption of innocence and the prohibition from self-incrimination;**
- g) **End the practice of retroactive application of penal laws to acts committed before the occupation of Crimea, and refrain from using law enforcement bodies and the justice system to pressure and intimidate opponents;**
- h) **Uphold the right of defence counsel to perform their professional functions without intimidation, harassment or improper interference;**
- i) **End the practice of extracting confessions of guilt from persons in detention through threats, torture, or ill-treatment, and refrain from practices such as forcible psychiatric hospitalization, which may amount to ill-treatment;**
- j) **Ensure adequate medical assistance to all individuals detained in penitentiary institutions irrespective of their citizenship or any other grounds;**
- k) **Enable unimpeded freedom of movement to and from Crimea, and end deportations of Crimean residents pursuant to Russian Federation immigration rules;**
- l) **Ensure that the rights to freedom of expression, peaceful assembly, association, thought, conscience and religion can be exercised by any individual and group in Crimea, without discrimination on any grounds, including race, nationality, political views or ethnicity;**

- m) Stop applying legislation on extremism, terrorism and separatism to criminalize free speech and peaceful conduct, and release all persons arrested and charged for expressing dissenting views, including regarding the status of Crimea;
- n) Allow the development of independent and pluralistic media outlets, including those representing minority communities, and refrain from placing legal and administrative obstacles on their registration or operation;
- o) Put an end to police actions, including house searches, summons, detentions, taking of DNA samples, targeting disproportionately members of the Crimean Tatar community;
- p) Lift any limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the Mejlis;
- q) Ensure the availability of education in the Ukrainian language, and enable all ethnic communities in Crimea, including the Crimean Tatars and Ukrainians, to maintain and develop their culture, traditions and identity, and to commemorate important events;
- r) Ensure access of all Crimean residents, including those without Russian Federation passports, to employment, health treatment, property and public services, without discrimination;
- s) End the ban on the use of Substitution Maintenance Therapy (SMT) for patients suffering from drug dependence;
- t) Respect the right to property and the prohibition to confiscate private property; ensure security of tenure for the Crimean Tatars by putting in place a mechanism facilitating recognition of their property rights.

To the Government of Ukraine to:

- a) Use all legal and diplomatic means available to promote and guarantee the enjoyment of the human rights of residents of Crimea;
- b) Investigate, within practical limits, human rights violations and abuses committed in Crimea as well as those perpetrated in mainland Ukraine in relation to the 'civil blockade' of Crimea;
- c) Remove all non-necessary restrictions to freedom of movement to and from Crimea, and ensure that the perimeter of the mined area near the Kalanchak and Chaplynka crossing points in the Kherson region is visible and well protected;
- d) Simplify access to civil documents, education and other public services to residents of Crimea and IDPs;
- e) Support dialogue between the Ombudspersons of Ukraine and the Russian Federation to facilitate the voluntary transfer of Ukrainian prisoners held in Crimea to penitentiary institutions in mainland Ukraine;
- f) Refrain from actions that would raise obstacles to the enjoyment by residents of Crimea of their human rights.

To the international community:

- a) Insist on full cooperation of the Russian Federation with international and regional monitoring mechanisms, including by granting unrestricted access to their representatives to Crimea;

- b) Remind the Russian Federation and Ukraine to strictly abide by international human rights law and international humanitarian law in ensuring the protection of the population of Crimea;**
- c) Raise cases of human rights violations and abuses in discussions with the Russian Federation authorities at bilateral and multilateral forums.**

IX. End notes

¹ Hereafter referred to as ‘Crimea’.

² All future references to the term “occupation” are to be interpreted in line with UN General Assembly resolution 71/205 referring to the “temporary occupation” of Crimea.

³ The resolution 71/205 was adopted by the UN General Assembly on 19 of December 2016.

⁴ The people’s militia was registered on 29 July 2014. It is composed of former policemen and army officers, Afghan war veterans and biker groups, tasked to ‘maintain order and combat fascism’ on the peninsula; see Народное Ополчение Республика Крым, “Устав Общественной Организации”, 9 сентября 2014, available at: <http://narodnoe-opolchenie.ru/ustav-obshhestvennoy-organizatsii/>.

⁵ Speaking to journalists, the President of the Russian Federation, Vladimir Putin, stated: “*Behind the backs of the Crimean self-defense units, there were our soldiers. They acted in a very polite, but decisive and professional manner. There was no other way to help the people of Crimea to express their free will*”. Video conference, Ria Novosti, 17 April 2014.

⁶ Interview given to the TV channel “Rossiya” as part of a documentary “Crimea. The way home”, available at: <https://www.youtube.com/watch?v=c8nMhCMphYU>.

⁷ The referendum question provided two alternatives: “1. Are you in favour of the Autonomous Republic of Crimea reuniting with Russia as a constituent part of the Russian Federation?” or “2. Are you in favour of restoring the Constitution of the Republic of Crimea of 1992 and of Crimea’s status as part of Ukraine?”

⁸ See the statement of the Spokesperson of the UN Secretary-General of 17 March 2014 <http://www.un.org/apps/news/story.asp?NewsID=47366#.WcU48nRx3IU>.

⁹ Article 45 of the Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907 and Article 64, Geneva Convention IV.

¹⁰ The Mejlis is a self-governing institution of the Crimean Tatar people holding executive powers. Its members are chosen from among the members of an elected assembly, the Kurultai.

¹¹ Articles 49 and 76, Geneva Convention IV.

¹² See “Human Rights Assessment Mission in Ukraine. Human Rights and Minority Rights Situation”, OSCE report of the High Commissioner for National Minorities and the Office for Democratic Institutions and Human Rights, The Hague/ Warsaw (12 May 2014), pp. 49-76.

¹³ Interview given to the TV channel “Rossiya” as part of a documentary “Crimea. The way home”, available at: <https://www.youtube.com/watch?v=c8nMhCMphYU>.

¹⁴ <https://www.theguardian.com/world/2014/feb/25/ukraine-sevastopol-installs-pro-russian-mayor>.

¹⁵ According to the Constitution of the ‘Republic of Crimea’, adopted on 11 April 2014, the Head of Crimea («Глава Республики Крым») who is the highest-ranking official of Crimea may also act as the Prime Minister of Crimea. Starting from 14 April 2014, Sergey Aksenov has been acting as the Head and the Prime Minister of Crimea. See: <http://glava.rk.gov.ru/rus/officially.htm>

¹⁶ The referendum question provided two alternatives: “1. Are you in favour of the Autonomous Republic of Crimea reuniting with Russia as a constituent part of the Russian Federation?” or “2. Are you in favour of restoring the Constitution of the Republic of Crimea of 1992 and of Crimea’s status as part of Ukraine?”

¹⁷ <http://www.crimea.gov.ru/act/11689>.

¹⁸ The Opinion was prepared following a request of the Secretary-General of the Council of Europe of 7 March 2014.

¹⁹ See Paragraph 28 of Opinion no. 762 / 2014 on “Whether the decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organize a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea’s 1992 constitution is compatible with constitutional principles” (Venice, 21-22 March 2014).

²⁰ See *supra* endnote 8.

²¹ OHCHR report on the human rights situation in Ukraine, 15 April 2014, paragraph 82

²² According to the Crimean the election commission, 1,274 096 persons (83.1 per cent) cast their ballots, of whom 1,233,002 (96.77 per cent) voted to join the Russian Federation, 31,997 (2.51 per cent) voted for Crimea to be part of Ukraine, and 9,097 votes (0.72 per cent) were invalid; see <http://archive.is/bvjR6>. In Sevastopol, 274,101 persons (89.5 per cent) cast their ballots, of whom 262,041 (95.6 per cent) voted to join the Russian Federation, 9,250 (3.37 per cent) voted for Crimea to be part of Ukraine, and 2,810 votes were invalid (1.03 per cent); see <http://archive.is/zbExZ>.

²³ On 14 March 2014, the Constitutional Court of Ukraine ruled that the decision to hold a referendum was unconstitutional, and on 15 March the Parliament of Ukraine terminated the powers of the Parliament of Crimea.

²⁴ The law “*On Securing the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine*” entered into force on 22 November 2014.

²⁵ The resolution was adopted by 101 countries, 11 voted against, 58 abstained and 24 were absent.

²⁶ The resolution was adopted by 70 countries, 26 voted against, 77 abstained and 21 were absent.

²⁷ Agreement between the Office of the High Commissioner for Human Rights and the Government of Ukraine concerning the deployment of a short-term UN Human Rights Monitoring Mission in Ukraine, done at Geneva on 31 July 2014.

²⁸ The objectives of the visit were to discuss allegations of human rights violations, protection concerns and the establishment of a sub-office of the HRMMU in Simferopol. See OHCHR report on the human rights situation in Ukraine, 15 March to 2 April 2014, paragraphs 80 to 93.

²⁹ Gender-sensitive investigation methods, including regarding interviewing, security arrangements, witness protection and safe handling of information were used by OHCHR. See OHCHR manual on gender integration in monitoring available at <https://intranet.ohchr.org/Offices/Geneva/TEsprDD/RuleofLawEqualityandNon-DiscriminationBranch/WomensHumanRightsAndGenderSection/Documents/Chapter15-20pp.pdf>.

³⁰ Article 42 of the 1907 Hague Regulations states: “*Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.*”

³¹ On 15 September 2015, Article 1 of the law of Ukraine “*On Securing the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine*” was amended to establish the beginning of the occupation of Crimea on 20 February 2014.

³² The Government of Ukraine exercised its right to derogate from its obligations under the International Covenant on Civil and Political Rights in relation to the rights to liberty and security (Article 9); fair trial (Article 14); effective remedy (Article 2(3)); respect for private and family life (Article 17); and freedom of movement (Article 12) as well as obligations enshrined in Article 5 (liberty and security), Article 6 (fair trial) Article 8

(respect for private and family life) and Article 13 (effective remedy) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

³³ Human Rights Committee, Concluding Observations on Moldova (CCPR/C/MDA/CO/2(2009), paragraph 5).

³⁴ *Ilascu and Others v. Moldova and Russia*, 48787/99, European Court of Human Rights, 8 July 2004, paragraph 331.

³⁵ Article 43, 1907 Hague Regulations.

³⁶ Henckaerts, Doswald-Beck, *Customary International Humanitarian Law*, Volume I. Rule 149, hereinafter, Customary IHL Rules; See also Article 3, Hague Convention (IV) and Article 91, Additional Protocol I.

³⁷ See Report of the International Criminal Court on Preliminary Examination Activities (2016), paragraphs 155 to 158. Pursuant to two article 12(3) declarations lodged by the Government of Ukraine on 17 April 2014 and 8 September 2015, the Court may exercise jurisdiction over Rome Statute crimes committed on the territory of Ukraine since 21 November 2013.

³⁸ <http://2001.ukrcensus.gov.ua/eng/results/general/nationality/>.

³⁹ <http://www.statdata.ru/naselenie-krima-i-sevastopolya>.

⁴⁰ <http://www.dsns.gov.ua/ua/Ostanni-novini/61047.html>.

⁴¹ <http://www.internal-displacement.org/europe-the-caucasus-and-central-asia/ukraine/figures-analysis>.

⁴² http://www.gks.ru/free_doc/new_site/population/demo/perepis_krim/obsh_itog_kfo.docx

⁴³ <http://www.statdata.ru/naselenie-krima-i-sevastopolya>.

⁴⁴ See Article 4 of the Russian Federation law “*On the Accession of the Republic of Crimea into the Russian Federation and the Creation of New Federal Subjects – the Republic of Crimea and the City of Federal Significance Sevastopol*” (21 March 2014).

⁴⁵ See Annual Report of the High Commissioner for Human Rights of the Russian Federation for 2014, Crimea chapter.

⁴⁶ Article 45, 1907 Hague Regulations.

⁴⁷ OHCHR report on the human rights situation in Ukraine, 2 April to 6 May 2014, paragraph 127.

⁴⁸ http://rian.com.ua/CIS_news/20140422/345528247.html.

⁴⁹ Article 20, Federal Law No. 62-FZ “*On Citizenship of the Russian Federation*” (31 May 2002).

⁵⁰ <http://helsinki.org.ua/advices/poluchenye-vyda-na-zhytelstvo-dlya-hrazhdan-pozhelavshyh-sohranyt-ukraynskoe-hrazhdanstvo-y-prozhyvayuschyh-postoyanno-na-territoryy-kryima/>.

⁵¹ Article 3 of the Russian Federation Law “*On circulation of agricultural land*” (24 July 2002).

⁵² OHCHR report on the human rights situation in Ukraine, 16 February to 15 May 2016, paragraph 197.

⁵³ OHCHR report on the human rights situation in Ukraine, 16 November 2016 to 15 February 2017, paragraphs 139 to 141.

⁵⁴ Judgment of the Balaklava district court of the Republic of Crimea, 22 November 2016, No. 5-207/2016, <http://sudact.ru/regular/doc/s56ZvgkNvSgw/>

⁵⁵ Judgment of the Supreme court of the Republic of Crimea, 15 November 2016, No. 12-2050/2016, <http://sudact.ru/regular/doc/hbZ5VPzDk710/>.

⁵⁶ In addition, the occupying power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. See Article 49, Geneva Convention IV.

⁵⁷ Judgment of the Supreme court of the Republic of Crimea, 17 November 2016, No. 12-401/2016, <http://sudact.ru/regular/doc/Q9mwes1Qfjb/>.

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- ⁵⁸ See “Human Rights in Retreat. Abuses in Crimea”, Human Rights Watch, 17 November 2014, available at: <https://www.hrw.org/report/2014/11/17/rights-retreat/abuses-crimea>.
- ⁵⁹ Judgment of the Supreme court of the Republic of Crimea, 2 November 2016, No. 12-1696/2016, <http://sudact.ru/regular/doc/55PTDREeCUZT/>.
- ⁶⁰ Judgment of the Sudak city court of the Republic of Crimea, 25 October 2016, No. 5-131/2016, <http://sudact.ru/regular/doc/MdwdkOOIxGdO/>.
- ⁶¹ OHCHR report on the situation of human rights in Ukraine, 16 November 2015 to 15 February 2016, paragraph 195.
- ⁶² Article 4 of the Federal Constitutional Law “*On the Accession of the Republic of Crimea into the Russian Federation and the Creation of New Federal Subjects – the Republic of Crimea and the City of Federal Significance Sevastopol*” (21 March 2014).
- ⁶³ Article 11 of the Law of the Republic of Crimea “*On State Civil Service of the Republic of Crimea*” (29 May 2014).
- ⁶⁴ This number includes 3,581 persons employed in the city of Sevastopol and 16,803 in the Autonomous Republic of Crimea. http://www.ukrstat.gov.ua/druk/publicat/kat_u/2014/bl/03/bl_ds_13.zip.
- ⁶⁵ <http://ru.krymr.com/content/news/27024784.html>.
- ⁶⁶ Article 54, Geneva Convention IV.
- ⁶⁷ Article 6 of the Russian Federation law “*On the Accession of the Republic of Crimea into the Russian Federation and the Creation of New Federal Subjects – the Republic of Crimea and the City of Federal Significance Sevastopol*” (21 March 2014).
- ⁶⁸ The Annual Report of the High Commissioner for Human Rights of the Russian Federation for 2014 mentions in relation to Crimea that the “*objective difficulties of the transition period throughout 2014*” have given rise to “*a number of legal and law enforcement grey areas*” which have encouraged corruption schemes, Moscow, 2015, p. 96.
- ⁶⁹ Article 64, Geneva Convention IV.
- ⁷⁰ OHCHR report on the human rights situation in Ukraine, 16 February to 15 May 2015, paragraph 159.
- ⁷¹ See Articles 64, 65, 67, and 70, Geneva Convention IV and Article 15, International Covenant on Civil and Political Rights.
- ⁷² OHCHR report on the human rights situation in Ukraine, 16 February to 15 May 2015, paragraphs 158-159 and HRMMU report on the human rights situation in Ukraine, 16 May to 15 August 2016, paragraph 157.
- ⁷³ OHCHR report on the human rights situation in Ukraine, 16 February to 15 May 2017, paragraph 144.
- ⁷⁴ Ibid. paragraph 145.
- ⁷⁵ UN Basic Principles on the Role of Lawyers adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, Principles 16 and 22.
- ⁷⁶ OHCHR report on the human rights situation in Ukraine, 15 March to 2 April 2014, paragraph 86.
- ⁷⁷ See List of Issues in Relation to the Seventh Periodic Report of the Russian Federation, *Human Rights Committee*, 18 December 2014, CCPR/C/RUS/Q/7/Add.1, paragraph 173.
- ⁷⁸ <http://khpg.org/en/index.php?id=1457018864>.
- ⁷⁹ HRMMU interview, 13 August 2017.
- ⁸⁰ <http://www.telegraph.co.uk/news/worldnews/europe/ukraine/10716412/Ukraines-unlikeliest-funeral-the-only-two-foes-to-die-in-Russias-Crimea-takeover-are-mourned-together.html>.
- ⁸¹ <http://www.independent.co.uk/news/world/europe/ukraine-naval-officer-shot-dead-by-russian-solider-in-crimea-9243306.html>.
- ⁸² <https://ru.krymr.com/a/27740314.html>.

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- ⁸³ <https://www.kyivpost.com/article/content/euromaidan/two-die-in-rallies-outside-crimean-parliament-says-ex-head-of-mejlis-337708.html>.
- ⁸⁴ OHCHR report on the human rights situation in Ukraine, 16 November 2015 to 15 February 2016, paragraph 187.
- ⁸⁵ See Article 2, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Article 7, International Covenant on Civil and Political Rights; and Article 3, European Convention for the Protection of Human Rights and Fundamental Freedoms.
- ⁸⁶ See OHCHR report on the human rights situation in Ukraine, 15 June 2014, paragraphs 299-303 and 309 and OHCHR report on the human rights situation in Ukraine, 18 August to 16 September 2014, paragraph 165.
- ⁸⁷ See Report by Nils Muiznieks, Commissioner for Human Rights of the Council of Europe, following his Mission in Kyiv, Moscow and Ukraine, from 7 to 12 September 2014, paragraph 17.
- ⁸⁸ See List of Issues in Relation to the Seventh Periodic Report of the Russian Federation, *Human Rights Committee*, 18 December 2014, CCPR/C/RUS/Q/7/Add.1, paragraph 174.
- ⁸⁹ Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, Principle 2.
- ⁹⁰ HRMMU interviews, 7 September 2016 and 11 December 2016.
- ⁹¹ OHCHR report on the human rights situation in Ukraine, 16 August to 15 November 2016, paragraph 158.
- ⁹² OHCHR report on the human rights situation in Ukraine, 16 November 2016 to 15 February 2017, paragraph 133.
- ⁹³ Rule 99, Customary International Humanitarian law.
- ⁹⁴ Article 9, International Covenant on Civil and Political Rights; UN Human Rights Committee (HRC), General comment no. 35, Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35.
- ⁹⁵ Communication No. 458/1991, *A. W. Mukong v. Cameroon* (Views adopted on 21 July 1994), in UN doc. *GAOR, A/49/40* (vol. II), p. 181, paragraph 9.8.
- ⁹⁶ OHCHR report on the human rights situation in Ukraine, 16 February to 15 May 2016, paragraphs 183 to 185.
- ⁹⁷ OHCHR report on the human rights situation in Ukraine, 16 November 2015 to 15 February 2016, paragraph 202.
- ⁹⁸ HRMMU interview, 20 October 2014.
- ⁹⁹ Article 2, Convention for the Protection of All Persons from Enforced Disappearance.
- ¹⁰⁰ Rule 99, Customary International Humanitarian Law.
- ¹⁰¹ Rule 90, *Ibid.*
- ¹⁰² Rule 89, *Ibid.*
- ¹⁰³ Rule 123, *Ibid.*
- ¹⁰⁴ See *Cyprus v. Turkey*, 25781/94, Judgment, European Court of Human Rights, 10 May 2001, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59454>.
- ¹⁰⁵ Reshat Ametov, a pro-Ukrainian activist, was abducted in Simferopol and found dead two weeks later.
- ¹⁰⁶ The Ukrainian NGO *CrimeaSOS* estimates that between March 2014 and March 2017, agents of the Russian Federation were directly or indirectly involved in at least 36 cases of enforced disappearances. See Enforced Disappearance in Crimea Annexed by Russian Federation 2014-2016, *CrimeaSOS*, p. 2.
- ¹⁰⁷ OHCHR report on the human rights situation in Ukraine, 15 November 2014, paragraphs 213-215.
- ¹⁰⁸ Information provided by the Prosecutor's office of the Republic of Crimea to *CrimeaSOS* on 29 November 2016.

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- ¹⁰⁹ Ibid.
- ¹¹⁰ Ibid.
- ¹¹¹ The Federal List of Extremist Materials was introduced by Federal Law No. 114-FZ “*On Combating Extremist Activities*” (25 July 2002).
- ¹¹² See Opinion No. 660/2011 on the Federal Law on Combating Extremist Activity of Russian Federation, The European Commission For Democracy Through Law (Venice Commission), 1 June 2012.
- ¹¹³ Annual Report of the High Commissioner for Human Rights of the Russian Federation for 2014, Moscow, 2015, p. 99
- ¹¹⁴ See “*The Situation of the Crimean Tatars since the Annexation of Crimea by the Russian Federation*”, Report prepared by an Unofficial Turkish Delegation in Crimea on 27-30 April 2015 (5 June 2015), pp. 9-10.
- ¹¹⁵ OHCHR report on the human rights situation in Ukraine, 18 August to 16 September 2014, paragraphs 155-156.
- ¹¹⁶ See “*The Situation of the Crimean Tatars since the Annexation of Crimea by the Russian Federation*”, *ibid.* p. 9.
- ¹¹⁷ <http://fedsfm.ru/documents/terrorists-catalog-portal-act>
- ¹¹⁸ http://www.krim.fsin.su/news/detail.php?ELEMENT_ID=129921.
- ¹¹⁹ Article 14(5), International Covenant on Civil and Political Rights.
- ¹²⁰ Statistics of the State Penitentiary Service of Ukraine as of 20 March 2014, <http://www.kvs.gov.ua/peniten/control/main/uk/publish/article/735176>.
- ¹²¹ Annual Report of the High Commissioner for Human Rights of the Russian Federation for 2015, Moscow, p. 72
- ¹²² Report of the High Commissioner for Human Rights in the Republic of Crimea, 2016, p. 63, http://ombudsman.rk.gov.ru/file/doklad_2016.pdf
- ¹²³ Rule 58, United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules).
- ¹²⁴ OHCHR report on the human rights situation in Ukraine, 16 February to 15 May 2017, paragraph 150.
- ¹²⁵ HRMMU interview, 21 March 2017.
- ¹²⁶ Ibid.
- ¹²⁷ One Ukrainian NGO claimed on 31 May 2016 that 2,200 prisoners had been transferred from Crimea to the Russian Federation, <https://hromadskeradio.org/programs/hromadska-hvylya/2200-krymskyh-uvyaznennyh-bulo-peremishcheno-na-terytoriyu-rosiyi-advokat#V0In6plsZF0.twitter>.
- ¹²⁸ OHCHR report on the human rights situation in Ukraine, 16 May to 15 August 2016, paragraph 181.
- ¹²⁹ The trial started on 21 July 2015, and on 25 August 2015, a military tribunal sentenced him to 20 years of imprisonment.
- ¹³⁰ See Articles 49 and 76, Geneva Convention IV.
- ¹³¹ OHCHR report on the human rights situation in Ukraine, 16 February to 15 May 2017, paragraph 151.
- ¹³² Ibid. paragraph 152.
- ¹³³ See Article 76, Geneva Convention IV; Article 10, International Covenant on Civil and Political Rights; Article 3, European Convention on Human Rights and Fundamental Freedoms, and *Kudla v. Poland*, 30210/96, European Court of Human Rights, 26 October 2000, paragraph 94.
- ¹³⁴ Article 7, Treaty of Accession between the Republic of Crimea and the Russian Federation (18 March 2014).
- ¹³⁵ This figure was announced by the military commissioner of Sevastopol, Alexei Astakhov, on 25 May 2017.

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- ¹³⁶ HRMMU interviews, 20 November 2015 and 13 October 2016.
- ¹³⁷ Article 51, Geneva Convention IV.
- ¹³⁸ See OSCE Special Monitoring Mission to Ukraine thematic report, “Freedom of movement across the administrative boundary line with Crimea” (21 June 2015), available at: <http://www.osce.org/ukraine-smm/165691>.
- ¹³⁹ See Article 12, International Covenant on Civil and Political Rights; and Articles 2 and 3, Protocol 4 to the European Convention on Human Rights and Fundamental Freedoms.
- ¹⁴⁰ HRMMU interview, 5 May 2017.
- ¹⁴¹ See Article 23, International Covenant on Civil and Political Rights; Article 10, Convention on the Right of the Child; Article 8, European Convention on Human Rights and Fundamental Freedoms.
- ¹⁴² Article 49, Geneva Convention IV.
- ¹⁴³ HRMMU interview, 26 May 2017.
- ¹⁴⁴ The decision on the undesirability of stay of Mr. Dzhemilev and Mr. Chubarov in the Russian Federation was taken pursuant to Article 27 of the Federal Law “*On the Procedure of Exit from the Russian Federation and Entry to the Russian Federation*”. See Annual Report of the High Commissioner for Human Rights of the Russian Federation for 2014, p. 101.
- ¹⁴⁵ HRMMU interview, 17 October 2016.
- ¹⁴⁶ HRMMU interviews, 19 February 2015, 22 September 2015 and 3 February 2016.
- ¹⁴⁷ See Article 10, Law of Ukraine “*On Guaranteeing the rights and freedoms of citizens and on the legal regime on the temporarily occupied territory of Ukraine*”.
- ¹⁴⁸ On 23 November 2016, 14 citizens of Uzbekistan and one Azeri citizen travelling from Crimea to mainland Ukraine were stopped by Ukrainian border guards on the ABL and issued with three-year entry bans to Ukraine for having accessed Crimea through the Russian Federation, in violation of Ukrainian legislation.
- ¹⁴⁹ See Government Regulation No. 367 of 4 June 2015.
- ¹⁵⁰ OHCHR report on the human rights situation in Ukraine, 16 May to 15 August 2017, paragraph 148.
- ¹⁵¹ OHCHR report on the human rights situation in Ukraine, 16 August to 15 November 2015, paragraphs 144 to 146.
- ¹⁵² OHCHR report on the human rights situation in Ukraine, 16 November 2015 to 15 February 2016, paragraph 198.
- ¹⁵³ OHCHR report on the human rights situation in Ukraine, 16 May to 15 August 2016, paragraph 175.
- ¹⁵⁴ Rule 104, Customary International Humanitarian Law.
- ¹⁵⁵ See Article 18(3), International Covenant on Civil and Political Rights, and Article 9(2), European Convention on Human Rights and Fundamental Freedoms.
- ¹⁵⁶ Maximum fines amount to the equivalent of \$780 for individuals or \$15,000 for organizations.
- ¹⁵⁷ See Article 5.26, part 4 of the Code of Administrative Offenses of the Russian Federation (“Carrying out missionary activity in violation of the requirements of the law”).
- ¹⁵⁸ See Article 5.26, part 3, *ibid*.
- ¹⁵⁹ OHCHR report on the human rights situation in Ukraine, 7 May to 7 June 2014, paragraph 315.
- ¹⁶⁰ OHCHR report on the human rights situation in Ukraine, 16 July to 16 August 2014, paragraph 163.
- ¹⁶¹ OHCHR report on the human rights situation in Ukraine, 1 to 30 November 2014, paragraph 84.
- ¹⁶² OHCHR report on the human rights situation in Ukraine 15 December 2014, paragraph 84.

¹⁶³ On 24 June 2014, the FSB raided a madrassa in the village of Kolchugino, in the Simferopol district. On 13 August 2014, three madrassas in Simferopol were searched. On 22 September 2014, a seven-hour search was carried out at the Derekoi Mosque in Yalta.

¹⁶⁴ See report of the Independent Expert on minority issues, Rita Izsák, concerning the protection and promotion of the rights of religious minorities, A/68/268, paragraph 61: “*It is essential to ensure that all procedures for registration are accessible, inclusive, non-discriminatory and not unduly burdensome. Registration procedures designed to limit beneficiaries due to political or social intolerance run afoul of human rights standards*”. See also report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, A/HRC/22/51, paragraph 42: “*failure to register, or re-register periodically, could lead to legal vulnerability that also exposes the religious minorities to political, economic and social insecurity*”.

¹⁶⁵ The term “religious organizations” includes parishes, congregations, theological schools, monasteries, and other constituent parts of a church or religious group.

¹⁶⁶ <http://khp.org/en/index.php?id=1497831415>.

¹⁶⁷ <https://uawire.org/news/jehovah-s-witness-follower-in-the-crimea-dies-after-trial>.

¹⁶⁸ The churches in Perevalne (Simferopol district) and Sevastopol were seized while those in Krasnoperekopsk, Kerch and Saki were closed.

¹⁶⁹ <https://ru.krymr.com/a/news/28721834.html>.

¹⁷⁰ OHCHR report on the human rights situation in Ukraine, 16 May to 15 August 2016, paragraphs 165 to 167.

¹⁷¹ OHCHR report on the human rights situation in Ukraine, 16 November 2015 to 15 February 2016, paragraphs 199-200.

¹⁷² OHCHR report on the human rights situation in Ukraine, 17 September to 31 October 2014, paragraph 212.

¹⁷³ OHCHR report on the human rights situation in Ukraine, 18 August to 16 September 2014, paragraph 159.

¹⁷⁴ According to the International Covenant on Civil and Political Rights (Article 21) and the European Convention on Human Rights and Fundamental Freedoms (Article 11), state authorities have a responsibility to respect and ensure freedom of peaceful assembly, including by protecting assemblies from attacks or disruption by third parties. Any restrictions of this right must be proportionate to achieve a legitimate aim that is demonstrably necessary in a democratic society.

¹⁷⁵ OHCHR report on the human rights situation in Ukraine, 16 May to 15 August 2015, paragraph 175.

¹⁷⁶ European Court of Human Rights, *Stankov and the United Macedonian Organization Ilinden v. Bulgaria* (2001), paragraph 94.

¹⁷⁷ See A/HRC/31/66 paragraph 30, and A/HRC/23/39, paragraph 63.

¹⁷⁸ See Amnesty International “*One Year On. Violations of the right to freedom, expression and association in Crimea*”, March 2015, pp 9-14.

¹⁷⁹ OHCHR report on the human rights situation in Ukraine, 7 May to 7 June 2014, paragraphs 298 to 301 and 303.

¹⁸⁰ *Ibid.* paragraph 302.

¹⁸¹ OHCHR report on the human rights situation in Ukraine, 17 September to 31 October 2014, paragraph 230.

¹⁸² Ministry of Foreign Affairs of the Russian Federation, submission to UNESCO, 14 April 2015, available at: <http://russianunesco.ru/eng/article/2070>.

¹⁸³ OHCHR report on the human rights situation in Ukraine, 16 February to 15 May 2015, paragraphs 165-166.

¹⁸⁴ See Fourth Report submitted by the Russian Federation pursuant to Article 25, paragraph 2 of the Framework Convention for the Protection of National Minorities (Received on 20 December 2016), p. 28.

¹⁸⁵ *Human Rights Committee*, General Comment No. 34, *Article 19: Freedoms of opinion and expression*, UN Doc. CCPR/C/GC/34 (12 September 2011), paragraph 42.

¹⁸⁶ OHCHR report on the human rights situation in Ukraine, 16 May to 15 August 2017, paragraph 139.

¹⁸⁷ See Amnesty International Public statement, “*Crimea: Rapidly Deteriorating Human Rights Situation in the International Blind Spot*”, 17 March 2017, p. 5.

¹⁸⁸ HRMMU interview, 29 June 2014.

¹⁸⁹ See “*The situation of national minorities in Crimea following its annexation*”, European Parliament, Policy Department, Directorate General for External Policies, 2016, p.19, available at:

[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/578003/EXPO_STU\(2016\)578003_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/578003/EXPO_STU(2016)578003_EN.pdf).

