

**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 III OF THE ANNEXES
TO THE WRITTEN STATEMENT
OF OBSERVATIONS AND SUBMISSIONS
ON THE PRELIMINARY OBJECTIONS OF THE RUSSIAN FEDERATION
SUBMITTED BY UKRAINE**

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Pursuant to Rules of the Court Article 50(2), this annex is comprised of such extracts of the whole document as are necessary for the purpose of the pleading. A copy of the whole document has been deposited with the Registry.

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Albin Eser

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I. Introduction: Progress on Misconceived Propositions

The Rome Statute's Article 30 on 'Mental element' and Article 32 on 'Mistake of fact or mistake of law', if read together as their substantive interrelations necessitate,¹ create an ambivalent impression.

On the one hand, it cannot be stressed enough that the Rome Statute explicitly proclaims basic postulates of culpability by requiring a certain state of mind and also by recognizing that responsibility may be excluded by certain misperceptions of the perpetrator. Thus, the Rome Statute not only removes itself from older notions of 'result liability' which punished the wrongful deed without consideration of the actor's mind, but it also dissociates itself from notions of 'strict liability', as they are still practised in certain areas of common law. So perhaps for the first time in international legislation, the Rome Statute proclaims a principle which, if not necessarily traceable back to Roman law, was basically developed in the canon law and was finally expressed in the Latin maxim: *actus non facit reum nisi mens rea*.² This progress towards a conception of crime in which culpability is an essential element, is particularly remarkable considering that the *mens rea* principle used to be limited to the requirement of an intentional (or at least negligent) act which may be excluded by a mistake of fact, but not by a mistake of law, as is still the position in certain national penal codes.³ By now admitting mistake of law, though still under narrow conditions, as a ground for excluding criminal

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(p. 891) responsibility, Article 32(2) of the ICC Statute heralds a breakthrough to a more comprehensive understanding of culpability which doesn't fully equate to the psychological-mental elements of intent or knowledge but also requires some sort of normative blameworthiness. On these terms, the combined message of Articles 30 and 32 may be understood as laying the foundations for culpability as an independent subjective requirement of criminal responsibility in addition to the objective wrongdoing by the wilful act.

On the other hand, however, it cannot be overlooked that Articles 30 and 32 are, to say the least, not the best way of embedding essential issues into law. This is neither the place to question political shortcomings in the scope of certain requirements nor the place for denouncing the Statute's obvious disregard of certain conceptions to be dealt with later. What is at issue here are rather the inherent inconsistencies and presumably more or less unconscious implications and exclusions which make these two articles partially meaningless or, even worse, partially counterproductive. If, for instance, according to Article 32(1) a

mistake of fact shall exclude criminal responsibility (only) ‘if it negates the mental element’, this paragraph simply repeats what is already stated in Article 30 (1) by requiring a certain mental element. Instead of this repetition which seems to have been acceptable to the Preparatory Committee as a mere clarification of a generally accepted principle,⁴ it would have been much more interesting to have clarified under which conditions a mistake of fact may negate the mental element. Even worse, as a mistake of fact shall be a ground for excluding criminal responsibility ‘only’ if it negates the mental element, an error on facts seems to be irrelevant if, instead of a ‘material’ element in terms of the definitional elements of the crime (such as the nature of the act or the harm caused to a certain victim), it merely concerns a ground of justification or excuse as in the case that the perpetrator mistakenly believes himself attacked by the victim and thus shoots in the subjective state of self-defence. Whereas quite a few national laws would simply not regulate this case of a mistaken assumption of a justifying situation and, thus, would leave room for excluding criminal responsibility by analogy to a mistake of fact, the drafters of the Rome Statute, perhaps not aware of this configuration—and perhaps due to a ‘mistake’ of their own—barred the exclusion of responsibility.⁵ Or just to give another example of an ill-conceived proposition, the limitation of mistake of law as a merely optional ground for excluding criminal responsibility to the

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(p. 892) case that it ‘negates the mental element’ (Article 32(2) sentence 2), is again, repetitious as it was with mistake of fact; even more so it is inconsistent with Article 30(1) which, in requiring the mental element, would be frustrated if, according to the optional clause of Article 32(2) sentence (2) an exclusion of responsibility might not be granted although the mistake of law negated the mental element. Or ‘mental element’ must be construed with regard to mistake of law in broader terms than merely comprising the ‘material’ elements of the crime, as proposed in Article 30(1); then, however, the regulation of both the ‘mental element’ and the various ‘mistakes’ lose their contours.

As further flaws of this sort could and will indeed be added,⁶ one may wonder how this could have happened. There are mainly two explanations. The one of more political-psychological nature is the general reserve towards excluding criminal responsibility because of errors in general and with regard to international crimes in particular, since in this area we are dealing with offences so grave that it appears difficult to accept that the perpetrator should not have known what he was doing. As we will see particularly in war crimes, however, there are situations in which a soldier does not easily know for sure what is right and what is wrong. The other explanation for the hardly satisfying shape of the ICC articles here in question is a more theoretical one: as the aforementioned political struggle about what errors to tolerate or not was never really solved but rather continued ‘behind the scenes’ by arguing with partially irreconcilable national propositions of mistake of fact and law,⁷ it was impossible to agree on a consistent concept. Thus, in view of Article 21 of the ICC Statute it will be all the more necessary, though extraordinarily difficult, to construe Articles 30 and 32 of the ICC Statute in a way that is adequately applicable.

II. Development prior to the Rome Statute

Some of the problems described above may perhaps be better understood and, thus, more easily solved for the future if at least some of the earlier positions and steps are examined.

A. Taking Notice of mens rea

Keeping in mind that it took quite some time to get general elements of responsibility for international crimes explicitly recognized at all,⁸ it is no wonder that the pronouncement of general rules for the mental element of the crime and its

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(p. 893) eventual negation by an error took even longer. So with regard to ‘official’ documents by international organs or inter-governmental commissions, it took until the *Report of the Preparatory Committee’s* 51st Session of 1996 to come out with general rules on ‘*Mens rea* Mental Elements of Crime’ (article K) and on ‘Mistake of Fact [or law]’ (article K)⁹ (the contents thereof will be dealt with later).

This does not mean, however, that prior to this remarkable step, the issues of the mental element and the exclusion of responsibility by an error were completely disregarded in the theory and practice of international criminal law. But even insofar as these elements were taken into consideration, it was in a more sporadic manner and/or in non-binding drafts.

The first instance was the jurisprudence of the International Military Tribunal (IMT) of Nuremberg. Although the Charter of the IMT¹⁰ did not contain any hint of mistake of fact or law, the Nuremberg judgments did not reject defences of mistake absolutely, provided that they concerned an ‘honest’ error.¹¹

B. Propositions of the Mental Element

A second observation concerns the concept of *mens rea* which, though not explicitly mentioned in either the IMT Charter of Nuremberg nor in other conventions on international crimes, may be required by the very nature of the crimes concerned. Thus, when Article 6(a) of the IMT Charter speaks of planning or preparing crimes against peace, such acts can hardly be committed other than intentionally, as is true with regard to the ‘taking of hostages’ according to the Geneva Conventions of 1949¹² or with ‘systematically oppressing’ according to the Apartheid Convention of 1973.¹³ Other documents were more outspoken by explicitly requiring a certain state of mind for certain crimes. This is the case with the International Law Commission’s Draft Code of Crimes against the Peace and Security of Mankind of 1954 requiring for genocidal acts the ‘intent to destroy’ in whole or in part a protected group or that ‘inflictions on the group conditions of

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(p. 894) life’ must be carried out ‘deliberately’.¹⁴ In a more general form, the Protocol I to the Geneva Conventions of 1977 requires grave breaches of this Protocol to have been committed ‘wilfully’.¹⁵ The ILC Draft Code of 1991 merely enlarges the catalogue of provisions requiring a certain state of mind such as, in addition to those already contained in the Draft of 1954, ‘wilful’ attacks on property of exceptional value and ‘wilful’ damage to the environment.¹⁶ The same line of merely specifying a certain state of mind was followed by the ICTY and ICTR Statutes by requiring for grave breaches of the Geneva Conventions that killing, causing great suffering, and depriving a prisoner of war of the rights of fair trial be committed ‘wilfully’,¹⁷ whereas this intent was not explicitly required for genocidal acts¹⁸ while, again differently, destruction of cities not justified by military necessity was a war crime even if only done ‘wantonly’.¹⁹ Though it might be true that these provisions had been drafted under the silent proposition that ‘guilty intent is a condition for the crime’ and whilst it might in the end be merely a question of procedure whether this intent is assumed or must be proven individually,²⁰ two shortcomings cannot be overlooked: firstly that the subjective requirement of a certain state of mind if not explicitly provided for,²¹ appears underestimated and eventually even neglected in practice. Secondly, the sporadic manner of requiring ‘wilful’, ‘deliberate’ or even merely ‘wanton’ commission of one type of crime but not of others, may lead to the reverse conclusion that for certain crimes no special state of mind is required for even mere negligence may suffice. It was felt that the only way to overcome these uncertainties was to come up with a general rule for the mental element. After the *Ad Hoc* Committee on the Establishment of an International Criminal Court in 1995 appeared amenable to this suggestion²² and

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(p. 895) a non-governmental committee of experts, convening in Siracusa in 1995,²³ supported the need for express regulation,²⁴ the Freiburg Draft of 1996, prepared by a working group of the aforementioned Siracusa Committee, in a general rule on *mens rea*, made two fundamental proposals: first, that ‘criminal responsibility [for international crimes] cannot be based on strict liability’, and secondly, that ‘unless provided for otherwise, [international crimes] are punishable only if committed intentionally’.²⁵ Whereas the principal denouncement of ‘strict liability’ was seen as perhaps too challenging to common law tradition, and was therefore not integrated into the Updated Siracusa Draft, ‘knowledge’ was incorporated as a possible alternative to ‘intent’.²⁶ Although this alternation between intent and knowledge, as will be shown later, appears conceptually disputable, the efforts to draft general mental requirements proved successful at least insofar as the ILC Draft Code of 1996 required the perpetration of relevant crimes to be committed ‘intentionally’;²⁷ again oddly, however, aiding and abetting were to be carried out (merely) ‘knowingly’,²⁸ whereas with regard to the various other forms of complicity the Draft Code remained silent. At any rate, from then on, despite occasional variations, all further inter-governmental drafts by the Preparatory Committee and its working groups contained a general regulation for the mental element(s) of crime, starting with the Report of the Preparatory Committee of 1996²⁹ and ending with the Draft Statute and Draft Final Act of 1998.³⁰

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(p. 896) C. Opening the Door to Mistake of Fact and Mistake of Law

Whereas the need to regulate on the mental element of crimes was recognized rather late, the issues of *mistake of fact and mistake of law* were debated much earlier. Since the Nuremberg judgments, as mentioned above, at least occasionally had accepted defences of error,³¹ UN-supported committees started as early as in the 1950s to tackle this issue, though for more than three decades without visible success.³² Once more it needed the efforts of non-governmental groups such as the International Law Association (ILA) and the Association Internationale de Droit Pénal (AIDP) to get things moving. What later on would become the core of the Rome Statute’s regulation of mistake of fact and *mistake of law* in Article 32, can be found as early as in A Draft International Criminal Code of 1980 in recognizing mistake of law or of fact as a defence, ‘if it negates the mental element ... provided that said mistake is not inconsistent with the nature of the crime or its elements’.³³ Thereafter the ILC, in revising its Draft Code of 1954, which had not yet taken notice of errors, made a significant step by recognizing ‘exceptions to the principle of responsibility’ and thereby also referring to ‘error of law or of fact’ in its Draft Code of 1987.³⁴ By a somewhat strange statutory technique, however, the ILC Draft did not positively recognize mistake as a ground for relieving criminal responsibility, but rather precluded this effect in general by accepting mistake only for the exceptional case that under the given circumstances the mistake was ‘unavoidable’ for the perpetrator. Since this regulation appeared less than satisfying and no better solutions seemed available, the ILC Draft Code of 1991 refrained from further mentioning *mistake of fact* and *mistake of law* at all, thus leaving it up to its general Article 14 on ‘defences and extenuating circumstances’ according to which ‘the competent court shall determine the admissibility of defences under the general principles of law’, thus, at least tacitly leaving the door open for errors of fact and law as potential defences in single cases.³⁵

Although this indecisiveness of the ILC on essential issue was sharply criticized by academics,³⁶ the ILC in its Draft Code of 1996 upheld its position of leaving it to the Court whether to admit a defence, including mistake, or not.³⁷ In the meantime the ICTY and ICTR Statutes of 1993/1994 were even more reluctant, completely

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(p. 897) refraining from any general clause on defences or other extenuating circumstances, thus, leaving it up to the Tribunals whether to pay attention to defences of mistake, as it might have done in the *Erdemović* case.³⁸ At any rate, it had again taken the impetus of non-governmental initiatives to put the problems of mistake of fact and law onto the legislative table. After the Siracusa Draft of 1995 had identified mistake of fact and mistake of law as issues to be regulated,³⁹ the Freiburg Draft of 1996, by clearly distinguishing between factual and legal errors as well as requiring reasonable belief in not acting unlawfully, provided two rules by which not only mistakes with regard to the definitional elements of the crime and its prohibition but also mistakes with regard to justifying circumstances and provisions would have been covered.⁴⁰ Although the Updated Siracusa Draft appears to preserve the same pattern by literally adopting paragraph 2 on mistake of law from the Freiburg Draft, it deviates significantly by starting its paragraph 2 with an equation of mistake of law and fact by equally requiring that the mistake ‘negates the mental element’ and by degrading the reasonable belief of the perpetrator to a mere proviso.⁴¹

Whereas the *ad hoc* Committee in 1995 had not yet taken explicit notice of mistake of fact or mistake of law,⁴² the non-governmental demands for regulations on mistake of fact or mistake of law seem to have exerted sufficient influence to have this issue taken up officially and not to see it dropped any longer. Still, however, wide-ranging differences in proposals (as evidenced in the compilation by the Preparatory Committee of 1996,⁴³) led to basically two opposing approaches in further discussions: whereas a more general option would recognize both mistake of fact or of law as a defence ‘if not inconsistent with the nature of the alleged

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(p. 898) crime’ and even if avoidable would still leave room for mitigation of punishment, the other option would accept mistake of fact only ‘if it negates the mental element’ and would reject mistake of law in principle.⁴⁴

When looking back from the final result in the Rome Statute’s Article 32, the latter, stronger option was obviously victorious by precluding mistake of law as far as possible and, in addition, by equating mistake of fact or mistake of law in requiring the negation of the mental element, as proposed in the Updated Siracusa Draft.⁴⁵ Whereas the first decision on a narrow scope of mistake of law is political in nature and, thus, the politicians are responsible for it, the equation issue is of a more doctrinal nature and thus open for conceptual criticism. At any rate, however, when keeping in mind that, even in its final draft of April 1998, the Preparatory Committee felt urged to note that there were still widely divergent views on this article,⁴⁶ we cannot but wonder that a consensus was reached at all.

III. Variety of Mental States in the Rome Statute

As a provision of Part 3 on ‘General Principles of Criminal Law’, Article 30 of the ICC Statute establishes requirements for the mental element valid for all crimes of that Statute. As indicated by its opening words ‘unless otherwise provided’, however, Article 30 is not the only place within the Statute where mental elements can be found although it is the main one. Thus, while Article 30 merely states the general requirements and basic concepts of ‘intent’ and ‘knowledge’, other mental states or variations with regard to the degree of subjective responsibility may be found elsewhere in the Statute, for instance within the specific definition of crimes or general principles of criminal law.⁴⁷

A. Mental Requirements Less Strong than Intention: Negligence—Wantonness—Recklessness

On the one hand, the requirements of mens rea can remain below the threshold of intent. Since, for instance, according to Article 28(1)(a) of the ICC Statute a commander is deemed responsible not only if he

knew but also if he 'should have known' that a subordinate was committing or about to commit a relevant crime,

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(p. 899) his responsibility may be based on mere negligence rather than full intent. In a similar way, the mental level of responsibility is lowered with certain grave breaches of the Geneva Conventions in that it suffices that the extensive destruction and appropriation of property, not justified by military necessity, is carried out merely 'wantonly' (Article 8(2)(a)(iv) of the ICC Statute) as 'wantonness' comes closer to 'recklessness' than to intent.⁴⁸ The same is true of a commander's responsibility for failure to exercise control properly by 'consciously disregarding information' on the subordinates committing a crime.⁴⁹ Still less strong than intent, another variation can consist of the combination of partially higher, partially lower mental requirements as in the case of crimes against humanity which require a certain criminal act, such as murder, enslavement, torture or rape, which each on its own part must be part of a widespread or systematic attack directed at any civilian population: whereas the core crime (as murder, etc.) must be committed 'with intent and knowledge' according to the general requirements of Article 30(1) of the ICC Statute, with regard to it possibly being involved with a widespread or systematic attack it suffices that the perpetrator has 'knowledge of the attack' (Article 7(1) of the ICC Statute).

B. Stricter Requirements than Intention: Wilful—Purposeful—Tracherous

Contrary to the aforementioned lowering of mental requirements, other provisions in the Rome Statute require stronger subjective graduations than provided for in Article 30 of the ICC Statute. This is particularly the case with certain war crimes, such as killing or causing great suffering or depriving a prisoner of war of the rights of fair and regular trial, which must be committed 'wilfully'⁵⁰ or the wounding of individuals belonging to the hostile nation or army or a competent adversary which must be performed 'treacherously'.⁵¹ With particular emphasis on the aim envisaged by the perpetrator, certain forms of complicity such as aiding and abetting or in any other way contributing to a group crime must be determined by a certain 'purpose' such as facilitating the commission of the crime or furthering a criminal activity of the group, respectively.⁵² This picture becomes even more confusing when you consider that the Rome Statute in close proximity to crimes requiring 'wilful' commission speaks of 'intention' or even omits any special reference to the mental requirement as, for example, in war crimes.⁵³

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(p. 900) Before denouncing this confusing diversity as sheer thoughtlessness, if not misconceived arbitrariness, one must realize that the international crimes covered by the Rome Statute are mostly drawn from existing international treaties which concerned themselves less with criminal doctrinal consistency than with the imperatives of international negotiations and were thus not always careful in their use of criminal law terminology.⁵⁴ Instead of eliminating this diversity by removing the various mental references from the specific crimes and by substituting them with a consistent general requirement and terminology as may be observed with some national penal codes such as Austria (§§ 5–7), France (Article 121-3), Germany (§§ 15, 18), or Poland (Article 8), it was probably a wise decision to leave the specific crime definitions as they were developed within the original treaties; otherwise the Rome Statute would have run the risk of missing the meaning of certain violations of Conventions if taken out of their international context. On this line of reasoning, however, it would have been even wiser if the Preparatory Committee had also refrained from defining 'intent' and 'knowledge' (in Article 30 of the ICC Statute) whilst leaving 'wilful' and 'purpose' undefined. This has opened the door to speculation whether 'wilfully causing great suffering' in war crimes is different from 'intentionally causing great suffering' by crimes against humanity, and both again different from (mentally not specified) 'causing serious bodily harm' by genocide,⁵⁵ and thus whether the latter

requires ‘intent’ and ‘knowledge’ according to the general rule of Article 30(1) of the ICC Statute. In such a diverse configuration, selective definitions such as those provided for intent and knowledge can operate as unpredictable obstacles, making consistent construction of divergent provisions more difficult rather than easier.⁵⁶

C. Specific Intent

Some provisions are characterized by their requiring that the crime be committed with a certain aim as, for instance, in the case of genocidal acts ‘with intent to destroy a protected group’⁵⁷ or in the case of aiding and abetting ‘for the purpose of facilitating’ the commission of the main crime.⁵⁸ In these cases, the general ‘intent and knowledge’ of Article 30(1) of the ICC Statute must be accompanied by a special intent (*dolus specialis*). This combination of a ‘general intent’ (with

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(p. 901) regard to the basic act and its regular consequences and circumstances) and a ‘specific intent’ (with regard to an additional aim)⁵⁹ is clearly exemplified in the case of complicity in group crimes in which the relevant contribution must be made ‘intentionally’ and, in addition, ‘with the aim of furthering the criminal activity of the group’.⁶⁰ In order to avoid uncertainties, it had been contemplated making mention of both types of intent;⁶¹ the Preparatory Committee, however, deemed it not necessary to explicitly mention both forms of ‘intent’ in the present Article 30 of the ICC Statute as ‘any specific intent should be included as one of the elements of the definition of the crime’.⁶²

On closer inspection, however, it is questionable in some cases whether crime definitions with the explicit element of ‘intentionally’ or ‘with intent’ merely mean ‘intent’ in its general form or in terms of a specific intent. A clear answer is rarely found solely from the wording as such; more important is therefore the context in which ‘intent’ is required. If it appears to be used in broader terms, it merely determines the general requirements of the mental element. If, however, it is to express a certain purpose or a specific goal of the perpetrator, a specific intent is at stake.⁶³ Although there might be doctrinal differences between both, as evidenced in the rich as well as divergent literature in certain countries,⁶⁴ no fitting formula has been found which could be easily handled. At any rate, one remarkable difference seems to be the following: whereas with special intent particular emphasis is put on the volitional element, thus excluding mere *dolus eventualis*,⁶⁵ general intent is characterized by Article 30 of the ICC Statute as requiring ‘knowledge’ as well, thus strengthening the cognitive element. This means, for instance, in case of aiding and abetting, that, according to Article 25(3)(c) of the ICC Statute, the aider

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(p. 902) in terms of ‘general intent’ must have knowledge of the main crime to be committed, whereas with regard to the special intent of facilitating the commission of the crime, the aider and abettor must not only know but even wish that his assistance shall have this effect.⁶⁶ In a similar way, it would suffice for the general intent of genocidal killing according to Article 6(a) of the ICC Statute that the perpetrator, though not striving for the death of his victim, would approve of this result whereas his special ‘intent to destroy’ in whole or in part the protected group must want to effect this outcome.⁶⁷

IV. The Mental Element according to Article 30 of the ICC Statute

A. Underlying Basic Concepts

Before going into details, it seems advisable to emphasize some basic features which are not explicitly stated but nevertheless implicitly underly Article 30 (in connection with Article 32 of the ICC Statute).

1. The Exclusion of ‘strict liability’

Although ‘strict’ liability in terms of founding criminal responsibility on the fulfilment of the objective elements of the crime is not explicitly excluded, the requirement of a mental element in Article 30 of the ICC Statute makes clear that the crime must also be subjectively attributable to the perpetrator, even if the crime definitions in Articles 6 to 8 do not explicitly require a certain state of mind. In this respect, Article 30 in requiring the commission of a crime ‘with intent and knowledge’ functions as a general and supplementary rule for criminal responsibility according to the Rome Statute. What is more, this is not only true for the perpetration of the crimes of Articles 6 to 8 of the ICC Statute, but applies also to the various forms of perpetration and participation of Article 25(3) of the ICC Statute. This is because Article 25(3), when it doesn’t require a special (and then remarkably stronger) state of mind at all,⁶⁸ does not distinguish between perpetration and participation and, thus, presupposes intention and knowledge according to the general rule of Article 30 of the ICC Statute.⁶⁹

Although a general one, this requirement is not absolute, as it is conditioned by the restriction of ‘unless otherwise provided’. Thus, by leaving the door open for

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(p. 903) a multiplicity of regulations regarding the mental element, Article 30(1) of the ICC Statute could, at least in theory, allow its complete suspension. Such a return to ‘strict’ liability concepts, meanwhile happily relinquished in most criminal justice systems of the world, is hardly likely to happen in practice though, since the Rome Statute, rather than yield to any sort of strict liability, in the end rejected preliminary proposals for the inclusion of recklessness or mere negligence,⁷⁰ the only exception being the commander’s responsibility for negligently not realizing his forces were committing a crime.⁷¹

As a matter of course, the mental element, whatever it is required for, must not be presumed but proven in each individual case.⁷² Consequently, it appears questionable whether conclusions from the objective commission of a crime to the presence of the relevant mental element can be drawn as easily as suggested by the Preparatory Commission’s Elements in allowing that the ‘existence of intent and knowledge can be inferred from relevant facts and circumstances’.⁷³ If at all, such an inference would only be feasible as a procedural device, but not in terms of a substantive substitute for intent.

2. No Full Comprehension of Guilt (in terms of ‘culpability’ or ‘blameworthiness’)

When reading of ‘mental element’ one could perhaps expect more than mere regulations on intent and knowledge or on the exclusion of recklessness and negligence. For if ‘mental element’ is understood as ‘*mens rea*’, as it appears from the equivocal usage of ‘mental element’ and ‘*mens rea*’ in the drafts of the Rome Statute,⁷⁴ and if the Latin phrase of ‘*mens rea*’ is translated into modern English in terms of ‘guilty mind’, as commonly done,⁷⁵ criminal guilt for an international crime seems to be either synonymous with intent and knowledge, and thus restricted to a purely psychological fact, or guilt may also have a broader meaning by requiring, beyond mere intention and knowledge, some sort of normative culpability or blameworthiness which may be lacking even if the perpetrator, as in the

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(p. 904) case of mental disease or duress (Article 31(1)(a) and (c) of the ICC Statute), is aware that he is killing a human being and does it nevertheless. This broader concept is represented in several recently reformed penal codes, such as those of Austria and Germany, which expressly speak of ‘*Schuld*’ (guilt) in

terms of culpability or blameworthiness as distinct from intent and negligence,⁷⁶ and thus, in fact, recognize normative elements such as blameworthiness as well as psychological mental elements such as intention and negligence, and both together under the common umbrella of subjective elements. Contrary to this, the Rome Statute appears to adhere to a narrower psychological concept of the mental element (intent and knowledge according to Article 30 of the ICC Statute) while the defendant's incapacity to appreciate the unlawfulness of the conduct or his acting under duress are described less specifically as 'grounds for excluding criminal responsibility' (Article 31 of the ICC Statute). This more psychological approach rather than a normative reproach may also explain why mistake of law shall exclude criminal responsibility only if it negates the 'mental element' (Article 32(2) of the ICC Statute), whereas in the case of the perpetrator's ignorance of the prohibition German law, better reflecting reality and leaving the mental intention of the act untouched, would merely deny his '*Schuld*' (in terms of blameworthiness), provided that his mistake of law was unavoidable.⁷⁷ Therefore the Rome Statute can hardly be accredited a full comprehension of blameworthiness, as occasionally assumed.⁷⁸ In the Rome Statute's favour, however, it must be conceded that quite a few national penal codes barely older than the Rome Statute, such as those of France and Spain, neither speak specifically of 'mental element' nor distinguish the lack of blameworthiness from other grounds for excluding responsibility.⁷⁹ Nevertheless, the criminal law doctrines of these countries did not prevent them from developing normative concepts in terms of the French '*élément moral*' or the Spanish personal '*culpabilidad*'.⁸⁰ There is no reason why a similar development of a more comprehensive concept of the mental elements and blameworthiness should not be possible on the basis of the Rome Statute as well.

B. Intention, Intent and/or Knowledge: Relations in Need of Clarification

At first glance, Article 30 of the ICC Statute appears quite clear when, first, requiring 'intent and knowledge' with regard to the material elements of the crime

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(p. 905) (paragraph 1) and, second, by defining 'intent' (paragraph 2) and 'knowledge' (paragraph 3). On closer inspection, however, it appears puzzling that the elements of intent and knowledge, although through the use of the word 'and' they are required together conjunctively (paragraph 1), they are not equally related to the same points of reference: whereas 'intent' is related to conduct (paragraph 2(a)) and its consequences (paragraph 2(b)) and in the latter case even reduced to mere awareness of the consequences, 'knowledge' is related to the existence of certain circumstances or consequences occurring in the ordinary course of events (paragraph 3). The uncertainty is increased when you realize that prior to the February 1997 session of the Preparatory Committee there had been some debate as to whether the two terms in question should be disjunctive using the word 'or' rather than conjunctive as in the final draft.⁸¹ However, if the conjunctive version was chosen on the theory that one cannot act 'intentionally' without having the 'knowledge of the relevant surrounding circumstances',⁸² it would not have been necessary to mention knowledge as an element of its own at all as an inherent precondition of intent. At any rate, the conjunctive version is at least better than a disjunctive one would have been as the latter might promote the misinterpretation that an international crime may be punishable either for mere proof of the perpetrator's intention to act (without necessarily knowing all relevant circumstances) or for the perpetrator's mere awareness of the circumstances and consequences of a crime (without necessarily intending for them to occur).⁸³

In order to ease the apparent frictions in the structure and wording of Article 30 of the ICC Statute, both an analytical and a linguistic clarification might be helpful. From the psychological-analytical point of view, the mental element is determined by (the presence or absence of) cognitive and volitional components both of which can vary in different degrees.⁸⁴ Only to name five gradations of the mental element most common

in national criminal codes and textbooks, its strongest type is characterized by the perpetrator's full knowledge of all material elements of the crime

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(p. 906) and by his purposeful will to bring about the prohibited result; in this so-called *dolus directus in the first degree* the volitional element is certainly predominant, as for instance in the case of genocide where the perpetrator plans on killing as many members of the protected ethnic group as possible. This final will to kill is less strong in terms of a *dolus directus in the second degree* when, as in the case of a war crime, the perpetrator aims at destroying a certain building, while not wishing, however certainly knowing that he cannot reach his military aim without inevitably killing innocent civilians. The volitional element becomes even less strong and, thus, the cognitive element gains more weight, in the case of so-called *dolus eventualis*, where in the aforementioned example of a war crime the perpetrator does not wish to kill civilians, but in being aware of this danger is prepared to approve of it if it should happen. Although coming very close to this last gradation, a further one can vary insofar as the perpetrator is aware of the dangerousness of his bombing a building, but is not prepared to hit innocent civilians as well and therefore acts solely due to his relying on the absence of civilians at the scene; within this spectrum of 'recklessness' or 'conscious negligence', as named in certain jurisdictions, the cognitive element is still present while the volitional element is lacking. One step further takes us to so-called 'unconscious negligence', where even the cognitive element is no longer actually present, but is merely hypothetical in that the perpetrator should and could have known of the presence of circumstances and the occurrence of consequences constituting a crime by his conduct.

When in describing these various gradations of the mental element the terms 'intent', 'intention' and 'intentionally' did not appear, this was done on purpose as these terms are burdened with various meanings and their broader and narrower senses may be easily mixed up. This terminological problem seems to be an English phenomenon. Whereas other legal languages, such as Italian and German, can easily comprise the three aforementioned forms of *dolus* as 'dolo' or 'Vorsatz', thereby possessing special expressions for their cognitive and volitional elements in terms of 'coscienza e volontà' or 'Wissen und Wollen',⁸⁵ in English legal terminology a similar distinction between 'dolus' as distinct from other mental elements (such as recklessness and negligence) and their cognitive and volitional components seems not to exist; therefore, the term 'intentional' appears at times in the broader sense of 'dolus' and in other contexts in the narrower sense of volitional (as distinct from cognitive). Despite the fact that 'intention' and 'purpose' are commonly used synonymously,⁸⁶ however, if it is true that 'intention' is the

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(p. 907) general word, while 'intent' is directed at a certain result and 'purpose' expressing a certain determination,⁸⁷ 'intention' could stand for *dolus*, whereas 'intent' could express its volitional component.⁸⁸

In view of these facts the mental element in Article 30 of the Rome Statute may be construed in the following way.

First, instead of 'mental element', Article 30 should bear the heading, or at least be understood, in terms of 'intention', the reason being that the present title gives the impression of comprising all mental requirements while, in fact, Article 30 only deals with intention (in the aforementioned broader sense), whereas other equally mental phenomena, such as mistake of fact or law as well as the commander's responsibility for negligent failure to prevent his forces from committing a crime, are dealt with elsewhere (in Articles 32 and 28(a)(i), respectively).

Second, paragraph 1 of Article 30, in requiring 'intent and knowledge' (unless otherwise provided) expresses the principal composition of 'intention' by both *volitional and cognitive components*. By

expressly naming both, is it made clear that each of them may have its own significance as, for instance, in the case of Article 7(1) of the ICC Statute where the crime of murder, extermination etc. must be committed with both intent and knowledge, whereas with regard to the widespread or systematic attack the crime is part of 'knowledge' alone suffices.⁸⁹

Third, paragraph 1 of Article 30 having left open what is to be understood by 'intent' and 'knowledge', definitions are given in paragraphs 2 and 3. Although paragraph 1 relates intent as well as knowledge without any differentiation to the '*material elements*' of the crime, the reference points of intent and knowledge are, in fact, different as evidenced by the distinctive mental requirements with regard to conduct, consequences, and circumstances in paragraphs 2 and 3.

Fourth, whatever else the material elements may be,⁹⁰ according to paragraph 2, the reference points of *intent* are only the *conduct* and the *consequence(s)* thereof.

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(p. 908) But even between these two material elements a remarkable difference must be mentioned: whereas the relation to conduct must be truly volitional (sub-paragraph (a)), the relation to a consequence (of the conduct) need not in any case be volitional as according to sub-paragraph (b), rather it suffices that the perpetrator is 'aware' that the consequence will occur in the ordinary course of events—thus, even within the intent requirement a clear degradation from volition to mere cognition is to be noticed.⁹¹

Fifth, in relating *knowledge* primarily to *circumstances* and to *consequences*, though the latter only insofar as they occur in the ordinary course of events, paragraph 3 is correct in assuming that circumstances can normally only be known of but not be intended. This is not exclusively so, however, as in certain cases the perpetrator can very well wish to have a certain circumstance present, as for instance, if he intends to kill not just any human being but rather a member of an ethnical group (in terms of Article 6 of the ICC Statute); this circumstance is, thus, not only an object of knowledge (according to paragraph 3 of Article 30) but of intent as well (paragraph 2). An even plainer inconsistency between paragraphs 2 and 3 concerns 'consequences occurring in the ordinary course of events' of which the perpetrator may have 'knowledge' (according to paragraph 3) as well as be 'aware' under the mantle of 'intent' (according to paragraph 2 (b)).

After all, although Article 30 on the 'mental element' can certainly not be called a masterpiece of legal architecture, it provides sufficient building blocks for a meaningful construction of 'intention' (as distinct from other states of mind which have not been explicitly regulated), the details of which are still to be considered.

C. The Object of Intention: The 'material elements'

It seems worth mentioning that the 'material elements' as the object of intention came into Article 30(1) of the ICC Statute at the very last moment, another sign of uncertainty about how to define the mental element. While the earlier drafts had continuously spoken of 'physical elements'⁹² and the late change to 'material elements' may appear as nothing more than a matter of synonymy,⁹³ there is at least a difference between the two terms insofar as 'physical' would certainly be narrower in connoting some sort of corporeal or at least external objects (such as bodily harm or destruction of property) whereas 'material' is open enough to

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(p. 909) comprise psychological injuries (as breaking the victim's will) or even legal detriments (as discrimination by apartheid or deprivation of a prisoner of war of a fair trial). On the other hand, however,

‘material’ element might even be understood as open enough to comprise any element connected ‘with (i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) the existence of a justification or excuse for such conduct’. In these terms, as they can be found in the definition of ‘material element of an offense’ in the American Model Penal Code (Section 1.13 (10)), the intention of the perpetrator would have to comprise not only all positive definitional elements of the crime but the absence of justifications or other exclusions of criminal responsibility as well. Thus, provided that ‘material’ is understood in terms of ‘substantive’ as distinct from procedural elements, the only exceptions not to be covered by the intention would be matters of a procedural nature, such as the jurisdiction of the Court or the statute of limitations.⁹⁴ This broad notion of material elements, as it is represented in the German literature by a minority of scholars,⁹⁵ certainly has its merits if one is confronted with a mistake as to a ground of justification; for if the intention must comprehend both the presence of all positive elements of the crime (i.e. the act, its consequences, and attending circumstances) and the absence of facts which might negate the crime (as by a justification), the perpetrator’s mistaken belief of being in a situation of self-defence would exclude his intention and, thus, his criminal responsibility. In this way, as will be seen later, one could indeed quite easily treat the mistaken assumption of a justification, as in the case of putative self-defence; for if the intention also had to comprise the absence of justifying facts, the erroneous assumption of those would ‘negate the mental element’ according to Article 32(2) sentence (2) of the ICC Statute.⁹⁶

Yet, it is very questionable whether this route can in fact be taken. Even if the aforementioned broad notion of ‘material elements’ in the Model Penal Code is a strong argument in this direction, the American Law Institute itself does not adhere to it consistently, as it later on defines the ‘material element’ of offences as ‘those characteristics (conduct, circumstances, result) of the actor’s behaviour that, when combined with the appropriate level of culpability, will constitute the offense’.⁹⁷ As culpability is thereby only mentioned as an additional (albeit necessary) component of responsibility, the ‘material elements’ constituting the offence are conduct, circumstances, and result (in terms of consequences) and, thus, exactly the same three objects of intent and knowledge according to Article 30(2)

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(p. 910) and (3) of the ICC Statute. So when certain drafters of the Rome Statute considered ‘material’ to be interchangeable with ‘physical’, they apparently had the traditional *actus reus* in mind, as it also obviously underlay the definition of the ‘material element’ in Article IV(2) of the Draft International Criminal Code.⁹⁸ This narrower notion of ‘material element’ also corresponds to the ‘*élément matériel*’ in the French translation of the Rome Statute, as the classical French doctrine would comprehend this element as ‘*manifestation extérieure de la volonté délictueuse*’ (in terms of a prohibited result, such as aggression towards a human person and injuries in the case of homicide or, in the case of theft, the taking away of another’s property),⁹⁹ as distinct from the ‘*élément légal*’ comprising the unlawfulness and the absence of justification.¹⁰⁰ It thus comes as no surprise that the German translation of Article 30(1) of the ICC Statute (drawn up by the Federal Government) speaks of ‘*objektive Tatbestandsmerkmale*’ in terms of comprising the positive definitional elements of the crime while not covering negative grounds for excluding responsibility.¹⁰¹

Continuing in this vein, precluding elements of (constituting or negating) unlawfulness from the concept of the ‘material elements’ and thus from being objects of intention, limits intention to the material elements and leads to the disregard of the prohibition as such and, consequently, to the irrelevance of the perpetrator’s consciousness of unlawfulness (which meanwhile by many jurisdictions is deemed a necessary requirement of culpability). This logic could provide another explanation why the common law tradition with its narrow restriction of intent to the ‘material’ (in terms of physical-factual) elements of the crime definition has such difficulties in incorporating mistake of law into a comprehensive concept of an unlawful and culpable act.¹⁰²

Annex 81

Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, Northwestern Journal of International Human Rights, Vol. 6 (2008)

Pursuant to Rules of the Court Article 50(2), this annex is comprised of such extracts of the whole document as are necessary for the purpose of the pleading. A copy of the whole document has been deposited with the Registry.

Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts

Doug Cassel*

I. INTRODUCTION: TOO MANY QUESTIONS, TOO MANY ANSWERS

Can transnational corporations or their executives be held criminally or civilly liable for aiding and abetting human rights violations committed by governments or militaries of foreign countries where they do business? What body of law determines the answer -- international law, the law of the foreign state, or the law of the home state?

If the answer is that corporations and their executives can be held liable, what standard defines "aiding and abetting" liability? Does merely doing business in a repressive state qualify? If a corporation sells goods or services to a repressive government, does the corporation aid or abet if it has *knowledge* that its products will be used to commit human rights violations? Or must corporate officers *intend* to assist the commission of violations?

For corporate executives, the answer to one question -- whether they can be held criminally liable as accessories to crimes against human rights -- has long been clear. As early as 1946, for example, a British military court convicted the two top officials of the firm that supplied Zyklon B to the Nazi gas chambers as accessories to war crimes.¹

Beyond that modest marker, however, there is room for argument, and often active debate, about everything else. To some extent the debate turns on whether international criminal law requires that those who aid and abet merely have *knowledge* of the principal crime, or must instead have a *purpose* to facilitate the crime. In United States federal court suits against corporations under the Alien Tort Statute ("ATS"),² this international law debate is compounded by a domestic dispute over whether the definition of "aiding and abetting" should be drawn from international law or from federal common law. Overlaying both debates is an even more basic disagreement about whether corporations can be held liable in tort for violations of international law at all. The confusion engendered by these multi-layered debates denies legal certainty, both to corporations and to victims of human rights violations facilitated by corporations.

The U.S. Supreme Court recently failed to muster a quorum in a case that might have clarified the extent of corporate liability for aiding and abetting under the ATS.³

* Professor of Law, Notre Dame Presidential Fellow, and Director, Center for Civil and Human Rights, Notre Dame Law School.

¹ See generally Trial of Bruno Tesch and Two Others (The Zyklon B Case), 1 Law Reports of Trials of War Crim. 93 (1947) (Brit. Mil. Ct., Hamburg, 1-8 March 1946); see also cases discussed *infra* Part II.A.

² Alien Tort Claims Act, 28 U.S.C. § 1350 (2007) (providing that federal district courts "shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States").

³ *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd for lack of quorum sub nom.* *American Isuzu Motors Inc. v. Lungisile Ntsebeza*, 2008 U.S. LEXIS 3868 (May 12, 2008). See discussion of this case *infra* Part III.

D. The International Criminal Court: A Purpose Test

A few months before the ICTY Trial Chamber in *Furundzija* adopted a knowledge test for aiding and abetting, the Rome Statute of the International Criminal Court (“ICC”) adopted a purpose test for most, but not all, cases of aiding and abetting.³⁵ Article 25 (3) (c) of the ICC Statute makes criminally responsible one who, “[f]or 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” (emphasis added).³⁶

In retrospect, this standard seems surprising. Only two years earlier, as noted above, the respected International Law Commission adopted a “knowingly” aids or abets standard in its Draft Code. How did the ICC end up with a purpose test?

The drafting history shows that the purpose test was not adopted until the Rome Conference. Several prior drafts of the ICC Statute, including the final draft submitted to the Rome negotiators by the Preparatory Committee in 1998, bracketed the language of what ultimately became article 25 (3)(c). The bracketed language, indicating disagreement among the drafters, would have imposed responsibility on one who “[with [intent][knowledge] to facilitate the commission of such a crime,] aids, abets or otherwise assists in the commission”³⁷

There was thus a longstanding disagreement between advocates of a “knowledge” test and those who preferred an “intent” test. The dispute was not resolved until the final negotiating conference at Rome. In the end, neither term was chosen, and instead out popped the “purpose” test.

Why? I have not found any official explanation. DePaul Law Professor M. Cherif Bassiouni, who chaired the drafting committee at the conference, explains that the decision was taken not by his committee, but by the Working Group on the General Principles of Criminal Law,³⁸ chaired by Per Saland, Director of the Department for International Law and Human Rights of the Swedish Ministry for Foreign Affairs.³⁹ In a

³⁵ Rome Statute of the International Criminal Court, United Nations Diplomatic Conference on Plenipotentiaries on the Establishment of an International Criminal Court, *adopted* July 17, 1998, *entered into force*, July 1, 2002, U.N. Doc. A/CONF.183/9, 21, art. 25.3(c), 37 I.L.M. 999 (1998) [hereinafter ICC Statute]. Curiously, the *Furundzija* Court, although citing art. 25 of the then new ICC Statute in regard to *actus reus*, did not discuss it in regard to *mens rea*, in regard to which it cited only article 30 of the ICC Statute, dealing with knowledge and intent. *Furundzija*, Case No. IT-95-17/1-T, ¶ 231, 243-45.

³⁶ ICC Statute, *supra* note 35, art. 25.3(c) provides: “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:

(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;”

³⁷ M. CHERIF BASSIOUNI, THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: AN ARTICLE-BY-ARTICLE EVOLUTION OF THE STATUTE 194 (2005), (1998 Preparatory Committee Draft art. 23.7(d)); *see id.* at 197 (Zutphen Draft art. 17.7(d)); *see id.* at 198 (Decisions Taken By Preparatory Committee In Its Session Held 11 to 21 February 1997, article B(d)); *see also id.* at 203 (1996 Preparatory Committee, Proposal 3.2 “An accomplice is a person who knowingly, through aid or assistance, facilitates the preparation or commission of a crime.”)

³⁸ Telephone interview with Cherif Bassiouni, Professor, DePaul University College of Law, in Chicago, IL (Feb. 22, 2008).

³⁹ *See* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE xviii (Roy S. Lee ed., 1999) [hereinafter Lee].

compilation of reports on the drafting process edited by the Executive Secretary of the Diplomatic Conference, Mr. Saland discusses article 25, but not article 25 (3) (c), or how the bracketed dispute between “knowledge” and “intent” got resolved as “purpose.”⁴⁰

Professor Bassiouni believes the dispute had to do with differences between civil law and common law lawyers and different understandings of language.⁴¹ If so, the language in the end seems to have come out the same in both English and French: a “purpose” test.⁴²

Professor Dr. Kai Ambos, a leading scholar who was a member of the German delegation at the Rome Conference and in a position to know, explains that the “purpose” test was borrowed from the Model Penal Code of the American Law Institute.⁴³ Originally adopted in 1962, the Model Code specifies a purpose test for aiding and abetting, as follows:

Section 2.06. Liability for Conduct of Another; Complicity.

...

(3) A person is an accomplice of another person in the commission of an offense if:

(a) with the purpose of promoting or facilitating the commission of the offense, he

...

(ii) aids or agrees or attempts to aid such other person in planning or committing it⁴⁴

Professor Ambos’ explanation is supported by the similarity of language between Model Penal Code 2.06(3) (a) (“purpose of promoting or facilitating the commission of the offense”), and ICC Statute Article 25 (3) (c) (“purpose of facilitating the commission of such a crime”).⁴⁵

The question, then, is what a purpose test means.⁴⁶ In the Model Penal Code, a person acts “purposely” if he or she has a “conscious object” to cause a given result.⁴⁷ To

⁴⁰ *Id.* at 198-200.

⁴¹ Telephone conversation with Cherif Bassiouni, Professor, DePaul University College of Law, Chicago, IL (Feb. 22, 2008).

⁴² The equally authoritative French text of the first clause of article 25(3)(c) reads, “En vue de faciliter la commission d’un tel crime” Statut de Rome de la Cour pénale internationale, art. 25(3)(c) (July, 7 1998), available at <http://www.icrc.org/DIH.nsf/WebART/585-50025?OpenDocument>. This might literally be translated, “With a view toward facilitating the commission of such a crime” A more accurate translation is probably, “With the aim of facilitating the commission of such a crime”

⁴³ Kai Ambos, *General Principles of Criminal Law in the Rome Statute*, 10 CRIM. L.F. 1, 10 (1999). Professor Dr. Ambos is the Chair of Criminal Law, Criminal Procedure, Comparative Law and International Criminal Law at the Georg-August-Universität Göttingen in Germany.

⁴⁴ MODEL PENAL CODE: OFFICIAL DRAFT AND EXPLANATORY NOTES 29-30, § 2.06 (1985) (as adopted at the 1962 Annual Meeting of the American Law Institute) [hereinafter MODEL PENAL CODE].

⁴⁵ See full text of ICC Statute art. 25(3)(c), *supra* note 36.

⁴⁶ ICC Statute *supra* note 35, at 24, arts. 30.2, 30.3. The ICC Statute defines “knowledge” and “intent,” but not “purpose.” The word “purpose” is not used elsewhere in the substantive criminal articles of the Statute, except in article 25.3(d). See full text *infra* note 54.

⁴⁷ MODEL PENAL CODE § 2.02(2)(a) (“A person acts purposely with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that

aid and abet under the Code, one must have a conscious object to cause the commission of the principal crime.

However, this Code definition is not necessarily imported into the ICC Statute. The ICC Statute is a treaty. In international law the general rule is that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁴⁸ The “preparatory work” of a treaty is only a “supplementary” means of interpretation, consulted only to “confirm” the meaning that results from the general rule, or if the general rule produces an unclear or absurd meaning.⁴⁹

In this case the drafting history simply confirms the meaning resulting from the general rule, because the “ordinary meaning” of “purpose” is that the person consciously intends to bring about the result in question.⁵⁰

Even so, “purpose” in the ICC Statute need not mean the exclusive or even primary purpose. A secondary purpose, including one inferred from knowledge of the likely consequences, should suffice. Consider, for example, the Zyklon B case. The court accepted that the purpose of the defendant businessmen in selling Zyklon B, while knowing that it would be used in the gas chambers, was to make a profit. For all the court knew, the defendants could not care less about Hitler’s goal of eliminating the Jews; they simply aimed to profit from his doing so. Yet by supplying gas in the knowledge that it would be used to kill human beings, one may infer that one of their purposes -- admittedly secondary -- was to encourage continued mass killings of Jews. Only so could they continue selling large quantities of gas to the Nazis for profit: if Hitler were to cease gassing Jews, the Nazis would no longer buy so much gas.⁵¹

they exist.”).

⁴⁸ Vienna Convention on the Law of Treaties, art. 31.1, May 23, 1969, 1155 U.N.T.S.331 [hereinafter Vienna Convention].

⁴⁹ *Id.* art. 32 (“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”).

⁵⁰ The first definition of “purpose” in Merriam-Webster’s Online Dictionary, for example, is “something set up as an object or end to be attained.” Merriam-Webster’s Online Dictionary Definition of Purpose, available at <http://www.merriam-webster.com/dictionary/purpose>.

⁵¹ Cf. *Direct Sales Co. v. U.S.*, 319 U.S. 703, 713 (1943). In upholding the conspiracy conviction of a drug company that supplied obviously excessive quantities of morphine to a physician who it must have known was selling them illegally, the Court inferred criminal intent from the company’s knowledge. The Court explained: “When the evidence discloses such a system, working in prolonged cooperation with a physician’s unlawful purpose to supply him with his stock in trade for his illicit enterprise, there is no legal obstacle to finding that the supplier not only knows and acquiesces, but joins both mind and hand with him to make its accomplishment possible. The step from knowledge to intent and agreement may be taken. There is more than suspicion, more than knowledge, acquiescence, carelessness, indifference, lack of concern. There is informed and interested cooperation, stimulation, instigation. And there is also a ‘stake in the venture’ which, even if it may not be essential, is not irrelevant to the question of conspiracy. Petitioner’s stake here was in making the profits which it knew could come only from its encouragement of Tate’s illicit operations. In such a posture the case does not fall doubtfully outside either the shadowy border between lawful cooperation and criminal association or the no less elusive line which separates conspiracy from overlapping forms of criminal cooperation.” (Footnote omitted.)

This seems to be the only reasonable interpretation of “purpose,” if article 25 (3) (c) is interpreted, as it must be, in light of the “object and purpose” of the ICC Statute.⁵² The purpose of the Statute is to ensure that “the most serious crimes of concern to the international community as a whole must not go unpunished.”⁵³ It is difficult to believe that the drafters would have intended that those who knowingly supply gas to the gas chambers, for the primary purpose of profit, should escape punishment.

A separate provision of article 25 -- article 25 (3) (d) -- provides an alternative theory of responsibility where a “group of persons” acts “with a common purpose.”⁵⁴ Anyone who intentionally facilitates a crime by such a group can be held responsible, if he or she has either the “aim” to further the group’s criminal activity or purpose, or the “knowledge” of the group’s intention to commit the crime.⁵⁵ The ICC Statute thus embraces a “knowledge” test as sufficient to impose criminal responsibility on one who aids and abets a group crime.⁵⁶

Per Saland, the Swedish diplomat who chaired the Working Group at Rome, explains that this provision emerged from a debate over whether to include criminal responsibility for conspiracy between common law lawyers, who favored it, and some civil law lawyers whose systems do not criminalize conspiracy. The solution was found at Rome by borrowing, “with slight modifications,” language from the International Convention on the Suppression of Terrorist Bombings, and inserting it into what is now article 25 (3) (d) of the ICC Statute.⁵⁷

⁵² Vienna Convention, *supra* note 48, art. 31.1.

⁵³ ICC Statute, *supra* note 35, at 4, pmbl.

⁵⁴ ICC Statute, *supra* note 35, at 22, art. 25.3(d) provides: “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”

(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”

⁵⁵ ICC Statute, *supra* note 35, art. 25 (3)(d)(i), (ii).

⁵⁶ Professor Ambos does not agree that article 25 (3) (d) allows mere knowledge to suffice to aid and abet a group crime. Because he reads article 25 (3) (d) to require the “aim” of promoting the crime, he views it as duplicative of article 25 (3) (c), and hence “simply superfluous.” Ambos, *supra* note 43, at 12-13. With respect, Professor Ambos’ reading is not supported by the text of article 25(3)(d), which makes “knowledge” an alternate theory of liability for aiding and abetting a group crime. ICC Statute, *supra* note 35, art. 25(3)(d). Nor is his reading supported by the general presumption that drafters do not insert superfluous articles.

As put succinctly by another scholar, the better reading is that “under the ICC Statute, while intent is required to aid and abet a crime committed by a single person (or a plurality of persons not forming a joint criminal enterprise) [under article 25(3)(c)], knowledge is sufficient to aid and abet a joint criminal enterprise [under article 25(3)(d)].” A. Reggio, *Aiding and Abetting in International Criminal Law: The Responsibility of Corporate Agents and Businessmen For “Trading With The Enemy” of Mankind*, 5 INT’L CRIM.L.REV. 623, 647 (2005). Reggio suggests that a “possible reason” for the lower *mens rea* required to aid and abet group crimes is that they are considered “more serious than crimes committed by a single person.” *Id.* at 647, n. 102.

⁵⁷ Lee, *supra* note 39, at 199-200; see International Convention for the Suppression of Terrorist Bombings, art. 2(3)(c), Jan. 8, 1998, G.A. Res. 164, U.N. GAOR, 52nd Sess., Supp. No. 49, at 389, U.N. Doc. A/52/49 (1998) (making criminally responsible anyone who, “(c) In any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.”).

In the context of the terrorist bombings convention, the purpose of this theory of criminal responsibility is understandable: anyone who contributes to the commission of a terrorist bombing by, say, supplying explosives or funds, and who has knowledge of a terrorist group's intent to commit a bombing, should be held criminally responsible.

Parallels could arise in the corporate context. For example, where a corporate executive contributes funds or explosives to a Colombian paramilitary group, knowing of its intent to murder labor leaders or bomb a union office, the executive should be held criminally responsible for aiding and abetting the crimes. His knowledge is sufficient; there is no need to prove that he shared the purpose to kill the labor leaders (although that too may be inferred from the circumstances). In some cases governmental bodies may also be sufficiently cohesive and criminal to qualify as "groups," so that corporate executives who knowingly assist them can be held criminally responsible for aiding and abetting.⁵⁸

In conclusion, despite the "purpose" test in ICC Statute article 25 (3) (c), one can make a responsible argument that customary international law, as reflected in the majority of the post-World War II case law, the case law of the ICTY⁵⁹ and ICTR,⁶⁰ the ILC Draft Code, and group crimes under article 25 (3) (d) of the ICC Statute, requires that those who aid and abet merely have *knowledge* that they are assisting criminal activity.

⁵⁸ Articles 9 and 10 of the Nuremberg Charter allowed the International Military Tribunal to declare a "group or organization" criminal. The Nurnberg Trial 1946, 6 F.R.D. 69, 131 (1946). The Tribunal's Judgment defined groups based on whether they had a common criminal purpose or activity, whether they committed crimes as a group rather than merely as a collection of individuals, and whether the group's members participated knowingly and voluntarily at a responsible level. The Tribunal viewed "group" as a "wider and more embracing term than 'organization.'" *Id.* at 146. In either case, the Tribunal explained, "A criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter." *Id.* at 132.