¹⁹⁰ Russian Federal Law “*On Amending the Federal Law ‘Enacting chapter 1 of the Civil Code of the Russian Federation’ and Article 1202(3) of the Civil Code of the Russian Federation*” (5 May 2014), available at: <http://base.garant.ru/70648870/>.

¹⁹¹ Russian Federal Law “*On Amending some legal acts of the Russian Federation*” (23 May 2015) and Russian Federal Law “*On Introducing Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-Commercial Organizations Performing the Function of Foreign Agents*” (20 July 2012).

¹⁹² This number includes “autonomous non-commercial organizations”, “national-cultural autonomies” and “non-government organizations”. See <http://unro.minjust.ru/NKO.aspx>.

¹⁹³ <http://rgo.informjust.ua/>.

¹⁹⁴ HRMMU interview, 3-4 September 2017

¹⁹⁵ OHCHR report on the human rights situation in Ukraine, 18 August to 16 September 2014, paragraph 165.

¹⁹⁶ *Ibid.*

¹⁹⁷ See law “*On special aspects of regulation of property and land matters in the Republic of Crimea*” (31 July 2014), Resolution of the ‘State Council of the Republic of Crimea’ “*On aspects of administration of the property of the Republic of Crimea*” (30 April 2014) with subsequent amendments. Other legal acts seeking to facilitate the process of nationalization include the law “*On the administration and disposition of state-owned property in the Republic of Crimea*” (8 August 2014), and the Resolution of the ‘State Council of the Republic of Crimea’ “*On property nationalization of agricultural companies, institutions and organizations in the Republic of Crimea*” (26 March 2014).

¹⁹⁸ This figure is based on information collected by OHCHR from open sources.

¹⁹⁹ In the city of Sevastopol, nationalization was conducted in accordance with a Resolution of the Sevastopol city government “*On some aspects of the nationalization of property*” (28 February 2015) with subsequent amendments.

²⁰⁰ See Resolutions of the Sevastopol city Government “*On some aspects of the nationalization of property*” No. 118-III, 123-III, 662-III of 28 February 2015, 28 February 2015 and 8 July 2016 respectively.

²⁰¹ Articles 46 and 56, 1907 Hague Regulations.

²⁰² *Ibid.* Article 55.

²⁰³ See “*The Integration of Formerly Deported People in Crimea, Ukraine*”; Needs Assessment of the OSCE High Commissioner on National Minorities, August 2013, pp. 9-15.

²⁰⁴ Presidential Decree No. 615/2010 proposed taking “*measures, in accordance with established procedures, for facilitating the adoption of the Concept of the State ethno-*

national policy and programmes for the period until 2015 for resettlement of Crimean Tatars, other persons deported on the ground of ethnic origin, and their descendants who have returned or are returning to Ukraine for permanent residence, their adaptation and integration in Ukrainian society.”

²⁰⁵ On 10 May 2014, the Russian Federation Minister of Crimean Affairs stated at a press conference that the Russian authorities would deal with cases of unauthorized acquisition of land in Crimea “with full responsibility and caution”; see OHCHR report on the human rights situation in Ukraine, 7 May to 7 June 2014, paragraph 320.

²⁰⁶ Law ‘On provision of land plots which are in state or municipal property and on certain issues of land relations’ (15 January 2015), available at <http://crimea.gov.ru/textdoc/ru/7/act/66z.pdf>.

²⁰⁷ Resolution No. 2206 “On the demolition of illegally constructed buildings in the municipal district of Simferopol”, adopted on 23 September 2016.

²⁰⁸ See Article 11(1), International Covenant on Economic, Social and Cultural Rights; Article 17(1), International Covenant on Civil and Political Rights; Article 1, European Convention on Human Rights and Fundamental Freedoms; and UN Committee on Economic, Social and Cultural Rights (CESCR); General Comment No. 7: The right to adequate housing (Art. 11.1): forced evictions, 20 May 1997, E/1998/22

²⁰⁹ See Resolutions 1993/77 and 2004/28 of the United Nations Commission on Human Rights.

²¹⁰ OHCHR report on the human rights situation in Ukraine, 16 February to 15 May 2015, paragraph 163.

²¹¹ See “Report of the Human Rights Assessment Mission on Crimea (6-18 July 2015)”, OSCE Office for Democratic Institutions and Human Rights and High Commissioner for National Minorities, paragraph 258, 17 September 2015, available at: <http://www.osce.org/odihr/report-of-the-human-rights-assessment-mission-on-crimea?download=true>

²¹² See law No.1236/30-10 (4 April 2017), which regulates the use of official languages in the spheres of education, legislation, public relations, official correspondence and daily life.

²¹³ OHCHR report on the human rights situation in Ukraine, 15 May to 16 August 2016, paragraphs 176-177.

²¹⁴ OHCHR report on the human rights situation in Ukraine, 16 August to 15 November 2016, paragraphs 167 to 169.

²¹⁵ See Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all forms of racial discrimination (Ukraine v. Russian Federation); Request for the indication of provisional measures, 19 April 2017, General List No. 166, paragraph 106.

²¹⁶ Committee on the Elimination of Racial Discrimination, CERD/C/RUS/CO/23-24.

²¹⁷ See Article 26, International Covenant on Civil and Political Rights; Articles 2 and 13, International Covenant on Economic, Social and Cultural Rights; Article 29, Convention on the Right of the Child; Article 5, Convention on the Elimination of All Forms of Racial Discrimination; Article 10, Convention on the Elimination of Discrimination Against Women ; Articles 1, 2 and 5, UNESCO Convention against Discrimination in Education; Articles 26 and 29, International Labor Organization Convention concerning Indigenous and Tribal Peoples in Independent Countries, No. 169.

²¹⁸ See *Committee on Economic, Social and Cultural Rights, General Comment No. 13*, (twenty-first session, 1999), *the right to education (article 13 of the Covenant)*, E/C.12/1999/10, 8 December 1999, paragraphs 51-52.

²¹⁹ See Information on the Situation in the Republic of Crimea (Russian Federation) in the Fields of UNESCO Competence, Received from Russian Competent Authorities (As of 10 October 2014); 195 EX/5.INF.5, Paris, 21 October 2014, p.14.

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- ²²⁰ See “Situation with Access to Education in the Native Language in Crimea”, *Crimean Human Rights Group*, available at: http://www.civicsolidarity.org/sites/default/files/detailed_report_education_crimea_a4_.pdf.
- ²²¹ The university was made a part of the Crimean Federal University (CFU) as the Taurida Academy in Crimea. Following this, the Ukrainian authorities relocated the Vernadsky Taurida National University to mainland Ukraine, and reopened it in Kyiv on 27 September 2016.
- ²²² See Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all forms of racial discrimination (Ukraine v. Russian Federation); Request for the indication of provisional measures, 19 April 2017, General List No. 166, paragraph 106.
- ²²³ According to the Crimean Tatar NGO *Maarifchi*, among 1st grade children in September 2016, 825 out of approximately 20,000 were educated in the Crimean Tatar language.
- ²²⁴ See “Situation with Access to Education in the Native Language in Crimea”, *Crimean Human Rights Group*, available at: http://www.civicsolidarity.org/sites/default/files/detailed_report_education_crimea_a4_.pdf.
- ²²⁵ <https://www.15minut.org/news/172009-sevastopolskie-vrachi-uvolnyayutsya-iz-zanizkih-zarplat-i-vysokih-cen-na-zhile>.
- ²²⁶ HRMMU interview, 20 December 2016.
- ²²⁷ This information was mentioned by the Minister of Health of Crimea in November 2016. See <http://podpricelom.com.ua/en/read/social-analitics-read/minister-medical-centers-crimea-staffed-doctors-one-third.html>.
- ²²⁸ OHCHR report on the human rights situation in Ukraine, 16 May to 15 August 2015, paragraph 186.
- ²²⁹ The Committee on Economic Social and Cultural Rights expressed its concern “*about the continued ban on the medical use of methadone and buprenorphine for treatment of drug dependence*” in the Russian Federation “*and the fact that the Government does not support opioid substitution therapy (OST) and needle and syringe programmes.*” See fifth periodic report of the Russian Federation (E/C.12/RUS/5), Concluding Observations, 1 June 2011, paragraph 29.
- ²³⁰ In Crimea, OST was legal since 2006.
- ²³¹ See “*Substitution maintenance treatment in Ukraine: Humanitarian and medical mission 16-21 May 2014*”, Expert report of the Pompidou Group, P-PG/ (2014) Misc. 1 rev.
- ²³² <https://www.theguardian.com/world/2015/jan/20/ukrainian-drug-addicts-dying-due-to-treatment-ban-says-un>.
- ²³³ <http://www.rferl.org/a/crimeas-methadone-ban-hitting-rehab-patients-hard/25429665.html>.
- ²³⁴ <http://podpricelom.com.ua/en/read/social-analitics-read/increase-hiv-incidence-recorded-crimea.html>.
- ²³⁵ See Article 11, International Covenant on Civil and Political Rights; Articles 24(2)(c) and 27, Convention on the Right of the Child; and Article 28, CRPD; and Article 25, Universal Declaration of Human Rights.
- ²³⁶ Article 54(2), Customary International Humanitarian Law.
- ²³⁷ OHCHR report on the human rights situation in Ukraine, 15 June 2014, paragraph 322.
- ²³⁸ <http://tass.ru/en/economy/749184>.
- ²³⁹ <http://tass.ru/en/russia/790555>.
- ²⁴⁰ *Committee on Economic, Social and Cultural Rights, General Comment No 4, The Right to Adequate Housing (Article 11(1) of the Covenant)*, 13 December 1991, paragraph 8(b), E/1992/23, Annex 3.

²⁴¹ OHCHR report on the human rights situation in Ukraine, 16 May to 15 August 2016, paragraph 200.

²⁴² *Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23.

²⁴³ Under international human rights law, the Government remains obliged to ensure the satisfaction of minimum essential levels of social and economic rights (e.g. primary health care, essential food stuff, basic shelter and housing and most basic forms of education); see *Committee on Economic, Social and Cultural Rights, General Comment No. 3*, *ibid.*

Annex 760

United Nations Human Rights Council, Report of the Special Rapporteur on Minority Issues on Her Mission to Ukraine (7–14 April 2014), U.N. Doc. A/HRC/28/64/Add.1 (26 August 2014)



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Agenda item 3

**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

Report of the Special Rapporteur on minority issues, Rita Izsák

Addendum

Mission to Ukraine* **

Summary

The overwhelming majority of the minority and other representatives consulted by the Special Rapporteur on minority issues during her visit to Ukraine described a history of harmonious inter-ethnic and interfaith relations and a legislative, policy and social environment that was generally conducive to the protection of their rights, including cultural and linguistic rights. Nevertheless, minority issues have become highly politicized as the situation of political and social unrest has emerged in some regions since February 2014. That threatens to create and widen fractures along national, ethnic and linguistic lines and undermine peaceful coexistence if not quickly resolved. An end to violence and constructive consultations on minority rights must be primary objectives for all stakeholders.

The overall human rights and minority rights situation and the civil and political, economic, social and cultural conditions experienced by minorities cannot justify any violent action or incitement and support of such action by any party, national or international. While there are challenges relating to minority issues, some radical elements are intent on promoting and inciting disunity. It is essential to establish a process of national and regional dialogue with the objective of understanding the concerns and issues

* The summary of the present report is being issued in all official languages. The report itself, contained in the annex to the summary, is being issued in the language of submission and Russian only.

** Late submission.



of all minority communities and ensuring that they are addressed appropriately and rapidly through democratic mechanisms and not through recourse to force or coercion. Moderate voices must come to the fore. First and foremost, solutions to the current situation must come from the citizens of Ukraine themselves.

A historical good governance deficit and widespread corruption have contributed to a lack of trust in political institutions and actors and have significantly contributed to instability. Measures are required to reinforce the minority rights infrastructure and to build confidence that minority rights will be protected in law and in practice. Such measures should include strengthening of legal protection, enhancing institutional attention to minority issues, and instituting stronger and permanent consultation mechanisms. All measures should be adequately funded and politically supported.

Annex

[English and Russian only]

Report of the Special Rapporteur on minority issues on her mission to Ukraine (7–14 April 2014)

Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction	1–3	4
II. Methodology	4–7	4
III. Minority rights: legal and institutional framework.....	8–18	5
IV. Minority rights in the context of political and social unrest in 2014.....	19–28	8
V. Issues of minority identity in Ukraine	29–34	10
VI. Language and cultural rights of minorities.....	35–43	11
VII. Situation of internally displaced persons and Crimean Tatars	44–56	13
VIII. Situation of religious minorities	57–62	16
IX. Situation of the Roma.....	63–67	17
X. Conclusions and recommendations	68–97	18

I. Introduction

1. The Special Rapporteur on minority issues, Rita Izsák, conducted an official visit to Ukraine between 7 and 14 April 2014, at the invitation of the Government. She visited Donetsk, Kyiv, Odesa and Uzhgorod. She consulted widely with hundreds of stakeholders, including senior government officials from the Ministry of Foreign Affairs and the Ministry of Culture, representatives of civil society and minority communities, religious leaders, political actors, academics, journalists and internally displaced persons (IDPs), the diplomatic community, United Nations bodies and other national and international actors. She thanks the Government and all of those who consulted with her and provided information.

2. Key objectives of her visit were to hear the voices of minorities and to understand their issues and concerns, both long-standing and current. The Special Rapporteur met representatives of communities including those who identified as ethnic Armenians, Azerbaijanis, Bulgarians, Crimean Tatars, Gagauzis, Germans, Greeks, Hungarians, Moldovans, Poles, Roma, Romanians, Russians, Ruthenians, Slovaks, Vietnamese and members of Jewish communities. She also met ethnic Ukrainians to learn about their situation as de facto minorities in some localities including the Autonomous Republic of Crimea.

3. The most recent census was conducted in 2001. The main minority groups recorded include Russians 8,334,100 (17.3 per cent), Belarusians 275,800 (0.6 per cent), Moldovans 258,600 (0.5 per cent), Crimean Tatars 248,200 (0.5 per cent) and Bulgarians 204,600 (0.4 per cent). There are smaller populations of Armenians, Hungarians, Jews, Poles, Romanians and other nationalities.

II. Methodology

4. The Special Rapporteur's evaluation is based on the provisions of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and other relevant international standards, from which she has identified four broad areas of global concern: (a) the protection of a minority's survival by combating violence against it and preventing genocide; (b) the protection and promotion of the cultural identity of minority groups, and their right to enjoy their collective identity and to reject forced assimilation; (c) the guarantee of the rights to non-discrimination and to equality, including ending structural or systemic discrimination and the promotion of affirmative action, when required; and (d) the right to the effective participation of minorities in public life and in decisions that affect them.

5. The Special Rapporteur focuses her work on minority groups whose generally non-dominant situations require measures to allow them to exercise all their rights, including minority rights, to the fullest. Apart from the national dimensions, minority issues have regional and local dimensions. A group that may constitute a dominant majority or a significant proportion of the population nationally or in a particular region may be numerically smaller and non-dominant in another region. Minority rights protection must also be applied fully for those who find themselves in the situation of being de facto minorities in the localities in which they live.

6. In view of the current political situation in the Autonomous Republic of Crimea and eastern Ukraine, the Special Rapporteur notes that ethnic Ukrainians may constitute de facto minorities in some regions where they live. Some communities, notably Crimean Tatars, self-identify as indigenous peoples. Their engagement with her mandate on minority

issues in no way undermines or is incompatible with their claims to indigenous status and to enjoy the rights contained in the United Nations Declaration on the Rights of Indigenous Peoples.

7. In its resolution 68/262 of 27 March 2014, the General Assembly upheld the territorial integrity of Ukraine and underscored that the referendum held in the Autonomous Republic of Crimea on 16 March 2014 had no legal validity. The visit and findings of the Special Rapporteur are in full conformity with resolution 68/262 regarding recognition of the continuing status of the Autonomous Republic of Crimea as the territory of Ukraine under international law. The present report does not provide a comprehensive analysis or chronology of events resulting in political and social unrest and conflict in 2014, but summarizes developments relevant to minority issues. The report includes references to events after the Special Rapporteur's visit and has benefited from the reports of the Office of the United Nations High Commissioner for Human Rights (OHCHR)¹ and others.

III. Minority rights: legal and institutional framework

8. Ukraine is a party to several of the international human rights instruments that are most relevant to minority rights, including: the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination. Article 9 of the Constitution of Ukraine provides that ratified international treaties are part of the national legislation. Ukraine is a member of the Council of Europe, and has been a State party to the Convention for the Protection of Human Rights and Fundamental Freedoms since 1997. It has signed and ratified the major European multilateral treaties for the protection of national minorities: the Framework Convention for the Protection of National Minorities, and the European Charter for Regional or Minority Languages, and falls under their monitoring procedures.

9. The Constitution of Ukraine² (art. 11) requires that the State “promotes the consolidation and development of the Ukrainian nation, of its historical consciousness, traditions and culture, and also the development of the ethnic, cultural, linguistic and religious identity of all indigenous peoples and national minorities”. The right to equality and non-discrimination is enshrined under article 24, which prohibits “privileges or restrictions based on race, colour of skin, political, religious and other beliefs, sex, ethnic and social origin, property status, place of residence, linguistic and other characteristics”.

10. Article 10 establishes that the State language is Ukrainian but that “the free development, use and protection of Russian, and other languages of national minorities of Ukraine, is guaranteed”. Article 53 recognizes the right to native-instruction: “Citizens who belong to national minorities are guaranteed in accordance with the law the right to receive instruction in their native language, or to study their native language in State and communal educational establishments and through national cultural societies”.

11. On 25 June 1992, Law 2494–XII on National Minorities³ was adopted. It defines national minorities as citizens who are not ethnic Ukrainian but hold feelings of a national identification and affinity among themselves (art. 3). It established a consultative body, the Council of Representatives for Public Associations of National Minorities, within the

¹ Available from www.ohchr.org/en/countries/ENACARegion/Pages/UAIndex.aspx.

² English version provided by Ukraine to the Venice Commission, available from [www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2014\)012-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2014)012-e).

³ Available from <http://zakon2.rada.gov.ua/laws/annot/en/2494-12>.

former Ministry for Nationalities (art. 5). It guarantees cultural rights including, inter alia, native-language instruction in State educational institutions, the celebration of national holidays, the right to freedom of religion, and protection of historical and cultural heritage (art. 6). Minority languages may also be used, alongside Ukrainian, in workplaces where the majority of the population belongs to a minority (art. 8). The right to political participation at all levels is guaranteed (art. 9). A specific State budget is established to support “the development of national minorities” (art. 16). Article 19 provides that in case of conflict between that norm and international law, the latter has primacy.

12. Since the Law on National Minorities was adopted, the institutional framework of national minorities has undergone numerous changes and the Ministry for Nationalities has been abolished. In 2010, Presidential decree No. 1085/2010 disbanded the State Committee on Nationalities and Religions, which was the main body in charge of minority issues, following institutional reform, and its competencies were assumed by the Ministry of Culture. At the time of the Special Rapporteur’s visit, the Department of Organizations and National Minorities had primary responsibility for minority issues within the Ministry of Culture and had only six staff members.

13. In 2013, the Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities stated that the Law on National Minorities was “outdated”, “too vague in its provisions” and “inconsistent”, resulting in “a gap in legal certainty for persons belonging to national minorities with regard to the enjoyment of their constitutionally guaranteed rights, such as in the areas of education, language or representation in elected bodies”.⁴ The European Commission against Racism and Intolerance of the Council of Europe has called for revisions to the Law to include provisions prohibiting direct and indirect racial discrimination.⁵

14. Law 5029–VI on Principles of the State Language Policy⁶ was adopted on 3 June 2012, and constitutes, to date, the primary national legislation on national minorities’ linguistic rights, and the use of minority languages in public life. Recognition of the status as “regional languages” is provided to 17 languages (Belorussian, Bulgarian, Crimean Tatar, Gagauz, German, Hungarian, Karaim, Krymchak, Modern Greek, Moldovan, Polish, Romani, Romanian, Russian, Rusyn, Slovak and Yiddish) in regions where the language is spoken by at least 10 per cent of the population (art. 7). That allows minority languages to be used in public administration, schools and courts alongside Ukrainian. Other provisions include the right to use minority languages in Parliament, the publication of the acts of the central State authorities, guarantees of freedom to receive media broadcasts from neighbouring countries in regional or minority languages, and free circulation of information in the written press in those languages. Despite moves to abolish the law in February 2014, these were vetoed by the interim President and, at the time of writing, the law remains in force while under review.

15. The 2001 Criminal Code of Ukraine criminalizes (art. 161) inciting national, racial or religious enmity and hatred, humiliation of national honour and dignity, insulting citizens’ feelings with respect to their religious convictions, and any direct or indirect restriction of rights, or granting direct or indirect privileges to citizens based on race, colour of skin, political, religious and other convictions, sex, ethnic and social origin, property status, place of residence, linguistic or other characteristics. In 2009 amendments expanded

⁴ Available from www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_3rd_OP_Ukraine_en.pdf.

⁵ Available from www.coe.int/t/dghl/monitoring/ecri/country-by-country/ukraine/UKR-CbC-IV-2012-006-ENG.pdf.

⁶ Available from <http://zakon2.rada.gov.ua/laws/annot/en/5029-17>.

the scope of provisions and penalties for inciting racial, national and religious hatred, intolerance and discrimination.⁷

16. The legislative framework for political representation and the electoral system includes the Constitution, the Law on Political Parties (2001),⁸ and the Law on Election of the People's Deputies (2011).⁹ The 2012 Law on National Minorities (art. 9) contains a general provision regarding the representation of minorities among candidates for elections, which in principle guarantees minorities the right "to be elected or to be appointed to any position in the legislative, executive, judicial bodies, in the bodies of local or regional self-government".¹⁰ However, no specific measures are provided to ensure the political participation of minorities. Some interviewees indicated that the current formulation of electoral districts and restrictions on minority parties should be reconsidered in order to improve the possibility for minority representatives to be elected to Parliament.

17. The Ukrainian Parliament Commissioner for Human Rights (the Ukrainian Ombudsperson¹¹) is a constitutional, independent body created in December 1997. The Commissioner conducts legal proceedings and inspections and receives individual complaints. A 2010 special report of the Ukrainian Parliament Commissioner for Human Rights noted that a monitoring programme on the human rights status of national minorities had been initiated by the Ombudsman's office.¹² The European Commission against Racism and Intolerance recommended the establishment of a special representative of the Ombudsman with competence to deal with minority issues and racial discrimination.¹³

18. The Ministry of Culture stated that processes were under way to strengthen and expand institutional attention to minority issues, including proposals to establish new independent bodies with responsibility for minorities and inter-ethnic affairs. At the time of writing full details of those proposals were unavailable. The Special Rapporteur urges the authorities to put in place fully inclusive and participatory processes to establish such bodies and to provide assurances that they will be representative of minorities and have appropriate budgets and powers. She noted a general lack of awareness of minority rights amongst minorities and found that minorities mainly focused attention on intercommunal relationships, but often seemed to have limited knowledge of government obligations to protect and promote minority rights.

⁷ Available from www.coe.int/t/dghl/monitoring/ecri/country-by-country/ukraine/UKR-CbC-IV-2012-006-ENG.pdf.

⁸ Available from <http://zakon3.rada.gov.ua/laws/annot/2365-14>.

⁹ Available from www.epde.org/tl_files/EPDE/RESSOURCES/Electoral%20Legislation/Election%20Code%20of%20Ukraine_EN.pdf.

¹⁰ Denys Kovryzhenko, *Regulation of Political Parties in Ukraine: The Current State and Direction of Reforms* (Agency for Legislative Initiatives, OSCE/ODIHR, 2010), p. 86, available from <http://parlament.org.ua/upload/docs/Party%20Report%20Ukraine.pdf>.

¹¹ See www.ombudsman.gov.ua/en/index.php?view=article&catid=38%3A2010-12-15-09-15-51&id=1145%3A1aw-of-ukraine-qon-the-ukrainian-parliament-commissioner-for-human-rightsq&format=pdf&option=com_content&Itemid=25.

¹² Available from www.ombudsman.gov.ua/en/images/stories/07022011/S_Dopovid_5_en.pdf, p.148.

¹³ *Ibid.*, p. 147.

IV. Minority rights in the context of political and social unrest in 2014

19. The situation of political and social unrest in some regions since February 2014, while having minority rights dimensions, is distinct from the general minority rights situation in Ukraine. Evidence suggests that the concerns of minorities, primarily over language and cultural rights, following the Euromaidan movement and the new Government taking power in February 2014, have been unduly escalated to create a situation of high tension and conflict. The presence and activities of far-right, ultranationalist “self-defence” groups and unidentified illegal armed actors have created anxiety and inflamed tensions in several locations. The Special Rapporteur does not consider that they represent or speak for most persons belonging to minorities or the majority of the Ukrainian people, and they should not be allowed to influence political, social or economic decisions via force or coercion.

20. The role of informal, unofficial and sometimes illegally armed groups, including in the events in the occupied Autonomous Republic of Crimea, and the unrest in eastern and southern Ukraine leading to the takeover and occupation of some buildings and towns have been prominent and highly destabilizing. It is essential to quickly re-establish the rule of law and the role of legitimate law enforcement actors and for all non-official groups to be disarmed and dispersed. Where any individuals involved in such groups are alleged to have committed or incited crimes, they must be prosecuted according to the law.

21. Several interviewees complained about worsening economic conditions, corruption, unemployment and the lack of good governance, which they considered to have contributed to grievances, political instability and a general distrust of politicians and political structures. It is essential to consider the wider economic and political dimension of the current situation and to implement measures to guarantee equality, social and economic rights and combat corruption and mismanagement of resources, as a means to increase trust in political leadership. The reality or perception of inequality in access to resources or distribution of resources, also involving geographical imbalances, as well as partisan politics and political patronage serve to undermine stability and create ethnic, linguistic, and geographic fault lines.

22. Ethnic Russians consulted in Donetsk, Kyiv and Odesa strongly expressed their views that the Euromaidan movement represented an explicit anti-Russian agenda with potential implications for their future rights and security. Some stated concern over the role of far-right and Ukrainian nationalist groups including the All-Ukrainian Union “Svoboda” (Freedom) and “Pravyi Sektor” (Right Sector), that have openly expressed anti-Russian and anti-Semitic sentiments and have nationalist agendas. It is evident that dialogue between the Government and ethnic-Russian groups in eastern and southern Ukraine is weak, while it is essential to build confidence that minority rights guarantees will be put in place and respected. The Special Rapporteur notes the poor election results of far-right and allegedly anti-Russian parties in the May 2014 elections.¹⁴

23. The Special Rapporteur was not provided with evidence that anti-Russian sentiment was widespread. There have been few incidents of discrimination, harassment or abuse of individuals or groups on the basis of their Russian identity in Kyiv or other localities. Russians and ethnic Ukrainians frequently stated that their relations remained good. Incidents of intercommunal violence were extremely rare or non-existent in most localities at the time of the Special Rapporteur’s visit. However, in the current situation of conflict in

¹⁴ Right Sector and Svoboda received just 0.9 per cent and 1.3 per cent of the vote, respectively.

some regions, it is necessary for all relevant actors, including the United Nations human rights monitoring team, to identify incidents or trends that indicate that violence or intimidation on the grounds of ethnicity, language or religion are increasing.

24. In April and May 2014, unrest in southern and eastern Ukraine escalated significantly with public buildings in localities including Donetsk, Kharkiv, Odesa and Slovyansk falling under the occupation of pro-Russian activists and violent incidents as Ukrainian authorities responded. Vaguely defined pro-Russian elements, including organized and illegally armed groups, often emerged in previously peaceful locations, sometimes with tragic consequences. Such incidents have the potential to further divide communities along ethnic and linguistic lines and create the conditions for the escalation of tensions.

25. On 11 May 2014, pro-Russian elements in separatist-controlled cities and towns in Donetsk and Luhansk regions held “referendums” asking “Do you support the act of State self-rule of the Donetsk/Luhansk People’s Republic?” The vote was condemned as illegal by the Government and the international community and the Special Rapporteur supports that opinion. Reports suggest that many pro-unity supporters boycotted the action while pro-Russian supporters took part. The “referendums” lacked democratic legitimacy. They provided a distorted and unreliable account of public opinion and have served to further divide communities, increase tensions and destabilize the situation.

26. Some minority representatives emphasized their desire for greater political and cultural autonomy for some regions. Some representatives of Russian ethnicity maintained strongly nationalist feelings associated with their kin-State and historical claims over certain territories. Those who proclaimed a “People’s Republic” in Donetsk and held “referendums” on the status of those regions stated their objective as separation from Ukraine. Regrettably, some have sought to achieve that by force.

27. The Special Rapporteur considers it important to monitor and robustly address any hate speech and incitement to violence that may fuel tensions, particularly in the context of the current crisis. The Organization for Security and Co-operation in Europe (OSCE)/Office for Democratic Institutions and Human Rights (ODIHR) Human Rights Assessment Mission in Ukraine found that “instances of hate speech towards ethnic and religious groups have been widespread” including in the Autonomous Republic of Crimea. It stated that “pro-Maidan activists have often been labelled ‘*banderovtsy*’, ‘Nazis’ and ‘fascists’. Supporting the territorial integrity and unity of Ukraine has been depicted as a sign of intolerance and nationalism”.¹⁵ The Mission report noted indications of growing anti-Tatar sentiment in the Autonomous Republic of Crimea. The Special Rapporteur concurs with the assessment of the Mission that there has been a trend that has seen political orientation conflated with ethnic background in eastern and southern Ukraine, where Ukrainian identity and symbols have been targeted for hate speech. Equally, any anti-Russian sentiments must be closely monitored.

28. The Special Rapporteur received reports stating that some Russian language media sources in Donetsk Oblast (region) and Ukrainian language media in the Autonomous Republic of Crimea have faced closure or broadcasting restrictions. The violent takeover of some broadcast media was reported in some localities under pro-Russian control.¹⁶

¹⁵ See www.osce.org/odihr/118476?download=true.

¹⁶ The June 2014 OHCHR report on the human rights situation in Ukraine states that “according to NGOs, freedom of media in the Donetsk region is severely curtailed, with Ukrainian TV channels switched off by the ‘Donetsk People’s Republic’ and replaced by its own media programmes and Russian TV” (para. 232). Available from www.ohchr.org/Documents/Countries/UA/HRMMUReport15June2014.pdf.

Freedom of expression and media freedom should be guaranteed within the framework of the Constitution and international law, and respected in practice. All journalists should be free to work in safety and without threat of detention or violence. Nevertheless, evidence suggests that some media provided a distorted picture of events as they developed. Journalists and those who control media content have a responsibility to convey information accurately and objectively and to avoid propaganda or misinformation which may incite unrest or violence.

V. Issues of minority identity in Ukraine

29. Given the historical, geopolitical and national/cultural contexts that have shaped independent Ukraine, issues of identity are complex and emotive. Many of those consulted self-identified primarily according to their national or ethnic origins in a kin-State, while placing less emphasis on their Ukrainian identity and citizenship. Ukraine consequently has numerous large minority groups with strong historical, ethnic, cultural and linguistic connections to neighbouring countries and clear historical narratives regarding their communities, and their “belonging” in Ukraine. The Special Rapporteur also interviewed representatives of groups, including Ruthenians, who felt that they had not been recognized as minorities or indigenous peoples, which is how they identified themselves.

30. Many representatives of minorities emphasized their strong and enduring relations with their kin-States and the fact that no barriers existed to their establishing associations and maintaining social and cultural ties with those countries. They maintained cultural associations and events and minority media, as well as education in their mother tongue languages, sometimes with the support of kin-States. It is evident that Ukraine substantively upholds the right of minorities to establish their own associations and to maintain free and peaceful contacts including across frontiers; some interviewees stated that additional State support and funding were necessary.

31. Despite a strong feeling of minority identity, the majority of those consulted also emphasized their Ukrainian citizenship and their satisfaction with their treatment as minorities. Some interviewees suggested that stronger history and civic education components could be incorporated in school curricula in order to foster stronger Ukrainian national identity, mutual knowledge and understanding among different groups and to promote national unity.