The Tribunal found some but not all of the accused government agencies to be criminal groups in this sense. Finding that the Gestapo and SD were used for criminal purposes after 1939, the Tribunal declared to be criminal "the group composed of those members" who held positions above a certain level after 1939 and who became or remained members with knowledge that the group was being used to commit crimes under the Charter, or who were "personally implicated as members of the organization in the commission of such crimes." *Id.* at 139-40.

On the other hand, neither Hitler's Cabinet nor the military high command were deemed to be groups. After 1937 the Cabinet never "really acted as a group or organization." It never met and was "merely an aggregation of administrative officers subject to the absolute control of Hitler." Although "[a] number of the cabinet members were undoubtedly involved in the conspiracy to make aggressive war . . . they were involved as individuals, and there is no evidence that the cabinet as a group or organization took any part in these crimes." *Id.* at 144-45.

In the case of the military high command, the Tribunal noted that "their planning at staff level, the constant conferences between staff officers and field commanders, their operational technique in the field and at headquarters was much the same as that of the . . . forces of all other countries." It continued, "To derive from this pattern of their activities the existence of an association or group does not . . . logically follow. On such a theory the top commanders of every other nation are just such an association rather than what they actually are, an aggregation of military men, a number of individuals who happen at a given period of time to hold the high-ranking military positions." *Id.* at 146.

⁵⁹ Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Trial Chamber, Judgment, ¶ 193 n. 217 (Dec. 10, 1998), reprinted in 38 I.L.M. 317, ¶ 193 n. 217 (1999); see also Prosecutor v. Krstic, Case No. IT-98-33-A, Appeals Judgment, ¶¶ 134, 143 (Apr. 19, 2004); see also Prosecutor v. Tadic, Case No. IT-94-1-T, Trial Chamber Judgment, ¶ 674 (May 7, 1977).

⁶⁰ See, e.g., Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 545 (Sept. 2, 1998).

Moreover, even if a stricter interpretation of customary law might be required for ATS law in the U.S. (as discussed below), leading to the adoption of the more stringent standard of ICC Statute article 25 (3) (c) -- that the aider and abettor must do so for the “purpose” of facilitating a crime -- such purpose need not be exclusive or primary. One who knowingly sells gas to the gas chamber operator for the primary purpose of profit may be inferred to have a secondary purpose of killing people, so that he can keep selling more gas to kill more people. Such a merchant of death aids and abets the principal murderers. Neither the ICC Statute nor any other source of international law should be interpreted otherwise.

E. International Criminal Law Responsibility of Corporations

Corporations cannot generally be prosecuted before international criminal courts, and current international law does not generally impose criminal responsibility on corporations. The Nuremberg Charter did permit the International Military Tribunal to declare “groups or organizations” criminal. However, the Tribunal could do so only at the trial of an “individual.”⁶¹ Moreover, the only consequence of declaring an organization criminal was not to punish the organization, but rather to permit individual members to be put on trial for belonging to the organization, without the need in each case to retry its “criminal nature.”⁶² The Nuremberg Tribunal thus declared as criminal the groups consisting of the knowing and voluntary members (in some cases only those above a certain rank) of the Nazi Party Leadership Corps, SD, SS and Gestapo.⁶³

Otherwise only natural persons were tried at Nuremberg. Likewise the ICTY, ICTR and ICC Statutes all provide jurisdiction only over natural persons.⁶⁴ The reason is in part philosophical objections by some states to prosecutions of legal entities,⁶⁵ and in part the fact that only some national justice systems (such as the United States) allow corporations *per se* to be convicted of crimes.

Per Saland describes the unsuccessful effort at the Rome Conference to subject “legal entities” to ICC jurisdiction. He explains that a very difficult issue throughout the Conference was

whether to include criminal responsibility of legal entities This matter deeply divided the delegations. For representatives of countries whose legal system does not provide for the criminal responsibility of legal entities, it was hard to accept its inclusion, which would have had far-reaching legal consequences for the question of complementarity. Others strongly favored the inclusion on grounds of efficiency

⁶¹ Nuremberg Charter, *supra* note 17, art. 9.

⁶² *Id.* art. 10.

⁶³ The Nurnberg Trial 1946, 6 F.R.D. at 131-46.

⁶⁴ ICTY Statute, *supra* note 20, art. 6; ICTR Statute, *supra* note 21, art. 5; ICC Statute, *supra* note 35, art. 25(1).

⁶⁵ The argument is that individuals, but not abstract legal entities, can bear moral responsibility and hence deserve criminal conviction. See M.C. BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 378 (Kluwer Law Int. 2d ed. 1999).

Annex 82

Antonio Vallini, *Mens Rea: Mistake of Fact and Mistake of Law*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE (Antonio Cassese ed., 2009)

Part B Issues, Institutions, and Personalities, M, Mens Rea

Antonio Vallini

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Mens Rea

Mens rea, as a synonym for mental element, is made up of those elements of the offence which concern the interior and psychological sphere of the actor. *Mens rea* may be contrasted with the **actus reus**, which is made up of the material, external elements of the offence. The evolution of ICL has been fragmentary, mainly as a result of decisions of national judges, each based on the principles of criminal liability proper to the legal system to which such judges belong. This has made the emergence of a general, i.e. customary, international law definition of mental element very difficult. As for treaties or binding SC resolutions establishing international criminal tribunals, Art. 30 ICCSt. outlines a mental element typical, ‘unless otherwise provided’, of all the crimes provided for in Arts. 6, 7 and 8, which consists both of **intent** with respect to the conduct and consequences and knowledge in relation to the circumstances and consequences of the crime. Both these psychological attitudes are the subject of a specific definition. This provision applies only to the ICC jurisdiction; it does not codify previous customary law, and it is doubtful whether, in time, it may give rise to a general rule of ICL. If the clause ‘unless otherwise provided’ is understood too extensively, it might relegate Art. 30 ICCSt. to (p. 413) a residual role with respect to other sources, even in ICC case law.

It is difficult to find even basic notions that are common to all the major legal systems of the world. In common law systems, depending on the kind of offence, *mens rea* is normally made up of intent (distinguished as either direct or oblique intent, or general versus **special intent**), knowledge (that may co-exist with intent), and **recklessness** (in its various forms), while significance is only exceptionally attributed to **negligence**, or to various species of *mens rea* (e.g. wilfulness, malice). In civil law systems, a distinction is made between *dolus* (*dol*, *Vorsatz*, *dolo*) and *culpa* (*Fahrlässigkeit*, *colpa*, *negligência*, *imprudencia*, *imprudence/négligence*). *Dolus* is formed by a will whose intensity may vary (from intention—*direkter Vorsatz*, *dolo diretto*, *intention*, *dolo directo*—down to merely taking the risk—***dolus eventualis***, *bedingter Vorsatz*, *dolo eventuale*, *dol éventuel*, *dolo eventual*) and full knowledge of the *actus reus*. *Culpa* exists when there is no *dolus*, but the offence could have been avoided if the actor’s behaviour had complied with accepted standards of prudence. When negligence is accompanied by awareness of the violation of that standard—and by the erroneous conviction that in any case the offence could be avoided—we are faced with so-called advertent negligence (*negligência consciente*; *colpa consciente*; *culpa consciente*, *bewusste Fahrlässigkeit*).

In reality, the notion of mental elements as upheld in the major legal systems of the world is extremely complex. Some definitions (e.g. recklessness or intent) and distinctions (e.g. between *dolus eventualis* and advertent negligence) are not yet clear even in the systems that adopt them. Concepts that seem to be analogous on the terminological and conceptual level, may vary their meaning when they are included in structurally different legal systems (for instance, the different legal regulation of **mistake of fact** may make analogies between intent and *dolus directus* only apparent). Thus, the only principles that may truly be said to be common are the following:

1. the most serious form of *mens rea*, which is always a sufficient basis for a criminal conviction, is the one in which the subject's main aim is the perpetration of the crime, in full awareness of all its constitutive elements;
2. the minimum form of *mens rea* which is sufficient, in all legal systems, for offences that are analogous to the underlying offences in international criminal law, is that of the person who pursues ends that are different from the commission of the crime, but knows and accepts the risk of wholly fulfilling the *actus reus*.

The case law of the ad hoc tribunals largely comports with these indications. Negligence is normally considered insufficient, except in cases of **command responsibility**. At least the awareness of a higher—or reasonable—likelihood of risk is required (e.g. Judgment, **Stakić** (IT-97-24-T), TC, 31 July 2003, § 656 et seq.). Importance is also attributed to the taking of that risk, with the result that the category of *dolus eventualis* is often mentioned (e.g. *Stakić*, TJ, § 661), though this element often appears to be deduced simply from the awareness, on the one hand, and, on the other, from the high level of risk created, measured by an objective test (see Judgment, **Blaškić** (IT-95-14-A), AC, 29 July 2004, § 34 et seq.). Elsewhere, the Prosecutor was asked to prove that the actor could not reasonably have believed that the elements of the crime would not be fulfilled (Judgment, **Kunarac** (IT-96-23-T), TC, 22 February 2001, § 435). This kind of *mens rea* is similar to advertent recklessness, or to the simplified ascertainment of *dolus eventualis*. In this way, ad hoc tribunals reach a good compromise between opposing requirements. On the one hand, they make a juridically correct choice, because they use a mental element that is shared by the most important legal systems and also is sufficiently intense to act as the basis for a criminal conviction of an international nature. On the other, they exclude any easy impunity in the case (very common in practice) of a fragmentation of the commission of the international crime among several actors or co-perpetrators. Especially when a **joint criminal enterprise** is large and complex, participants who play marginal roles, or take part in phases that are logically and chronologically distant from the final fulfilment of the crime, do not have full awareness of every element of the overall offence committed, but at most are aware of a concrete risk of one or more criminal events (Judgment, **Furundžija** (IT-95-17/1-T), TC, 10 December 1998, § 236 ff.). In a case in which one of the perpetrators committed an act outside the common criminal design, the foreseeability of that act was considered sufficient to attribute responsibility to the participants who did not personally will it. It was specified, however, that this form of *mens rea* is something more than negligence, given that the prosecutor had to demonstrate that 'the actions of the group were most likely to lead to that result' (objective test: a high risk), that the co-perpetrator possessed awareness of this risk (cognitive element) and 'nevertheless willingly took that risk' (voluntary

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(p. 414) element, in practice, automatically deduced from the first two): Judgment, **Tadić** (IT-94-1-A), AC, 15 July 1999, §§ 194–220. This is not, therefore, an exception, but an application of the normal concept of *mens rea*. In an important decision, it was held that the responsibility of a person who plays a leading role in a joint criminal enterprise may be only based on wilful blindness (culpable indifference) regarding the possible commission of crimes not directly willed by him, or directly willed by other co-perpetrators. In practice, however, it was proved that the defendant had taken notice of the effects of other people's crimes (dead bodies of victims, bloodstains, signs of violence), and consequently the **ICTY**, once again, simply resorted to reasonable criteria of proof of a *dolus eventualis*, which in any case was

considered necessary (Judgment, *Kvočka and others* (IT-98-30/1-T), TC, 2 November 2001, §§ 407–408).

Art. 30 ICCSt. rejects mere recklessness and *dolus eventualis*, because it requires awareness that a consequence will occur in the ordinary course of events (not could occur) and awareness that a circumstance falling under the notion of the crime exists (not could exist). In short, the actor must be sure that he is committing, or helping to commit, a crime. This restrictive, rigorous choice as regards *mens rea* may prevent the extension of responsibility, for example, to all the subjects involved in a joint criminal enterprise. It is consistent, however, with the requirement of limiting the jurisdiction of the court only to the categories of conduct that arouse a particular social alarm, committed by subjects playing fundamental roles, and consequently more aware of the criminal nature of the overall project. Another novelty must be taken into account in trials within the jurisdiction of the ICC: in conformity with the ordinary civil law rule, the Statute expressly recognizes that a mistake regarding an element of the definition of the crime, whether material (mistake of fact) or normative (**mistake of law**), is capable of excluding the *mens rea*, whether it is a ‘reasonable’ or an ‘unreasonable’ mistake (Art. 32 ICCSt.). Also a culpable mistake may exclude a real and actual knowledge of all the circumstances and the certainty of the consequences, which are essential elements of the *mens rea*, as defined by Art. 30 ICCSt.

As regards the special forms of *mens rea* indicated in the definitions of certain specific crimes it bears pointing out that the wilfulness typical of some war crimes (e.g. ‘wilful killing’ or ‘wilfully causing great suffering or serious injury to body or health’: Art. 130 GC III; Art. 2(a), (c), (f) ICTYSt.), which ‘includes both guilty intent and recklessness which may be likened to serious criminal negligence’ (Judgment, *Blaškić* (IT-95-14-T), TC, 3 March 2000, § 152), is mentioned in Art. 8(2)(i), (iii), (vi) ICCSt. This indication is therefore binding also for the ICC; the rule of Art. 30 ICCSt. only applies ‘unless otherwise provided’. For other war crimes, on the contrary, the ICCSt. departs from the other sources in requiring a true intent (e.g. Art. 8(2)(b)(i), (ii), (iii), (iv), (ix), (xxiv), (xxv)). This requirement must be interpreted in accordance with the definition of intent in Art. 30 ICCSt. The same goes for those definitions of crimes which expressly use the term knowledge (see expressly last part of Art. 30 ICCSt.). Among these, the most significant one is Art. 7(1): knowledge of the attack, which distinguishes, as an element of context, **crimes against humanity**. As knowledge, in Art. 30 ICCSt., means awareness that a circumstance really exists, the ICC will have to depart from the case law of ad hoc tribunals, according to which it is sufficient that the actor knowingly took the risk of participating in the implementation of the inhumane plan, policy or organization (Judgment, *Tadić* (IT-94-1-T), TC, 7 May 1997, § 656 et seq.; *Blaškić*, TJ, §§ 251, 255, 257; *Kunarac*, TJ, § 434). In any case, the details of the overall project of attack on human rights need not be known (see *Kunarac*, TJ, § 434) and ‘the perpetrator does not need to share the purpose or goals of the broader attack’ (see Judgment, *Muvunyi* (ICTR-2000-55A-T), TC, 12 September 2006, § 516). In contrast, the ICCSt. does not introduce any innovation as regards the specific intent of the crime of **genocide**.

Further indications about *mens rea* in international crimes may be drawn from the ratio which is normally recognized for this element of the offence. Commentators dealing with both common law and civil law systems argue that if criminal law were to punish facts which escape the awareness, the will, or at least the control of the actor, not even the most careful and honest person could feel safe from punishment; instead of being a useful means of social orientation, criminal law would become a dangerous instrument of repression and a cause of collective uncertainty. For this reason, many civil law systems use the concept of culpability (*Schuld, colpevolezza, culpa*), intended as an appraisal of the subject’s specific grounds for acting in a manner other than that prescribed by law. Besides the mental element, this appraisal takes into account other situations that may influence the ability to behave differently, which in common law systems have the value of defences, e.g. insanity, minority, intoxication, ignorantia legis, duress, superior order. Also ad hoc international tribunals seem to require a concrete reason for behaving differently from the legal prescriptions. This rationale illuminates a series of

(p. 415) standards of application which are by now consolidated. Thus, for example, only the real perception of a risk may lead a subject to behave differently, or at least to be more careful about what he does or does not do; it is therefore not possible to ascertain the *mens rea* by having recourse to merely objective tests, based only on what an abstract ‘reasonable’ or ‘honest’ man would have understood, and done, in a similar case. Consistently with these considerations, ad hoc tribunals refuse to presume the necessary negligence for superior responsibility, and require, instead, proof of an awareness, in the presence of which the superior ‘had reason to know’ about the offences of his subordinates (***Delalić and others*** (IT-96-21-A), AC, 20 February 2001, § 384 ff.; Judgment, ***Akayesu*** (ICTR-96-4-T), TC, 2 September 1998, § 489). From another point of view, the push to ‘behave differently’ is given by the knowledge of doing harm or being likely to do harm. It is therefore only this cognitive element that needs to be ascertained, whereas it is unimportant whether the defendant intimately shared the causing of that harm. Consistently with this criterion, it is by now clear that a specifically racist or inhumane frame of mind is not a necessary element of crimes against humanity, while the ethical significance of certain motives—e.g. sadism, cruelty, racism—is at most an aggravating circumstance (***Blaškić***, TJ, §§ 783 ff.), or a criterion of proof of *dolus*. Also the discriminatory intent typical of **persecution** is intended as a sub-category of specific intent (Judgment, ***Vasiljević*** (IT-98-32-T), TC, 29 November 2002, § 248 et seq.; Judgment, ***Kupreškić and others*** (IT-95-16-T), TC, 14 January 2000, § 632 ff.; ***Stakić***, TJ, § 737 et seq.).

Precisely because the actor should entertain a full motivation to behave differently from what is prescribed by an international criminal rule, ignorance of the rule that defines the crime has been considered irrelevant, ever since the Nuremberg trials. *Ignorantia legis poenalis* does not prevent the subject from perceiving the harmfulness of his own behaviour. Art. 33 ICCSt., however, admits an excuse, under certain conditions, for ignorance of an international prohibition caused by a **superior order**, or by a norm of the local legal system, which is in contrast with that prohibition, provided that this refers to **war crimes**, or offences whose criminal nature is at times not so evident. This, too, may be an indication of the progressive affirmation, also in ICL, of a culpability that takes into account the specific, real existence of a reason for behaving differently.

ANTONIO VALLINI

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Annex 83

Kai Ambos, TREATISE ON INTERNATIONAL CRIMINAL LAW, VOL. I: FOUNDATIONS AND
GENERAL PART (2013)

*Pursuant to Rules of the Court Article 50(2), this annex is
comprised of such extracts of the whole document as are
necessary for the purpose of the pleading. A copy of the
whole document has been deposited with the Registry.*

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A. The General Mental Requirement: Intent and Knowledge (Article 30 ICC Statute)

(1) Preliminary remarks and terminological clarifications

Article 30 of the ICC Statute contains the general *mens rea* rule for international criminal law. It requires that the material elements of a crime are committed with *intent* and *knowledge*, that is, it pursues a *binary approach*, apparently excluding any lower standard. In fact, this is one of the several issues of interpretation of Article 30, which we will have to analyse in more detail below.¹ Another issue refers to the meaning of the term '*committed*' in Article 30. Apparently it is, however, not limited to the material commission or perpetration of a crime but also embraces the other modes of criminal liability provided for in Article 25(3) of the ICC Statute.² Apart from that, Article 30 raises several other issues of interpretation. Before we analyse these in more detail, two preliminary clarifications have to be made.

First of all, the meaning of the term '*intent*' must be clarified. A literal interpretation—leaving alone the underlying philosophical issue of a psychological understanding of intent as opposed to a normative understanding of culpability (discussed previously)³—yields ambiguous results. Intent can be understood either in the general sense, embracing the cognitive and volitional aspects of the mental element,⁴ or in a mainly volitional, purpose-based sense.⁵ While traditional *common law* knows specific intent crimes implying aim and purpose, for example burglary,⁶ intent or intention was always understood in both a volitional and cognitive sense.⁷ Modern English law still includes in the definition of intention, separate from purpose, 'foresight of virtual certainty'; at best, the core meaning of intent or intention is reserved to desire, purpose, and so on.⁸ In

References

(p. 267) *R v Woolin*, the House of Lords, with regard to a murder charge, defined intention by referring to 'virtual certainty' as to the consequence of the defendant's actions.⁹ Also, the US Model Penal Code ('MPC'), which served as a reference for the ICC Statute in many regards, albeit distinguishing between 'purpose' and 'knowledge' (s. 2.02(a)), defines the former in a cognitive sense by referring to the perpetrator's 'conscious object' with regard to conduct and result.¹⁰ According to the Australian Criminal Code Act ('CCA') a person acts with 'intention', with regard to conduct, if he 'means to' engage in it, or, with regard to a result, if he 'means to bring it about or is aware that it will happen in the ordinary course of events'.¹¹ Interestingly, with regard to the knowledge or awareness standard, common law jurisdictions

oscillate between ‘practically’ or ‘virtually certain’¹² and a lower awareness that a certain result ‘will occur in the ordinary course of events’.¹³

In *civil law jurisdictions*, the distinction between purpose and knowledge and, thus, the meaning of ‘intention’ is likewise not always clear-cut.¹⁴ In French law,¹⁵ the expression ‘*intention criminelle*’ was introduced into the former Criminal Code (Article 435) by a legislative Act on 2 April 1892 but was never explicitly defined. The Code employed the expressions ‘*à dessein, volontairement, sciemment, frauduleusement, de mauvaise foi*’ (‘intentionally, voluntarily, knowingly, fraudulent, and mala fide’). The new Criminal Code refers to criminal intent in Articles 121–3, but does not define it either. The French judges, apparently considering themselves—in the sense of Montesquieu’s famous proverb—as only the ‘*bouche de la loi*’, have refrained from proposing a general definition of criminal intent.¹⁶ In the scholarly literature, ‘intention’ is defined in both a volitional sense¹⁷ and a cognitive sense.¹⁸ On this basis, a distinction between the volitional *dolus directus* (direct intent) and the cognitive *dolus indirectus* (indirect or oblique intent) is drawn.¹⁹ In German and Spanish law, *dolus directus* in the first degree (‘*dolus specialis*’, ‘*intención*’, ‘*Absicht*’) is normally understood as expressing a strong volitional (will, desire) and a weak cognitive (knowledge, awareness) element.²⁰ *Dolus* in this sense means the desire to bring about the

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(p. 268) result, or can be defined as a ‘purpose-bound will’.²¹ Yet, this apparently straightforward interpretation is by no means uncontroversial. In the Spanish doctrine, ‘*intención*’ is understood by an important part of the doctrine either as intent in a general sense (‘*dolus*’, ‘*dolo*’)²² or as encompassing both forms of *dolus directus* (desire and knowledge).²³ Even the German term ‘*Absicht*’, which in ordinary language possesses a clear volitional tendency, is, in legal terminology, not invariably understood in a purpose-based sense.²⁴ Apart from that, ‘*Absicht*’ need not necessarily refer to all preconditions, transitional stages, intermediate goals, or side effects which are inevitably connected with the desired ultimate aim and are necessary steps to be taken on the way to this aim (e.g., the destruction of a group in the case of genocide). Such inevitable, closely interconnected side effects or intermediate steps are encompassed by the ‘*Absicht*’, if the perpetrator knows with virtual certainty of their occurrence.²⁵ On the other hand, the perpetrator may desire or wish, for example, the destruction of a group (as required by Article 6 ICC Statute) only as an intermediate goal—as a means to a further end.²⁶ He may, for example, pursue the final aim of a military occupation of a region populated by the affected group and, in order to reach this final goal, kill or deport members of the respective group with the intent to destroy it. While in this case, this intermediate goal would still be part of the main consequences brought about by the perpetrator’s conduct and as such would be willingly and intentionally produced on the way to the final goal, the situation would be different if the destruction of the group would only be an unwelcome side effect of the perpetrator’s conduct to gain final control of the respective region, that is, it would not be part of the main consequences as envisaged by the perpetrator but only an unfortunate, subsidiary collateral consequence.²⁷

Another issue refers to the—often ignored—difference between *intent and motive* in criminal law. The principle of culpability²⁸ requires that the perpetrator acts with a certain state of mind, normally with intent; possible motive(s), that is, the reason(s) why the agent performed the act, is (are) irrelevant in this respect.²⁹ This—here so-called—*irrelevance thesis* has been correctly recognized by the international case law.³⁰ Thus, in principle, a certain motive only becomes relevant at the sentencing stage as a mitigating or aggravating

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(p. 269)

▶ [View full-sized figure](#)

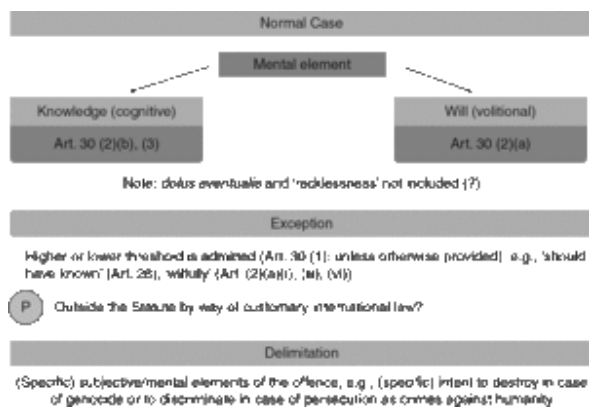


Figure 8. The mental element in International Criminal Law (Art. 30 ICC Statute)

Source: own elaboration

factor.³¹ However, the irrelevance thesis requires two qualifiers. First, the legislator may include certain motives in the offence definition and make them part of the *mens rea* element, in particular of a special intent.³² Secondly, there is a classical scholarly discussion over whether certain motives or convictions of a ‘*délinquant par conviction*’ (‘*Gewissenstäter*’) may exclude the agent’s criminal responsibility (by way of a justification or excuse).³³ Yet, while this would make motives relevant at the level of attribution, it does not affect the constituent elements of the offence (the *actus reus*, *élément matériel*,³⁴ *tipo*, *Tatbestand*), that is, the ‘*délinquant par conviction*’ fulfils the elements of the *actus reus*, acting, by all means, ‘*tipicamente*’ (‘*tatbestandsmäßig*’).

References

(p. 270) We can now turn to the actual interpretation of Article 30. While the reference in paragraph 1 to ‘intent’ and ‘knowledge’ seems to be quite straightforward in that it expresses the volitive and cognitive side of the mental element, a closer look at the provision as a whole reveals some inconsistencies. Thus, to begin, the subject matter or objects of reference of Article 30 must be analysed. Then, the different degrees or standards of *mens rea* are to be examined. The following figure tries to summarize the provision and its main problems.

(2) The subject matter or objects of reference of Article 30 in general

(a) The general object of reference of the mental element: material elements

Article 30(1) of the ICC Statute refers to the ‘material elements’ of the offence. In the original text which was submitted to the Drafting Committee of the Rome Conference the term ‘physical elements’ was used. However, the drafters substituted ‘physical’ with ‘material’, invoking problems with translation into the other official UN languages and questioning the identical meaning of both terms.³⁵ This is not very convincing because the term ‘material’ has more substance than ‘physical’. It at least makes clear that substantive—and not procedural—elements are intended within the meaning. In any case, Article 30 takes an ‘element analysis’—as opposed to a ‘crime analysis’—approach, which draws on the MPC.³⁶ Section 1.13(10) MPC defines a ‘material element of an offence’ as ‘an element that does not relate exclusively to the statute of limitations, jurisdiction, venue, or to any other matter similarly unconnected with (i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) the existence of a justification or excuse for such conduct’. Accordingly, ‘material elements’ would refer to substantive legal requirements of criminal liability including grounds for excluding criminal responsibility, but they would not include procedural impediments to a criminal prosecution. The subject matter of the mental element would not only encompass the *actus reus* of an offence, but also substantive defences. Thus, the agent would have to act with at least an awareness of the defence.

Against such an interpretation of the term ‘material elements’ is its usage in the former codifications and in common law in general. The American Law Institute uses elsewhere a narrower understanding of the ‘material element’ which embraces the elements of the agent’s action—‘conduct, circumstances, result’—in the offence.³⁷ In Article VI(2) of Bassiouni’s Draft International Criminal Code of 1985³⁸ the term ‘material elements’ was used as tantamount to the *actus reus*, that is, to the objective elements of the offence. An additional argument in support of this narrow reading is the meaning of the term ‘physical elements’, which was originally meant to be used instead of ‘material elements’. ‘Physical elements’ are only the objective elements of an offence. This is also confirmed by the interpretation of the French version of Article 30 of the Statute. In the classical French doctrine the term ‘*élément matériel*’ meant the manifestation of the criminal will of the agent. The principle ‘*pas d’infraction sans activité matérielle*’ rules the French law, but it is understood less strictly since the recognition of crimes of endangerment

 References

(p. 271) (*Gefährungsdelikt*) and criminal liability for attempted crimes. Today, the ‘*élément matériel*’ encompasses the conduct (act or omission) independently from the result.³⁹ While it may also, similar to s. 1.13(10) MPC, encompass grounds for excluding criminal responsibility—if one does not see these as a separate category of the ‘*élément légal*’⁴⁰—the prevailing doctrine understands it as an equivalent to the Anglo-American *actus reus*.⁴¹ In contrast, the Spanish version of the Statute uses the term ‘*elementos materiales*’, which encompasses more than mere *actus reus*. The objective elements of an offence would have to be described with ‘*elementos objetivos del tipo*’ or ‘*elementos del tipo objetivo*’. The term ‘*elementos materiales*’ seems to be used here as an antonym of procedural elements. This would be congruent with the definition of ‘material elements’ contained in the MPC and would also encompass grounds excluding criminal responsibility. Ultimately, the decisive argument in favour of a restrictive interpretation is provided for by Article 30 of the ICC Statute itself. Article 30(2) and (3) refer to ‘conduct’, ‘consequence’, and ‘circumstance’—which are elements of the *actus reus*. Therefore, ‘mental elements’ in Article 30 should be interpreted as referring only to the objective elements of an offence.⁴²

(b) The specific objects of reference of the mental element: ‘conduct’, ‘consequence’, and ‘circumstance’

The elements introduced by Article 30(2) and (3) belong, from a systematic perspective, to the ‘material elements’. Article 30(1) connects the material elements with the mental element (‘intent and knowledge’); paragraph 2 defines ‘intent’ with regard to ‘conduct’ and ‘consequence’; and paragraph 3 defines ‘knowledge’ with regard to ‘circumstance’ and ‘consequence’. Thus, conduct, consequence, and circumstance constitute the concrete forms of the material elements.⁴³ The wording is based on previous codifications⁴⁴ and on s. 2.02 MPC.⁴⁵ This provision distinguishes not only between four different categories of intent (‘purpose’, ‘knowledge’, ‘recklessness’, and ‘negligence’) but links intent to ‘conduct’, ‘result’, and ‘attendant circumstances’. Similarly, speaking about the necessary intent, s. 18 of the English Draft Criminal Code Bill (‘DCCB’)⁴⁶ refers to ‘results’ and ‘circumstances’ and s. 2(4) of the Canadian Draft Bill to ‘conduct’, ‘consequence’, and ‘circumstances’.⁴⁷ Section 14 of the Australian Criminal Code (CCA) subdivides the ‘physical elements’ into

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(p. 272) ‘conduct’, ‘circumstance’, and ‘result of conduct’, where ‘conduct’ means action, omission, or a ‘state of affairs’. The fault elements are intention, knowledge, recklessness, or negligence (s. 17).

What then do the terms ‘conduct’, ‘consequence’, and ‘circumstance’ concretely mean? Article 30(2)(a) refers to a ‘conduct’ (‘*comportement*’, ‘*conducta*’), paragraph (2)(b) to ‘consequence’ (‘*consequence*’, ‘*consecuencia*’). Thus, on the one hand, the reference is made to the *conduct* of a criminal offence—the prohibited act or omission covered by the offence definition⁴⁸—and, on the other hand, to the *consequence* of a criminal action—a common element in the definition of most crimes. Accordingly, ‘consequence’ in this context means the (completed) result or the danger that was caused by the conduct.⁴⁹ This also

follows from s. 18(b)(ii) DCCB, which relates intention to results and makes clear that this term is used as a synonym for ‘consequence’.⁵⁰ In doctrinal terms, subparagraph (a) refers then to the act or omission of the agent, that is, an element pertinent to each and every criminal offence, while subparagraph (b) refers to the result, that is, an element contained only in a result crime. During the discussion of the Preparatory Commission, it was expressed that ‘conduct’ should encompass only wilful human action, contrary to involuntary body movements.⁵¹ This is not convincing, for such a clarification would have had to be agreed upon in a general definition of ‘act’ or *actus reus*, but such an agreement was not reached in Rome.⁵² In any case, intentional conduct is predicated on voluntary human action, that is, this is a necessary prerequisite for the existence of intent.⁵³

The interpretation of ‘conduct’ and ‘consequence’ as referring to conduct and result crimes also makes sense from the perspective of general doctrinal considerations. On the one hand, the distinction is also known in national systems. The common law systems distinguish between conduct and result crimes.⁵⁴ The French doctrine distinguishes between ‘*infraction matérielle*’ and ‘*infraction formelle*’, which in its structure corresponds to the differentiation between conduct crime and result crime.⁵⁵ The Spanish doctrine refers to ‘*delito de mera actividad*’ and ‘*delito de resultado*’,⁵⁶ thereby taking up the reference to ‘*conducta*’ and ‘*consecuencia*’ in Article 30 ICC Statute. On the other hand, the Rome Statute contains not only result crimes but also conduct crimes in the case of war crimes,⁵⁷ for example, declaring that no quarter will be given (Article 8(2)(b)(xii) and (e)(x)) or the employment of poison or poisoned weapons (Article 8(2)(b)(xvii)).⁵⁸ Many offences distinguish between the prohibited conduct and the consequences triggered

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(p. 273) thereby, and combine them. Article 8(2)(b)(iv) criminalizes the launching of an attack in the knowledge that it will cause loss of life or injury to civilians. According to Article 8(2)(b)(vii), making improper use of a flag of truce is a criminal offence if it results in death or serious personal injury.

Apart from ‘conduct’ and ‘consequence’, Article 30(3) introduces the term ‘*circumstance*’ (‘*circonstance*’, ‘*circunstancia*’). In the common law system, the ‘circumstance’ element refers to relevant facts pertaining to the definition of a criminal offence,⁵⁹ like for example the age or sex of the victim of a sexual offence or, in the case of theft, the fact that the property belongs to another person.⁶⁰ From a German perspective, the agent who is ignorant of such a circumstance—as ‘a fact which is a statutory element of the offence’—lacks intent within the meaning of § 16 of the German Criminal Code (‘StGB’).⁶¹ The ‘facts’ belonging to the definition of the offence are regularly: conduct, object of the conduct, consequence (result), and the attendant circumstances of the offence,⁶² that is, that they are the material facts making up the offence definition.⁶³ In turn, all these definitional or statutory elements are the object of reference of the mental element.⁶⁴ If one considers the *actus reus* as defining the wrongfulness of the conduct (as *Unrechtstypus*),⁶⁵ then it includes in particular those elements which constitute the specific degree of wrongfulness of an offence.⁶⁶

Despite these general definitions, the boundaries between conduct, consequence, and circumstance may become blurred, especially if one defends a broad reading of the conduct element.⁶⁷ Take for example the war crime of the transfer of the occupation power’s civilian population into the occupied territory (Article 8(2)(b)(viii)). One may define the whole offence definition as ‘conduct’, or take a narrow approach and consider the status of a territory as ‘occupied’ and the fact that the population is that of an occupying power as circumstances, with the ensuing consequences with regard to the necessary mental standard.⁶⁸ Further, it is controversial which of the elements of Articles 6–8 ICC Statute are to be seen as ‘circumstances’. Apart from the conceptual problem just mentioned, this controversy gains particular importance since the classification of an element as a ‘circumstance’ would trigger the knowledge requirement, stipulated by Article 30(3) as ‘awareness that a circumstance exists’.⁶⁹ Thus, if one makes a particular element of Articles 6–8 a ‘circumstance’, especially those included in the *chapeau* of the provisions, the agent has to be aware

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(p. 274) of it. We will have to return to this practically very relevant problem below, when dealing with the particular crimes.

(3) The standard or degrees of the mental element

The mental standards regarding ‘conduct’, ‘consequence’, and ‘circumstance’ provided for by Article 30(2) and (3) are not entirely clear. Some clarifications have therefore to be made in this section.

(a) With regard to ‘conduct’

In this regard it is required that the agent ‘means to engage’ (*entend adopter*, *se propone incurrir*) in the ‘conduct’. It is clear that Article 30(2)(a) refers to the volitional aspect of the conduct and not, as already explained above, to its voluntariness or involuntariness. But does the emphasis on the volitional aspect mean that *dolus directus* in the first degree, that is, a purpose-based direct intent, is required? Does the agent have to act with a purpose to perform this particular conduct? While the wording of the English, French, and Spanish text favours this conclusion,⁷⁰ it is problematic that in legal doctrine *dolus directus* in the first degree regularly refers to the consequence and not the conduct envisaged by the offence.⁷¹ It is difficult to imagine an intentional, purpose-based conduct if the agent does not pursue a specific goal but only performs a specific act. Nevertheless, this does not mean that an intentional, purpose-based commission of a pure conduct crime is impossible;⁷² only, unlike in a result-based crime, the purpose does not refer to a consequence but to the conduct itself. Thus, a soldier can employ poison or poisonous weapons (Article 8(2)(b)(xvii)) on purpose, namely, if this is exactly what he wants to do, that is, if he ‘means to engage in the conduct’. He may, in addition, with the same act want to bring about a specific consequence or result; yet, this is irrelevant as long as he only meant to perform the particular conduct.⁷³ Of course, with its emphasis on the volitional aspect of the mental element (‘means to engage’), subparagraph (a) introduces a high threshold with regard to the conduct element. Thus, for example with regard to the employment of poisonous weapons, the mere awareness of the soldier would not suffice.

A lower standard may, in light of the unambiguous wording of subparagraph (a), only be possible if one also reads into the volitional ‘means to engage’ a cognitive standard, similar to the understanding of ‘purposely’ in § 2.02(2)(a)(ii) MPC as awareness regarding the attendant circumstances.⁷⁴ This comes close to the view in the German doctrine that volitional consequences are also those whose occurrence the agent holds for certain or at

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(p. 275) least very probable, if the actions are performed according to his plan.⁷⁵ This broad reading has also been adopted by the *Lubanga* PTC’s definition of *dolus directus* in the first degree⁷⁶ and it is supported by Article 30(2)(b) where ‘intent’ incorporates knowledge and, therefore, allows for a cognitive element for the ‘(specific) intent crimes’.⁷⁷ Of course, such a (cognitive) reading of subparagraph (a) would broaden it to the detriment of the accused and thus conflict with the *lex stricta* aspect of the principle of legality embodied in Article 22(2) of the ICC Statute.⁷⁸ Thus, in sum, given the clear wording of subparagraph (a), with regard to conduct the agent must mean to engage in it, that is, want to perform this particular conduct.⁷⁹

(b) With regard to ‘consequence’

Regarding the consequences, Article 30(2)(b) stipulates two categories of the mental element. The first category corresponds to the ‘conduct’ standard of subparagraph (a): ‘the agent means to cause’ (*entend causer*, *se propone causar*). Thus, regarding the causal course of events and the consequences, the agent has to act with a direct, purpose-based intent. More clearly than in the case of subparagraph (a), the object of reference of the mental element here—a result crime—calls for a purpose-based interpretation (*dolus directus* in the first degree).⁸⁰ The second category establishes a cognitive standard which draws on the indirect or oblique intent of common law and the *dolus directus* in the second degree of civil law:⁸¹ the agent must be aware that the consequence ‘will occur in the ordinary course of events’.

The first question arising is whether the volitive and cognitive standards are required cumulatively or only alternatively. By employing the disjunctive ‘or’, subparagraph (b) seems to support an alternative reading. However, Article 30(3) repeats the cognitive standard with regard to ‘consequence’ and Article 30(1) requires both ‘intent and knowledge’. Thus, the interplay of paragraphs 1 and 3 implies that, regarding ‘consequence’, the agent has to act with intent *and* knowledge.⁸²

The wording ‘in the ordinary course of events’ comes from the English law and can also be found in s. 18(b)(ii) DCCB.⁸³ Herewith, the intermediate consequences and collateral effects necessary for the final result which are virtually certain and do not rest on a ‘wholly improbable supervening event’ can be imputed to the agent.⁸⁴ By way of example: if the agent blows up an aeroplane to obtain the insurance money (which is his final aim), it corresponds to the ‘ordinary course of events’ that the passengers will die (intermediate consequence or collateral effect). Thus, in order to impute the consequence(s) to the agent, his awareness that a particular consequence will occur in the ordinary course of events

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(p. 276) suffices; the ordinary course standard adds an objective component to the otherwise subjective knowledge requirement. Such collateral effects can be qualified as ‘wanted’, because the agent assumes with virtual certainty that they will occur.⁸⁵

(c) With regard to ‘circumstance’

Article 30(3) of the ICC Statute requires the agent’s awareness ‘that a circumstance exists’. If one holds—against this author’s opinion—that ‘knowledge’ encompasses ‘wilful blindness’, it could be read into paragraph (3) and it would suffice that the agent was wilfully blind regarding a circumstance.⁸⁶

Apart from that, this paragraph raises the question as to which type of ‘awareness’ is required. Is factual awareness sufficient or does the agent have to act with ‘legal’ or ‘normative awareness’, that is, with awareness regarding certain legal requirements? This will be dealt with in a special section below.⁸⁷

(d) Are lower standards than ‘intent’ and ‘knowledge’ sufficient?

It is controversial whether Article 30 ICC Statute, notwithstanding the ‘unless otherwise provided’ formula,⁸⁸ excludes *per definitionem* any lower threshold than ‘intent’ and ‘knowledge’. As we have just seen, pursuant to paragraph 2, the ‘intent’ requirement is fulfilled if the agent ‘means to engage’ in a certain ‘conduct’ or ‘means to cause’ a certain consequence or is ‘aware that it will occur in the ordinary course of events’. Does this definition exclude any lower threshold? The issue has become practical in particular with regard to the lower intent standard of *dolus eventualis*, well known in civil law jurisdictions. In contrast, it is not particularly problematic that *recklessness*, that is, a form of conscious risk-taking,⁸⁹ is not encompassed by Article 30 since otherwise mere risk awareness without a volitional component⁹⁰ and, with regard to a consequence (Article 30(2)(b)), less than the required awareness would suffice.⁹¹ The exclusion of recklessness is also confirmed by the fact that the respective provision of the ‘Draft Statute’ was finally not adopted.⁹² In addition, as will be shown later, the Statute expressly requires recklessness for some war crimes under Article 8 and thus makes clear that this mental standard falls under the ‘unless otherwise provided’ clause of Article 30.

The question whether Article 30 ICC Statute encompasses also the *dolus eventualis* standard is more complex. The ICC’s Pre-Trial Chamber I held in the *Lubanga* confirmation decision that Article 30 requires a volitional element which, apart from intent and knowledge, encompasses also *dolus eventualis*.⁹³ It further distinguished between two

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(p. 277) scenarios which reach the required threshold. First, where the actor is aware of the substantial likelihood that his conduct will result in the realization of the objective elements of the crime, but, nevertheless, decides to carry it out.⁹⁴ Secondly, where the risk of bringing about the objective elements of

the crime is low, but the actor clearly or expressly accepts this risk.⁹⁵ However, PTC I did not provide any reasoning for its interpretation except invoking the ad hoc tribunals'—similarly unfounded—recourse to *dolus eventualis*.⁹⁶ In contrast, the *Bemba* PTC II in its confirmation decision held that Article 30 embraces only direct intent.⁹⁷ According to the Chamber, the wording 'will occur in the ordinary course of events' comes 'close to certainty',⁹⁸ while in the case of *dolus eventualis*, the occurrence of the undesired consequences is a mere likelihood or possibility.⁹⁹ The Chamber concluded that if the drafters of the Statute had intended to include such a lower category of *mens rea*, they could have used the wording 'may occur' or 'might occur in the ordinary course of events', which comes closer to expressing a mere eventuality or possibility.¹⁰⁰ The Chamber further pointed to the *travaux préparatoires* which show that *dolus eventualis* appeared in the initial negotiations, but was dropped at an early stage.¹⁰¹ The *Lubanga* Trial Chamber concurred with this view in its long-awaited judgment, arguing that Article 30(2)(b) excludes *dolus eventualis* because it demands full awareness with regard to the existence of a risk that the harmful consequences will occur.¹⁰²

This view is in line with a position that I espoused as early as 1999,¹⁰³ arguing Article 30(2)(b) requires a higher degree of certainty than the *dolus eventualis*' mere possibility on the basis of uncertain facts¹⁰⁴ with regard to the consequences arising out of the criminal conduct.¹⁰⁵ In fact, *dolus eventualis* is a kind of 'conditional intent' by which a wide range of subjective attitudes towards the result are expressed, which have as a common denominator that the agent 'reconciles himself' with the result ('sich mit der Rechtsgutsverletzung abfinden') as a possible cost of attaining his ulterior goal.¹⁰⁶ As to recklessness, this means that *dolus eventualis* entails a higher volitional threshold—the volitional element in the form of the 'reconciling himself' with the result is, in fact, absent in recklessness¹⁰⁷—which, in turn, means that the former stands between *dolus eventualis* and conscious

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(p. 278) (advertent) negligence ('bewusste Fahrlässigkeit').¹⁰⁸ In any case, as regards the standard of Article 30(2)(b), the agent who only 'reconciles himself' with the harmful outcome of his conduct is indifferent to it but not aware that 'it will occur in the ordinary course of events'. The agent only thinks that the result is possible. Thus, consenting to the finding of the Pre-Trial Chamber II, the wording of Article 30 hardly leaves room for an interpretation which includes *dolus eventualis* within the concept of intent as a kind of 'indirect intent'.¹⁰⁹

Also, the PTC I's recourse to the case law of the ad hoc tribunals is not at all convincing. None of the Statutes in question contains a general provision defining *mens rea*. Thus, the judges of the ICTR and ICTY were bound neither by the statutory wording nor the drafting history but, quite to the contrary, could take recourse to rules of customary law valid at the time when the crimes were committed. Finally, there is a policy argument against *dolus eventualis*: the nature of the ICC as a court of last resort to avoid impunity for international core crimes entails a particular gravity of the crimes to be prosecuted by the Court. This gravity is not only expressed by the *actus reus*, but also by the *mens rea*, and a higher degree of the latter adds to the gravity of the respective crimes.¹¹⁰

(4) The object of reference of the mental element with regard to the specific crimes (Articles 6–8 ICC Statute)

As shown above,¹¹¹ the objects of reference of the mental element are the material elements of the offences contained in Articles 6–8. The peculiarity of these crimes is, though, that they contain 'contextual elements' or a *chapeau* by means of which they receive their international dimension.¹¹² It is unclear whether the mental element also encompasses these *contextual elements*, that is, if they constitute material elements within the meaning of Article 30(1).

The following analysis of the subjective requirements of each particular crime will take into account the *Elements of Crimes* (hereinafter 'Elements'), which, according to Article 9 of the ICC Statute, are intended to 'assist' the Court in the interpretation and application of Articles 6–8. Although the Elements of Crimes are part of the applicable law according to Article 21(1)(a),¹¹³ Article 9—as *lex specialis*—clarifies that they

Annex 84

William A. Schabas, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* (2d ed., OUP, 2016)

Pursuant to Rules of the Court Article 50(2), this annex is comprised of such extracts of the whole document as are necessary for the purpose of the pleading. A copy of the whole document has been deposited with the Registry.

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Part 3 General Principles of Criminal Law: Principes Généraux Du Droit Pénal, Art.30 Mental element/Elément psychologique

William A. Schabas

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(p. 626) Article 30. Mental element/Elément psychologique

<p>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.</p>	<p>1. Sauf disposition contraire, nul n'est pénalement responsable et ne peut être puni à raison d'un crime relevant de la compétence de la Cour que si l'élément matériel du crime est commis avec intention et connaissance.</p>
<p>2. For the purposes of this article, a person has intent where:</p>	<p>2. Il y a intention au sens du présent article lorsque:</p>
<p>a) In relation to conduct, that person means to engage in the conduct;</p>	<p>a) Relativement à un comportement, une personne entend adopter ce comportement;</p>
<p>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.</p>	<p>b) Relativement à une conséquence, une personne entend causer cette conséquence ou est consciente que celle-ci adviendra dans le cours normal des événements.</p>
<p>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.</p>	<p>3. Il y a connaissance, au sens du présent article, lorsqu'une personne est consciente qu'une circonstance existe ou qu'une conséquence adviendra dans le cours normal des événements. « Connaitre » et « en connaissance de cause » s'interprètent en conséquence.</p>

Introductory Comments

Actus non facit reum nisi mens sit rea. Fault is an essential component of all criminal prosecution, although criminal law systems recognize a number of degrees or forms of it, such as negligence and recklessness. Crimes are usually analysed with respect to two elements, one of them mental (the *mens rea*) and the other material (the *actus reus*). But there is no parallel provision to article 30 in the *Rome Statute* dealing with the material element. It was not for want of proposals. Several were submitted in the course of the drafting of the *Statute*,¹ and a provision on the material element appeared in the final draft adopted by the Preparatory Committee.² According to Per Saland, who presided over the relevant negotiations at the Rome Conference, the *actus reus* provision was dropped because it was too difficult to reach agreement.³ Professor Roger S. Clark has written: 'Saland does not explain further how the issue became too hard and I have not found anything useful in the public record.'⁴

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(p. 627) Drafting of the Provision

As with most of the other general principles in the *Rome Statute*, the issue of codifying the mental element of crimes did not arise until the General Assembly phase of the negotiations. Several draft texts were submitted during the sessions of the Preparatory Committee.⁵ According to the 1996 Report of the Committee:

A general view was that since there could be no criminal responsibility unless mens rea was proved, an explicit provision setting out all the elements involved should be included in the Statute. There was no need, however, to distinguish between general and specific intention, because any specific intent should be included as one of the elements of the definition of the crime.⁶

Aside from defining the nature of the mental element, using the classic criminal law notions of 'intention' and 'knowledge', there was much debate about, and many attempts to codify, the concept of 'recklessness'.⁷ At the third session of the Preparatory Committee, in February 1997, a text emerged that is essentially identical to article 30.⁸ Despite much continuing discussion, it remained unchanged in the final draft of the Preparatory Committee, where it was presented without square brackets or footnotes.⁹ However, a fourth paragraph was also proposed that concerned recklessness. Although part of the Preparatory Committee draft, it was in square brackets. A footnote indicated: 'Further discussion is needed on this paragraph.'¹⁰ A second footnote said: 'A view was expressed to the effect that there was no reason for rejecting the concept of commission of an offence also through negligence, in which case the offender shall be liable only when so prescribed by the Statute.'¹¹

At the Rome Conference, there were a few minor changes to the wording of the first three paragraphs of the draft provision, and to the title, which was '*Mens rea* (mental elements)' in the Preparatory Committee's text. In the first paragraph, the phrase 'a person is only criminally responsible' was changed to 'a person shall be criminally responsible'. A reference to 'physical elements' was changed to 'material elements'. In paragraph 2(a), 'engage in the act [or omission]' was replaced with 'engage in the conduct'. The original version of paragraph 3 read: 'For the purposes of this Statute and unless otherwise provided, "know", "knowingly" or "knowledge" means to be aware that a circumstance exists or a consequence will occur.' It was changed somewhat in the final version, although the modifications seem more formal than substantive. Paragraph 4, dealing with recklessness, it was dropped entirely.¹²

Analysis and Interpretation

The *Rome Statute* sets a demanding standard for the mental element, requiring in paragraph 1 of article 30 that '[u]nless otherwise provided' the material elements of the offence must be committed 'with intent and knowledge'.¹³ In two subsequent paragraphs, (p. 628) the *Statute* defines these concepts. A person has intent with respect to conduct when that person means to engage in the conduct. A person has intent with respect to a consequence when that person means to cause that consequence or is aware that it will occur in the ordinary course of events. Knowledge is defined as 'awareness that a circumstance exists or a consequence will occur in the ordinary course of events'. Article 30 defines 'knowledge', adding that 'know and knowingly' shall be construed accordingly. However, 'know' and 'knowingly' are not otherwise used in either article 30 or, for that matter, elsewhere in the *Rome Statute*. The word 'known' appears in the command responsibility provision. The word 'knowledge' is employed in the *chapeau* of crimes against humanity.

A Default Rule: 'Unless Otherwise Provided' (Art. 30(1))

Article 30 begins with the words '[u]nless otherwise provided'. This makes article 30 a 'default rule',¹⁴ a *lex generalis*,¹⁵ to be applied 'unless the *Rome Statute* or the Elements of Crimes require a different standard of fault'.¹⁶ The Trial Chamber in *Katanga* stated: 'The Chamber recalls that where the Elements of Crimes leave the mental element unspecified, regard must be had to article 30 of the Statute to determine whether the crime as committed with intent and knowledge.'¹⁷ The best example in the *Statute* itself of an exception to the general principle is article 28(a), on superior responsibility of military commanders, which sets a 'should have known' standard that manifestly falls below the knowledge requirement of article 30.¹⁸ The possibility of conviction of a military commander for crimes committed by subordinates where the commander 'should have known that the forces were committing or about to commit such crimes'¹⁹ is certainly in conflict with article 30, but is sheltered by the words 'otherwise provided'. Genocide is defined in article 6 as requiring an 'intent to destroy', which has been frequently described in the case law as a 'specific intent' or *dolus specialis* standard.²⁰ Judges of the Court have also referred to

certain war crimes and crimes against humanity, such as torture and pillage, as requiring a specific intent.²¹ The limitation of the defence of superior orders to cases that do not constitute ‘manifest illegality’ constitutes an exception to the general rule, in that it imposes an objective standard for the assessment of knowledge of illegality that may be at odds with that of the individual defendant.²² Furthermore, exclusion of the defence of superior orders in cases of genocide and crimes against humanity constitutes a derogation from article 30.²³

There are also examples of derogation from article 30 in the Elements of Crimes, for example, the norm by which the perpetrator of the genocidal act of transferring children

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(p. 629) ‘should have known, that the person or persons were under the age of 18 years’.²⁴ There is some academic debate as to whether the words ‘unless otherwise provided’ encompass exceptions in the Elements rather than the *Rome Statute* itself.²⁵ The core of the argument that provisions of the Elements that depart from article 30 are unacceptable rests on the formulation of article 9 of the *Statute*, which says that the Elements of Crimes are to ‘assist’ the Court. Nevertheless, article 21 lists them as a source of applicable law, and to the extent that they are ‘provided’ by such a source, they may be deemed to be ‘otherwise provided’. That provisions of the Elements of Crimes intentionally fall within the exceptions to article 30 is made abundantly clear in paragraph 32 of the general introduction to the Elements: ‘Where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element ... intent, knowledge or both, set out in article 30, applies.’ In *Bemba*, Pre-Trial Chamber III subscribed to the view by which exceptions in the Elements are permitted when it described the *mens rea* requirements of the *Statute* as follows: ‘Consequently, it must be established that the material elements of the respective crime were committed with “intent and knowledge”, unless the Statute or the Elements of Crimes require a different standard of fault.’²⁶

The mental element has two components, namely intent (i.e. a volitional element) and knowledge (i.e. a cognitive element). Adopting terminology from continental legal doctrine, judges of the International Criminal Court have described these volitional and cognitive components as *dolus*. There are said to be three relevant forms of *dolus*: *dolus directus* in the first degree or direct intent; *dolus directus* in the second degree or oblique intention; and *dolus eventualis* or subjective or advertent recklessness. *Dolus directus* in the first degree (or direct intent) refers to knowledge by the offender that his or her acts or omissions will bring about the material elements of the crime and the carrying out of these acts or omissions with the purposeful will (intent) or desire to bring about those material elements of the crime. In other words, ‘the suspect purposefully wills or desires to attain the prohibited result’.²⁷ The volitional dimension is predominant.