32. The long history of settlement in the territory of Ukraine by different peoples has created overlapping and sometimes competitive identities. In the short time since independence, it has proved difficult to unite such diverse population groups and forge a sense of common Ukrainian identity.¹⁷ Measures to promote national identity, culture and language, known as Ukrainianization, are legitimate and necessary to promote unity and economic, geographic and social mobility in a country with such diverse population groups. However, issues of cultural autonomy and the ability for minorities to influence decisions that affect them and the regions where they live were particularly prominent in consultations held and the Special Rapporteur encourages continued dialogue with minorities on those important matters.

33. Russian minority representatives acknowledged that, prior to the unrest, they did not face a repressive environment, widespread discrimination, exclusion, or violence based on their identity. They commonly reflected their greatest concerns as being in the fields of

¹⁷ Minority Rights Group International, “Ukraine overview”, available from www.minorityrights.org/5053/ukraine/ukraine-overview.html.

language and education and expressed their perception that the Euromaidan movement and pro-European Government would diminish the status of the Russian language and culture, reinforced by attempts to abolish the 2012 language law. Some ethnic Russians viewed the territory and people of Ukraine as historically and culturally Russian and strongly rejected the label “minority” being applied to them.

34. A population census is overdue and is planned for 2016. In the absence of accurate disaggregated data that reveal the ethnic, linguistic or religious composition of the population, there is often dangerous speculation and manipulation relating to the size of certain groups. An early and well-conducted census will provide reliable data on the ethnic and linguistic diversity of Ukraine, help to identify problems facing particular population groups, and enable the Government to understand and respond to the needs of different minorities.

VI. Language and cultural rights of minorities

35. Consultations revealed that the use of minority languages was highly important and emotive for many communities and an essential aspect of individual and community identity. National minorities clearly expressed their desire to maintain and protect their language rights and their ability to use their languages freely in private and public without discrimination. Most communities broadly expressed satisfaction that their children had the opportunity to learn and, in many cases, be taught in their mother-tongue language. Minority schools have been established and can function freely according to national law.

36. Calls to upgrade the status of Russian as a second official State language have been the subject of fierce disagreement between pro-Russians and those who advocate the primacy of Ukrainian. The Government considers that widespread knowledge and use of Ukrainian as the State language are important to Ukrainian national identity and unity and allow economic, geographical and social mobility while ensuring that those belonging to any ethnic or linguistic minority can participate fully in all aspects of society, including political life. Minority representatives frequently mentioned that the use of minority languages was a significant and valued feature of Ukrainian society and was not incompatible with the teaching and use of Ukrainian.

37. Reliable data concerning the number of users of minority languages and their geographic distribution are important to ensure that they comply fully with international standards for protection of the linguistic rights of minorities. The 2001 census revealed that, while 67.5 per cent described their native language as Ukrainian, 29.6 per cent recorded their native language as Russian.¹⁸ Russian is widely spoken in the south, the east and the Autonomous Republic of Crimea, particularly the regions of Crimea (77.0 per cent), Donetsk (74.9 per cent), Luhansk (68.8 per cent), Zaporizhia (48.2 per cent) and Kharkiv (44.3 per cent), while in some other regions there is reportedly extensive bilingualism.

38. The passing of Law 5029–VI on the Principles of the State Language Policy in 2012 provided relatively extensive language rights and a low threshold of 10 per cent for recognition of regional language status, benefiting several minority language communities. However, it also raised concerns, including with regard to the promotion of the Ukrainian language, despite its status as the sole State language. The Law was criticized, including by the European Commission for Democracy through Law (Venice Commission), as being overly focused on the promotion of the status of the Russian language, potentially at the

¹⁸ Available from http://2001.ukrcensus.gov.ua/d/mono_eng.pdf.

expense of Ukrainian.¹⁹ While the Law remains in effect, the Government has announced that new language legislation is being drafted and will be subject to review by the Commission before being passed into law.

39. Nevertheless, steps in February 2014 to abolish the 2012 Law on the Principles of the State Language Policy, although vetoed in practice, created anxiety as minorities were concerned that new amendments would weaken their linguistic rights. Ethnic Russians spoke passionately about the decline in use of Russian in education, and their desire to see enhanced protection measures put in place. Some pointed out that there were relatively few Russian language schools in relation to the number of Russians who considered it their first language and described a gradual decline of the Russian language and cultural institutions.

40. Some ethnic Russians voiced their concerns regarding assimilation and the gradual erosion of elements of Russian culture and language. One representative stated: “There is not a repressive environment, but there is an attempt to push out the Russian culture part of me.” Although according to Ministry of Education and Science statistics, in 2012/2013 Russian was the language of instruction and study in 1,256 schools providing general education, with 694,331 pupils being taught in Russian, ethnic Russian representatives noted a decline in education in the Russian language, notably in higher education, and that some Russian cultural centres had closed.

41. In practice, Russian remains widely used and understood. The Government states that 40 per cent of all printed media nationally are in Russian and up to 74 per cent of media broadcasts are in Russian in some regions. Government objectives of promoting Ukrainian as the national language may impact on the extent of Russian language use over time. Although according to the Government over 100 public associations represent the Russian minority, some ethnic Russians stated that civil society organizations and activities to promote Russian language and culture and to raise their issues and concerns were relatively weak.

42. The January 2014 report of the Committee of Experts on the European Charter for Regional or Minority Languages,²⁰ while noting some challenges for smaller linguistic minorities, stated: “In regard of Hungarian, Romanian and Russian the situation is by and large satisfactory and the right of speakers to receive education in these languages is more or less secured. The traditional models of teaching in Hungarian, Romanian and Russian have been preserved, although there seems to be a certain decline in the number of pupils enrolled.” Concern was expressed that the “phasing out of higher education in Russian will constitute an obstacle to full access of Russian speakers to higher education”. The report referred to an unmet demand from users of minority languages for support to establish and sustain cultural centres and a lack of long-term financing for such centres.

43. Civil society groups emphasized that any revised language law must fully conform with international standards and should not weaken the existing protection of the linguistic rights of minorities. Some expressed concern that a new language law might increase the threshold of 10 per cent for recognition of minority languages as “regional languages”, restrict language rights in fields such as the media and education, and provide weak language rights protection for smaller and dispersed minority groups. Importantly, some minorities stated that they had not been consulted about the process of drafting a revised

¹⁹ The Commission recommended the implementation of balanced policies in order to preserve Ukrainian as an integrative tool within society. See [www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2011\)047-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)047-e).

²⁰ Available from www.coe.int/t/dg4/education/minlang/Report/EvaluationReports/UkraineECRML2_en.pdf.

law and were unaware of its status. Ethnic Russians expressed concern that allegedly anti-Russian officials of Svoboda would have a substantive role in formulating the new law.

VII. Situation of internally displaced persons and Crimean Tatars

44. The Special Rapporteur attempted to gain access to the Autonomous Republic of Crimea to assess the situation of minorities and to consult with the de facto authorities and minority and other community actors. Regrettably, she did not receive the required assurances to enable her to travel. The general human and minority rights situation in the Republic is of concern as administrative authority over the region has been illegally assumed by the Russian Federation following a disputed referendum on 16 March 2014.²¹ On 27 March, the General Assembly underscored in its resolution 68/262 that that referendum had “no validity” and upheld the territorial integrity of Ukraine, including the Autonomous Republic of Crimea.

45. The 2001 census revealed that ethnic Russians made up 58.3 per cent of the total population in Crimea (1,180,400 people, although that percentage has declined from 65.6 per cent in 1989). Ukrainians accounted for 492,200 people or 24.3 per cent (a decline from 26.7 per cent in 1989), and 243,400 were Crimean Tatars (reflecting an increase from 1.9 per cent in 1989 to 12 per cent in 2001 owing to the significant return of Tatars to the peninsular). The number of returning Crimean Tatars reportedly peaked at 41,400 in 1991, and has been rapidly falling since.²²

46. The Special Rapporteur interviewed several people who had left the Autonomous Republic of Crimea. Some mentioned uncertainty, social and political pressure and fear for their security and rights as the reasons for their decision to leave. They reported a tense and threatening environment, including via social media, against those who opposed or criticized the events surrounding the “referendum” and some stated that they knew about incidents of physical and verbal abuse. Some interviewees stressed their desire to remain Ukrainian and not to live in the Russian Federation. Some stated that Ukrainian language media in Crimea had been “switched off”. In the current political circumstances, the human rights situation of ethnic Ukrainians who remain in the Autonomous Republic of Crimea as a de facto minority requires close monitoring; some reports suggest that there has been intimidation of those who openly oppose Russian control of the region or use the Ukrainian language in public.

47. Some individuals stated that concerns over maintaining Ukrainian citizenship and passports had been a contributing factor in their decision to leave. They expressed fears that those who wished to remain Ukrainian in the Autonomous Republic of Crimea would face discrimination as “foreigners” with implications for their economic, social and cultural rights and their right to participate in political life. Crimean residents were given one month, until 18 April 2014, to submit applications declaring that they did not wish to become Russian citizens. Some reported procedural difficulties that apparently made it difficult to meet the necessary requirements to keep their Ukrainian passports, including a shortage of registration offices, and suggested that those were deliberate barriers.

48. Concern exists regarding the implications of not accepting Russian citizenship and passports, including loss of property, restrictions on freedom of movement, provision of

²¹ Pro-Russian authorities claimed that 97 per cent of voters supported the proposal to join the Russian Federation, a figure that was disputed by the Ukrainian authorities.

²² Minority Rights Group International, “Ukraine overview”, available from www.minorityrights.org/5053/ukraine/ukraine-overview.html.

State pensions, and the possible loss of government jobs. Civil servants and law enforcement officials are required under Russian law to formally relinquish their Ukrainian passports since those who occupy government jobs cannot hold dual citizenship.²³ Some expressed concern that Ukrainian citizens would feel compelled not to refuse Russian citizenship owing to the potential impact on their human rights. Equally, expectations of a hostile climate towards those with pro-Ukrainian views and those who wished to remain Ukrainian might encourage more people to leave.

49. The Special Rapporteur consulted leaders of the Crimean Tatar Mejlis (the self-governing body of Tatars). The return of Tatars, who are the indigenous inhabitants of the Autonomous Republic of Crimea, following their mass deportation in 1944, resulted in reported friction with the significant Russian population. Repatriation programmes were reportedly insufficiently funded and many returnees lacked adequate support. Issues of concern included high unemployment among Tatars and competition for land, despite their claims to land rights as indigenous people. There was no compensation provided for the properties that Tatars had lost and many, lacking access to land, occupied public lands. Consequently incidents of confrontation with other communities and the police have been recorded.

50. It is of great concern that many Crimean Tatars will refuse to accept Russian citizenship or authority which may render them even more vulnerable. Most Crimean Tatars boycotted the March 2014 referendum.²⁴ Sergey Aksyonov, who at the time was “governor” in the Autonomous Republic of Crimea, reportedly stated publically that Crimean Tatars should “leave if they don’t like it”. Some Crimean Tatar leaders who travelled out of the Republic have faced restrictions on re-entering, including the former head of the Mejlis, Mustafa Dzhemilev, who called for a boycott of the “referendum”. On 22 April, he was banned from travelling to the Republic for five years, leading to protests and subsequently a warning from the de facto authorities that the Mejlis could be dissolved if it supported “extremist activities”. On 5 July, a ban on entry was imposed on the current head of the Mejlis, Refat Chubarov, reportedly for “extremist statements”. Charges were reportedly brought against 30 protestors and fines imposed. The authorities imposed a temporary ban on public protests in advance of the seventieth anniversary of the deportation of Crimean Tatars.

51. Some incidents have heightened anxiety within Tatar communities. On 3 March 2014 a Tatar labourer, Reshat Ametov, disappeared after reportedly being led away from a protest in Simferopol by unknown men in camouflage. His body was found days later in the mixed ethnic community of Belogorsk. Prior to the referendum of 16 March, Tatar communities reportedly had crosses marked on the walls or gates of their homes, which allegedly heightened anxiety regarding potential targeting. OHCHR stated that some Tatar representatives had mentioned concerns over unidentified uniformed men claiming rights on Tatar properties and land and reports of plans to relocate some communities.²⁵

52. At the time of drafting, the Office of the United Nations High Commissioner for Refugees (UNHCR) reported over 10,000 verified IDPs in 24 regions as of 20 May 2014, the majority having left the Autonomous Republic of Crimea, with numbers continuing to

²³ EUDO Observatory on Citizenship, “The aftermath of annexation: Russia and Ukraine adopt conflicting rules for changing citizenship of Crimean residents” (11 April 2014), available from <http://eudo-citizenship.eu/news/citizenship-news/1113-the-aftermath-of-annexation-russia-and-ukraine-adopt-conflicting-rules-for-changing-citizenship-of-crimean-residents>.

²⁴ OHCHR was informed by representatives of Crimean Tatars that no more than 1,000 out of a population of 290,000–300,000 participated in the 16 March referendum.

²⁵ June 2014 OHCHR report on the human rights situation in Ukraine (see note 16 above).

rise.²⁶ The Government has no registration system for IDPs on national or ethnic lines that would allow for a full breakdown according to identity. Estimates suggest that many are Crimean Tatar (80 per cent in western Ukraine; 20 per cent in the Kyiv region); however there are reports of an increased registration of ethnic Ukrainians, ethnically mixed families, ethnic Russians, refugees, asylum seekers and foreigners married to Ukrainian citizens.²⁷ The true number may exceed that provided, given that many people may have found accommodation with relatives and communities without registering with organizations that provide support. According to UNHCR, factors triggering movement include increased security concerns and personal threats.

53. Efforts to address the needs of IDPs and protect the rights of those who remain in the Autonomous Republic of Crimea and prevent further displacement should conform with the Guiding Principles on Internal Displacement. UNHCR reported the priority concerns of IDPs as: maintaining contacts in the Autonomous Republic of Crimea; freedom to move and communicate between the Republic and the mainland; assistance with shelter and employment; simplified procedures for obtaining identity and residence documents to enjoy social and economic rights on the mainland; continuity of social payments; and assistance with property sales, transfer of funds and personal belongings. The Special Rapporteur welcomed efforts to support IDPs and witnessed solidarity across various communities manifested in voluntary services and contributions. However, some reports suggested that IDPs had experienced difficulties gaining access to financial support from the State.

54. Some Crimean Tatar representatives indicated that, historically, their rights had not been fully recognized and protected by any authority in the Autonomous Republic of Crimea. The Government mentioned that, following the events in the Republic resulting in the “referendum”, in March 2014 the Verkhovna Rada had passed a resolution guaranteeing the rights of the Crimean Tatar people as a part of the State of Ukraine (No. 1140–VII of 20 March). According to the resolution, Ukraine guarantees to preserve and develop “the ethnic, cultural, linguistic and religious uniqueness of the Crimean Tatar people, as indigenous people and of all national minorities of Ukraine”. It acknowledges the Mejlis of the Crimean Tatar people as a competent authority and requires urgent submission of draft laws and regulatory legal acts confirming the status of the Crimean Tatar people as indigenous people.

55. According to General Assembly resolution 68/262 on the territorial integrity of Ukraine, the Russian Federation has no legal jurisdiction over the Autonomous Republic of Crimea or its populations. Nevertheless, it is to be noted that on 21 April 2014, following its occupation of the Republic, the Russian Federation published a decree on measures to rehabilitate Armenian, Bulgarian, Greek, Crimean Tatar and German populations and State support for their revival and development. The Special Rapporteur notes that the full spectrum of human rights of minorities must be respected, protected and promoted without discrimination by the de facto authorities even in situations of territorial dispute or occupation.

56. In view of recent political and social change and the activities of armed militias, the Special Rapporteur recommends that the United Nations human rights monitoring mission should be allowed unfettered access to the Autonomous Republic of Crimea at the earliest opportunity. It should engage with both the de facto authorities and diverse civil society and community actors to ensure that human rights standards, including minority rights, are upheld in practice.

²⁶ See <http://unhcr.org.ua/attachments/article/971/IDP.pdf> and www.unhcr.org/537b24536.html.

²⁷ From mid-April 2014, UNHCR noticed movement of people away from eastern Ukraine as tensions increased in the regions.

VIII. Situation of religious minorities

57. Ukraine has a wide range of religions, belief groups and religious freedoms and the rights of religious minorities are protected in practice. Nevertheless, given the climate of political and social unease, it is particularly necessary for the authorities to guard against any human rights violations, including acts of violence, intimidation, threat or abuse targeted at individuals or groups based on their religion. Some incidents of concern have been reported in the context of the tense social and political environment since February 2014.

58. Jewish representatives reflected that they were well integrated, enjoyed their rights as a religious minority and that anti-Semitism, discrimination and violent incidents were rare. They generally expressed satisfaction at the extent of their minority rights protection. However, some incidents were reported in the context of the unrest that had put Jewish communities on alert. In February, the Giymat Rosa Synagogue in Zaporizhia, near Kyiv was firebombed. In early April 2014, a Holocaust memorial in Odesa was vandalized with Nazi graffiti. On 19 April, the Nikolayev Synagogue was firebombed causing minor damage. Representatives expressed concern about adequate protection measures. One leader stated: "No proper police are in place; ordinary people are carrying arms." Some anti-Semitic graffiti was also reported in the Autonomous Republic of Crimea.

59. Of concern to the Jewish community was the distribution in Donetsk by men wearing balaclavas of leaflets calling on Jews to register with the pro-Russians, pay a tax, or leave. The leaflets bore a stamp reportedly of the self-proclaimed "People's Republic of Donetsk", although it declared the leaflets to be a hoax. It remains unclear who was behind the leaflet. One leader of the Jewish community mentioned an incident in which neo-Nazi graffiti, allegedly signed by the Right Sector, had been painted on the walls of a synagogue in Odesa. Right Sector representatives denied involvement and reportedly helped remove the graffiti. A Jewish leader stated: "Politicians are playing the 'Jewish card'" and that the incidents were intended to inflame tensions and concerns amongst Jewish communities for political ends.

60. While incidents remain rare, they nevertheless indicate a potential rise in manifestations of anti-Semitism, which must be monitored closely. The lack of implementation of the rule of law in some localities provides an environment in which far-right groups have undoubtedly increased their activities and such anti-Semitic incidents may become more pronounced. Such incidents have created anxiety and should be investigated as crimes aggravated by hatred. Anti-Semitism must be acknowledged by the Government and measures should be taken to prosecute according to the law any person or group alleged to have committed or incited anti-Semitic acts.

61. Senior representatives of the Ukrainian Orthodox Church (Moscow Patriarchate) expressed concerns over alleged reports from church members of rising animosity against them, searching of properties, and the questioning of a church leader. They stated that there had been calls for Russian churches to be destroyed and Russian priests to be killed. They mentioned calls for the two most important monasteries to be transferred to the Kyiv Patriarchate and threats, allegedly by the Right Sector, to take over the cathedral unless it was transferred to the Kyiv Patriarchate. They reported cases of intimidation and persecution, including the case of a priest who had fled to Luhansk after having been interrogated by the authorities.

62. In the Autonomous Republic of Crimea, there have been news reports of representatives of the Ukrainian Orthodox Church claiming that Russian priests with armed supporters had threatened to confiscate churches. Some representatives of the Ukrainian Catholic Church reportedly left Crimea following alleged threats of arrest or property

seizure and intimidation. One priest was allegedly detained and beaten in March 2014 and a number of priests and parishioners have reportedly left for areas under Ukrainian control. Some Tatar representatives expressed concern, as members of the Muslim minority, over the extent to which their rights to freedom of religion, expression and assembly would be protected. According to UNHCR, some observant Muslims (mainly Tatar) and evangelical Christians mentioned fear of religious persecution as a reason for leaving the Autonomous Republic of Crimea.

IX. Situation of the Roma

63. The Special Rapporteur was made aware of ongoing concerns with regard to the situation of Roma communities in Ukraine. She visited a Roma settlement and consulted widely with Roma representatives. Economic and social marginalization, as well as problems with registration and identity documents, were widely reported by Roma representatives. The Government's Strategy on the Protection and Integration of Roma in Ukraine until 2020 as well as the National Action Plan on Roma Inclusion are welcomed and have been drafted with the participation of some Roma organizations. However Roma representatives expressed their concern over their lack of participation in the formulation and monitoring of the Strategy and stated that policies were often inadequately funded and poorly implemented in practice.

64. In the context of the tense political situation in March and April 2014, there have been reports of attacks on some Roma communities by armed perpetrators. Despite comments from some Roma that they had previously had good relations in the locality, such incidents were clearly causing anxiety in Roma communities. The European Roma Rights Centre stated that: "It is evident in the current ongoing political instability in Ukraine that some elements are attempting to target Roma, or to mark Roma as scapegoats".²⁸ In the current context of tension and with the reported presence of a number of far-right and extreme nationalist groups in different localities, threats and attacks against Roma communities must be taken extremely seriously, prevented and perpetrators prosecuted where any such acts take place.

65. On Friday 18 April 2014, there was an attack on a Roma settlement in the city of Slovyansk, which was largely under the control of pro-Russian illegally armed groups. According to residents, at about 10 p.m. a group of around 20 masked armed people burst into Roma houses, beat residents, including women and children, demanded gold and money and took possessions. The attackers were armed with automatic weapons and fired shots into some homes. On the same day, a Roma family house was reportedly set on fire in Cherkassy following tensions between Roma and non-Roma in the town.²⁹ The Special Rapporteur also received unconfirmed information about alleged threats against Roma by separatists in Donetsk and Luhansk at the end of May, which had reportedly resulted in 60 Roma families leaving to seek refuge with families in Lviv and in the Russian Federation. Such incidents should be immediately investigated.

66. One Roma resident of Slovyansk is reported as stating: "They say they are going to evict the Roma from here. And we don't sleep in our houses, because we are afraid someone will come."³⁰ On 29 April 2014, a Roma man was shot and seriously injured in Slovyansk while reportedly trying to defend his home from attackers. Roma representatives

²⁸ See www.errc.org/article/joint-statement-on-violence-against-roma-in-ukraine/4278.

²⁹ Ibid.

³⁰ See www.upi.com/Top_News/World-News/2014/04/22/Ukrainian-Roma-attacked-and-robbed/5231398172543/.

stated that they had alerted authorities about such incidents and called for heightened security, including police patrols of Roma settlements, to protect Roma from further attacks. They urged the affected Roma communities to file complaints about violence or threats although they indicated that the Roma were fearful of doing so given the lack of trust in police forces in some locations.

67. The Special Rapporteur visited a Roma community on the outskirts of Kyiv. Over 100 people, including more than 60 children, were living on a rubbish tip in basic shelters of wood and tarpaulin. The community scavenged scrap from the site which they sold to local merchants. Community members described their situation, which included a shortage of food and drinking water, and poor sanitation, health and access to health care. None of the children were in school and they were clearly inadequately dressed for the low temperatures. The community members stated that they had travelled from Uzhgorod owing to the lack of work or income-generating opportunities there and in the hope of finding a better situation. The community needs urgent intervention to improve living conditions and ensure the health, well-being and access to education for their children.

X. Conclusions and recommendations

General comments

68. **Many persons belonging to minorities in Ukraine have strong, distinct historical, ethnic, religious and linguistic identities that they wish to maintain and express, as well as strong cultural, economic, social or linguistic connections with kin-States. Their historical and group narratives are frequently heavily influenced by those ties. Despite previous periods of political and social upheaval since independence, harmonious relations have endured between different population groups and equal treatment was described in most areas of life. Many minority representatives emphasized their minority status while asserting their desire to build their futures as equal citizens of Ukraine.**

69. **Ukraine is a relatively new independent State, following a long period of historical Russian linguistic and cultural hegemony. In the current context it should be recognized that a gradual decline in the influence and extent of a formerly dominant minority language and culture does not automatically indicate evidence of discrimination or human rights violations. However, while it is legitimate for the Government to foster Ukrainian national identity and language, that must be conducted in a manner which respects, protects and promotes the rights of minorities. Sensitivity must be exercised to ensure that no law, policy or programme has discriminatory intent or effect.**

70. **Ukraine has a legislative and policy framework and environment that are generally consistent with the provisions of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and that are generally conducive to the protection of minority rights, including their civil and political and economic, social and cultural rights.**

71. **As in many States, the infrastructure for minority rights protection requires strengthening and development and complaints by minorities must be addressed appropriately. That should be achieved in full consultation with minorities. It is essential that any revisions to existing legislation and policy, as well as newly adopted laws, including relating to the status and use of minority languages, fully conform with international standards relating to equality, non-discrimination and minority rights.**

72. Any revised language law must be carefully considered and sensitively addressed to ensure that it fully conforms with international standards for the protection of the linguistic rights of minorities, while equally not undermining the knowledge and use of Ukrainian. It should not weaken standards previously established in the 2012 Law on the Principles of the State Language Policy. Steps must be taken to ensure wide and meaningful consultation, so that the law meets, to the fullest extent, the rights and expectations of the highly diverse and distinct linguistic communities of Ukraine.

Minority rights in the context of political and social unrest since February 2014

73. While recognizing the concerns of minorities, the Special Rapporteur considers that the current human and minority rights situation and the civil and political, economic, social and cultural conditions experienced by minorities cannot justify any violent actions or incitement and support of those actions by any party, national or international. The majority of the population of Ukraine, irrespective of national origin, ethnicity or language, wishes for a peaceful and united Ukraine, rich in its ethnic and linguistic diversity and confident in its future security and stability.

74. Developments in early 2014 have created an environment of uncertainty and distrust that may create fractures along national, ethnic and linguistic lines and which threaten peaceful coexistence if not quickly resolved. In some localities, tension has spilled over into conflict. Such tensions must be diffused as a matter of urgency. The radical nationalist objectives of a limited number of individuals or groups should not be allowed to dictate the future of Ukraine. Protection of human rights and minorities relies on the rule of law, which must be quickly re-established and upheld in all locations.

75. Good and inclusive governance is essential for the effective management of diversity. The current crisis, although framed by some as an inter-ethnic dispute between pro-Ukrainian and pro-Russian factions, has been partially caused by wider political and economic factors that must be recognized and addressed in order to avoid further ethnic, regional and political polarization. A historic good governance deficit, widespread corruption and mismanagement of resources have contributed to a lack of trust in political institutions and actors and significantly contributed to instability.

76. The situation of minority communities in the Autonomous Republic of Crimea, including Crimean Tatars, ethnic Ukrainians and other potentially vulnerable groups, should be monitored closely. The United Nations human rights monitoring mission and other international monitors should be allowed unfettered access to the Republic at the earliest opportunity. They should engage with both de facto authorities and diverse civil society and community actors to assess the extent to which human rights standards, including minority rights, are being upheld in practice.

77. The Special Rapporteur notes that, even in situations of territorial dispute or occupation, the full spectrum of human rights of minorities must be respected, protected and promoted without discrimination by the de facto authorities.

78. Those displaced from the Autonomous Republic of Crimea and other locations should be provided with all necessary short, medium and long-term support. Mechanisms of possible return to their homes, compensation for loss of property, or restitution of property and land should be considered. All relevant authorities must take measures to reduce or prevent further displacement, including through

implementation of human and minority rights standards. The possibility for IDPs to return voluntarily to their places of origin with assurances for their security should remain a key objective.

79. It is essential to begin a process of national dialogue with the objective of understanding the concerns and issues of all communities and ensuring that they are addressed appropriately and rapidly. Moderate voices must come to the fore. First and foremost, solutions to the current situation must come from the Ukrainian people themselves. That must be achieved through decision-making processes that are inclusive and which respect diversity and political structures that ensure the participation of all, including minorities.

80. Hate speech and incitement to hatred, hostility or violence targeted at any person or group must not be tolerated. Political and community leaders should be the first to condemn any such statements and to send a clear message that they will be treated as criminal acts, punishable by law. Those elements on any side engaging in or inciting violence or hatred must be prosecuted. They should have no role in shaping the future of Ukraine, nor should they be allowed to impose their will through the use of violence or force. All non-official and illegally armed groups should be disarmed and disbanded.

81. Freedom of expression, assembly and the right to protest peacefully must be protected even in times of political unrest and must only be restricted under exceptional circumstances. All relevant authorities must uphold those rights for all. Violent protest, the forced or armed occupation of public buildings or territories, the formation of armed militia groups and activities to intimidate, threaten or coerce are not legitimate in a democratic society and should be addressed according to the law and international standards.

82. The Special Rapporteur notes that all journalists should be free to conduct their work in safety and without threat of detention or violence and that the freedom of the media must be protected. Censorship of media should be used only as a last resort and any restrictions on the media and freedom of expression must be legitimate, proportionate and in conformity with international standards. Nevertheless, the Special Rapporteur is deeply concerned over media coverage that was frequently cited as misrepresenting the situation and serving to fuel tensions. Governments and media outlets have a responsibility to convey information accurately and objectively and to avoid any propaganda or misinformation which may incite unrest or violence.

83. The rights of religious minorities are protected in practice. However, given the climate of political and social unease, it is particularly necessary for the authorities to guard against any human rights violations, including against Crimean Tatars and members of Jewish communities. Acts of anti-Semitism, hate speech, violence, intimidation, threat or abuse targeted at individuals or groups based on their religion or belief must not be tolerated. All relevant authorities have an obligation to act swiftly to protect all religious groups in all localities, their places of worship, monuments and burial sites, particularly during periods of heightened tension, and to prosecute the perpetrators of violations against them.

84. The Special Rapporteur was struck by the many actors who have demonstrated national unity, solidarity and dialogue across different population groups to ensure a peaceful resolution to the crisis. Different faith and community groups have reached across religious and ethnic divides to offer support and assistance to those affected by the current situation, including those who have been displaced, and some of those with different political views have sought reconciliation. Political, religious and community

leaders are urged to use their influence to promote dialogue and encourage peaceful solutions to tensions.

Strengthening minority rights protection

85. The Special Rapporteur considers that additional measures are required to strengthen minority rights protection. Considering the great diversity of population groups and the sensitivity of minority issues in the independent, post-Soviet era, institutional attention to minority issues is currently insufficient and has been downgraded in recent years. Mechanisms to register complaints and seek solutions are currently insufficient. At the time of the Special Rapporteur's visit, there were only six staff members within the Ministry of Culture with direct responsibility for minority issues. The Government must recognize the wider scope of minority rights that includes but goes beyond cultural issues, and ensure appropriate ministerial-level attention to minority issues.

86. The Special Rapporteur welcomes Government assurances that measures to strengthen institutional attention to minority issues are being developed. She recommends the establishment of a consultative and advisory body on minority issues with frequent and regular sessions, empowered to consider a wide range of matters of relevance to minorities, including problems of minority languages and education, religious affairs, and measures to address practically and prevent ethnic tensions from emerging. A dedicated Ombudsperson or similar structure mandated to address minority issues and receive complaints from minorities should also be considered.

87. A key pillar of minority rights is full and equal participation in public life, including political participation at the national, regional and local levels. Full access to democratic structures is critical for minorities to voice their concerns and to achieve meaningful solutions to their issues. Measures are necessary to strengthen the political participation of minorities and guarantee their full involvement in decision-making bodies.

88. Policies to guarantee representation of minorities in Parliament include reserved seats or the redrawing of electoral districts to allow compact minority communities to elect their own representatives, and should be considered. Measures to increase political and cultural autonomy for some localities with large minority populations may be considered, where appropriate and in full consultation with all communities affected. The Special Rapporteur urges consideration of the recommendations of the Forum on Minority Issues which addressed minorities and effective political participation during its second session.³¹

89. In many countries, autonomous arrangements have been established and are appropriate taking into account specific circumstances, including where a national minority forms a high percentage of the population in a region. However, the nature and extent of that autonomy should be established in conformity with national law and international standards and through democratic, legal and consultative mechanisms and constructive dialogue which takes fully into account the views of minorities and all affected communities, including ethnic Ukrainians who might constitute a minority in affected regions.

90. Political parties and actors have a responsibility to all citizens and are accountable to all, irrespective of their national, ethnic, religious and linguistic

³¹ Available from www.ohchr.org/EN/HRBodies/HRC/Minority/Pages/Session2.aspx.

identity. The Government and all political parties must uphold the highest standards with regard to the banning of statements and political platforms that promote racism, xenophobia or hate speech, or which are intended to incite ethnic, religious or other forms of hatred or intolerance. Any such actions should be prosecuted according to the law. As a confidence-building measure, all political parties should clearly state their commitment to minority rights protection and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

91. Educational curricula should reflect the diversity of Ukraine and enable students to learn about their own origins, cultures and religions, but also those of others, in a positive way that recognizes the contributions of all groups to society. Minority and mother-tongue schools, while legitimately maintaining minority languages and cultures, should also be required to provide education on the wider ethnic, national, social and religious make-up of society. The national curriculum should include education on active citizenship.