In *dolus directus* of the second degree, the cognitive element is more important. The offender need not have the actual intent or will to bring about the material elements of the crime, but must be aware that those elements will be the almost inevitable outcome of his or her acts or omissions.²⁸ In other words, the offender must be ‘aware that [... the consequence] will occur in the ordinary course of events’.²⁹ In this context, the ‘volitional element decreases substantially and is overridden by the cognitive element,

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(p. 630) i.e. the awareness that his or her acts or omissions “will” cause the undesired proscribed consequence’.³⁰

As for the third form, *dolus eventualis*, which is akin to the common law concept of recklessness, Pre-Trial Chamber II has held that ‘such concepts are not captured by article 30 of the Statute’. It said its conclusion was supported by the express language of the phrase ‘will occur in the ordinary course of events’, as it does not leave room for a lower standard than *dolus directus* in the second degree.³¹ This conclusion is reinforced with reference to the *travaux préparatoires* of the *Statute*. According to Roger S. Clark, the drafters of the *Statute* ‘were generally uncomfortable with liability based on recklessness or its civil law

(near) counterpart, *dolus eventualis*'.³² At the Rome Conference, '*dolus eventualis* and its common law cousin, recklessness, suffered banishment by consensus. If it is to be read into the Statute, it is in the teeth of the language and history'.³³ After analysing the *travaux*, Pre-Trial Chamber II concluded that 'the idea of including *dolus eventualis* was abandoned at an early stage of the negotiations'.³⁴

Material Elements (Art. 30(1))

The *Rome Statute* does not contain any parallel provision on the *actus reus* or material element of the crime.³⁵ The reference to 'material elements' in article 30(1) is perhaps the last remnant of the draft text on the subject. The final Preparatory Committee draft contained an *actus reus* article, but the Working Group was unable to reach consensus on its content,³⁶ essentially because of problems in defining the notion of omission. The Coordinator of the Working Group made a proposal accompanied by a *nota bene*, saying: 'Another option could be to have no article dealing with omission. It seems that the substantive content of paragraph 2(a) is largely covered by whatever is stated in the definitions of the crimes, and paragraph 2(b) would to some extent be covered by article 28 on command responsibility at least if the approach is taken to state this as a responsibility rather than non-immunity'.³⁷ During the debates, he added that article 22(2) prohibiting analogies would ensure that judicial discretion on the subject of omissions was never abusive. A footnote to the Working Group's report stated: 'Some delegations were of the view that the deletion of article 28 required further consideration and reserved their right to reopen the issue at an appropriate time'.³⁸ Nothing more was heard of the subject.

Material elements are set out in the definitions of the crimes (arts 6–8) and the Elements of Crimes. As paragraphs 2 and 3 of article 30 explain, they consist of 'conduct',

References

(p. 631) 'consequence', and 'circumstance'. Both acts and omissions may constitute material elements.

If there may be room for some debate about inclusion of recklessness within article 30, there can be none about negligence. In *Lubanga*, Pre-Trial Chamber I referred to the 'should have known' requirement provided in certain provisions of the Elements of Crimes dealing with the age of persons recruited into armed forces. It described this as 'an exception to the "intent and knowledge" requirement embodied in article 30 of the Statute. Accordingly, as provided in article 30(1) of the Statute, it will apply in determining the age of the victims, whereas the general "intent and knowledge" requirement will apply to the other elements of the war crimes ...'.³⁹ According to Charles Garraway, when these negligence-based provisions of the Elements were being drafted: 'Those with reservations as to the *vires* of this provision were reassured by article 9(3) of the Statute providing that elements "shall be consistent" with the Statute. Any inconsistent element would be struck down by the judges'.⁴⁰ But *Lubanga* suggests that they are not inconsistent with the *Statute*, not because they are consistent with article 30, but because they are 'otherwise provided'.

Intent (Art. 30(2))

An accused person has 'intent' in two situations. Where the crime requires 'conduct', the person must 'mean to engage in that conduct'. This is a relatively straightforward idea in criminal law, excluding unintentional conduct such as automatic or reflex behaviour, and 'accidents'. With respect to a crime of conduct, the accused is deemed to intend the conduct. As a general rule, the Prosecutor need not actually prove that the person intended the conduct, as this follows logically from proof of the conduct itself. The accused person may rebut what amounts to a logical presumption by proposing a defence, arguing that despite appearances the conduct was not in fact intentional. Classic examples of this include the defences of mental incapacity and intoxication, as well as mistake.⁴¹

Intent is also relevant to crimes where the material element involves a consequence. The first crime listed in the *Rome Statute*, genocide by killing (art. 6(1)), requires a consequence because the victim must be dead. Article 30(2) establishes that where consequence is an element of the crime, the Prosecutor must establish that the accused 'means to cause that consequence or is aware that it will occur in the ordinary

course of events'.⁴² Again, the *mens rea* is generally presumed, based upon proof of the actual acts or omissions of the accused, without the need for further evidence such as statements, psychological materials, and proof of motive. The reference to 'ordinary course of events' suggests that an objective rather than a subjective standard may be applied. In other words, the mental element of the accused will be assessed not in light of the individual's personal circumstances, but rather against what an 'ordinary' person would have expected. Nevertheless, it is not enough 'to merely anticipate the possibility that his or her conduct would cause

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(p. 632) the consequence. This follows from the words "will occur"; after all, it does not say "may occur".⁴³

The expression 'a consequence will occur' has been interpreted by the Appeals Chamber as referring 'to future events in respect of which there is virtual certainty that they will occur'.⁴⁴ Citing the *Bemba* confirmation decision, the Appeals Chamber said 'absolute certainty about a future occurrence can never exist; therefore the Appeals Chamber considers that the standard for the foreseeability of events is *virtual certainty*'.⁴⁵ According to the Pre-Trial Chamber in the *Bemba* confirmation decision:

Thus, the Chamber considers that, by way of a literal (textual) interpretation, the words '[a consequence] will occur' serve as an expression for an event that is 'inevitably' expected. Nonetheless, the words 'will occur', read together with the phrase 'in the ordinary course of events', clearly indicate that the required standard of occurrence is close to certainty. In this regard, the Chamber defines this standard as 'virtual certainty' or 'practical certainty', namely that the consequence will follow, barring an unforeseen or unexpected intervention that prevent its occurrence.⁴⁶

The Pre-Trial Chamber said it is a standard that is undoubtedly higher than that of *dolus eventualis*, which is foreseeability of the occurrence of the undesired consequences as a mere likelihood or possibility. Thus, 'had the drafters of the Statute intended to include *dolus eventualis* in the text of article 30, they could have used the words "may occur" or "might occur in the ordinary course of events" to convey mere eventuality or possibility, rather than near inevitability or virtual certainty'.⁴⁷

The Trial Chamber in *Lubanga* had written that 'it is necessary, as a minimum, for the prosecution to establish [that] the common plan included a critical element of criminality, namely that its implementation embodied a sufficient risk that, if events follow the ordinary course, a crime will be committed'.⁴⁸ Referring to this passage, the Appeals Chamber said 'it does not help in creating more clarity that the Trial Chamber, in the section on the mental element, explains that this "involves consideration of the concepts of 'possibility' and 'probability', which are inherent to the notions of 'risk' and 'danger' ". It said that the phrase was 'confusing' and that reference to 'risk' in the interpretation of article 30(2) should be avoided.⁴⁹

Knowledge (Art. 30(3))

Where crimes involve a 'circumstance' or a 'consequence', the perpetrator must have knowledge of these elements. Some definitions of crimes require this explicitly. For example, the *chapeau* to the definition of crimes against humanity requires that the offender 'have knowledge of the attack' that must be widespread or systematic and directed against a civilian population.⁵⁰ As a Chamber explained: "The attack is to be seen as the

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(p. 633) circumstance of the crimes against humanity and thus, the element "with knowledge" is an aspect of the mental element under article 30(3) of the Statute which states that "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events'.⁵¹ Some of the

definitions of war crimes also include an explicit knowledge element. An example is the war crime of 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'.⁵² There is no shortage of examples where a knowledge element is obviously implicit. With respect to the crime of genocide of killing, the perpetrator must kill a member of a protected group with intent to destroy the national, ethnic, racial, or religious group.⁵³ Clearly, there must be knowledge not only that the group exists, but also that the victim is a member of the group. Many of the war crimes provisions concern 'protected persons'; again, the offender must know the status of the victim.

The general norm concerning knowledge as a component of the mental element must be read with an eye to article 32 of the *Statute*, which governs the defence of mistake.

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- ²⁵ See, e.g., Kevin Jon Heller, 'Mistake of Legal Element, the Common Law, and Article 32 of the Rome Statute, A Critical Analysis' (2008) 6 *JICJ* 419, at 435–6.
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Annex 85

Richard Gardiner, TREATY INTERPRETATION (2d ed., 2015)

Pursuant to Rules of the Court Article 50(2), this annex is comprised of such extracts of the whole document as are necessary for the purpose of the pleading. A copy of the whole document has been deposited with the Registry.

Oxford Public International Law

Part II Interpretation Applying the Vienna Convention on the Law of Treaties, A The General Rule, 5 The General Rule: (1) The Treaty, its Terms, and their Ordinary Meaning

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In any event, 'the Court cannot base itself on a purely grammatical interpretation of the text' (*Anglo-Iranian Oil Co., I.C.J. Reports 1952*, p. 104).¹⁵⁷

Where purely grammatical analysis produces an untenable result, the narrowly grammatical interpretation may have to be ignored. For example, in the *US-UK Heathrow Airport User Charges Arbitration* a provision in an Air Services Agreement required that '[user charges imposed or permitted to be imposed by a Party on the designated airlines of the other Party] are equitably apportioned among categories of users'.¹⁵⁸ The tribunal rejected a construction of this which required apportionment by the UK authorities to be equitable merely as among US airlines rather than equitably among different types of users of all nationalities. The tribunal also noted that although grammatically the apportionment was to take place after the charges had been imposed, this was clearly not what was meant. 'For both these reasons, a narrowly grammatical interpretation of the "equitable apportionment" condition must be discarded as untenable.'¹⁵⁹

(p. 209) 4.2.7 Different meanings of same term in a single instrument

It is a general principle in interpretation of a well-drafted document to expect the same term to have the same meaning throughout a single instrument. A related, or perhaps obverse, principle is that different terms can be expected to have different meanings. Neither of these is an absolute rule and departures may be more likely in the case of treaties, particularly where there have been many negotiators, sometimes with different groups working on different parts of the text, and sometimes using several languages, some of which may have a greater and more nuanced range of words on a particular topic than do other languages. In the Award in the *Rhine Chlorides* case, the Tribunal noted that:

... the mere fact that a treaty uses two different terms (but which are very close in meaning) does not mean that it must immediately conclude, without further analysis, that the parties intended to create a significant distinction. Naturally, each treaty is presumed to be consistent in the way it uses its terms, but this presumption cannot be regarded as an absolute rule.¹⁶⁰

Context, as an element of the general rule of interpretation in the Vienna Convention, is defined to include the whole of the treaty although the primary use of context is as an aid to identifying the ordinary meaning of terms. This is a wider use of context than a common usage in relation to a word or phrase, where it refers to the most immediate surroundings. However, the greater definition of context includes the lesser. In the absence of any specific indication in a treaty that a term has a particular meaning in a specific part of the treaty (such as a definition provision for a particular part), it is both the immediate context and the wider context which will be significant determinants of the meaning.


A good example of context suggesting different meanings of the same term is in the references in the general rule of interpretation to 'in connection with conclusion' of a treaty, which at one point suggests a single moment and at another seems more apt to refer to a process.¹⁶¹ An example of different terms in one language being found to have been used interchangeably, or at least haphazardly in other languages, is in the Award in the *Rhine Chlorides* case (above). In that case it was in large measure the context which led the Tribunal to reject an argument that references to expenses (with various qualifiers) meant the sums specified in the treaty in relation to each ton of chlorides stored, rather than the actual cost of storage.¹⁶²

Annex 86

Lee Jarvis & Tim Legrand, *The Proscription or Listing of Terrorist Organisations: Understanding, Assessment, and International Comparisons*, Terrorism and Political Violence, Vol. 30 (2018)



The Proscription or Listing of Terrorist Organisations: Understanding, Assessment, and International Comparisons

Lee Jarvis  and Tim Legrand

School of Politics, Philosophy, Language and Communication Studies, University of East Anglia, Norwich, UK;
The National Security College, The Australian National University, Canberra, Australia

ABSTRACT

This article serves as an introduction to this Special Issue on the banning or proscription of terrorist organisations around the world. It begins by arguing for greater attention to proscription powers because of their contemporary ubiquity, considerable historical lineage, implications for political life, and ambiguous effectiveness. Following an overview of the Issue's questions and ambitions, the article discusses five themes: key moments of continuity and change within proscription regimes around the world; the significance of domestic political and legal contexts and institutions; the value of this power in countering terrorism and beyond; a range of prominent criticisms of proscription, including around civil liberties; and the significance of language and other symbolic practices in the justification and extension of proscription powers. We conclude by sketching the arguments and contributions of the subsequent articles in this Issue.

KEYWORDS

Banning; listing;
proscription; terrorism;
terrorist organisations

Introduction

The dramatic increase of academic interest in counterterrorism powers in the period since September 11, 2001, in particular, has been much discussed and well documented.¹ Journals such as this one have been at the forefront of debate on the use, effectiveness, and consequences of measures as disparate as counter-radicalisation initiatives,² drone strikes,³ extraordinary rendition,⁴ detention without trial,⁵ sustained military campaigns, legal instruments, and beyond. Yet, while numerous attempts have been made to explore the effectiveness, compatibility, and legitimacy of such tools,⁶ the power of proscription or the (black)listing of terrorist organisations—the focus of this Special Issue—remains curiously neglected, having attracted comparatively little scholarly attention to date. This Issue presents an attempt to address this lacuna, and to offer the first sustained analysis of the workings and consequences of diverse proscription regimes around the world.

As the articles collected in this Special Issue demonstrate, there are at least four reasons why we might find ourselves surprised at the lack of scholarly attention afforded to proscription. First, this is a power that is employed extremely widely—although, as we shall see, inconsistently—across the globe. Most states in the international system, and a number of international governmental organisations (IGOs), maintain lists of banned

terrorist groups. In the United States, for instance, the Secretary of State designates a list of Foreign Terrorist Organizations (FTOs); a list which contains 61 organizations at the time of writing this introduction.⁷ In the United Kingdom, it is the Home Secretary who has the power to proscribe an organisation believed to be engaged in terrorism (with Parliament's consent). Seventy-one organizations are on this list.⁸ At the inter-state level, meanwhile, the European Union established its own "list of persons, groups and entities involved in terrorist acts and subject to restrictive measures"⁹ following the events of September 11, 2001. This list currently hosts 13 persons, and 31 groups and entities.¹⁰ This similarity of instruments, yet diversity of outcomes, raises important strategic and political questions to which the articles in this Issue are addressed in relation to these lists and others maintained by, *inter alia*, Australia, Canada, Spain, Turkey, and Sri Lanka.

A second reason we might be surprised by this neglect relates to this power's considerable historical lineage. As this Issue demonstrates, efforts to ban identified terrorist groups are by no means limited to post-9/11 counterterrorism paradigms. Indeed, the outlawing of organisations deemed threatening to national security or order may be traced back several hundred years across multiple conflicts and insurgencies. These include in relation to pre-Christendom Rome, Britain's anti-monarchy Yorkists¹¹ and struggles with Irish Republicanism, ETA in Spain, as well as—more recently—Western state actions against groups such as Al Qaeda, Boko Haram, and Islamic State. Several of the articles in this Issue stress the importance of situating contemporary proscription regimes within specific national circumstances which pre-date the so-called "war on terror," making the power an important case for exploring the boundaries and evolution of counterterrorism frameworks that remain too often read through a presentist lens.

Third, the proscription of terrorist organizations has significant implications for political life—and therefore the lives of citizens—within and beyond liberal democratic states. Most obviously, legislating against activities such as the membership of, support for, or glorification of specific groups risks intruding upon liberal democratic freedoms, including those of expression, association, and speech.¹² Such questions are not unique to proscription;¹³ indeed, metaphorical framings of counterterrorism as requiring some form of balance between liberty and security remain pervasive despite academic criticism.¹⁴ These questions are, however, particularly acute in this context given that proscription typically serves a *preventive* purpose—at times in combination with other ambitions—which is directed toward crimes as yet uncommitted.¹⁵

Finally, powers of proscription also, we suggest, merit greater consideration given that their relevance and effectiveness in the struggle against terrorism has arguably yet to be demonstrated. Already, scholars¹⁶ have raised concerns that the outcomes of counterterrorism policies and programmes are too rarely, if at all, evaluated by governments, although others have suggested that it is possible to do precisely this.¹⁷ And, there are good reasons to question the effectiveness of proscription specifically in attenuating terrorist violence. As several contributors to this Issue observe, the banning or sanctioning of terrorist groups is often a symbolic rather than directly instrumental decision: one that may have policy ends some distance from counterterrorism aspirations. These supplementary ambitions may be important, or desirable, or they may not. But they do raise additional questions for policy and political evaluation in this context. Indeed, what might be even more striking here is that practitioners, too, are often reticent about the functional

value of proscription, as attested by the former U.S. Director of National Intelligence, James R. Clapper, who was interviewed for this Issue:

For whatever reason it seemed as though our listing a group had an impact. People noticed and the rest of the world cared, but as far as impact on us in intelligence; it really didn't have any.¹⁸

Proscription in global perspective: Questions and themes

Broadly understood, powers of proscription refer to a series of legal instruments which permit a government or other authoritative actor to prohibit the presence of, or support for, an identified organisation within its jurisdiction. The act of proscribing an organisation in this way, it is often claimed by supporters of such powers, signals society's disavowal of a group's ideas and actions, at the same time as it suppresses a group's ability to promote or undertake violent extremist activities. Suppression typically entails the creation and implementation of a range of criminal offences, including criminalising membership of specified groups, prohibiting visible manifestations of support for listed groups—such as the wearing of uniforms or the display of symbols, and criminalising attempts to solicit or provide financial support for such groups (amongst other offences).

Beyond these specific offences—which vary from jurisdiction to jurisdiction as we shall see in the articles that follow—proscription also serves a crucial broader purpose. That is, the designation of terrorist groups undergirds vast aspects of the Western world's counterterrorism frameworks. The formal designation of an organisation as terrorist, for instance, is a typical pre-requisite to the confiscation or freezing of that group's assets; or the prevention of its members from soliciting support; or the banning of an organisation running for political office, travelling across national borders, or using certain forms of transport. Moreover, the listing of organisations as terrorist is also key to the lack of significant domestic political criticism that follows potentially controversial counterterrorism actions, such as extra-judicial killings overseas.¹⁹ Proscription, in short, is a fulcrum of states' counterterrorism capabilities and ambitions.

Yet, because different states adopt their own idiosyncratic approaches to defining, enacting, and applying proscription regimes, the global edifice of “banned organisations” is replete with tensions, incongruences, unintended consequences, perverse outcomes, and questionable effectiveness. In the first instance, as noted above, there is considerable variance globally around who is, and who is not, considered to be “terrorist.” This is the case even amongst formally allied countries with considerable records of cooperation around counterterrorism, intelligence, and beyond. Where the total number of groups on the U.S. list of Foreign Terrorist Organizations currently stands at 61,²⁰ the UK has designated²¹ 71 international terrorist organisations, and 14 further organisations in Northern Ireland under previous legislation. These figures compare with the 53 “listed terrorist entities” in Canada,²² and the 24 listed terrorist organizations in Australia.²³ Indeed, only 16 groups are proscribed across all four of these countries. For critics, global counter-money laundering initiatives have been stymied precisely by a failure to adequately agree *between* states which groups do, and do not, fall within national and/or international proscription provisions.²⁴ Perhaps of greater concern, however, is growing disquiet that some forms of proscription may be counter-productive, galvanising support for violent extremist groups in some states.

In this Issue we offer the first systematic attempt to compare, contrast, and evaluate the construction and consequences of proscription regimes from a range of significant case studies around the world. Taken collectively, the articles in this Issue pull attention to five key themes. First are a series of important historical questions around the emergence, continuation, and transformation of proscription powers, both globally and in relation to specific regimes. What strategic challenges or political contexts have given rise to the introduction and extension of these powers to new organizations? Or, conversely, what explains instances of reluctance to proscribe ostensibly worthy candidates? A second set of themes centres on pressing political questions around the impact of proscription upon seemingly established political settlements within liberal democratic states, in particular. Here, we delve into the power's potential for intrusion upon freedoms of speech and association, as well as the ability of citizens to engage in dissent and various forms of oppositional or symbolic political action. Third, this Issue attempts to evaluate the legal situation of national proscription regimes and their relationship with international counter-terrorism initiatives, and, indeed, international law. Fourth are broadly sociological considerations of the ways in which diasporas and minority communities are affected by proscription mechanisms. These include the implications for communities who might be linked to overseas struggles against oppressive regimes, and, domestically, the ways in which proscription might contribute to stigmatisation and the creation of "suspect communities."²⁵ Finally, the Issue also provides analysis of the effectiveness of proscription decisions in achieving their intended ambitions of diminishing or disrupting violent extremist activities and ideas.

As the above themes suggests, this discussion will be of interest to a wide, and interdisciplinary, audience. The articles collected herein offer a variety of methodological, theoretical, and disciplinary contributions, spanning literatures found within Political Science, International Relations, Public Policy, Law, History, and Criminology. In addition, reflecting the unbounded, global implications of domestic proscription laws, this issue is very obviously international in its outlook. The articles that follow focus on the specific proscription regimes of Australia, Canada, the European Union, Spain, Sri Lanka, Turkey, the U.S., and UK—at times in comparison with other countries. What is more, these are regimes that intersect with or impinge on some of the most pressing conflicts or struggles taking place around the world today, including those in Syria, Iraq, Afghanistan, and Northern Ireland. Yet, although an unbounded "war on terror" is implied by the contemporary deployment of these powers, we shall see that many of these regimes emanate as much, if not more, from the insurgencies and separatist movements of the 20th century.

Continuities and change in proscription regimes

The proscriptions of antiquity and the middle ages serve to remind us that outlawing or banishing enemies of the state is a longstanding privilege of sovereignty.²⁶ Today's proscription regimes might be considered crude, though no less severe, reflections of these historic antecedents. Despite clear differences—including of legitimate authority and military technologies—there are parallels between older declarations of outlawry, authorising the killing of an outlawed man without judicial oversight or criminal penalty,²⁷ and contemporary targeted killings of terror suspects by U.S. or UK drone strikes over the Middle East or South Asia. In each we see

identified individuals being excluded from a particular community and the protections it offers, whether geographical, normative, or both.

Notwithstanding such historical continuities, our contributors to this issue draw particular attention to the influence of 20th-century conflicts on today's proscription regimes. Amongst these cases, the UK stands apart in the breadth of its experience of conflict with insurgency or liberation movements in its overseas colonial territories. In her exposition of the wavering fortunes of Kurdish separatist movements, for instance, Victoria Sentas situates the "origins of proscription as a mode of warfare against anti-colonial struggles," especially those of post-war British (and French) rule, but also in recent conflicts in Sri Lanka and Northern Ireland.²⁸ Indeed, Clive Walker observes how the UK's prevailing domestic proscription regime emerged within the mires of urban conflict in Northern Ireland. Here Walker emphasises how the logics of UK counterterrorism policy in that region have long sought "to stem extreme ideologies by criminalising direct and indirect incitements of terrorism," especially during Margaret Thatcher's tenure as Prime Minister, with her notorious attempt to deprive extremists of "the oxygen of publicity."²⁹ Yet, presaging the violences associated with religious extremism in the new millennium, it was a more recent comprehensive review of the UK's counterterrorism powers by Lord Lloyd in 1996 that recognised the growing threat of international terrorism and recommended the consolidation of the UK's counterterrorism legislation, resulting in the articulation of its current proscription framework in the Terrorism Act 2000.³⁰

An important point of comparison to the UK—given the longevity of its own struggle with separatism—is the Spanish proscription regime which has also been profoundly shaped by its immediate past. Angela Bourne's contribution in this issue sets out a tension here between the era of dictatorship and Spanish experiences of contemporary separatist movements, emphasising Spain's instinct to pursue a strategy of tolerance throughout the 1980s and 1990s. Faced with a complex assortment of (violent and non-violent) opposition within the Basque region, and mindful of Spain's recent history of state oppression, political elites in that period elected to pursue a strategy of political integration over the exclusion of violent separatist movements. The reflex for tolerance was, Bourne explains, a product of Spain's transition from dictatorship to democracy and a concomitant suspicion of excessive state powers. This changed, however, in the late 1990s with a judicial decision to broaden the conception of "terrorist organisation" to include groups affiliated to terrorist organisations such as political parties, trade unions, and workers' organisations. The post-2001 counterterrorism injunctions of the EU and international community, then, operated as a *post-hoc* "external legitimisation of illegalisation processes,"³¹ which were already well underway on the Iberian Peninsula.

Across the Atlantic, Canada's (more limited) exposure to domestic political disjuncture proved similarly—if surprisingly—influential in the construction of its own proscription regime. An outbreak of Quebecois separatism prompted the Canadian government in 1970 to pass the *War Measures Act*, which declared the *Front de Liberation du Quebec* to be an unlawful association and criminalised its membership. The Act led to the imprisonment of hundreds of non-violent Quebec separatist sympathisers becoming, thereafter, a "moving force" in Canada's constitutional bill of rights.³² This common experience contrasts, of course, with Australia which had no meaningful encounter with sustained violent separatism in the twentieth century. This lack of equivalent threats to national security, however, did not prevent Australia devising and employing its own regime of

exclusion. As McGarrity and Williams demonstrate in their contribution, proscription powers were prominently, and controversially, deployed to ban the Industrial Workers of the World organization in 1913, and—subsequently—the Communist Party in 1950.³³ Indeed, the latter organisation challenged, unsuccessfully, their ban in a high court challenge in 1950.³⁴ Nonetheless, it is telling that during the hearing one of the judges, Justice Kitto, expressed his misgivings over the proscription power: “You cannot have punishment that is preventive. You can’t remove his tongue to stop him speaking against you. That is wide open to a totalitarian state.”³⁵

As with so much of relevance to global counterterrorism efforts, the attacks of 9/11 marked an immediate and pronounced transformation in the status of proscription worldwide.³⁶ In Security Council Resolution 1373, *United Nations Suppression of Terrorism Regulations*, the United Nations enjoined members states to institute mechanisms to quell the financing of and support for terrorism.³⁷ The legislative response was immediate. The Australian government passed both The Charter of the United Nations (Anti-Terrorism Measures) Regulations 2001³⁸ and The Security Legislation Amendment (Terrorism) Act 2002,³⁹ Canada responded with the Anti-Terrorism Act 2001,⁴⁰ and the United States passed its own Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act 2001 (USA PATRIOT Act).⁴¹ The United Kingdom—having very recently revised and consolidated its own counterterrorism powers under the considerable Terrorism Act 2000⁴²—bolstered its existing powers further with the Anti-Terrorism, Crime and Security Act 2001.⁴³

Despite the persistence of concerns about hasty legislating in the field of counterterrorism,⁴⁴ it is notable that the outcomes of this wave of law-making have remained largely intact throughout the intervening years.⁴⁵ In many instances, proscription powers have been *broadened* rather than rolled back, in order to capture a wider array of offences—including, for instance, the glorification or advocating of terrorism. This appetite for banning, indeed, appears to show few signs of abating, as the Australian Attorney-General recently suggested:

I think there is an argument that the threshold for proscribing organisations as terrorist organisations is too high at the moment, which is why I’ve instructed the preparation of amendments to the Commonwealth Criminal Code, to lower the threshold at which organisations can be listed as terrorist organisations.⁴⁶

Diversity and interplay of proscription regimes

Another theme brought into focus by contributors to this Issue is the diversity of political and legal settings that structure proscription regimes and their complex transnational interactions. Here the authors demonstrate the bewildering array of laws that work toward the exclusion, sanctioning, or criminalisation of specific groups and—at times—individuals. The terminology of blacklisting, listing, designation, outlawing, banning orders, and more, are commonplace in the rubric of proscription. These are reflective of the often opaque and ambiguous processes and powers that constitute these regimes. In part, this is a product of the idiosyncrasies of national legal philosophies and traditions, but it also reflects the diversity of political interests, definitions of terrorism, and norms pertaining to exclusion, across the case studies collected here.

For example, McGarrity and Williams' article introduces readers to Australia's parallel "executive" and "judicial" pathways to proscription.⁴⁷ The former relies upon the executive's near unilateral designation of particular groups as terrorist. The latter, in contrast, relies upon a jury's determination that a particular organisation meets the relevant criteria for being considered a terrorist organisation. Canada shares these two pathways to listing terrorist entities:⁴⁸ identification as such by the executive, on the one hand, and assessment as meeting the definition of terrorism by a court, on the other, typically in the context of a prosecution. Unlike the Australian regime, however, Canada does not formally criminalise membership of an organisation, only specified activities undertaken in contribution to a listed group's illegal conduct. In contrast to Australia, and other examples such as the UK, put otherwise, it is terrorist *acts* in the Canadian system that are criminalised, not membership of terrorist *groups*.

Turning to the U.S., there is a remarkable array of legal instruments available to sanction designated, or even suspected, terrorist groups. Amongst these, the Foreign Terrorist Organization list is the most prominent—and the subject of extended reflection by James Clapper in the interview published here.⁴⁹ In addition to this, however, there is also the "Terrorist Exclusion List";⁵⁰ the "Specially Designated Terrorists" (SDTs) list; the "Specially Designated Global Terrorists" (SDGT) list;⁵¹ and, the state-sponsors of terrorism list.⁵² Indeed, given this broad collection of instruments, it is surprising that one additional list—the Specially Designated Narcotics Traffickers⁵³—has been employed by the U.S. to target Kurdish negotiators under the *US Foreign Narcotics Kingpin Designation Act* ("Kingpin Act").⁵⁴

Crucially, these diverse regimes are not unconnected to one another; they frequently intersect in the context of ongoing struggles of armed groups beyond the domestic jurisdiction. In her examination of efforts to outlaw Kurdish separatism, for instance, Sentas underlines the cementing power of overlapping and intersecting proscription regimes, arguing: "The particular operations and effects of proscription are organised through transnational cooperation and the complex interaction of other diverse listing regimes."⁵⁵ Nadarajah, discussing responses to ongoing conflict in Sri Lanka, extends this view, arguing that proscription regimes are cohered by common Western "liberal peace logics" representing "a disciplinary modality of transnational security governance" aimed at the production of a global liberal order.⁵⁶

Consequences of proscription

In pursuit of domestic and global security, proscription is deployed to effect a range of direct and indirect sanctions and penalties. It is not, however, a device of great precision. And so it is understood to produce outcomes that might be described as unintended or, at least, unanticipated; not least for individuals, political organisations, and ethnic diasporas which might become snared in proscription sanctions. This also, of course, has broader implications for national security, international organisations, and fundamental liberal freedoms.

For individuals connected to designated entities, the consequences can be severe. By refusing the temptation to criminalise membership of terrorist organisations, Canada adopts a relatively cautious approach, relying upon the criminalisation of any conduct undertaken by individuals in association with a "listed entity" pursuant to terrorism.⁵⁷

Other states, however, are less restrained. Thus, where both the Australian and UK proscription regimes contain “status” offences relating to membership—criminalising individuals for who they are, rather than what they have done—Australia’s powers grant prosecutors considerable latitude, specifying “informal” members as well those who have “taken steps to become a member.” This prompts McGarrity and Williams to wonder, “Is, for example, an individual who merely attends a meeting of an organisation or subscribes to a magazine of an organisation to be regarded as a member?”⁵⁸ Australia’s powers go even further than this, however, with a second status offence of “association,” which criminalises knowingly associating with a member of a proscribed terrorist organisation on two or more occasions with the intention of supporting the organisation.⁵⁹ Status offences of this sort attract much criticism for the latitude they provide to the state’s apparatuses. In Turkey, for example, membership offences have been used as a means of suppressing domestic dissent and support for Kurdish separatism in which Kurds are, as Sentas argues in this issue, “routinely” prosecuted for crimes connected to the PKK or membership of the PKK on often spurious evidence. As she notes, the period of 2009 and 2013 alone saw nearly 40,000 such prosecutions.⁶⁰

This diversity of offences within global proscription regimes is matched by the considerable variation that exists in the extent of sanctions that are applied to proscribed or listed organisations. At one end of the scale, Canada does not ban organisations *per se*, or membership thereof, and since the October Crisis of 1970, Canada has taken pains to avoid such a “negative model” of proscription.⁶¹ In other regimes, such as those maintained by the United Kingdom, Australia, and the United States, the designation of a group as a terrorist organisation entails that property can be frozen, and providing financial or other services to a group is criminalized. Proscription regimes also give rise to a range of indirect consequences, some of which are unintended or, at least, unacknowledged. Amongst our contributors here, for example, it is noted that proscription regimes can aggravate attempts at peace and reconciliation⁶² and “codify antagonistic relations between states and sections of their societies.”⁶³

Although these implications are significant, the persistence—indeed, often extension—of proscription as a counterterrorism tool may be taken as testament to the continuing view of state representatives that this constitutes an effective mechanism for resolving terrorist violence or for satisfying other interests. Commonly, we see governments make weak and strong causal claims of proscription; the “weak” causal effect of its symbolism for communicating the government and society’s disavowal or stigmatisation of designated groups,⁶⁴ and the “strong” causal reasoning that holds that proscription’s financial and criminal sanction significantly reduces a group’s capacity to commit terrorist acts.⁶⁵

The UK is illustrative of these claims. In his article on the UK’s longstanding use of proscription, both at home and in its colonies abroad, Walker identifies five prominent policy claims. First, proscription “caters for ... the state’s concerns about paramilitarism.” Second, proscription serves a pre-emptive function in that it works to address underlying terrorist “structures and capabilities rather than awaiting the harms from an attack and applying a *post hoc* response to tangible actions.” Third, this is a power which fits with the criminalisation of terrorism and serves as a convenient means to prosecute would-be terrorists, “but which in reality extends the ambit of the offence of conspiracy since no other specific crime need be contemplated.”⁶⁶ Fourth, proscription has also been argued to serve a symbolic function, expressing the state’s disavowal of a

group's politics and/or its methods. Finally, citing Lord Bassam, Walker also notes that proscription is often justified by the British government as providing an important contribution to "our responsibility to support other members of the international community in the global fight against terrorism." This emphasis on the symbolic aspects of proscription is picked up by James Clapper in the interview which brings this Issue to a close. In it, Clapper affirms the value of the FTO list in terms of its "important symbolism, both domestically and internationally, to listing terrorist groups." Though doubtful in general of the "substantive" utility of FTO listing, Clapper suggests that the sanctions of FTO listing gain traction where groups exhibit "nation-state characteristics."

This set of reasons underlines the multiple aims that are served by proscription. Depending on the context, proscription can be variously or even simultaneously instrumental, political, and symbolic. It can seek to communicate a government's political stance on a conflict; it can bolster global efforts to vanquish common threats; it can trigger policing powers targeting a specific group and its supporters; and it can augment a government's diplomatic relationship with other states. Against this array of policing and political benefits conferred by proscription, it is unsurprising that these powers are privileged and protected by governments worldwide.

Problems of proscription

Although proscription may have—as we have seen—considerable utility for governments in their confrontation with terrorism, these powers have also long provoked discomfort amongst commentators and even legislators themselves. In the British context, for example, parliamentary debate around the addition of new organisations to the proscribed list has seen this power described as "severe" and "heavy"; with fears expressed including the power's risk of transgressing liberal democratic rights and freedoms, as well as its potential to be counter-productive in producing or aggravating the very types of violence and organisation it is intended to diminish.⁶⁷ Our contributors in this Issue engage with concerns such as these, depicting a range of knotty legal, political, and causal problems.

McGarrity and Williams' survey of the machinations of the Australian proscription regime identifies many prominent juridical objections to proscription. Though the considerable latitude for proscription afforded to the Attorney-General via "executive" proscription is preferable, in their view, to a judicial determination of what is, or is not, a terrorist organisation, they insist that executive proscription remains problematic: it denies the affected group or individual natural justice, and provides few meaningful avenues for review of the proscription decision-making, not least for the group concerned. They further highlight the frailties of having two processes via which proscription can proceed, commenting on how the first—the definition of terrorist organisation—is "exceptionally broad," and the second—targeting groups concerned in the "advocacy" of terrorism—is framed with such ambiguity as to entail a "threat to the freedom of expression." As they highlight, this brings about considerable risk of executive abuse of these powers in the absence of meaningful checks and balances from elsewhere in the political system. Association offences, they further suggest, contribute to perceptions that Muslim communities are unfairly targeted within contemporary counterterrorism initiatives. This may have significant additional consequences for national security, for, as they note: "Home-grown terrorism is far more likely to emerge from a divided society in which people feel marginalised and disempowered on the basis of their race or religious beliefs."

Adding to these concerns, Forcese and Roach point to a similar lack of due process within the Canadian system of listed groups and their members. As they point out, there is no notice given, or opportunity to challenge faulty intelligence, accorded to groups before they are listed under this regime. In addition, the lowered substantive standard for listing terrorist organisations leaves the process susceptible to the problem of “false positives.” The consequence of such mistakes is not just to cause direct harm to innocent individuals or groups, which may be egregious in itself, but also to fuel extremist narratives around Western islamophobia, with counterterrorism set as “indiscriminately aimed at Muslims rather than violence.”⁶⁸ Adding to such issues is Marieke de Goede’s analysis of the processes and consequences of EU blacklisting measures, which she contends are frequently based on superficial source material, and proceed via an elusive process of decision-making. In consequence, she finds, blacklisting entails breaches of human rights.⁶⁹

This is some of the cross-section of the problems with proscription put forward by the contributions within this issue. Across the case studies explored, authors voice often-shared concerns that proscription decision-making is heavily politicised, deleterious to fundamental liberties or rights, and characterised by a generous and, in many cases, unilateral remit accorded to the executive. Input into specific proscription decisions, moreover, is frequently predicated on untested, unchallenged, and superficial evidence with only scant legislative scrutiny. Likewise, judicial oversight has tended to be narrowed in law and, in any case, only triggered in the unlikely event that members of a proscribed organisation have sufficient legal resources and access to the courts of the appropriate jurisdiction.

Language and symbolism

The above discussion emphasises some of the major political and ethical challenges raised by proscription, especially in the context of liberal democratic states. Yet, as we have already seen, the banning of specific organisations is frequently a lengthy and complex process involving multiple actors and agendas that extends beyond decision-making by executive fiat. Angela Bourne’s article in this Issue, for instance, focuses on the Spanish experience and encourages us to see proscription as an example of securitization: a process by which the threat posed by terrorism—in this case *Euskadi ta Askatasuna* (ETA)—is amplified, or even produced. Drawing on recent “sociological” approaches to securitization,⁷⁰ Bourne investigates how the Spanish courts in the late 1990s pursued a much broader understanding of ETA as a “complex structure” of multiple parts than had previously been the case, and how this framing was subsequently picked up and augmented in the Spanish mainstream media’s efforts to emphasise the threat of ETA and associated groups to the democratic community.

Bourne’s article encourages us to take seriously the importance of language and other symbolic practices for counterterrorism mechanisms such as proscription. Proscription—like any other security measure—has to be explained and justified to various audiences, if it is to appear as a legitimate, necessary, and/or proportionate reaction to a particular threat. Crucial within this process—and the focus of Marieke de Goede’s contribution to this Issue—are arguments or claims made about temporality: about time. De Goede’s article draws on a small but growing literature on temporality and counterterrorism. Authors such as Noon⁷¹ and Angstrom⁷² have highlighted the importance of historical

metaphors and analogies—from the Crusades to Pearl Harbor—in the framing of the contemporary war on terror, while Jarvis⁷³ and Fisher⁷⁴ explore the discursive work that is done by arguments about specific pasts, presents, and futures in this context. Other work, drawing on sociological and related literatures around risk, emphasises the importance of (constructed) future scenarios for specific counterterrorism policies and initiatives.⁷⁵ De Goede's contribution in this Issue is to demonstrate the significance of arguments around a) “violent futures” and b) the ostensibly temporary nature of blacklisting practices, for two recent proscription cases that came before the European General Court (formerly the European Court of Justice). As she summarises, “As a security measure, proscription brings the potential, catastrophic future into the present and renders possible a present sanction in advance of terrorist violence.”⁷⁶

These articles serve to link this Special Issue—and the issue of proscription—to contemporary debates on the symbolic, performative, ritualistic, and discursive aspects of counterterrorism practices. In so doing, they demonstrate the purchase of recent theoretical advances within fields such as critical security studies for the analysis of proscription, and speak to contemporary literatures associated with critical terrorism studies, understood in its broadest sense. These articles complement the legal, policy, and normative analysis contained elsewhere in this issue, by asking, in effect, “what needs to be in place for the proscription or listing of specific organisations?” Their emphasis on lawmakers and the criminal justice system, moreover, speaks to recent debate within this journal and beyond⁷⁷ on the role of “security professionals” beyond political executives in counterterrorism decision-making.

In this Special Issue

The Special Issue begins with Nicola McGarrity and George Williams' analysis of the Australian proscription regime. Their article begins with an introduction to the legislation underpinning this regime—which incorporates two different pathways to the identification of a terrorist organisation—and a discussion of some of the deficiencies thereof. These include problems associated with the designation of terrorist organisations, and the circumscribed space that exists for the review and contestation of specific listing decisions. McGarrity and Williams then turn to the use of Australian proscription powers in practice, noting that 23 organisations were listed under Division 102 by March 2017, with all but one of which self-identifying as Islamic. This leads into an analysis of the various proscription offences and prosecutions provided for within the Australian regime, with a particular focus on cases involving accusations of membership, funding, and providing support or resources for terrorist organisations.

The second article in this issue, by Craig Forcese and Kent Roach, turns to the Canadian experience of terrorist group listing. As with McGarrity and Williams, Forcese and Roach are keen to situate contemporary powers historically. In this case, however, subsequent challenges to the 1970 listing of the Front de Liberation du Quebec stand as a cautionary note discouraging the banning of organisations. Forcese and Roach's article highlights a potential disconnect in the Canadian example between a power which is “potent in principle, but ... rarely deployed in practice,”⁷⁸ although in so doing, notes the scope that exists for the greater use of this going forward. The article concludes by highlighting a number of criticisms that resonate with the Australian case, including

around issues of due process, problems of false positives, and concerns around delisting and the intrusion of political considerations upon banning decisions.

Clive Walker's contribution calls particular attention to the role of deproscription in counterterrorism frameworks. Drawing predominantly on cases relating to the conflict around Northern Ireland, Walker puts forward a potentially counter-intuitive argument for *deproscription* as a fundamental, but overlooked, element of counterterrorism policy. He commences by unpicking the effectiveness and fairness of UK proscription laws, arguing that neither are reflected well in current deproscription processes. There are, therefore, in Walker's view several compelling grounds to revamp current deproscription powers. These include: to maintain the lawfulness of proscription; to assist conflict resolution; and to facilitate restorative justice approaches. Deproscription reform, Walker concludes, requires strengthened oversight by the executive, legislature, and judiciary if it is to function as an effective component of counterterrorism.

Suthaharan Nadarajah's article critiques the means-end instrumentalism of proscription's advocates. In it, he argues, proscription powers are more appropriately understood as constitutive of the West's vision of a global liberal peace. Approaching the conflict in Sri Lanka as the embodiment of that vision, with market democracy set against "a violent ethno-nationalist separatist threat," Nadarajah considers the oscillations in security postures taken by Western states towards the LTTE and the Tamil diaspora between 1983 and 2009. Here he finds that proscription in this context is "inseparable from and conditioned by the everyday calculations inherent to wider Western efforts towards global stability." The banning of Tamil groups in Western states, he continues, is therefore a product of transformations in how liberalism and illiberalism are understood and operationalised in security policy.

Victoria Sentas' contribution reframes proscription as a mode of post-colonial counter-insurgency. Her article considers the globalised proscription of the Kurdistan Workers' Party (PKK) and its attendant effects on the broader Kurdish population. Her argument unpacks the historical logics and practices of counterinsurgency and draws parallels to prevailing international proscriptions, highlighting how both depict state/non-state conflicts as a struggle for the consent of the population.

Angela K. Bourne's article takes a different approach to the issue of proscription in Spain, one which draws upon securitization theory. In it, she explores the Spanish state's widening of the targets of listing in the late 1990s from the Basque nationalist *Euskadi ta Askatasuna* (ETA) to a much broader collection of associated groups including political parties, trade unions, and women's organisations. Her analysis begins by exploring court rulings against organisations and parties linked to ETA, before exploring the public resonance of this concerted attempt at securitization via quantitative and qualitative analysis of the major Spanish daily newspaper, *El Pais*. Doing so reveals considerable similarity in the increased judicial and media appetite to frame ETA as a "complex structure" with multiple parts posing a significant threat to the Spanish democratic community.

Marieke de Goede's article offers an analysis of two recent criminal trials relating to proscription within the European Union. The first of these concerns the (de-)listing of Mr. Kadi before the European Court of Justice that took place in a series of cases between 2001 and 2013. The second concerns the placing of the LTTE on the European Union blacklist in 2006. These cases, she argues, demonstrate the importance of assumptions and

arguments about temporalities—including temporary presents, and future intentions—as much as considerations relating to due process and the human rights of those charged with terrorism-related offences.

The Special Issue comes to a close with a focus upon the United States' experience of proscription. Here we attempt to complement the small, but growing, academic literature on this particular case study⁷⁹ via a prolonged and annotated discussion with James Clapper, the former U.S. Director of National Intelligence. This interview explores the issue of proscription from the perspective of those who are charged with very real responsibilities regarding national security. In it, Clapper reflects on the function of the Foreign Terrorist Organization (FTO) list within the broader context of U.S. counterterrorism initiatives. He argues that the FTO list was, throughout his tenure, shaped by the latent political and diplomatic concerns of the U.S. government and was thus more “symbolic” than “substantive.” Elaborating this perspective, Clapper speaks to many of the themes raised by earlier articles in the Issue, including the foreign policy drivers of FTO listing, the implications of the FTO list for peace negotiations, questions around the cohesion of terrorist groups, and the effectiveness of FTO listings.

Notes

1. See, for example: A. Silke, ed., *Research on Terrorism: Trends, Achievements and Failures* (Abingdon: Routledge, 2003); M. Sageman, “The Stagnation in Terrorism Research,” *Terrorism and Political Violence* 26, no. 4 (2004): 565–80.
2. See for example: J. Horgan and K. Braddock, “Rehabilitating the Terrorists? Challenges in Assessing the Effectiveness of De-radicalization Programs,” *Terrorism and Political Violence* 22, no. 2 (2010): 267–91; C. Heath-Kelly, “Counter-Terrorism and the Counterfactual: Producing the ‘Radicalisation’ Discourse and the UK PREVENT Strategy,” *The British Journal of Politics & International Relations* 15, no. 3 (2013): 394–415.
3. M. Smith and J. I. Walsh, “Do Drone Strikes Degrade Al Qaeda? Evidence from Propaganda Output,” *Terrorism and Political Violence* 25, no. 2 (2013): 311–27; D. Byman, “Why Drones Work: The Case for Washington’s Weapon of Choice,” *Foreign Affairs* 92, no. 4 (2013): 32–43.
4. J. D. Boys, “What’s so Extraordinary about Rendition?,” *The International Journal of Human Rights* 15, no. 4 (2011): 589–604.
5. J. McCulloch and S. Pickering, “Pre-Crime and Counter-Terrorism: Imagining Future Crime in the ‘War on Terror,’” *The British Journal of Criminology* 49, no. 5 (2009): 628–45.
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ORCID

Lee Jarvis  <http://orcid.org/0000-0002-4149-7135>

Notes on contributors

Lee Jarvis is Professor of International Politics at the University of East Anglia. His research on the politics of terrorism and security has been published in journals including *Review of International Studies*, *Security Dialogue*, *Terrorism and Political Violence*, *Studies in Conflict and Terrorism*, and *Political Studies*. He is author or editor of eleven books, including: *Anti-terrorism, Citizenship and Security* (with Michael Lister, 2015), *Security: A Critical Introduction* (with Jack Holland, 2015), and *Counter-Radicalisation: Critical Perspectives* (with Christopher Baker-Beall and Charlotte Heath-Kelly, 2015).

Tim Legrand is a lecturer at the National Security College, Crawford School of Public Policy at the Australian National University and Secretary of the Australian Political Studies Association. His research is concerned with global governance and the transnational dimensions of security policy governance in the Anglosphere. His research has been published in leading international journals including *Public Administration*, *Review of International Studies*, *Policy Studies*, *British Politics*, and *Security Dialogue*.

Annex 87

CBS News, *"Multiple Kidnappings for Ransom" Funding ISIS, Source Says* (21 August 2014)

"Multiple kidnappings for ransom" funding ISIS, source says

cbsnews.com/news/multiple-kidnappings-for-ransom-funding-isis-source-says



By ISIS militants had demanded a ransom for James Foley, an American journalist who was abducted while reporting for GlobalPost in 2012. The extremist group released a video of his execution Tuesday.

Updated on: August 21, 2014 / 1:35 PM / CBS News

Much of the funding for the Islamic State of Iraq and Syria (ISIS) is coming from extortion and "multiple kidnappings for ransom," a counterterrorism source told CBS News.

The kidnappings are primarily from citizens of European countries, including employees of corporations who quietly pay the ransom demands to get their people back, the source told CBS News senior investigative producer Pat Milton. Recently a Scandinavian corporation paid \$70,000 for the return of a kidnapped employee, Milton reports.

ISIS militants had demanded a ransom for James Foley, an American journalist who was abducted while reporting for GlobalPost in 2012. The extremist group released a video of his execution Tuesday.

GlobalPost CEO Philip Balboni told reporters Wednesday the company had spent "millions" on efforts to bring Foley home, including hiring an international security firm.

When asked about a ransom purportedly demanded by the kidnappers, Balboni said the price tag involved both financial and political demands, and that it was "substantial" and always remained the same.

A U.S. official told the Associated Press that the ISIS militants who beheaded Foley had demanded 100 million Euros (about \$132.5 million) in ransom for his release. A second U.S. official told The AP that the demands were sent in emails to Foley's family in New Hampshire. Both officials spoke on condition of anonymity because they were not authorized to discuss the ransom demands by name.

ISIS has taken a page out of the al Qaeda game book to use ransom as a source of revenue, the source told Milton. However, ISIS differs from al Qaeda in that the group has in some ways developed a "hybrid form of funding" that is both global and local, according to CBS News Senior National Security Analyst Juan Zarate.

Reports say the group is bringing in more than \$1 million a day. To stem that revenue, U.S. officials will have to take certain steps now to cut off those donors but also help opposing forces in Iraq and Syria wrest back control of the local economy -- a process that could take years.

"They've combined the ability to raise funds and run an economy locally with the ability to tap into on the enthusiasm for their cause globally," Zarate said. "That really presents challenges for counterterrorism officials and in some ways is a more complicated terrorist funding model than we've seen in the past."

Milton reports that ISIS is also getting money through other criminal activity such as robberies as well as donations from supporters, some of whom make contributions through the guise of a charitable organization.

CBS News correspondent Holly Williams reports that in the land they control, ISIS is busy making the money they need to fund what they call an Islamic state. A video from Syria shows an ISIS fighter policing a local market. ISIS also levies taxes and even sells gasoline and electricity.

First published on August 21, 2014

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Annex 88

Lingvo Universal Russian-to-English Dictionary, *направлять* (software ed., 2018)

направлять

LingvoUniversal (Ru-En)



(кого-л./что-л.) *несовер.* - направлять; *совер.* - направить

1) (на кого-л. / что-л.) *прям. и перен.*

direct (at, to); turn (to); aim (at), level (at); point (to, toward) (*оружие* || *a weapon*)

2) (*посылать, отсылать*)

refer (*за справкой, информацией* || *for information*); send; assign, detach

3) (*адресовать*) send

4) (*оттачивать лезвие* || *of a blade*) sharpen

направлять

Learning (Ru-En)

vt; св - направить

1) *устремлять* to direct

2) *посылать* to send

направлять

Context (Ru-En)

направлять

LingvoEconomics (Ru-En)

direct, guide, head, order, swing

направлять

Law (Ru-En)

expedite, depute, direct, refer, send

направлять

Politics (Ru-En)

address, (*куда-л.*) assign, steer, delegate, direct, dispatch, guide, transmit

направлять

LingvoScience (Ru-En)

govern, guide, put, refer, route, steer, train

направлять

Physics (Ru-En)

гл.

guide, direct

направлять

Biology (Ru-En)

(*рост растений*)

train

направлять

Psychology (Ru-En)

гл.

1) direct (*at, to*), turn (*to*), aim (*at*)

2) (*руководить*) direct, guide

3) (*посылать*) send; (*за справкой, информацией*) refer; (*кого-л. на работу*) assign (smb. to work)

направлять

LingvoComputer (Ru-En)

direct, guide, refer

направлять

Engineering (Ru-En)

direct, govern, guide, lead, pilot

направлять

Auto (Ru-En)

guide

направлять

Building (Ru-En)

direct, guide, lead, refer, route, sway, vector

направлять

Sport (Ru-En)

direct

направлять

HoverDictionary (Ru-En)

send; direct; aim; guide; point; refer; level; assign

направлять

ExplanatoryBTS (Ru-Ru)

см. направить; -яю, -яешь; нсв.

направлять

Explanatory (Ru-Ru)

I *несов. перех.*

1.

Устремлять кого-либо или что-либо куда-либо, в какую-либо сторону.

отт. перен. Сосредоточивать что-либо на чём-либо, устремлять к чему-либо, против чего-либо.

2.

Посылать, отправлять кого-либо или что-либо куда-либо.

отт. Давать назначение.

3.

Адресовать, давать чему-либо тот или иной ход, направление (*о делах, бумагах и т.п.*).

4. *разг.*

Учить, наставлять.

II *несов. перех.*

1.

Налаживать (*инструмент, машину и т.п.*).

2.

Выпрямлять, оттачивая лезвие режущего инструмента

направлять

LingvoThesaurus (Ru-Ru)

1.

Суп: отсылать, адресовать, обращать, командировать (*оф.*), посылать, отправлять, откомандировывать (*оф.*)

2.

'делать предметом внимания'

Суп: устремлять (*кн.*), наводить, наставлять (*редк.*), обращать, сосредоточивать (*кн.*), концентрировать (*кн.*)

3.

Суп: руководить, вести, возглавлять, править, управлять

направлять

Dahl_user

НАПРАВЛЯТЬ, направить что, кого; обращать в какую-либо сторону, устремлять, наворачивать куда, на месте, или пуская в ход; | поправлять, исправлять, приводить в должный вид, порядок;

| * наставлять, руководить, поучать;

| **нск.* наготовить, припаси (запаси). Корабль направляют рулем и парусами. Сваю направляют отвесно. Пушки направлены на цель. Направить соху, борону, изладить совсем. Бритву направляют на оселке и ремне. Он смолоду дурно направлен. Направляй всякого к добру и к истине Немного кучер ваш направил, как за угол, так и вывалил! не долго правил. -ся, быть направляемому;

| брать направленье, направлять себя. Судно направляется по компасу. Птица направились прямо к лесу. Бритва еще не направились. На вас не направишься ножичков вы не умеете беречь их, не напасешься. На пьяном шапки не направляешься.

Направляванье (леза, лезвия) *длит.* Направленье *окончат.* Направа (лезвия), направка *жен.*, *-об.* действие по *гл.* Направленье ножа, косы, направка, точка. Направленье пути, течения, ветра, черта, по которой пролегает дорога, действует сила, происходит движенье. Магнитная стрелка кажет два главных направленья: север и юг. В этом обществе дурное направленье. Наявляющая *жен.*, *геом.* линия, по коей движется другая, образуя чрез это, умственно, кривую поверхность. Направной или направочный, для направленья, направки служащий или к нему относящийся. Направлятель, направитель *муж.* -ница *жен.* направщик *муж.* -щица *жен.* кто направляет. Направлятели молодежи должны бы думать об ответственности за это. Нет ли здесь направщика бритв? Направо *нареч.* вправо, на правую руку, в правую сторону, одесную; *противоп.* налево.

| *воен.* командное слово: направо, требует поворота на каблуках вправо, на четверть круга, чтобы левое плечо пришлось там, где была грудь. Полуоборот направо, в ту же сторону, на осьмую долю круга. Направе *нареч.* то же, но направо включает значенье *вин.*, а направе *пред.*; первое выражает движенье, второе покой: в правой стороне, на правой руке. Направый **сев.* прямой, выпрямленный, очень или вовсе прямой;

| правый, невинный ни в чем не виноватый. Нос направо, *стар.* прямой. Он направо в этом деле. Направдаться, набраться правды, прямоты, в насмешку.

направлять

Dahl

НАПРАВЛЯТЬ, направить что, кого; обращать в какую-либо сторону, устремлять, наворачивать куда, на месте, или пуская в ход; | поправлять, исправлять, приводить в должный вид, порядок;

| * наставлять, руководить, поучать;

| **пск.* наготовить, припаси (запаси). Корабль направляют рулем и парусами. Сваю направляют отвесно. Пушки направлены на цель. Направить соху, борону, изладить совсем. Бритву направляют на оселке и ремне. Он смолоду дурно направлен. Направляй всякого к добру и к истине Немного кучер ваш направил, как за угол, так и вывалил! не долго правил. -ся, быть направляему; | брать направленье, направлять себя. Судно направляется по компасу. Птица направила прямо к лесу. Бритва еще не направила. На вас не направишься ножичков, вы не умеете беречь их, не напасешься. На пьяном шапки не направляешься. Направлянье (леза, лезвия) *·длит.* Направленье *·окончат.* Направа (лезвия), направка *жен.*, *·об.* действие по *гл.* Направленье ножа, косы, направка, точка. Направленье пути, теченья, ветра, черта, по которой пролегает дорога, действует сила, происходит движенье. Магнитная стрелка кажет два главные направленья: север и юг. В этом обществе дурное направленье. Наявляющая *жен.*, *геом.* линия, по коей движется другая, образуя чрез это, умственно, кривую поверхность. Направной или направочный, для направленья, направки служащий или к нему относящийся. Направлятель, направитель *муж.* -ница *жен.* направщик *муж.* -щица *жен.* кто направляет. Направлятели молодежи должны бы думать об ответственности за это. Нет ли здесь направщика бритв? Направо *нареч.* вправо, на правую руку, в правую сторону, одесную; *·противоп.* налево.

| *воен.* командное слово: направо, требует поворота на каблуках вправо, на четверть круга, чтобы левое плечо пришлось там, где была грудь. Полуоборот направо, в ту же сторону, на осьмую долю круга. Направе *нареч.* то же, но направо включает значенье *вин.*, а направе *пред.*; первое выражает движенье, второе покой: в правой стороне, на правой руке. Направый *·*сев.* прямой, выпрямленный, очень или вовсе прямой;

| правый, невинный ни в чем не виноватый. Нос направо, *·стар.* прямой. Он направ в этом деле. Направдаться, набраться правды, прямоты, в насмешку.

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направлять

Dahl_user(1)

НАПРАВЛЯТЬ, направить что, кого; обращать в какую-либо сторону, устремлять, наворачивать куда, на месте, или пуская в ход; | поправлять, исправлять, приводить в должный вид, порядок;

| * наставлять, руководить, поучать;

| **пск.* наготовить, припаси (запаси). Корабль направляют рулем и парусами. Сваю направляют отвесно. Пушки направлены на цель. Направить соху, борону, изладить совсем. Бритву направляют на оселке и ремне. Он смолоду дурно направлен. Направляй всякого к добру и к истине Немного кучер ваш направил, как за угол, так и вывалил! не долго правил. -ся, быть направляему; | брать направленье, направлять себя. Судно направляется по компасу. Птица направила прямо к лесу. Бритва еще не направила. На вас не направишься ножичков, вы не умеете беречь их, не напасешься. На пьяном шапки не направляешься. Направлянье (леза, лезвия) *·длит.* Направленье *·окончат.* Направа (лезвия), направка *жен.*, *·об.* действие по *гл.* Направленье ножа, косы, направка, точка. Направленье пути, теченья, ветра, черта, по которой пролегает дорога, действует сила, происходит движенье. Магнитная стрелка кажет два главные направленья: север и юг. В этом обществе дурное направленье. Наявляющая *жен.*, *геом.* линия, по коей движется другая, образуя чрез это, умственно, кривую поверхность. Направной или направочный, для направленья, направки служащий или к нему относящийся. Направлятель, направитель *муж.* -ница *жен.* направщик *муж.* -щица *жен.* кто направляет. Направлятели молодежи должны бы думать об ответственности за это. Нет ли здесь направщика бритв? Направо *нареч.* вправо, на правую руку, в правую сторону, одесную; *·противоп.* налево.

| *воен.* командное слово: направо, требует поворота на каблуках вправо, на четверть круга, чтобы левое плечо пришлось там, где была грудь. Полуоборот направо, в ту же сторону, на осьмую долю круга. Направе *нареч.* то же, но направо включает значенье *вин.*, а направе *пред.*; первое выражает движенье, второе покой: в правой стороне, на правой руке. Направый *·*сев.* прямой, выпрямленный, очень или вовсе прямой;

| правый, невинный ни в чем не виноватый. Нос направо, *·стар.* прямой. Он направ в этом деле. Направдаться, набраться правды, прямоты, в насмешку.

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направлять

Mechanics (Ru-En)

направлять

Polytechnical (Ru-En)_user(1)_user

baffle, direct, pilot

направлять

Polytechnical (Ru-En)_user(1)

baffle, direct, pilot

направлять

Polytechnical (Ru-En)_user_user

baffle, direct, pilot

направлять

Polytechnical (Ru-En)_user

baffle, direct, pilot

направлять

Polytechnical (Ru-En)

baffle, direct, pilot

направлять

Lohwater (Ru-En)_user

направить *v.*

direct, turn, send

направлять

Lohwater (Ru-En)

направить *v.*

direct, turn, send

направлять

Smirnitsky (Ru-En)_user

направить

1. (*вн.* на *вн.*; *прям.* и *перен.*) direct (*d.* at, to), turn (*d.* to); (*оружие*) aim (*d.* at), level (*d.* at)
2. (*вн.*; *посылать*) send* (*d.*); (*за справкой, информацией*) refer (*d.*)
3. (*вн.*; *адресовать*) send* (*d.*)
4. (*вн.*; *оттачивать лезвие*) sharpen (*d.*)

направлять

Smirnitsky (Ru-En)

направить

1. (*вн.* на *вн.*; *прям.* и *перен.*) direct (*d.* at, to), turn (*d.* to); (*оружие*) aim (*d.* at), level (*d.* at)
2. (*вн.*; *посылать*) send* (*d.*); (*за справкой, информацией*) refer (*d.*)
3. (*вн.*; *адресовать*) send* (*d.*)
4. (*вн.*; *оттачивать лезвие*) sharpen (*d.*)

направлять

Zimmerman (Ru-En)

см. тж. повернут в направлении

- It is usually found more efficient **to lead** (or **direct**) the vapour **to** the low-pressure casing.
- The light **is led** (or **guided**) **to** the slit.
- Many patients **are referred to** a geriatric clinic with the diagnosis of ...
- In this way the energy, spread over a wide range of frequencies, **has been channeled** (or **directed**) **into** a narrow band.
- The liquid **is directed to** the proper tanks.
- The carbon dioxide **is** then **sent to** the ammonia synthesis reactor.

направлять

Synonym_user

Обращать, устремлять, руководить, гнуть, клонить куда, отклонять, отвлекать от чего, склонять на что; адресовать.

Направить на путь истины

Ср. <Учить и Отвращать >. **См.** водить, метить, обращать, править, учить (кого), целить...**направлять**

Synonym

Обращать, устремлять, руководить, гнуть, клонить куда, отклонять, отвлекать от чего, склонять на что; адресовать.

Направить на путь истины

Ср. <Учить и Отвращать >. **См.** водить, метить, обращать, править, учить (кого), целить...**направлять**

Ushakov_user

НАПРАВЛ'ЯТЬ, направляю, направляешь. *несовер.* к **направить**.

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направлять

Ushakov

НАПРАВЛ'ЯТЬ, направляю, направляешь. *несовер.* к **направить**.

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направлять

LAW dictionary (Борисенко и Саенко)

гл.

(законопроект и т.п.) to direct (to);

refer (to);

send (to)

Annex 89

Lingvo Universal Russian-to-English Dictionary, *умышленно* (software ed., 2018)

умышленно

LingvoUniversal (Ru-En)

нареч.

deliberately, wittingly

умышленно

Context (Ru-En)

умышленно

Law (Ru-En)

deliberately, wittingly, designedly, knowingly, intentionally, wilfully

умышленно

Politics (Ru-En)

deliberately

умышленно

HoverDictionary (Ru-En)

deliberately; intentionally, purposely; wilfully, wittingly

умышленно

ExplanatoryBTS (Ru-Ru)

см. умышленный; нареч.

Умышленно громко петь.

Умышленно раскрыть дверь.

Умышленно неправильно информировать.

умышленно

Explanatory (Ru-Ru)

I нареч. обстоят. цели

Имея заранее обдуманые намерения; сознательно, преднамеренно.

II предик.

Оценочная характеристика чьих-либо действий как сознательных, преднамеренных, имеющих заранее обдуманые намерения.

умышленно

LingvoThesaurus (Ru-Ru)

Суп: *см. специально*

умышленно

BibleDic_user

ум'ышленно ([Иез.45:20](#)) — одна из вопиющих ошибок в русском переводе. Должно быть — неумышленно (*срн.* [Лев.4:27](#) ; [Чис.15:16](#) ,22,24,26-29,30; [Чис.35:15](#) ,22). (*см. Библия, жертвоприношение*)

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умышленно

BibleDic

ум'ышленно ([Иез.45:20](#)) — одна из вопиющих ошибок в русском переводе. Должно быть — неумышленно (*срн.* [Лев.4:27](#) ; [Чис.15:16](#) ,22,24,26-29,30; [Чис.35:15](#) ,22). (*см. Библия, жертвоприношение*)

Generated by n-Cyclop™

умышленно

Lohwater (Ru-En)_user

adv.

intentionally

умышленно

Lohwater (Ru-En)

adv.

intentionally

умышленно

Synonym_user

Предумышленно, заведомо, зазнамо, нарочно, нарочито, (пред)намеренно, злонамеренно, злобно, демонстративно, специально, тенденциозно по закону, на заказ, с предвзятой целью, по предварительному умыслу; как назло.

Прот. случайно...

умышленно

Синоним

Предумышленно, заведомо, зазнамо, нарочно, нарочито, (пред)намеренно, злонамеренно, злостно, демонстративно, специально, тенденциозно по закону, на заказ, с предвзятой целью, по предварительному умыслу; как назло.

Прот. случайно...

умышленно

LAW dictionary (Борисенко и Саенко)

нареч.

by intentional design;

designedly;

intentionally;

premeditatedly;

purposely;

wilfully

Annex 90

OHCHR, *Report On the Human Rights Situation in Ukraine* (16 August to 15 November 2018)

Pursuant to Rules of the Court Article 50(2), this annex is comprised of such extracts of the whole document as are necessary for the purpose of the pleading. A copy of the whole document has been deposited with the Registry.

**Office of the United Nations High Commissioner
for Human Rights**

**Report on the human rights situation in Ukraine
16 August to 15 November 2018**



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VII. Human rights in the Autonomous Republic of Crimea and the city of Sevastopol

As long as you refuse to testify, we will deny all family visit requests of your relatives.

- An FSB investigator to a defendant in a Hizb ut-Tahrir case

95. The Russian Federation continued to apply its laws in Crimea and the city of Sevastopol in violation of its obligation under international humanitarian law to respect the legislation of the occupied territory.¹¹⁹ The implementation of Russian Federation legislation has curtailed the exercise of fundamental freedoms and has been used to stifle dissent on the peninsula.

96. OHCHR continued to record systematic human rights violations in Crimea, including unjustified restrictions on freedoms of opinion and expression, freedom of movement, violations of the right to maintain one's identity, culture and tradition, and property rights. In total, OHCHR documented 44 violations during the reporting period, and of this number 43 violations occurred within the reporting period; with the Government of the Russian Federation responsible for 32 and the Government of Ukraine for 11.¹²⁰

A. Freedoms of opinion and expression

97. Unjustified restrictions on fundamental freedoms imposed by the Russian Federation through the arbitrary and excessively broad application of its anti-extremism legislation in Crimea continued.¹²¹

98. In the period under review, at least five Crimean residents (three men and two women, all Crimean Tatars) were sentenced under extremism-related charges for possessing material or posting information on social media deemed "extremist" or "terrorist". On 4 September, three family members – a father, mother and daughter – were found guilty of extremism for posting on their social network pages a *Youtube* video featuring a public rally, which had taken place in Simferopol back in September 2013.¹²² In all three cases, the court found that the video in question contained symbols of *Hizb ut-Tahrir*, a religious organization banned in the Russian Federation as "terrorist". The father spent 10 days in administrative detention, while the court ordered the mother and the daughter to pay fines. In another emblematic case, on 20 September, a Crimean Tatar doctor from the Feodosiia city hospital was found guilty of extremism after the Russian Federation authorities discovered three Islamic books considered "extremist" in the hospital's premises.¹²³

99. The Russian Federation authorities apply anti-extremism legislation in Crimea in an arbitrary and selective manner, in order to stifle dissent, instill fear and deny a plurality of views. Amongst the citizens exposed to such persecution are those who have previously

¹¹⁹ See Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (Fourth Geneva Convention); Article 43 of the Regulations concerning the Laws and Customs of War on Land, Annex to Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, Geneva Convention IV on Civilians, art. 64.

¹²⁰ The violations attributable to the Government of Ukraine did not necessarily occur in Crimea itself, but concern events in mainland Ukraine connected to the situation in Crimea. They are related to freedom of movement, access to public services, and the right to property.

¹²¹ See also OHCHR second thematic report "On the situation of human rights in the temporary occupied Autonomous Republic of Crimea and the city of Sevastopol, Ukraine", 13 September 2017 to 30 June 2018, par. 46.

¹²² OHCHR interview, 2 October 2018.

¹²³ OHCHR interview, 28 September 2018.

expressed their dissenting views towards the Russian Federation authorities, publicly supported other individuals accused of terrorism, sympathized or are believed to have links with organizations banned in the Russian Federation.

100. OHCHR notes that such undue restrictions on the right to impart information and ideas gravely undermine freedom of expression guaranteed by international human rights treaties including those to which the Russian Federation is a State party.¹²⁴ Moreover, application of the Russian Federation anti-extremism legislation in Crimea constitutes a violation of its obligation, as an occupying power, to respect the penal laws of the occupied territory.¹²⁵

B. Deprivation of liberty

101. Significant developments have taken place in the case of five crewmembers from mainland Ukraine apprehended on a fishing boat “ЯМК-0041” on 4 May 2018 by the Russian Federation authorities in the Black Sea. Only one crew member was formally charged with illegal fishing and remanded in detention. Four other crew members were transferred to a military base in Balaklava where they were held without legal basis until released on 25 June. Despite the absence of administrative or criminal charges against them, Russian FSB officers have seized their passports and prohibited them from leaving the peninsula.¹²⁶ During their detention, the victims were held in a house near Sevastopol under constant FSB surveillance with limited access or contact with the outside world.¹²⁷

102. On 14 October 2018, one of the fishermen was allowed to return to mainland Ukraine in order to attend the funeral of his mother. Later, on 30 October, the Russian Federation authorities allowed three other sailors from «ЯМК-0041» fishing boat to leave the peninsula.¹²⁸ On 1 November, the vessel’s captain was released from pre-trial detention. As of 15 November, he remains in Crimea on an obligation not to abscond.

C. Right to maintain one’s identity, culture and tradition and freedom of association

103. OHCHR noted a continued narrowing of possibilities to manifest Ukrainian identity and enjoy Ukrainian culture in Crimea since the beginning of the occupation.¹²⁹

104. On 29 August 2018, law enforcement officials conducted a house search targeting an activist of the Ukrainian Cultural Centre, and warned her about forthcoming extremism-related charges during an interrogation.¹³⁰ She felt compelled to leave the Crimean peninsula, based on a well-founded fear of persecution. Since 2017, the activist had been repeatedly summoned for interrogations under the guise of “conversations” in different law enforcement bodies where she was questioned about her pro-Ukrainian views and activities of the Ukrainian Cultural Center and threatened by the FSB.

¹²⁴ See Article 19 of the ICCPR and Article 10 of the ECHR.

¹²⁵ See Article 64 of the Geneva IV Convention.

¹²⁶ OHCHR interview, 30 August 2018.

¹²⁷ OHCHR interview, 19 October 2018.

¹²⁸ On the same day, four crewmembers of another fishing boat “ЯОД – 2105” (all – from mainland Ukraine) detained in the Black Sea on 28 August 2018 were also allowed by the Russian Federation authorities in Crimea to return home. Simultaneously, seven crewmembers of the “Nord” vessel, arrested by the State Border Guard Service of Ukraine in the Azov Sea on 25 March, returned to Crimea, following several unsuccessful attempts to leave mainland Ukraine with the use of travel documents issued by the Russian Federation.

¹²⁹ Article 27 of ICCPR states that “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.” See OHCHR first thematic report on Crimea “Situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol (Ukraine)” par. 182-186.

¹³⁰ OHCHR interviews, 26 September, 27 September, and 9 October 2018.

105. OHCHR recalls that another former activist of the Ukrainian Cultural Center felt compelled to leave Crimea under similar circumstances in August 2017.¹³¹ The Ukrainian Cultural Center is one of the few organizations in Crimea, which has continued to promote Ukrainian culture through public events and commemorations since the beginning of the occupation. The number of its activists has dropped significantly due to the fear of persecution and periodic “warnings” of the law enforcement not to engage in “ill-advised activities”. The narrowing civic space to promote Ukrainian culture is aggravated by the decreasing availability of Ukrainian language in education sphere in Crimea.¹³²

D. Property rights and equal access to public service

106. Despite the ongoing occupation of the Crimean peninsula by the Russian Federation, the Government of Ukraine retains obligations under international law to not interfere with the enjoyment of the right to property of current or former residents of Crimea, as well as to use all legal and diplomatic means available to ensure respect for human rights in relation to the population in Crimea.¹³³

107. OHCHR notes a persistent pattern of continuous violations of property rights of current and former Crimean residents by the state-owned bank PrivatBank.¹³⁴ Shortly after the beginning of the occupation, savings accounts of the bank’s clients in Crimea were blocked, adversely affecting the socioeconomic rights and livelihoods of Crimea residents.¹³⁵ In one case, PrivatBank denied access to the considerable savings of an elderly couple from Kerch that were needed for essential cancer treatment.¹³⁶ PrivatBank justifies its actions with reference to the Ukrainian legislation that defines the status of Crimea as an occupied territory and cancels the operation of banks in the peninsula.

VIII. Technical cooperation and capacity-building

108. OHCHR continues its technical cooperation and capacity-building activities aimed at assisting the Government and civil society to protect and promote human rights in Ukraine.

109. On 16 August and 1 November 2018, as part of the institutionalized pre-deployment programme for officers of the Civil-Military Cooperation unit (CIMIC), OHCHR delivered a session on prevention of arbitrary detention, torture and conflict-related sexual violence, as well as on the protection of freedom of movement and housing, land and property rights, to approximately 62 military officers (including seven women) to be deployed to eastern Ukraine as part of CIMIC. OHCHR has been participating in the pre-deployment programme since September 2017, and has delivered a total of seven trainings for over 212 officers. On 6 November, OHCHR contributed to a training on civilian casualty recording for 13 CIMIC officers (including two women) who are to work with the Civilian Casualty Mitigation Team established within the Joint Forces Operation.

110. OHCHR referred 24 allegations of human rights violations to specific duty-bearers; to the Government of Ukraine, 20 allegations were raised with four of them fully and six partially addressed; to the ‘ombudsperson’ of ‘Donetsk people’s republic’ four allegations were raised with one partially addressed.

¹³¹ OHCHR first thematic report on Crimea “Situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol (Ukraine)”, par. 169.

¹³² See, on the right to education in native languages, OHCHR second thematic report “On the situation of human rights in the temporary occupied Autonomous Republic of Crimea and the city of Sevastopol, Ukraine”, 13 September 2017 to 30 June 2018, par. 68-71.

¹³³ HRC, Concluding Observations on Moldova (CCPR/C/MDA/CO/2(2009)); ECtHR, *Ilascu and Others v. Moldova and Russia* (8 July 2004), paragraph 331.

¹³⁴ The Government of Ukraine holds 100 per cent of the bank’s shares through the Ministry of Finance of Ukraine.

¹³⁵ The issue is aggravated by the Ukrainian legislative framework that does not recognize individuals with registered addresses in Crimea as “residents” of Ukraine for banking purposes. See on this issue, OHCHR Report on the human rights situation in Ukraine, 16 November 2017 to 15 February 2018, paragraph 130.

¹³⁶ The husband died of cancer in 2017. OHCHR interview, 4 October 2018.

Annex 91

U.N. General Assembly Resolution No. 71/205, U.N. Doc. A/RES/71/205, *Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine* (19 December 2017)



General Assembly

Distr.: General
1 February 2017

Seventy-first session
Agenda item 68 (c)

Resolution adopted by the General Assembly on 19 December 2016

[on the report of the Third Committee (A/71/484/Add.3)]

71/205. Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine)

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations,

Recalling the Universal Declaration of Human Rights,¹ international human rights treaties and other relevant international instruments and declarations,

Confirming the primary responsibility of States to promote and protect human rights,

Reaffirming the responsibility of States to respect international law, including the principle that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State and from acting in any other manner inconsistent with the purposes of the United Nations, recalling its resolution 2625 (XXV) of 24 October 1970, in which it approved the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, and reaffirming the principles contained therein,

Recalling its resolution 68/262 of 27 March 2014 on the territorial integrity of Ukraine, in which it affirmed its commitment to the sovereignty, political independence, unity and territorial integrity of Ukraine within its internationally recognized borders, and relevant decisions of international organizations, specialized agencies and bodies within the United Nations system,

Condemning the temporary occupation of part of the territory of Ukraine – the Autonomous Republic of Crimea and the city of Sevastopol (hereinafter “Crimea”) – by the Russian Federation, and reaffirming the non-recognition of its annexation,

Welcoming the reports of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Ukraine, of the Commissioner for Human Rights of the Council of Europe, and of the human rights assessment mission of the Office for Democratic Institutions and Human Rights and the High

¹ Resolution 217 A (III).



Commissioner on National Minorities of the Organization for Security and Cooperation in Europe, in which they stated that violations and abuses of human rights continued to take place in Crimea and pointed to the sharp deterioration of the overall human rights situation,

Condemning the imposition of the legal system of the Russian Federation and the negative impact on the human rights situation in Crimea,

Condemning also the reported serious violations and abuses committed against residents of Crimea, in particular extrajudicial killings, abductions, enforced disappearances, politically motivated prosecutions, discrimination, harassment, intimidation, violence, arbitrary detentions, torture and ill-treatment of detainees and their transfer from Crimea to the Russian Federation, as well as reported abuses of other fundamental freedoms, including the freedoms of expression, religion or belief and association and the right to peaceful assembly,

Expressing serious concern at the decision of the so-called Supreme Court of Crimea of 26 April 2016 and the decision of the Supreme Court of the Russian Federation of 29 September 2016 to declare the Mejlis of the Crimean Tatar People, the self-governing body of the Crimean Tatars, to be an extremist organization and to ban its activities,

Recalling the prohibition under the Geneva Conventions of 12 August 1949² for the occupying Power to compel a protected person to serve in its armed or auxiliary forces,

Welcoming the continued efforts of the Secretary-General, the United Nations High Commissioner for Human Rights, the Organization for Security and Cooperation in Europe, the Council of Europe and other international and regional organizations to support Ukraine in promoting, protecting and ensuring human rights, and expressing concern over the lack of safe and unfettered access by established regional and international human rights monitoring mechanisms and human rights non-governmental organizations to Crimea,

1. *Condemns* the abuses, measures and practices of discrimination against the residents of the temporarily occupied Crimea, including Crimean Tatars, as well as Ukrainians and persons belonging to other ethnic and religious groups, by the Russian occupation authorities;

2. *Urges* the Russian Federation:

(a) To uphold all of its obligations under applicable international law as an occupying Power;

(b) To take all measures necessary to bring an immediate end to all abuses against residents of Crimea, in particular reported discriminatory measures and practices, arbitrary detentions, torture and other cruel, inhuman or degrading treatment, and to revoke all discriminatory legislation;

(c) To immediately release Ukrainian citizens who were unlawfully detained and judged without regard for elementary standards of justice, as well as those transferred across internationally recognized borders from Crimea to the Russian Federation;

² United Nations, *Treaty Series*, vol. 75, Nos. 970–973.

(d) To address the issue of impunity and ensure that those found to be responsible for abuses are held accountable before an independent judiciary;

(e) To create and maintain a safe and enabling environment for journalists and human rights defenders to perform their work independently and without undue interference in Crimea;

(f) To permit the reopening of cultural and religious institutions;

(g) To revoke immediately the decision declaring the Mejlis of the Crimean Tatar People an extremist organization and banning its activities, and repeal the decision banning leaders of the Mejlis from entering Crimea;

(h) To cooperate fully and immediately with the Office of the United Nations High Commissioner for Human Rights, the Organization for Security and Cooperation in Europe and the Council of Europe on the situation of human rights in Crimea;

3. *Requests* the Secretary-General to seek ways and means, including through consultations with the United Nations High Commissioner for Human Rights and relevant regional organizations, to ensure safe and unfettered access to Crimea by established regional and international human rights monitoring mechanisms to enable them to carry out their mandate;

4. *Urges* the Russian Federation to ensure the proper and unimpeded access of international human rights monitoring missions and human rights non-governmental organizations to Crimea, recognizing that the international presence in Crimea is of paramount importance in preventing further deterioration of the situation;

5. *Requests* the Office of the United Nations High Commissioner for Human Rights to prepare a dedicated thematic report on the situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol in accordance with the existing mandate and within the existing resources of the human rights monitoring mission in Ukraine, which is currently funded by voluntary contributions;

6. *Decides* to continue its consideration of the matter at its seventy-second session under the item entitled "Promotion and protection of human rights".

*65th plenary meeting
19 December 2016*

Annex 92

U.N. Economic and Social Council, *Draft International Convention on the Elimination of All Forms of Racial Discrimination, Mr. Ingles: Proposed Measures of Implementation*, U.N. Doc. E/CN.4/Sub.2/L.321 (17 January 1964)

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COMMISSION ON HUMAN RIGHTS
SUB-COMMISSION ON PREVENTION OF
DISCRIMINATION AND PROTECTION
OF MINORITIES

Sixteenth session
Item 4 of the agenda

DRAFT INTERNATIONAL CONVENTION ON THE ELIMINATION
OF ALL FORMS OF RACIAL DISCRIMINATION

Mr. Ingles: Proposed Measures of Implementation

Article 1

1. The States Parties to this Convention undertake to submit a report on the legislative or other measures, including judicial remedies, which they have adopted and which give effect to the provisions of this Convention, (a) within one year after the entry into force of the Convention for the State concerned and (b) thereafter whenever the Economic and Social Council so requests upon recommendation of the Commission on Human Rights and after consultation with the States Parties.
2. All reports shall be submitted to the Secretary-General of the United Nations for the Economic and Social Council which may transmit them to the Commission on Human Rights or the specialized agency concerned for information, study and, if necessary, general recommendations.
3. The States Parties directly concerned may submit to the Economic and Social Council observations on any general recommendations that may be made in accordance with paragraph 2 of this article.

Article 2

There shall be established under the auspices of the United Nations a Fact-Finding and Conciliation Committee (hereinafter referred to as "the Committee")

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to be responsible for seeking the amicable settlement of disputes between States Parties concerning the interpretation, application or fulfilment of the present Convention.

Article 3

1. The Committee shall consist of eleven members who shall be persons of high moral standing and acknowledged impartiality.
2. The members of the Committee, who shall serve in their personal capacity, shall be elected by the General Assembly of the United Nations in accordance with the procedures established in articles 4 and 5, consideration being given to equitable geographical distribution of membership and to the representation of the different forms of civilization as well as of the principal legal systems.
3. The Committee may not include more than one national of the same State.

Article 4

1. The members of the Committee shall be elected from a list of persons possessing the qualifications prescribed in article 3 and nominated for the purpose by the States Parties to this Convention. Each State Party shall nominate not more than four persons. These persons shall be nationals of the nominating State or of any other State Party to the Convention.
2. At least three months before the date of each election to the Committee, the Secretary-General of the United Nations shall address a letter to the States Parties to the Convention inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated and shall submit it to the General Assembly and to the States Parties to the Convention.

Article 5

The members of the Committee shall be elected for a term of five years. They shall be eligible for re-election if renominated. The terms of six of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these six members shall be chosen by lot by the President of the General Assembly of the United Nations.

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Article 6

When electing members of the Committee, the General Assembly of the United Nations shall also designate from the list of nominees submitted by the States Parties under article 4 an alternate for each member so elected. An alternate need not be of the same nationality as the member concerned, but both of them should be from the same geographical area or region.

Article 7

1. In the event of the death or resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.
2. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, or is unable to continue the discharge of his duties, the Chairman of the Committee shall notify the Secretary-General of the United Nations who shall thereupon declare the seat of such member to be vacant.
3. In each of the cases provided for by paragraphs 1 and 2 of this article, the Secretary-General of the United Nations shall forthwith induct into office the alternate concerned as member of the Committee for the unexpired term and shall inform each State Party to this Convention accordingly.

Article 8

Members of the Committee shall receive travel and per diem allowances in respect of the periods during which they are engaged on the work of the Committee from the resources of the United Nations on terms laid down by the General Assembly.

Article 9

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations. Subsequent meetings may be held either at the Headquarters or at the European Office of the United Nations, as determined by the Committee.
2. The secretariat of the Committee shall be provided by the Secretary-General of the United Nations.

Article 10

1. The Committee shall elect its Chairman and Vice-Chairman for a period of two years. They may be re-elected.
2. The Committee shall establish its own rules of procedure. Before adopting such rules, the Committee shall send them in draft form to the States then Parties to the Convention who may communicate any observation and suggestion they may wish to make within three months.
3. The Committee shall re-examine its rules of procedure if at any time so requested by any State Party to the Convention.

Article 11

1. If a State Party to this Convention considers that another State Party is not giving effect to a provision of the Convention, it may, by written communication, bring the matter to the attention of that State. Within three months after the receipt of the communication, the receiving State shall afford the complaining State an explanation or statement in writing concerning the matter, which should include, to the extent possible and pertinent, references to procedures and remedies taken, or pending, or available in the matter.
2. If the matter is not adjusted to the satisfaction of both parties, either by bilateral negotiations or by any other procedure open to them, within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee by notice given to the Secretary-General of the United Nations and to the other State.

Article 12

The Committee shall deal with a matter referred to it under article 11 of this Convention only after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law.

Article 13

In any matter referred to it, the Committee may call upon the States concerned to supply any relevant information.

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Article 14

1. Subject to the provisions of article 12, the Committee, after obtaining all the information it thinks necessary, shall ascertain the facts, and make available its good offices to the States concerned with a view to an amicable solution of the matter on the basis of respect for the Convention.
2. The Committee shall in every case, and in no event later than eighteen months after the date of receipt by the Secretary-General of the United Nations of the notice under article 11, paragraph 2, draw up a report in accordance with the provisions of paragraph 3 below which will be sent to the States concerned and then communicated to the Secretary-General of the United Nations for publication. When an advisory opinion is requested of the International Court of Justice, in accordance with article 15, the time-limit shall be extended appropriately.
3. If a solution within the terms of paragraph 1 of this article is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached. If such a solution is not reached, the Committee shall draw up a report on the facts and indicate the recommendations which it made with a view to conciliation. If the report does not represent, in whole or in part the unanimous opinion of the members of the Committee, any member of the Committee shall be entitled to attach to it a separate opinion. Any written or oral submission made by the parties to the case shall also be attached to the report.

Article 15

The Committee may recommend to the Economic and Social Council that the Council request the International Court of Justice to give an advisory opinion on any legal question connected with a matter of which the Committee is seized.

Article 16

The Committee shall submit to the General Assembly, through the Secretary-General of the United Nations, an annual report on its activities.

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Article 17

The States Parties to this Convention agree that any State Party complained of or lodging a complaint may, if no solution has been reached within the terms of article 14, paragraph 1, bring the case before the International Court of Justice after the report provided for in article 14, paragraph 3, has been drawn up.

Article 18

The provisions of this Convention shall not prevent the States Parties to the Convention from submitting to the International Court of Justice any dispute arising out of the interpretation or application of the Convention in a matter within the competence of the Committee; or from resorting to other procedures for settling the dispute, in accordance with general or special international agreements in force between them.

Annex 93

U.N. Economic and Social Council, *Draft International Convention on the Elimination of All Forms of Racial Discrimination, Suggestions for Final Clauses submitted by Officers of the Third Committee*, U.N. Doc. A/C.3/L.1237 (15 October 1965)

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Twentieth session
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DRAFT INTERNATIONAL CONVENTION ON THE ELIMINATION OF
ALL FORMS OF RACIAL DISCRIMINATION

Suggestions for final clauses submitted by
the Officers of the Third Committee

I. SIGNATURE AND RATIFICATION

1. The present Convention is open for signature by any State Member of the United Nations or of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the Convention.

2. The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

II. ACCESSION

1. The present Convention shall be open to accession by any State referred to in paragraph 1 of article 1.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

III. ENTRY INTO FORCE

1. The present Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or instrument of accession.

2. For each State ratifying the Convention or acceding to it after the deposit of the twentieth instrument of ratification or instrument of accession, the present Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or instrument of accession.

IV. TERRITORIAL APPLICATION

1. The present Convention shall apply to all non-self-governing, trust, colonial and other non-metropolitan territories for the international relations of which any State Party is responsible. Subject to the provisions of paragraph 2 of this article, the Party concerned shall, at the time of signature, ratification or accession, declare the non-metropolitan territory or territories to which the Convention shall apply ipso facto as a result of such signature, ratification or accession.

2. In any case in which the previous consent of a non-metropolitan territory is required by the constitutional laws or practices of the Party or of the non-metropolitan territory, the Party concerned shall endeavour to secure the needed consent of the non-metropolitan territory within the period of twelve months from the date of signature of the Convention by the metropolitan State, and when such consent has been obtained, the Party shall notify the Secretary-General. This Convention shall apply to the territory or territories named in such notification from the date of its receipt by the Secretary-General.

3. After the expiry of the twelve-month period mentioned in the preceding paragraph, the States Parties concerned shall inform the Secretary-General of the results of the consultations with those non-metropolitan territories for whose international relations they are responsible and whose consent to the application of this Convention may have been withheld.

V. FEDERAL STATE

In the case of a Federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of Parties which are not Federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment;

(c) A Federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention showing the extent to which effect has been given to that provision by legislative or other action.

VI. RESERVATIONS

1. At the time of signature, ratification or accession, any State may make reservations to any article in the present Convention.

2. If any State makes a reservation in accordance with paragraph 1 of the present article, the Convention, with the exception of those provisions to which the reservation relates, shall have effect as between the reserving State and the other Parties. The Secretary-General of the United Nations shall communicate the text of the reservation to all States which are or may become Parties to the Convention. Any State Party to the Convention or which thereafter becomes a Party may notify the Secretary-General that it does not agree to consider itself bound by the Convention with respect to the State making the reservation. This notification must be made, in the case of a State already a Party, within ninety days from the date of the communication by the Secretary-General; and, in the case of a State subsequently becoming a Party, within ninety days from the date when the instrument of ratification or accession is deposited. In the event that such a notification is made, the Convention shall not be deemed to be in effect between the State making the notification and the State making the reservation.

3. Any State making the reservation in accordance with paragraph 1 of the present article may at any time withdraw the reservation, in whole or in part, after it has been accepted, by a notification to this effect addressed to the Secretary-General of the United Nations. Such notification shall take effect on the date on which it is received.

VII. DENUNCIATION AND ABROGATION

A Contracting State may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

VIII. SETTLEMENT OF DISPUTES

Any dispute between two or more Contracting States over the interpretation or application of this Convention, which is not settled by negotiation, shall at the request of any of the parties to the dispute be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.

IX. REVISION

A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General. The General Assembly shall decide upon the steps, if any, to be taken in respect of such a request.

X. NOTIFICATIONS

The Secretary-General of the United Nations shall inform all States referred to in paragraph (1) of article I of the following particulars:

- (a) Signatures, ratifications and accessions under articles I and II;
- (b) The date of entry into force of this Convention under article III;
- (c) Communications and ratifications received in accordance with articles IV, V and IX;
- (d) Reservations and denunciations under articles VI and VII.

XI. AUTHENTIC TEXT

1. The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

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2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States belonging to any of the categories mentioned in paragraph (1) of article I.

Annex 94

U.N. Economic and Social Council, *Draft International Convention on the Elimination of All Forms of Racial Discrimination, Poland: Amendments to the Suggestions for Final Clauses Submitted by the Officers of the Third Committee (A/C.3/L.1237)*,
U.N. Doc. A/C.3/L.1272 (1 November 1965)

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DRAFT INTERNATIONAL CONVENTION ON THE ELIMINATION OF
ALL FORMS OF RACIAL DISCRIMINATION

Poland: amendments to the suggestions for final clauses submitted
by the Officers of the Third Committee (A/C.3/L.1237)

(1) I. Signature and Ratification

Replace paragraph 1 by the following text:

"1. The present Convention is open for signature by all States".

(2) II. Accession

Replace paragraph 1 by the following text:

"1. The present Convention is open to accession by any State which has not signed it".

(3) IV. Territorial Application

Delete the whole article.

(4) V. Federal State

Delete the whole article.

(5) VI. Reservations

Replace the entire text of this article by the following:

"1. At the time of signature, ratification or accession, any State may make reservations to the present Convention with the exception of articles I, II, III, IV and V.

2. Any State Party which has made reservations in accordance with paragraph 1 of the present article may at any time withdraw them by written notification to this effect to the Secretary-General of the United Nations. Such notification shall take effect on the date on which it is received."

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(6) VIII. Settlement of Disputes

In the third line of this article, replace the word "any" by "all".

(7) XI. Authentic Text

At the end of paragraph 2, delete the words "belonging to any of the categories mentioned in paragraph (1) of article I".

Annex 95

U.N. General Assembly, *Draft International Convention on the Elimination of All Forms of Racial Discrimination, Ghana: Revised Amendments to Document A/C.3/L.1221*,
U.N. Doc. A/C.3/L.1274/REV.1 (12 November 1965)



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DRAFT INTERNATIONAL CONVENTION ON THE ELIMINATION
OF ALL FORMS OF RACIAL DISCRIMINATION

Ghana: revised amendments to the articles relating to measures of
implementation submitted by the Philippines (A/C.3/L.1221)

Replace the text of the articles by the following:

Article I

1. The States Parties to this Convention undertake to submit a report on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this Convention: (a) within one year after the entry into force of the Convention for the State concerned; and (b) thereafter every two years and whenever the Committee constituted in accordance with paragraph 5 of the present article so requests.

2. All reports shall be submitted to the Secretary-General of the United Nations for consideration by the Committee constituted in accordance with paragraph 5 of the present article.

3. The Committee shall consist of eighteen members elected by and from amongst States Parties to this Convention, consideration being given to equitable geographical distribution of membership and to the representation of the different forms of civilisation as well as of the principal legal systems.

4. The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years: immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the Committee.

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5. A State Party elected to membership of the Committee in accordance with paragraph 3 of the present article, shall be responsible for the expenses of its representative on the Committee while in performance of Committee duties.

6. The Committee shall request further information from the States Parties if necessary, and make suggestions and general recommendations and report annually to the General Assembly on its activities. However, such suggestions and general recommendations shall only be reported to the General Assembly after prior consultation with the States Parties concerned.

7. The States Parties concerned may, in addition, submit to the General Assembly observations on suggestions or general recommendations made in accordance with paragraph 6 of the present article.

Article II

1. The Committee shall adopt its own rules of procedure.

2. The Committee shall elect its officers for a term of two years.

3. The secretariat of the Committee shall be provided by the Secretary-General of the United Nations.

4. The meetings of the Committee shall be held at the Headquarters of the United Nations.

Article III

1. If a State Party to this Convention considers that another State Party is not giving effect to a provision of the Convention, it may, by written communication, bring the matter to the attention of that State. Within three months after the receipt of the communication, the receiving State shall afford the other State an explanation or statement in writing concerning the matter, which should include, to the extent possible and pertinent, references to procedures and remedies taken, or pending, or available in the matter.

2. If the matter is not adjusted to the satisfaction of both parties, either by bilateral negotiations or by any other procedure open to them, within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, constituted in accordance with paragraph 3 of article I, by notice given to the Committee and also to the other State.

Article IV

1. The Committee shall request the State, on which the notice was given, to submit an explanation in writing concerning the matter, which should include, to the extent possible and pertinent, references to procedures and remedies taken, or pending, or available in the matter.

2. The Committee shall deal with a matter referred to it in accordance with paragraph 2 of article III only after it has ascertained that all available remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law.

Article V

In any matter referred to it, the Committee may call upon the States concerned to supply any relevant information.

Article VI

When any matter arising out of article III is being considered by the Committee, the Governments in question shall, if not already represented thereon, be entitled to send a representative to take part in the proceedings of the Committee, without voting rights, while the matter is under consideration. Adequate notice of the date on which the matter will be considered shall be given to the Governments in question.

Article VII

1. Subject to the provisions of paragraph 2 of article IV, the Chairman of the Committee, after the Committee has obtained and collated all the information it thinks necessary, shall appoint a Conciliation Commission hereinafter referred to as the Commission, of an ad hoc nature comprised of.....members with the full and unanimous consent of the parties to the dispute, whose good offices shall be made available to the States concerned with a view to an amicable solution of the matter on the basis of respect for the Convention.

2. The members of the Commission who shall serve in their personal capacity, must be persons of high moral standing and acknowledged impartiality in whom the parties to the dispute have confidence, but shall neither be nationals of the States Parties to the dispute nor of a State not party to this Convention.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. Before the commencement of its transactions each member of the Commission shall attest and affix his signature to three copies of the oath of impartiality prescribed below, a copy of each then being forwarded to the parties to the dispute and one to the Secretary-General for the archives of the United Nations.

Form of Solemn Declaration

I solemnly declare that I will honourably, faithfully, impartially and conscientiously perform my duties and exercise my powers as a member of the Commission appointed pursuant to article VII of the articles relating to measures of implementation of the Draft International Convention on the Elimination of All Forms of Racial Discrimination, to examine the complaint filed by the Government of _____ concerning the observance by _____ of the provisions of the said Convention, and to help find an amicable solution to the dispute.

5. The meetings of the Commission shall be held at the Headquarters of the United Nations, except where it becomes necessary to visit the disputant States.

6. The secretariat provided in accordance with article II, paragraph 3 shall also service the Commission whenever a dispute among States Parties brings it into being.

7. The States Parties to the dispute shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General.

8. The Secretary-General shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties to the dispute in accordance with paragraph 7 of the present article.

9. The information obtained and collated by the Committee shall be made available to the Commission and the Commission may call upon the States concerned to supply any other relevant information.

Article VIII

1. When the Commission has fully considered the complaint, it shall prepare a report embodying its findings on all questions of fact relevant to determining the issue between the parties and containing such recommendations as it may think proper as to the steps which should be taken to meet the complaint and the time within which they should be taken.

2. The Chairman of the Committee shall communicate the report of the Commission to the Secretary-General of the United Nations and to each of the Governments concerned in the complaint, and the Secretary-General shall cause it to be published.

3. Each of these Governments shall within three months inform the Secretary-General whether or not it accepts the recommendations contained in the report of the Commission; and if not, whether it proposes to refer the complaint to the International Court of Justice.

Article IX

1. With their common consent the parties to a dispute arising out of the interpretation or application of the Convention, whether it has been dealt with by the Commission of Conciliation or not, may submit the dispute to the International Court of Justice.

2. The International Court of Justice may affirm, vary or reverse any of the findings and recommendations of the Commission, if any.

3. The decision of the International Court of Justice in regard to a complaint or matter which has been referred to it in pursuance of the present article shall be final.

Article X

In the event of a State Party to the Convention failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission, or in the decision of the International Court of Justice, as the case may be, the Committee may recommend to the General Assembly or to the Security Council, as the case may be, such action as it may deem wise and expedient to secure compliance therewith.

Article XI

The defaulting Government may at any time inform the Committee that it has taken the steps necessary to comply with the recommendations of the Commission or with those in the decision of the International Court of Justice, as the case may be, and may request it to constitute a Commission of Conciliation to verify its contention. In this case the provisions of articles VII, VIII and IX shall apply,

and if the report of the Commission or the decision of the International Court of Justice is in favour of the defaulting Government, the Committee shall forthwith recommend the discontinuance of any action taken in pursuance of article X.

Article XII

1. Each State Party to this Convention shall constitute a National Committee consisting of nine members chosen from independent and objective persons not having any official connexion with the Government of the State.

2. Any person within the jurisdiction of the State claiming that any of his rights enumerated in the Covenant has been violated, may submit his case before this Committee.

3. The National Committee shall ascertain the facts and if it deems that the case is well founded, shall endeavour to obtain satisfaction for the petitioner from the Government.

4. In the event the said Committee does not succeed in obtaining satisfaction for the petitioner or should the Committee dismiss the case, either the Committee or the petitioner, as the case may be, shall have the right to appeal to the Committee established in accordance with paragraph 3 of article I.

5. The names of the members constituting the National Committee shall be registered with the United Nations.

6. The National Committee shall have an appropriate register to enter any complaint or alleged violation submitted to it, regardless of whether such complaint or violation is entertained by it or not.

7. Certified copies of the register mentioned in the previous paragraph shall be submitted by the National Committee to the Secretary-General on the understanding that the contents of such certified copies shall not be disclosed and will be kept confidential by the Secretary-General.

Article XIII

The provisions of this Convention concerning the settlement of disputes or complaints shall be applied without prejudice to existing constitutional or other binding provisions of agencies related to the United Nations dealing with the settlement of disputes or complaints in the field of discrimination, and shall not

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prevent the States Parties to the Convention from resorting to other procedures for settling a dispute in accordance with the general or special international agreements in force between them.

Article XIV

No reservations shall be made under the present articles of implementation measures of this Convention.

Annex 96

*U.N. General Assembly, Ghana, Mauritania and Philippines: Articles Relating to
Measures of Implementation to be Added to the Provisions of the Draft
International Convention on the Elimination of All Forms of Racial Discrimination
Adopted by the Commission on Human Rights,
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OF ALL FORMS OF RACIAL DISCRIMINATION

Ghana, Mauritania and Philippines: articles relating to measures
of implementation to be added to the provisions of the draft
International Convention on the Elimination of All Forms of Racial
Discrimination adopted by the Commission on Human Rights
(A/5921, annex)

Article VIII

1. There shall be established a Committee consisting of eighteen experts of high moral standing and acknowledged impartiality elected by States Parties to this Convention from amongst their nationals who shall serve in their personal capacity, consideration being given to equitable geographical distribution of membership and to the representation of the different forms of civilization as well as of the principal legal systems.
2. The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years: immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the Committee.
3. A State Party, a national of which is elected to membership of the Committee in accordance with paragraph 1 of the present article, shall be responsible for the expenses of its expert on the Committee while he is in performance of Committee duties.
4. The States Parties to this Convention undertake to submit a report on the legislative, judicial, administrative or other measures that they have adopted and that give effect to the provisions of this Convention: (a) within one year

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after the entry into force of the Convention for the State concerned; and
(b) thereafter every two years and whenever the Committee constituted in accordance with paragraph 1 of the present article so requests.

5. All reports shall be submitted to the Secretary-General of the United Nations for consideration by the Committee constituted in accordance with paragraph 1 of the present article.

6. The Committee may request further information from the States Parties if necessary.

7. The Committee shall report annually through the Secretary-General to the General Assembly on its activities and may make suggestions and general recommendations based on the examination of the reports and information received from the States. However, such suggestions and general recommendations shall only be reported to the General Assembly after prior consultation with the States Parties concerned.

8. The States Parties concerned may, in addition, submit to the General Assembly observations on suggestions or general recommendations made in accordance with paragraph 7 of the present article.

Article IX

1. The Committee shall adopt its own rules of procedure.

2. The Committee shall elect its officers for a term of two years.

3. The Secretariat of the Committee shall be provided by the Secretary-General of the United Nations.

4. The meetings of the Committee shall be held at the Headquarters of the United Nations.

Article X

1. If a State Party to this Convention considers that another State Party is not giving effect to the provisions of the Convention, it may bring the matter to the attention of the Committee. The Committee shall then transmit the complaint to the States Parties concerned. Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and any remedy that may have been taken by that State.

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2. If the matter is not adjusted to the satisfaction of both parties, either by bilateral negotiations or by any other procedure open to them, within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter again to the Committee constituted in accordance with paragraph 1 of Article VIII by notice given to the Committee and also to the other State.

3. The Committee shall deal with a matter referred to it in accordance with paragraph 2 of the present Article only after it has ascertained that all available remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law.

4. In any matter referred to it, the Committee may call upon the States Parties concerned to supply any other relevant information.

5. When any matter arising out of the present Article is being considered by the Committee, the States Parties concerned shall be entitled to send a representative to take part in the proceedings of the Committee, without voting rights, while the matter is under consideration. Adequate notice of the date on which the matter will be considered shall be given to the States Parties concerned.

Article XI

1. (a) Subject to the provisions of Paragraph 3 of Article X, the Chairman of the Committee, after the Committee has obtained and collated all the information it thinks necessary, shall appoint a Conciliation Commission hereinafter referred to as the Commission, of an ad hoc nature composed of five members with the full and unanimous consent of the parties to the dispute, whose good offices shall be made available to the States concerned with a view to an amicable solution of the matter on the basis of respect for the Convention.

(b) If the States Parties to the dispute fail to reach agreement on all or part of the composition of the Commission within three months, those members of the Commission not agreed upon by the States Parties to the dispute shall be elected by two-thirds majority vote of the Committee from amongst its own members.

2. The members of the Commission who shall serve in their personal capacity, should be persons of such high moral standing and acknowledged impartiality as to deserve the confidence of the States Parties to the dispute, but shall neither be nationals of these States to the dispute nor of a State not party to this Convention.
3. The Commission shall elect its own Chairman and adopt its own rules of procedure.
4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations, or at any convenient place as determined by the Commission.
5. The Secretariat provided in accordance with Article IX, paragraph 3, shall also service the Commission whenever a dispute among States Parties brings it into being.
6. The States Parties to the dispute shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General.
7. The Secretary-General shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties to the dispute in accordance with paragraph 6 of the present article.
8. The information obtained and collated by the Committee shall be made available to the Commission and the Commission may call upon the States concerned to supply any other relevant information.

Article XII

1. When the Commission has fully considered the complaint, it shall prepare and submit to the Chairman of the Committee a report embodying its findings on all questions of fact relevant to the issue between the parties and containing such recommendations as it may think proper for the amicable solution of the dispute.
2. The Chairman of the Committee shall communicate the report of the Commission to each of the States Parties to the dispute, and to the Secretary-General of the United Nations for publication.
3. Each of the States Parties to the dispute shall within three months inform the Chairman of the Committee whether or not it accepts the recommendations contained in the report of the Commission.

/...

Article XIII

The provisions of this Convention concerning the settlement of disputes or complaints shall be applied without prejudice to existing constitutional or other binding provisions of agencies related to the United Nations dealing with the settlement of disputes or complaints in the field of discrimination, and shall not prevent the States Parties to the Convention from resorting to other procedures for settling a dispute in accordance with the general or special international agreements in force between them.

Annex 97

U.N. Economic and Social Council, *Draft International Convention on the Elimination of All Forms of Racial Discrimination, Ghana, Mauritania, and Philippines: Amendments to the Suggestions for Final Clauses Submitted by the Officers of the Third Committee (A/C.3/L.1237)*, U.N. Doc. A/C.3/L.1313 (30 November 1965)

UNITED NATIONS
GENERAL
ASSEMBLY



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Twentieth session
THIRD COMMITTEE
Agenda item 58

DRAFT INTERNATIONAL CONVENTION ON THE ELIMINATION
OF ALL FORMS OF RACIAL DISCRIMINATION

Ghana, Mauritania and Philippines: amendments to the suggestions
for final clauses submitted by the officers of the Third Committee
(A/C.3/L.1237)

1. III. ENTRY INTO FORCE

Paragraphs 1 and 2

Replace the word "twentieth" before "instrument of ratification" by "Twenty-seventh".

2. VIII. SETTLEMENT OF DISPUTES

Delete the comma after "negotiation", and insert the following between the words "negotiation" and "shall": "or by the procedures expressly provided for in this Convention,".

Annex 98

U.N. General Assembly, Official Record of the Third Committee, 1367th Meeting, U.N.
Doc. A/C.3/SR.1367 (7 December 1965)



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Chairman: Mr. Francisco CUEVAS CANCINO
(Mexico).

AGENDA ITEM 58

Draft International Convention on the Elimination of All Forms of Racial Discrimination (continued) (A/5803, chap. IX, sect. I; A/5921; E/3873, chap. II and annexes I and III; A/C.3/L.1237, L.1239, L.1241, L.1249, L.1262, L.1272, L.1292, L.1305 and Add.1, A/C.3/L.1307/Rev.2, L.1313, L.1314, L.1317)

FINAL CLAUSES (continued)

CLAUSE IV

1. The CHAIRMAN invited the Committee to continue its consideration of the suggestions for final clauses submitted by the officers of the Committee (A/C.3/L.1237) and the amendments thereto.
2. Mr. ABDEL-HAMID (United Arab Republic) said that his delegation was in favour of the deletion of clause IV, as proposed in the third of the Polish amendments (A/C.3/L.1272), since the substance of the text was already contained in the second revised version of article XIII (bis) (A/C.3/L.1307/Rev.2) of the articles relating to measures of implementation.
3. Mr. HOVEYDA (Iran), supported by Miss FAROUK (Tunisia) and Mr. RIOS (Panama), suggested that the vote on clause IV and on the third Polish amendment should be postponed, in order not to prejudice the Committee's decision on article XIII (bis).