92. The Government should take additional measures, including providing financial and institutional support, for minorities to establish cultural and advocacy associations and maintain and enhance their activities. While there are now an increasing number of civil society organizations, further strengthening of civil society is needed so that minorities can enhance cultural activities as well as jointly formulate and convey important messages and establish and maintain dialogue with various authorities.

93. The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (art. 5) calls for programmes of cooperation and assistance among States with due regard for the legitimate interests of minorities. Article 6 requires States to cooperate on questions relating to minorities in order to promote mutual understanding and confidence. Under article 7, States should cooperate to promote respect for the rights set forth in the Declaration. States with large diaspora communities are urged to take all possible steps to promote reconciliation and to defuse tensions where they exist. They must avoid actions that undermine confidence or incite, fuel or support violent or separatist movements on the part of minorities.

94. There has been an apparent escalation of anti-Roma sentiment and of incidents of violence and intimidation directed towards Roma in the context of the 2014 political unrest. All relevant authorities should ensure adequate protection of Roma communities and that any incidents of violence and intimidation are fully and speedily investigated and perpetrators prosecuted. Authorities should ensure that current and ongoing political instability is not used by any party as an opportunity to attack or intimidate Roma or forcefully remove them.

95. In the medium to long term, more robust responses from the Government are required to address Roma exclusion, marginalization and poverty. Measures should include an institutional, policy and programme framework, created with the full participation of Roma, that is adequately financed and politically supported to tackle the long-term challenges that many Roma experience.

96. The most recent census was conducted in 2001. The absence of accurate demographic and socioeconomic data constitutes a serious challenge to ensuring protection of minority rights. Accurate data will reveal the current picture of national, ethnic, religious and linguistic groups and provide key socioeconomic information, including in relation to such issues as language and identity. Such data, including reliable data on the number of users of minority languages and their geographic

distribution, should facilitate development of policy and programme measures to improve the situation of minorities.

97. Census questions should allow open and multiple responses that enable respondents to self-identify according to their national, ethnic, religious and linguistic affiliation, including multiple identities. Ensuring accurate data for the most marginalized groups, such as Roma, is essential and should be facilitated through outreach and information for communities and training of census collection staff.

Annex 761

Intentionally Omitted

Annex 762

OHCHR, Report on the Human Rights Situation in Ukraine (15 April 2014)

**Office of the United Nations
High Commissioner for Human Rights**

**Report on the human rights situation in
Ukraine**

15 April 2014

TABLE OF CONTENTS

	<i>Page</i>
I. EXECUTIVE SUMMARY	3
I. INTRODUCTION	6
A. Context	
B. Universal and regional human rights instruments ratified by Ukraine	
C. UN human rights response	
D. Methodology	
III. UNDERLYING HUMAN RIGHTS VIOLATIONS	10
A. Corruption and violations of economic and social rights	
B. Lack of accountability for human rights violations and weak rule of law institutions	
IV. HUMAN RIGHTS VIOLATIONS RELATED TO THE MAIDAN PROTESTS	13
A. Violations of the right to freedom of assembly	
B. Excessive use of force, killings, disappearances, torture and ill-treatment	
C. Accountability and national investigations	
V. CURRENT OVERALL HUMAN RIGHTS CHALLENGES	15
A. Protection of minority rights	
B. Freedom of expression, peaceful assembly and the right to information	
C. Incitement to hatred, discrimination or violence	
D. Lustration, judicial and security sector reforms	
VI. SPECIFIC HUMAN RIGHTS CHALLENGES IN CRIMEA	20
VII. CONCLUSIONS AND RECOMMENDATIONS	22
A. Conclusions	
B. Recommendations for immediate action	
C. Long-term recommendations	

Annex I: Concept Note for the deployment of the UN human rights monitoring mission in Ukraine

I. EXECUTIVE SUMMARY

1. During March 2014 ASG Ivan Šimonović visited Ukraine twice, and travelled to Bakhchisaray, Kyiv, Kharkiv, Lviv, Sevastopol and Simferopol, where he met with national and local authorities, Ombudspersons, civil society and other representatives, and victims of alleged human rights abuses. This report is based on his findings, also drawing on the work of the newly established United Nations Human Rights Monitoring Mission in Ukraine (HRMMU).

2. Underlying human rights violations, including lack of accountability for past human rights violations committed by security forces, the lack of independence of the judiciary and a perceived denial of equal rights and protection, including through mismanagement of resources and through corruption, lack of a system of checks and balances and the lack of free elections, were among the root causes of the popular protests that took place throughout Ukraine, and in particular on Independence Square (Maidan) from November 2013 to February 2014. While the protests were initially triggered by the Yanukovych Government's refusal to sign an Association Agreement with the European Union, the excessive use of force by the Berkut special police and other security forces at the end of November initially against largely peaceful protestors on the Maidan led to a significant radicalisation of the protest movement. The violence on 30 November transformed the protests, from demonstrations in favour of signing the EU Association Agreement, to include demands to reform the system of authority and punish those responsible. Serious human rights violations were committed including during the Maidan protests, which resulted in the death of 121 individuals (this number includes 101 Maidan protesters, 17 officers of the internal affairs/police, 2 were members of NGO "Oplot" that attacked the Maidan in Kharkiv and a Crimean Tatar found dead). There have been also numerous reports of torture and ill-treatment of protesters. The Maidan protest movement¹ also revealed historical, but still relevant divisions within Ukrainian society and long-standing grievances with respect to the lack of good governance and the rule of law of previous Governments.

3. Since the Government took power at the end of February 2014, tensions have decreased, along with the allegations of human rights violations. However, some developments could have a detrimental impact if not promptly addressed, especially in light of the presidential elections scheduled for 25 May.

4. For instance, the advocacy of national, racial or religious hatred by some political parties, groups and individuals, that constitutes incitement to discrimination, hostility or violence and nationalistic rhetoric witnessed during the Maidan protests may have an adverse impact on the situation in Ukraine. An attempt by the new ruling coalition in Parliament on 23 February 2014, to repeal the Law on the Principles of State Language Policy, and thus make Ukrainian the sole State language at all levels, was seen as a hostile move against the Russian-speaking minority. Acting President Turchynov however declined to sign and approve the Parliament's decision to repeal the law, on 2 March 2014. The drafting of new language legislation must not be hurried and must include the active involvement of representatives of minorities at the very outset.

¹ The Maidan protest movement refers to the various groups that participated in demonstrations and centred on Independence (Maidan) square in the centre of the Kyiv. This initially included persons demonstrating for Ukraine to enter the Association Agreement with the European Union, hence the fact that there is often a reference made to "Euro-Maidan". However, over time the movement included a number of other elements, including anti-Government, anti-corruption, far right wing groups and others, some of whom did not necessarily share the same pro-European aspirations.

5. Similarly, in a bid to break away from the past, the Parliament has taken initial steps to adopt legislation regarding a lustration policy that would apply to some public officials affiliated to the previous Government. There are concerns that this law, if adopted, could be used to vet out large numbers of officials. It is essential that any new legislation and policies be adopted through an approach based on the rule of law and human rights, without any spirit of revenge. It is crucial to ensure that human rights violations are not dealt with any form of human rights violations.

6. In Crimea, a number of concerns relating to human rights could be observed before and during the 16 March referendum. On 27 March, the General Assembly in paragraph 5 of resolution 68/262 concluded that the referendum “had no validity”. In addition to this, the presence of paramilitary and so called self-defence groups as well as soldiers in uniform without insignia, widely believed to be from the Russian Federation, was not conducive to an environment in which voters could freely exercise their right to hold opinions and the right to freedom of expression. There have also been credible allegations of harassment, arbitrary arrest, and torture targeting activists and journalists who did not support the referendum. Furthermore, seven persons were reported as missing; the HRMMU is verifying their whereabouts. The situation of the Tatar community is also one that remains somewhat ambiguous following the referendum. While the Tatar community was promised numerous concessions, including Government positions as well as the recognized status as indigenous peoples, the majority of the members of the community chose to boycott the referendum.² Statements from authorities in Crimea and officials in the Russian Federation indicate plans to relocate or resettle within Crimea some of those Crimean Tatars who in protest against the slow progress of the restitution of land lost following forced relocation of their land, have occupied land illegally in recent years.

7. In eastern Ukraine, where a large ethnic Russian minority resides, the situation remains particularly tense with ethnic Russians fearing that the central Government does not represent their interests. Although there were some attacks against the ethnic Russian community, these were neither systematic nor widespread. There are also numerous allegations that some participants in the protests and in the clashes of the politically opposing groups, which have already taken at least four lives, are not from the region and that some have come from the Russian Federation.

8. Irrespective of the fact that systemic shortcomings may be only remedied in the longer-term, it will be important to immediately take initial measures to build confidence between the Government and the people, and among the various communities, and reassure all people throughout Ukraine that their main concerns will be addressed.

9. In addition to combatting speech that advocates national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence and introducing impartial reporting on the on-going human rights situation, it will be critical to counter the deepening divide in the country by ensuring inclusivity and equal participation of all in public affairs, including political life. In this respect, legislation on minorities, in particular on linguistic rights, should be adopted following full consultation with all those concerned and according to relevant international and regional human rights standards.

² OHCHR was informed by representatives of Crimean Tatars that no more than 1000, out of a population of 290,000-300,000, participated in the 16 March referendum.

10. While the situation requires attention in particular in eastern Ukraine and in Crimea, there are positive changes underway or under reflection. There are, for example, indications of a willingness to ensure a break with past injustices and to elaborate a new vision for Ukraine's future. Strengthening the rule of law, democracy and human rights will be key to any lasting change. Legislative and institutional reforms should be carried out in a comprehensive, transparent and consultative way, and therefore not be rushed. Furthermore, they should be sustained through consistent and accountable implementation.

11. The international community, including the United Nations, can play a role in supporting an environment where the human rights of all, including minorities and indigenous peoples, may be best promoted and protected. In particular, it will be important to ensure that the 25 May elections take place in an environment conducive to free and fair elections. Without an independent, objective and impartial establishment of the facts and circumstances surrounding alleged human rights violations, there is a serious risk of competing narratives being manipulated for political ends, leading to divisiveness and incitement to hatred.

12. Among other means to address these challenges and at the request of the Government of Ukraine, OHCHR established the UN Human Rights Monitoring Mission in Ukraine (HRMMU). This mission became operational on 15 March and will consist of 34 staff, including national staff, deployed in Lviv, Kharkhiv, Odesa and Donetsk, and seeks also the presence of a sub-office in Simferopol. In the meantime, HRMMU continues to monitor the situation in Crimea, in accordance with the General Assembly resolution 68/262 of 27 March on the Territorial Integrity of Ukraine.

13. In addition to monitoring the human rights situation, the Office of the United Nations High Commissioner for Human Rights stands ready to provide technical assistance for legislative and other reforms.

II. INTRODUCTION

A. Context

14. The Office of the United Nations High Commissioner for Human Rights (OHCHR) has been closely following the human rights situation in Ukraine since November 2013, when mass protests started in Kyiv further to the Government's announcement that it would not sign the Association Agreement with the European Union (EU). These protests subsequently spread to other parts of the country, and by mid-February had escalated into violent clashes between riot police and other security forces and protesters.

15. The excessive use of force by the Berkut special police and other security forces was met with impunity and led to a significant radicalisation of the protest movement. Over time, protest called for the resignation of President Yanukovich and his government, and for overall change. Violence escalated after 16 January 2014, following the adoption of a set of more stringent anti-protest laws. Anti-government demonstrators occupied several government buildings, including the Justice Ministry and the Kyiv City Hall, and demonstrations spread across the western and central parts of Ukraine. The violent clashes that occurred between security forces and protesters from 18 to 20 February, including the actions of snipers, resulted in the death of 121, mostly protesters, but also law enforcement officials. Hundreds of people were injured and had to be hospitalised, and some of them remain in critical condition. According to the General Prosecutor's Office of Ukraine, more than 100 persons remain unaccounted for as at 2 April.

16. On 21 February, President Yanukovich and opposition leaders signed a compromise agreement setting out elections by the end of the year and a return to the 2004 Constitution. On the same day, the Ukrainian Parliament reinstated the 2004 Constitution. After President Yanukovich's departure from Kyiv, on 22 February, the Parliament decided that he had "withdrawn from performing constitutional authorities" and decided to hold presidential elections on 25 May³. In the meantime, Parliament elected Mr Oleksandr Turchynov as Speaker and thus acting President of Ukraine. A new Government was formed on 26 February.

17. While a number of domestic and international initiatives were undertaken during the Maidan events, they did not manage to prevent conflict escalation and bloodshed. The departure of former President Yanukovich put an end to the deadly confrontations, but daunting new challenges emerged.

Events in Crimea

18. Following the dismissal of President Yanukovich at the end of February, unidentified armed men began taking over strategic infrastructures in Crimea. Ukrainian Authorities alleged that the armed men were Russian armed forces and/or allied local paramilitary groups.

³ After long discussions mediated by EU foreign representatives, President Yanukovich stated on 21 February that he had reached a deal with the opposition which would "settle the crisis". On 22 February 2014, 328 of 447 members of the Ukrainian parliament (MPs) voted to "remove Viktor Yanukovich from the post of president of Ukraine" on the grounds that he was unable to fulfill his duties¹ and to hold early presidential elections on 25 May. The vote came an hour after Mr. Yanukovich stated in a televised address that he would not resign. He subsequently declared himself as "the legitimate head of the Ukrainian state elected through a free vote by Ukrainian citizens. However, later that day he fled the capital for Kharkiv, then travelled to Crimea, and eventually to southern Russia.

The Russian Government insisted that the forces did not include Russian troops, but only local self-defence groups. As Russia refused to recognize the new Government of Ukraine, but instead recognized the legitimacy of former President Victor Yanukovich, his request for intervention was taken into consideration by the Russian authorities.

19. On 27 February 2014, in a contested situation including the presence of armed persons around its building, the Parliament of the Autonomous Republic of Crimea dismissed the former local government and appointed Mr Sergey Aksyonov as “prime minister”. The same day, it also decided to hold a referendum on 25 May 2014, on the future status of Crimea. The Ukrainian Central Electoral Committee declared this decision as contrary to the Ukrainian Constitution. On 14 March the Constitutional Court of Ukraine ruled that the decision to hold a referendum was unconstitutional. On 15 March the Ukrainian Parliament terminated the powers of the Verkhovna Rada. The date of the referendum was brought forward first to 30 March, and finally to 16 March. At the referendum, voters were asked to choose between two options: firstly, “Do you support the reunification of Crimea with Russia with all the rights of the subject of the Russian Federation?”; or, secondly, “Do you support the restoration of the 1992 Constitution of the Republic of Crimea and the status of the Crimea as part of Ukraine?”. On 11 March, the Supreme Council of Crimea voted to secede from Ukraine.

20. On 1 March, the Federation Council of the Russian Federation (upper chamber of the Russian Parliament) approved a request from President Vladimir Putin permitting the usage of Russian armed forces to protect the Russian speaking population. According to reports, the Russian Federation also started boosting its military presence in Crimea. Unidentified armed men, without military insignias, took control of the administrative border between Crimea and the rest of Ukraine and blocked several Ukrainian military bases. Ukrainian Authorities alleged that the armed men were Russian armed forces and/or allied local paramilitary groups. The Russian Government justified its involvement to be in response to the will of the local population and as an effort to protect ethnic Russians and Russian-speakers in the region.

21. On 5 March 2014, the Shevchenko district court of Kyiv issued arrest warrants for Mr. Sergey Aksyonov and the Chair of the Supreme Council (Crimean Parliament), Vladimir Konstantinov. The Security Service of Ukraine was requested to bring them to court. Ukraine’s new Government also warned the Crimean Parliament that it faced dissolution unless it cancelled the referendum. In response, the authorities in Crimea stated that the new Government in Kyiv came to power illegitimately through a coup d’état. On 11 March, they also closed the airspace over Crimea for flights from the rest of Ukraine. On 15 March, the Ukrainian Parliament took the decision to dissolve the Supreme Council of Crimea.

22. On 16 March, the Supreme Council of Crimea voted to secede from Ukraine, and held a referendum on whether Crimea should join the Russian Federation or remain part of Ukraine with the degree of autonomy it had in 1992. The referendum resulted in a reported turnout of over 81%, where based on reports over 96% of voters supported Crimea joining the Russian Federation. However, the OHCHR delegation received many reports of vote rigging. Ukraine refused to recognize the results of the Crimean referendum, claiming that it was in violation of its Constitution.

23. On 27 March, the UN General Assembly adopted resolution 68/262 upholding the territorial integrity of Ukraine and underscored that the referendum held on 16 March 2014 had no validity. In addition, the resolution’s operative paragraph 4 welcomed the UN and OSCE assistance to Ukraine in protecting the rights of all persons, including minorities.

B. Universal and regional human rights instruments ratified by Ukraine

24. Ukraine is a party to most core international human rights instruments, including: the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; and the Convention on the Rights of Persons with Disabilities.

25. Ukraine is a party to a number of regional European treaties, including: the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR); Protocol No. 6 to the ECHR concerning the abolition of the death penalty in times of peace; Protocol No. 12 to the ECHR concerning the general prohibition of discrimination; Protocol No. 13 to the ECHR concerning the abolition of the death penalty in all circumstances; Framework Convention on the Protection of National Minorities; the European Charter for Regional and Minority Languages; the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment; the Council of Europe Convention on Action against Trafficking in Human Beings.

26. It has not yet become a party to the following instruments: the International Convention for the Protection of All Persons from Enforced Disappearance; the international Convention on the Protection of the Rights of All Migrant Workers and Members of their families; the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights; the third optional Protocol to the Convention on the Rights of the Child; the Rome Statute of the International Criminal Court; the 1954 Convention relating to the Status of Stateless Persons; and the 1961 Convention on the Reduction of Statelessness.

27. Ukraine has not availed itself of the right of derogation under article 4 of the International Covenant on Civil and Political Rights, and therefore the rights contained therein are fully applicable.

C. UN human rights response

28. In light of the deteriorating situation, it was assessed that the UN can play an important role in deescalating tensions, including through human rights monitoring. Assistant Secretary-General (ASG) Ivan Šimonović, planned to undertake a mission to Ukraine in March, which was requested by the Secretary-General to be moved forward due to the rapid deterioration of the situation. Several high-level UN visits took place from mid-February to mid-March, including respectively, Senior Adviser Robert Serry; Deputy Secretary-General, Jan Eliasson; and Under-Secretary-General for Political Affairs Jeffrey Feltman and the Secretary-General, Ban Ki-Moon. The latter two visits took place at the same time as that of ASG Šimonović.

29. The UN offers a neutral platform and professional expertise which can add significant value to the efforts to ensure that human rights are respected and protected in Ukraine. Independent monitoring and analysis of the human rights situation will outline technical, legal or other assistance needs, which will complement recommendations received by Ukraine from UN human rights mechanisms, and may contribute to addressing the root causes of the violence. These endeavours can and should be undertaken in cooperation with regional organizations, including the OSCE and the Council of Europe.

30. ASG Šimonović mission to Ukraine had the following overall objectives: to assess the human rights situation; to raise the issue of accountability and bring visibility to human rights violations and concerns; to make strong calls for the protection of human rights (including those of minorities); and to place human rights promotion and protection as a critical factor in deterring pre-electoral, electoral and post-electoral violence and possible further violations.

31. ASG Šimonović arrived in Kyiv on 6 March and left on 18 March. The delegation led by the ASG visited Kyiv, Kharkiv, and Lviv. It sought access to Crimea, but was not able to go, as the authorities informed the delegation that they would neither receive the mission nor ensure its security. On 14 March, a second request for access to Crimea was sent to the authorities. They then confirmed their readiness to meet with ASG Šimonović, with a view to discussing measures for human rights protection, which could lead to the de-escalation of tension. In all locations, the ASG and his delegation met with stakeholders from across the cultural, ethnic, linguistic and political spectrum - high-level officials, the Ombudsperson, civil society organizations representing various communities, representatives of regional organizations and the diplomatic community. Information from these meetings as well as documents gathered form the basis for this report. The delegation met and heard accounts from victims of human rights violations committed during the demonstrations in Kyiv and elsewhere. The delegation also met with the UN Country Team (UNCT). On Friday 14 March, ASG Šimonović held a press conference in Kyiv and another through VTC in New York. The same day, he also briefed representatives of the Kyiv diplomatic community on the preliminary findings of his mission. On 19 March 2014, ASG Šimonović briefed the Security Council on his mission.

32. ASG Šimonović undertook a second mission to visit Crimea from 21 to 22 March.

33. In the meantime, OHCHR deployed a Human Rights Monitoring Mission in Ukraine (HRMMU) as of 14 March, upon the invitation of the Government of Ukraine. The objectives of the HRMMU are to: monitor the human rights situation in the country and provide regular, accurate and public reports by the High Commissioner on the human rights situation and emerging concerns and risks; recommend concrete follow-up actions to relevant authorities, the UN and the international community on action to address the human rights concerns, prevent human rights violations and mitigate emerging risks; establish facts and circumstances and conduct a mapping of alleged human rights violations committed in the course of the demonstrations and ensuing violence between November 2013 and February 2014 and to establish facts and circumstances related to potential violations of human rights committed during the course of the deployment.

34. Mr. Armen Harutyunyan was appointed to lead the mission. Nine international staff members are deployed in Ukraine as of early April 2014. The entire team, once fully operational will comprise 34 staff, including national professional staff and 12 drivers. HRMMU is currently deployed in Lviv, Kharkiv, Odesa and Donetsk and it seeks also the presence of a sub-office in Simferopol. In the meantime, HRMMU continues to monitor the situation in Crimea, in a manner consistent with the General Assembly resolution 68/262 of 27 March 2014, on the Territorial Integrity of Ukraine.

D. Methodology

35. The present report contains preliminary findings on the human rights situation in Ukraine up to 2 April 2014. It is based on the two missions of ASG Ivan Šimonović to Ukraine (from 6 to 18 March and from 21 to 22 March to Crimea) and on the first weeks of

operation of HRMMU. Although information continues to be gathered and verified, the present report with its preliminary findings is being publicly released already now with a view to contributing towards establishing the facts and defusing tensions. Impartial reporting on the human rights situation can help not only to trigger accountability for human rights violations, but it also aims at the prevention of manipulation of information, which serves to create a climate of fear and insecurity and may fuel violence. This is especially important with regard to eastern Ukraine.

36. In accordance with its objectives, HRMMU is gathering and verifying information with regards to particular cases of human rights violations and, more broadly, the overall human rights situation. Information is then assessed and analysed, thus contributing to accountability and reinforcing State responsibility to protect human rights. HRMMU is providing reports on the basis of information verified as credible and from reliable sources, and is advocating for measures to be taken by respective state institutions with a view to providing appropriate remedies. HRMMU is also undertaken in line with the Secretary-General's Rights Up Front Plan of Action, to ensure that the UN is aware of the human rights context and that OHCHR regularly provides analysis of main human rights concerns and risks of violations, and that a UN strategy is developed as necessary to address the situation at country, regional and global levels. The present report, in line with the UN General Assembly resolution on the "Territorial Integrity of Ukraine", underscores also the obligation of authorities in Crimea to ensure the protection of all the rights to which individuals there are entitled within the context of Ukraine's ratified universal and regional human rights instruments.

III. UNDERLYING HUMAN RIGHTS VIOLATIONS

A. Corruption and violations of economic and social rights

37. Corruption remains one of the most serious problems in Ukraine and has affected all human rights, whether civil, political, economic or social, exacerbated inequalities, eroded public trust in state institutions including the justice system, led to impunity and undermined the rule of law. It may be noted that in 2013, Transparency International ranked Ukraine 144th out of 176 countries (the country being ranked first is considered the least corrupt).

38. There has been only patchy implementation of international commitments to tackle corruption made under the UN Convention against Corruption, which entered into force in December 2005 and was ratified by Ukraine four years later. A National Anti-Corruption Strategy for 2012 – 2015 was adopted by presidential decree in October 2011, but there is currently no comprehensive anti-corruption law in Ukraine. The Ministry of Justice informed the OHCHR delegation that a draft law containing provisions applicable to corruption in both the public and private sectors would be presented by the end of March.

39. Corruption has disproportionately affected the poor and the most vulnerable. It impacts negatively on the enjoyment by all of economic and social rights, including the right to health services. Health service allocations make up 3.5% of the country's GDP, which falls well short of the minimum recommended by the WHO (7%). The poorest segment of the population cannot afford costly treatment in a situation where the country has no medical insurance system.

40. The Ministry of Health supports reform of management of medical services to move away from a centralized medical system and enable greater medical self-governance.

Insufficient salaries for employees in the health service have led to emigration of qualified staff. It has also affected professional competency and fed corruption practices, thus leading to inequalities in access to health care.

41. More generally, the socio-economic situation in Ukraine is of concern and constitutes one of the causes of recent events. In its 2008 review of the implementation of the International Covenant on Economic, Social and Cultural Rights in Ukraine, the Committee on Economic, Social and Cultural Rights expressed a number of concerns. In particular, it referred to a finding that 28 per cent of the population reportedly lived below the official poverty line, that the minimum wage does not provide an adequate standard of living, and that unemployment benefits amount to 50 per cent of the minimum subsistence level. It also expressed concern at the inadequate level of social assistance, and that several hundreds of thousands of children below the age of 15 were working in the informal and illegal economy and several thousands of children living in the street.

42. These concerns should constitute priorities for any new Government in Ukraine in the coming months and years. The Ukrainian Authorities must, as a matter of priority, put in place measures to eradicate corruption, while ensuring good governance and the rule of law. In addition, efforts should be made to redress disparities in standards of living and ensure equal access to, and quality of, health, education, employment and social support structures for all, including marginalised communities throughout the country.

B. Lack of accountability for human rights violations and rule of law institutions

43. The justice system in Ukraine has traditionally been marred by systemic deficiencies, including corruption, lack of independence and a lack of equality of arms between prosecution and defence in criminal proceedings. Other major concerns relate to the excessive use and length of pre-trial detention, numerous reports of cases of torture and ill-treatment, a significant reliance on suspects' confessions during criminal proceedings, insufficient or inadequate legal reasoning in indictments and overall underfunding of the justice system.

44. A new Code of Criminal Procedure (CCP) entered into force in November 2012. The new code responds to some of the major concerns expressed by UN human rights mechanisms (e.g. the UN Human Rights Council, Universal Periodic Review, or the UN Human Rights Committee). It introduces an adversarial system; supports the presumption of innocence, including the need to specify the circumstances suggesting reasonable suspicion that would justify a deprivation of liberty; and provides increased safeguards for timely access of detainees to a lawyer and a doctor. Alternative measures to deprivation of liberty are also provided.

45. A round-table discussion organized in November 2013 by the Ombudsperson's office on the occasion of the first anniversary of the entry into force of the new CCP identified the substantial decrease in the number of pre-trial detentions as a clear achievement since the entry into force of the new code. However, dozens of people who participated in the Maidan demonstrations were arrested and held in police custody and lengthy pre-trial detention, subjected to torture and ill-treatment, and deprived of their right to a fair trial and due process, in violations of the new CCP.

46. Other challenges remain. The provisions of the new CCP are not applied to all cases. Those opened before November 2012 are still processed under the former Code. The lack of

effective implementation of the new CCP provisions and examples of political interference in legal proceedings (“new provisions, old instructions”) also constitute a challenge.

47. According to the current provisions of the Constitution, judges are appointed for an initial period of five years by the President, upon recommendation of the High Council of Justice, based on a proposal from the High Qualifications Commission for Justice. After this five-year probation period, they become eligible for life tenure by Parliament, upon proposal of the High Qualifications Commission. This system opens the possibility for undue influence on the decision-making of judges during their probation period. The role and composition of the High Council of Justice and High Qualifications Commission as currently provided for in the Constitution are also a cause for concern. The Minister of Justice is represented on the High Qualifications Commission and can exercise considerable influence on the appointment of, as well as on disciplinary procedures against, judges. The High Council of Justice is composed of 20 members, the majority of whom have institutional links to the executive branch.

48. It should be noted that the CCP in place until 2012, conferred considerable discretion to the Prosecutor throughout criminal proceedings, including with regard to decisions on pre-trial detention. In addition, the public prosecutor’s multiplicity of roles is also a cause of concern raised by many international human rights mechanisms. Aside from his responsibility to conduct criminal investigations and prosecute persons formally accused, s/he oversees the legality and human rights compliance of those investigations.

49. Complaints and allegations of torture or ill-treatment are examined by the Public Prosecutor’s office which is reluctant to pursue complaints and, through its work on criminal investigations, has very close links with police forces. Article 216 of the new CCP provides for the creation within five years (as of 2012) of a State Bureau of Investigation to investigate allegations of human rights violations committed by judges, law enforcement officers and high-ranking officials. However, no progress has yet been made towards its creation.

50. In March 2014, the Ukrainian Parliament prioritized the adoption of legislation related to prosecution, anti-corruption and law enforcement reform.

51. The prevalence of impunity for human rights violations perpetrated by law enforcement forces has been an issue for a long time in Ukraine. An overall reform of the security sector needs to be undertaken. In this context, law enforcement officers should receive adequate training with regard to international human rights norms and standards. All acts of torture or ill-treatment should be investigated while also condemned firmly and publicly by the Ukrainian Authorities.

52. There has been a culture of effective impunity in Ukraine for the high level of criminal misconduct, including torture and extortion, often committed by the police in the course of their work. Structural shortcomings, widespread corruption, close functional and other links between prosecutors and police, non-existent or flawed investigations into criminal acts committed by the police, harassment and intimidation of complainants, and the subsequent low level of prosecutions all fuel this lack of accountability for human rights violations. There is a large number of detentions, many of which are not registered. Allegations of torture may not be investigated effectively and promptly and complaints of such violations were generally ignored or dismissed for alleged lack of evidence.

IV. HUMAN RIGHTS VIOLATIONS RELATED TO THE MAIDAN PROTESTS

A. Violations of the right to freedom of assembly

53. There have been notable failures to respect the right to freedom of peaceful assembly in line with international human rights standards since protests started in November 2013. In some cases, local authorities sought to ban or restrict public gatherings through court decisions. On 22 November, the Kyiv district administrative court banned the use of “temporary structures such as tents, kiosks and barriers” from 22 November to 7 January. Local authorities in Odesa applied to a court to ban a demonstration that had attracted several hundred people on 23 November. On 24 November, the court endorsed the ban and the remaining demonstrators were violently dispersed by the police.

54. The Ukrainian Authorities attempted to disperse the demonstration in Kyiv twice, on 30 November and on 11 December, respectively. On 30 November, the Authorities justified the decision to disperse the demonstration by claiming that a New Year tree needed to be erected in the square. On 11 December, the Minister of Interior stated that the decision to remove barricades from the roads surrounding the Maidan was in response to citizens’ complaints that the demonstration was blocking traffic. There have also been reports of individuals having been prevented from attending demonstrations or who were harassed for having done so.

55. While article 39 of the Ukrainian Constitution guarantees freedom of assembly, no post-independence laws regulate it. In the absence of such a law, courts have referred to local authority regulations or to the Decree of the Presidium of the Supreme Soviet of the USSR of 28 July 1988 on the procedure for organizing and holding meetings, rallies, street marches and demonstrations in the USSR.

B. Excessive use of force, killings, disappearances, torture and ill-treatment

56. The first instance of excessive use of force against demonstrators took place in the early hours of 30 November 2013, when 290 riot police officers (known as ‘Berkut’) dispersed Maidan protesters, mainly students and youths. Witness testimony and footage of the incident shows that the riot police used excessive force to clear demonstrators, forced assessed as both indiscriminate and disproportionate, including through chasing and beating demonstrators who ran away. The violence escalated on 1 and 2 December and there were serious clashes in nearby streets between demonstrators and riot police, and an attempt to storm the presidential administration building. At least 50 riot police and hundreds of protesters were injured, and twelve persons detained on charges of “organizing mass disorder”. A third instance of excessive use of force and violent clashes occurred on 10 and 11 December 2013, when the riot police attempted to remove barricades, and left 36 persons hospitalized, including 13 policemen. Violent clashes resumed on 19 January 2014, following the adoption of controversial new laws on 16 January limiting the ability to conduct unsanctioned public demonstrations. Demonstrators, many of whom were linked to the far right wing “Right sector” group, attacked governmental buildings, throwing stones, firecrackers and Molotov cocktails at the police. The response of the police included the use of water cannons, in sub-zero temperatures and live fire, as a result of which five demonstrators were killed.