It was so agreed.

CLAUSE V

4. Miss TABBARA (Lebanon) supported the fourth Polish amendment (A/C.3/L.1272), calling for the deletion of clause V. A State, whether unitary or

federal, was represented at the international level as a single entity, and the United Nations had never concerned itself with the manner in which international instruments were applied within the territory of a country. It might be dangerous for the federal States themselves to expose their systems to criticism, as a consequence of the procedure envisaged in clause V, sub-paragraph (c). The question was a purely domestic one, which it would be better for the States concerned to settle internally.

5. Mr. LAWREY (Australia) observed that, as the representative of a federal State, he did not share the misgivings expressed by the representative of Lebanon. For essentially practical reasons, his delegation favoured the inclusion of a federal clause in the draft Convention, and it was quite prepared to accept the text suggested by the officers of the Committee, including sub-paragraph (c). Under Australia's written federal Constitution, the implementation of most international instruments relating to economic and social matters necessarily required the consent of, and action by, a number of governments. To obtain such consent and action was time-consuming and sometimes difficult, owing to the variety of legislation involved; in the case of the draft Convention under discussion, even municipal ordinances and regulations would be required. The adoption of clause V would enable the Australian Government to accept obligations under the Convention within the limits of its authority, without awaiting the consent of all local governments which would be necessary for the application and implementation of the instrument. His delegation therefore felt obliged to oppose the fourth Polish amendment.

6. Mrs. SEKANINOVA (Czechoslovakia) opposed the inclusion of the so-called "federal clause" in the draft Convention. In addition to the arguments advanced by the representatives of Poland and Lebanon, her delegation considered that such a clause would substantially weaken the Convention as a whole by establishing inequality of obligations as between federal and unitary States. It would not be in conformity with the recognized principles of international law, under which a federal State as a whole was regarded as a subject of international law.

7. Mr. HOVEYDA (Iran) said that, although he had no strong views on the matter, he thought it rather strange to include in the draft Convention a provision such as the suggested clause V. When a federal State acceded to an international Convention, it acted on behalf of all its constituent states or provinces, and the Third Committee had already adopted provisions designed to ensure implementation of the Convention throughout the territory of a State Party. He was not

convinced by the Australian representative's argument, and he would vote in favour of the Polish amendment.

8. Miss WILLIS (United States of America) said that, although her country had a written Constitution and was a federal State, her delegation nevertheless agreed with the representative of Poland who, in introducing his amendment, had said that such clauses tended to destroy the uniform application of international agreements by placing federal States in a special position. Her delegation would therefore vote in favour of the Polish amendment.

9. Mr. KOCHMAN (Mauritania) said that his delegation, too, would vote in favour of the Polish amendment. A federal State which ratified a convention must ensure that its provisions were applied throughout its territory, and only the central Government could take the necessary measures to that end.

10. Mr. TSAO (China) said that his delegation's main concern was to ensure that as many States as possible acceded to the Convention. The constitutional position of other federal States was not necessarily the same as that of the United States, and his delegation would therefore vote in favour of the retention of the federal clause.

11. Mr. INCE (Trinidad and Tobago) supported the Polish amendment. It was an accepted fact that, whatever form of constitution a State might have, foreign affairs were within the purview of the central Government. Some treaties, which were self-executing, automatically became the law of the land once they were acceded to by a federal State, while in the case of non-self-executing treaties the constitutional processes of the federal State provided for legislation to make them operative in the constituent provinces or states. His delegation could not, therefore, accept the arguments advanced by the representatives of Australia and China.

12. Mr. TAYLOR (United Kingdom) said that for his country, which itself had no problems arising from a federal constitution, an explanation such as that given by the representative of Australia concerning the genuine difficulties a government would have in accepting a United Nations instrument was sufficient reason for the inclusion in the instrument of a federal or other necessary clause. It was not appropriate for any Member State to imply that another could manage its affairs more effectively if it adopted a different kind of constitution. His delegation would therefore abstain in the vote on the Polish amendment.

13. Mr. LAWREY (Australia) said that the statement of the position of federal States made by the representative of Trinidad and Tobago did not accurately reflect Australia's constitutional position. In order not to take the time of the Committee, he himself had not dwelt on the subject in detail, but it was true, as the representative of China had suggested, that the constitutional position was not necessarily identical in all federal States. As the United Kingdom representative had appreciated, the matter was of some practical concern to Australia, and it was in the interest of facilitating the widest and easiest acceptance of the draft Convention that his delegation

had taken its position in favour of the retention of a federal clause.

14. Mr. BOULLET (France) observed that the suggested clause V was not of direct concern to his country, which had a unitary Constitution. His delegation, while appreciating the concern of federal States for the integrity of their constitutional systems, believed that a federal clause would enable a State to accede to the Convention while avoiding the application of its provisions to a part of its territory. It would appear more logical for a federal Government first to obtain the consent of its constituent states or provinces, after which it could accede to the Convention without reservations of any kind. His delegation therefore favoured the deletion of the federal clause.

15. Mr. RODRIGUEZ FABREGAT (Uruguay) recalled that his delegation had always taken the position that the argument of domestic jurisdiction could never be advanced in justification of any violation of human rights. The United Nations Charter made it quite clear that all human beings, whether living in a federal or a unitary State or in a colonial territory, were entitled to the enjoyment of such rights, and the draft Convention must go at least as far as the Charter itself. His delegation would vote accordingly on clause V.

16. Mrs. MANTZOULINOS (Greece) said she did not believe that a federal clause was customary in United Nations practice. Although she appreciated the concern of some delegations, the inclusion of such a clause would, in her view, establish international precedents which might create difficulties in the future. Her delegation therefore considered that the federal problem should be treated as a domestic matter.

17. Miss AGUTA (Nigeria), speaking as the representative of a federal State, said that her Government supported the Polish amendment because it deemed it inappropriate for the United Nations to specify how any State should implement the Convention in the light of its own Constitution. The provisions already adopted provided a sufficient option for States wishing to become parties to the Convention.

18. Mr. DAYRELL DE LIMA (Brazil) said that his delegation would support clause V in the form in which it appeared in document A/C.3/L.1237.

19. The CHAIRMAN invited the Committee to vote on the fourth amendment submitted by Poland (A/C.3/L.1272) calling for the deletion of clause V.

The fourth Polish amendment (A/C.3/L.1272) calling for the deletion of clause V was adopted by 63 votes to 7, with 16 abstentions.

CLAUSE VI

20. Mr. LAMPTEY (Ghana), introducing the three-Power amendment (A/C.3/L.1314) to the fifth Polish amendment (A/C.3/L.1272) concerning clause VI of the suggested final clauses (A/C.3/L.1237) on behalf of the sponsors, said that the latter supported the fifth Polish amendment in the belief that reservations to the substantive clauses, and especially to articles I to V, would make the Convention meaningless. They had submitted their amendment because a careful

reading of the articles on measures of implementation (articles VIII to XIV) showed that reservations to those articles would nullify their effect, render the implementation machinery meaningless, and destroy the whole Convention.

21. Mr. ABDEL-HAMID (United Arab Republic) suggested that, since the text of articles VIII to XIV had not yet been finalized, the Committee should postpone action on final clause VI.

It was so agreed.

CLAUSE VII

22. The CHAIRMAN invited the Committee to consider clause VII of the suggested final clauses (A/C.3/L.1237).

Clause VII was adopted unanimously.

CLAUSE VIII

23. The CHAIRMAN invited the Committee to consider clause VIII of the suggested final clauses (A/C.3/L.1237) and the amendments thereto: the sixth Polish amendment (A/C.3/L.1272) and the second amendment submitted by Ghana, Mauritania and the Philippines (A/C.3/L.1313).

24. Mr. MACDONALD (Canada), referring to the suggested final clause VIII, said that he opposed the sixth Polish amendment (A/C.3/L.1272), since it would have the effect of nullifying the entire clause on the settlement of disputes. If all parties to a dispute had to consent to its submission to the International Court of Justice, there was no need for a special provision on the subject, since any inter-State dispute could be brought before the Court with the common consent of the parties.

25. Any party to a dispute over the interpretation or application of the Convention should be able to bring the matter before the Court, for the Convention was being prepared under United Nations auspices and the Court was the Organization's principal juridical organ. Moreover, clause VIII allowed parties to a dispute considerable latitude. They could resort to negotiation and other modes of settlement, and no time-limit was imposed for settlement. A controversy could thus be protracted almost indefinitely before recourse was had to the Court. In view of the flexibility of the article's terms, he did not see why the Polish delegation should want, in effect, to eliminate reference to the Court under the Convention.

26. He supported the second three-Power amendment (A/C.3/L.1313), which made a valuable addition to the clause.

27. Mr. KORNIENKO (Ukrainian Soviet Socialist Republic) supported the Polish amendment and expressed surprise that the Canadian representative should have interpreted it as eliminating reference to the International Court of Justice. It was the Committee's repeatedly expressed desire that the Convention should be ratified by the largest possible number of States. If that was so, the views of a large number of States on the present issue should be respected. As the Polish representative had said at the 1358th meeting, under international law a sovereign State could not be made subject to the jurisdiction of the Court except

by its own consent. That principle had been confirmed by the Committee's own action in adopting article 8 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages. The Committee should not now take a backward step and create fresh obstacles for prospective signatories. The Polish amendment was not designed to eliminate reference to the Court, but to bring the clause concerning such reference into line with current practice.

28. Mr. MACDONALD (Canada) said that he had meant only that the adoption of the Polish amendment would leave matters as they currently stood under international law. His delegation hoped, on the other hand, that it would be possible to confer in advance on the Court a measure of jurisdiction in regard to matters connected with the Convention. He fully realized that some countries might be reluctant to accept the Court's jurisdiction. However, in view of the latitude allowed under clause VIII, which did not require reference to the Court unless it was requested, he had hoped that all delegations could accept the clause as drafted.

29. Mr. LAMPTEY (Ghana) said that the three-Power amendment was self-explanatory. Provision had been made in the draft Convention for machinery which should be used in the settlement of disputes before recourse was had to the International Court of Justice. The amendment simply referred to the procedures provided for in the Convention.

30. Replying to a question from Mr. COCHAUX (Belgium), Mr. DABROWA (Poland) said that the meaning of the Polish amendment was that all parties to disputes must agree on the Court's jurisdiction in each particular case.

31. Mr. OSPINA (Colombia) said that the Polish amendment would deprive clause VIII of all its force. He supported the three-Power amendment.

32. Miss WILLIS (United States of America) said that the Polish amendment would make clause VIII a meaningless provision since in the absence of such a provision the States Parties could agree among themselves to refer a dispute to the International Court of Justice. The Polish delegation's argument that under the Court's Statute the jurisdiction of the Court was compulsory only for States accepting the "optional clause" of Article 36 was not entirely correct. It was true that the Court's jurisdiction depended on consent, but the declaration provided for in Article 36, paragraph 2, of the Statute was only one way by which a State could indicate such consent. Article 36, paragraph 1, of the Statute provided that the Court's jurisdiction comprised, *inter alia*, "all matters specially provided for ... in treaties and conventions in force". Moreover, the San Francisco Conference had clearly accepted the principle that "legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court" (Article 36, paragraph 3, of the Charter). The adoption of clause VIII as drafted would reaffirm the Committee's adherence to a Charter principle. Moreover, the Court, composed of judges of the highest moral character and legal qualifications, could be of considerable value in settling the complex legal

issues which might be involved in disputes arising out of the Convention. Her delegation would regret any decision which would make reference to the Court dependent on the agreement of all States parties to a dispute.

33. Mr. MOVCHAN (Union of Soviet Socialist Republics) said that the authors of the Charter and the Statute had proceeded on the basic premise that the Court could consider only such matters as were referred to it with the consent of the parties. That principle was clearly stated in both the Charter and the Statute. Thus there were no grounds for suggesting that the Polish amendment belittled the functions and importance of the Court. The United States representative had referred to Article 36, paragraph 1, of the Statute, but it was important to note that the Article began: "The jurisdiction of the Court comprises all cases which the parties refer to it . . .".

34. Agreement to bring cases before the Court could be given in individual cases or in advance with respect to certain categories of questions. For a number of years two opposing approaches had been taken in the drafting of multilateral agreements, and the approach defended in the Committee by the Canadian and United States representatives had by no means won general acceptance. In view of the United States delegation's frequent appeals for generally acceptable provisions he would have thought the Polish amendment would have commended itself to that delegation. The amendment would reaffirm what was stated in the Charter and the Statute and would leave reference to the Court open to those States which had accepted its compulsory jurisdiction. It was therefore in keeping with the spirit in which the draft Convention had so far been formulated.

35. Regardless of the decision taken in the Committee, the principle of voluntary recourse to the Court could not be altered. It had been confirmed by the practice of recent years and was being increasingly recognized in international agreements, among them the Vienna Conventions on Diplomatic Relations and on Consular Relations and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages.

36. Mr. WALDRON-RAMSEY (United Republic of Tanzania) endorsed the previous speaker's remarks. The consent of all parties to a dispute must obviously be obtained before the question was brought before the International Court of Justice. That was consistent with the Charter and the Statute of the Court.

37. Obtaining the common consent of parties had practical merits as well. The Committee had discussed at length who would defray the expenses incurred in the implementation of the Convention. In the present instance, if any party to a dispute could refer it to the Court, financial problem were likely to arise. The expenses of the Court would have to be defrayed by someone. Whether it would be the party referring the case to the Court, both parties or the United Nations would have to be determined. If the Polish amendment was adopted, however, recourse to the Court would be with the consent of both parties and it was logical to expect that they would share the costs. Thus for practical reasons in addition to reasons of principle he favoured the Polish amendment.

38. Mr. BOULLET (France) said that his delegation could not support the Polish amendment. It was his country's traditional position to accept a priori the jurisdiction of the International Court of Justice whenever a party to a dispute chose to submit the matter to the Court, provided of course that the issue arose within the framework of a convention to which his country had acceded. His delegation would support the three-Power amendment since it brought clause VIII into line with provisions already adopted in the matter of implementation.

39. Mr. CAPOTORTI (Italy) said that the Statute of the Court and current international law clearly allowed for both possibilities under discussion—the submission of a dispute to the Court either by any or by all of the parties. The principle of consent of the parties was respected in both cases, the only difference being in the time of consent; in one case consent was given upon ratification of the convention, while in the other it was given when a particular dispute arose. It had been said that the Polish amendment was more in keeping with international practice, but that practice in fact recognized both methods. Many conventions included a provision such as the suggested clause VIII. He did not think international law or the Statute of the Court could usefully be invoked to decide the present issue. The Committee should adopt a practical approach and decide which method was more in accord with the spirit of the Convention and would ensure the most satisfactory settlement of disputes relating to the Convention. From that standpoint he favoured the clause suggested by the officers of the Committee (A/C.3/L.1237). Consent of States would be much more difficult to obtain when a dispute already existed than when the Convention was opened for signature. States should be all the more ready to give their consent at the outset because of the great variety of admissible settlement procedures short of recourse to the Court. He therefore supported clause VIII and the three-Power amendment, which was a useful addition.

40. Mr. COCHAUX (Belgium) agreed with the previous speaker. The Court was an important international organ whose role in settling disputes connected with the present draft Convention—an instrument created by the United Nations—should not be belittled. As others had noted, clause VIII provided for various modes of settlement offering ample opportunity for agreement before the Court was resorted to. Acceptance of the clause was very important for the effective implementation of the Convention. He would support the three-Power amendment, which introduced a useful clarification.

41. Mr. INCE (Trinidad and Tobago) said that his delegation supported the three-Power amendment to clause VIII, which would strengthen that clause. He agreed with the Canadian representative that the use of the word "all" would make it much more difficult to bring a case before the International Court of Justice. However, since, in accordance with accepted principles of international law, a sovereign State could not be haled before the Court without its consent and since the Convention was being drawn up in a spirit of goodwill, the wisest course might be to let the word "any" stand, in order to facilitate reference of cases

to the Court. He therefore appealed to the Polish representative not to press his amendment.

The second amendment submitted by Ghana, Mauritania and the Philippines (A/C.3/L.1313) was adopted unanimously.

The sixth Polish amendment (A/C.3/L.1272) was rejected by 37 votes to 26, with 26 abstentions.

Clause VIII, as a whole, as amended, was adopted by 70 votes to 9, with 8 abstentions.

42. Mr. LAMPTEY (Ghana) said that his Government took the position that cases should be referred to the International Court of Justice only with the full consent of both parties. However, it had accepted the compulsory jurisdiction of the Court in the case of certain specific conventions. His delegation attached so much importance to the International Convention on the Elimination of All Forms of Racial Discrimination that it could have supported clause VIII as submitted by the officers of the Committee. In view of its position of principle on the question of the International Court, it had abstained in the vote on the Polish amendment.

43. Mr. BOŽOVIĆ (Yugoslavia) said that his country did not recognize the compulsory jurisdiction of the International Court of Justice and had reserved its right to decide in each case whether a dispute arising out of the provisions of a treaty to which it was a signatory should be referred to the Court. It supported the principle that disputes over the interpretation of treaties should be brought voluntarily before the Court. For that reason his delegation had abstained in the vote on clause VIII.

44. Mr. TEKLE (Ethiopia) said that he had voted in favour of the Polish amendment because he considered that the full consent of both parties was necessary for a case to be brought before the International Court of Justice.

CLAUSE IX

45. The CHAIRMAN invited the Committee to consider clause IX of the suggested final clauses (A/C.3/L.1237).

46. Mr. BOULLET (France) said that his delegation could not accept the principle that the General Assembly, whose membership would include some States not parties to the Convention, should decide on a request for revision of the Convention. That decision should be taken by the States Parties alone. In any event, the procedure for such requests and the action to be taken on them should be dealt with in rules of procedure and not in the Convention itself. His delegation therefore requested that a separate vote should be taken on the second sentence of clause IX.

47. Miss TABBARA (Lebanon), supported by Mrs. WARZAZI (Morocco), said that the procedure provided for in the second sentence of clause IX was entirely appropriate. Since it was the General Assembly which was preparing and would adopt the Convention, it and not the States Parties should revise it.

48. Mr. DABROWA (Poland) and Mr. KOCHMAN (Mauritania) supported the French representative's request for a separate vote.

49. Mr. CAPOTORTI (Italy) said that the situation would be quite different once the Convention was in force. Now, when the General Assembly was drafting the Convention, no States had as yet assumed obligations under it. However, a revision of the Convention when the latter was in force would affect the obligations of the parties and it was thus logical that the task of revision should be entrusted to the States Parties. He therefore supported the French representative's view. Clause IX should in any case be regarded as supplementing clause X.

50. Mr. LAMPTEY (Ghana) observed that since the Convention would be a multilateral instrument in which all States would have an interest, it was only proper that all States, including non-parties, some of which might be in the process of ratifying it, should have a say in its revision. The General Assembly was certainly the appropriate body to institute revision procedures.

51. Mr. BELTRAMINO (Argentina) said that clause IX should be read in the light of article VIII (bis) as adopted by the Committee (A/C.3/L.1305), which implied the idea of revision of the Convention. His delegation would support clause IX in its present form.

The second sentence of clause IX (A/C.3/L.1237) was adopted by 47 votes to 21, with 23 abstentions.

Clause IX as a whole was adopted by 75 votes to none, with 16 abstentions.

CLAUSE X

52. The CHAIRMAN invited the Committee to consider clause X of the suggested final clauses (A/C.3/L.1237).

53. Mr. DABROWA (Poland) requested a separate vote on the words "referred to in paragraph 1 of article I".

54. In reply to questions by Mr. MUMBU (Democratic Republic of the Congo) and Mr. AL-RAWI (Iraq), the CHAIRMAN said that, while it was true that the Committee had not yet voted on the clause concerning reservations and that the numbers of the articles referred to in clause X would have to be changed in the light of previous decisions, the Committee would be voting only on the notification procedure. The consequential amendments necessitated by decisions which the Committee had taken or would take would be made to the final text.

The words "referred to in article I, paragraph 1 in clause X (A/C.3/L.1237) were adopted by 62 votes to 11, with 18 abstentions.

Clause X as a whole was adopted by 81 votes to none, with 10 abstentions.

CLAUSE XI

55. The CHAIRMAN invited the Committee to consider clause XI of the suggested final clauses (A/C.3/L.1237) and the seventh Polish amendment (A/C.3/L.1272) which proposed the deletion from paragraph 2 of the words "belonging to any of the categories mentioned in article I, paragraph 1".

The seventh Polish amendment (A/C.3/L.1272) was rejected by 55 votes to 14, with 20 abstentions.

Clause XI as a whole was adopted by 78 votes to none, with 10 abstentions.

56. Mrs. MANTZOULINOS (Greece) said she wished the record to indicate that her delegation had voted in favour of clause XI.

The meeting rose at 1.40 p.m.

Annex 99

Ukrainian Note Verbale No. 72/22-620-2403 to the Russian Federation Ministry of
Foreign Affairs (23 September 2014)

*This document has been translated from its original
language into English, an official language of the Court,
pursuant to Rules of the Court, Article 51.*

THE MINISTRY OF FOREIGN AFFAIRS OF UKRAINE

№72/22-620-2403

The Ministry of Foreign Affairs of Ukraine presents its compliments to the Ministry of Foreign Affairs of the Russian Federation and has the honour to report a violation by the Russian Federation of its obligations under the International Convention on the Elimination of All Form of Racial Discrimination (ICERD) dated 1966.

The Ministry of Foreign Affairs of Ukraine states that the Russian Side acting through its state agencies, designated representatives, individuals and legal entities entrusted with state functions as well as separatist forces which act under the guidance and control of the Russian Side, commits actions related to racial discrimination and encourages, advocates and supports racial discrimination against Ukrainian and Crimean Tatars and their representative institutions in the temporarily occupied by the Russian Federation territory of Ukraine - Autonomous Republic of Crimea and City of Sevastopol.

In compliance with the fundamental obligations outlined in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution (Article 5(b);

The right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service (Article 5(c).

The right to freedom of movement and residence within the border of the State (Article 5(d);

The right to leave any country, including one's own, and to return to one's country (Article 5(d);

The right to nationality (Article 5(d);

The right to own property alone as well as in association with others (Article 5(d);

The right to freedom of thought, conscience and religion (Article 5(d);

The right to freedom of opinion and expression (Article 5(d);

The right to freedom of peaceful assembly and association (Article 5(d).

On the basis of Articles 2 and 5 of the Convention, the Ministry of Foreign Affairs of Ukraine insists on international responsibility of the Russian Federation for its internationally unlawful acts of racial discrimination. These actions include:

Intimidation, conducting of coercive actions, persecution of ethnic Ukrainian and indigenous Crimean Tatar population of Crimea in connection with using of Ukrainian and Crimean Tatar language and national symbols in public places;

Closing the Ukrainian schools in Crimea and City of Sevastopol;

Restriction of political and civil rights of ethnic Ukrainian and Crimean indigenous population in Crimea and City of Sevastopol;

Coercive imposition of Russian citizenship and intimidation along with persecution those who refuses to join the Russian citizenship;

Restriction of the right to freedom of thought, conscience and religion.

The above mentioned internationally wrongful acts of the Russian Side have been confirmed inter alia by following facts and information:

April 21, 2014, activists of illegal paramilitary pro-Russian organizations had attacked the building of the Mejlis of the Crimean Tatar People in order to remove the Ukrainian flag from its facade. As a result of the attack the spokeswoman of the Mejlis Mrs L.Muslymova was heavily injured.

April 22, 2014 the occupying authority had banned from being broadcasted on the facilities of the State Television and Radio Company of "Krym" (Crimea) any statements of the leader of Crimean Tatar people, Mr Mustafa Dzhemilev, the Chair of the Mejlis Mr Refat Chubarov, and other members of the Mejlis.

April 22, 2014 while crossing the administrative border of Crimea Mr M.Dzhemilev was served the Act of prohibition to enter the territory of Crimea till April 19, 2019;

In April 2014 some Crimean media (Internet portal «Blackseanews», TV channel "Chernomorka", Internet portal " Sobytiya Kryma") were forced to move their editorial offices to the territory of mainland Ukraine due to the fears of their personal safety and obstructions they had been faced in their work;

In April 2014, Sevastopol's local authorities in the framework of so-called "saving and optimization" process had decided to stop teaching pupils in Ukrainian boarding school №7 from the new school year. Those pupils who do not want to move to Russian schools had been concluded to transfer to a boarding schools for children with mental retardation;

Starting from April 2014 Ukrainian schools in Crimea has been prohibited to teach Ukrainian language and literature and those teachers are forced to retire;

- May 4, 2014 so-called "Prosecutor of Crimea" Ms N.Poklonska had announced a warning to Mr R.Chubarov about the inadmissibility of his extremist activity, in particular, in view of the fact that "in several districts of Crimea the Mejlis led by Mr R.Chubarov had conducted an illegal public action of extremist nature associated with numerous riots, highways blockage, illegal border crossing, obstruction of public authorities and violence";

May 4, 2014 the occupying administration had decided to ban entry the Crimea for Mr R.Chubarov till 4 June 2019. June 5, 2014 while returning from visiting session of the Majlis in Kherson region Mr R.Chubarov was refused to cross the administrative border of Crimea;

May 6, 2014 so-called "Deputy Prosecutor of Crimea" V.Kuznyetsov had announced a warning to Deputy Chairman of the Majlis Mr A.Chyhyhozu about the inadmissibility of extremist activity;

May 16, 2014 the Federal Service of Security (FSB) of the Russian Federation had conducted a house-check in premises of Chief of External Relations of the Majlis Mr A.Hamzyn's as well as Mr M.Dzhemilev's premises;

Imposing multiple obstructions to cultural and mass actions led by the Majlis during June 2014, in particular, in the context of the celebration of the Crimean Flag Day on June 26, 2014;

In June 2014 imposing pressure on publishing office of the "Crimean svitlytsa (chamber)", the only Ukrainian-language newspaper in the Crimea, which was ordered to vacate the premises that were under long-term lease. This newspaper had also been refused in issue distributing and in its inclusion to the catalogue of subscriptions;

June 24, 2014 the FSB of Russian Federation put pressure on Chief Editor of Majlis's newspaper "Avdet" Mr Sh.Kaybullayev in connection with the publication by the newspaper of "extremist materials – the decision of Majlis to boycott of so-called "elections to the State Council" in the temporarily occupied AR Crimea and City of Sevastopol;

July 3, 2014 the Parliamentary Commissioner of Ukraine on Human Rights had received a collective appeal signed by more than 400 inmates in the pre-trial detention facility of City of Simferopol with complaints of discrimination against them on the grounds of belonging to the citizenship of Ukraine. Those who renounced the citizenship of Russian Federation were experiencing cruel treatment;

September 10, 2014 the Chairman of the Audit Committee of the Kurultai of Crimean Tatars, a member of the Majlis Mr A.Ozenbasha was violently removed from the train "Simferopol-Lviv" in connection with the prohibition to leave the Crimea;

September 15, 2014 the building of the Majlis was attacked with the aim to remove the Ukrainian flag from its facade;

September 16, 2014 armed individuals were conducted illegal searches in the premises of Majlis on 2 Schmidt Street, City of Simferopol. They had seized the protocols of meetings, removed office equipment and Mr M.Dzhemilev's personal belongings;

September 17, 2014 the Head of the "Fund of "Crimea" Mr R.Shevkiyev whom the building of the Majlis belongs to was read the court order of bailiffs of the Russian Federation demanding the release the premises.

September 18, 2014 the Majlis premises were blocked by bailiffs the Russian Federation;

12 churches of Ukrainian Orthodox Church of Kiev Patriarchate had been forcibly banned from operation since the date of the so-called "Crimean referendum".

The Ministry of Foreign Affairs of Ukraine declares that Crimea and City of Sevastopol are an integral part of Ukraine, which was confirmed by the UN General Assembly Resolution A/RES/68/262 "Territorial Integrity of Ukraine " as well as Baku Declaration and Resolutions of the OSCE Parliamentary Assembly (June 28 - July 2, 2014), and calls on the Russian Side to fully comply with the obligations of States Occupier in accordance with the rules and principles of international humanitarian law

and, among others, confirmed by the Convention for the Protection of Civilian Persons in Time of War of 1949 and other international human rights instruments, in the term of conditions of the international legal regime of occupation of the part of territory of Ukraine - Crimea and City of Sevastopol.

The Ministry of Foreign Affairs of Ukraine strongly demands from Russian Federation to stop immediately the internationally wrongful acts, to investigate all crimes outlined in this note, and severely punish those responsible.

The Ministry of Foreign Affairs of Ukraine also demands to provide the Ukrainian Side with all appropriate assurances and guarantees to not reiterate in the future the above-mentioned international illegal activities.

The Ministry of Foreign Affairs of Ukraine also demands from the Russian Side to make full compensation for damages incurred as a result of the internationally wrongful actions conducted by the Russian Side. Thus, the Ukrainian Side is ready to discuss the forms and measure of such compensation.

In this regard, the Ukrainian Side offers to the Russian Side to negotiate the use of the International Convention on the Elimination of All Forms of Racial Discrimination of 1966, in particular, the implementation of international legal liability in accordance with international law.

September 23, 2014. Kyiv.

Annex 100

Russian Federation Note Verbale No. 14279 to the Embassy of Ukraine in Moscow (16
October 2014)

*This document has been translated from its original
language into English, an official language of the Court,
pursuant to Rules of the Court, Article 51.*

№14279/2ДСНГ

The Ministry of Foreign Affairs of the Russian Federation presents its compliments to the Embassy of Ukraine to the Russian Federation and referring to the Note of the Ministry of Foreign Affairs of Ukraine №72/22-620-2403, dated 23 September 2014 has the honour to inform on its readiness to conduct a talks on the interpretation and application of International Convention on the Elimination of All Forms of Racial Discrimination 1966.

Nothing in this Note aggrieves the position of the Russian Side concerning the declarations and statements, contained in the mentioned note of Ukrainian Side.

The Ministry would request the Embassy to send the written confirmation on the receipt of this note.

The Ministry avails itself of this opportunity to renew to the Embassy the assurances of its highest consideration.

Moscow, 16 October 2014

**Embassy of Ukraine
Moscow**

Annex 101

Russian Federation Note Verbale No. 3962 to the Embassy of Ukraine in Moscow
(16 October 2014)

This document has been translated from its original language into English, an official language of the Court, pursuant to Rules of the Court, Article 51.

№3962-н/дгпч

The Ministry of Foreign Affairs of the Russian Federation presents its compliments to the Embassy of Ukraine in Moscow and in reply to the Note of the Ministry of Foreign Affairs of Ukraine №72/22-620-705, dated 30 March 2015 has the honour to inform the following.

The Ministry of Foreign Affairs of the Russian Federation in perplexity perceives the statement of Ukrainian Side regarding the unwillingness of Russia to hold talks on the issues of implementation of International Convention on the Elimination of All Forms of Racial Discrimination and on allegedly delayed time-limits. The Russian Federation expressed its consent on the meeting with Ukrainian Side on that issue in the Ministry's Notes dated 16 October and 27 November 2014. In the last Note, as one of options, it was proposed to hold the talks in Minsk. Furthermore in the Note, dated 11 March 2015 and in Note, dated 17 December 2014, were mentioned the exhaustive reasons under which Strasbourg is a less convenient place for mentioned talks, including the financial reasons, which ought to have the vital importance for Ukraine too. However, despite that, Ukrainian Side in the Note, dated 15 December 2014, continued to insist on holding these talks in Strasbourg without giving any explanations, under which Minsk would be inappropriate at that moment. Such unconstructive approach to the selection of the venue of the talks doesn't indicate the true desire to held honest talks.

The Note of the MFA of Ukraine, dated 11 March 2015, contains a reference on allegedly expressed consent of the Russian Side in the Note, dated 16 October 2014, on the suggested by Ukrainian Side agenda of the talks. In this regard, the Ministry draws the attention to the fact that this Note couldn't contain the consent of

**Embassy of Ukraine
Moscow**

the agenda, proposed by Ukrainian Side, as far as agenda proposal was received from MFA of Ukraine only in the Note №72/23-620-2673, dated 29 October 2014, response to which was given in the notes of the Ministry dated 27 November 2014 and 11 March 2014.

Also, there are unclear statements of Ukrainian Side in the Note, dated 30 March 2015 regarding the agenda, suggested by the Russian Federation in the Note 11 March 2015. The Russian Federation acts on the premise that the object of the honest talks on the Convention should be a guarantee of optimal implementation of obligations implied from that international agreement for Russia and Ukraine, in the interest of all persons, which rights are guaranteed by Convention, but not the usage of talks and exchange of notes on this issue for formal statements as it mentioned in the Note of MFA of Ukraine, dated 30 March 2015 “address to other measures of peaceful settlement of disputes in accordance to the Convention”. Such approach of Ukrainian Side doesn’t indicate the true intention to conduct honest and effective talks.

From our part, the Russian Federation confirms once more its adherence to the International Convention on the Elimination of All Forms of Racial Discrimination 1966 and readiness to hold talks on the issue, associated with the Convention on the Elimination of All Forms of Racial Discrimination as it stated in the Note, dated 11 March 2015, and agrees to hold it on 8 April of this year in Minsk.

Nothing in this Note aggrieves the position of the Russian Side concerning the declarations and statements, contained in the mentioned note of Ukrainian Side. Discussion of any of these issue in the future consultations doesn’t aggrieves the question on whether it falls under provisions of the Convention and on the question whether domestic means of legal assistance or international mechanisms apply, including stipulated in the Convention.

The Ministry avails itself of this opportunity to renew to the Embassy the assurances of its highest consideration.

Nothing in this Note aggrieves the position of the Russian Side concerning the declarations and statements, contained in the mentioned Note of the Ukrainian Side.

The Ministry would request the Embassy to send the written confirmation on the receipt of this note.

The Ministry avails itself of this opportunity to renew to the Embassy the assurances of its highest consideration.

Moscow, 16 October 2014

Annex 102

Ukrainian Note Verbale No. 72/23-620-2673 to the Russian Federation Ministry
of Foreign Affairs (29 October 2014)

*This document has been translated from its original
language into English, an official language of the Court,
pursuant to Rules of the Court, Article 51.*

Ministry of Foreign Ukraine

No. 72/23-620-2673

The Ministry of Foreign Affairs of Ukraine presents its compliments to the Ministry of Foreign Affairs of the Russian Federation and in reply to your Ministry's Note № 14279/2dsng of 16 October 2014 has the honor to convey the following.

The Ministry of Foreign Affairs of Ukraine propose to hold talks on interpretation and application of the International Convention on Elimination of all Forms of Racial Discrimination of 1965 on during 21 November 2014 in Kiev (Ukraine) or, otherwise, in Geneva (Switzerland), Vienna (Austria), Strasburg (France). Ukrainian Side already made all necessary preparations for the negotiations to be hold in any of the above mentioned cities.

Ukrainian Side will recognise absence of prompt response from the Russian Side and groundless postponing of giving a clear and definitive response regarding the exact place and date agreed upon by the Russian Side as the unwillingness of the Russian Side to conduct talks on resolving issues regarding the International Convention on Elimination of all Forms of Racial Discrimination of 1965.

During the talks the Ministry of Foreign Affairs of Ukraine proposes to discuss following issues:

- the availability of factual evidence of discriminatory actions being carried out by Russian Federation, its governmental bodies as well as federal and local ones, against the Ukrainian and Crimean Tatar population;
- facts of encouraging, protecting and supporting of racial discrimination, that is being carried out by any persons or organisations against Ukrainian and Crimean Tatar population;
- issues of applying effective measures to revise general policy of the Russian Government on the federal and local scale, and also to discuss the possibility of amending, repealing or revocation of any laws and decrees, which could serve as a cause or encouragement for racial discrimination;
- ensuring that the Russian Side is undertaking all available measures, including the introduction of new legislative acts, in order to ban the racial discrimination, which is being carried out by any persons or organisations against Ukrainian and Crimean Tatar people;
- all available measures, which will be required to ensure imposition of appropriate punishment to the above crimes taking into the account the severity of these crimes.

The Ministry of Foreign Affairs avails itself of this opportunity to renew to the Ministry of Foreign Affairs of Russian the assurances of its highest consideration.

Kyiv, 29 October 2014

Annex 103

Russian Federation Note Verbale No. 15642 to the Embassy of Ukraine in Moscow (27
November 2014)

*This document has been translated from its original
language into English, an official language of the Court,
pursuant to Rules of the Court, Article 51.*

№ 15642/2ДСНГ

The Ministry of Foreign Affairs of the Russian Federation presents its compliments to the Ministry for Foreign Affairs of Ukraine and in reply to Note №72/23-620-2673, dated October 29, 2014 has the honour to state the following.

The Russian Side is ready to conduct negotiations on issues related to realization of the International Convention on Elimination of All Forms of Racial Discrimination 1966 and suggests that negotiations take place in Moscow, the Russian Federation or Minsk, Republic of Belorussia.

The Russian Side acts on the premise that during the negotiations the Ukrainian Side will provide full and unbiased information on fulfillment by the Ukrainian side of commitments on subparagraphs a, b, c, d of part 1 article 2, subparagraphs a, b, c of article 4, subparagraph b, c, d, e of article 5 as well as other articles of International Convention on Elimination of All Forms of Racial Discrimination, in particular, in regard to Russian speaking population of Ukraine.

With such understanding the Russian Side is ready to proceed with agreement of terms and agenda of negotiations.

Nothing in the above note affects the stance of the Russian Side regarding the claims and statements made by the Ukrainian Side in mentioned Note.

Furthermore, in regard to mentioned statements of the Ukrainian Side the Russian Side notices that according to the article 11 of Convention if any state-party believes that another state-party does not fulfil conditions of the Convention, it should address its concerns to the Committee on Elimination of All forms of Racial Discrimination.

The Ministry for Foreign Affairs of the Russian Federation avails itself of this opportunity to renew to the Ministry for Foreign Affairs of Ukraine the assurances of its highest consideration.

**The Ministry for Foreign Affairs of Ukraine
Kiev**

Moscow, November 27, 2014

Annex 104

Ukrainian Note Verbale No. 72/22-620-3069 to the Russian Federation Ministry of
Foreign Affairs (15 December 2014)

*This document has been translated from its original
language into English, an official language of the Court,
pursuant to Rules of the Court, Article 51.*

MINISTRY OF FOREIGN AFFAIRS

№72/22-620-3069

The Ministry of Foreign Affairs of Ukraine presents its compliments to the Ministry of Foreign Affairs of the Russian Federation and in response to the Ministry of Foreign Affairs of the Russian Federation Note № 15642/2dsng dated 27 November October 2014 has the honour to state the following.

The Ministry of Foreign Affairs of Ukraine considers the abovementioned reply of the Russian Side as a direct evidence of the obvious unwillingness of the Russian Federation to settle the dispute on interpretation and application of the International Convention on Elimination of all Forms of Racial Discrimination of 1966 (hereinafter referred to as the Convention). The Russian Side was informed of this by the note of the Ukrainian Side №72/22-620-2946 of December 1, 2014.

The position of the Ministry of Foreign Affairs of Ukraine is acknowledged by the fact that the Ukrainian Side had suggested to hold the negotiation on the interpretation and application of the Convention on November 21, 2014. The Russian Side gave its reply only with the abovementioned note of November 27, 2014, which was delivered to the Ukrainian Side only on December 4, 2014.

Without any detriment to the previously stated approach of the Ukrainian Side and guided by the real desire to settle a dispute on interpretation and application of the Convention by negotiation, the Ministry of Foreign Affairs of Ukraine is ready to hold the abovementioned negotiations on January 23, 2015 in Strasburg (France) as it was suggested in our previous note. The Ukrainian side has already elaborated the possibility of holding such negotiation at the premises of the Council of Europe.

Taking into consideration the abovementioned Note of the Ministry of Foreign Affairs of the Russian Federation dated November 27, 2014, the approach of the Russian Side on the subject of the negotiation consists of the readiness to hold 'negotiations on issues regarding the fulfilment' of the Convention and 'proceeds from the fact that during the negotiations the Ukrainian Side will be ready to give the Russian Side a comprehensive and objective information on the fulfilment by Ukraine of its obligations under the [Convention], including those on the Russian-speaking population of Ukraine'.

The Ministry of Foreign Affairs of Ukraine considers the approach stated by the Russian Side and its understanding of the subject of the negotiation as an attempt to avoid discussion of the issues regarding the facts of their violation of the Convention by shifting the accents and moving the negotiations into the field of settlement of the issues of the realisation of the Convention and discussion of the general issues regarding the fulfilment by Ukraine of its obligations on the Russian-speaking population of Ukraine.

In this regard, the Ministry of Foreign Affairs of Ukraine once again underlines that there is a dispute on interpretation and application of the Convention. We insist on the observance of the proposed by the Ukrainian Side subject of the negotiations, which was agreed by the Russian Side in its Note №14279/2dsng of October 16, 2014, as well as of the agenda, which has not met any objections of the Russian Side.

At the same time, unreasonable approach by the Russian Side on the comprehensive and objective information to the implementation of the obligations by Ukraine under the Convention regarding the Russian-speaking population testifies that the Russian Side has no concrete and convincing facts and evidences of the inobservance by Ukraine of its obligations under the Convention, including those regarding the Russian-speaking population of Ukraine.

In the context of the approach stated by the Russian Side, the Ministry of Foreign Affairs of Ukraine underlines that Ukraine fulfils its obligations under the Convention by not allowing any kind of discrimination, including the language one.

Thus, the approach of the Russian Side on the comprehensive and objective access to the information by the Ukrainian Side on its implementation of the obligations by Ukraine under the Convention cannot be a subject of the negotiations suggested due to the absence of the concrete and convincing facts and evidences of the inobservance by Ukraine of its obligations.

The Ministry of Foreign Affairs of Ukraine underlines that the Ukrainian Side cannot agree with the understanding and interpretation of the Russian Side of the provisions of the Article 11 of the Convention under which the matter may be brought to the attention of the Committee on the Elimination of Racial Discrimination (hereinafter referred to as the Committee).

The Ministry of Foreign Affairs of Ukraine considers that the provisions of the Article 11 of the Convention are of optional nature and should be regarded all together and within a context of the Article 22 of the Convention, which establishes the procedure of the settlement of the disputes, including its interpretation and implementation.

The Ukrainian Side proceeds from the understanding that the provisions of the Article 11 of the Convention are optional and do not contain obligations of the parties to turn to the Committee, but provides that the state-party 'may bring to the attention of the Committee' its position on inobservance by other party of the provisions of the Convention. In addition to

that, the provisions of the Article 22 on the procedure of the settlement of the dispute 'between two or more States Parties with respect to the interpretation or application of this Convention' provides that any dispute should be settled on a first instance 'by negotiation or by the procedures expressly provided for in this Convention'. That means that the Convention allows the state members to choose the means of the pre-trial settlement 'by negotiations or' appeal to the Committee as a 'procedure(s), expressly provided for in this Convention'.

The Ministry of Foreign Affairs of Ukraine states that the Ukrainian side will consider the another absence of the reply by the Russian side in the reasonable terms as well as another unreasonable delay in determination of the place and date of the negotiation as a refusal to settle a dispute on interpretation and implementation of the Convention by negotiations. Accordingly, we will consider it as impossible to settle a dispute in place by negotiations in the understanding of the Article 22 of the Convention.

The Ministry of Foreign Affairs avails itself of this opportunity to renew to the Ministry of Foreign Affairs of Russian the assurances of its highest consideration.

15 December 2014

Annex 105

Ukrainian Note Verbale No. 72/22-620-3070 to the Russian Federation Ministry of Foreign Affairs (15 December 2014)

This document has been translated from its original language into English, an official language of the Court, pursuant to Rules of the Court, Article 51.

MINISTRY OF FOREIGN AFFAIRS OF UKRAINE

72/22-620-3070

The Ministry of Foreign Affairs of Ukraine presents its compliments to the Ministry of Foreign Affairs of the Russian Federation and following its Note #72/22-620-2403 of September 23, 2014 has the honour to report a violation by the Russian Federation of its obligations under the International Convention on the Elimination of All Form of Racial Discrimination (ICERD) 1966.

The Ministry of Foreign Affairs of Ukraine considers that the Russian Federation acting through its governmental bodies, authorised persons, individual and legal entities, who were acting on behalf of the State, separatist forces, who are managed and controlled by the Russian Side, carry out discrimination related acts, encourage, protect and support racial discrimination against Ukrainians and Crimean Tatars and their representation bodies on the temporarily occupied by the Russian Federation territory of Ukraine – Autonomous Republic of Crimea and the City of Sevastopol.

According to principal obligations, prescribed by the Article 2 of the Convention, States Parties undertake to prohibit and bring to an end racial discrimination in all of its forms and to ensure all human beings are equal before the law without a distinction of race, colour, national or ethnic origin, especially in such rights as:

The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution (Article 5b);

The right to participate in elections - to vote and to stand for election - on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service (Article 5c);

The right to freedom of movement and residence within the border of the State (Article 5d);

The right to leave any country, including one's own, and to return to one's country (Article 5d);

The right to nationality (Article 5d);

The right to own property alone as well as in association with others (Article 5d);

The right to freedom of thought, conscience and religion (Article 5d);

The right to freedom of opinion and expression (Article 5d);

The right to freedom of peaceful assembly and association (Article 5d).

**Ministry of Foreign Affairs
of the Russian Federation
Moscow**

Taking into consideration Articles 2 and 5 of the Convention, the Ministry of Foreign Affairs of Ukraine claims that the Russian Federation carries out internationally unlawful acts which correspond to the racial discrimination. In particular:

- intimidates, outrages, prosecutes ethnic Ukrainians and Crimean Tatars for their use of Ukrainian and Crimean Tatars languages in the public places as well as national symbols;
- shuts down Ukrainian language-based schools in Crimea and in the City of Sevastopol;
- limits political and public rights of the ethnic Ukrainians and Crimean Tatars in Crimea and in the City of Sevastopol;
- compulsory forces into Russian citizenship and intimidates and prosecutes those, who refused to accept it;
- limits the right to freedom of thought, conscience and religion.

The abovementioned internationally unlawful acts of the Russian Side are confirmed inter alia by the following facts:

- criminal prosecution of Haiser Dzhemilev, son of the Crimean Tatars' leader Mustafa Dzhemilev, is in progress;
- Ukrainian schools keep being shut down and Ukrainian schoolbooks keep being exterminated. Thus, on the information of a member of the Medzhlis of Crimean Tatars Eskander Bariev all the Ukrainian schoolbooks in a Simferopol district school were collected and exterminated right at the sight of schoolchildren;
- *on March 15, 2014* the body of Reshat Ametov was found in Crimea. Information on the investigation is still absent;
- harassment of the Orthodox Ukrainians from the side of so called "Crimean Government" and Ukrainian Orthodox Church (Moscow Patriarchate) continues. This is mainly done by preventing the believers and clergymen from entering the seized by "Crimean self-defence" and Russian military men churches and clerical premises. Thus, in the Hieromartyr Clement of Rome Church (Sevastopol City) illegal searches were carried out on a regular basis, clergy had been attacked and harassed a number of times. In the Church of Intercession of the Holy Virgin (Perevalne town) attempts to seize the Church's premises for the purposes of Ukrainian Orthodox Church (Moscow Patriarchate) were made. In their course a property of the clergy was damaged;
- *on May 2014*, activists of the Ukrainian community house Timur Shaymardanov and Sayran Zinedinov disappeared;
- *on May 6, 2014* a member of Medzhlis Abduraman Egiz was attacked by around 20 representatives of the "Crimean self-defence";
- *on May 15, 2014* a photo correspondent of Crimean Telegraph newspaper, citizen of Ukraine Maksym Vasylenko was detained in Simferopol and suffered cruel treatment from the side of "Crimean self-defence" members.

Maksym Vasylenko was preparing a report on training of special police units a day before the 70th anniversary of the Crimean Tatars deportation;

- *on May 18, 2014* a resolution by the Prosecutor General's Office of the Russian Federation was sent on the name of an editor of ONA Information Agency demanding to remove a message on the anti-Government protests from the news feed of the Agency;

- *on May 18, 2014* chief editor of the Internet project “Open Crimean Channel” Osman Pashayev and his team (correspondent, cameraman and driver) were groundlessly detained by the members of “Crimean self-defence” in the course of the commemorative events dedicated the 70th anniversary of the Crimean Tatars deportation. Their equipment and personal belongings were confiscated. They were subjected to physical and psychological pressure, questioned without lawyers. Their belongings were not returned after they were released;

- *on June 5, 2014* one of the founders of an Internet portal “Crimean Events” Ruslan Yugosh was psychologically pressured as a journalist by the Crimean police in a way of continuously summoning him and his 73-year old mother;

- *on June 24, 2014* in Kolchugino Town (Simferopol District) unidentified persons dressed in “Berkut” uniforms (introduced themselves as Russian FSB employees) seized an Islamic religious educational institution in order to have it searched. In its course the institution’s property was damaged and some equipment confiscated;

- *on June 24, 2014* unidentified persons intruded into the house of a director of Kolchugino Town school Aider Osmanov;

- *on June 29, 2014* in Simferopol a fact of leaflets distribution appealing to inform Crimean FSB about those, who didn’t support the Russian annexation of Crimea or took part in a local Maidan was recorded;

- *on August 19, 2014* Russian FSB held a search at a house of Crimean Tatars in Bakhchisaray, where, allegedly, extremist literature and a pistol were found;

- *on August 2014* a number of Turkish imams and religious teachers of the Crimean muftiat were forced to leave the peninsula, because Russian Immigration Service refused to extend their residence permits;

- *on August 26, 2014* director of a Dzhankoy school was held responsible for storage and distribution of an allegedly extremist literature;

- *on August 28, 2014* a group of policemen together with people wearing camouflage and civil clothes intruded into a house of Crimean Tatar family in Bakhchisaray and under the pretext of searching for drugs and arms confiscated books from “the list of extremist literature”;

- *on September 4 and 5, 2014* police and Russian FSB conducted searches at least at ten houses of Crimean Tatars in Simferopol, Nyzhniehorsk, Krasnoperekopsk, Bakhchisarai under the pretext to reveal drugs and arms. Instead of this, the religious literature was confiscated;

- *on September 8, 2014* the house of the Crimean activist, ethnic Ukrainian Elizabeth Bohutska was searched by law enforcement forces. The office equipment was confiscated. Ms Bohutska was detained and interrogated concerning her participation in May of this year in protests against the ban on the entry to the Crimea for Mr Dzhemilev, the "anti-Russian" publications in the Internet that allegedly contain "extremist appeals and incitement to ethnic hatred". Ms Bohutska was forced to leave Crimea because of the fear of terrorism charges and arrest;

- *on September 9, 2014* a search at Crimean school at Tankove Town (Bakhchisaray District) was held. In its course a banned literature has allegedly been found. Two Turkish teachers were taken to be questioned by FSB;

- *on September 10, 2014* unlawful searches were carried out at the houses of Crimean Tatars at Kamyanka Town by unidentified armed people. They were searching for arms, drugs and extremist literature. Confiscated office equipment, mobile phone and two religious books. House owners were taken to Simferopol to be questioned and released after 18-hours of detention on the precondition of signing a "no complaint" statement. Thus, their belongings were not returned;

- *on September 11, 2014* representatives of the Crimean prosecutor's office conducted a search at the library of Crimean Engineering and Pedagogical University in order to reveal "banned literature";

- *on September 16, 2014* a group of people in camouflage and masks who introduced themselves as "Crimean FSB" intruded into a house of the Medzhlis member Eskender Bariev, conducted a search and seized office equipment for "technical expertise". Similar searches took place at the houses of Mustafa Asaba and Asadula Bairov;

- *on September 27, 2014* Isliam Dzhapparov and Dzhevdet Isliamov were kidnapped in Belhorsk Town;

- *on October 3, 2014* Eskendr Apseliamov was reported missing;

- *on October 6, 2014* Edem Asanov, who was kidnapped on September 29, 2014 in Yevpatoriia, was found dead;

- *on October 14, 2014* one of the kidnapped Crimean Tatars Bylial Bylialov, first year student of the Crimean Industrial and Pedagogical University, was found dead, and another one - Artem Dayrabekov, first-year student of Taurian National University was taken in a critical condition to an intensive care unit of a hospital;

- *on October 16, 17, 22, 2014* Tahir Smerdliayev, Moussa Apkerimov, Rustam Abdukharamov were arrested and charged with various criminal acts during the protests on May 3, 2014;

- *on December 6, 2014* "prosecutor of Crimea" Natalia Poklonska handed over to the Deputy Head of the Crimean Tatar Medzhlis Ahtem Chyyhozu a warning on the inadmissibility of unauthorized gatherings on the peninsula;

- *on December 10, 2014* the Committee on the Rights Protection of Crimean Tatars received from "prosecutor's office of Crimea" a warning

concerning the inadmissibility of holding a meeting on the International Human Rights Day.

The Ministry of Foreign Affairs of Ukraine states that the Autonomous Republic of Crimea and the City of Sevastopol are the integral parts of Ukraine, that was confirmed by the UN GA Resolution A/RES/68/262 entitled "Territorial integrity of Ukraine" and the OSCE PA Baku Declaration and Resolutions (28 June – 2 July 2014) and calls for the Russian Federation as an occupant state to fully adhere to its obligations in accordance to the forms and principles of the international humanitarian law, secured by the Convention for the Protection of Civilian Persons in Time of War 1949 and other applicable international treaties on human rights, including the International Convention on the Elimination of All Form of Racial Discrimination 1966.

The Ministry of Foreign Affairs of Ukraine calls for the Russian Federation to observe international legal responsibility and insists the Russian Federation discontinues international unlawful acts, investigates all crimes mentioned in this Note and severely punishes the guilty.

The Ministry of Foreign Affairs of Ukraine demands that the Ukrainian Side is provided with the assurances and guarantees that the abovementioned international unlawful acts will not be perpetrated again.

The Ministry of Foreign Affairs of Ukraine also demands that the Russian Side to fully reimburse the damage that was caused by international unlawful acts of the Russian Side.

Kyiv, 15 December 2014

Annex 106

Russian Federation Note Verbale No. 2697 to the Embassy of Ukraine in Moscow (11
March 2015)

*This document has been translated from its original
language into English, an official language of the Court,
pursuant to Rules of the Court, Article 51.*

№ 2697-н/ДГПЧ

The Ministry for Foreign Affairs of the Russian Federation presents its compliments to the Ministry for Foreign Affairs of Ukraine and in reply to Notes №72/22-620-297, dated February 6, 2015, №72/22-620-3070 and №72/22-620-3069, dated December 15, 2014 has the honour to state the following.

The Ministry for Foreign Affairs of the Russian Federation underlines the need of compliance with norms of diplomatic correspondence and, in particular, calls the MFA of Ukraine to refrain from accusations of the Russian Side that it allegedly “occupies” the Crimea peninsula. It is well known by the Ukrainian Side that Republic of Crimea became a part of the Russian Federation in full accordance with international law, in particular as a result of realisation of the right of peoples on self-determination which was violated by government of Ukraine during many years. This right is secured in article 1 of the UN Charter, article 1 of the International Covenant on Civil and Political Rights 1966 and also in article 1 of the International Covenant on Economic, Social and Cultural Rights 1966.

The Russian Federation reaffirms its adherence to the commitments of the International Convention on Elimination of All Forms of Racial Discrimination 1966 and with perplexity perceives ignorance by the Ukrainian Side of the Russian Side consent to hold negotiations on issues on realization of elimination of all forms of racial discrimination and suggestions to conduct mentioned negotiations in Moscow or Minsk set out in Ministerial Note, dated November 27, 2014.

Without any explanation the Ukrainian Side continues to insist on holding a meeting in Strasbourg which does not correspond with declared “true intention of the Ukrainian Side to conduct negotiations”. The Russian Side has in a comprehensive way outlined reasons why Strasbourg and other cities of Western Europe suggested by the Ukrainian Side as negotiation platforms are not suitable and why conducting mentioned negotiations in Minsk is preferable (Note of the Ministry for Foreign Affairs of the Russian Federation №16599/ДНВ, dated December 17, 2014). The Ministry would like to draw attention of the Ukrainian Side to the fact that objective discussion of matters, ensued from applying the Convention requires participation of interagency delegation.

Thus conducting the consultations in Strasbourg as it is suggested by Ukrainian Side will incur massive expenses for Russian and Ukrainian Sides

**The Ministry for Foreign Affairs of Ukraine
Kiev**

as well as a need of obtaining visas. Taking these factors into account, Russian Side suggests conducting the consultations in Minsk on the week commencing on April 6, 2015. If Ukrainian Side believes that there are obstacles for conducting a meeting in Minsk, as it was suggested in the Note, dated November 27, 2014, Russian Side suggests to hold consultations during the same dates in Simferopol.

Russian Side suggests the following agenda of the consultations:

- Exchange of information about acts that could be qualified as acts of racial discrimination that happened or could have happened on the territory of Russian Federation and Ukraine and are in violation of the International Convention on Elimination of All Forms of Racial Discrimination;
- Exchange of information about the mechanism of legal defense through competent national courts and other state institutions of the Russian Federation and Ukraine in any case of acts of racial discrimination that infringe basic human rights and freedoms;
- The basics of international law combating with all forms of racial discrimination in the context of Russian-Ukrainian relations;
- Measures to develop cooperation of the Russian Federation and Ukraine on matters regarding realization of the International Convention on Elimination of All Forms of Racial Discrimination.

The ministry underlines that nothing of the abovementioned affects the stance of the Russian Side regarding the claims and statements made by the Ukrainian Side in its relevant Note correspondence. The discussion of any issues in the upcoming consultations doesn't affect the matter if they fall under the effect of the mentioned Convention as well as the matter regarding the implication of internal measures of legal defence or international mechanisms including those provided by the Convention.

Ministry for Foreign Affairs of the Russian Federation avails itself of this opportunity to renew to the Embassy of Ukraine in Moscow the assurances of its highest consideration.

Moscow, March 11, 2015

Annex 107

Ukrainian Note Verbale No. 72/22-620-705 to Russian Federation Ministry of Foreign Affairs (30 March 2015)

This document has been translated from its original language into English, an official language of the Court, pursuant to Rules of the Court, Article 51.



MINISTRY OF FOREIGN AFFAIRS OF UKRAINE

No. 72/22-620-705

The Ministry of Foreign Affairs of Ukraine presents its compliments to the Ministry of Foreign Affairs of the Russian Federation and, responding to the *note verbale* of the Ministry of Foreign Affairs of the Russian Federation No. 2697-Н/ДГПЧ of March 11, 2015, has the honour to inform the following.

The Ministry of Foreign Affairs of Ukraine considers the almost three months, which have passed since the Ukrainian Side had sent the diplomatic *note verbale* on arranging the negotiations concerning the interpretation and application of the 1966 International Convention on the Elimination of all forms of Racial Discrimination (hereafter – the Convention), to prove the lack of true desire and *bona fides* in the approach of the Russian Federation towards resolving the existing dispute concerning the interpretation and application of the Convention by means of negotiations. Along with that, the Ministry of Foreign Affairs of Ukraine, in its *note verbale* No. 72/22-620-3069 of December 15, 2014, had already broached the issue of necessity for the Russian Federation to comply with the reasonable time limits, but, as of today, this was not reflected in the activity of the Russian Side.

The Ministry of Foreign Affairs of Ukraine underlines once again the inconsistency of the statement presented by the Russian Side on the necessity to adhere to the norms of the diplomatic correspondence. In this context, the Ukrainian Side had informed the Russian Side several times about its stance on the legal status of the Autonomous Republic of Crimea and the City of Sevastopol as the occupied territories, which fully corresponds to the norms of the international law and is shared by the international community.

Accordingly, the Ukrainian Side considers the Russian side to be *de facto* temporarily occupying the part of Ukraine's territory, namely the Autonomous Republic of Crimea and the City of Sevastopol. Notwithstanding that the occupied part of Ukraine's territory remains under Ukraine's sovereignty, the Russian Federation, which exercises effective control on the occupied part of Ukraine's territory, is obliged to adhere to the international legal obligations imposed onto the invader state. This, among the rest, relates to providing for the human rights protection, inclusive of the commitments by the Russian Federation according to the Convention.

The Ministry of Foreign Affairs of Ukraine considers the proposal by the Russian Side to conduct negotiations in Simferopol as disrespectful of Ukraine's sovereignty and unacceptable, since Simferopol is a part of Ukraine's territory that is occupied by the Russian Federation.

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of the Russian Federation
Moscow**

Also, the Ministry of Foreign Affairs of Ukraine considers unconstructive a proposal by the Russian Side to conduct the negotiations in Strasbourg, the French Republic.

The Ukrainian Side reminds the Ministry of Foreign Affairs of the Russian Federation that it was the Russian Side, who, with no reasonable purpose, had ignored the proposal of the Ukrainian Side to conduct negotiations in several European countries, on neutral ground of the relevant international organizations. Thereat, the Ministry of Foreign Affairs of Ukraine concludes that it is the Ukrainian Side, who, being an initiator of the negotiations, is fully justified to propose the ground for negotiations and deem it suitable until the Russian Side puts the solid background to justify its refusal.

Taking into account the peremptory refusal of the Russian Side to conduct negotiations in Strasbourg, understanding the great importance, which the Russian Side attaches to the financial part of conducting negotiations, with no damage made to the previously disclosed stance of the Ukrainian Side and being governed by the true desire to resolve, by means of negotiations, the dispute concerning the interpretation and application of the Convention the Ministry of Foreign Affairs of Ukraine is ready to conduct the mentioned negotiations on April 8, 2015 in Minsk, the Republic of Belarus.

The Ministry of Foreign Affairs of Ukraine also states that the understanding of the subject of negotiations and their agenda, which was suggested by the Russian Side in the *note verbale* No. 2697-н/ДГПЧ of March 11, 2015, is an attempt to avoid discussing the issues related to the facts of breaching the Convention by the Russian Side and to shift the negotiations towards resolving the issues of implementing the Convention and discussing the general issues, related to fulfilment by Ukraine of its commitments under the Convention.

In this regard, the Ministry of Foreign Affairs of Ukraine once again asserts the existence of the dispute concerning the interpretation and application of the Convention and insists on adhering to the negotiation subject proposed by the Ukrainian Side, to which the Russian Side had expressed its consent by the *note verbale* No. 14279/2ДСНГ of October 16, 2014, and the negotiation agenda, to which there was no objection expressed by the Russian Side.

The Ministry of Foreign Affairs of Ukraine informs that in case of repeated absence of the response from the Russian Side within the reasonable time frame, the Ukrainian Side shall deem this lack of action being a proof of impossibility to resolve the existing dispute by means of negotiations as stipulated by the Article 22 of the Convention, and shall deploy other means of peaceful dispute resolution in accordance with the Convention.

The Ministry of Foreign Affairs of Ukraine avails itself of this opportunity to renew to the Ministry of Foreign Affairs of the Russian Federation the assurances of its consideration.

Kyiv, March 30, 2015

Annex 108

Russian Federation Note Verbale No. 8761 to the Embassy of Ukraine in Moscow (9 July 2015)

This document has been translated from its original language into English, an official language of the Court, pursuant to Rules of the Court, Article 51.

**Ministry of Foreign Affairs
of the Russian Federation
Moscow**

№. 8761-н/дгпч

Ministry of Foreign Affairs of the Russian Federation presents its compliments to the Embassy of Ukraine to the Russian Federation and in response to the previous verbal notes №. 14279/2дснг of October 16, 2014, №. 15642/2дснг of November 27, 2014, №2697-н/дгпч of March 11, 2015 and in accordance to the consultations in Minsk on April 8, 2015 has the honor to attract attention to the range of facts with regards to implementation of Ukraine's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination of 1966.

According to the principal obligations in Articles 2 and 5 of the Convention, States Parties commit themselves to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of every person before the law, without distinction in race, color, national or ethnic origin, in particular in the accordance to fulfilment of the following rights:

The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution (Article 5(b));

The right to freedom of movement and residence within the State (Article 5(d));

The right to freedom of opinion and expression (Article 5(d));

The right to housing (Article 5(e));

The right to healthcare, medical assistance, social insurance and social services (Article 5(e));

The right to access to any place or any type of service, intended for public use (Article 5(f)).

In this regard, the Russian Side wants to attract attention to the following facts and information regarding the situation in self-proclaimed Donetsk and Luhansk peoples republics, in places of Russian and Russian-speaking population residence, namely:

- According to the information of the UN High Commissioner on Human Rights (UNHRC), collected in cooperation with the World Health Organization, from the beginning of military actions on the territory of Ukraine and by February 28, 2015 in South-Eastern part of Ukraine 5,809 people have died and 14,740 injured. Among them 1,012 have died and 3,793 injured during the period of December 1, 2014 to February 15, 2015. By March 2, 2015 the UNHRC has informed that the quantity of killed people exceeded 6 thousand;

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- According to the information of self-proclaimed Luhansk peoples republic (“LNR”), from the beginning of military actions till April, 2015 1,629 people were

killed in “LNR” (874 civilians and 755 military men), including 14 children. 3,128 people were injured (1,309 civilians and 1,819 military men). According to the information of self-proclaimed Donetsk peoples republic (“DNR”), from the beginning of military actions in “DNR” 3,430 people were killed, including 57 children; from January 1, 2015 – 975 people were killed, including 17 children. Total number of injured people: 10,052, including 260 children; from the beginning of 2015 – 2,815, including 51 children;

- On September 9, 2014 the Ukrainian Armed Forces used heavy offensive armament of indiscriminate effect for shelling of Donetsk and Luhansk peoples republic’s residential places of Russian and Russian-speaking population;
- On October 1, 2014 93-rd brigade of the Ukrainian Armed Forces shelled school No. 57 and public transport stop located in Kyiv district of Donetsk, which caused 8 people killed and over 10 injured in different level of heaviness;
- On December 15, 2014 the Ukrainian Armed Forces used heavy offensive armament of indiscriminate effect for shelling of preschool orphanage No. 2 “Topoliok” (Slaviansk city, Bulvarnaya Street, 17 “a”), general school No. 63 (Donetsk city, Stepanenko Street, 10), general school No. 57 (Donetsk city, Yasnopolianskaya Street, 5) and other preschools and schools and children’s social infrastructure objects and orphanages located on the territory of Donetsk and Luhansk peoples republics;
- From December 1, 2014 to January 12, 2015 top Ukrainian political and military officials, as well as subordinated leaders of the Ukrainian nationalistic “Aidar”, “Azov” and “Dnepr” battalions shelled repeatedly, using heavy armaments of indiscriminate effect, Donetsk, Horlivka, Dokuchaevsk and Olenivka as well as other localities. As a result, 40 people were killed while 120 were wounded with various severity levels; some residential buildings and social infrastructure facilities were partially and completely destroyed.

The Russian Federation would also like to draw the attention to the actions as follows related to Ukraine’s compliance with obligations under the Convention, namely:

- On July 12, 2014, unidentified persons representing defense and law enforcement agencies of Ukraine shelled from the Ukrainian territory a service vehicle of the military unit # 2198 with the (Russian) servicemen as follows: V.Roudenko, A.Bandurov and O.Moushynskyi who were patrolling a state border of the Russian Federation and moving on the Russian territory along the border with Ukraine towards the village of Kuibyshevo, Rostov region;
- On July 14, 2014, unidentified persons representing defense and law enforcement agencies of Ukraine shelled from the Ukrainian territory a check point # 1, situated on the territory of Russia, near border with Ukraine, at the locality of Derkoul, Tarasovskyi district, Rostov region, resulting in the death of two servicemen of the (Russian) military unit # 54046 A.Voronov and A.Davoyan;
- On July 31, 2014, and August 10, 2014, unidentified persons representing defense and law enforcement agencies of Ukraine shelled from the Ukrainian territory the area located near the village of Mityakinskaya, Tarasovskyi district, Rostov region;
- Between June 19 and 27, 2014, in Stanichno-Louganskiy district unidentified persons representing defense and law enforcement agencies of Ukraine illegally retained a Russian Federation citizen A.Mikhailenko. The Russian citizen was stopped while undergoing a personal search at a checkpoint located not far from the village of Shyrokyi, Stanichno-Louganskiy district, by unidentified persons wearing

military uniform with sleeve patches of Dnepr battalion. The above persons searched A.Mikhailenko, openly stole his money and a mobile phone, then placed handcuffs on him and illegally retained him in an isolated room at the check point during several hours. Afterwards, A.Mikhailenko was transferred to unknown locality by unidentified persons in military uniform, where he was illegally retained and suffered repeated physical abuse;

- On July 26, 2014, unidentified persons representing defense and law enforcement agencies of Ukraine shelled from the Ukrainian territory Russian customs point MAPP Veselo-Voznesenka located in Rostov region, Neklinovskiy district, 118-th km of the Marioupol-Rostov highway;
- On August 21, 2014, unidentified persons representing defense and law enforcement agencies of Ukraine shelled the territory of the Russian Federation from the Ukrainian territory.

The Ministry of Foreign Affairs of the Russian Federation demands information from Ukraine on the measures taken with regard to the above facts and on bringing those guilty to justice.

The Ministry avails itself of this opportunity to renew to the Embassy of Ukraine in Moscow the assurances of its highest consideration.

Moscow, July 9, 2015

Annex 109

Ukrainian Note Verbale No. 72/22-194/510-2006 to the Russian Federation Ministry of Foreign Affairs (17 August 2015)

This document has been translated from its original language into English, an official language of the Court, pursuant to Rules of the Court, Article 51.



Ministry of Foreign Affairs of Ukraine

No. 72/22-194/510-2006

The Ministry of Foreign Affairs of Ukraine expresses its esteem for the Ministry of Foreign Affairs of the Russian Federation and is honored to report the following on the first round of talks between Ukraine and the Russian Federation on the interpretation and application of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 (hereinafter – the Convention), which was held in Minsk, the Republic of Belarus, on April 8, 2015.

The Ukrainian side and the Russian side discussed during the first round of talks a wide range of issues under the agreed agenda.

At the start of the meeting, the Ukrainian side stated its fundamental position as follows:

- The Autonomous Republic of Crimea and the town of Sevastopol are an integral part of the territory of Ukraine, covered by the sovereignty of Ukraine and which are currently under the effective control of the Russian Federation as a consequence of its military aggression;
- as per the generally accepted norms and principles of international law, the territory of the Autonomous Republic of Crimea and the town of Sevastopol is regarded by Ukraine as occupied territory, and this approach is supported by the international community, as reflected in the decisions of a number of international organizations;
- despite the occupation, international law imposes on the Russian Federation the obligation to also perform its international legal commitments in the sphere of human rights, including those taken under the Convention, in occupied territory, specifically in the Autonomous Republic of Crimea and Sevastopol.

Noting the existence of differences in the positions of the sides on this issue, the Russian delegation stated that this should not prevent the discussion of specific human rights issues, including on the territory of Crimea and the town of Sevastopol, in the context of complying with the Convention. However, the Russian

side stated its position that the self-declaration of independence by the so-called "Republic of Crimea" is fully consistent with the principle of self-determination as enshrined in the Declaration on Principles of International Law and other documents adopted within the UN framework.

In this regard, during further discussions, the Ukrainian side proposed to the Russian side that this matter should be taken to the UN's International Court of Justice.

During the discussion of the first item on the agenda concerning the application of the Convention, the Russian side presented an overview of national legislation and measures ensuring the implementation of the Convention, as well as remedies in cases of racial discrimination and the role of courts, prosecutors, and other competent authorities of the Russian Federation in this process. Special attention was paid to the procedure for adopting and publicizing decisions on declaring non-governmental organizations as well as documents, materials, and publications as extremist.

The Russian side also stated that the 2013 recommendations of the European Commission against Racism and Intolerance concerning revision of the definition of extremism in the Russian legislation have still effectively not been implemented; only in about 5 percent of cases Russian courts canceled or did not support the decisions of prosecutor's offices on declaring materials or publications as extremist; the Russian delegation does not have information on court decisions on declaring as extremist literature seized from Crimean schools, libraries and mosques.

The Russian side agreed to provide to the Ukrainian side additional explanations on this matter at the later stages of the negotiation process.

During the discussion of the second item on the agenda concerning the exchange of information on acts that had taken place or could have taken place in the Russian Federation or Ukraine and that can be qualified as acts of racial discrimination in violation of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, the Russian delegation stated that:

- the events in Ukraine that took place after February 21, 2014 were directed against the Russian Federation, Russian citizens and/or the Russian-speaking population of Ukraine;
- measures taken by Ukraine's law-enforcement bodies, in particular the ban imposed by the State Border Service of Ukraine in March-May 2014 on the crossing of the state border by 20,000 Russian citizens, the annulment of the accreditation of Russian journalists, the events in Odessa on May 2, 2014, etc. are evidence of organized persecution on the grounds of language or ethnicity;
- The Russian Federation cannot remain indifferent to the plight of Russian-speaking citizens living in eastern Ukraine, and this is why the Russian side sends humanitarian convoys there and provides other support, condemning certain calls urging to oppose "rebels" and separatist forces in eastern Ukraine as examples of racial discrimination;
- The Russian side stated that it published the so-called "White Paper," which contains examples of "violation of human rights standards in Ukraine."

The Ukrainian side requested that this information be presented in writing and noted that, if it receives a note on these matters, the Ukrainian side will respond appropriately.

The Russian delegation stated that an investigation had been launched, on the basis of Article 12 of the Criminal Code of the Russian Federation and international humanitarian law, including the Geneva Conventions of 1949, in connection with criminal acts committed against Russian citizens, including journalists, and the use in eastern Ukraine of "prohibited methods of warfare against Russian and Russian-speaking population," with the Russian Federation exercising universal jurisdiction over "crimes against the peace and security of mankind" on the basis of international law.

The Russian side regards these facts as examples of non-compliance by Ukraine with its obligations under the Convention. In this connection, the Investigative Committee of the Russian Federation sent 12 requests for legal assistance to the competent authorities of Ukraine, which have gone unanswered.

In turn, the Ukrainian side expressed the following position:

- the information, facts, and evidence which had been communicated to the Russian side through relevant notes of the Ministry of Foreign Affairs of Ukraine are qualified as acts of racial discrimination in violation of the Convention;
- the Ukrainian side presented additional information about facts and events in the Autonomous Republic of Crimea and the town of Sevastopol, which the Ukrainian side qualifies as acts of racial discrimination in violation of the Convention, namely: the violation of the right to personal security and protection by the state against violence or bodily harm, political rights, the right to freedom of movement and residence within the state, the right to leave any country, including one's own, and to return to one's own country, the right to citizenship, the right to own property individually or jointly with others, the right to freedom of thought, conscience and religion, the right to freedom of opinion and its free expression, the right to freedom of peaceful assembly and association;
- the facts and evidence which the Ukrainian side has and which were communicated to the Russian side during the negotiations and by previous notes of the Ministry of Foreign Affairs of Ukraine point to the consistent and methodical nature of relevant events and acts on the territory of the Autonomous Republic of Crimea and in the town Sevastopol;
- these events and acts target representatives of the Crimean Tatar and the Ukrainian population of Crimea as well as pro-Ukrainian residents of Crimea;
- the nature of these acts constitutes a violation of the rights of the aforesaid persons, which are protected by the Convention and compliance with which is an obligation of the parties to the Convention.

Commenting on the statements of the Russian delegation about the situation in Ukraine and the launch by the Russian Federation of investigations, the Ukrainian side:

- expressed objections as to the Russian Federation having grounds to exercise universal jurisdiction over crimes committed in that area;
- noted the primacy of Ukrainian jurisdiction on the entire territory of Ukraine;
- communicated the launch by the Ukrainian Prosecutor-General's Office at the request of the human rights ombudsman of the Verkhovna Rada [Parliament] of criminal proceedings in connection with

the offenses committed by members of the Ukrainian Armed Forces;

- reported on the progress of the review by the Ukrainian Prosecutor-General's Office of the Russian side's requests for legal assistance and the responses thereto;
- cited abundant evidence and examples of crimes committed by Russian citizens and their participation in the conflict, which had also been confirmed by international organizations, and reported that Ukrainian competent authorities were conducting investigations in that connection.

During the discussion of the third item on the agenda concerning the discussion of specific facts that prove or may prove the non-compliance by the Russian Federation or Ukraine with the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, the Russian delegation:

- presented information about the progress of an investigation by the competent authorities of the Russian Federation of certain facts which the Ukrainian side reported through notes of the Ministry of Foreign Affairs of Ukraine;
- stated that the investigating authorities of the Russian Federation do not regard the facts presented in the notes of the Ukrainian side as such that can be qualified as racial discrimination within the meaning of the Convention;
- also reported that an investigation established that the persons who, as the Ukrainian side claims, had been subjected to racial discrimination were in illegal possession of firearms, used narcotic substances, were involved in other asocial activities, and at least one of them committed suicide;
- presented statistics showing that citizens of different ethnic origins had disappeared in Crimea and noted that the statistics reflected the ethnic composition of the population as a whole;
- outlined the measures taken by competent authorities when they discover delays in investigations;
- separately commented on the legal requirements concerning procedures for the organization of peaceful assemblies of citizens in Crimea and the grounds for the refusal to grant permission for several actions by Crimean Tatars, refuting the stance that the prohibition of mass gatherings is applied in a

discriminatory manner against Crimean Tatars;

- noted the willingness to verify new facts that will be submitted by the Ukrainian side or affected persons;
- objected to the position of the Ukrainian side that the facts presented by it can qualify as racial discrimination within the meaning of the Convention on the grounds of ethnicity, language, religion or political views.

In response to the information provided, the Ukrainian delegation:

- noted discrepancies in the interpretation of and different approaches to the application of the Convention;
- noted a clear difference in the approaches applied by Russian law-enforcement bodies in the classification and investigation of offenses committed against ethnic Ukrainian and Crimean Tatar population of Crimea, on the one hand, and in cases when representatives of those ethnic groups are charged with administrative or criminal offenses, on the other hand;
- noted, citing the presented facts, the obvious systematic nature of such a treatment of ethnic Ukrainians and Crimean Tatars and the existence of grounds for assessing such facts as discrimination on the grounds of ethnicity and religion;
- demanded that the Russian side take measures on all the facts and evidence of discrimination presented by the Ukrainian side, both those communicated in writing in the notes of the Ministry of Foreign Affairs of Ukraine and those communicated verbally during talks, and take steps to end racial discrimination and to prevent it in future;
- expressed objection against the exercise of the extemporal jurisdiction of the Russian Federation in relation to events and facts that occurred prior to the occupation of Crimea by the Russian Federation.

Based on the results of the meeting, the sides noted the absence of a common interpretation of the demands of the Convention and agreed to continue to work on overcoming the differences, including by conducting at least one more round of talks.

Summarizing the results of the first round of talks, the Ukrainian side wanted to note the following:

1. The Ukrainian side noted the existence of facts and events in the occupied Autonomous

Republic of Crimea and in the town of Sevastopol that it qualifies as acts of racial discrimination within the meaning of the Convention; such acts are systematic and deliberate, whereas the actions of the Russian competent authorities aimed at their investigation are biased and ineffective;

2. The Russian side said that the competent bodies of the Russia Federation do not qualify the facts and events presented in the notes of the Foreign Ministry of Ukraine as acts of racial discrimination within the meaning of the Convention; denied any bias in the decisions made by its authorities concerning ethnic Ukrainians and Crimean Tatars or any signs that the Russian Federation violates the Convention;

3. The Ukrainian side stated that the obligations of the Russian Federation concerning the implementation of the Convention on the territory of the Autonomous Republic of Crimea and the town of Sevastopol are conferred upon it by international law in connection with the occupation of part of the territory of Ukraine;

4. The Russian side said that the self-declaration and the subsequent accession to the Russian Federation of the so-called "Republic of Crimea" are fully consistent with international law, which, however, does not affect in any way the obligation of the Russian Federation to enforce the Convention on that territory and should not be an obstacle to further negotiations;

5. The Ukrainian side expects to receive from the Russian side soon additional explanations and information on court decisions declaring as extremist literature seized from Crimean schools, libraries and mosques.

6. If it receives in writing the information presented during the talks on events which the Russian side qualifies as acts of racial discrimination, the Ukrainian side will provide a reasoned response.

7. The parties agreed to continue talks on the interpretation and application of the Convention.

The Ministry of Foreign Affairs of Ukraine avails itself of this opportunity to renew to the Ministry of Foreign Affairs of the Russian Federation the assurances of its highest consideration.

[seal:] The Ministry of Foreign Affairs of Ukraine
Identification number: 00026620

Kyiv, August 17, 2015

Annex 110

Russian Federation Note Verbale No. 11812 to the Embassy of Ukraine in Moscow (28
September 2015)

*This document has been translated from its original
language into English, an official language of the Court,
pursuant to Rules of the Court, Article 51.*

No. 11812-ii/dgptch

The Ministry of Foreign Affairs of the Russian Federation presents its compliments to the Embassy of Ukraine in Moscow, and in response to the note of the MFA of Ukraine in Moscow No.72/22-194/510-2006 dated August 17, 2015 has the honor of informing the Embassy as follows.

The Russian Party states that a single-sided description by the Ukrainian Party of the progress of consultations between the Russian and the Ukrainian delegations is not conducted in accordance with the recognized international practice. The description of the negotiation points of the Russian Party is a prerogative of the Russian Party only, and the Russian Party rejects attempts of the Ukrainian Party to present their own interpretation as an objective reflection of the consultations progress. Such an approach does not further constructive and conscientious review of issues that might be related to implementation of rights of citizens under the International Convention on Elimination of All Forms of Racial Discrimination. The Russian Party proceeds from the premise that, the issue on the necessity and

TO THE EMBASSY OF UKRAINE

the city of Moscow

Translation from Russian to English

forms of reflection of the progress of negotiations should be determined in the defined framework of the negotiation process.

The Russian Party notes that the first round of consultations, that took place between the Russian and Ukrainian delegations on the issues that might be related to the International Convention on Elimination of All Forms of Racial Discrimination dated in 1965 lasted for approximately 3 hours due to the schedule of presence of the Ukrainian Party in Minsk. The large portion of this time, per suggestion of the Ukrainian Delegation, was spent on description of factual circumstances of events that might be related to implementation of the Convention, and, as a result, the delegations did not have an opportunity to substantively discuss all the issues included in the agenda.

The Russian Federation confirms its adherence to the rigorous implementation of provisions of the International Convention on Elimination of All Forms of Racial Discrimination dated in 1965, and strengthens its willingness to continue consultations with the Ukrainian Party on the issues that might be related to application of the Convention, first and foremost, with the purpose of optimal implementation of rights and interests of individuals who have the right for protection in light of provisions of the Convention.

The Russian Party is ready to provide additional information on the issues raised by the Ukrainian Party, and, in turn, expects to receive from the Ukrainian Party responses regarding the information provided by the Russian Delegation during the negotiations in Minsk, as related to the number of facts relevant to performance by Ukraine of its obligations according to the Convention. A portion of the mentioned facts was described

for the Ukrainian Party in the note of the Ministry No. 8761/dgpch dated July 9, 2015.

At the same time, the Russian Party confirms its readiness to provide the Ukrainian Party with the information related to the issues mentioned in the note of the MFA of Ukraine No. 72/22-194/510-2006 dated August 17, 2015.

The Ministry strengthens that nothing contained in this note prejudices the position of the Russian Party in respect of the statements and the claims of the Ukrainian Party set forth in the exchange of notes on this matter.

The Ministry wishes to avail itself of the opportunity to renew to the Embassy the assurances of its highest consideration.

Moscow, September 28, 2015

[seal:] The Ministry of Foreign Affairs of the Russian Federation No. 3

Annex 111

Ukrainian Note Verbale No. 72/22-194/510-839 to the Russian Federation Ministry of Foreign Affairs (5 April 2016)

This document has been translated from its original language into English, an official language of the Court, pursuant to Rules of the Court, Article 51.

The Ministry of Foreign Affairs of Ukraine presents its compliments to the Ministry of Foreign Affairs of the Russian Federation and, in addition to notes No. 72/22-620-2403 of 23 September 2014, No. 72/23-620-2673 of 29 October 2014, No. 72/22-620-2946 of 1 December 2014, Nos. 72/22-620-3070 and 72/22-620-3069 of 15 December 2014, No. 72/22-620-297 of 6 February 2015, No. 72/22-620-705 of 30 March 2015, No. 72/22-620-759 of 3 April 2015, No. 72/22-620-966 of 24 April 2015, and No. 72/22-194/510-2006 of 17 August 2015, has the honour to state the following concerning the International Convention on the Elimination of All Form of Racial Discrimination (the “Convention”).

The Ministry of Foreign Affairs of Ukraine reiterates its grave concern that the Russian Federation, acting through its state agencies, designated representatives, individuals and legal entities, including the de facto authorities of illegally-occupied Crimea, continues to commit, encourage, and fail to prevent acts of racial discrimination in violation of the Convention. Specifically, the Russian Federation continues to engage in and support widespread discrimination against ethnic Ukrainians and Crimean Tatars and their representative institutions in the Autonomous Republic of Crimea and the City of Sevastopol. In particular, without prejudice to other violations which the Ukrainian Side has already raised or may raise, the following actions constitute violations of the Convention for which the Russian Federation is responsible:

1. Disappearance and murder of Crimean Tatar individuals, including Reshat Ametov, Timur Shaimardanov, Serian Zinedinov and numerous others;

2. Political suppression of the Tatar community and their leaders, including Russia’s five-year exclusion of Mustafa Dzhemilev and Refat Chubarov from Crimea, Russia’s prevention of other leaders’ attempts to participate in the 2015 World Congress of Crimean Tatars, numerous raids of the Mejlis and the private homes of Mejlis members and other Tatars, judicial proceedings seeking to ban the Mejlis initiated by the so-called prosecutor of Crimea in February 2016, and other actions;

3. Mass intimidation and invasion of property rights of Crimean Tatars, including raids of private homes and cultural institutions in Simferopol, the Leninskiy district, and the Dzhankoy district in January and February 2016;

4. Restrictions on the freedom of assembly, including actions in retaliation for protests against the illegal referendum in Crimea, selective

and discriminatory application of laws on freedom of assembly to the Crimean Tatars, various decrees and general laws limiting locations of and requiring approval for peaceful assemblies, and particular restrictions on assemblies to mark the European Day of Remembrance for Stalinism and Nazism, Crimean Tatar Flag Day, Human Rights Day, and other events of particular cultural importance to the Crimean Tatar and ethnic Ukrainian communities;

5. Restrictions and prohibitions on the activities of Tatar and ethnic Ukrainian media outlets, in particular Avdet newspaper, ATR television station, QHA news agency, the Chernomorskaya TV and Radio Company, and the Center for Journalist Investigations;

6. Restrictions on the right to education and training of Tatars and ethnic Ukrainians, including searches of Tatar and Ukrainian schools, and seizure or destruction of these schools' property, and closure of these schools, as well as discrimination against education in minority languages. For example, the Russian Federation's own statistics presented to UNESCO reflect a steep drop in children receiving Ukrainian-language instruction after the Russian occupation, from 12,694 to only 1,990.

Due to these and other actions by Russian authorities, ethnic Ukrainians and Crimean Tatars have suffered under a broad campaign of harassment, intimidation, and discrimination. As a result of this discrimination, thousands of ethnic Ukrainians and Tatars have been forced to flee Crimea.

The Ministry of Foreign Affairs of Ukraine recalls that the parties held negotiations over their dispute concerning these and related violations of the Convention on 8 April 2015. The Ukrainian Side further recalls that at those negotiations, the Russian Side denied that Crimean Tatars and ethnic Ukrainians have been the victims of discrimination in Russian-occupied Crimea. The Ukrainian Side must remind the Russian Side that the widespread pattern of racial discrimination by Russian authorities has been repeatedly substantiated by credible neutral sources, including the United Nations Human Rights Monitoring Mission in Ukraine. The Ukrainian Side must further express its disappointment that the Russian Federation's violations of the Convention have continued notwithstanding Ukraine's protests, including in the notes and negotiations mentioned above.

The Ministry also recalls that during the previous negotiations on April 8, 2015 the Russian Side committed to providing additional explanation and information on Russian judicial practice concerning

seizures of alleged extremist literature from Crimean schools, libraries, and mosques. The Ukrainian Side further notes that it raised this issue in note No. 72/22-194/510-2006 of August 17, 2015. The Ministry of Foreign Affairs of Ukraine expresses its disappointment that the Russian Side has not undertaken these or any other constructive steps to follow up on the previous negotiations.

In light of the lack of progress since the prior round of negotiations and the continuing grave situation with respect to discrimination in Crimea, the Ministry of Foreign Affairs of Ukraine proposes to hold further negotiations on the interpretation and application of the Convention. The Ukrainian Side proposes to hold this second round of negotiations in Minsk, Belarus on April 26, 2016.

The Ministry believes that agenda, which the parties agreed during the first round of negotiations, can be taken as a basis. Thus, during the second round of negotiations on the interpretation and application of the Convention Ministry of Foreign Affairs of Ukraine proposes to discuss the following issues:

1. Implementation of the agreements reached in the first round of negotiations;
2. Exchange of information on events that occurred in Ukraine or Russian Federation and which the Parties qualify as acts of racial discrimination within the meaning of the Convention;
3. Implementation of Ukraine and the Russian Federation of its obligations under the Convention.

The Ministry urges the Russian Side to take part in these negotiations fully prepared to address all of the acts of discrimination Ukraine has raised; to explain the basis for its disagreement with the credible neutral parties that have documented a campaign of discrimination by Russian authorities in Crimea; to discuss reparation for victims of discrimination; and to discuss measures to prevent future discrimination against ethnic Ukrainians and Crimean Tatars.

The Ministry of Foreign Affairs of Ukraine avails itself of this opportunity to renew to the Ministry of Foreign Affairs of the Russian Federation the assurances of its consideration.

Kyiv, 5 April 2016

Annex 112

Ukrainian Note Verbale No. 72/22-194/510-1023 to the Russian Federation Ministry of Foreign Affairs (26 April 2016)

This document has been translated from its original language into English, an official language of the Court, pursuant to Rules of the Court, Article 51.

72/22-194/510-1023

The Ministry of Foreign Affairs of Ukraine presents its compliments to the Ministry of Foreign Affairs of the Russian Federation and, in addition to notes No. 72/22-620-2403 of 23 September 2014, No. 72/23-620-2673 of 29 October 2014, No. 72/22-620-2946 of 1 December 2014, Nos. 72/22-620-3070 and 72/22-620-3069 of 15 December 2014, No. 72/22-620-297 of 6 February 2015, No. 72/22-620-705 of 30 March 2015, No. 72/22-620-759 of 3 April 2015, No. 72/22-620-966 of 24 April 2015, No. 72/22-194/510-2006 of 17 August 2015, and No. 72/22-194/510-839 of 5 April 2016, strongly protests against unlawful discriminatory actions targeting a representative body of Crimean Tatars, the “Mejlis of the Crimean Tatar People” (the “Mejlis”), in unlawfully-occupied Crimea.

The Ministry of Foreign Affairs of Ukraine reiterates its grave concern that the Russian Federation, acting through its state agencies, designated representatives, individuals and legal entities, including the de facto authorities of unlawfully-occupied Crimea, continues to commit, encourage, and fail to prevent acts of racial discrimination against Crimean Tatars in violation of the International Convention on the Elimination of All Form of Racial Discrimination (the “Convention”).

The Ukrainian Side in particular objects, on an urgent basis, to the recent suspension of the Mejlis, an action taken by Russian authorities with the clear intention and ultimate purpose and effect of nullifying or impairing the recognition, enjoyment or exercise by Crimean Tatars of their fundamental rights in unlawfully-occupied Crimea. Specifically, on 13 April 2016, the Russian-controlled Crimean prosecutor, Natalya Poklonska, issued an order to suspend the activity of the Mejlis for its allegedly “extremist” actions pending the decision of the so-called Supreme Court of Crimea. On 18 April 2016, the Ministry of Justice of the Russian Federation reported that it had put the Mejlis on its list of organizations whose activity is suspended for their “extremist” actions. The Russian-controlled Crimean prosecutor in a statement to the Russian news agency TASS explained that due to the suspension and restriction of its rights, the Mejlis could not use any state or municipal media, hold various public mass events, use bank accounts or engage in any activity in unlawfully-occupied Crimea. On 26 April 2016, the so-called “Supreme Court of Crimea” granted a judgment in support of the Russian-controlled Crimean prosecutor’s request to suspend activity of the Mejlis for its allegedly “extremist” actions.

The Ministry of Foreign Affairs of Ukraine is of the view that the suspension of the Mejlis has the purpose and effect of discriminating against ethnic Crimean Tatars, nullifying and impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, social, cultural or any other field of public life. The circumstances of the suspension must further be considered in light of the ongoing pattern of acts targeting Tatar individuals, political figures, businesses, and media for abuse and mistreatment, including disappearances, exiles, and attacks on the Tatar community's rights to freedom of expression and association. All of these circumstances confirm that the actions against the representative body of the Crimean Tatar people are discriminatory and a violation of the Convention. This conclusion has been confirmed by independent observers, including the United Nations, European Union, and Secretary General of the Council of Europe, as well as human rights organizations, who have urged the Russian Federation to refrain from shutting down the Mejlis.

The Ministry of Foreign Affairs of Ukraine calls upon the Russian Federation:

- to be prepared to address the suspension of the Mejlis at the upcoming round of negotiations concerning the Convention, in addition to the issues addressed in note No. 72/22-194/510-839 of 5 April 2016;
- to cease racial discrimination of ethnic Crimean Tatars and immediately reverse the illegal and discriminatory decision concerning the Mejlis;
- to acknowledge its international responsibility for racial discrimination of ethnic Crimean Tatars in the Autonomous Republic of Crimea and the City of Sevastopol;
- to comply with its obligations under international law, including obligations under the Convention;
- to offer appropriate assurances and guarantees of non-repetition of such illegal activity, and
- to make full reparation for the injury caused by its internationally wrongful acts.

The Ministry of Foreign Affairs of Ukraine avails itself of this opportunity to renew to the Ministry of Foreign Affairs of the Russian Federation the assurances of its consideration.

Kyiv, 26 April 2016

Annex 113

Ukrainian Note Verbale No. 72/22-194/510-1116 to the Russian Federation Ministry of Foreign Affairs (11 May 2016)

This document has been translated from its original language into English, an official language of the Court, pursuant to Rules of the Court, Article 51.

72/22-194/510-1116

The Ministry of Foreign Affairs of Ukraine presents its compliments to the Ministry of Foreign Affairs of the Russian Federation and in response to the Ministry's note No. 4413-Н/ДГПЧ of April 25, 2016, has the honour to inform the following.

The Ministry of Foreign Affairs of Ukraine cannot agree with the Russian Side's objection to the Ukrainian Side's summary of the first round of negotiations concerning the interpretation and application of the 1965 International Convention on the Elimination of Racial Discrimination (hereinafter, the "Convention") that took place on April 8, 2015 in Minsk, the Republic of Belarus. The Ukrainian Side offered an objective summary of the first round of negotiations in order to facilitate the negotiation process. The Ukrainian Side considers the Russian Side's objections to be unproductive and contrary to the goal of achieving a negotiated resolution of the disputed issues. With this in mind, the Ukrainian Side reserves the right to provide further objective summaries of the course and the outcomes of the negotiations.

The Ministry of Foreign Affairs of Ukraine states that it disagrees with the Russian Side's statement that Ukraine has not provided specific information and has given vague summaries of its allegations. The Ukrainian Side, in the first round of negotiations and in its notes No. 72/22-620-2403 of September 23, 2014, No. 72/22-620-3070 of December 15, 2014, No. 72/22-620-297 of February 6, 2015, No. 72/22-620-759 of April 3, 2015, No. 72/22-620-966 of April 24, 2015, No. 72/22-194/510-893 of April 5, 2016 and No. 72/22-194/510-1023 of April 26, 2016, has identified specific facts and circumstances that constitute violations of the Convention. The Ukrainian Side looks forward to discussing these violations at the upcoming round of negotiations.

The Ministry of Foreign Affairs of Ukraine reiterates its position expressed in the note No. 72/22-620-705 of March 30, 2015, concerning the subject-matter of the negotiations, and notes again that Ukraine intends to engage in negotiations to discuss specific facts and circumstances that constitute violations of the Convention by the Russian Federation, including claims raised in diplomatic notes and during the first round of negotiations, with the objective of resolving a dispute between Ukraine and Russia with respect to the interpretation or application of the Convention. The Ukrainian Side also confirms, in response to statements in the Russian Side's note dated 25 April 2016, that Ukraine will be prepared to address the allegations that have previously been made against it by the Russian Federation. With this in

mind, the Ukrainian Side cannot agree with the agenda proposed by the Russian Side for the second round of negotiations. The agenda proposed in the Ukrainian note No. 72/22-194/510-839 of April 5, 2016 is consistent with the agenda followed and agreed upon during the first round of negotiations, and is intended to focus the discussion on the central issues between the parties.

The Ukrainian Side reiterates its position expressed during the first round of negotiations concerning the first item of the Russian proposed agenda, “the general framework of interpretation and application of the [Convention], including a potential exchange of good practice for the highest level of protection of rights and legitimate interests of persons entitled to the protection under the Convention.” The Ukrainian Side believes that the general discussion proposed by the Russian Side would be an inefficient use of time and would distract from addressing the dispute between the parties. If the Russian Side believes that there are particular issues concerning the general framework of the Convention or good practices relating to it, which might be useful to resolve the existing dispute, the Ukrainian Side urges it to communicate this information in writing before the second round of negotiations. Any such matters can appropriately be discussed with reference to particular instances of possible discrimination under the Convention.

Furthermore, the Ukrainian Side cannot understand the purpose of the discussion of the second item of the Russian proposed agenda, “issues of human rights protection of individuals belonging to national minorities, specifically focusing on those living in the Crimean Peninsula, under the Convention during 1992-2013,” and how it relates to the subject-matter of the negotiations. If the Russian Side has any claims against Ukraine under the Convention based on events during the period 1992-2013, it should communicate this information in writing before the second round of negotiations so that the Ukrainian Side can be ready to discuss any appropriate issues.

Against this background, the Ministry of Foreign Affairs of Ukraine expresses its readiness to meet with the Russian Side on May 31, 2016, in Minsk, the Republic of Belarus, with the purpose to engage in negotiations to resolve a dispute concerning application and interpretation of the Convention. The Ukrainian Side hopes that the agenda can be established in advance of the negotiations in order to maximize time for substantive discussion, and anticipates that the Russian Side will act constructively to resolve expeditiously any remaining disagreement on the agenda at the beginning of the negotiations.

The Ministry of Foreign Affairs of Ukraine avails itself of this opportunity to renew to the Ministry of Foreign Affairs of the Russian Federation the assurances of its highest consideration.

Kyiv, 11 May 2016

Annex 114

Russian Federation Note Verbale No. 5774 to the Embassy of Ukraine in Moscow (27
May 2016)

*This document has been translated from its original
language into English, an official language of the Court,
pursuant to Rules of the Court, Article 51.*

No. 5774-н/дгпч

Ministry of Foreign Affairs of the Russian Federation presents its compliments to the Embassy of Ukraine to the Russian Federation and referring to the diplomatic note of the MFA of Ukraine No. 6111/22-012-1156 as of May 11, 2016 has the honor to inform on the following.

The Ministry considers to be inconsistent with generally accepted diplomatic practice the actions of the Ukrainian Side, which without consent from the Russian Side sets its hands to “the objective summary of the outcomes” of the discussion held during bilateral consultations, and, moreover, in response to Russia's objections to this methodology of fixing the outcomes of discussion continues to insist on its right to “continue providing the objective exposition of the outcomes regarding the course and results of the negotiations”. Such approach is not conducive to good faith and constructive dialogue in order to the best implementation of 1965 the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter – the Convention) in the interests of the persons entitled to protection under the Convention. The issue of how to record the outcomes of the consultations should be decided by agreement between the Parties.

The Russian Side is always open for discussion of any events and incidents, which according to the opinion of the Ukrainian Side may be relevant to the implementation of the Convention, and which are declared verbally or in writing. During the previous round of consultations on 8 April 2015 the Ukrainian delegation fully used the opportunity to present the materials and put questions orally. In the spirit of openness and establishing the constructive dialogue the Russian Side did not oppose such form of presentation and conducting discussion. At the same time the Russian Side assumes that constructive discussion suggests equal opportunities for both delegations, and therefore reserves the right to present materials and put questions both orally and in writing.

If the Ukrainian Side is interested in a constructive discussion, then the Ministry insists that Ukrainian Side should refrain from frequently used vague generalizations, for example «and many others», «and other activities», «thousands of Ukrainians and Crimean Tatars».

The Ministry would like to note that the agenda of the upcoming consultations should reflect the opinion of both delegations and should not prejudice their outcome. In order to meet the suggestions of the Ukrainian Side the Russian Side agreed during the previous round of discussions on 8 April 2015 to begin a discussion with the specific events and incidents that would presumably be relevant to the implementation of the Convention. Also the delegations reached the understanding, that after such a discussion the Parties will discuss the general framework of interpretation and application of the Convention. However, due to lack of time, this issue was not discussed, thus it was reserved for the discussion during the next round of consultations. Therefore, the Russian Side insists that it should be discussed during the forthcoming meeting in Minsk.

**Embassy of Ukraine
Moscow**

Discussion regarding general scope of interpretation and application of the Convention has significant practical importance, as it enables delegations to exchange

information regarding their national legislation aimed at the implementation of the provisions of Convention, and provides a better understanding of application of the provisions of the Convention in any given situation and the applicable means of legal protection. Discussion concerning that issue provides both delegations with ability to point out their standards and expectations they have regarding the implementation of the Convention, and share their best experience in that sphere and provide each other with recommendations concerning improvement of the situation, where it is necessary. This, in turn, enables the Parties to remove concerns connected with the application of the Convention and improve modalities of its implementation, where necessary. Particularly, Ukrainian Side expressed its interest to the Russian legislation and judicial practice regarding extremist literature. That issue can be discussed within the framework of the present item of agenda. Additionally, the Russian Side expects Ukrainian delegation to be prepared in course of consultations to provide the information concerning its legislation and practice in that sphere, as well as any other legislation and practice, connected to fulfillment of its duties under the Convention, particularly legislation and practice concerning conducting of meetings, forums and marches, legislation and practice concerning assurances of the freedom of media and particularly the issue of prohibition for television channels to perform broadcasting. Furthermore, the Russian Side is interested to receive information concerning the legislation and practice of providing access to education in Russian language in the territory of Ukraine, as well as dynamics in the number of schools, which provide teaching in Russian and Ukrainian languages, particularly the number of such schools in 1991 and 2016.

The Russian Side also considers it necessary to discuss in the course of consultations the situation with the fulfillment of obligations under the Convention on the territory of the Crimean Peninsula in the period from 1992 till 2013. The Ukrainian Side proposes to discuss events and situations, which may be connected with implementation of the Convention in this territory after 2013. However this discussion cannot be complete or objective without understanding of the situation that has arisen with the implementation of the Convention in this territory to the said moment. Additionally, reviewing of that issue would allow revealing practical approaches of Ukraine to the application of the Convention.

Taking into account the abovementioned, the Russian Side is prepared to provide the Ukrainian Side with the specific information on this issue during the upcoming consultations and presumes that the Ukrainian Side will be prepared to comment on the situation with implementation of its obligations under the Convention on the territory of Crimea during the period from 1992 through 2013.

The Russian Side also expects that Ukrainian delegation will be ready to give the relevant comments regarding the specific events and incidents, connected with realization of the Convention by Ukraine, which were listed by the Russian delegation during the previous round of consultations on April 8, 2015, and indicated in the note № 8761-Н/ДГПЧ as of July 9, 2015.

The Russian Side expresses its satisfaction with the fact that the Ukrainian Side is ready to participate in the consultations on May 31, 2016 in Minsk, Republic of Belarus, and counts on the constructive and conscientious discussion of the issues, connected with the realization of the Convention, aiming to the best implementation of its provisions in the territory of Russia and Ukraine.

The Ministry underlines that all the foregoing is without prejudice to the position of the Russian Side in respect of the statements and allegations contained in the respective

notes Ukrainian Side. Discussion of any questions in course of the upcoming consultations is without prejudice to the question of whether they fall into the scope of the said Convention, as well as the question of whether domestic remedies or international mechanisms, including those under the Convention, are applicable to them.

The Ministry avails itself of this opportunity to renew to the Embassy of Ukraine in Moscow the assurances of its highest consideration.

Moscow, May 27, 2016

Annex 115

Russian Federation Note Verbale No. 5787 to the Embassy of Ukraine in Moscow (27
May 2016

*This document has been translated from its original
language into English, an official language of the Court,
pursuant to Rules of the Court, Article 51.*

№5787-n/dgpch [ДГПЧ]

The Ministry of Foreign Affairs of the Russian Federation presents its compliments to the Embassy of Ukraine in Moscow and, referring to the earlier notes №14279/2dsng dated October 16, 2014; №15642/2dsng dated November 27, 2014, №17004/2dsng dated December 8, 2014, №2697-n/dgpch dated March 11, 2015, №4192-n/dgpch dated April 6, 2015, №8761-n/dgpch dated July 9, 2015, №11812-n/dgpch dated September 28, 2015 and №4413-n/dgpch dated April 25, 2016 as well as the consultations held at Minsk, Republic of Belarus, on April 8, 2015, has the honour to draw attention to the number of facts related to the fulfilment by Ukraine of its obligations under International Convention on the Elimination of All Forms of Racial Discrimination of 1965.