57. The violence in Kyiv reached its peak between 18 and 20 February 2014, when mass violent clashes took place mainly on Institutskaya Street. During these three days around 90 people were killed, mostly from sniper shots allegedly from rooftops. The new Minister of

Health, Mr. Oleg Musii, indicated to OHCHR that, as chief of the medical services on Maidan, he saw law enforcement officers removing the bodies of individuals who are still unaccounted for. He noted that snipers were aiming to kill (targeting the head and vital organs of the victims) and also depicted cases of police brutality, including beatings of medical staff and preventing medical personnel from attending the wounded. According to information gathered so far, in the period from December 2013 to February 2014, in total 121 people were killed, either as a result of severe beating or gunshots. This number includes 101 Maidan protesters, 17 officers of the internal affairs/police, 2 members of NGO “Oplot” that attacked Maidan in Kharkiv and a Crimean Tatar found dead.

58. Most acts of severe beatings, torture, and other cruel, inhuman or degrading treatment were attributed to the ‘Berkut’ riot police. For example, one demonstrator was stripped naked, roughly pushed around and forced to stand still on the snow in freezing temperatures while a police officer filmed him with a mobile phone. At the same time, there were a number of examples of members of the broad Maidan protest movement around the country taking control of local state administrations and forcing regional governors to sign their applications for resignation letters, while in parallel protesters took over Regional Administration buildings. One example of such actions was from the Right Sector activist Alexander Muzychko, who filmed himself intimidating and physically assaulting the prosecutor of Rivne district on 27 February 2014.⁴

C. Accountability and national investigations

59. The Ukrainian Authorities have committed to shedding light on all cases of excessive use of force and arbitrary killings, including from unidentified snipers, torture, disappearances and other human rights violations that occurred during the Maidan events. There were also cases of abductions by unidentified individuals in or outside hospitals, and persons were later found dead.

60. The newly appointed Prosecutor-General launched investigations into the killings of protesters, including regarding the responsibility of high-ranking officials. An investigation by the Interior Ministry is looking into the fate of persons who disappeared during the protests and cases of abuse of power by law enforcement officials. The OHCHR delegation was informed that a group of 75 victims are included in one single criminal investigation targeting responsibility of former senior officials, including the former President, former Interior Minister and several other officials, while there are also 65 separate cases filed against police for the abuse of power and brutality.

61. While OHCHR was provided with general information about the cases launched by the Office of the Prosecutor-General, it also heard from civil society representatives that some of the victims have not yet been contacted by relevant authorities for investigation purposes. According to NGO sources, there are also concerns regarding the collection and preservation of evidence and forensic examinations which may not have been systematically carried out regarding cases of those killed during recent events. Such examinations would have been essential to help determine criminal responsibility, including with regard to the so-called snipers whose identity and affiliation remains to be clarified. Involvement of international experts can be helpful both in terms of capacity as well as impartiality and credibility. Concerns have been raised by local interlocutors in relation to the fact that the investigation is

⁴ Mr Muzychko died in a police raid in Rivne on 24 March. The exact circumstances will require further investigation.

concentrating exclusively on the issue of persons killed by snipers on 20 February, and that it is not looking into issues related to responsibility for excessive force used on other occasions during the course of demonstrations between November 2013 and January 2014.

V. CURRENT OVERALL HUMAN RIGHTS CHALLENGES

A. Protection of minority rights

62. According to the 2001 census, ethnic Ukrainians constitute about 78 per cent of Ukraine's population, ethnic Russians constitute around 17 per cent, and around 5 per cent belongs to other ethnic groups. While 67 per cent of the population declared Ukrainian as their native language, well over one-third of the population (including many ethnic Ukrainians) speaks Russian in their daily life. Russian is the predominant language of communication in eastern and southern regions of the country, as well as in central Ukraine, including capital Kyiv. As a result, Ukraine is largely a bilingual society, as was confirmed by stakeholders met by the delegation throughout Ukraine. Consequently, nationalistic rhetoric and hate speech may turn the ethno-linguistic diversity into a divide and may have the potential for human rights violations.

63. The diversity of Ukrainian society – as in any society is enriching – and needs to be promoted and protected as a positive factor rather than a divisive one. According to a law adopted in August 2012, any local language spoken by at least a 10% minority could be declared official within the relevant area (oblast, rayon or municipality). Russian was within weeks declared an official language in several southern and eastern oblasts and cities. The 2012 Law also recognised 17 other languages as regional languages.

64. As already noted, Ukraine is a party to the Council of Europe's Framework Convention for the Protection of National Minorities and to the European Charter for Regional or Minority Languages. Both the Advisory Committee on the Framework Convention and the Committee of Experts on the European Charter, while acknowledging progress, have found that there was great scope for improvement regarding the protection of the rights of minorities in Ukraine.

65. In its third opinion released in 2012, for example, the Advisory Committee on the Framework Convention recalled its previous observations on the need to remove legal obstacles to wider representation of national minorities and more effective participation of persons belonging to national minorities in elected bodies. It regretted that the numerous recommendations made by international bodies for the introduction of a regional proportional system based on open lists and multiple regional constituencies, to allow for stronger regional, including minority, representation, had not been taken into account.

66. The OHCHR delegation met with some interlocutors who conveyed a perception that the right of minorities to participate in political life is not fully taken into account. While the *Batkivshchyna* and *Svoboda* parties, currently part of the new majority coalition, are largely affiliated with western Ukraine, the Party of Regions is seen as prevalingly being supported by the population of eastern regions. The composition of the current Cabinet is perceived by some people in eastern and southern Ukraine as not being inclusive, as most of its members come from western Ukraine. According to various reports, a number of high level officials – governors, mayors, and senior police officers – have been replaced by supporters of the new coalition parties, many coming from western Ukraine.

67. A motion of the new ruling coalition in Parliament on 23 February 2014, attempted to repeal the Law on the Principles of State Language Policy, adopted on 3 July 2012, and make Ukrainian the sole State language at all levels. On 2 March, Oleksandr Turchynov, acting President and Chair of the Parliament, declined to sign and approve the Parliament's decision to repeal the law. The 2012 law continues to apply for the time being, but a new law is being prepared. The motion, though never enacted, raised concerns among Russian speakers and other minorities in Ukraine, and was largely considered a mistake. Despite deepening divides between some social groups, there are also civil society actions against it, emphasising the need for tolerance, mutual respect and solidarity. In Lviv, the delegation was heartened by its meeting with Mr. Volodimir Beglov, who had launched a campaign for people across Ukraine to speak Russian for a day in protest against the repeal of the Law on Languages, and in solidarity with Ukraine's Russian-speaking minorities. This individual initiative shows that there is a way forward and that transcending ethnic and linguistic differences is possible in Ukraine.

B. The right to freedom of expression, peaceful assembly and the right to information

68. Demonstrations have continued to take place since early March, in particular in eastern Ukraine. At least four persons were killed as a result of violence that broke out between anti-government protestors and supporters of the Government, who allegedly travelled to Donetsk and Kharkiv from western and central regions of Ukraine. The OHCHR delegation was told by several interlocutors about allegations according to which people were brought in buses and paid to take part in protests and conduct them according to specific scenarios, including causing violent incidents. Some protesters allegedly come from the Russian Federation, according to information received from local authorities and confirmed by the central authorities.

69. Reports have been made of arrests during demonstrations that have taken place during the week starting on 10 March in Donetsk and in Kharkiv⁵. Police moved to clear protests sites and arrested the leader of protests in Donetsk⁶. Since the start of the Maidan protests, and particularly after the beginning of the Crimea crisis, the human right to information needs to be carefully monitored. While the distorted anti-Maidan discourse of the media controlled by the supporters of former President Viktor Yanukovich ended with the latter's dismissal in the end of February, new concerns emerged whereby pro-Maidan politicians or activists would exert pressure on the media to air or voice 'patriotic' discourse. For example, on 18 March 2014, the representative of Svoboda political party MP Igor Myroshnichenko and other Svoboda party members arrived to the National Television Company of Ukraine and intimidated and assaulted its Head Mr Olexander Panteleimonov, forcing him to sign a resignation letter. The Acting Prosecutor General committed to investigating the attack, which was also condemned by the Authorities.

70. The OHCHR delegation was provided with various accounts of events that have been perceived by some interlocutors as indicating attempts to limit freedom of expression. While cases under previous Governments were numerous, recent ones include:

⁵ <http://rus.ozodi.org/archive/news/20140201/11266/11266.html?id=25287436>

⁶ http://obs.in.ua/index.php?option=com_content&view=article&id=4859:ukr-world&catid=3:reg-news&Itemid=11

- On 13 March, the Pechorski District Court of Kiev placed Mr. Hennady Kernes, Mayor of Kharkiv, under house arrest under three articles of the Criminal Code. However, Mr. Kernes believes that he is a victim of selective justice due to his political views;

- On 10 March, the police arrested Mr. Mikhail Dobkin, former Governor of Kharkiv, allegedly on suspicion of a crime under article 110 (2) of the Criminal Code of Ukraine (“Offence against the territorial integrity and the inviolability of borders of Ukraine, committed by an individual in his capacity as a State official”).

71. The delegation was unable to obtain further clarification on the aforementioned cases, although Mr. M. Dobkin was eventually released. Irrespective of the actual facts of these specific examples, it will be important, in particular in the preparation of the 25 May elections, to ensure free communication of information and ideas about public and political issues between citizens, candidates and elected representatives. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.

72. New restrictions on free access to information came with the beginning of the Crimea crisis. Media monitors indicated a significant raise of propaganda on the television of the Russian Federation, which was building up in parallel to developments in and around Crimea. Cases of hate propaganda were also reported. Dmitri Kiselev, Russian journalist and recently-appointed Deputy General Director of the Russian State Television and Radio Broadcasting Company, while leading news on the TV Channel “Rossiya” has portrayed Ukraine as a “country overrun by violent fascists”, disguising information about Kyiv events, claimed that the Russians in Ukraine are seriously threatened and put in physical danger, thus justifying Crimea's “return” to the Russian Federation. On 6 March, analogue broadcasts of Ukrainian television channels (notably Ukraine's First National Channel, Inter, 1+1, Channel Five etc.) were shut off in Crimea, and the vacated frequencies started broadcasting Russian TV channels. On 12 March, Ukrainian broadcasters blocked three leading television channels – the 1 Channel, NTV and Rossia TV - in Kyiv and other locations in Ukraine. As a result, there are serious concerns that people – both in Russia and Ukraine and especially in Crimea – may be subject to propaganda and misinformation, through widespread misuse of the media, leading to a distortion of the facts. OHCHR shall analyse the recent decision of the Kyiv District Administrative Court to suspend broadcasting by First Channel, Worldwide Network, RTR Planeta, Rossiya 24 and NTV Mir, in line with applicable provisions against advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. During the month of March 2014, in several regions, the authorities have reacted to anti-Government protests and attempts to forcefully take over administrative buildings by detaining perpetrators. In some cases, persons were charged under the Criminal Code article sanctioning offences against the territorial integrity and inviolability of the borders of Ukraine (articles 110). There is concern that this article may sometimes have been used to restrict freedom of speech. On 22 March the local police in Donetsk arrested Mikhail Chumachenko, described as the leader of the “Popular Militia of the Donbas”. Material is reported to have been seized demonstrating Chumachenko’s intention to take over the regional administration building and proclaim himself the ‘people’s governor’. In addition to being charged for attempting to forcefully overthrow the authorities and/or the constitutional order (article 109 of the Criminal Code), he was also charged under article 110.

C. Incitement to hatred, discrimination or violence

73. During its mission, the OHCHR delegation was informed that there had been some cases where members of the Russian minority have been harassed or even attacked, such as in the case of the attack against a member of Parliament. While it seems that these violations are neither widespread nor systemic, the delegation endeavoured to collect information on cases of incitement to intolerance or hatred and related violence against all minorities. It noted the following instances:

- Ukrainian businessman and politician who on 4 March was reportedly detained and beaten by the Crimean police and who allegedly called on the crowds in Independence Square, to “shoot at the heads of Russian citizens who are in Crimea... using snipers”;

- On 10 March, in Luhansk, Mr Oleh Lyashko, Leader of the Radical Party of Ukraine and a member of the Ukrainian Parliament, who is supportive of the new coalition Government, together with a group of armed men, allegedly detained Mr Arsen Klinchayev, member of the Luhansk Regional Council and activist of the Young Guard believed to be a pro-Russian organization. The detention was allegedly accompanied with violence and threats⁷;

- In another alleged incident in early March, Mr. Dmytro Yarosh, leader of the Right Sector⁸, who declared his intention to run for presidency during the upcoming elections on 25 May, posted a call on a Russian-language social network vkontakte.com. He allegedly wrote: “Ukrainians have always supported the liberation struggle of the Chechen and other Caucasian peoples. Now it’s the time for you to support Ukraine... As the Right Sector leader, I urge you to step up the fight. Russia is not as strong as it seems”. The Right Sector later denied that its leader made such statements, explaining that his website had been hacked. According to other reports, Mr. Yarosh also allegedly stated that “non-Ukrainians” should be treated according to principles set forth by Ukrainian nationalist leader Stepan Bandera, although such statements were publicly refuted by Mr Yarosh himself.

74. Only isolated anti-Semitic incidents have been reported before and after the recent period of unrest. In February 2014, a Molotov cocktail was thrown at the synagogue in Zaporizhzhya (central Ukraine)⁹. On 13 March, a Jewish rabbi was attacked by two unidentified young men in the Podol neighbourhood of Kyiv¹⁰. Another attack was reported in the same neighbourhood in Kyiv on the following day against a Jewish couple¹¹. However, when interviewed by an impartial and reliable source representative of the various Jewish communities in Ukraine, it appears that these communities do not feel threatened, as confirmed also by the Association of Jewish Organisations and Communities of Ukraine, publicly in a letter to the President of the Russian Federation on 5 March 2014.

75. On 1 March, OHCHR received information about alleged attacks against Roma in the Kyiv Oblast. On 27 February, a young Roma was beaten up in Pereslav-Khmelnytsk. His attackers accused him of being ‘apolitical and indifferent to the country’s political life’. According to reports, around 15 masked and armed persons raided Roma houses in Korostena,

⁷ <http://news.meta.ua/cluster:35037395-Liashko-v-Luganske-zaderzhal-lidera-prorossiiskoi-organizatsii/>

⁸ Right Sector (Ukrainian: Pravyi Sektor) is a Ukrainian nationalist paramilitary collective of several organizations, described as having far right views. The group's membership has been growing and has been estimated to be about 5,000. The group first emerged at the end of November 2013 at the Euromaidan protests in Kiev, as an alliance of far-right Ukrainian nationalist groups.

⁹ <http://www.vaadua.org/news/neizvestnyy-kinul-kokteyl-molotova-v-zdanie-sinagogi-v-zaporozhe#sthash.45DHalqx.dpuf>

¹⁰ <http://112.ua/kriminal/v-podolskom-rayone-kieva-napali-na-ravvina-34122.html>

¹¹ <http://112.ua/obshchestvo/v-kieve-soversheno-esche-odno-napadenie-na-evreev-34609.html>

on 28 February, allegedly with the same motivation. Roma victims stated that they had called the police for protection, to no avail. Several Roma families have reportedly left town after receiving threats.

76. Recent developments in the eastern part of Ukraine and in Crimea are likely to have an impact on radical groups with possible signs of nationalistic sentiments and rhetoric and therefore need to be closely monitored. The OHCHR delegation heard from various sides about concerns with regard to the “Right Sector”, a right-wing group that expresses paramilitary ambitions and is known for statements which could be considered extremist. Their active participation in the defence of Maidan and suggested increasing popularity are causing concerns for the Russian-speaking minority. While there has been no confirmed evidence of attacks by the “Right Sector”, including any physical harassment, against minorities, there were numerous reports of their violent acts against political opponents, representatives of the former ruling party and their elected officials. The role of the group during the Maidan protests was prominent; they were often in the first line of defence or allegedly leading the attacks against the law enforcement units. Their alleged involvement in violence and killings of some of the law enforcement members should be also investigated. However, according to all accounts heard by the OHCHR delegation, the fear against the “Right Sector” is disproportionate, although parallels have been drawn by some between this group and past right wing nationalistic movements at the time of the Second World War. On 1 April, the Ukrainian Parliament adopted a decision by which all armed groups, including the Right Sector, must disarm.

D. Lustration, judicial and security sector reforms

77. In a bid to break away from the past, the new Government has taken initial steps to implement a lustration policy that would apply to all public officials. A lustration committee under the Cabinet of Ministers was established in February 2014 but is not yet functioning. The committee in its current form is composed of representatives of civil society and lawyers. The head of the Committee, Mr. Yegor Sobolev, emphasized that a “special act” on the judiciary would be prepared as a priority, with the assistance of Council of Europe experts. The draft law should determine the status of the lustration committee and include provisions to ensure its effective functioning.

78. During discussions with the Vice-Speaker of the Verkhovna Rada, Mr. Ruslan Koshulinskii, he expressed the view that the draft lustration law may also refer to other senior officials, including officials who worked closely with the administration of Mr. Yanukovich, held senior positions in the former Soviet Union and its former Communist Party, and former KGB officials. The Deputy Minister of Justice mentioned during a meeting that the notion of lustration was “too generic” and that specific language would be used to address vetting needs for different categories of state services.

79. All reforms and new policy measures must be taken through an approach based on the rule of law and human rights, without any spirit of revenge. It is crucial to ensure that human rights violations are not addressed with any form of human rights violations. In particular, any lustration measure must be taken fully respecting human rights. This should include: an individualized review process, and that employees subject to a review should be granted a fair hearing, with the burden of proof falling on the reviewing body to establish that a public employee is not suitable to hold office.

VI. SPECIFIC HUMAN RIGHTS CHALLENGES IN CRIMEA

80. ASG Šimonović visited Crimea on 21 and 22 March and travelled to Bakhchisaray, Sevastopol and Simferopol. The main objectives of the visit, were to: discuss the presence and operation of the UN Human Rights Monitoring Mission's sub-office in Simferopol and, in this context, present Mr. Harutyunyan as the Head of the UNHRMM in Ukraine who will be based in Kyiv; discuss the human rights concerns and allegations collected so far, and inquire about actions undertaken by the authorities to address them; and finally, to discuss measures pertaining to human rights which would contribute to addressing urgent protection concerns and thus also alleviating tensions and leading to the de-escalation of situation in and around Crimea.

81. ASG Šimonović collected first-hand information through meetings with the authorities in Crimea, leaders and members of the Crimean Tatar community, other representatives of civil society and journalists, and Ukrainian military officers and officers without insignia. Additional information has been gathered from a variety of reliable sources, including some through extensive telephone and Skype discussions.

82. The political aspects of recent developments in Crimea are beyond the scope of the assessment of this report. At the same time, however, these developments have a direct impact on the enjoyment of human rights by all people in Crimea. The delegation met with sources, who claimed that there had been alleged cases of non-Ukrainian citizens participating in the referendum, as well as individuals voting numerous times in different locations.

83. Preliminary findings, based on publicly available information as well as reports from civil society representatives in Crimea, suggest that the referendum of 16 March raised a number of concerns in terms of respect for human rights standards. Such concerns relate to the free communication of information and ideas about public and political issues. This implies a free press and other media are able to comment on public issues without censorship or restraint and to inform public opinion. A local Ukrainian journalist reportedly received threats through posters, which were disseminated near his place of residence. According to other reports, people in Crimea had limited access to information during the week prior to the referendum. According to some reports, Ukrainian TV channels were blocked since 10 March.

84. For the full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the International Covenant on Civil and Political Rights, it is necessary to ensure, *inter alia*, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign and to advertise political ideas. Bloggers and local civil society representatives reported cases of human rights violations regarding journalists and civil society representatives who were perceived to be against the referendum.

85. Reports included a number of cases of abduction, unlawful arrest and detention by unidentified armed groups, harassment, and violence against peaceful demonstrators. Some activists and journalists were arbitrarily detained or disappeared. According to information provided by civil society groups, seven persons were known to have gone missing. Some previously considered missing were later released but found to have been subjected to torture or other ill-treatment. Some victims were kept in the Military Drafting Center (Voenkomat) in Simferopol. For example, on 9 March, two persons – Mr. Andrei Schekun and Mr. Kovalski – were allegedly kidnapped and later released on the administrative border with Kherson Oblast – with signs of ill-treatment or torture. However, the media reported soon after the referendum about the disappearance of a Crimean Tatar, Mr Reshat Ametov, who had been

missing for several days. Reportedly, he was taken away by uniformed men. Mr. Ametov's body was found on 16 March in the village of Zemlyanichne, in the Belogoski district of Crimea, with alleged signs of torture, hand-cuffed and with adhesive tape over his mouth. The HRMMU is verifying the whereabouts of all those who went missing.

86. The presence of paramilitary and so called self-defence groups as well as soldiers without insignia, widely believed to be from the Russian Federation, was also not conducive to an environment in which the will of the voters could be exercised freely. According to reports, some individuals had their documents/ passports taken away before the poll by unidentified militias, and searches and identity checks were conducted by unauthorised or unidentified people, in the presence of regular police forces¹².

87. The ASG was assured that the authorities in Crimea will conduct thorough investigations of all human rights violations. These investigations should also cover crimes and human rights abuses allegedly committed by members of self-defence units. All cases of abductions and forced disappearances, arbitrary detentions, torture and ill-treatment, reportedly by so-called self-defense militia and disbanded Berkut, should be fully and impartially investigated and the results of these investigations made public. The authorities in Crimea should react promptly to any similar violations that may occur in future and decisively condemn them.

88. The protection of the rights of Crimean Tatars regarding restitution of property, including land or compensation for its loss related to their deportation from Crimea during times of USSR has been a concern since their return after the independence of Ukraine. Recent events have led to a renewed sense of uncertainty among Tatar representatives. According to Mr. Refat Chubarov, chairman of the Mejlis of Crimean Tatars, and other civil society actors in Crimea, there are reports of unidentified uniformed men claiming rights on properties and land. Several statements from the authorities in Crimea and officials in the Russian Federation, indicate plans to relocate or resettle within Crimea some of those Crimean Tatars who have occupied land illegally in recent years while waiting for their land to be returned. The authorities in Crimea have assured the Crimean Tatars that their rights would be protected, including through positive measures such as quotas in the executive and legislative organs. However, Crimean Tatar representatives have expressed reservations regarding the reality of these assurances. In addition to land squatting issues, concerns were also raised with regard to recent statements by some authorities that certain land segments will be alienated for public purposes.

89. It is widely assessed that Russian-speakers have not been subject to threats in Crimea. Concerns regarding discrimination and violence were expressed by some ethnic Ukrainians members of minorities, and especially Tatars, as indigenous peoples. In a meeting with authorities in Crimea these concerns regarding inter-ethnic tensions were dismissed, assuring that ethnic Russians, ethnic Ukrainians and Crimean Tatars and other minorities receive sufficient protection, with their three languages recognized as official languages. Despite this, Tatars largely boycotted the referendum and remain very concerned about their future treatment and prospects. Although there was no evidence of harassment or attacks on ethnic Russians ahead of the referendum, there was widespread fear for their physical security. Photographs of the Maidan protests, greatly exaggerated stories of harassment of ethnic Russians by Ukrainian nationalist extremists, and misinformed reports of them coming armed

¹² There are numerous reports about the searches by the self-defense groups (sometimes in the presence of uniformed police) of the personal belongings of people arriving by train to Simferopol or by car travelling from the mainland.

to persecute ethnic Russians in Crimea, were systematically used to create a climate of fear and insecurity that reflected on support to integration of Crimea into the Russian Federation.

90. During the ASG's visit to Crimea, the situation of the remaining Ukrainian military personnel in Sevastopol and Bakhchisaray was discussed. The authorities in Crimea confirmed that although there were some complaints of the previous period, the blocked garrisons had sufficient food and access to healthcare, though some experienced shortages in drinking water. The reported pressure on them and their families had allegedly decreased. Some officers and soldiers with whom the delegation was able to meet stressed their fear of being accused of defection or desertion and being criminally prosecuted upon return to mainland Ukraine.

91. Notwithstanding the adoption of General Assembly resolution 68/262 on the Territorial Integrity of Ukraine, there are a number of measures taken in Crimea that are deeply concerning in terms of human rights. For example, measures such as the introduction of Russian citizenship, making it difficult for those who opt to maintain their Ukrainian citizenship to stay in Crimea, give rise to issues of legal residency and loss of related social and economic rights, including the right to work. The current situation also raises concerns with regard to land and property ownership, wages and pensions, health service, labour rights, education and access to justice. In particular, civil society representatives have drawn attention to the difficulties arising from the location of the central property register in Kyiv and the severing of communication between the local administration and the administration based in Kyiv. The authorities in Crimea indicated during discussions that human rights will be fully respected, including those pertaining to citizenship and property rights.

92. The overall climate of uncertainty, including human rights and protection concerns, has led some people, predominantly Tatars and ethnic Ukrainians, to leave Crimea. For example, in the Lviv region alone, the local authorities and private citizens have already accommodated some 639 Crimeans, among them a majority being Crimean Tatars who have left and gone to the Lviv region; others have left for Turkey. The number of Crimean Tatars currently displaced is estimated to have reached 3000.

VII. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

93. There is an urgent need to ensure full respect for the rule of law and human rights in Ukraine in order to guarantee the enjoyment of human rights for all, including minorities, while also contributing to de-escalate tensions in eastern Ukraine and Crimea. In doing so, it is proposed that immediate recommendations on overcoming human rights challenges be implemented as a matter of priority. However, underlying human rights violations that are among the root causes of the protests and continue to negatively impact on the situation must also be addressed in the long-term. It is important that the Government demonstrates commitment and pursues a public and inclusive debate on necessary legal and policy reforms, and where possible, takes concrete steps towards the implementation of some of the long-term recommendations, as outlined in this report.

94. As a matter of priority for the Government during this crucial period, is to immediately address possible instances of speech that advocates national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence in order to de-escalate tensions and ensure an environment that is conducive to the holding of free and fair elections. Political leaders should be encouraged to send messages of inclusiveness and counter hate speech and

other manifestations of extremism. That will play an important role in promoting a culture of tolerance and respect. Any public statements that incite national, racial or religious hatred should be unequivocally condemned, promptly investigated and adequately sanctioned, to ensure that such discourse is not condoned in society.

95. During this sensitive period for the country, the protection of minority rights is clearly both a human rights imperative and key to conflict prevention. In the current context, the adoption of measures to reassure all members of minorities regarding respect for their right to equal participation in public affairs and public life is urgently needed. The conduct of public affairs covers all aspects of public administration, as well as the formulation and implementation of policy at international, national, regional and local levels. Therefore, a mechanism should be put in place to ensure full consultation of minorities, including numerically smaller minorities, in decision-making processes at the central, regional, and local levels,

96. Violations related to the Maidan protests should be investigated and addressed in order to ensure accountability of perpetrators. In light of numerous attacks against journalists during the Maidan demonstrations, and ahead of the referendum in Crimea, measures should be taken to ensure that their right to security of the person, as well as freedom of expression are protected and promoted. The Government should send out a strong public message in this regard. It should clearly inform that all acts of aggression, threats and intimidation against journalists and other media professionals, as well as human rights defenders, will be immediately investigated, prosecuted and punished. Journalists and human rights defenders, who are victims of such acts, should be provided with adequate remedies.

97. With respect to Crimea, it will be important for the authorities in Crimea to both publicly condemn all attacks or harassment against human rights defenders, journalists or any members of the political opposition; and ensure full accountability for such acts, including arbitrary arrests and detentions, killings, torture and ill-treatment, through prompt, impartial and effective investigations and prosecutions. It is crucial that the cases of missing persons are resolved, and that access to places of detention is granted, including the Military Drafting Center (Voenkomat) in Simferopol, to all international organisations requesting it. The protection of the rights of all minorities and indigenous peoples in Crimea, in particular Crimean Tatars, must be assured.

98. The actions carried out by members of paramilitary groups in Crimea, raise serious concerns. The rule of law should be urgently restored in Crimea and security of all individuals and public order ensured. Permitting unregulated forces to carry out abusive security operations violates that obligation and basic respect for human rights. The authorities in Crimea should immediately disarm and disband all paramilitary units operating outside of the law, protect people from their illegal actions, and ensure that all law enforcement activities are carried out by the police. The authorities should ensure that any self-defence units that are created operate in accordance with the law and that the public is aware of the units' chain of command structure and accountability mechanisms. The authorities in Crimea confirmed their intention to disarm and disband all armed groups (including self-defense groups).

99. Independent and impartial monitoring and reporting of the human rights situation in Crimea would deter violations, stimulate accountability and prevent the spreading of rumours and political manipulations. Mr. Rustam Timirgaliev was informed on the structure and the mandate of the envisaged UN Human Rights Monitoring presence and had promised to revert. However, in the meantime, the Russian Federation communicated through diplomatic

channels that any UN human rights presence should be discussed with it and that it does not support the deployment of human rights monitors in Crimea. Nonetheless, UN HRMMU will continue to seek the presence of a sub-office in Crimea, in consultation with the Government of Ukraine and various interlocutors in Crimea, and continue to monitor the human rights situation from outside the Autonomous Republic of Crimea.

100. There is also serious concern about violations of the civil and political rights of the inhabitants of Crimea, in particular with regard to those who oppose recent events. Recent events also create major concerns of effective statelessness, as well as concerns of the loss of rights of those who wish to be considered citizens of Ukraine.

101. Underlying human rights violations by previous Governments were among the root causes of the popular demonstrations that took place throughout Ukraine and in particular in the centre of Kyiv on Maidan from November 2013 to February 2014. There are now clear indications of a willingness by the present Government to ensure a break with past injustices and to elaborate a new vision for Ukraine's future. Strengthening the rule of law, democracy and human rights will be key to any lasting change and to avoid any spirit of revenge. Legislative and institutional reforms should be carried out in a comprehensive, transparent and consultative way, and therefore not be rushed. Furthermore, they should be sustained through consistent and accountable implementation.

102. A number of priority human rights concerns and corresponding reforms need to be addressed in the short, medium and long term. Irrespective of the fact that systemic shortcomings may be only remedied in the medium and long-term, it will be important to pave the way immediately through a series of initial measures that will build confidence and reassure all people, including minorities, that their concerns will be addressed.

103. The international community and the UN in particular, can and should play a role in supporting an environment where the human rights of all, including minorities and indigenous peoples, can be best promoted and protected. Without an independent and objective establishment of the facts and circumstances surrounding alleged human rights violations, there is a serious risk of competing narratives being manipulated for political ends and leading to divisiveness and incitement to hatred.

104. In this context, OHCHR engagement and provision of information and analysis of the human rights situation through the UN Human Rights Monitoring Mission on the ground will allow the UN to undertake further steps to respond to the situation in Ukraine in line with the Secretary-General's Rights Up Front approach. In providing an impartial and authoritative human rights assessments, it can contribute to establishing the facts, de-escalating tensions, and paving the way for an environment that is conducive to the holding of free and fair elections. OHCHR is ready to assist in the implementation of the recommendations contained in this report.

B. Recommendations

To the Government of Ukraine:

(i) Recommendations for immediate action

Accountability and the rule of law

1. Ensure accountability for all human rights violations committed during the period of unrest, through securing of evidence and thorough, independent, effective and impartial investigations, prosecutions and adequate sanctions of all those responsible for these violations; ensure remedies and adequate reparations for victims.
2. Ensure that any lustration initiatives are pursued in full compliance with fundamental human rights of persons concerned, including right to individual review and right of appeal.