In accordance with Article 1 of the Convention and the basic obligations provided for by Articles 2 and 5 of the Convention, State Parties are obliged to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

The Embassy of Ukraine

in Moscow

- The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution (Article 5b);
- The right to freedom of movement and residence within the border of the State (Article 5d);
- The right to freedom of thought, conscience and religion (Article 5d);
- The right to freedom of opinion and expression(Article 5d);
- The right to freedom of peaceful assembly and association (Article 5d);
- The right of access to any place or service intended for use by the general public (Article 5f);

In this respect, the Russian side wants to draw attention to the following facts and information related to the acts or actions in respect of representatives of Russian speaking or Russia's mass media who reside and carry out their professional activities in the territory of Ukraine, namely:

- On 23.01.2014, Mr. A.Kisilev, a representative of the Russian news resource "Lenta.ru", was detained in Kyiv by law enforcement officers and transported to Obolonsky Police Department where he was beaten that resulted in numerous wounds and bruises.
- On 31.01.2014, Mr. N.Perfyliev and Mr. A. Zakharov, correspondents of the news resource "KazanFirst", were kidnapped in Kyiv and beaten with cruelty by law enforcement officers of Ukraine;

- On 20.02.2014, Ms.D.Anisimova, Mr.A.Yaroshevsky and Ms.E.Piskunova, correspondents of the TV channel “Russia Today”, were caught under fire in Kyiv city center;
- On 14.03.2014, Mr. P.Nikylin, a journalist of “The Russian Planet”, was beaten by units of so called self-defence. The assaulters took away his passport and threatened him with a gun;
- On 14.03.2014, Mr.V.Kozhemyakin, a correspondent of “The Arguments and Facts” newspaper was detained by the SBU officers for 3 days and interrogated “with predilection”. The journalist was banned to enter Ukraine for three years;
- On 15.03.2014, Mr. I.Petrov, a journalist of the “RBK” newspaper, was taken off the train “Moscow - Sevastopol” by Ukrainian frontier guard and detained for 6 hours. He was prohibited to enter the territory of Ukraine;
- On 19.03.2014, a videographer of the NTV channel was denied to enter the territory of Ukraine in the airport of Kharkiv;
- On 19.03.2014, Mr. A.Khudiakov, a correspondent of “Segodnia.ru” was kidnapped by persons who introduced themselves as employees of the Security Service of Ukraine (SBU). The journalist was forced under threats to sign documents on his consent to cooperate with the SBU. His SIM and memory cards were seized and his video and photo materials were deleted. Mr. A.Khudiakov was deported from the country;
- On 20.03.2014, A.Buzaladze, S.Yeliseieva, S.Zavidova and M.Isakova, correspondents of the Russian TV channel “Russia 1”, were detained in Donetsk and brought out to “Vasilievka” checkpoint where they were kept without any explanations for several hours before they were deported;
- On 29.03.2014, I.Ielkov, K. Zavrazhyn and Y.Tiunev, journalists of the “Ruskaia gazeta” and TV channel “Ren-TV”, were detained by the SBU

over a night and, then, deported from Ukraine. All of them are forbidden to enter the territory of Ukraine;

- On 02.04.2014, R.Super, a journalist of the TV channel “Ren-TV”, was detained in the airport of Odessa and deported afterwards;
- On 08.04.2014, a correspondent of the news agency “RIA Novosti” was not permitted by officers of the Kharkiv Regional State Administration to join an excursion for journalists in the building of the Administration. It was motivated by the fact that the correspondent represented Russian news agency;
- On 08.04.2014, A. Mayorov and S. Gurianov, correspondents of the “5th Channel”, were detained in the airport of Kharkiv where their passports were temporarily taken away. They were denied to enter the territory of Ukraine;
- On 09.04.2014, A.Kolesnikov and D.Azarov, correspondents of the “Commersant” newspaper, were taken off the train “Moscow - Donetsk” in Kharkiv and sent to Belgorod (Russia);
- On 14.04.2014, R.Zhuravlev, a representative of the “Ura.ru” information resource, was detained in the Borispil airport. He was prohibited to enter the territory of the country for 5 years;
- On 16.04.2014, E.Reshetneva, S.Truskov and V.Klivanov, correspondents of the “VGTRK” TV channel, were detained until 17.04.2014 in the area of the town of Iziium, Kharkiv region;
- On 17.04.2014, K.Babayeva and M.Povaliaieva, reporters of the “Life news” TV Channel, were detained by local police in the city of Mariupol for more than 24 hours;
- On 18.04.2014, a correspondent of the “Gazeta.ru” publication, was taken off the train “Moscow- Mariupol”;

- On 23.04.2014, S.Chyrych (national of the Republic of Belarus), a reporter of the “NTV” TV Channel, was detained near Pervomaisk, Dneprovsk region. He was placed under house arrest until the end of May;
- On 25.04.2014, A.Rogatkin, a reporter of the “VGTRK” TV company, was denied to enter the territory of Ukraine;
- On 06.05.2014, a camera crew of “The TV Center” led by V.Kuzmina, which was heading to Kyiv for the coverage of forthcoming presidential elections, was not allowed to enter the territory of the country. They were detained at passport control in the Borispil airport of Kyiv City;
- On 06.05.2014, A.Kazannikova and A.Matveiev, reporters of the “Life news” TV channel, caught under mortar shelling near the city of Sloviansk;
- On 09.05.2014, F.I.Zavaleykov, a reporter of the “RT” “RUPTLY” video information agency, was severely wounded in the stomach while carrying out his professional duties at the centre of Mariupol by an unidentified persons who were members of military or law enforcement officers;
- On 11.05.2014, P.Kanygin, a correspondent of “Novaya Gazeta”, was detained somewhere between Artemivsk and Sloviansk and brought to Kyiv. Subsequently, he was released, but the reasons of the detention has not been explained.
- On 13.05.2014, a group of journalists of “Life News” (O.Sydiakina, M.Saichenko, M.Abulhatin) was shot near Kramatorsk;
- On 15.05.2014, a camera crew of “TV Center” (N.Vasiliev, I.Kozhukhov, N.Medvediev) which was heading to Kyiv for news coverage of forthcoming presidential elections, was detained while undergoing passport control in the Borispil airport;

- On 15.05.2014, an automobile with the reporters of the Russian “5th Channel” and “RUPTLY” video agency which was heading from Kramatorsk to Dmytrivka, was fired upon;
- On 16.05.2014, a camera crew of the “Zvezda” TV channel led by the A.Nikolaiev, which was heading to Kyiv for the coverage of forthcoming presidential elections, was denied to enter the territory of Ukraine. Members of the crew were detained while undergoing passport control in the Borispil airport in Kyiv.
- On 18.05.2014, O.Sydiakin and M.Saichenko, Russian journalists from the “Life News” news agency, were kidnapped in the area of Kramatorsk. They were released only on 25th of May;
- On 19.05.2014, K.Kybkalo, a reporter of “VGTRK”, who worked together with a camera crew in Zakarpattia [Western Ukraine], was forced to leave the territory of Ukraine within a day because law-enforcement authorities threatened to deport her and initiate a criminal case against her;
- On 20.05.2014, a camera crew of the “RT” TV channel led by A.Knyshenko, which was heading to Kyiv for the coverage of forthcoming presidential elections, was denied to enter the territory of Ukraine;
- On 21.05.2014, a camera crew of the “5th channel” led by K.Rozhkov, which was heading to Kyiv for coverage of forthcoming presidential elections, was not permitted to enter the territory of Ukraine;
- On 21.05.2014, A.Chukanova and D.Vyshkevych, correspondents of “VGTRK” TV channel, who were heading to Kyiv for the coverage of forthcoming presidential elections, were not permitted to enter the territory of the country. They were detained in the Borispil airport of Kyiv during passport control;

- On 22.05.2014, an automobile of the “LifeNews” camera crew consisting of A.Repin and A.Melnikov was fired upon near Lysychaisk;
- On 23.05.2014, A.Serychenko and A.Peleshok, reporters of the “RT” TV channel who were heading to Kyiv for the coverage of forthcoming presidential elections, were not permitted to enter the territory of Ukraine;
- On 23.05.2014, I.Azar, a journalist of the “Eho Moskvyy” radio station, was denied to enter the territory of Ukraine;
- On 24.05.2014, a camera crew of “VGTRK” led by the special reporter A.Rogatkin, which intended to cover the presidential elections in Ukraine, was taken off the train in Konotop, Sumska oblast. The journalists were detained despite the fact that they were accredited by the Central Election Commission of Ukraine;
- On 24.05.2014, resulting in a mortar shelling of Andreyevka, Slaviansk region of the Donetsk oblast, organised by the military forces of Ukraine, a national of Italian Republic A.Rokkelli, a photographer, and his Russian companion N.A.Myronov, a human rights activist, were killed;
- On 27.05.2014, a camera crew of “MIR 24” led by M.Krasotkin, was fired upon by snipers in Donetsk;
- On 29.05.2014, a camera crew of the “Russia 24” TV channel was fired upon in Donetsk while filming in the airport;
- On 29.05.2014, P.Parhomenko, a reporter of the “Commersant FM” radio station, who headed to Chernobyl, not to the southeast of the country, was not allowed to enter the territory of Ukraine and was forced to take a return flight;
- On 30.05.2014, A.Kots, a correspondent of the “Comsomolskaia Pravda” newspaper, was prohibited to enter the territory of Ukraine until 15 May, 2014;

- On 05.06.2014, Oleg Liashko, a member of the Parliament, the leader of the Radical Party of Ukraine, expelled from the building of Verkhovna Rada of Ukraine the camera crew of the “VGTRK” TV channel headed by A.Balytskyi;
- On 06.06.2014, A.Syshenkov and A.Malyshev, correspondents of the “Zvezda” TV channel, were detained at a checkpoint near Slaviansk. The journalists were subsequently transmitted to SBU. They were released after midnight July 9;
- On 11.06.2014, A.Ievstegneiev and D.Kiyanovskyi, reporters of “Pervyi Kanal”, were fired upon in the township of Semenovka near Slaviansk, which was under the control of military forces of Ukraine;
- On 14.06.2014, E.Davidov and N.Konashenkov, reporters of the “Zvezda” TV channel, were detained by SBU officers at the checkpoint located on the Donetsk – Dniepropetrovsk rout. Their money and valuables were taken away. During interrogations, they were beaten. On 16th of June they were released;
- On 16.06.2014, A.Stenin and A.Krasnoshchekov, reporters of the “Ria News” news agency and “RT” “RUPTLY” video news agency, as well as A.Kots and D.Steshin, correspondents of the “Komsomolskaia Pravda” newspaper, were fired upon near Slaviansk;
- On 17.06.2014, A.Voloshyn, a soundman, and I.Korneliuk, a reporter of “VGTRK”, came under mortar shelling near settlement of Metalist on the outskirts of Luhansk. A. Voloshyn was killed at the place of the shelling, and I.Korneliuk died at a Luhansk hospital;
- On 24.06.2014, a camera crew of “Pervyi Kanal” was shelled by mortars near Slaviansk;

- Over the night from 29.06.2014 to 30.06.2014, A.Klian, a videographer of “Pervyi Kanal” was fired upon near military base on the outskirts of Donetsk. A.Klian was mortally injured in stomach and died on the way to a hospital;
- On 01.07.2014, D.Kulaga and V.Yudin, reporters of the “Ren TV” were fired by mortars at the checkpoint of Izvaryno, Luhansk region. As a result of the fire, both of them were shell-shocked;
- On 03.07.2014, a camera crew of “Pervyi Kanal” was fired upon in Luhansk;
- On 11.07.2014 Y. Snegiriov, a correspondent of “Rosiyskaia Gazeta”, was fired by mortars in Luhansk;
- On 11.07.2014, V.Moroz, a reporter of “Life News” was fired by mortars in Luhansk. As a result of the fire his arm was wounded;
- On 14.07.2014, Y.Rozhkov, a reporter of “Russia 1”, was denied to enter the territory of Ukraine without any explanations;
- On 01.08.2014, A.Yeprimian, a reporter of “RT” “RUPTLY” video news agency, was detained by Ukraine’s law-enforcement officers. After interrogations, she was ordered to leave the territory of the country within the next two days;
- On 06.08.2014, as the result of Ukrainian military’s fire upon the convoy of refugees near Snezhnoye, Donetsk region, A.Stenin, the reporter of the “Rosia Segodnia” international news agency who covered the movement of the convoy, was killed;
- On 14.08.2014, the National Television and Broadcasting Council of Ukraine obliged providers to switch off the Russian-language version of “Euronews” TV channel;

- On 22.08.2014, journalists of "Russia today", "ITAR-TASS", "NTV", "Pervyi Kanal" were fired upon by mortars while performing their professional duties in Lugansk;
- On 28.08.2014, the National Television and Broadcasting Council of Ukraine announced the list of 49 journalists and Russian TV channel managers who were prohibited to enter the territory of Ukraine. The list included the following persons: Konstantin Ernst, Ivan Okhlobystin, Dmitry Kiselev, Julia Chumakov, Irada Zeynalov, Ivan Prozorov, Mikhail Leontyev, Ekaterina Andreeva, Alexander Evstigneev, Vitaliy Eliseev, Peter Tolstoy, Pyotr Fedorov Oleg Dobrodeev Alexei Balitchi Julia Bystritskaya Evgeny Popov, Andrey Kondrashov, Zafir Salem, Boris Korchevnikov, Eugene Snipes, Evelyn Zakamskaya Vladimir Kulistikov, Kirill Pozdnyakov, Anastasia Litvinova, Irina Varlamov, Andrei Dobrov, Alexei Pushkov, Ashot Gabrelyanov, Ermina Katondzhyan Anatoly Suleymanov, Catherine Agafonov, Stanislav Grigoriev, Sergei Dorenko, Alexey Efimov, Maxim Kiselev, Sergey Skripnikov Anton Zlatopolsky, Vitaly Harutyunyan, Andrey Kunitsyn, Maxim Berezikov, Alex Brodsky, Margarita Simonyan, Kuzmina Vera, Anna Prokhorova, Semen Pegov Alexei Pimanov Ilya Doron, Vladimir Solovyov, Arkady Mamontov;
- On 01.09.2014, a journalist of the "Echo Moskvyy" radio station T.Olevskii and "Forbes" correspondent A. Dzhemal were detained by soldiers of nationalistic battalion of "Azov";
- On 09.09.2014, upon the claim of National Television and Broadcasting Council of Ukraine, Kyiv District Administrative Court banned broadcasting of 15 Russian channels in the ethereal and cable networks of the country, including "Pervyi Kanal. Vsemirnaia Set", "RTR-Planeta", "NTV-Mir", "Russia 24", "TVCI", "Russia 1", "NTV", "TNT", "Petersburg-52" "Zvezda", "REN TV", "RBC-TV", "Life News", "RT" and "Istoria";

- On 01.10.2014, M.Musin, a Russian scientist and head of the “Anna-news” news project, and his colleagues were captured by Ukrainian security forces;
- On 10.10.2014, V. Donskoy, an independent journalist, died on the Russian-Ukrainian border while returning from Ukrainian security forces captivity;
- On 15.10.2014, A.Dotsenko, a journalist of “Channel 7” (Ukraine) was fired for the assistance to Russian journalists to prepare a reportage about the monument to the city founders;
- On 16.10.2014, State Committee for Television and Radio Broadcasting of Ukraine together with the law-enforcement authorities of the country, State Registration Service, and Post of Ukraine revoked licences of several print mass media which contained the word “Russian” in their names. According to the State Committee for Television and Radio Broadcasting, such measures were taken within the framework of the program on "purification of the domestic information space from the separatist press".
- On 22.10.2014, an attempt to pressurise E. Anokhin, chief editor of the "Information Centre" website registered in Ukraine, was made by detaining him in Odessa without any explanations.
- On 22.10.2014, a Russian-speaking freelance correspondent of the “Ridus” civic news agency (Ukraine) was beaten near the office of “Parnas” party, where demonstration of the film devoted to N.Savchenko took was taking place.
- On 24.10.2014, searches were carried out in the Kyiv offices of the organisations engaged in Russian TV channels broadcasting. The reasons for the searches were not specified.

- On 04.11.2014, Zh.Karpenko, a journalist of the "Life News" TV channel, was detained and transported to a police department after she was asked questions by Ukrainian journalists who surrounded her in the Maidan;
- On 14.11.2014, a camera crew of the TV channel "NTV" headed by K.Reshetnev was fired upon by Ukrainian armed forces near Luhansk while filming a reportage about the events around Stanitsa Luganskaya located about 15 km North-East of the administrative center where severe fights were taking place. Ukrainian security forces fire upon exactly the place where was the "NTV" camera crew.
- On 19.11.2014, D. Tarhov, a correspondent of "REN TV", and A.Oy, a cameraman, were deported from the territory of Ukraine at the Boryspil airport of Kyiv;
- On 26.11.2014, members of "Pravyi Sektor" in Kyiv, through threats of violence, forced E.Kozlovskaya (she uses nickname Zmanovskaya for professional activities), a journalist of "LifeNews" TV channel, to promise to stop the spread of "false information";
- On 27.11.2014, Markiyan Lubkivsky, an adviser to Head of State Security Service of Ukraine, wrote on his Facebook timeline that, "for the period of the Russian aggression against Ukraine, State Security Service of Ukraine has issued a ban to enter the territory of Ukraine for 83 Russian journalists who represented the following Russian mass media: "Zvezda ", "VGTRK", "LifeNews" and others (10 were deported forcefully, 73 - were denied to enter the territory of the State);
- On 01.01.2014, Zh.Karpenko, a journalist of the "LifeNews" TV channel, was assaulted while filming a reportage about the torchlight procession dedicated to the birthday of Stepan Bandera;

- On 10.01.2014, a group of unidentified persons in balaclavas bombarded the editorial office of the "Slavyanka" newspaper (Ukraine) with the Molotov cocktails;
- On 16.01.2014, at the public action for the resignation of the Prosecutor General of Ukraine V.Yarema, about 20 people assaulted Zh.Karpenko, a "LifeNews" correspondent, and A.Ulianov, a videographer, took away and broke down their expensive filming equipment;
- On 20.01.2015, the leaders of Pravyi Sector and so called "force units of Maidan" stated that they had started to pursue Russian journalists with the purpose to obstruct their professional activities. According to the reports of the "Life News" TV channel, it has got in its possession the records of conversations between the activists of radical organisations where the men under the nicknames of "Roman Kyiv", "Zhaket", "Zliuka Bober" and others were planning provocations and discussing the most successful ways of the 'hunt';
- On 20.01.2015, a camera crew of the "Russia-24" TV channel was fired upon while shooting a reportage about the bus stricken by a mortar shell in the Kyiv district of Donetsk;
- On 23.01.2015 a camera crew of the independent journalist A.Kochkina was fired upon in the region of Horlivka where a children hospital was shelled earlier that day;
- On 27.01.2015, Security Service of Ukraine initiated a criminal case against the Lugansk branch office of the Ukrainian Broadcasting, Radio Communication and Television Concern for broadcasting Russian TV channels;
- On 30.01.2015, E.Hramtsev, a journalist of "LifeNews", and N.Kalysheva, a camerawoman, were detained by Security Service of Ukraine and, subsequently, deported from the territory of Ukraine. Their residence

permits have been terminated. In addition, they were prohibited to enter the territory of Ukraine for 5 years;

- On 11.02.2015 and 12.02.2015, the security officers of the President of Ukraine P.Poroshenko obstructed the work of P.Zarubin and O.Skabeeva, journalists and political commentators of “VGTRK”, during the meeting of the “Normandy Four” in Minsk. Mr. P.Zarubin was taken away and locked for a while in a separate room for his clear but loud question when President Poroshenko appeared. Ms. O.Skabeeva was not allowed to ask a question - a security officer of the President of Ukraine literally shut her mouth up with a rough movement pressing her down to his body;
- On 12.02.2015, Verhovna Rada of Ukraine adopted Resolution No. 185-VIII “On the temporary termination of the accreditation granted by the Ukrainian state authorities to the journalists and representatives of certain mass media of the Russian Federation”;
- On 12.02.2015, SBU officers arrested A.Zaharchuk, a reporter holding Ukraine citizenship, who was collaborating with “Nevskiye novosti”, a Russian information agency. They initiated a criminal case on the fact of treason by the journalist;
- On 25.02.2015, Security Service of Ukraine detained and subsequently deported from Ukraine A.Hryhoriev, a journalist of “NTV” channel, and E.Makarov, a journalist of the “Pervyy Kanal”, who were covering nationalist march in Kyiv;
- On 25.02.2015, I.Osipova, a journalist of the “NTV” TV channel, was denied to enter the territory of Ukraine;
- On 26.02.2015 Zh.Karpenko, a journalist of the “LifeNews” TV channel, and A.Ulianova, a camerawoman, were denied to enter the territory of Ukraine. The Journalists were banned to enter the territory of Ukraine

despite the fact that the Kyiv court was considering the case on the assault against them during the torchlight procession in Kyiv on 01.01.2015;

- On 26.02.2015, M.Lubkivskyy, an adviser to Head of Security Service of Ukraine, informed all Ukrainian journalists collaborating with or assisting to their Russian colleagues about a criminal liability for “assistance to the aggressor, in particular, for carrying out subversive information activities against Ukraine”;
- On 05.03.2015, Ministry of Foreign Affairs of Ukraine terminated accreditation of Russian mass media for the events organised by the Ministry;
- On 13.03.2015 a cameraman of the “Novorossiia-TV” was arrested by Security Service of Ukraine;
- On 15.03.2015, O.Moroz, a chief editor of the “Neteshynskyy vestnik”, was found dead in her apartment with the signs of violence;
- On 24.03.2015, a group of the Russian journalists of the “REN TV” was fired upon near Shyrokin from the positions of Ukraine military forces while following OSCE special monitoring mission convoy observing cease-fire regime. The driver of the group was wounded;
- On 13.04.2015, S.Suhobok, a journalist of the “ProUA” and “Obkom” internet portal, was killed in Kyiv;
- On 16.04.2015, O.Buzina, a TV journalist and a writer, was shot dead near his home in Kyiv;
- On 02.05.2015, D.Kataev, a journalist of the “Dozhd” Russian TV channel, was denied entry to Ukraine in the Odessa airport. He was detained and expelled from Ukraine. The journalist was handed a decision on the denial to enter Ukraine;

- On 23.05.2015, Security Service of Ukraine did not allow A.Shalimova, a journalist of the German-language TV channel “RT Deutsch”, a national of Germany, to enter the territory of Ukraine. In the airport premises, she was handed in the order on the prohibition to enter the territory of Ukraine for next three years. Less than 3 weeks before that, A.Shalimova visited Odessa with the purpose to shoot a film about the tragedy in the Trade Union Building of May 2, 2014;
- On 01.07.2015, A.Cherepnyna, a journalist of “Pervyy Kanal”, was kidnapped and deported from the territory of Ukraine with the prohibition to enter the territory of Ukraine during the next three years. Then, she was interrogated and was not allowed to contact her family members and colleagues for several days;
- On 20.07.2015, a camera crew of “REN TV” was fired upon near village of Horlivka, Donetsk region;
- On 23.07.2015, National Television and Broadcasting Council of Ukraine prohibited broadcasting of the following Russian TV channels in Ukraine: “Dom kino”, “Oruzhiye” and “Illiuzion”;
- On 12.08.2015, a camera crew of the “REN TV” was fired upon in the area of the Donetsk airport;
- On 03.09.2015 a discriminatory Law No.1831 “On Amending Certain Legislative Acts of Ukraine Regarding Ensuring Transparency of the Ownership of the Mass Media, as well as Realisation of the Principles of State Policy in the TV and Radio Broadcasting” was adopted. According to the Law, individuals and legal entities registered in the offshore jurisdictions, stateless persons, individuals and legal entities of a state recognised by Verkhovna Rada as a ‘state-aggressor’ or ‘state occupant’, were prohibited to found or participate in TV-organizations or providers of the program services;

- On 16.09.2015, President of Ukraine P.Poroshenko signed an order bringing into force the decision of National Security and Defense Council of Ukraine “On Imposition of Special Individual Economic and Other Measures (Sanctions)” dated September 2, 2015 which contains approximately 400 individuals and more than 100 legal entities from the Russian Federation and other countries, including Russian journalists and mass media organisations;
- On 22.01.2016, a Russian channel “Comedia TV” was removed from the list of the channels authorised for being rebroadcasted in Ukraine’s cable networks based upon a decision of National Television and Broadcasting Council of Ukraine. The reason for such prohibition was that the channel broadcasted films with the actors holding Russian citizenship who were deemed “to be a threat to the national security of the state” (G.Depardieu, M.Porechenkov, O.Tabakov, F.Bondarchuk, V.Gaft, V.Gostyukhin);
- On 18.02.2016, upon a decision of National Television and Broadcasting Council of Ukraine, the following channels were excluded from the list of the channels authorised for being rebroadcasted in Ukraine’s cable networks: “Telecafe”, “Muzyka Pervogo”, “Vremia: dalekoe i blizkoe”, “Dom kino”, “Dom kino PREMIUM”, “Bober”, “Moya Planeta”, “Nauka 2.0.”, “Zhyvaya Planeta”, “strana”, “24 DOC”, “T24”, “Mult”, “IQ HD”, “MAMA”, “Russkiy roman”, “Russkiy detective”, “Russkaya comedia”, “Russkiy bestseller”, “Bestseller +”, “RiT”, “Park razvlecheniy”, “Rossia segodnia”, “SPUTNIK”, “Russkaya sluzhba novostey”, “VOENNAYA TAYNA”, “NTV PLUS SPORT”, “Kinosoyuz”, “Kinoklub”, “Nashe novoe kino”, “Moskva 24”, “Telekanal Soveta Federatsii”, “Obschestvennoe televidenie Rossii”, “Kino est kino”, “Mir Seriala”, “Zvezda”, “Sovershenno Secretno”, “Shanson-TV”, “Avto Plus”, “Kuhnia TV”, “KHL”, “Boetz”, “Nastoyashchee strashnoe televidenie”, “Sarafan”;

- On 24.02.2016, a Russian journalist M.Stoliarova, editor-in-chief of the “Podrobnosti Nedeli” TV program and creative production director of the “Inter” TV channel, was deported from Ukraine because of her professional activities;
- On 14.03.2016, at the line of contact in Donbas, Ukrainian military forces performed a massive shelling of the settlement of Zaytsevo near Horlivka where camera crews of “Pervyy Kanal” and “Zvezda” channels came under fire;
- On 17.03.2016, according to a decision of National Television and Broadcasting Council of Ukraine, the following Russian channels were excluded from the list of the channels authorised for being rebroadcasted in Ukraine’s cable networks: “Radost moya”, “Ocean-TV”, “TDK”, “Detskii”, “India TV”, “Zdorovoe televidenie”, “La-minor TV”, “Mat i detya”, “Evrokino”, “HD LIVE”, “DRIVE”, “STV”;
- On 26.03.2016 near the township of Yasinovataya, Donetsk region, a camera crew of the “LifeNews” Russian channel came under the fire of Ukrainian military forces while shooting a reportage on the situation with the rebel’s checkpoint in Yasinovataya;
- On 20.04 2016, in order to promote “the improvement of the national security level of Ukraine in the area of information”, P.Poroshenko signed the Law of Ukraine No.1046-VIII dated March 29, 2016 amending the Law of Ukraine “On Cinematography” which prohibits the demonstration of the movies “produced by individuals and legal entities of an aggressor-state”. The prohibition covers films shot after January 1, 2014. Taking into account the general nature of statements, including the statements of the Ukrainian officials, the prohibition aimed against individuals and legal entities of Russia.

The Ministry of Foreign Affairs of the Russian Federation strongly requests Ukraine to provide the information regarding the measures taken in respect of the facts mentioned above, as well as the information about bringing those who are guilty to justice.

The Ministry avails itself of the opportunity to renew to the Embassy of Ukraine in Moscow the assurance of its highest consideration.

Moscow, May 27, 2016

Annex 116

Ukrainian Note Verbale No. 72/22-194/510-1973 to the Russian Federation Ministry of Foreign Affairs (18 August 2016)

This document has been translated from its original language into English, an official language of the Court, pursuant to Rules of the Court, Article 51.

MINISTRY OF FOREIGN AFFAIRS OF UKRAINE

№ 72/22-194/510-1973

The Ministry of Foreign Affairs of Ukraine presents its compliments to the Ministry of Foreign Affairs of the Russian Federation and in a follow-up to the second round of negotiations on interpretation and implementation of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (The Convention) on May 31, 2016, has the honour to revert with a brief summary of the discussion during the meeting.

The Ukrainian and Russian Sides discussed the agenda, exchanged information regarding the alleged violations of the Convention, addressed claims raised during the first round of negotiations and in diplomatic correspondence, and considered general questions of treaty implementation and good practices under the Convention.

During the discussion of the agenda, the Parties agreed to observe the following agenda:

- 1) Exchange of information regarding alleged acts that occurred or may have occurred in the Russian or Ukrainian territories and that may constitute violations of the Convention;
- 2) Exchange of information concerning the incidents raised in the first round of negotiations and diplomatic correspondence;
- 3) General questions of treaty implementation and good practices under the Convention.

The Ukrainian Side reiterated its position expressed during the first round of negotiations and in the diplomatic correspondence concerning the discussion of general questions of treaty implementation and good practices under the Convention. Additionally, the Ukrainian Side noted that the proper venue to discuss item three of the agenda should be the Committee on the Elimination of Racial Discrimination, which is charged with monitoring the Convention's implementation. The Russian Side insisted on a discussion of general treaty practice, distinguished the monitoring procedures implemented by the Committee from bilateral negotiations, and argued that this discussion would be useful to properly understand and to address claims raised during the negotiations. As a compromise solution and without prejudice to the Ukrainian Side's reservations, the Parties agreed to allocate time for the discussion of general questions of treaty implementation and good practices under the Convention.

The Russian Side opened the discussion on the first item of the agenda. It raised a number of allegations relating to the rights of

congregants of the Ukrainian Orthodox Church of the Moscow Patriarchate department and Russian and Russian-speaking journalists in Ukraine.

The Russian Side noted that the Ukrainian Orthodox Church of the Moscow Patriarchate was an important part of the cultural and religious life of the Russian and Russian-speaking population of Ukraine. It claimed that since early 2014, there had been an increase in allegedly aggressive actions towards the Ukrainian Orthodox Church of the Moscow Patriarchate. The Russian Side further maintained that, since 2014, clergy and congregants of the Ukrainian Orthodox Church of the Moscow Patriarchate had suffered moral coercion, intimidation, physical assault, and seizure of their churches. It claimed that allegedly a wide discrimination campaign had been launched in Ukraine against the Ukrainian Orthodox Church of the Moscow Patriarchate to provoke hatred towards the Russian Orthodox Church in Ukraine. It listed specific alleged incidents and names of representative individuals, and provided a brief background about the alleged circumstances of each incident.

Additionally, the Russian delegation restated information included in its diplomatic note №5787-Н/ДППЧ of May 27, 2016, related to acts or actions in respect of representatives of Russian or Russian-speaking mass media who resided and carried out their professional activities in the territory of Ukraine.

In response to the information provided by the Russian Side, the Ukrainian Side reserved its right to fully review and respond at a later time to any new material and information presented by the Russian Side shortly before or during the negotiations. Additionally, it asked the Russian Side to provide the newly reported allegations concerning the Ukrainian Orthodox Church of the Moscow Patriarchate in writing. The Ukrainian Side further provided preliminary and general comments concerning the facts and incidents presented by the Russian Side. The Ukrainian Side undertook to reply to the newly presented allegations after a full review, and to provide where necessary additional explanation of the relevant provisions of Ukrainian legislation in respect of these allegations. The Russian Side agreed to provide the newly reported allegations concerning the Ukrainian Orthodox Church of the Moscow Patriarchate in writing.

Under the first item of agenda, the Ukrainian delegation restated the allegations it had made previously in its diplomatic correspondence and during the first round of negotiations and raised new allegations in support of its claims under the Convention.

The Ukrainian Side expressed its concern with the disappearance and murder of Crimean Tatars and Ukrainian activists in the occupied territory of Crimea. It noted that the number of individuals concerned

and common features among the disappearances demonstrated that these disappearances must be targeted and coordinated to intimidate the Crimean Tatar and Ukrainian population, rather than coincidental. It listed the names of representative individuals who had disappeared and provided a brief background about the circumstances of each person's disappearance. The Ukrainian Side pointed out that many of these forced disappearances had been widely reported in the media and documented by the United Nations, the OSCE, the Council of Europe, the Unofficial Turkish Delegation to Crimea, Human Rights Watch, and other organizations.

The Ukrainian delegation further raised its concerns with respect to political suppression of the Crimean Tatar and ethnic Ukrainian communities by the Russian Federation. The Ukrainian Side highlighted that Russia's methods of suppressing the Crimean Tatar and ethnic Ukrainian communities and their leaders included the recent ban of the Mejlis, restrictions on freedom of movement, numerous raids of the Mejlis and the private homes of Mejlis members and other Crimean Tatars, and initiation of discriminatory criminal cases. In support of each claim the Ukrainian Side listed specific incidents and names of representative individuals, and provided a brief background about the circumstances of each incident. The Ukrainian Side expressed its view that these actions, considered individually and collectively, were intended to suppress the political activities of the Crimean Tatar and ethnic Ukrainian communities and constituted violations of the Convention.

The Ukrainian Side expressed its concern with the mass intimidation and invasion of Crimean Tatars' property rights in the occupied territory of Crimea. The Ukrainian delegation asserted that the Russian authorities, including the FSB, had conducted illegal searches of Crimean Tatar private homes and businesses intended to intimidate the Crimean Tatar community. It stressed that a number of these raids had been in the context of the suppression of the Mejlis, attacks on the media, and other targeted efforts to disrupt Crimean Tatar community life.

The Ukrainian Side raised its concerns with restrictions on the freedom of assembly of Crimean Tatars and ethnic Ukrainians imposed by the Russian authorities in the occupied territory of Crimea. In support of each claim the Ukrainian Side listed specific incidents and provided a brief background about the circumstances of each incident. Separately, the Ukrainian delegation alleged that the Russian authorities had retroactively applied laws to punish a rally organized by the Mejlis on 26 February 2014 in support of Ukraine's sovereignty. The Ukrainian Side pointed out that most of the incidents had been reported in the media and documented by the United Nations and the

OSCE. The Ukrainian Side emphasized that this pattern of discriminatory application of the law, as well as the selective retroactive application of new laws, violated the Convention as it restricted freedom of thought, opinion, and assembly of Crimean Tatars and ethnic Ukrainians.

The Ukrainian Side expressed its concern with restrictions and prohibitions imposed by the Russian authorities on Crimean Tatar and ethnic Ukrainian media activities in the occupied territory of Crimea. The Ukrainian delegation recalled that numerous Crimean Tatar and ethnic Ukrainian media outlets had been subjected to a variety of harassment, including searches of property and interrogations of personnel. In support of this claim the Ukrainian Side listed specific incidents and provided a brief background about the circumstances of each incident. In the view of the Ukrainian Side, these events had resulted in the total exclusion of independent Crimean Tatar and ethnic Ukrainian media from Crimea. The Ukrainian delegation noted that this pattern of activity restricted the freedom of thought, expression, and opinion of Crimean Tatars and ethnic Ukrainians and other protected groups, and violated the Convention.

The Ukrainian Side raised its concerns with restrictions imposed by the Russian authorities on the right to education and training of Crimean Tatars and ethnic Ukrainians in the occupied territory. Specifically, it noted a number of incidents in which the Russian authorities had carried out targeted searches of Ukrainian schools, seized and destroyed those schools' property, and discriminated against education in minority languages. It further noted that Crimean Tatar religious schools and madrassas had also been subject to discriminatory searches. The Ukrainian Side pointed out that many of these incidents had been reported in the media and documented by the OSCE and the Council of Europe.

Separately, the Ukrainian delegation raised its concerns with respect to LGBT rights and their freedom of expression and the religious rights of Crimean Tatar and Ukrainian communities. In support of these claims the Ukrainian Side listed specific incidents and provided a brief background about the circumstances of each incident.

In response to the facts and incidents listed by the Ukrainian Side, the Russian delegation raised certain questions and asked for certain clarifications. The Russian delegation expressed doubts that the alleged disappearances of Crimean Tatars targeted the Crimean Tatar population and constituted a violation of the Convention. In support of its position, the Russian delegation relied on its statistics of disappeared persons in Crimea that allegedly showed that the number of disappeared Crimean Tatars constituted 7% of all disappeared persons. The Ukrainian Side responded to the Russian Side's questions and

agreed to clarify certain issues when it follows up with a list of newly stated claims.

During the discussion of the second item of the agenda, the Ukrainian delegation handed over to the Russian Side a *Non-Paper* responding to the claims raised by the Russian Side during the first round of negotiations and in diplomatic notes. Additionally, the Ukrainian Side forwards herewith the *Non-Paper*.

The Russian Side did not respond to the claims raised by Ukraine during the first round of negotiations and in its diplomatic notes. Instead, the Russian delegation raised certain questions and asked for clarifications concerning specific incidents mentioned in Ukraine's diplomatic notes. The Ukrainian Side responded to some of the questions and reserved its right to respond to all of the questions after their full review. The Ukrainian delegation asked the Russian Side to follow up by putting all its questions in writing. The Russian Side refused to follow up as requested and maintained that it had raised questions that are specific enough for the Ukrainian delegation to be able to record them. The Ukrainian Side forwards herewith a list of questions raised by the Russian delegation as they were noted by the Ukrainian delegation during the meeting with Ukraine's responses.

Within the framework of the third item of the agenda, the Russian delegation provided information concerning general questions of treaty implementation and good practices under the Convention.

At the conclusion of the second round of negotiations, the Parties agreed to continue the discussion on interpretation and application of the Convention.

This diplomatic note is without prejudice to the Russian Side's right to express any specific objections to or comments on the summaries set forth in the note.

The Ministry of Foreign Affairs of Ukraine emphasizes the importance it attaches to the matters it has raised concerning discrimination in violation of the Convention. In order to determine whether the dispute raised by Ukraine with respect to the interpretation and application of the Convention can be resolved by negotiation, the Ukrainian Side proposes to hold a further round of negotiations on [the first week of September, 2016,] in Minsk.

The Ministry of Foreign Affairs of Ukraine avails itself of this opportunity to renew to the Ministry of Foreign Affairs of the Russian Federation the assurances of its consideration.

Kyiv, "18" August 2016

The List of Questions Raised by the Russian Delegation Together with Ukraine's Responses

I. Questions Put Forward by the Russian Delegation Concerning Allegations Raised by Ukraine in its Statement During the Second Round of Negotiations			
No.	Questions Raised by the Russian Delegation	Statement of the Ukrainian Delegation During the Second Round of Negotiations	Ukraine's Further Response
1.	<p>Why does Ukrainian Delegation believe that the disappearance of a number of individuals, some of whom were Crimean Tatars, may indicate that it has some relevance to the Convention?</p>	<p>The Ukrainian Side listed names of representative individuals who have disappeared, and provided a brief background about the circumstances of each person's disappearance.</p> <p>a) Reshat Ametov - disappeared on March 3, 2014 and was found dead two weeks later with knife wounds and bruises, one eye missing, and a plastic bag on his head. He disappeared after he was filmed standing in a silent protest before uniformed men and Crimean self-defence forces surrounding the Cabinet of Ministers.</p> <p>b) Timur Shaimardanov - disappeared on May 26, 2014 after he spoke about the disappearance of another individual at a public meeting.</p> <p>c) Serian Zinedinov - disappeared on May 30, 2014 after he had tried to locate Timur Shaimardanov.</p> <p>d) Islia Djafarov and his cousin Djozed Isliamov - disappeared on September 27, 2014 near the city Belogorsk.</p>	<p>The Ukrainian side is of the view that the number of Crimean Tatar individuals who have disappeared and the circumstances of each and every disappearance, together with the broader situation of repression faced by Crimean Tatars, indicate that Russian authorities specifically target Crimean Tatars, and/or fail to investigate disappearances and murders of Crimean Tatars carried about by so-called "self-defense" forces and others. Such a large number of disappearances of Crimean Tatar individuals cannot be coincidental, and demonstrate Russia's failure to guarantee, on non-discriminatory grounds, the right to security of person, in violation of the Convention.</p> <p>The Ukrainian Side notes that the repression of Crimean Tatars by Russian authorities, including through murders and disappearances that have never been investigated, has been widely documented and reported, including by the United Nations Human Rights Monitoring Mission.</p>

		<p>e) Edem Asanov - disappeared September 29, 2014 in Evpatoria.</p> <p>f) Artem Dainobekov and Belial Belialov - disappeared on October 3, 2014 in Simferopol.</p> <p>g) Usein Sytnobiev, the resident of Feodosia - disappeared on October 21, 2014.</p> <p>h) Iskander Ivseliamov - disappeared on October 3, 2014 in Simferopol.</p> <p>i) Leonid Porch - disappeared on May 22, 2014.</p> <p>j) Vasyliy Chernysh - disappeared on March 15, 2014 in Simferopol.</p> <p>k) Ivan Bondarets - disappeared in March 2014 in Simferopol.</p> <p>l) Valeriy Vaschuk - disappeared at the beginning of March 2014 when he travelled to Simferopol.</p> <p>m) Betla Almerov - disappeared on July 19, 2015 in Simferopol.</p> <p>n) Mamed Sidimov and Asmad Ibragimov - disappeared on August 21, 2015 in Simferopol.</p> <p>o) Muhtar Aislanov - disappeared on August 24-27, 2015 in Simferopol.</p> <p>p) Ruslan Goniev and Roman Terohov - disappeared on December 15, 2015.</p>	
2.	The Ukrainian side mentioned that there was no "prompt investigation" of some facts.	The Ukrainian Side reported a case involving Andrey Kolomiets, the	The case of Andrey Kolomiets is indicative of the Russian authorities' unwillingness to investigate

	<p>Which criteria are applied to determine a lack of prompt investigation, and which investigations are not effective in this context?</p>	<p>Ukrainian national, who was detained in the territory of Kabardino-Balkaria (the Russian Federation) in May 2015. Andrey Kolomiets was detained on suspicion of drug possession, however, after detention he was brought to Crimea and charged with an attempted murder of two Crimean “Berkut” policemen. During the trial, a witness testimony rebutted the charges against Andrey Kolomiets. The prosecution was unable to provide reliable evidences in support of the charges against Andrey Kolomiets. The victims confirmed that they were not injured or hospitalized. However, Kolomiets faced up to 20 years in prison. Having been detained in Kabardino-Balkaria Republic in May 2015, Andrey Kolomiets was brutally tortured by the Russian law enforcement officers with the aim to obtain his confessions. Kolomiets described that the law enforcement put a bag on his head, then attached wires to his fingers using large staples, placed his hands on wet rag, and let electric current pass through the wire. Andrey Kolomiets can identify officers who tortured him. The Russian authorities did not investigate the claim filed by Andrey Kolomiets. Andrey Kolomiets tried to commit suicide because of the torture. On April 14, 2016, the court in Simferopol extended detention period for Kolomiets.</p>	<p>promptly incidents relating to ethnic Ukrainians. Additionally, international organizations, including the UN have recognized Russia’s failure to investigate disappearances of Crimean Tatars – specifically the UN has noted that there has been “no progress” in the investigation with respect to Ametov. Russia’s failure to act promptly includes not only its failure to conclude investigations, but also the failure to institute an investigation promptly. For example, as set out in Ukraine’s diplomatic note of September 23, 2014, Timur Shaimardanov’s family reported his disappearance to the police on May 27, 2014, but the criminal investigation into his disappearance was initiated only on July 9, 2014.</p> <p>The Ukrainian Side observes that by occupying Crimea and exercising de facto effective control, the Russian Federation has assumed an obligation to ensure the protection of human rights in the area under its control. Ukraine considers that the Russian Federation has the capacity to conduct prompt and effective investigations, and that the lack of such investigations in these cases is clear from the facts and circumstances.</p>
3.	<p>The Ukrainian side reported a number of facts in sufficient details where detentions occurred somewhere at farmer’s market and,</p>	<p>Detention of the Crimean Tatars based on ethnicity: i. On the night of April 1 - 2, 2016 the</p>	<p>It is clear from the facts of these two incidents that the Russian authorities in Crimea detained only persons of Muslim ethnicity most of whom were</p>

<p>according to the language used, the persons were detained based on their “ethnic identity.” What was the ground to consider that those [detentions] were based on ethnic identity rather than on some other grounds? Is there any information about it?</p>	<p>armed men without any identification signs detained about 35 persons of Muslim ethnicity. A defense attorney reported that late in the evening the armed men with covered faces came to the local cafe "Baghdad" and in a rude manner conducted a personal body search of café visitors. Later, they detained persons of non-Slavic appearance, Muslims, and escorted them to the Bogdan van. They did not explain the grounds for the search and they did not produce a warrant for the search of the premises or persons. The Muslim detainees, most of them Crimean Tatars, were taken to the Centre for Combating Extremism in Simferopol. The defense attorney reported that the detainees witnessed other people in the Centre for Combating Extremism detained in the same manner. The authorities of the Center forced the detainees, against their will, to undergo the state registration procedure. These actions are discriminative in nature because the Russian authorities detained the persons concerned on the basis of their ethnic and religious affiliation. The so-called Prosecutor of Crimea Natalia Poklonskaya did not identify any violations of human rights in these actions, and characterized those actions as preventive activities performed by the Ministry of Internal Affairs, Federal Migration Service,</p>	<p>Crimean Tatars. There were no reports that other persons of non-Muslim ethnicity were detained during these two incidents. Additionally, Ukraine has brought to the attention of the Russian Federation numerous criminal proceedings targeting Crimean Tatars and their political leaders. Specifically, criminal cases have been initiated against Refat Chubarov, Mustafa Dzhemilev, Lenus Islyamov and Akhtem Chigoz. The Russian authorities brought charges only against Crimean Tatars in a case relating to the events of February 26, 2014, when Crimean Tatars and pro-Russia demonstrators clashed in front of Crimea’s parliament building. Such actions, considered individually and collectively, are intended to target and suppress the Crimean Tatar community.</p>
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4.	<p>The Ukrainian side mentioned two points: first, that it is important to distinguish between the actions of individuals and those of government bodies; and, second, whether the actions concerned were appealed or whether any claims were filed with this respect. In some instances, it was mentioned that some actions were appealed, in most cases, such information was not provided. For example, it was said that administrative detentions were carried out; or, for example, it was mentioned that, in the course of administrative detention, allegedly forced dactylography was conducted which, according to the Ukrainian side, should not have been carried out. Accordingly, we would like to understand whether those who undergone through this procedure complained about this? Have they exhausted any legal remedies?</p>	<p>On the night of April 1 - 2, 2016 the armed men without any identification signs detained about 35 persons of Muslim ethnicity. A defense attorney reported that late in the evening the armed men with covered faces came to the local cafe "Baghdad" and in a rude manner conducted a personal body search of café visitors. Later, they detained persons of non-Slavic appearance, Muslims, and escorted them to the Bogdan van. They did not explain the grounds for the search and they did not produce a warrant for the search of the premises or persons. The Muslim detainees, most of them Crimean Tatars, were taken to the Centre for Combating Extremism in Simferopol. The defense attorney reported that the detainees witnessed other people in the Centre for Combating Extremism detained in the same manner. The authorities of the Center forced the detainees, against their will, to undergo the state registration procedure. This is a</p>	<p>This incident should be viewed together with other Ukrainian claims raised in its diplomatic correspondence and during the negotiations that show a pattern of discriminatory actions on the part of the Russian Federation against the Crimean Tatars. Ukraine introduced this incident to demonstrate that the Russian authorities in Crimea specifically and exclusively target Crimean Tatars.</p> <p>The Ukrainian side is of the view that there are no effective legal remedies available to these people in Crimea. The Ukrainian side noted in its statement during the negotiations that the so-called Prosecutor of Crimea Natalia Poklonskaya had already determined that there were no violations of human rights in these actions, and characterized those actions as preventive activities performed by the Ministry of Internal Affairs, Federal Migration Service, and the Federal Service for Drugs Control. She confirmed that around 50 persons were checked in this manner. For these reasons it is irrelevant whether persons referenced in this incident exhausted any legal remedies because no effective legal remedies are available to the victims.</p>

		<p>breach not only of the discriminatory law but also a breach of the law of the Russian Federation. The 1998 Federal Law on the State Dactyloscopic Registration provides that fingerprints must be taken from persons suspected of committing a crime, persons accused of crimes, persons convicted for committing a crime and subjected to administrative arrest, or persons who committed an administrative offence. The Muslim detainees did not fall under any exceptions provided by the law that justify the forceful registration procedure. Therefore, the authorities of the Center did not have any authority to carry out mandatory fingerprinting of these persons. These actions are discriminative in nature because the Russian authorities detained the persons concerned on the basis of their ethnic and religious affiliation. The so-called Prosecutor of Crimea Natalia Poklonskaya did not identify any violations of human rights in these actions, and characterized those actions as preventive activities performed by the Ministry of Internal Affairs, Federal Migration Service, and the Federal Service for Drugs Control. She confirmed that around 50 persons were checked in this manner.</p>	
5.	The Ukrainian side mentioned an incident concerning inspections carried out by the law enforcement authorities in a Muslim mosque	On April 22, 2016, the journalists of QHA reported that police officers arrived to the mosque in Sevastopol requested to show	This incident should be viewed together with other incidents showing that Russian authorities target Muslims and the Crimean Tatars, as documented by

	to check up the passport regime. Is there any reason to believe that this inspection had been carried out without cause? And how is this incident relates to the Convention?	<p>their identity documents. These actions were carried out only with respect to Muslims and the Crimean Tatars.</p> <p>On May 06, 2016, FSB broke into the mosque in Molodezhnoye village of Simferopol district during the traditional Friday prayers, detained about a hundred people and placed them in buses. Later these people were released and instructed to appear in the police department at the place where they live.</p>	the United Nations Human Rights Monitoring Mission and other sources. These incidents together with others show a pattern of discriminatory actions on the part of the Russian Federation against the Crimean Tatars.
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II. Questions Raised by Russia Concerning Allegations Listed by Ukraine in Its Diplomatic Correspondence

No.	Questions Raised by the Russian Side	Allegations Raised by Ukraine	Ukraine's Further Response
1.	On the first page of the diplomatic note of April 5, 2016 (No. 72/22-194/510-839), the disappearance and murder of a number of persons is mentioned, and the expression "numerous others" at the end of paragraph one is used. We would like to know what does "numerous others" mean? Do you mean those listed in the items and those you have just mentioned or do we speak about other persons as well?	<p>Diplomatic note of April 5, 2016 No. 72/22-194/510-839:</p> <p>"Disappearance and murder of Crimean Tatar individuals, including Reshat Ametov, Timur Shaimardanov, Serian Zinedinov and numerous others;"</p>	<p>By "numerous others" the Ukrainian side means Crimean Tatar individuals listed in its diplomatic correspondence, during the negotiations, and in various reports of International organizations and NGOs. This list is without prejudice to the right of the Ukrainian Side to add to this list any additional individuals. The diplomatic note of April 5, 2016 (No. 72/22-194/510-839) brought to the notice of the Russian side the fact that numerous Crimean Tatars individuals disappeared and provided a representative list of such disappearances.</p> <p>The following individuals were reported missing:</p> <ul style="list-style-type: none"> - Reshat Ametov, Timur Shaimardanov, Serian Zinedinov (diplomatic note of April 5, 2016 No. 72/22-194/510-839); - Timur Shaimardanov, Sairan Zinedinov, Isliam Djafarov, Djavdet Isliamov, Eskander Apseliamov, Bilial Bilialiv

			<p>(diplomatic note of December 15, 2014, No. 72/22-620-3070);</p> <ul style="list-style-type: none"> - Edem Asanov, Artem Dainobekov, Usein Sytnobiev, Iskander Ivseliamov, Leonid Poch, Vasyliy Chernysh, Ivan Bondarets, Valeriy Vaschuk, Betla Almerov, Mamed Sidimov, Asmad Ibragimov, Muhtar Aislanov, Ruslan Goniev, Roman Terohov (listed during the second round of the CERD negotiations); - Fyodor Kostenko, Alem Terikhov, Ervin Ibragimov (reported elsewhere).] <p>The names of other individuals have been reported by, among other sources, the Council of Europe’s April 11, 2016 report, and the European Parliament’s April 2016 Policy Department Study.</p>
2.	<p>The paragraph 2 of the diplomatic note of April 5, 2016 (No. 72/22-194/510-839), mentions “numerous raids of the Mejlis ... and other Tatars, ... and other actions.” What specific raids do you refer to? Who did carry out them? When and where did these raids were carried out? Do you have more details on this matter, including information concerning place and time? What is the source of these claims?</p>	<p>Diplomatic note of April 5, 2016 No. 72/22-194/510-839:</p> <p>“2. Political suppression of the Tatar community and their leaders, including Russia’s five-year exclusion of Mustafa Dzhemilev and Refat Chubarov from Crimea, Russia’s prevention of other leaders’ attempts to participate in the 2015 World Congress of Crimean Tatars, numerous raids of the Mejlis and the private homes of Mejlis members and other Tatars, judicial proceedings seeking to ban the Mejlis initiated by the so-called prosecutor of Crimea in February 2016, and other actions;”</p>	<p>The Ukrainian side has reported in its diplomatic correspondence a number of incidents concerning numerous raids of the Mejlis and other Crimean Tatars. These incidents were reported during the first and the second round of negotiations.</p> <p>The following incidents were reported to the Russian side:</p> <ul style="list-style-type: none"> - On April 21, 2014 members of “self-defense” units arrived at the office of the Crimean Tatar Mejlis in Simferopol and removed a Ukrainian flag that had been raised on the building two days earlier (diplomatic note of September 23, 2014, No. 72/22-620-2403); - On January 30, 2015, armed representatives of the security service of

			<p>the Russian Federation made a search in the private residence of Mr. Chiyozy that resulted in the property damages, seizure of personal computers, belongings, and cash; there was moral coercion against members of his family (diplomatic note of February 6, 2015, No. 72/22-620-297).</p> <ul style="list-style-type: none">- On June 24, 2014 unidentified persons intruded into the house of a director of Kolchugino Town school Aider Osmanov (diplomatic note of December 15, 2014, No. 72/22-620-3070);- On August 19, 2014 Russian FSB held a search at a house of Crimean Tatars in Bakhchisaray, where, allegedly, extremist literature and a pistol were found (diplomatic note of December 15, 2014, No. 72/22-620-3070);- On August 28, 2014 a group of policemen together with people wearing camouflage and civil clothes intruded into a house of Crimean Tatar family in Bakhchisaray and under the pretext of searching for drugs and arms confiscated books from “the list of extremist literature” (diplomatic note of December 15, 2014, No. 72/22-620-3070);- On September 4 and 5, 2014 police and Russian FSB conducted searches at least at ten houses of Crimean Tatars in Simferopol, Nyzhniehorsk, Krasnoperekopsk, Bakhchisarai under the pretext to reveal drugs and arms. Instead of this, the religious literature was confiscated (diplomatic note of December 15, 2014, No. 72/22-620-
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			<p>3070);</p> <ul style="list-style-type: none">- On September 10, 2014 unlawful searches were carried out at the houses of Crimean Tatars at Kamyanka Town by unidentified armed people. They were searching for arms, drugs and extremist literature. They confiscated office equipment, mobile phone and two religious books. House owners were taken to Simferopol to be questioned and released after 18-hour-detention on the precondition of signing a "no complaint" statement. Thus, their belongings were not returned (diplomatic note of December 15, 2014, No. 72/22-620-3070);- On September 16, 2014 a group of people in camouflage and masks who introduced themselves as "Crimean FSB" intruded into a house of the Mejlis member Eskender Bariev, conducted a search and seized office equipment for "technical expertise." Similar searches took place at the houses of Mustafa Asaba and Asadula Bairov (diplomatic note of December 15, 2014, No. 72/22-620-3070);- On May 16, 2014 the Federal Service of Security (FSB) of the Russian Federation conducted a house-check in premises of Chief of External Relations of the Majlis Mr A. Hamzyn's as well as Mr M. Dzhemilev's premises (diplomatic note of September 23, 2014, No. 72/22-620-2403);- On September 16, 2014 armed
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			<p>individuals conducted illegal searches in the premises of Mejlis on 2 Schmidt Street, City of Simferopol. They had seized the protocols of meetings, removed office equipment and Mr M. Dzhemilev's personal belongings (diplomatic note of September 23, 2014, No. 72/22-620-2403);</p> <ul style="list-style-type: none">- On September 18, 2014, Russian authorities impounded the building of the Crimean Tatars Mejlis. Some 15 members of Russia's FSB arrived at the Mejlis premises and requested that people leave the building. The seizure of the building was reportedly in accordance with a Simferopol court ruling that ordered the seizure of all property and bank accounts of the Qirim (Crimean) Foundation (diplomatic note of September 23, 2014, No. 72/22-620-2403);- On September 25, 2014, the economic court ordered the Mejlis in Bakhchysarai to vacate the property they had previously rented. The ruling was in favor of the company that manages the property of Bakhchysarai City Council, which had apparently leased the property to the public foundation Council of Teachers, which in turn had leased the property to the regional Mejlis in Bakhchysarai. In March 2015, the appeals court upheld this decision, and the Mejlis vacated the premises thereafter. See OSCE, Report of the Human Rights Assessment Mission in
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			<p>Crimea (6-18 July 2015), ¶ 233.</p> <p>The Ukrainian Side reminds the Russian Side that the U.N. Human Rights Monitoring Mission has documented and criticized the suppression of the Mejlis of the Crimean Tatars, and related persecution of Crimean Tatars.</p>
3.	<p>The diplomatic note of April 5, 2016 (No. 72/22-194/510-839), refers to members of the Mejlis. How does the Ukrainian side define and/or understand the notion of a "member of the Mejlis"? How does the Ukrainian side determine for itself the membership at the Mejlis?</p>	<p>Diplomatic note of April 5, 2016 No. 72/22-194/510-839:</p> <p>“2. Political suppression of the Tatar community and their leaders, including Russia’s five-year exclusion of Mustafa Dzhemilev and Refat Chubarov from Crimea, Russia’s prevention of other leaders’ attempts to participate in the 2015 World Congress of Crimean Tatars, numerous raids of the Mejlis and the private homes of Mejlis members and other Tatars, judicial proceedings seeking to ban the Mejlis initiated by the so-called prosecutor of Crimea in February 2016, and other actions;”</p>	<p>Crimean Tatars have their own political structure, including a leadership body, the Mejlis, and Ukraine recognizes as members of the Mejlis those persons who are recognized as such by the Crimean Tatar people. The Russian Side should be familiar with an important cultural and political institution operating in Crimea, over which it exercises de facto control, and may consult among other resources the website of the Mejlis for basic information on its status and leadership.</p>
4.	<p>The paragraph 3 of the diplomatic note of April 5, 2016 (No. 72/22-194/510-839), mentions “[m]ass intimidation and invasion of property rights of Crimean Tatars ... in Simferopol, the Leninskiy district, and the Dzhankoy district in January and February 2016.” Can the Ukrainian side explain what this paragraph is about? What specific incidents do this paragraph refer to?</p>	<p>Diplomatic note of April 5, 2016 No. 72/22-194/510-839:</p> <p>“3. Mass intimidation and invasion of property rights of Crimean Tatars, including raids of private homes and cultural institutions in Simferopol, the Leninskiy district, and the Dzhankoy district in January and February 2016;”</p>	<p>The following incidents were reported to the Russian side:</p> <ul style="list-style-type: none"> - On 4 and 5 September 2014, at least 10 Crimean Tatar houses were searched by police officers and FSB officials in Simferopol, Nizhnegorsk, Krasnoperekopsk and Bakhchisaray. The homes searched belonged both to ordinary people and to Mejlis (the Crimean Tatar Assembly) members, including regional Mejlis heads. The police, who had warrants, found no weapons and drugs, but confiscated religious literature (diplomatic note of December 15,