Inclusivity, equal political participation and rights of minorities

3. Ensure inclusivity and equal participation of all in public affairs and political life, including members of all minorities and indigenous peoples and establish a mechanism to facilitate their participation.
4. Ensure that legislation on minorities, in particular on linguistic rights, is adopted following full consultation of all minorities concerned and according to relevant international and regional human rights standards.

Freedom of expression and peaceful assembly

5. Ensure the full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the International Covenant on Civil and Political Rights. A conducive environment to the forthcoming elections will also require the Freedom of expression, assembly and association, which are essential conditions for the effective exercise of the right to vote and must be fully protected. This includes: freedom to engage in political activity individually or through political parties and other organizations; freedom to debate public affairs; to hold peaceful demonstrations and meetings; to criticize and oppose; to publish political material; to campaign for election; and to advertise political ideas.
6. Ensure freedom of expression for all and take all measures that will ensure the safety of journalists, media professionals and human rights defenders so that they are able to play their full role in the run-up to elections, in shaping the future of their country.
7. Adopt legislation and other measures needed to ensure the right to peaceful assembly in compliance with the requirements of article 21 of the International Covenant on Civil and Political Rights. In particular, ensure that the principles of necessity, proportionality, non-discrimination and accountability underpin any use of force for the management of peaceful assemblies.
8. Prevent media manipulation by ensuring the dissemination of timely and accurate information. Take action against deliberate manipulation of information, in compliance

with international standards of freedom of expression and in full respect of due process guarantees.

Combatting hate speech

9. Combat intolerance and extremism and take all measures needed to prevent advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence and punish such incitement or acts of violence, which is of fundamental importance. A careful balancing act must however be maintained, with fully respecting the right to freedom of expression.
10. Take resolute steps to prevent negative stereotyping of minority communities in the media, while fully respecting the freedom of the press. Efforts to train media professionals must be increased, including by further promoting the visibility and effectiveness of the work of the national union of journalists in this regard.

Corruption

11. Put in place, as a matter of priority, all legislative and policy measures needed to effectively eradicate corruption.

Cooperation with HRMMU

12. Closely cooperate with the HRMMU and act upon its recommendations and steps needed to provide protection for persons at risk.

To the authorities in Crimea:

13. Publicly condemn all attacks or harassment against human rights defenders, journalists or any members of the political opposition; and ensure full accountability for such acts, including arbitrary arrests and detentions, killings, torture and ill-treatment, through prompt, impartial and effective investigations and prosecutions.
14. Actively resolve cases of missing persons, and grant access to places of detention, including the military facilities and offices in Simferopol and Sevastopol, to all international organisations requesting it.
15. Act to re-establish the rule of law, including by the effective disbandment of any and all 'self-defence forces' and/or para-military groups.
16. Take all measures to ensure that the human rights of Ukrainian soldiers based in Crimea are also fully respected.
17. Take all needed measures to protect the rights of persons affected by the changing institutional and legal framework, including on issues related to access to citizenship, right of residence, labour rights, property and land rights, access to health and education.

18. Investigate all allegations of hate speech and media manipulation, and take appropriate measures to prevent them and take appropriate sanctions while fully ensuring and strengthening freedom of expression.
19. Ensure the protection of the rights of all minorities and indigenous peoples in Crimea, in particular Crimean Tatars.
20. Grant access to independent and impartial human rights monitors, including by OHCHR.

(ii) Long-term recommendations:

Engagement with the international human rights system

- 21.. Enhance cooperation with the UN human rights system, including collaboration with OHCHR, in particular through the recently deployed United Nations HRMMU.
22. Ratify international human rights instruments to which Ukraine is not yet party. These include, the International Convention for the Protection of All Persons from Enforced Disappearance; the international Convention on the Protection of the Rights of All Migrant Workers and Members of their families; the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights; the third optional Protocol to the Convention on the Rights of the Child; the Rome Statute of the International Criminal Court; the 1954 Convention relating to the Status of Stateless Persons; and the 1961 Convention on the Reduction of Statelessness.
23. Implement recommendations of international human rights mechanisms. The recommendations and concerns expressed in the past few years by several human rights mechanisms continue to be of relevance and should be taken into account by the authorities when considering various reforms that will greatly impact on the protection of human rights for all people in Ukraine:
 - a. In particular, the UN Human Rights Committee issued several important recommendations in July 2013 when it considered the latest periodic report of Ukraine on the implementation of the International Covenant on Civil and Political Rights;
 - b. The recommendations adopted by the UN Human Rights Council following the Universal Periodic Review of the human rights situation in Ukraine in October 2012 should also be taken into consideration.
 - c. The report of the UN Sub-Committee on the Prevention of Torture following its visit to Ukraine in 2011 should be made public immediately and taken into consideration by the authorities when considering issues related to torture, ill-treatment, and detention related matters.
 - d. Ukraine has issued a standing invitation to special procedures. It should accommodate requests for such visits.
 - e. Encourage the development of a national human rights action plan, with clear timelines and benchmarks, addressing every recommendation resulting from the international and regional HR systems to be implemented within a certain time-frame - with the support of the international community, regional and bilateral actors, and the UN system.

Legislative and policy reforms:

24. Reform the administration of justice system so that it functions independently, impartially and effectively; reform the security sector so as to ensure that it functions in full respect of international norms and standards; provide for full accountability for human rights violations.
25. Strengthen rule of law institutions so that they fully comply with relevant international and regional human rights norms and recommendations of human rights mechanisms.
26. Review legislation and policies applicable to the management of peaceful assemblies, and if necessary, modify them to ensure their compliance with human rights standards. In particular, these should specify that the principles of necessity, proportionality, non-discrimination and accountability underpin any use of force for the management. In this regard, particular attention should be paid to the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.
27. Ensure that such policies, practices and instructions are observed through rigorous training for the personnel involved. In particular, effective internal oversight mechanisms must be put in place in order to review all incidents of injury or loss of life resulting from the use of force by law enforcement personnel as well as all cases of use of firearms during duty.
28. Ensure the institutional independence of the State Bureau of Investigation, under Article 216 of the new CCP, which provides for its creation within five years (as of 2012) to enable it to investigate allegations of human rights violations committed by judges, law enforcement officers and high-ranking officials. It will be very important to ensure that this new body is independent from the Prosecutor's Office. Public accountability and sufficient resourcing is essential to enable it to function effectively, promptly, independently and impartially.

Economic and social rights:

29. Take concrete steps to redress disparities in standards of living and equal access to and quality of health, education, employment, and social support structures for all, including marginalised communities throughout the country.

Annex 763

OHCHR, Report on the Human Rights Situation in Ukraine (15 May 2014)

**Office of the United Nations High Commissioner
for Human Rights**

**Report on the human rights situation in Ukraine
15 May 2014**

TABLE OF CONTENTS

I.	EXECUTIVE SUMMARY	3
II.	METHODOLOGY	5
III.	INVESTIGATIONS INTO HUMAN RIGHTS VIOLATIONS RELATED TO THE MAIDAN PROTESTS	6
IV.	HUMAN RIGHTS CHALLENGES.....	8
	A. Rule of law	8
	B. Law enforcement sector reform	10
	C. Freedom of peaceful assembly	11
	D. Freedom of expression	13
	E. Right to life, liberty and security	14
	F. Political rights	16
	G. Minority rights	18
V.	PARTICULAR HUMAN RIGHTS CHALLENGES IN THE EAST.....	21
	A. The right to life, liberty and security	21
	B. Freedom of expression.....	24
	C. Investigations related to events in the east	25
	D. Economic and social rights	26
VI.	PARTICULAR HUMAN RIGHTS CHALLENGES IN CRIMEA.....	26
	A. Internally displaced persons from Crimea	27
	B. Rights of Crimean residents.....	27
	C. Rights of indigenous peoples	31
VII.	CONCLUSIONS AND RECOMMENDATIONS.....	32
VIII.	ANNEX	35

I. EXECUTIVE SUMMARY

1. The present report is based on the findings of the United Nations (UN) Human Rights Monitoring Mission in Ukraine (HRMMU)¹ covering the period of 2 April - 6 May 2014. It follows the first report on the human rights situation in Ukraine released by the Office of the UN High Commissioner for Human Rights (OHCHR) on 15 April 2014.
2. Since the issuance of the first report, the HRMMU has noted the following steps undertaken by the Government of Ukraine to implement some of the recommendations from the report. These include: the drafting of legislation on peaceful assembly; and the development of a policy to prevent the negative stereotyping of minority communities in the media.
3. The HRMMU also notes the ongoing investigation by the Office of the General Prosecutor into the gross human rights violations that were committed during the violent Maidan clashes between November 2013 and February 2014 that resulted in the killing of protesters and police, as well as allegations of torture and reports of missing persons. These investigations need to be completed in a timely, independent, effective and impartial manner to ensure accountability and justice for all, both victims and alleged perpetrators; the process and the results of these investigations must be transparent.
4. OHCHR appreciates that the Government of Ukraine has welcomed the HRMMU, offering open and constructive cooperation. It has been forthright in providing information and discussing with the HRMMU human rights concerns: right to life, liberty and security of person, the freedoms of movement, peaceful assembly, expression and association, as well as right to fair trial and equal access to justice without discrimination and the protection of the rights of all minorities.
5. The main findings and conclusions for the period covered by this report are:
 - i. The Government of Ukraine is taking steps to implement the provisions of the Geneva Agreement concluded on 17 April 2014.² On the same day, the Cabinet of Ministers of Ukraine issued an Order "On the organization of the discussion of amendments to the provisions of the Constitution of Ukraine on decentralization of State power". On 18 April, a parliamentary coalition suggested to all political parties represented in the parliament to sign a memorandum of understanding regarding ways to resolve the situation in eastern Ukraine. According to acting President and Speaker of Parliament Turchynov, the initiative was not supported by members of the opposition. On 22

¹ Concept note on the HRMMU is attached.

² The Geneva meeting took place on 17 April 2014. As the result of the negotiations between the representatives of Ukraine, EU, USA and Russian Federation in Geneva on 17 April 2014, an agreement was reached on initial concrete steps to de-escalate tensions and restore security for all: (1) All sides must refrain from any violence, intimidation or provocative actions; (2) All illegal armed groups must be disarmed; all illegally seized buildings must be returned to legitimate owners; all illegally occupied public offices must be vacated; (3) Amnesty granted to the protestors who left seized buildings and surrendered weapons, with the exception of those found guilty of capital crimes; and (4) The announced constitutional process will be inclusive, transparent and accountable carried out through a broad national dialogue.

April, the draft law “On prevention of harassment and punishment of persons in relation to the events that took place during mass actions of civil resistance that began on 22 February 2014” was registered in Parliament.

- ii. Armed groups continue to illegally seize and occupy public and administrative buildings in cities and towns of the eastern regions and proclaim “self-declared regions”. Leaders and members of these armed groups commit an increasing number of human rights abuses, such as abductions, harassment, unlawful detentions, in particular of journalists. This is leading to a breakdown in law and order and a climate of intimidation and harassment.
- iii. In the aftermath of the 16 March unlawful “referendum”³ in the Autonomous Republic of Crimea, Ukraine, there are increasing reports of residents being affected by the changing institutional and legal framework. Human rights concerns relate to citizenship, property and labour rights, access to health and education. Of concern to the HRMMU, are the increasing reports of on-going harassment towards Crimean Tatars, and other residents who did not support the “referendum”. The reported cases of Crimean Tatars facing obstruction to their freedom of movement, as well as the recent attack on the building of the parliament of the Crimean Tatar people are worrying developments. Legislation of the Russian Federation is now being enforced in Crimea, in contradiction with UN General Assembly resolution 68/262, entitled “Territorial integrity of Ukraine”. In addition, its differences with Ukrainian laws will have a significant impact on human rights, posing in particular limitations on the freedoms of expression, peaceful assembly, association and religion.
- iv. The Government of Ukraine needs to carry out a prompt, transparent and comprehensive investigation into the violent events in Odesa and ensure that the perpetrators are brought to justice in a timely and impartial manner. The impact of the 2 May violence in Odesa has hardened the resolve of many, and strengthened the rhetoric of hatred. In its aftermath, a call was made for mobilisation to join local armed groups in the eastern regions of Donetsk and Luhansk. Referenda on the “recognition” of the so-called “Donetsk People’s Republic and “Luhansk People’s Republic” were planned in both regions for 11 May.
- v. Many peaceful demonstrations have been observed by the HRMMU in the country. A tendency has been observed for a peaceful protest to suddenly turn into a violent confrontation. Increasingly the result of such violent acts and confrontation leads to numerous deaths and injuries. All too often, the police appear unable to guarantee the security of participants, and ensure law and order. Peaceful assemblies must be permitted, both as a matter of international law and as a way for people to express their opinion. Policing should facilitate such assemblies, ensuring the protection of participants, irrespective of their political views.

³ UN General Assembly Resolution 68/262 on the territorial integrity of Ukraine, OP 5: “*Underscores* that the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014, having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol”.

- vi. In eastern Ukraine, freedom of expression is under particular attack through the harassment of, and threats to, journalists and media outlets. The increasing prevalence of hate speech is further fuelling tensions. Both these factors are deepening divisions between communities and exacerbating the crisis. All parties must take immediate steps to avoid incitement and radicalisation.
- vii. Campaigning for the 25 May Presidential elections is well underway. Some candidates report arbitrary restrictions, conflicts and incidents, which impacts and curtails their ability to campaign with voters. Transparent, fair and democratic Presidential elections on 25 May are an important factor in contributing towards the de-escalation of tensions and restoration of law and order.

II. METHODOLOGY

6. The report on the human rights situation in Ukraine was prepared by the HRMMU and covers the period from 2 April to 6 May 2014.
7. This report is prepared pursuant to the objectives of the HRMMU as set out in the concept note (see annex), and in line with UN General Assembly Resolution 68/262, entitled “Territorial integrity of Ukraine”, as adopted on 27 March 2014.
8. During the reporting period, the HRMMU has continued to operate from a main office in Kyiv, with sub-offices in Donetsk, Kharkiv, Lviv and Odesa (which also covers Crimea) with the same staff capacity (34).
9. The HRMMU coordinates and cooperates with various partners in Ukraine, in particular the UN Country Team (UNCT) and the OSCE Special Monitoring Mission (SMM) to Ukraine.
10. The HRMMU monitors reports of human rights violations by conducting on-site visits (where access and security allow), carrying out interviews, gathering and analysing all relevant information. The HRMMU exercises due diligence to corroborate and cross-check information from as wide a range of sources as possible, including accounts of victims and witnesses of human rights violations, state actors, the regional authorities, local communities, representatives of groups with diverse political views, the Ombudsman Institution, civil society organisations, human rights defenders, regional organisations, UN agencies and the diplomatic community. The HRMMU also collects information through secondary sources, such as media reports and information gathered by third parties. Wherever possible, the HRMMU ensure that its analysis is based on the primary accounts of victims and/or witnesses of the incident and on-site visits. On some occasions, primarily due to security-related constraints affecting access, this is not possible. In such instances, the HRMMU relies on information gathered through reliable networks, again through as wide a range of sources as possible that are evaluated for credibility and reliability.
11. Where the HRMMU is not satisfied with the corroboration of information concerning an incident, it will not be reported. Where information is unclear, the HRMMU will not report on the incident and conclusions will not be drawn until the information obtained has been verified.

12. The cases presented in the report do not constitute an exhaustive list of all cases being monitored by the HRMMU but are rather considered emblematic of current human rights concerns, pointing to existing or emerging trends and patterns of human rights violations. The HRMMU works through an electronic database to support its analysis of cases and reporting.

III. INVESTIGATIONS INTO HUMAN RIGHTS VIOLATIONS RELATED TO THE MAIDAN PROTESTS

Amnesty for those responsible for ordering the violent crackdown on Maidan protesters on 29 - 30 November 2013 to be reviewed

13. On 2 April, the Kyiv City Appeal Court cancelled, and sent back for further review, the decision of the Pecherskyi District Court on the amnesty for persons, responsible for ordering the violent crackdown and dispersal of demonstrators by the riot police "Berkut"⁴ on the night of 30 November 2013. This was the first instance of excessive use of force against peaceful demonstrators during the Maidan demonstrations. At least 90 persons were injured; 35 protesters were detained and later released. This violent incident is widely viewed as triggering further Maidan protests. A new hearing is scheduled at the Pecherskyi District Court on 14 May.

Criminal proceedings into the killings of 19-21 January and 18-20 February 2014

14. Following the violent clashes on 1-2 December and 10-11 December 2013, and the clashes and killings of demonstrators that took place on 19-21 January, violence in Kyiv reached its peak 18 and 20 February. More than 120 people (three of them women) were killed and hundreds were injured – demonstrators and police officers. Some died later in hospital from their injuries.

15. The HRMMU has been following the two separate criminal proceedings opened by the Office of the General Prosecutor: one for the killing of demonstrators and one for the killing of police officers.⁵

16. The Office of the General Prosecutor has opened a criminal investigation based on Articles 115 (Murder), 121 (Intended grievous bodily injury) and 194 (Wilful destruction or damage of property) of the Criminal Code. This is looking at the killing of protesters (75 persons) and injuries caused by the use of firearms between 19 January to 20 February on Hrushevskoho and Instyutaska streets.

17. According to the preliminary investigation, the Berkut special unit killed 46 persons during the protests. As of 24 April 2014, three Berkut officers were arrested and officially charged with murder (article 115). Information received by the HRMMU from the Office of the Prosecutor General suggests that additional Berkut officers are under investigation.

18. The Investigative Department of the Office of the General Prosecutor continues to investigate the excessive use of force and degrading treatment by law enforcement officials

⁴ The "Berkut" unit was the Special Forces within the Ministry of Interior. On 25 February 2014, Minister of Interior Arsen Avakov signed a decree dissolving the unit.

⁵ As of 6 May, criminal proceedings were underway, with no further details available.

against Maidan activist Mr. Havryliuk, who was stripped naked, roughly pushed around and forced to stand still in the snow in freezing temperatures while a police officer filmed him with a mobile phone. In this case, a serviceman of the internal troops of the Ministry of Interior is under suspicion based on article 365 (Excess of authority or official powers) of the Criminal Code.

19. The Office of the General Prosecutor informed the HRMMU that it is verifying claims that foreigners participated in the above-mentioned crimes, particularly in the targeted killings in February. In January-February, a number of attacks, abductions, severe beatings and killings of Maidan activists, as well as arson of cars belonging to the Auto-Maidan were committed by the so-called “titushky”, also referred to as an “Anti-Maidan” group. This includes the attack against the journalist Viacheslav Veremiy, who was beaten and shot on the night of 18 February and died in hospital on 19 February. In this case, three suspects are wanted by the Office of the General Prosecutor in the context of an investigation into the activities of the criminal group – one is arrested, while two remained at large.

Request to the International Criminal Court to investigate the Maidan violence

20. On 9 April, the Government of Ukraine submitted a request to the International Criminal Court (ICC) to investigate the events that occurred on Maidan from 21 November 2013 to 22 February 2014. The Registrar of the ICC received a declaration lodged by Ukraine accepting the ICC jurisdiction with respect to alleged crimes committed on its territory during the above mentioned period. The declaration was lodged under article 12(3) of the Rome Statute, which enables a non-party to the Statute to accept the exercise of jurisdiction of the Court. The Prosecutor of the ICC has decided to open a preliminary examination into the situation in Ukraine in order to establish whether the Rome Statute criteria for opening an investigation are met. On 15 April, the Minister of Justice officially stated that there was unanimous support within the Government for the ratification of the Rome Statute, which Ukraine signed in 2000 but not yet ratified.

Missing persons

21. According to the NGO EuroMaidan SOS, which has maintained a list of missing persons since the early days of Maidan, as of 5 May 2014, 83 persons (including four women) still remained unaccounted for. There is no official information from the Ministry of Interior or the Office of the General Prosecutor on the number of people still missing relating to Maidan, as investigations were on-going.

22. Initially in the aftermath of the Maidan, 314 persons were registered as missing, according to the Office of the General Prosecutor. A large number have since been found alive; some were recognised as killed or dead. It is critical to identify the whereabouts and fate of those who remain missing from Maidan.

23. An International Advisory Panel⁶ has been initiated by the Secretary-General of the Council of Europe, Thorbjorn Jagland, to oversee the judicial investigations into the violent clashes during the Maidan events from 30 November 2013 to 21 February 2014. Information has been requested by the Panel into violent acts committed by any person during three

⁶ The members of the panel are: Sir Nicolas Bratza, Chairman, a former President of the European Court of Human Rights; Mr. Volodymyr Butkevych, a former Judge of the European Court of Human Rights; and Mr. Oleg Anpilogov, a member of Kharkiv Regional Council.

periods: the night of 30 November/1 December 2013; 1 December 2013; and 18-21 February 2014. The Panel will hold its first meetings in Kyiv at the end of June 2014.

IV. HUMAN RIGHTS CHALLENGES

A. Rule of law

24. During the reporting period, the HRMMU monitored a number of measures within the sphere of the rule of law. These included: the introduction of amendments to the Constitution; Criminal Code amendments to toughen sanctions regarding violations of territorial integrity; legislation on the restoration of the credibility of the judiciary; laws providing for amnesties, as well as the law on occupation in the aftermath of the 16 March unlawful referendum in Crimea.

Constitutional reform

25. On 17 April, the Cabinet of Ministers issued an Order “On the organization of the discussion of amendments to the provisions of the Constitution of Ukraine on the decentralization of State power”. By 1 October 2014, senior government officials, the regional administrations and the Kyiv city administration are to organise debates on the planned constitutional amendments⁷ that would propose the decentralization of power. This Order accelerates the implementation of the Concept on reforming local government and territorial organization of power in Ukraine, which was adopted on 1 April 2014.

26. Public parliamentary hearings were held on amendments to the Constitution of Ukraine on 29 April, with the main areas of reform aiming to empower local governments, strike a balance between all branches of State power, ensure the independence of the judiciary, and oversight of the work of public authorities. Political parties agreed that by 25 May proposals on constitutional amendments will be finalised, with a Parliamentary session on constitutional reform to be held after this date. Further steps towards the delegation of broad powers to the local authorities are being made. On 23 April, the Government approved the first draft law “On cooperation of the territorial communities” that envisages five forms of possible cooperation within communities, based on an earlier Concept on the Reform of Local Self-Government and Territorial Organisation of Powers in Ukraine, approved on 1 April by the Cabinet of Ministers.

27. On 5 May, Prime Minister Arseniy Yatseniuk, submitted to the Parliament a draft law “On a national survey”, to be conducted on 25 May, the same day as the Presidential elections, on issues of concern for all Ukrainians: national unity, territorial integrity of the

⁷ According to the Parliamentary Interim Commission on Constitutional Reform, the main areas of the Constitutional reform are: extension of powers of local self-government, to achieve a balance between all branches of power; the development of an independent judicial branch; oversight of public authorities. Under a new Constitution regional and district state administrations will be dissolved. Local territorial communities would elect regional and district councils (local parliaments) and their heads. The executive committees of local councils would serve as local governments. State power and authority, as well as the functions of setting the local budget would be delegated to such structures. At the same time, state representative bodies would be created and located at the territorial level. They will maintain control over the adherence to legislation in a certain territory but would have no financial or economic influence in the region.

country and the decentralisation of power.⁸ On 6 May, Parliament decided not to adopt the initiative.

Criminal Code amendments toughen sanctions for violations of territorial integrity

28. On 16 April, the acting President of Ukraine signed the Law "On amendments to the Criminal Code of Ukraine", which entered into force on 19 April. It includes provisions that increase penalties related to the encroachment and inviolability of the territorial integrity of Ukraine, as well as for high treason and the undermining of national security (Sabotage and espionage).

Law on Lustration

29. On 7 April, approximately 150 activists of Maidan self-defence unit, the Right Sector and Auto-Maidan picketed, blocked and stormed the Supreme Court building, at the time of the scheduling of an extraordinary session of the Congress of Judges. The protesters along with Yegor Sobolev, head of the Lustration Public Committee of Maidan, demanded the lustration of judges and appointment of new ones. On 8 April, the Right Sector and Auto-Maidan activists blocked the Parliament calling on its members to speed up the adoption of the lustration legislation.

30. On 8 April, the Parliament passed the Law "On the restoration of the credibility of the judiciary in Ukraine" (the Law on lustration of judges) with 234 votes⁹ and it entered into force on 10 May (while the proposed law on lustration for public servants was taken off the Parliamentary agenda). Its purpose is to strengthen the rule of law, to restore confidence in the judiciary, and to combat corruption in the courts through the dismissal of judges whose gross violations of professional and ethical standards have discredited the judiciary. The Law also determines the legal and organisational framework by which judges are to be vetted. It sets out the aim, objectives and timelines for the vetting of judges, as well as the bodies authorised to conduct these procedures, the content of the vetting, and the measures to be taken following the results of the vetting. According to the Law, the process of lustration is to be carried out by an Interim Special Commission. It is foreseen to consist of 15 members; five candidates from each of the following institutions: the Supreme Court, the Parliament and the Governmental Commissioner on the Issues of the Anti-Corruption Policy.

31. The HRMMU is concerned that immediate dismissal of judges may put in jeopardy the administration of justice. The implementation of the Law can lead to the unjustified and non-motivated dismissals of judges. The Law does not follow some generally recognized requirements in the area of judicial proceedings: it implements retrospective liability for actions which were not considered punishable before the Law's adoption; the adopted court decisions mentioned in the Law are to be scrutinized by the Interim Special Commission. Also, the text of the Law uses the term "political prisoner", which is not defined in current Ukrainian legislation. The HRMMU reiterates its earlier recommendation that any lustration initiatives be pursued in full compliance with fundamental human rights of persons concerned, including right to individual review and right of appeal.¹⁰

⁸ The idea to conduct such survey was announced by Mr. Yatseniuk on 30 April during the opening of a session of the Government. He stated that, "in framework of the decentralisation of power, Ukrainian authorities are ready for the additional guarantees on the respective territory for the Russian-speaking population and other national minorities".

⁹ In total, there are 450 members of Parliament.

¹⁰ OHCHR report on the human rights situation in Ukraine, 15 April 2014, p. 25 (available online at http://www.ohchr.org/Documents/Countries/UA/Ukraine_Report_15April2014.doc).

Amnesties

32. The annual legislation “On Amnesty in 2014” entered into force on 19 April. Administered by the courts, it applies to minors, pregnant women, persons having children under 18 or children with disabilities, persons with disabilities and persons infected with tuberculosis or with an oncological disease, persons having reached the age of retirement, war veterans, combatants and invalids of war, liquidators of the accident at the Chernobyl nuclear power plant, persons having parents over 70 or with disabilities. In addition some military personnel imprisoned for committing medium gravity offences will be released. Persons who have committed grave criminal offences will not be eligible for such an amnesty. The Parliamentary Committee on Legislative Support of Law Enforcement estimates that between 23,000 – 25,000 convicts could be eligible for an amnesty.

33. From 9 to 23 April, five drafts laws on ‘amnesty’ for the activists who have participated in the protests after 22 February were submitted to the Parliament by different political parties.¹¹ While the proposed drafts varied all seek amnesty legislation that covers: actions to overthrow legal government (article 109); organisation of riots (article 294); seizure of administrative and public buildings (article 341). The majority of the proposals considered that cases of “separatism”, as violations against the territorial integrity of Ukraine (article 110), should fall within the scope of an adopted amnesty law.

34. All drafts aim to ease tensions and resolve the crisis in Ukraine, particularly in the east and south of the country, and for the most part give a date of 22 February from where acts as provided for should be applicable. The Committee on Legislative Support of Law Enforcement is now responsible for preparing the draft legislation.

Law on Occupation

35. The Law “On guaranteeing citizens’ rights and freedoms and legal regime in the temporarily occupied territory of Ukraine” was adopted on 15 April. Its provisions and implications are analysed in section VI on “Particular Human Rights Challenges in Crimea”.

B. Law enforcement sector reform

36. The ongoing events and violence in various parts of the country have resulted in an increasing erosion of law and order. The most recent example is the tragic events that took place in Odesa during the afternoon and evening of 2 May, where 46 people were killed in violent clashes, and a fire in the Trade Union building where many people had taken refuge.¹²

37. In order to develop a concept for the reform of the law enforcement bodies, an Expert Council “on the issues of human rights and reformation” was established in the Ministry of Interior on 4 April. It has a membership of 14 people, of which four are women, and includes human rights defenders. It will submit to the Government a concept of the reform of law enforcement bodies by November 2014. The reform package should reinforce the rule of law; de-politicise, de-militarise, de-centralise and strengthen the structure of the law enforcement bodies through accountability, transparency, and closer cooperation with the public and local

¹¹ 9 April Draft Nr. 4667(Party of Regions); 10 April Draft Nr. 4667-2 (non-affiliated MP Rudkovsky); 18 April Draft Nr. 4667-3 (Cabinet of Ministers); 22 April Draft Nr. 4667-4 (Party of Regions); 23 April Draft Nr. 4667-5 (Communist Party).

¹² Official death toll as of 4 May 2014.

communities; and professionalise the staff. The HRMMU has been included into the Council with an observer status.

38. On 23 April, the Ministry of Justice suspended, pending the investigation of allegations of torture that occurred in 2013, the heads of a number of penitentiary facilities, including those of the Dnipropetrovsk pre-trial detention facility and Penitentiary Colony No. 3 in Krivii Rig, Dnipropetrovsk region. On 24 April, the head of the pre-trial detention facility in Odesa was dismissed. The Government ordered the establishment of a special commission under the Ministry of Justice, which should focus on improving the legislative framework for torture prevention. This will support the work of the National Preventive Mechanism, established under the Ombudsman Institution.

39. Experts and human rights defenders continue to stress that conditions in places of the deprivation of liberty do not meet international norms and standards. The use of torture and ill-treatment in pre-trial detention facilities is often attributed to the fact that police officers are still evaluated on quantitative indicators.

C. Freedom of peaceful assembly

40. In April and early May, rallies and peaceful demonstrations have continued to take place. While many are peaceful – some gathering in large numbers, some consisting of a few picketers – a tendency can be observed in some urban areas of simultaneous rallies of opposing groups ending in violent confrontations.

41. The continuation of protests reflects a variety of demands, some supporting the unity of Ukraine, some opposing the Government of Ukraine, and some seeking decentralisation or federalism, with others looking at separatism.

42. The HRMMU has observed various rallies in support of Ukraine, its unity and territorial integrity that took place between 17-21 April in various towns, including Kyiv, Donetsk, Luhansk, Poltava, Dnipropetrovsk, Sumy, Khartsyzsk (Kharkiv region) and Odesa. Each peacefully gathered approximately 300 - 2,000 people. Further examples of peaceful protest took place on 28 and 29 April in Chernivtsi and Uzhgorod (western Ukraine) against the deployment of military and riot police to the south-east regions of Ukraine.

43. The HRMMU observed other rallies that aimed to: promote social and economic rights; demand an increase to social benefits and salaries; an end to corruption; and the improvement in governance. On 9 April, a peaceful protest of some 200 representatives of small businesses took place in Zaporizhzhya (south Ukraine) seeking an end to illegal markets and corruption. On 1 May in Kyiv, a peaceful rally took place demanding political change, constitutional reform, early Parliamentary elections, an increase of salaries and social benefits.

44. A number of peaceful assemblies supporting “federalism” have been observed by the HRMMU in Donetsk, Kharkiv, Luhansk and Odesa.

45. At the same time there were a number of examples when such peaceful rallies turned violent. The HRMMU is concerned with repeated acts of violence against peaceful participants of rallies, mainly those in support of Ukraine’s unity and against the lawlessness

in the cities and villages in eastern Ukraine. In most cases, local police did nothing to prevent violence, while in some cases it openly cooperated with the attackers. For example, on 6 April, 1,000 pro-Russian activists attacked an improvised gathering by several dozen supporters of Ukraine's unity in Severodonetsk in Luhansk Region. Six of the pro-Ukrainian activists sought medical assistance.

46. On 13 April, pro-Russian activists attacked a peaceful rally in support of Ukraine's unity in front of Mariupol City Police Department. Nineteen participants of the rally were taken to the hospital with injuries of varying severity.

47. On 13 April, the HRMMU observed pro-Russian and pro-Ukrainian rallies being held at the same time in close proximity in Kharkiv. While the presence of the police had for most of the time managed to keep the two sets of supporters apart, the situation broke down towards the end of both events. As many of the pro-Ukrainian activists were leaving their rally, they were attacked by the pro-Russian activists who broke through the police chain. Some people who did not manage to escape, were surrounded and then beaten severely. At least 16 persons were wounded; with some admitted to hospital. The police initiated criminal proceedings on the grounds of hooliganism that led to people being injured, under Part 4 of article 296 of the Criminal Code.

48. On 27 April in Donetsk, approximately 500 protesters demanded a referendum on the status of the Donetsk Region and to release those detained by the Ukrainian authorities, including Pavel Gubarev (former self-proclaimed Governor of the Donetsk region). It was from this demonstration that protesters then moved to the building of the State TV-Radio company "Donbass". Having been joined by a group from the movement "Oplot", the protesters stormed the building demanding the re-launch of the broadcasting of Russian TV channels.

49. On 27 April, in Kharkiv opposing activists organised meetings in nearby squares. On the main square, 500-600 protesters gathered, while at the same time another group supporting the unity of Ukraine rallied in a slightly larger number on a neighbouring square. Two groups of football fans from Kharkiv and Dnipropetrovsk joined the pro-Ukrainian gathering. As the latter marched towards the football stadium, clashes erupted despite the efforts of the police to separate the two groups. As a result, 14 people were injured, including two police officers. Protesters in the main square tried to build a tent settlement on the main square (Freedom square) in Kharkiv but were prevented from doing so by the police. Criminal proceedings were started under article 294 (Riots). As of 5 May, no one was charged or detained.

50. On 28 April, participants of a peaceful rally in support of Ukraine's unity in Donetsk were attacked and violently beaten by the supporters of the self-proclaimed "Donetsk People's Republic", who were armed with metal sticks, noise grenades, baseball bats and pistols, while the police was reluctant to prevent the clash. As a result, two persons were hospitalised, dozens wounded, and five participants of the rally (reportedly students) were abducted and held in the local office of the Party of the Regions; they were released the next day.

51. The most tragic of all incidents occurred in Odesa on 2 May where what was initially a rally spiralled into violent clashes and a fire, which claimed 46 lives.¹³

52. While article 64 of the Constitution provides for the freedom of peaceful assembly, there is no law that regulates the conduct of such assemblies.¹⁴ The HRRMU has observed that this gap in the legislative framework creates confusion, irregularities and an *ad hoc* approach to policies and practices that regularize and manage peaceful assemblies. These include: the organisation/preparation of a peaceful assembly; cooperation with the police during a peaceful assembly; the terms of notification for a peaceful assembly; the appeal procedure when an assembly is rule to be prohibited.

53. The HRMMU has observed that in some cases the local authorities turned to administrative courts to decide on the prohibition of assemblies.¹⁵ Such decisions are motivated by an inability to ensure the safety of participants, the lack of police staff. However, such practices lead to the violation of the human right to peaceful assembly.

54. Legislation on peaceful assembly, in line with international norms and standards needs to be adopted. Police should then be trained in policing regulations for such events, so as to facilitate peaceful assemblies, protect the security of participants, and provide space for such events in a manner that is non-discriminatory and participatory.

D. Freedom of expression

55. The HRMMU is concerned about the curtailment of freedom of expression, harassment and threats to security incurred by journalists working in Ukraine, especially in the east. Below are some cases that the HRMMU is following, illustrating the pressure, intimidation and danger that journalists and media outlets are coming under in the struggle for control of the media, and what information the general public can access and obtain. For more cases, particularly in the Donetsk region see section V on “Particular Human Rights Challenges in the east”:¹⁶

- a) On 9 April, journalists in Kharkiv protested against violations of press freedom after the local TV channel ATN was attacked by a group of armed persons who beat up and threatened Oleg Uht, the TV director of ATN. A suspect has been arrested in the investigation of this case.
- b) On 15 April, a newspaper editor was severely beaten by unidentified persons in Sumy. He suffered severe injuries to the head and an open fracture of his arm.

¹³ See below under section IV. E.

¹⁴ According to Article 39 of the Constitution of Ukraine citizens have the right to assemble peacefully without arms and to hold meetings, rallies, processions and demonstrations, upon notifying in advance the bodies of executive power or bodies of local self-government. This provision is the only legislation in Ukraine that governs the exercise of the right to peaceful assembly. A draft law on peaceful assembly is currently included on the Parliamentary agenda.

¹⁵ The court in Zaporizhzhya has prohibited conducting any rallies and assemblies from 25 April till 18 May, allegedly to avoid possible scuffles. The decision was also announced on 27 April during the rally on Lenin square.

¹⁶ See section V.

- c) On 16 April, the TV station “Center” in Horlivka (Donetsk region) reportedly terminated broadcasting its programs due to an increased number of attacks against its journalists. Journalists have reported to the HRMMU that they feel increasingly threatened each time they showed their Ukrainian ID.
- d) On 23 April, unknown assailants reportedly threw Molotov cocktails at the premises of the local newspaper “Province” in the town of Konstantinovka, Donetsk region. The newsroom was burned down. Prior to the incident, staff of the newspaper had faced certain threats and intimidation. On 18 April, the front door of the paper was reportedly painted with the words “Enough lying!” and “Here you can sign up for membership in the Right Sector”.
- e) On 25 April, a Russian journalist and cameraman were deported from Ukraine on the basis that their activities were “harming the security and territorial integrity of the country”.
- f) On 4 May, in Odesa, a Channel 5 journalist was attacked by pro-federalism activists, while reporting on events in the city. The Office of the Regional Prosecutor initiated a criminal investigation under article 171 (prevention to the legal journalists’ activity).

56. Incitement to hatred continues to fuel tensions. This is particularly prominent in the eastern regions of the country.

57. Acting President Oleksandr Turchynov, issued a Presidential decree 28 April “On measures to improve the formation and realisation of State policy in the sphere of informational safety of Ukraine”.¹⁷ It foresees the development of further laws and policies to regulate the media environment and activity of journalists, particularly of foreign media outlets.

E. Right to life, liberty and security

58. The breakdown in law and order, and the surge in violence are leading to more deaths and a deteriorating situation in Ukraine. Armed groups have increasingly committed human rights abuses, including abductions, torture/ill-treatment, unlawful detentions and killings as well as the seizing and occupying of public buildings.

59. On 5 May, the head the police in Cherkasy region, announced that suspects had been identified in the investigation of the murder of Vasily Sergiyenko. He was abducted from his home on 4 April by three unknown persons in Korsun-Shevchenkivskiyi, Cherkasy region. On 5 April, his body was found in a forest about 150 kilometres outside Kyiv, with reported signs of stab wounds and torture.

60. On 15 April, a NGO activist was assaulted in Drohobych (Lviv region) by unknown perpetrators and consequently hospitalised. The attack is thought to be linked to the work of the activist on abuse of power by officials. The case was reported to the police by the medical staff in the hospital.

¹⁷ Presidential Decree No. 449/2014

61. On 28 April, Hennadiy Kernes, the Mayor of Kharkiv, a well-known pro-unity supporter, was shot as he was cycling near his home by unknown persons and severely injured and, flown to Israel for treatment on 29 April. To enable his medical evacuation, the Pecherskyi District Court in Kyiv had to lift his house arrest, which he had been under since 13 March. He is charged under articles 127 (Torture), 129 (Death threats) and 146 (Unlawful arrest) of the Criminal Code for beating a Maidan activist.

62. The current deteriorating economic situation and unemployment level, with the ongoing crisis, could see a rise in the number of cases of violence against women, domestic violence and trafficking in humans, as vulnerabilities become much more acute. This requires particular attention and support in eastern Ukraine, where historically there has been less active participation and involvement by NGOs to date. For example, in Donetsk the only shelter for victims of trafficking and domestic violence is run by the authorities, with space for 13 individuals.

Odesa violence

63. On 2 May, a national unity rally gathered around 1,500 people, including many fans from the football clubs of Chornomorets Odesa and Metalist Kharkiv¹⁸, as well as city residents. Among the crowd there were reportedly also some radical members of the Right Sector and Maidan self-defence unit armed with bats and metal sticks. Shortly after the rally began, the latter were provoked by approximately 300 well-organized and armed pro-federalism activists; the rally turning into a mass disorder, which lasted for several hours. As a result, four protesters in support of Ukraine were killed by gunshots (a fifth died later in the hospital from his injuries). Many were injured during the afternoon (mostly protesters supporting federalism). During the evening, violent clashes between the two sides continued on the main square (Kulikove polje), which ended in a fire at the Trade Union building where protesters supporting federalism had taken refuge. As a result of the events, 46 people died of whom 30 (including 6 women) were trapped and unable to leave the burning building and 8 (including one woman) died from jumping out of the windows. In total, 38 died at the scene of the fire. At least 230 were injured.¹⁹ As of 5 May, 65 remained in hospital, including two minors. Nine were in critical condition, including one policeman.

64. The list of missing persons, initially 13 persons, is now maintained by a special hotline organised by the Mayor's office. On 5 May, it contained 45 names, but the figure constantly changes due to numerous mistaken reports or initial calls from worried parents and subsequently solved cases of missing children.

65. The Office of the General Prosecutor has opened an investigation into the events of 2 May in Odesa. The same day, 114 persons were taken by police from the location of the incident, reportedly for their own protection. The police investigation department informed the HRMMU that only 11 have been officially detained under part 2 of article 294 (Riots leading to death).

¹⁸ Joint marches among fans are a regular tradition before all football matches.

¹⁹ According to the Odesa City Council Health Department, 230 persons requested medical aid, out of them 214 were delivered to hospitals in ambulances.

66. In the context of the events in Odesa, the role of the police and the lack of preparedness and protection were highly questionable.²⁰ The Office of the Prosecutor has opened criminal proceedings against the police officers under article 367 (Neglect of official duty). On 3 May, the head of the regional police, Mr Lutsiuk, was dismissed.

67. On 5 May, Arsen Avakov, the Minister of Interior, announced that a special unit of the National Guard (400 persons) arrived in Odesa to protect the integrity of the region and restore public order. It will be under supervision of the head of Odesa Regional Administration. The unit comprises armed volunteers, which is of concern given their lack of training in handling mass protests.

F. Political rights

Human rights in the electoral process

68. On 4 April, the Central Election Commission (CEC) confirmed the registration²¹ of 23 candidates (20 men and 3 women) for the Presidential elections scheduled on 25 May.²²

69. Several candidates have reported facing arbitrary restrictions, hate speech, intimidation and violent attacks during their election campaigning. Some examples of such cases are listed below.

- a) On 10 April, Oleg Tsariov (non-affiliated candidate from eastern Ukraine) following a press conference in Odesa was reportedly prevented from leaving the location by “Right Sector” activists. Scuffles broke out between the latter and supporters of Mr. Tsariov. The police managed to transfer Mr. Tsariov out of the hotel.
- b) On 14 April, Mykhailo Dobkin (Party of Regions) and Oleg Tsariov were attacked in Kyiv at the ICTV (national TV channel) media building. Both are known for their pro-Russian stance and for supporting federalism.
- c) On 11 April in Rivne, there were reports of “Right Sector” activists who picketed, burned documents and then sealed the office of the Communist Party. They demanded activities of the party be banned for as long as Petro Symonenko, Head of the Communist Party, supported separatist activities in south-east Ukraine.
- d) On 22-23 April in Krasnodon and Alchevsk (Luhansk region) unknown persons attacked campaigning tents of Anatoliy Hrytsenko (Civic Position party). On 30 April, in Mykolaiv his campaigners were verbally harassed with demands to remove the campaign tents by unknown persons.

²⁰ The preparedness of the State Emergency Service of Ukraine and its ability to deal with arson is also questionable. Whereas the medical help (first aid provided by ambulance and medical help in the hospitals) was assessed as highly effective.

²¹ CEC denied registration to 17 candidates as they did not comply with the procedural norms. There were no claims of unlawful refusal in registration.

²² On 25 May there will be elections of mayors in some of the towns (namely Kyiv, Cherkasy, Chernivtsi, Odesa, Kherson, Mykolaiv, Sumy and a number of smaller towns throughout Ukraine. During the presidency of Viktor Yanukovich, the results of the mayors’ elections in these towns were illegitimate, but the early elections were blocked through the administrative pressure. The towns were governed by the secretaries of the city halls.

- e) On 28 April in the village Perehrestivka (Romensky district, Sumy region), the pro-unity campaign team of Oleh Liashko (Radical Party) was threatened and their property destroyed. He cancelled his campaigning activities in the area.
- f) Also on 28 April, Mykhailo Dobkin, was prevented from leaving the plane at Kherson airport by some 250 pro-unity activists. The police claimed they were prohibited from accessing the runway, and could not provide security to the Presidential candidate. A criminal case has been opened against the aforementioned activists (still being identified) under article 279 (Blocking transport communications by placing obstacles preventing normal functioning of transport or creating danger to human life or the onset of other serious consequences) of the Criminal Code.

70. The HRMMU has concerns about the security of the candidates and space for their pre-election activities, as well as how voters are able to access comprehensive information about the presidential candidates.

71. The NGO “Opora” has highlighted that the Presidential election campaign is often accompanied by intolerance, which could lead to more social tension and outbursts of violence. The HRMMU is concerned at the reports of billboards being posted by Oleh Liashko with the slogan “Death to occupants”. They have been sighted in in the regions of Chernivtsi, Ivano-Frankivsk, Rivne, and Ternopil.

72. On 1 May, Oleg Tsariov and Natalia Korolevska officially withdrew as candidates from the Presidential elections.²³ On 16 April, two criminal proceedings were initiated against Oleg Tsariov based on articles 109 (Actions to overthrow a government) and 110 (Separatism). As of 5 May, 21 candidates (19 men and 2 women) were confirmed as running for the Presidential post.

73. On 26 April, the CEC announced that in order to vote in the Presidential elections, Ukrainian citizens living in Crimea would have to register in person at any polling station on mainland Ukraine no later than five days prior to the election day, i.e. 19 May. This implies that residents of Crimea will have to travel to another region twice (to register and to vote) or to spend one week there. This is the only option provided to ensure their participation. The procedure for registration was simplified for the residents of Crimea, compared to other citizens of Ukraine who want to vote in another location. The citizens in Crimea do not have to provide any additional supporting documentation. As of 5 May, approximately 727 residents of Crimea have registered to vote on mainland Ukraine. The over 7,000 IDPs from Crimea will be able to vote where they are now settled.

74. On 30 April, Andriy Mahera, Deputy Chair of the CEC, announced that Presidential elections would be conducted whatever the circumstances and their outcome would be legally binding. Furthermore, in order to prevent the disruption of the electoral process, as well as to hinder any possible unlawful referendums in support of the various self-proclaimed "people's" republics (e.g. Donetsk People’s Republic) the decision had been made to block the access to the State Voter Register in several towns in Donetsk and Luhansk regions.²⁴

²³ Oleg Tsariov claimed that elections were not possible at a time of “civil war” in the country. Natalia Korolevska gave the reason for her decision as being that the elections were dividing the country.

²⁴ The access to the State Voter’s Registry in 7 towns of Donetsk region was blocked on 24 April and in 7 towns of Luhansk region on 30 April. The access to the registry in Crimea remains blocked since 6 March.

Women's participation

75. Women represent 54 % of the Ukrainian population, but they are underrepresented in politics as leaders. Ukraine is falling short of fulfilling its 2015 Millennium Development Goal commitment of having 30% of top leadership positions filled by women. Of the 21 Presidential candidates, only two are women. Only 10% of the members of Parliament are women. The current Cabinet of 18 Ministers includes only two women, although its composition was completely revisited in February. Women are better represented in local government: 12% of regional councillors; 23% of district councillors; and 28% of city councillors; and in village councils women making up 50% of the councillors.

76. The HRMMU has not noted any discriminatory language towards women either during the campaigns for the presidential or Kyiv mayor elections. At the same time, there were no systematic efforts to promote women in campaigning positions, as election commission members or as election observers. NGOs report that the election campaign has not sought to promote women and have expressed concern that the issue of gender equality is becoming lost amid the enormous reform agenda.

Political parties

77. On 21 April, Viacheslav Ponomariov, the self-proclaimed Mayor of Slovyansk, reportedly banned the election campaigning activities of the (pro-Maidan) political parties, such as "Udar", "Svoboda" and "Batkivshchyna" in Slovyansk.

78. On 30 April, the District Administrative Court of Kyiv issued a decision to terminate the activities of the political party "Russian Unity".²⁵ The Ministry of Justice provided evidence that the leader of the party, Sergey Aksionov (current "governor" in the Autonomous Republic of Crimea), had conducted an anti-State policy, aimed at the violation of the territorial integrity and independence of the country. The court hearing on the "Russian Block" is to resume on 12 May.

G. Minority rights

79. The UN Special Rapporteur on Minority Issues, Rita Izsák, conducted a mission to Ukraine on 7-14 April 2014, visiting Kyiv, Uzhgorod, Odesa and Donetsk (she was unable to access Crimea). In her press statement at the conclusion of the visit, she noted that inter-ethnic and inter-faith relations were harmonious; and that the legislative and policy environment was conducive to the protection of minority rights, including cultural rights. However, she also observed that considering the great diversity of population groups in Ukraine, the institutional attention to minority issues was currently insufficient and had declined or been downgraded in recent years. She further noted that the recent developments in Ukraine had created an environment of uncertainty and distrust that may create fractures along national, ethnic and linguistic lines and threaten peaceful coexistence if not resolved. She warned that in some localities the level of tension had reached dangerous levels and must be diffused as a matter of urgency.²⁶

²⁵ On 15 April, the Ministry of Justice filed a lawsuit prohibiting the activities of the political parties Russian Bloc and Russian Unity in Ukraine. Allegedly the leadership of the political parties was seeking to change the constitutional order by force, to undertake activities violating the sovereignty and territorial integrity of Ukraine, to illegally seize State power, to undertake war propaganda, violence, and incitement to ethnic, racial or religious hatred – all of which are contrary to Article 5 of the law "On Political Parties in Ukraine".

²⁶ Press statement of 16 April 2014, by the Special Rapporteur on minority issues, available online at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14518&LangID=E>.

80. The HRMMU has received credible reports that Crimean Tatars are experiencing significant pressure, examples of which are provided in section VI on “Particular Human Rights Challenges in Crimea”.

81. The importance of using one’s mother tongue freely in private and public without discrimination is of high importance. Generally communities expressed satisfaction that minority schools or specialized classes have been established and function freely according to national law. They frequently noted that the use of minority languages is a significant and valued feature of Ukrainian society and is in no way incompatible with the teaching and use of Ukrainian as the state language. However, the Special Rapporteur on Minority Issues referred to the concerns voiced by ethnic Russians that there were relatively few Russian schools in relation to their numbers. On 11 April, while in eastern Ukraine, acting Prime Minister Yatseniuk emphasised that the law “On the Basics of State Language Policy” so called “Kolisnechenko-Kivalov law”, remained in force. However, this remains a contentious issue in eastern Ukraine, with many not grasping that the use of languages is to be considered by region.

82. There have been individual cases of hostility and anti-minority acts reported to the HRMMU. These remain isolated incidents, but which can contribute to an atmosphere of mistrust and fear, which in turn can generate discrimination and violence, and potentially hate crimes.

83. The HRMMU has observed a number of cases motivated by hatred against minorities:

- a) In Odesa on 7 April, an incident when graffiti with swastikas was painted on Jewish tombs, the Holocaust memorial and on houses next to the Synagogue was monitored by the HRMMU. The signature of the Right Sector allegedly appeared next to the graffiti. On 8 April, the leaders of Right Sector from Kyiv and of the Ukrainian National Assembly personally met with the Chief Rabbi, Avraam Volf, to assure him that these organisations had not participated in these acts. Together with the municipal service and pro-unity activists, they washed off the graffiti from the tombs. The Jewish community believes these acts were a provocation and not part of a broader threat. On 8 April, the police opened a criminal investigation into the case based on article 296 of the Criminal Code (Hooliganism).²⁷
- b) On 15 April, in Donetsk, anti-Semitic leaflets²⁸ with the stamp of the “Donetsk People’s Republic” were circulated near the local synagogue. The self-proclaimed leaders of the “Donetsk People’s Republic” denied their involvement in the incident; its self-proclaimed Governor, Serhiy Pushylin, called it a provocation. On 18 April, the Security Service of Ukraine announced that the materials of this case were added to the on-going criminal proceedings under articles 110 (Trespass against territorial integrity and inviolability of Ukraine) and 294 (Riots).

²⁷ Criminal Code also foresees accountability for such criminal offences as: violation of graves (article 297), illegal desecration of religious sanctities (article 179), and violation of citizens’ equality based on their race, nationality or religious preferences (article 161).

²⁸ The text of the leaflet obliged all Jews of Donetsk region to pass registration by 3 May, which costs 30 USD. If not passed, they will be deprived of citizenship and deported from the Donetsk People’s Republic with the confiscation of their property.

84. The HRMMU in Odesa, Kyiv, Donetsk and Lviv met with representatives of the Jewish communities (the World Jewish Congress, Rabbis, and cultural centres). In all locations, it was informed that, apart from a few anti-Semitic incidents over recent years, they had not experienced significant violations or threats. However, one of them expressed concerns that the political party –“Svoboda” – which made anti-Semitic statements in the past - was now represented in the Parliament and the Government.

85. The HRMMU visited the Zakarpattya region, which is the most ethnically diverse area in Ukraine. In meetings with national and ethnic communities no information was received that suggested they were facing tension or hostilities. The largest national and ethnic communities (Hungarians, Russians, Ruthenians, Poles and Slovaks) described positive inter-ethnic relations. However, the HRMMU received allegations from representatives of the Roma community that they frequently face discrimination and stigmatisation, as well as arbitrary arrest and ill-treatment from law enforcement officials in Zakarpattya. They do not usually report such incidents due to their lack of trust in the law enforcement bodies and fear of further persecution.

86. In Donetsk region, the HRMMU has been monitoring the situation of the Roma community particularly following the attack during the night of 18 April on the Roma community in Slovyansk (Donetsk region), reportedly by an armed group of persons. NGO representatives reported to the HRMMU that seven households were attacked by armed men demanding gold, money and other valuables. The Roma Council of Ukraine has claimed that this was the most recent attack on the Roma community in the past months. One of the families has registered a complaint with the police. Two later reports of attacks on Roma communities received by the HRMMU could not be verified. Reports indicate that many Roma families have apparently left Slovyansk for unspecified reasons; the situation for those remaining in the town remains unverified.

87. The HRRMU has received credible reports of ongoing reports of hate speech, harassment and hate-motivated violent attacks against LGBT persons, including organised attacks by groups specifically targeting LGBT persons, and limited investigations into such attacks by law enforcement officials or remedy for victims. The issue of the protection of the rights of LGBT persons has repeatedly been misrepresented and used in a derogatory manner by political actors to discredit opponents. The LGBT community is concerned that the political programmes of the two right-wing parties – Svoboda and Right Sector (leaders of both are running for the Presidency) – clearly state combating homosexuality as one of their goals. Reportedly, the Communist Party of Ukraine has also made negative statements regarding sexual orientation. The LGBT community in Kharkiv informed the HRMMU that they have been receiving threats from both radical right-wing groups and pro-Russian movements. Both sides are quite similar in their negative attitude towards LGBT and their use of hate speech.

88. On 15 April, a draft law on the prohibition of propaganda of same-sex sexual relations aimed at children, which has been condemned by the UN human rights mechanisms, as well as the Council of Europe, was withdrawn from Parliament. However, another draft law (Nr. 0945), contemplating similar provisions, technically remains under consideration, despite a motion for its withdrawal.

89. Acknowledging the need for confidence-building between various communities in society, there have been some attempts by human rights NGOs in the Donetsk region to

organize discussions aimed at breaking the stereotypes that exist in the society about tensions between different groups and to engage in dialogue. On 16 April in Lutsk (western Ukraine), local civil society activists held a round table discussion on mutual understanding with representatives of national minorities of the region. Representatives of the local chapter of the Right Sector, Community Sector, Auto-Maidan, the Russian Cultural Centre and the Polish Cultural Society took part in this event.

V. PARTICULAR HUMAN RIGHTS CHALLENGES IN THE EAST

A. The right to life, liberty and security

90. The HRMMU has received credible reports regarding the increasing numbers and presence of well-organized armed persons in eastern Ukraine, particularly in the Donetsk region, which in some towns are forming so-called “self-defence” units. These armed groups are seizing and occupying more and more public and administrative buildings, including those of the Donetsk regional administration, the Prosecutor, the Security Service of Ukraine, as well as police departments in various towns, mostly in the northern part of the Donetsk region and parts of Luhansk region. These illegal take-overs of administration buildings (such as the Donetsk Regional State Administration and the Regional Department of the Security Service of Ukraine in Luhansk) by both armed and unarmed persons were done so with political demands for regionalisation, and at times reportedly separatism.

91. A number of regions self-proclaimed their “sovereignty”, for example on 7 April, there was the announcement by those occupying the Regional Administration Building in Donetsk of the establishment of the so-called “Donetsk People’s Republic”; on 27 April a similar announcement was made in Luhansk concerning the establishment of the so-called “Luhansk People’s Republic”.

92. The acquiescence of law enforcement bodies in the illegal seizure and occupation of public and administrative buildings in the Donetsk and Luhansk regions has been observed, raising questions regarding its implications for the administration of justice and the rule of law, including the prompt and effective investigation into reported criminal acts. This raises serious concerns regarding residents’ access to legal remedies, due process and overall guarantees for human rights protection.

93. This has contributed to a situation where armed persons, now formed into illegal groups, operate and run towns with impunity, for example in the town of Slovyansk located in the northern part of the Donetsk region. There has been a noted shift of apparent ‘control’ from the ‘political base’ of the “Donetsk People’s Republic” in Donetsk, to the “armed operations base” of the “Slovyansk self-defence unit” in Slovyansk.

94. The HRMMU is concerned with the undermining of human rights protection and guarantees of fundamental freedoms for the population of the town where buildings are occupied by armed persons, as well as the broader population of eastern Ukraine. Specifically, the HRMMU is concerned about the rise in the number of reported cases of intimidation, harassment and killings, as well as the wave of abductions and unlawful detentions of journalists, activists, local politicians, representatives of international organizations and members of the military.

Security and law enforcement operation

95. The Government first announced a “counter-terrorist” operation in eastern Ukraine, namely Donetsk region, on 13 April. The ensuing security and law enforcement operation was ceased by the authorities in observance of the Easter holidays and in the aftermath of the Geneva meeting and statement.²⁹ Following the discovery of the bodies (with alleged signs of torture) of Volodymyr Rybak³⁰, Horlivka city councillor, and Yuriy Popravko³¹, a student and Maidan activist from Kyiv, in a river near Slovyansk on 19 April, acting President Oleksandr Turchynov ordered the resumption of the “counter-terrorist” operation in eastern Ukraine on 24 April.

96. On 28 April, the body of another student, Yuriy Dyakovskiy, was discovered in the river near Slovyansk with similar signs of torture. He had arrived in Slovyansk on 16 April with three other friends and was allegedly abducted on 17 April.

97. The security and law enforcement operation has since then particularly concentrated on the town of Slovyansk, which serves as the “armed operations base” of the so-called “Slovyansk self-defence unit”. According to the law enforcement bodies of Ukraine, these armed groups are well organised and heavily armed, and have managed to down two Ukrainian helicopters with shoulder-held missiles. On 28 April, the Ministry of Interior reported that three checkpoints had been taken and that “five terrorists were destroyed” by Ukrainian security forces as they attempted to gain control of Slovyansk. Such use of force raises concerns as to whether other non-violent means could have been used, in line with relevant international norms and standards. Furthermore, the HRMMU is also concerned about information it has received regarding alleged cases of enforced disappearances in eastern Ukraine reported to have been carried out by the Ukrainian army as part of these operations. As security and law enforcement operations continue, increasing concerns are raised regarding the protection of the local population.

98. In Kostyantynivka on 3 May, during the security and law enforcement operations the Security Service of Ukraine reported wounded persons, not disclosing the exact number. According to local sources in the hospital in Kostyantynivka, there were a number of casualties as a result of those operations. The HRMMU is trying to further verify this information.

99. In Kramatorsk according to the Department of Public Health of the Donetsk Regional State Administration, six individuals among the local population were reportedly killed and 15 wounded in the course of a security and law enforcement operation that took place on 3 May.

100. On 16 April, during an attempt to take over a military unit in Mariupol by local pro-Russian protesters, reportedly three persons were killed, 13 wounded and 63 were detained by law enforcement officers. There are allegations that the protesters were armed. According to relatives of those detained, the protesters were not armed, and they allege more were killed by law enforcement bodies. The HRMMU is seeking to verify information in this case.

Unlawful detentions

²⁹ See footnote 2.

³⁰ Mr Rybak - a well-known supporter of the unity of Ukraine - was abducted by unknown persons on 17 April, and his whereabouts since that time had remained unknown. On 23 April, the State Security Service opened an investigation into the killing of Mr. Rybak.

³¹ Mr Popravko went missing on 18 April. Allegedly was tortured and drowned the same day.

101. Of grave concern, is the increased number of cases of abductions and unlawful detentions in the eastern regions, with journalists appearing to be particularly targeted. The illegal “Slovyansk self-defence unit” appears to be responsible for controlling these illegal activities. Information on the unlawfully detained was from time to time confirmed by the self-proclaimed mayor of Slovyansk, Viacheslav Ponomariov. The unlawful detention of a group of OSCE military observers and their Ukrainian five counterparts came to an end with their release on 3 May, after 10 days in captivity. One was released in the first 24 hours on medical grounds. Despite such releases, the HRMMU remains deeply concerned that there is little or no information on the reported cases of detentions, including of three officers from the Security Service of Ukraine apparently still detained by the “Slovyansk self-defence unit”. These acts are in violation of national laws and international standards. The HRMMU continues to receive reports of cases of abductions and unlawful detention of individuals whose whereabouts cannot be accounted for by relatives and colleagues. As of 5 May, the HRMMU was aware of at least 17 persons who were still reportedly unlawfully detained in the Donetsk region; however, the actual number of those unlawfully detained may be higher.

102. Some examples of cases which have and continue to be monitored by the HRMMU include:

- a) On 19 April, a railway police officer, left home in Slovyansk and has never returned. Criminal proceedings have been opened under article 46 of the Criminal Code (Illegal abduction or deprivation of liberty);
- b) In Kramatorsk, on 21 April an armed group abducted a police officer; criminal proceedings were initiated under article 349 of the Criminal Code (Capture of representative of government law enforcement agency as a hostage);
- c) On 29 April, a local activist, was allegedly abducted by unidentified persons, and is now unlawfully detained by an armed group in the occupied building of the State Security Service in Luhansk;
- d) On 29 April, an armed group abducted a member of the Svoboda party and a local election commission representative in the town of Konstantinovka. The next day, an armed group abducted a second Svoboda party representative. Unofficial sources told relatives that the two men are unlawfully detained in Slovyansk;
- e) On 2 May in Donetsk an armed group abducted an activist and aide. He was unlawfully detained, beaten and interrogated for three days. He was released on 5 May;
- f) On 3 May, pro-unity activists were unlawfully detained, beaten and interrogated in Luhansk. They were released on 4 May;
- g) On 4 May, a group of armed men abducted six residents of Novogradovka in Donetsk region, including town councillors and trade union members. They were severely beaten and tortured while unlawfully detained in the occupied building of the Regional State Administration in Donetsk and some of them were released on 5 May.

Detentions and cases of alleged enforced disappearances

103. The HRMMU has received credible reports of the detention and transfer to Kyiv by the Security Service of Ukraine of a number of persons. At times between their detention and confirmation of whereabouts, a number of these individuals had been held in conditions amounting to enforced disappearance. Examples of such cases are:

- a) On 26 April, an activist from the Artyomivsk self-defence unit, was reportedly detained by the Ukrainian military and transported by helicopter to Kramatorsk. He was

interrogated and released on 27 April after one day of enforced disappearance. The HRMMU interviewed the activist in the Artyomivsk hospital where he has been undergoing medical treatment for injuries sustained while in detention. According to him, Ukrainian special military units (allegedly “Alfa”) searched him at a checkpoint, which had been operated by an armed group. He was reportedly unarmed. His membership card from the Ukrainian branch of the Don Cossacks organization was found. He was beaten, blindfolded and taken to Kramatorsk where he was interrogated about his alleged connections to the Russian Federation. The local police in Artyomivsk registered the case. No criminal investigation has been opened, as he has refused to file an official complaint for fear of retaliation;

- b) An activist of the “Donetsk People’s Republic” was detained on 3 April by the Security Service of Ukraine and transferred to the Security Service of Ukraine pre-trial detention center in Kyiv. He has since been charged under article 294 (Civil unrest), and article 341 (Illegal occupation of government or public buildings and installations) of the Criminal Code. His relatives were not informed about his detention and transfer to the SBU in Kyiv for some time - HRMMU is verifying the timeframe. The National Preventive Mechanism has confirmed to the HRMMU that his state of health is satisfactory and he receives legal aid.

104. Pavel Gubarev, self-proclaimed “People’s Governor” of Donetsk region, was arrested on 6 March by the Security Service of Ukraine. According to his lawyer, the manner in which his detention took place presented a number of violations of the requirements of the Criminal Procedure Code of Ukraine. However, the HRMMU also received information according to which this would not be the case.

B. Freedom of expression

105. The struggle for control of the media outlets, and who is able to broadcast where, continues inside Ukraine, particularly in the east. The latest incident was the seizure of a TV centre in Donetsk on 27 April by pro-Russian protesters with the demand that it switches back to broadcasting Russian TV, which followed an earlier decision by the Kyiv administrative court to prevent such broadcasting and only permitting Ukrainian TV channels.

106. The environment for journalists working in eastern Ukraine is deteriorating. Journalists, bloggers and other media personnel either based in the region, or visiting, are facing increasing threats and acts of intimidation, including abduction and unlawful detention by armed groups. According to information received by the HRMMU, the so-called “Slovyansk self-defence unit” has been unlawfully detaining journalists since 15 April. There are reports that at the check-points of Slovyansk, there are lists of journalists and others that the armed group is seeking, with photographs and personal data. Allegedly, in this way many journalists have been detained. Most are accused by the armed groups who detain them of working for the CIA, FBI, the Right Sector or of being one-sided about their reports from Slovyansk.

107. The HRMMU is aware of at least 23 journalists, reporters, photographers (both foreign and Ukrainian nationals) who have been abducted and unlawfully detained by armed groups, primarily in Slovyansk. As of 5 May, 18 of them were known to have been released.

They have reported that those still kept in unlawful detention, including journalists, by the “Slovyansk self-defence unit”, had been subjected to ill-treatment.

108. The exact number of the journalists still unlawfully detained remains unknown. As of 5 May, the HRMMU was following the cases of a number of journalists, including: 1) journalist with the Open Dialogue Foundation who went missing on 16 April but was released on 6 May; 2) staff member of the “Hidden Truth TV, went missing on 20 April. Both were reportedly seen by a journalist who was then released³² in the basement of the seized building in Slovyansk; 3) a journalist with the Lviv-based media outlet “ZIK” was unlawfully detained by unknown persons on 25 April on the main square of Slovyansk; and 4) a journalist with the Lutsk-based “Volyn Post” newspaper, went missing on 26 April in Slovyansk. The whereabouts of at least two of these journalists remains unknown.

109. On 2 May, several journalist crews were briefly abducted by unknown persons in the Donetsk region: the production team of SkyNews and CBS as well a “Buzzfeed” news website journalist and his interpreter. The HRMMU interviewed most of the victims after their release and return to Donetsk. During their unlawful detention, the journalists and local staff were blindfolded, held at gun point, interrogated, and threatened. One female journalist was reportedly sexually harassed.

110. The impact of the developments in eastern Ukraine on the most vulnerable groups is being closely monitored by the HRMMU. Attacks by an armed group on Roma communities in Slovyansk that were reported, resulted in many Roma families leaving the area, with others remaining in the city fearful to cross checkpoints.

C. Investigations related to events in the east

111. Information provided to the HRMMU by the Office of the General Prosecutor showed that law enforcement agencies had registered 247 criminal proceedings concerning cases of “separatism”. 17 of these are under investigation by the Regional Prosecutors of Donetsk, Luhansk, Kherson and Dnepropetrovsk: eight concern violent acts to overthrow or change the constitutional order as stipulated or to seize state power (article 109 of the Criminal Code), or the infringement of Ukraine’s territorial integrity and inviolability (article 110 of the Criminal Code), and one criminal proceeding for high treason (article 111 of the Criminal Code). The remaining eight criminal proceedings concern excessive use of powers (article 365 of the Criminal Code) by police officers in connection with allegedly supporting an act of “separatism” (linked to either article 109 or 110 of the Criminal Code).

112. The HRMMU is following up on a number of cases where individuals were detained under these criminal proceedings related to events in the east. On 30 April, the HRMMU received information from the National Preventive Mechanism regarding ten detained persons. It was stated that they are held in the pre-trial detention centre of the Security Service of Ukraine based on respective court decisions, and, reportedly, are in satisfactory health condition and receive legal aid.

113. In addition, the HRMMU verified allegations made by a Russian senator claiming that Pavel Gubarev, the self-proclaimed governor of Donetsk, who was detained in Donetsk by

³² Journalist of the VICE News (USA) who was detained on 22 April and released on 24 April.

police on 6 March and transferred to Kyiv, had been tortured and was in a critical condition. The HRMMU spoke with the lawyer of Pavel Gubarev and the head of the National Prevention Mechanism; both denied the torture claim. On 30 April, the lawyers of Mr. Gubarev announced that Shevchenkivskiy District Court in Kyiv had prolonged the detention period of Mr. Gubarev until 28 June.

D. Economic and social rights

114. Public services are reported to be operating in most towns in the east, despite the seizure of public and administrative buildings. The impact on the access to, and the quality of, services provided by public institutions for residents in a non-discriminatory way continues to be observed, including in those towns either already controlled by armed groups, or with administrative buildings occupied by armed and unarmed opponents of the Government. The presence of armed groups and their particular control of towns such as Kramatorsk and Slovyansk is resulting in the disruption of many aspects of daily life. There are reports that many shops are closed; public services are fully operational, including public transport, schools and healthcare and medical facilities. Several major banks terminated operations in various parts of eastern Ukraine due to numerous instances of attacks on their offices.

115. The HRMMU heard of concerns regarding the on-going crisis from representatives of Women's NGO in both Kyiv and Donetsk. Their sense is that there is very little participation and inclusion of women in efforts to resolve the current crisis in Ukraine, particularly in the eastern regions. Their more active inclusion in such activities is viewed by many as critical to the success of possible steps to secure good governance, respect for human rights and the rule of law. Advocacy is necessary at all levels to ensure the inclusion of women into any effective efforts at national reconciliation and dialogue.

116. One gap raised in particular in Donetsk, is the inclusion of Women's NGOs in the Donetsk region so that they are more connected both geographically, e.g. with NGOs in Kyiv – the HRMMU has facilitated this connection. In Donetsk itself, the HRMMU has included a representative of the women's NGO coalition in regular NGO meetings it has initiated with members of the civil society in Donetsk to discuss human rights.

VI. PARTICULAR HUMAN RIGHTS CHALLENGES IN CRIMEA

117. In line with UN General Assembly Resolution 68/262, adopted on 27 March 2014, entitled "Territorial integrity of Ukraine", the HRMMU monitors the human rights situation in the Autonomous Republic of Crimea. On 28 April, a law, adopted by Parliament on 15 April "On guaranteeing citizens' rights and freedoms and legal regime in the temporarily occupied territory of Ukraine" entered into force (hereafter "Law on Occupied Territory"). According to the Law, the Autonomous Republic of Crimea and the city of Sevastopol, the airspace above them, domestic waters and territorial sea of Ukraine, including underwater space, are all defined as a temporarily occupied territory. It foresees that the temporarily occupied territory is an inalienable part of the soil of Ukraine where Ukrainian laws remain in effect. The Law stipulates that the responsibility for the violations of human rights and the destruction of cultural property lies with the Russian Federation as the occupying State according to the norms and principles of international law.

118. The Ombudsman reported that since the unlawful “referendum” in the Autonomous Republic of Crimea, the number of people seeking help has significantly increased. However, as of 7 April, the regional office of the Ombudsman in Crimea was forced to stop working and had to close, due to its eviction from its office and the overall obstruction faced by its staff in their work. The representative of the Ombudsman Institution in Crimea continues to receive information on Crimea through human rights defenders and NGOs. The HRMMU is concerned about the gap in human rights protection as a result of the closure of the Ombudsman regional representation.

A. Internally displaced persons from Crimea

119. UNHCR reports that as of 29 April there were 7,207 internally displaced persons (IDPs) registered in all 24 regions of Ukraine. With no official centralised registration process, there are concerns that this figure may not reflect the reality, with some IDPs not registering with local authorities. Registration with a local authority is only required should people wish to access state services, such as healthcare, or register for housing and employment. Most of IDPs have settled in Kyiv (1968 persons) and Lviv region (1207 persons); 445 persons registered in Poltava, 386 in Vinnytsya, 374 in Kharkiv, 300 in Dnipropetrovsk, 243 in Ivano-Frankivsk, 196 in Chernivtsi. The majority of IDPs are Crimean Tatars; although there are reports of an increased registration of ethnic Ukrainians, ethnically mixed families, and ethnic Russians. Most IDPs are women and children.

120. The local authorities of the regions where IDPs have settled have endeavoured to provide essential needs and services, including accommodation, schooling, social benefits and, in some cases, employment.

121. Common challenges that the IDPs face are: interruptions in the provision of, and access to, social benefits, including pensions, maternity benefits, and child assistance payments, difficulties in obtaining documents, e.g. university documents for students, and not being able to access their bank accounts in branches based on mainland Ukraine.

122. The Law “On the rights and freedoms of citizens and the legal regime on the temporarily occupied territory of Ukraine” refers to these people as the “citizens of Ukraine who have resettled from the temporarily occupied territories”. The Law also addresses other issues of concern to IDPs, such as how they can receive unemployment benefits, exercise their right to vote, and replace their identity documents. In addition, various ministries have adopted specific regulations and procedures to facilitate the access of persons from Crimea to education (including higher education), medical care, and social benefits. Nevertheless, a number of key issues, particularly residence registration and the related issue of business registration, still need to be addressed through legislation/regulations.

123. The HRMMU has received reports that some IDPs are planning to apply for asylum in Europe and Turkey; others plan to settle in their location; while others are looking to return to Crimea.

B. Rights of Crimean residents

124. As the legislation of the Russian Federation is being enforced on the territory of Crimea, at variance with the UN General Assembly resolution 68/262, this is creating difficulties for Crimean residents, as there are many differences with Ukrainian laws. One particular example concerns the treatment now available to HIV/AIDS patients in Crimea. In

Ukraine, people who use drugs have access to opioid substitution therapy (OST) as an integral part of the widespread implementation of harm reduction programmes. These programmes are an essential element in controlling HIV/AIDS and other infectious disease among injecting drug users in Ukraine, as elsewhere in Eastern Europe. In 2013, the Ukrainian State Service for drug control reported that approximately 8,000 people in Crimea were infected with HIV/AIDS. As of 1 March, there were 806 people using OST in Crimea; as of 6 May, the OST programmes in Crimea stopped. The majority of former OST patients now face deterioration in their health condition due to the fact that this treatment has been curtailed. This raises serious concerns for HIV/AIDS patients in particular, questioning how they may now access and gain quality healthcare treatment.

Right to citizenship

125. Citizenship issues became more critical following the agreement between the Russian Federation and the authorities in Crimea, which stipulates that the citizens of Ukraine and stateless persons permanently residing in Crimea or in Sevastopol as of 18 March 2014 shall be recognized as the citizens of the Russian Federation, with the exception of persons who within one month thereafter declare a desire to maintain their or their minor children's active citizenship or to remain stateless persons.

126. The deadline for Crimean residents to refuse Russian citizenship expired on 18 April, after which applications for refusing Russian citizenship were no longer accepted.

127. The HRMMU was informed of constraints faced by Crimean residents who refuse to acquire Russian citizenship: (1) the period granted for initiating the procedure of refusing Russian citizenship (18 April) was too short; (2) instructions from the Russian Federal Migration Service (FMS) on the refusal procedure were only available as of 1 April; (3) information about FMS points was not available until 4 April; (4) from 4 - 9 April only two FMS points were functioning - in Sevastopol and in Simferopol; (5) as of 10 April, 9 FMS points were working: Sevastopol, Simferopol, Yalta, Bakhchisaray, Bilogorsk, Evpatoriya, Saki, Kerch and Djankoy; (6) some requirements in the procedure of refusing Russian citizenship evolved over time, such as the necessity to be make the application in person, and that both parents were required for the application of a child. The HRMMU is concerned that there may be problems with regard to the right to citizenship and will closely monitor any related cases.

128. Article 5 of the adopted Law "On Occupied Territory" states that the forced automatic acquirement of Russian citizenship by Ukrainian residents living in Crimea is not legally accepted by Ukraine, and is not deemed as grounds for the withdrawal of Ukrainian citizenship.

129. The HRMMU is concerned with reports that those who did not apply for Russian citizenship are facing harassment and intimidation. It will be critical that they are ensured their property and land rights, access to education and healthcare and face no curtailment to the array of social benefits associated with citizenship. The transition period in Crimea will end on January 2015. Allegedly, those who have refused to acquire Russian citizenship by this time, will have to apply for residence permits; or else they could face deportation from the territory of Crimea.

Freedom of movement

130. The “Law on Occupied Territory” has only minor restrictions to the freedom of movement (foreigners and stateless persons will have to obtain a special permit to enter/leave the occupied territory). Under article 10, freedom of movement between the Autonomous Republic of Crimea and mainland Ukraine is allowed for Ukrainian citizens. On 14 April, the authorities in Crimea announced that full access for Ukrainian citizens to Crimea will be guaranteed as of 25 April.

131. In practical terms, there are long queues at the boundary line that now exists, with signs that the latter is becoming fully-functioning. This impedes and complicates maintaining family ties and places limitations on the freedom of movement. The existence of a boundary line between Crimea and mainland Ukraine with checks performed at 27 check points was announced on 25 April by the acting Head of the Federal Migration Service of Russia in Crimea, Petro Yarosh.

132. On 29 April, the Ministry of Foreign Affairs of Ukraine sent a diplomatic note of protest to the Russian Federation, stating that the establishment of a border was not in line with the basic principles and norms of international law and contradicts UN General Assembly Resolution 68/262.

133. On 22 April, 12 more names were added to the list of “Persons Engaged in Anti-Crimean activity, whose stay is undesirable on the territory of the Autonomous Republic of Crimea”, originally adopted by the “State Council of Crimea” on 27 March. It reportedly now includes 344 names, one of which is Mustafa Jemilev, ex-chairman of the Parliament of the Crimean Tatar people.

134. On 29 April, a group of Crimean Tatars reported that they were made to leave a train by law enforcement officials in the town of Djankoi, having been informed that they were not permitted to enter Crimea. Apparently at the time of the incident, no reason was given for this decision (possibly, the absence of Russian passports). The HRMMU is seeking further information on this incident to verify the situation, and why limitations were placed on the freedom of movement for these individuals.

135. On 30 April, the Cabinet of Ministers of Ukraine issued an Order “On temporary closure of crossing points across the border and checkpoints”,³³ according to which 27 check points are to be closed. The Order is not likely to have an impact on the freedom of movement for Crimean residents, as the check points to be closed are at airports (all flights connecting Crimea and continental Ukraine have been cancelled following the unlawful “referendum”) or at coastal entry points. This, however, might have a negative effect in the long run on trade, and thus economic rights.

Freedom of expression and access to information

136. In April, some Crimean media outlets moved their editorial offices to mainland Ukraine due to fear for their personal safety and impediments they were facing in their work. Examples of such moves are Internet portal “Blackseanews”, TV channel “Chornomorka” and Internet portal “Events of Crimea”.

³³ It is stated that the measure is required due to the deterioration of the situation in the Crimea and invasion of the armed formations and persons with the extremist views to the territory of Ukraine and military aggression from the side of the Russian Federation, blocking of the border check points, which prevents from conducting the control foreseen by the legislation.

137. The broadcasting of the Ukrainian TV channels in Crimea has been disconnected since early March, and is only available via satellite.

138. On 22 April, Lilia Muslimova, press-secretary of the Parliament of the Crimean Tatar people, announced that broadcasting was no longer permitted for the Crimean Tatar people on State TV and Radio Company “Krym” about Mustafa Jemilev and Refat Chubarov, member of the Parliament of the Crimean Tatar people.

139. With the enforcement of legislation of the Russian Federation, Crimean media face growing difficulties. All media outlets have to now re-register. A reported concern, that needs to be verified, is that an unofficial requirement for re-registration will be for the editor-in-chief to be a citizen of the Russian Federation.

140. On 10 April, Ukrainian radio stations had to suspend their work in Crimea due to the newly-occurred legal and technical difficulties in ensuring FM broadcasting on the territory of the peninsula. These included the six stations belonging to the group “TavrMedia” (Russian radio, Hit FM, Kiss FM, Radio Roks, Relax, Melodia), UMH Holding (AutoRadio, Our radio, Europe Plus) and Business Radio Group (Radio Shanson and Favourite radio Sharmanka).

Freedom of association

141. The HRMMU is concerned about NGOs based in Crimea who will now operate under the law on foreign agents of the Russian Federation. This will potentially affect their operations, as it places restrictions on the receipt of foreign funding. There is no such law in Ukraine.

Freedom of religion

142. Worrying developments have been reported to the HRMMU regarding freedom of religion in Crimea after the 16 March unlawful “referendum”. Besides earlier reported attacks on priests, the pressure on some religious communities seems to persist.

143. On 25 April, the Ukrainian Orthodox Church of Kyiv Patriarchate published an official statement, expressing deep concern that the authorities in Crimea did not comply with the written arrangements guaranteeing the safety of the Crimean diocese. In Sevastopol, the Temple of Martyr Clement of Rome, located on the territory of the Training Unit of the Ukrainian Navy, has practically been taken away from the Ukrainian Orthodox Church of Kyiv Patriarchate. The Archimandrite Macarius (ethnic Russian) and the parishioners are not allowed into church by the Russian military men that guard the territory. The attempts of the Crimean diocese to meet with representatives of the current city authorities of Sevastopol on this and other issues failed. Similar situation occurred with the Temple of the Intercession of the Theotokos (Protection of Virgin Mary) in the village of Perevalny. The priest and parishioners report harassment by representatives of the Ukrainian Orthodox Church of the Moscow Patriarchate. For example, on 13 April, during the Palm Sunday celebrations, some unidentified persons tried to prevent members of the congregation from entering the church, and attempted to provoke a conflict.

144. Growing pressure on the Muslim communities has also been reported. For example, the Islamic political group Hizb ut-Tahrir is banned in Crimea pursuant to Russian law, which has declared the group to be an extremist organisation. Hizb ut-Tahrir had been functioning in Crimea for over a decade, mainly being active in the spheres of education and

politics. Reportedly, most of its members have fled Crimea due to fear of prosecution by the Russian Federation based on charges of terrorism. In addition, many Crimean Tatars, who openly practice Islam reported their fears that the Russian authorities will consider them members of this group and thus prosecute them.

145. On 22 April, the deputy head of the Jewish community “Hesed-Shahar”, Borys Helman, reported that a memorial to the Holocaust victims in Sevastopol was desecrated by unknown persons. The inscriptions on the memorial were painted red, with signs of the “USSR” and Soviet symbols. The case was reported to the police, and is said to be under investigation.

C. Rights of indigenous peoples

146. Reports from Crimea raise serious concerns about on-going harassment towards Crimean Tatars.

147. The HRMMU has received reports from the “Standing Committee on inter-ethnic relations” in Crimea that on 9 April the memorial of Akim Dzhemilev, a famous Crimean Tatar choreographer, in the village Malorechenskoye (near Alushta) had been desecrated. The “Chair of the State Council” of the Autonomous Republic of Crimea has instructed police to respond to any reported acts of vandalism in Crimea.

148. On 19 April, Refat Chubarov, Chairman of the Parliament of the Crimean Tatar people, and Mustafa Jemilev, leader of the Crimean Tatar People, alleged that representatives of the ‘self-defence units’ stopped their car and harassed them on the highway Simferopol – Bakhchisaray near the village Chistenkoe.

149. On 21 April, a group of unidentified men, describing themselves as members of the ‘self-defence unit’ broke into the building of the Parliament of the Crimean Tatar people and removed the Ukrainian flag, harassing verbally and physically female employees.

150. On 22 April, the Presidium of the Parliament of the Crimean Tatar People issued an official statement calling on the Crimean authorities to de-escalate the current lawlessness in Crimea. According to the statement, the first step should be the dissolution of the so called “Crimean self-defence”. This is seen as the main source of the reported lawlessness, with an escalation of acts committed towards Crimean Tatars.

151. The same day, on his way back to Kyiv, Mustafa Jemilev was presented with “Notification of non-permission to enter the Russian Federation until 2019”. Although initially denied, this was later confirmed by Olha Kovitidi, “Senator” from Crimea in the Council of Federation of the Russian Federation.

152. On 3 May, Mustafa Jemilev tried to enter Crimea from mainland Ukraine via the crossing point Armiansk, after having been prevented from boarding the plane from Moscow to Simferopol on 2 May. Traditionally, Crimean Tatars drive to greet their leader on his return and entry to Crimea. This time they were met by a number of armed military personnel without clear identification insignias how blocked them. Later on, some of the Crimean Tatars crossed to mainland Ukraine. When the procession of people headed by Messrs. Jemilev and Chubarov tried to cross the border again, they were stopped. Access to Mr. Jemilev was once again forbidden and he returned to Kyiv. After several hours of waiting,

Crimean Tatars returned to Crimea, where they organised a peaceful flash-mob to draw attention to the incident. On 5 May, the court decision was issued to two persons, who were fined with 10,000 RUB each, for participating in the flash-mob. Reportedly, the court hearings were conducted under the strict control of the “Office of the Prosecutor” of Crimea.

153. Furthermore, on 4 May, Refat Chubarov, chairman of Parliament of Crimean Tatar people was urgently summoned to the “Office of the Prosecutor” of Crimea, Natalia Poklonskaya. Mr. Chubarov was given notice regarding a “Notification of the unacceptability of leading extremist activity” dated 3 May. The document reads that the actions of the Crimean Tatars on 3 May at the crossing point violated Russian legislation. Since they were coordinated by the Parliament of the Crimean Tatars People, its activity may be considered as extremist. According to the Federal Law of the Russian Federation Nr.114 FZ due to this extremist activity, the work of the Parliament of the Crimean Tatars People may be announced illegal and terminated.

154. This is a deeply worrying development, especially considering other examples³⁴ of human rights violations regarding Crimean Tatars.

VII. CONCLUSIONS AND RECOMMENDATIONS

155. Based on the HRMMU monitoring conducted during the reporting period, OHCHR recommends that the Government of Ukraine and the authorities in Crimea review and implement fully the recommendations of the first report on the situation of human rights in Ukraine, released on 15 April. In addition, OHCHR makes the following conclusions and recommendations:

To the Government of Ukraine:

a) Welcome steps taken to support the establishment of the HRMMU and encourage further cooperation in order to support the Government in addressing human rights concerns. OHCHR assures the Government of its on-going support in its efforts to address human rights concerns in line with international standards, and within the framework of the UN General Assembly resolution 68/262 and the Geneva Agreement of 17 April 2014.

b) The deterioration in the east of Ukraine – the unlawful activities of the armed groups, including the seizure and occupation of public and administrative buildings, and numerous human rights abuses, inter alia, unlawful detentions, killings, torture/ill-treatment and harassment of people – remain the major factor in causing a worsening situation for the protection of human rights. A prompt, impartial and comprehensive investigation should be undertaken into the events and violence in the east.

c) All armed groups must disarm and their unlawful acts brought to an end, including the immediate release all those unlawfully detained, and the vacation of occupied public and administrative buildings, in line with the provisions of the 17 April Geneva Agreement. Those found to be arming and inciting armed groups and transforming them into paramilitary forces must be held accountable under national and international law.

³⁴ HRMMU is verifying reports that Crimean Tatars working in law enforcement or holding important public positions are being pressured to submit letters of resignation.

d) Security and law enforcement operations must be in line with international standards and guarantee the protection of all individuals at all times. Law enforcement bodies must ensure that all detainees are registered and afforded legal review of the grounds of their detention.

e) The violent clashes in Odesa on 2 May resulted in the deaths of 46 people, with over 200 injured and 13 remaining missing. It appears to have hardened the resolve of those opposing the Government, and deepened division between communities. There is a need for an independent investigation into the violent events of that day. The perpetrators must be brought to justice in a fair and non-selective manner.

f) Primarily as a result of the actions of organised armed groups, the continuation of the rhetoric of hatred and propaganda fuels the escalation of the crisis in Ukraine, with a potential of spiralling out of control. Acts of hate speech must be publicly condemned and deterred. Political leaders should refrain from using messages of intolerance or expressions which may incite violence, hostility or discrimination; but they also have a crucial role to play in speaking out firmly and promptly against intolerance, discriminatory stereotyping and instances of hate speech³⁵.

g) There are increasing reports of harassment and intimidation of journalists. These should be investigated and addressed in order to ensure accountability and protect fundamental human rights and freedoms. Freedom of expression must be ensured allowing journalists the space and security to carry out their work objectively.

h) There is an increasing tendency in some critical urban areas for rallies of opposing groups to be held simultaneously, often leading to violent confrontations and clashes. This trend can be reverted by replacing incitement to hatred with the culture of tolerance and mutual respect for diverging views. Peaceful demonstrations must be permitted, as a matter of international law, and also as a way for people to express their opinion. Law enforcement agencies must facilitate peaceful assemblies, ensuring the protection of participants, irrespective of their political views. In this context, law enforcement officers must receive adequate training for handling rallies and protests in line with the international human rights standards.

i) The law enforcement reform package should aim to reinforce the rule of law; to de-politicise, de-militarise, de-centralise and strengthen the structure of the law enforcement bodies through accountability, transparency, and closer cooperation with the public and local communities, as well as professionalising the staff.

j) The Law “On the restoration of the credibility of the judiciary in Ukraine” must be brought in line with international norms and standards.

k) The announced national consultations on the discussion of the amendments to the Constitution of Ukraine on the decentralization of state powers should be advanced in accordance with the principle of equal inclusion of all, including national minorities and representatives of civil society, and ensuring equal role for women. A system of checks

³⁵ See the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (A/HRC/22/17/Add.4, appendix, para. 36).

and balances should be fully provided. If conducted in a broad, consultative and inclusive manner, this may be a positive step leading to the de-escalation of tensions and genuine national reconciliation.

l) The adoption of measures, including making official public commitments on minority protection and ensuring participatory and inclusive processes in public and political life - reassuring all members of minorities regarding respect for their right to life, equality, political participation in public affairs and public life, as well as their cultural and linguistic rights would significantly ease tensions within the Ukrainian society.

m) The Central Election Commission of Ukraine has set out that the presidential elections will be conducted whatever the circumstances and that the results will be legally binding. OHCHR is concerned that the presidential election campaign is being accompanied by intolerance from certain parties, with cases of hate speech being expressed and presidential candidates being harassed and physically attacked, which could lead to more social tension and violence. Free, fair and transparent presidential elections – in line with relevant international standards - are an important factor contributing towards the de-escalation of tensions and the restoration of law and order to enable the peaceful development of the country.

To the authorities in Crimea:

n) Reaffirming UN General Assembly resolution 68/262, entitled “Territorial integrity of Ukraine”, measures must be taken to protect the rights of persons affected by the changing institutional and legal framework, including on issues related to citizenship, right of residence, labour rights, property and land rights, access to health and education.

o) At variance with UN General Assembly resolution 68/262, the legislation of the Russian Federation is being enforced on the territory. In addition, its differences in comparison with Ukrainian laws already have and will continue having serious implications for the enjoyment of human rights and fundamental freedoms, including freedom of expression and media as well as freedoms of peaceful assembly, association and religion.

p) All acts of discrimination and harassment towards members of minorities and indigenous peoples – in particular Crimean Tatars – and other residents who did not support the “referendum” must come to an end, and all their human rights must be guaranteed.

q) Agree to the deployment of independent and impartial human rights monitors, including by the HRMMU.

VIII. ANNEX

Concept Note UN human rights monitoring in Ukraine

Introduction

This concept note proposes the objectives and activities of enhanced OHCHR engagement in Ukraine through the immediate deployment of a human rights team.

Rationale for OHCHR's engagement

OHCHR has been closely following developments in the country with the High Commissioner for Human Rights publicly voicing concerns regarding human rights violations, including the restrictive legislation adopted by the Parliament on 16 January, urging inclusive and sustainable dialogue, and calling for investigations into cases of killings, disappearances and other violations. On 21 February, the Special Procedures of the UN Human Rights Council also issued a press release condemning the excessive use of force and calling for proper and impartial investigation into the reported incidents of human rights violations. To date OHCHR's engagement in Ukraine has been through its Human Rights Adviser within the UN Resident Coordinator and UN Country Team, supported by its geographical desk team in Geneva.

The deployment of an OHCHR team to Ukraine is fully consistent with, the requirements of the Secretary-General's Rights Up Front Plan of Action. The Plan of Action also aims to ensure that UN Country Teams are provided with the support they require to respond to the human rights context, including through the deployment of human rights expertise. OHCHR's engagement, and provision of information and analysis of the human rights situation, will further allow the UN to undertake further steps to respond to an emerging crisis in Ukraine as set out in the Plan of Action.

Objectives

- Monitor the human rights situation in the country and provide regular, accurate and public reports by the High Commissioner on the human rights situation and emerging concerns and risks;
- Recommend concrete follow-up actions to relevant authorities, the UN and the international community on action to address the human rights concerns, prevent human rights violations and mitigate emerging risks;
- Establish facts and circumstances and conduct a mapping of alleged human rights violations committed in the course of the anti-government demonstrations and ensuing violence between November 2013 and February 2014;
- Establish facts and circumstances related to potential violations of human rights committed during the course of the deployment.

Activities

Monitoring, reporting and advocacy – The submission of regular updates and analysis to the High Commissioner on the human rights situation and principal concerns, with a specific focus on, and identification of, issues likely to have an impact on the overall security situation in Ukraine. This shall include recommendations for action to be taken by the relevant authorities, the international community and the UN in the country, and steps necessary to provide protection for persons at risk.

Coordination and collaboration with other human rights monitoring activities – The team will actively coordinate and collaborate with other human rights monitoring capacity within the country and deployments by other international organisations (including OSCE-ODIHR, CoE). More detailed working arrangements with these actors on the ground will have to be further elaborated, especially with respect to public reporting.

Advisory role to the RC and UNCT – The team, with the support of the Human Rights Advisor, will provide advice and recommendations to ensure the integration of a response to the key human rights concerns within the strategy of the UNCT. This will include advice to the Resident Coordinator (RC) on advocacy measures to be undertaken with key national actors in relation to human rights concerns, and may undertake direct advocacy with specific partners and stakeholders, in coordination with the RC and OHCHR. The team will also provide guidance to relevant members of the UNCT, and input to UNCT meetings.

Composition and deployment of the mission

The mission will be conducted by a team of seven human rights officers, headed by one P5 team leader, and made up of six P4/P3 human rights officers, security and administrative support staff, and supported by 25 national staff.

The head of the team will be based in Kiev and be responsible for the staff in five other locations of the country: initial planning has identified Lviv, Odessa, Simferopol, Donetsk and Kharkiv. OHCHR will aim to co-locate OHCHR team members within UN premises in these locations, if available, or at the offices of other international organisations, including OSCE-ODIHR.

Security

OHCHR Safety and Security Section will assist the team in coordinating its activity with UN DSS and will provide advice on security related aspects. A security officer will be included as a member of the team.

Dates of the mission

The suggested timeline for this mission is from mid-March, ensuring continuity of an increased human rights presence after ASG Simonovic's departure, and for a period of up to three months.

Funding

Funding will initially be provided from the Secretary-General's unforeseen and extraordinary expenses, with additional funding sources to be sought.