			<p>2014, No. 72/22-620-3070);</p> <ul style="list-style-type: none">- On 28 August 2014, several policemen as well as people in camouflage and in civilian clothes entered the house of a Crimean Tatar family in Bakhchisaray. Upon showing a court decision, they searched the house illegally for drugs and weapons, but instead confiscated books listed under the so-called 'list of extremist literature', prohibited under Russian anti-extremism legislation (diplomatic note of December 15, 2014, No. 72/22-620-3070).- The Ministry of Foreign Affairs of Ukraine in its statement reported massive illegal searches and groundless detention of thirteen citizens of Ukraine - representatives of the Crimean Tatar people on 11-12 February 2016. The Ministry called on the Russian Federation to stop immediately political repressions against citizens of Ukraine and release illegally detained Emir Ussein Kuku, Vadim Sirik, Enver Belirov, Eldar Selyamiyev and Muslim Aliyev. <p>The following incidents have been reported by various Human Rights bodies and NGOs:</p> <ul style="list-style-type: none">- On January 28, 2016, the searches took place at the premises of the Islamic Cultural Center in Simferopol, where the security forces "accidentally found" banned books. The press service of the Russian Prosecutor's Office of Crimea said that the searches had been carried out by police officers upon the tips of the visitors, including parishioners, about possible "destructive activities and dissemination of extremist materials" by this
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			<p>organization. <i>See</i> Unrepresented Nations and Peoples Organization, Crimean Tatars: <i>Mass Raids Conducted on Local Families</i> (Feb 4, 2016).</p> <ul style="list-style-type: none">- On January 29, 2016, there were searches in the houses of several families of the Crimean Tatars in Leninskiy district. There was no official information regarding the searches from the occupation "authorities" and local law enforcers. <i>See</i> Unrepresented Nations and Peoples Organization, Crimean Tatars: <i>Mass Raids Conducted on Local Families</i> (Feb 4, 2016).- Russia has acknowledged searching the home of Vaitov R.M. on January 30, 2015 in the Leninsky District of Stevastopol. It appears that Vaitov lived in a school building – Russia stated that this search was carried out “in the premises of the Muslim religious school “Madrasah” located on the second floor of the mosque of religious organization “Muslim Community ‘Miunevver.’” Russia acknowledged removing certain property from the premises. <i>See</i> Prosecutor General’s Office of the Russian Federation, <i>Information on the outcomes of the analysis of arguments set out in the letter of the Permanent Delegation of Ukraine to UNESCO</i> (October 23, 2015).- On September 10, 2014, the houses of two Crimean Tatars were searched in the village Kamenka (Leninskiy district). Armed men broke into the houses in the early morning, showed a warrant, but refused to invite independent witnesses. The men searched
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			<p>for weapons, drugs and 'extremist literature.' Two notebooks, a mobile phone and two religious books from a list of 'extremist literature' were confiscated. The homeowners were taken to Simferopol for interrogation and later released after 18 hours. They were forced to sign a statement stating that 'there was no moral or physical harm'; however their notebooks were not returned. <i>See</i> Office of the United Nations High Commissioner for Human Rights, <i>Report on the Human Rights Situation in Ukraine</i> (September 16, 2014), ¶ 154.</p> <ul style="list-style-type: none">- On 28 August 2014, several policemen as well as people in camouflage and in civilian clothes entered the house of a Crimean Tatar family in Bakhchisaray. Upon showing a court decision, they searched the house illegally for drugs and weapons, but instead confiscated books listed under the so-called 'list of extremist literature,' prohibited under Russian anti-extremism legislation. <i>See</i> Office of the United Nations High Commissioner for Human Rights, <i>Report on the Human Rights Situation in Ukraine</i> (September 16, 2014), ¶ 153.- On August 19, 2014 Russian FSB held a search at a house of Crimean Tatars in Bakhchisaray, where, allegedly, extremist literature and a pistol were found. This is one of several events that the UN characterizes as showing a continuation and intensification of searches by Crimean law enforcement bodies for so-called "extremist" literature and activity, mainly among the Crimean Tatar population. <i>See</i> Office of the
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			<p>United Nations High Commissioner for Human Rights, <i>Report on the Human Rights Situation in Ukraine</i> (September 16, 2014), ¶ 153.</p> <ul style="list-style-type: none"> - A member of the Mejlis of the Crimean Tatar People, Eskender Barijey, has reported that there were raids on Crimean Tatar families in the Dzhankojsky region of Crimea on Tuesday February 2, 2016. - Mass searches are being conducted in Dzhankoy district. Houses of the Crimean Tatar families are being searched in the village of Medvedivka for more than one and a half hours. First Deputy Chairman of the Mejlis of the Crimean Tatar People Nariman Dzhelalov has confirmed the information about mass searches in Dzhankoy district.
5.	<p>The paragraph 4 of the diplomatic note of April 5, 2016 (No. 72/22-194/510-839), refers to the persecutions in retaliation for protests against the illegal referendum in Crimea. Which persons does the Ukrainian side refer to? What does the Ukrainian side mean by “restrictions on assemblies”? Does the Ukrainian side refer to public events? Is it true that the Ukrainian side does not mean prohibition to celebrate an event, instead it means that someone’s application to hold an event was rejected for some reasons?</p>	<p>Diplomatic note of April 5, 2016 No. 72/22-194/510-839: “4. Restrictions on the freedom of assembly, including actions in retaliation for protests against the illegal referendum in Crimea, selective and discriminatory application of laws on freedom of assembly to the Crimean Tatars, various decrees and general laws limiting locations of and requiring approval for peaceful assemblies, and particular restrictions on assemblies to mark the European Day of Remembrance for Stalinism and Nazism, Crimean Tatar Flag Day, Human Rights Day, and other events of particular cultural importance to the Crimean Tatar and ethnic</p>	<p>The Ukrainian side reported in its diplomatic notes (diplomatic notes of April 24, 2015, No. 72/22-620-966, of December 15, 2014, No. 72/22-620-3070, of September 23, 2014, No. 72/22-620-2403) a number of incidents that constitute restriction of freedom of assembly, including but not limiting to discriminatory application of laws on freedom of assembly to the Crimean Tatars, various decrees and general laws limiting locations of and requiring approval for peaceful assemblies, etc.</p> <p>The Ukrainian side in its diplomatic note of April 24, 2015 (No. 72/22-620-966) and during the negotiations reported a number of criminal cases against Crimean Tatars, including Ahtem Chigoz, Tiar Smerdlijev, Musa Apkerimov, Eskender Nabiev, Talyat Unusov, Mustafa Degirmenci, Ali Asanov,</p>

		<p>Ukrainian communities;”</p>	<p>Eskender Kantemirov and Eskender Emirhvaliev, related to the events near the Crimean Parliament on February 26, 2014, and rally in support of Mustafa Dzhemilev on May 3, 2014.</p> <p>During the second round of negotiations, the Ukrainian side reported that Maidan activist Andriy Kolomiets was sentenced to 10 years in prison on June 10, 2016, for activities arising out of the Maidan protests. Kolomiets was arrested in May 2015 in Russia and transferred to Crimea. He was accused of murder or attempted murder of a law enforcement officer during the Maidan protests in Kyiv and possession of drugs. During a court hearing on March 30, his lawyer stated that he had been tortured.</p> <p>The United Nations High Commissioner for Human Rights reported that in May 2015, Olexander Kostenko was sentenced to four years in prison based on alleged violence against police officers in early 2014 and possession of firearms. Kostenko was arrested by ‘police’ on February 8, 2015 on suspicion of wounding a Berkut police officer on 18 February 2014 during the Maidan protests. Information suggests he was abducted by 2 men, possibility affiliated with the FSB on February 5, 2015. These persons blindfolded Kostenko, hit and tortured him, including with electric shocks, in an effort to obtain a confession from him. Mr. Kostenko’s medical examination revealed that he had suffered multiple fractures, a dislocated shoulder, and a broken elbow. <i>See Office of the United Nations High Commissioner for Human Rights, Report on the Human Rights Situation in Ukraine: 16 February to 15 May 2015</i>, ¶ 158.</p>
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			<p>By “restriction of assembly,” the Ukrainian side refers to activities by the Russian authorities in Crimea that by its purpose and effects limit the rights of Crimean Tatars and ethnic Ukrainians to hold the intentional and temporary presence of a number of individuals in a public place for a common expressive purpose, including rejection of permits, the prohibition of demonstrations, as well as post-demonstration prosecutions. The Ukrainian Side reminds the Russian Side that the right to freedom of peaceful assembly is well-established in international human rights law, and Russia should understand the contours of that right.</p>
6.	<p>The Ukrainian side mentioned in the diplomatic note of April 5, 2016 (No. 72/22-194/510-839), a number of events, including the Human Rights Day. The Russian side wants to know what relation does the Human Rights Day have to any ethnic group? Does the Ukrainian side consider that observance of the event is associated with a certain ethnic group and cannot be associated with another?</p>	<p>Diplomatic note of April 5, 2016 No. 72/22-194/510-839: “4. Restrictions on the freedom of assembly, including actions in retaliation for protests against the illegal referendum in Crimea, selective and discriminatory application of laws on freedom of assembly to the Crimean Tatars, various decrees and general laws limiting locations of and requiring approval for peaceful assemblies, and particular restrictions on assemblies to mark the European Day of Remembrance for Stalinism and Nazism, Crimean Tatar Flag Day, Human Rights Day, and other events of particular cultural importance to the Crimean Tatar and ethnic Ukrainian communities;”</p>	<p>In previous years, the Human Rights Day was held on Lenin Square in Simferopol by the initiative of the Mejlis. These rallies were proposed by the Mejlis in 2010 and were supported by OSCE member states. At these rallies, Crimean Tatars demanded the “revival” of their rights. On Dec 5, 2014 the Committee on the Rights of the Crimean Tatar People applied to hold a rally for this purpose. On Dec 9, 2014, city authorities rejected the proposed rally, allegedly due to Christmas and New Year’s celebrations.</p> <p>Also at this time, various authorities issued warnings to prominent members of the Tatar community. On Dec 7, 2014, the Crimean prosecutor’s office warned Deputy Chairman of the Mejlis, Akhtem Chygoz, about the ban on unsanctioned rallies, and on Dec 8, 2014, the Simferopol prosecutor’s office warned the coordinator of the Committee on the Rights of the Crimean Tatar People, Sinaver Kadyrov, that holding a public event without the consent of the administration of Simferopol was illegal.</p>

			<p>On Dec 10, 2014, Simferopol center was surrounded by members of security forces, particularly in front of the Council of Ministers of Crimea building and in Lenin square.</p> <p>The rally to mark Human Rights Day has been traditionally held at the Mejlis’s initiative and the other events intended to mark Human Rights Day planned by the Committee on the Rights of the Crimean Tatar People. The denial of permits to hold the events planned by both groups in 2014 coincided with various warnings by Russian authorities issued to prominent members of the Tatar community – the timing of these warnings clearly indicates that the Russian occupation authorities at the time linked these applications for permits to the Tatar community.</p>
7.	<p>The paragraph 6 of the diplomatic note of April 5, 2016 (No. 72/22-194/510-839), alleges that searches were conducted in the Ukrainian and Crimean Tatar schools. Could the Ukrainian side explain to what incidents this paragraph refers to?</p>	<p>Diplomatic note of April 5, 2016 No. 72/22-194/510-839:</p> <p>“6. Restrictions on the right to education and training of Tatars and ethnic Ukrainians, including searches of Tatar and Ukrainian schools, and seizure or destruction of these schools’ property, and closure of these schools, as well as discrimination against education in minority languages. For example, the Russian Federation’s own statistics presented to UNESCO reflect a steep drop in children receiving Ukrainian-language instruction after the Russian occupation, from 12,694 to only 1,990.”</p>	<p>The following incidents were reported to the Russian side:</p> <ul style="list-style-type: none"> - By mid-September 2014, searches had been carried out in 8 out of 10 religious schools (madrasas) belonging to the Spiritual Directorate of the Muslims of Crimea (Dukhovnoe Upravlenie Musulman Kryma) (diplomatic notes of December 15, 2014, No. 72/22-620-3070); - On September 9, 2014, the Crimean gymnasium in Tankove (Bakhchysarai district) was searched by people in civilian clothes. They searched the library and classes, looking for ‘extremist literature’. Two Turkish language teachers were taken for questioning after ‘prohibited literature’ was found. Other teachers alleged such

			<p>books had never been in the library and were planted as fake evidence by the FSB (diplomatic notes of December 15, 2014, No. 72/22-620-3070);</p> <ul style="list-style-type: none">- On 11 September, five officers of Crimean Prosecutor's office searched the library of Crimean Engineering and Pedagogical University (CEPU) for banned literature (diplomatic notes of December 15, 2014, No. 72/22-620-3070). <p>The following incidents have been reported by various Human Rights bodies and NGOs:</p> <ul style="list-style-type: none">- Three Madrassas in Simferopol, the Education Centre on Victory Avenue, a women's madrassa in Kamenka and Seit-Settar madrassa were searched between June and September 2014. OSCE describes this as part of a larger effort during this time. <i>See OSCE, Report on the Human Rights Assessment Mission on Crimea (6-18 July 2015)</i> (Sep. 17, 2015).- On June 24, 2014 a particularly intrusive search was carried out at a religious school in the village of Kolchugino in the Simferopol region. On June 24, 30, armed men, including police and FSB agents, forcibly entered the school and conducted an extensive search examining, among other things, the school's library and students' personal possessions. Bariev said that thirteen children and two teachers were on the school premises at the time. At the end of the search, which lasted about five hours, law enforcement officers confiscated several school computers and memory sticks. On the
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			<p>same day, authorities also searched the home of the school's deputy director, held him at the police station for several hours for questioning, and released him. <i>See</i> Human Rights Watch, <i>Rights in Retreat</i> (November 2014), at 16.</p> <ul style="list-style-type: none">- On August 26, 2014, the director of the Dzhankoi madrassa was fined 2,000 RUB (approximately 50 USD) under the Code on Administrative Offences of the Russian Federation for alleged storage and distribution of extremist literature. This is one of several events that the UN characterizes as showing a continuation and intensification of searches by Crimean law enforcement bodies for so-called "extremist" literature and activity, mainly among the Crimean Tatar population. <i>See</i> Office of the United Nations High Commissioner for Human Rights, <i>Report on the Human Rights Situation in Ukraine</i> (September 16, 2014), ¶ 153.- Russian authorities removed all textbooks and educational materials issued by Ukraine's Ministry of Education and seized books written by blacklisted Ukrainian authors. <i>See</i> OSCE, <i>Report on the Human Rights Assessment Mission on Crimea (6-18 July 2015)</i> (Sep. 17, 2015), at ¶ 192.- According to the Council of Europe's Commissioner for Human Rights of the Council of Europe, by mid-September 2014, searches had been carried out in 8 out of 10 religious schools (madrasas) belonging to the Spiritual Directorate of the Muslims of Crimea (Dukhovnoe Upravlenie Musulman
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			Kryma). <i>See Council of Europe, Report of October 2014.</i>
8.	The diplomatic note of April 5, 2016 (No. 72/22-194/510-839), alleges that thousands of Ukrainians and Crimean Tatars were forced to leave Crimea. Can the Ukrainian side specify the number of people it refers to in this paragraph? Can the Ukrainian side provide the source it relies on or give the reasons it has to consider that the leaving or entering [Crimea] is related to the application of the Convention?	Diplomatic note of April 5, 2016 No. 72/22-194/510-839: “Due to these and other actions by Russian authorities, ethnic Ukrainians and Crimean Tatars have suffered under a broad campaign of harassment, intimidation, and discrimination. As a result of this discrimination, thousands of ethnic Ukrainians and Tatars have been forced to flee Crimea.”	Ukrainian authorities have determined that nearly 21,000 people from Crimea have temporarily settled in Ukraine in 2015, more than half of them children. <i>See</i> http://ua.krymr.com/a/27186547.html
9.	On page one of the diplomatic note of April 24, 2015 (No. 72/22-620-966), the Ukrainian side refers to “prophylactic [preventive] measures” carried out by the Russian authorities to inform the population on the prohibition of organization and participation in peaceful meetings with reference to the legislation of the Russian Federation. What kind of “prophylactic [preventive] measures” does the Ukrainian side refer to? Where were these “prophylactic [preventive] measures” taken? How do the “prophylactic [preventive] measures” on application of legislation relate to the application of the Convention?	Diplomatic note of April 24, 2015 No. 72/22-620-966: “On April 2014, the employees of the police at the temporarily occupied territory of Ukraine conducted so called “prophylactic measures” by informing the population on the prohibition of organization and participation in peaceful meetings, referring on the legislation of the Russian Federation.”	By referencing to “prophylactic [preventive] measures,” the Ukrainian side refers to those measures which were precursors to the measures imposed in May 2014 and thereafter. Specifically, these measures concerned various decrees and general laws limiting locations of and requiring approval for peaceful assemblies and other restrictions imposed by Russian authorities on assemblies, including unreasonable searches. According to a Brief Review of the Situation in Crimea (April 2014) the Crimean Field Mission on Human Rights reported that the residents of Crimea reported that in course of implementation of the so-called “preventive measures” the police officers visited private residences and warned their inhabitants against the organization of and participation in peaceful assemblies.
10.	The diplomatic note of April 24, 2015 (No. 72/22-620-966), mentions an assembly near the building of the Supreme Council of Crimea 26 February 2014. It is well known	Diplomatic note of April 24, 2015 No. 72/22-620-966: “In January 2015 the Investigative Committee of Russia opened a criminal	The Ukrainian side is of the view that any deaths or injuries were unfortunate and unintentional, and that far more Ukrainians than Russians have been killed and injured in the course of Russia’s unlawful

	<p>that in the course of this event 79 people were injured and two died from injuries. The diplomatic note mentions "peaceful assemblies." The first question is what kind of assemblies the Ukrainian side considers peaceful? Does the Ukrainian side consider the assembly referenced in the note as peaceful assembly? How does the Ukrainian side define what kind of assembly is peaceful, and what is not peaceful? The second question is, how does the definition of the Ukrainian side correlate to the fact that during this assembly two persons died and 79 were injured? Is the fact that people died and were injured relevant for definition of "peaceful assemblies"?</p>	<p>case against the persons who took part in peaceful meeting near the building of Verkhovna Rada of AR Crimea on 26 February 2014. On the grounds of that criminal case – organization and participation in massive riots, On 29 January 2015 Deputy Head of Crimean Tatars people Madgelise Akhtem Chyigos was arrested on the grounds of that criminal case for the organization and participation in massive riots.”</p>	<p>occupation of Crimea.</p> <p>In this specific context, the Ukrainian Side referred to the intent of the individuals who participated in the cited event to assemble peacefully, and were nonetheless prosecuted by the Russian authorities.</p> <p>What is relevant for this claim is that Russian authorities launched retrospective prosecutions of Crimean Tatars with regard to incidents that took place before the unlawful occupation of Crimea by the Russian Federation.</p>
<p>11.</p>	<p>The diplomatic note of April 3, 2015 (No. 72/22-620-759), refers to so-called "black lists" of mass media. Could the Ukrainian side clarify what kind of blacklist it means?</p>	<p>Diplomatic note of April 4, 2015 No. 72/22-620-759:</p> <p>“The abovementioned internationally wrongful acts of the Russian party are confirmed inter alia by the facts and information presented below:</p> <ul style="list-style-type: none"> • the practice of Roskomnahlyad of compiling so-called "black lists" caused an unjustified refusal of annual registration of Tatar Media. From April 1, 2015 the broadcasting of Tatar television channel «ATR», children TV channel "Lyale" and radio "Meydan" were suspended. Printed publications of "Avdet", "Kirim" and Information Agency «QHA» were suspended as well;” 	<p>Russia has intentionally denied Tatar and Ukrainian media outlets the right to express themselves freely in Crimea, and refused to register them. The Council of Europe, among other bodies, has raised concerns regarding Russia’s actions in this regard.</p> <p>The following incidents have been reported by various Human Rights bodies and NGOs:</p> <ul style="list-style-type: none"> - In June and July 2014, the Russian FSB questioned Avdet’s Chief Editor, Shevket Kaybullayev in connection with Avdet’s publication of “extremist materials.” This questioning related to Mejlis decision to boycott elections to the State Council in Crimea. FSB agents said that they received a statement from Rinat Shaymardanov accusing the newspaper of publishing extremist materials. Id. Kaybullaev stated that it was made clear to him that the

			<p>publication of these boycott-related materials may have serious consequences for the newspaper. <i>See</i> Sergey Zayets (Regional Center for Human Rights) et al., <i>The Fear Peninsula: Chronicle of Occupation and Violation of Human Rights in Crimea</i> (2015).</p> <ul style="list-style-type: none">- As the OSCE reported, “On June 2 the Simferopol Prosecutor’s Office issued a warning to Shevket Kaibullayev, chief editor of the Tatar newspaper Avdet, for distributing extremist materials, reportedly in reaction to the newspaper’s reports which were critical of current Crimean authorities.” <i>See</i> OSCE, <i>OSCE Representative mourns death of Russian journalist; denounces new cases of media freedom violations in Ukraine</i> (June 17, 2014).- On 17 September 2014 – one day after Avdet’s premises was searched (see below) – the Avdet editor was given an official warning by the FSB for ‘actions that might incite extremist activities.’ <i>See</i> Office of the United Nations High Commissioner for Human Rights, <i>Report on the human rights situation in Ukraine</i> (15 November 2014), ¶ 226.- On September 16, 2014, Avdet’s office was raided and searched – for 17 hours – by unidentified members of the security forces. <i>See</i> Human Rights Watch, <i>Rights in Retreat</i> (November 17, 2014); <i>Office of the United Nations High Commissioner for Human Rights, Report on the human rights situation in Ukraine</i> (15 November 2014), ¶ 226. The search was ostensibly based on attempts to find “weapons, firearms, and publications
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			<p>inciting discord.” <i>See</i> Human Rights Watch, <i>Rights in Retreat</i> (November 17, 2014). During the search, the office was sealed, and the paper’s bank accounts were frozen. <i>See</i> Freedom House, <i>Report on Freedom of the Press in Crimea</i> (2015).</p> <ul style="list-style-type: none"> - Avdet was among several Crimean Tatar media outlets whose re-registration was refused in April 2015 due to blacklisting (“Roskomnahlyad”) by the Russian media regulator, Roskomnadzor. <i>See</i> Vitaly Shevchenko, <i>Crimean Tatar Media ‘silenced by Russia’</i>, BBC (Apr. 1, 2015); Council of Europe Media Freedom Alert, <i>Forced Closure of Crimean Tatar-Language Media Outlets</i> (April 1, 2015). Other outlets affected included the Tatar newspaper Yildiz, the television channel ATR, and the Tatar news agency QHA. <i>See</i> Council of Europe Media Freedom Alert, <i>Forced Closure of Crimean Tatar-Language Media Outlets</i> (Apr. 1 2015). - On August 11, 2014, ATR journalist Shevket Nemattulaev lost his accreditation in the Crimean State Council for not standing during the performance of the national anthems of the Russian Federation and the Republic of Crimea. <i>See</i> Sergey Zayets (Regional Center for Human Rights) et al., <i>The Fear Peninsula: Chronicle of Occupation and Violation of Human Rights in Crimea</i> (2015), at 59-60. - On September 24, 2014, the Russian Interior Ministry’s center for combatting terrorism in Crimea demanded certified copies of ATR’s registration documents and the lease
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			<p>agreement for the radio’s premises, the channel’s staff schedule and other information. <i>See</i> Sergey Zayets (Regional Center for Human Rights) et al., <i>The Fear Peninsula: Chronicle of Occupation and Violation of Human Rights in Crimea</i> (2015), at 60. These demands were sent in a letter to ATR’s General Director Elzara Islyamova. Id.</p> <ul style="list-style-type: none"> - In May 2014, the agency’s editor received the RF General Prosecutor’s Office directive demanding to remove information about anti-government protests planned in Russia on May 18 from the agency’s news feed. <i>See</i> Sergey Zayets (Regional Center for Human Rights) et al., <i>The Fear Peninsula: Chronicle of Occupation and Violation of Human Rights in Crimea</i> (2015), at 63. - On August 9, 2014, QHA’s general coordinator and an advisor to the Mejlis, Ismet Yuksel, was denied entry to Crimea – apparently in connection with a previously-imposed five-year ban on entering Crimea. <i>See</i> OSCE, <i>Report on the Human Rights Assessment Mission on Crimea (6-18 July 2015)</i> (Sep. 17, 2015), ¶ 229; Sergey Zayets (Regional Center for Human Rights) et al., <i>The Fear Peninsula: Chronicle of Occupation and Violation of Human Rights in Crimea</i> (2015), at 63. QHA was among several Crimean Tatar media outlets whose re-registration was refused in April 2015 due to blacklisting (“Roskomnahlyad”) by the Russian media regulator, Roskomnadzor. <i>See</i> Vitaly Shevchenko, <i>Crimean Tatar Media ‘silenced by Russia’</i>, BBC (Apr. 1,
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			<p>2015); Council of Europe Media Freedom Alert, <i>Forced Closure of Crimean Tatar-Language Media Outlets</i> (April 1, 2015).</p> <ul style="list-style-type: none"> - Other outlets affected by the April 2015 refusal of re-registration included the newspapers Avdet and Yildiz and the Tatar television channel ATR. <i>See</i> Council of Europe Media Freedom Alert, <i>Forced Closure of Crimean Tatar-Language Media Outlets</i> (Apr. 1 2015).
12.	<p>On page two of the diplomatic note of February 6, 2015 (No. 72/22-620-297), the Ukrainian side refers to “unreasonable search” and “fabricated charges.” What does the Ukrainian side mean by “unreasonable search”? What criteria does the Ukrainian side apply to define reasonableness of a search? What does the Ukrainian side mean by "falsified charges"?</p>	<p>Diplomatic note of February 6, 2015 No. 72/22-620-297:</p> <p>“On January 26, 2015, armed representatives of the security service of the Russian Federation made an unreasonable search in the office of the Crimean Tatar TV channel ATR and seized computer servers that caused the broadcast interruption of the said media;</p> <p>There is the ongoing prosecution of Mr. Akhtem Chygoz, Deputy Head of the Mejlis of the Crimean Tatar People:</p> <ul style="list-style-type: none"> - On January 29, 2015, he was detained on fabricated charges of organizing and participating in mass unrest, which had taken place near the premises of the Verkhovna Rada of the Autonomous Republic of Crimea on February 26, 2014;” 	<p>In Ukraine’s view, the searches are unreasonable if the Crimean Tatar population is subject to such searches under circumstances that would not cause searches of property of persons of other ethnic groups. Furthermore, according to the available information, the ATR provided to the Russian Investigative Committee all requested records the ATR had before the search. ATR stopped analog broadcasting for some time due to this search and ATR’s work was paralyzed for a day. Thus, there was no reasons for the Russian prosecution to search the office of the Crimean Tatar TV channel ATR.</p> <p>Ukraine is of the view that the Russian authorities prosecute Mr. Akhtem Chygoz based on false charges and without any grounds for to exercise criminal jurisdiction. As the European Parliament has stated, this case violates the norms of international humanitarian law, in particular the Geneva Conventions of 1949, as well as the Russian Criminal Code, because the de facto authorities retroactively applied Russian legislation to events that occurred before the occupation. <i>See</i> European Parliament Policy Department Study, <i>The situation of national minorities in Crimea following its</i></p>

			<p><i>annexation by Russia</i> (April 2016), at 15; OSCE, <i>Report on the Human Rights Assessment Mission on Crimea (6-18 July 2015)</i> (Sep. 17, 2015), ¶¶ 9, 42, 146. Under Article 70 of Geneva Convention (IV) of 1949, on the protection of civilians in war, an occupying power shall not arrest, prosecute or convict protected persons for acts committed or opinions expressed before the occupation, except for breaches of the laws and customs of war.</p>
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The List of Questions Raised by the Russian Delegation

With Respect to Ukraine's Claims

- A. Questions Raised by the Russian Delegations Concerning Facts and Incidents Reported by the Ukrainian Delegation During the Second Round of Negotiations**
1. Why does Ukrainian Delegation believe that the disappearance of a number of individuals, some of whom were Crimean Tatars, may indicate that it has some relevance to the Convention?
 2. The Ukrainian side mentioned that there was no "prompt investigation" of some facts. Which criteria are applied to determine a lack of prompt investigation, and which investigations are not effective in this context?
 3. The Ukrainian side reported a number of facts in sufficient details where detentions occurred somewhere at farmer's market and, according to the language used, the persons were detained based on their "ethnic identity." What was the ground to consider that those [detentions] were based on ethnic identity rather than on some other grounds? Is there any information about it?
 4. The Ukrainian side mentioned two points: first, that it is important to distinguish between the actions of individuals and those of government bodies; and, second, whether the actions concerned were appealed or whether any claims were filed with this respect. In some instances, it was mentioned that some actions were appealed, in most cases, such information was not provided. For example, it was said that administrative detentions were carried out; or, for example, it was mentioned that, in the course of administrative detention, allegedly forced dactylography was conducted which, according to the Ukrainian side, should not have been carried out. Accordingly, we would like to understand whether those who undergone through this procedure complained about this? Have they exhausted any legal remedies?
 5. A number of situations were mentioned when public events were held, for instance, such as gay pride parades. We would like to know how are they related to the Convention? Which ethnic group has been discriminated? What kind of discrimination the Ukrainian side alleges?
 6. The Ukrainian side mentioned an incident concerning inspections carried out by the law enforcement authorities in a Muslim mosque to check up the passport regime. Is there any reason to believe that this inspection had been carried out without cause? And how is this incident relates to the Convention?
- B. Questions Raised by the Russian Delegations Concerning Facts and Incidents Listed by the Ukrainian Delegation in Its Diplomatic Correspondence**

1. On the first page of the diplomatic note of April 5, 2016 (No. 72/22-194/510-839), the disappearance and murder of a number of persons is mentioned, and the expression “many others” at the end of paragraph one is used. We would like to know what does “many others” mean? Do you mean those listed in the items and those you have just mentioned or do we speak about other persons as well?
2. The paragraph 2 of the diplomatic note of April 5, 2016 (No. 72/22-194/510-839), mentions “numerous raids of the Mejlis ... and other Tatars, ... and other actions.” What specific raids do you refer to? Who did carry out them? When and where did these raids were carried out? Do you have more details on this matter, including information concerning place and time? What is the source of these claims?
3. The diplomatic note of April 5, 2016 (No. 72/22-194/510-839), refers to members of the Mejlis. How does the Ukrainian side define and/or understand the notion of a "member of the Mejlis"? How does the Ukrainian side determine for itself the membership at the Mejlis?
4. The paragraph 3 of the diplomatic note of April 5, 2016 (No. 72/22-194/510-839), mentions “[m]ass intimidation and invasion of property rights of Crimean Tatars ... in Simferopol, the Leninskiy district, and the Dzhankoy district in January and February 2016.” Can the Ukrainian side explain what this paragraph is about? What specific incidents do this paragraph refer to?
5. The paragraph 4 of the diplomatic note of April 5, 2016 (No. 72/22-194/510-839), refers to the persecutions in retaliation for protests against the illegal referendum in Crimea. Which persons does the Ukrainian side refer to? What does the Ukrainian side mean by “restrictions on assemblies”? Does the Ukrainian side refer to public events? Is it true that the Ukrainian side does not mean prohibition to celebrate an event, instead it means that someone’s application to hold an event was rejected for some reasons?
6. The Ukrainian side mentioned in the diplomatic note of April 5, 2016 (No. 72/22-194/510-839), a number of events, including the Human Rights Day. The Russian side wants to know what relation does the Human Rights Day have to any ethnic group? Does the Ukrainian side consider that observance of the event is associated with a certain ethnic group and cannot be associated with another?
7. The paragraph 6 of the diplomatic note of April 5, 2016 (No. 72/22-194/510-839), alleges that searches were conducted in the Ukrainian and Crimean Tatar schools. Could the Ukrainian side explain to what incidents this paragraph refers to?
8. The diplomatic note of April 5, 2016 (No. 72/22-194/510-839), alleges that thousands of Ukrainians and Crimean Tatars were forced to leave Crimea. Can

the Ukrainian side specify the number of people it refers to in this paragraph?
Can the Ukrainian side provide the source it relies on or give the reasons it has to consider that the leaving or entering [Crimea] is related to the application of the Convention?

9. On page one of the diplomatic note of April 24, 2015 (No. 72/22-620-966), the Ukrainian side refers to “prophylactic [preventive] measures” carried out by the Russian authorities to inform the population on the prohibition of organization and participation in peaceful meetings with reference to the legislation of the Russian Federation. What kind of “prophylactic [preventive] measures” does the Ukrainian side refer to? Where were these “prophylactic [preventive] measures” taken? How do the “prophylactic [preventive] measures” on application of legislation relate to the application of the Convention?
10. The diplomatic note of April 24, 2015 (No. 72/22-620-966), mentions an assembly near the building of the Supreme Council of Crimea 26 February 2014. It is well known that in the course of this event 79 people were injured and two died from injuries. The diplomatic note mentions "peaceful assemblies." The first question is what kind of assemblies the Ukrainian side considers peaceful? Does the Ukrainian side consider the assembly referenced in the note as peaceful assembly? How does the Ukrainian side define what kind of assembly is peaceful, and what is not peaceful? The second questions is, how does the definition of the Ukrainian side correlate to the fact that during this assembly two persons died and 79 were injured? Is the fact that people died and were injured relevant for definition of “peaceful assemblies”?
11. The diplomatic note of April 3, 2015 (No. 72/22-620-759), refers to so-called "black lists" of mass media. Could the Ukrainian side clarify what kind of blacklist it means?
12. On page two of the diplomatic note of February 6, 2015 (No. 72/22-620-297), the Ukrainian side refers to “unreasonable search” and “fabricated charges.” What does the Ukrainian side mean by “unreasonable search”? What criteria does the Ukrainian side apply to define reasonableness of a search? What does the Ukrainian side mean by "falsified charges"?

Annex 117

Ukrainian Note Verbale No. 72/22-194/510-2188 to the Russian Federation Ministry of
Foreign Affairs (26 September 2016)

*This document has been translated from its original
language into English, an official language of the Court,
pursuant to Rules of the Court, Article 51.*

72/22-194/510-2188

The Ministry of Foreign Affairs of Ukraine presents its compliments to the Ministry of Foreign Affairs of the Russian Federation and, in addition to notes No. 72/22-620-2403 of 23 September 2014, No. 72/23-620-2673 of 29 October 2014, No. 72/22-620-2946 of 1 December 2014, Nos. 72/22-620-3070 and 72/22-620-3069 of 15 December 2014, No. 72/22-620-297 of 6 February 2015, No. 72/22-620-705 of 30 March 2015, No. 72/22-620-759 of 3 April 2015, No. 72/22-620-966 of 24 April 2015, No. 72/22-194/510-2006 of 17 August 2015, No. 72/22-194/510-839 of 5 April 2016, No. 72/22-194/510-1023 of 26 April 2016, and No. 72/22-194/510-1116 of 30 May 2016 strongly protests against unlawful discriminatory actions targeting the Crimean Tatar people.

The Ministry of Foreign Affairs of Ukraine reiterates its grave concern that the Russian Federation, acting through its state agencies, designated representatives, individuals and legal entities, including the de facto authorities of unlawfully-occupied Crimea, continues to commit, encourage, and fail to prevent acts of racial discrimination against Crimean Tatars in violation of the International Convention on the Elimination of All Form of Racial Discrimination (the “Convention”).

The Ukrainian Side in particular objects to the Russian Federation’s treatment of Deputy Chairman of the Mejlis of the Crimean Tatar People, Ilmi Umerov. As noted in a United Nations report, on May 12, 2016, Mr. Umerov was arrested by the Russian FSB in Simferopol and charged with making public calls and actions aimed at undermining the territorial integrity of the Russian Federation. This offense carries a prison sentence of up to 5 years. As a consequence of these charges, Umerov was obligated not to leave Crimea.

Thereafter, on August 18, 2016, Russian authorities involuntarily confined Mr. Umerov and ordered that he undergo a psychiatric evaluation that could last 28 days or longer. The Chair of the OSCE Parliamentary Assembly’s human rights committee, Ignacio Sanches Amor, called for Mr. Umerov’s immediate release and referred to Mr. Umerov’s detention as “a worrying new low in Russia’s stigmatization of the Crimean Tatar community.” Mr. Umerov was released on 7

September 2016 after three weeks in forced psychiatric detention. He still faces the criminal charges raised against him in May.

The Ministry of Foreign Affairs of Ukraine is of the view that the Russian Federation's treatment of Mr. Umerov has the purpose and effect of discriminating against ethnic Crimean Tatars, nullifying and impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, social, cultural or any other field of public life. The Russian Federation's treatment of Mr. Umerov must further be considered in light of the ongoing pattern of acts targeting Tatar individuals, political figures, businesses, schools, and media for abuse and mistreatment, including disappearances, exiles, and attacks on the Tatar community's rights to freedom of expression and association. In particular, the Russian Federation's treatment of Mr. Umerov falls within the pattern of political suppression of the Crimean Tatar community noted in Ukraine's diplomatic correspondence and negotiations concerning the Convention.

As Ukraine has previously observed, the Russian Federation has repeatedly used discriminatory criminal prosecution and other discriminatory judicial acts to carry out its political suppression of the Crimean Tatar community. Examples of such discriminatory judicial actions include the recent suspension of the Mejis, as discussed in Ukraine's note No. 72/22-194/510-1023 of 26 April 2016, as well as the criminal prosecution of Haiser Dzhemilev, the son of the Crimean Tatar leader Mustafa Dzhemilev, discussed in Ukraine's note No. 72/22-620-3070 of 15 December 2014. In the negotiations held at Minsk on 31 May 2016, the initiation of discriminatory criminal cases against Mejlis leaders was also discussed, particularly with respect to cases initiated against Refat Chubarov, Mustafa Dzhemilev, and others.

The Ministry of Foreign Affairs of Ukraine again calls upon the Russian Federation to cease its discriminatory acts against ethnic Crimean Tatars, make appropriate reparation, and comply with its obligations under international law, including under the Convention. Ukraine further calls upon the Russian Federation to make reparation to Mr. Umerov, provide appropriate guarantees that he will not be further persecuted, and drop the charges against him.

The Ukrainian Side recalls that it has proposed holding the next round of negotiations under the Convention on 13 October 2016 in Minsk. The Ukrainian Side notes that the Russian Side has not responded to this proposal, and hopes that the Russian Side will respond promptly and agree to attend the negotiations. At these negotiations, the Ukrainian Side expects the Russian Side to be prepared to address its discriminatory violation of the human rights of Mr. Umerov, as well as all other actions the Ukrainian Side has previously raised.

The Ministry of Foreign Affairs of Ukraine avails itself of this opportunity to renew to the Ministry of Foreign Affairs of the Russian Federation the assurances of its consideration.

Kyiv, 26 September 2016

Annex 118

Ukrainian Note Verbale No. 72/22-633-2302 to the Russian Federation Ministry of
Foreign Affairs (7 October 2016)

*This document has been translated from its original
language into English, an official language of the Court,
pursuant to Rules of the Court, Article 51.*

72/22-663-2302

The Ministry of Foreign Affairs of Ukraine presents its compliments to the Ministry of Foreign Affairs of the Russian Federation and, in addition to notes No. 72/22-620-2403 of 23 September 2014, No. 72/23-620-2673 of 29 October 2014, No. 72/22-620-2946 of 1 December 2014, Nos. 72/22-620-3070 and 72/22-620-3069 of 15 December 2014, No. 72/22-620-297 of 6 February 2015, No. 72/22-620-705 of 30 March 2015, No. 72/22-620-759 of 3 April 2015, No. 72/22-620-966 of 24 April 2015, No. 72/22-194/510-2006 of 17 August 2015, No. 72/22-194/510-839 of 5 April 2016, No. 72/22-194/510-1023 of 26 April 2016, No. 72/22-194/510-1116 of 30 May 2016, and No. 72/22-194/510-2188 of 26 September 2016 strongly protests against the Russian Federation's unlawful discriminatory actions targeting the Crimean Tatar and ethnic Ukrainian populations of Crimea in violation of the International Convention on the Elimination of All Form of Racial Discrimination (the "Convention").

The Ministry of Foreign Affairs of Ukraine expresses its serious concern that the Russian Federation and its agents have continued to discriminate against minority populations in occupied Crimea, despite repeated protests by Ukraine and efforts to resolve the dispute under the Convention. The Ukrainian Side notes in particular the following events, which constitute continuations or repetitions of violations Ukraine has previously raised:

- On 30 May 2016, Lilia Budzhurova, deputy director of the Crimean Tatar channel ATR, was warned by Crimean prosecutors against expressing so-called extremist views due to her criticism of the arrests of Crimean Tatars on social media. This action continues the pattern protested by Ukraine, including in notes No. 72/22-620-2430 of 23 September 2014, No. 72/22-620-297 of 6 February 2015, No. 72/22-620/759 of 3 April 2015, and No. 72/22-194/510-839 of 5 April 2016, of restrictions and prohibitions on the activities of Tatar media outlets, including ATR television station and Avdet.

- In July 2016, Russia's Federal Financial Monitoring Service published a list of some 6,000 alleged "terrorists" and "extremists," including Anna Andriyevskaya, the ethnic Ukrainian editor of the Center for Journalist Investigations. In response, the OSCE Representative on Freedom of the Media observed that the inclusion of Ms. Andriyevskaya and other journalists on this list endangers those exercising their freedom of expression and cannot be justified. The Russian Federation's inclusion of Ms. Andriyevskaya on this list continues the pattern protested by Ukraine, including in notes No. 72/22-620-759 of 3 April 2015 and No. 72/22-194/510-839 of 5 April 2016, restricting and prohibiting the activities of ethnic Ukrainian media outlets such as the Center for Journalist Investigations.
- On 26 May 2016, numerous searches were conducted by the so-called Crimean police. In connection with these searches, four Crimean Tatars running a joint business were detained and released after a few hours. In total, at least 20 people, including numerous Crimean Tatars were interrogated. A United Nations report expresses concern that a series of police actions conducted since the beginning of 2016, including these searches of 26 May 2016, disproportionately target the Crimean Tatar community.

Similarly, on 1 April 2016, a group of armed and masked individuals entered a café located in the village of Pionerske (Simferopol district) and began destroying furniture, allegedly in search of drugs. They took dozens of Crimean Tatars to the police 'Centre for Countering Extremism' in Simferopol. These men were detained for four hours, during which time they were interrogated, photographed, and required to submit DNA samples and fingerprints. Before being released, they were forced to sign protocols stating they had no complaints against the police.

These recent actions continue the pattern protested by Ukraine, including in notes No. 72/22-620-3070 of December 15, 2014 and No. 72/22-194/510-839 of 5 April 2016, of the mass intimidation and invasions of property rights of Crimean Tatars. Based on such actions, the United Nations Office of the High Commissioner for Human Rights has stated that it is increasingly worried about

the growing number of large-scale “police” actions conducted with the apparent intention to harass and intimidate Crimean Tatars.

Another example of this pattern includes the Russian Federation’s search of the home of the home of Vaitov R.M., a Crimean Tatar, on January 30, 2015 in the Leninsky District of Sevastopol. The Russian Federation has acknowledged conducting this search in a submission to UNESCO, and stated that it removed certain property from the premises.

- On 10 June 2016, a Crimean court sentenced Ukrainian activist Andriy Kolomyets to 10 years’ imprisonment for allegedly attacking a Berkut riot police officer during the Maidan events and for alleged drug crimes. Mr. Kolomyets, like Oleksandr Kostenko, was convicted retroactively, based on laws introduced after the illegal referendum of March 2014, for acts that occurred prior to that date. The Russian Federation’s prosecution of these cases has been widely criticized.

The Russia Federation’s treatment of Mr. Kolomyets and others continues the pattern protested by Ukraine, including in note No. 72/22-194/510-839 of 5 April 2016, of restrictions on the freedom of assembly, including actions in retaliation for protests against the illegal referendum in Crimea.

- On 29 September 2016, the Russian Supreme Court confirmed a lower court ruling that banned the Mejlis of the Crimean Tatar people.

This decision by the Russian Supreme Court continues the pattern protested by Ukraine, including in Note Nos. 72/22-194/510-839 and 72/22-194/510-1023 of 5 and 27 April 2016, of political suppression of the Crimean Tatar community.

The Ministry of Foreign Affairs of Ukraine again calls upon the Russian Federation to cease its discriminatory acts against ethnic Crimean Tatars and ethnic Ukrainians, make appropriate reparation, and comply with its obligations under international law, including under the Convention.

The Ukrainian Side recalls, as it observed in note No. 72/22-194/510-2188, that it has proposed holding the next round of negotiations under the Convention on 13 October 2016 in Minsk. The Ukrainian Side hopes that the Russian Side will respond promptly and agree to attend the negotiations, and expects the Russian Side to be prepared to address the discriminatory actions described above, as well as all other actions the Ukrainian side has previously raised.

The Ministry of Foreign Affairs of Ukraine avails itself of this opportunity to renew to the Ministry of Foreign Affairs of the Russian Federation the assurances of its consideration.

Kyiv, 7 October 2016

Annex 119

Ukrainian Note Verbale No. 72/6111-194/510-2474 to the Russian Federation Ministry of Foreign Affairs (28 October 2016)

This document has been translated from its original language into English, an official language of the Court, pursuant to Rules of the Court, Article 51.

72/22-194/510-2474

The Ministry of Foreign Affairs of Ukraine presents its compliments to the Ministry of Foreign Affairs of the Russian Federation and, in reference to the parties' dispute concerning interpretation and implementation of the International Convention on the Elimination of All Form of Racial Discrimination (the "Convention"), and in response to Note No. 11042-Н/дгпч of 10 October 2016, has the honour to state the following.

As the Ukrainian Side has repeatedly stated, Ukraine does not agree that diplomatic practice prohibits the sharing of summaries of negotiations, and reminds the Russian Side that it is free to specifically object to any aspect of Ukraine's summary that it believes is incorrect. The Ukrainian Side has followed the practice of summarizing the outcomes of each negotiating session in the hope that it will facilitate understanding between the parties and therefore benefit the negotiation process. The Russian Side does not explain why it considers an effort to facilitate the negotiations as inappropriate or an indication that the Ukrainian Side does not act in good faith.

The Ukrainian Side takes note that the Russian Side has rejected the proposal to hold the next round of negotiations under the Convention in Minsk, Belarus on 13 October 2016. The Russian Side instead proposes to hold this meeting in Minsk on 24 November 2016. The Ukrainian Side is not available on 24 November and proposes to hold the meeting in Minsk on 1 December 2016.

The Ministry of Foreign Affairs of Ukraine avails itself of this opportunity to renew to the Ministry of Foreign Affairs of the Russian Federation the assurances of its highest consideration

Kyiv, October 28, 2016

Annex 120

Russian Federation Note Verbale No. 13091 to the Embassy of Ukraine in Moscow (28
November 2016)

*This document has been translated from its original
language into English, an official language of the Court,
pursuant to Rules of the Court, Article 51.*

The Ministry of Foreign Affairs of the Russian Federation presents its compliments to the Embassy of Ukraine in Moscow and with reference to the notes № 14279/дснГ dated 16 October 2014, № 15642/2дснГ dated 27 November 2014, № 17004/2дснГ dated 8 December 2014, № 2697-н/дгпч dated 11 March 2015, № 4192-н/дгпч dated 6 April 2015, № 8761-н/дгпч dated 9 July 2015, № 11812-н/дгпч dated 28 September 2015, № 4413-н/дгпч dated 25 April 2016, № 5774-н/дгпч dated 27 May 2016 and № 5787-н/дгпч dated 27 May 2016, as well as to the consultations which took place on 8 April 2015 and 30 May 2016 in Minsk, the Republic of Belarus, has the honor to draw to the attention a number of facts which allegedly may be relevant to fulfillment by Ukraine of its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination of 1965.

In conformity with Article 1 of the Convention, as well as in compliance with the fundamental obligations laid down in Articles 2 and 5 of the Convention, the States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution (Article 5b);
- the right to freedom of thought, conscience and religion (Article 5d);
- the right to freedom of opinion and expression (Article 5d);
- the right of access to any place or service intended for use by the general public (Article 5f);

In this regard the Russian Side would like to draw attention to the following facts and information related to the situation involving the believers and the priesthood of

the canonical Ukrainian Orthodox Church, hereinafter referred to as the UOC, as well as the property which belongs to the Church.

On 25 September 2015 the Ministry of Culture of Ukraine “recommended” to the leadership of the UOC to withdraw all the four eparchies operating in the south-east – Donetsk, Luhansk, Horlivka and Rovenki – to the territory under the control of the Armed Forces of Ukraine. As Mr. A. Iurash, a representative of the Ministry of Culture of Ukraine, stated, such a step should clearly demonstrate to the Ukrainian society that, the UOC “preserves devotion to the national interests of the country and is not an agent of someone’s influence”.

In 2016 the National Institute for Strategic Studies of Ukraine (governmental “primary scientific and research institution of analysis and prognosis support of operations of the President of Ukraine”) published yet another “analytical” report “On Domestic and External State of Ukraine in 2016” accompanying the annual Presidential address to the Verkhovna Rada, in which it was stated that the legal and structural subordination of the Ukrainian Orthodox Church to Moscow Patriarchate poses “a special threat to the preservation of territorial integrity and sovereignty of the Ukrainian state”, while the UOC was called “a conductor of political ideology of the Kremlin in the Ukrainian lands” (p. 234 of the “report”).

On commission from the Ministry of Culture of Ukraine, “The Right of Believers to Change Affiliation (Jurisdiction): Practical Guide” was published. The purpose of the brochure is to motivate and steer the believers of the UOC to change the canonical affiliation of their parishes.

On 7 December 2014 persons dressed as militants of Aidar nationalist battalion robbed the church shop in Pokrovsky Church in Trekhizbenka village, Luhansk oblast (the money-box of the church, video cameras and mobile telephones of the believers were seized under the pretense of “examination of accounts”).

On 18 December 2014 in the village of Pesky of Donetsk oblast persons dressed as servicemen of the Armed Forces of Ukraine (the AFU) robbed Iversky Nunnery, hauling away all valuable property, including mobile telephones of the nuns.

On 30 December 2014 unknown individuals overturned two memorial crosses standing near roads in the vicinity of Mygeya and Semenivka villages, Mykolaiv oblast.

On 14 January 2015 radical nationalists from UNSO grouping seized Pokrovsky Church in the city of Malyn, Zhytomyr oblast.

In the early hours of 25 January 2015 the Church dedicated to the Icon of Holy Mother “Of All Who Sorrow Joy” in the ravine of Babyn Yar in Kyiv was pelted with firebombs, the building suffered damage.

In the early hours of 27 January 2015 Martyr Tryphon’s Church in Troeshchyna, Kyiv was set on fire (external wall, the dome, the cross and some icons were damaged; the fact of arson was established).

On 28 January 2015 Kyiv City Council deprived the UOC of its land tax exemption. 74 deputies voted for that decision during the adoption of the budget of Kyiv for 2015. The church was excluded from the list of religious confessions that were entitled to the land tax exemption.

On 30 January 2015 during the session of the Cherniatyn village council, Zhmerynka region, Vinnitsa oblast, a group of nationalists threatening violence exerted pressure on the deputies demanding the transfer of First Martyr Stephen’s Church under the supervision of a religious organization named “The Ukrainian Orthodox Church of Kyiv Patriarchate”, hereinafter referred to as Kyiv Patriarchate.

On 7 February 2015, followers of Kyiv Patriarchate with the support of local authorities and radicals from the so-called “Zdolbuniv Hundred of Self-Defense” seized Miracle-Michael’s Church in the village of Novoselky, Zdolbyniv region, Rivne oblast.

In the night of 9 February 2015 unknown individuals broke the fence and smashed windows of John-Evangelist' Church in the village of Demydivka, Rivne oblast.

On 12 February 2015 vandals broke open the doors of Resurrection Cathedral in the city of Kovel, Rivne oblast.

On February 12, 2015, with the support of nationalists from the Right Sector, Exaltation of the Cross' Church of Velyka Sevastianivka village, Khrystynivka region, Cherkasy oblast, was violently seized. According to available information, the radicals dressed in military fatigues blocked the entrance to the church for parishioners and pushed off Archpriest of Khrystynivka region Vasyl Myhanchuk. It was noted that the people who gathered near the church intimidated the priest and pressed on him to side with Kyiv Patriarchate. A communication from the press-office of the UOC stated: "These controversial actions were preceded by the so called "popular assembly" during which people nonresident in the village and unrelated to the village's congregation resorted to explicit offences of the believers". Representatives of the local council "turned a blind eye to the prevention of illegal actions of the visiting radicals, thereby aiding and abetting the incitement of yet another hotbed of sectarianism".

In February 2015 a pressure and slander campaign against archpriest of the community of Aleksandro-Nevskyi Church was carried out, and leaflets inciting sectarianism were distributed in the village of Hotiv, Kyiv oblast.

On 1 March 2015 a group of about twenty masked and camouflaged radicals attempted to disrupt a Sunday service at Spaso-Preobrazhensky Cathedral of the UOC in Sumy. In the course of the act a member of Svoboda political party V. Ganzyna firstly got in a heated argument, and then attacked a guard of the church who was on duty, causing him bodily damage. The attackers blocked the entrance to the church and chanted violent threats towards archbishop of Sumy and Akhtyrka Eulogius, clergy and believers who were present at that service.

On 1 March 2015 representatives of Kyiv Patriarchate carried out a forcible seizure of Holy Martyr Paraskeva's Church in the village of Chudnytsia, Goshcha region, Rivne oblast, which belongs to the community of the UOC. Men from the neighboring regions and villages came to the village and, under the instructions of clergy of Kyiv Patriarchate, blatantly interrupted the service, offended the orthodox parishioners of the church, and used force towards women who tried to protect the church. The attackers broke and changed the locks and established their control of the church.

On 3 March 2015 members of Ukrainian paramilitary formations kidnapped Theophany, an orthodox hieromonch of Uspenskyi Nickolo-Vasylievskyi monastery of the UOC, who was present in the territory of Volnovakha region controlled by the Ukrainian Armed Forces. Several men in military uniform and masks lured the priest from the monastery and drove him away to an undisclosed location. Hieromonch Theophany, in addition to church activities, was engaged in the search for the remains of warriors who died during the Great Patriotic War.

On 7 March 2015 two memorial crosses in Pervomaysk and Arbuzyinka regions, Mykolaiv oblast, were sawed down and burnt. Extremist leaflets were found at the crime scene.

On 9 March 2015 a group of persons kidnapped Mr. Olexander Levchenko, a priest of the UOC, in Boryspil, Kyiv oblast. Three unidentified persons in balaclavas kidnapped using brute physical force; subsequently they threw him out in Baryshevka region, Kyiv oblast.

On 18 March 2015 representatives of Kyiv Patriarchate beat archpriest Rostyslav Sapozhnyk, Rector of the Exaltation of the Cross of the Lord Church in the village of Ugryniv, Horohiv region, Volyn oblast. In autumn 2014 the said church was seized by followers of Kyiv Patriarchate who started repairing it without proper permits. R. Sapozhnyk together with representatives of the administration of the region arrived to the church on 18 March 2015, where he was beaten in his head

with a stick repeatedly, while the representatives of the region administration were not allowed to enter the church.

On 18 March 2015 representatives of Kyiv Patriarchate supported by the local authorities seized the Nativity of the Most Holy Mother of God Church, which belonged to the UOC, in the village of Mylcha, Dubno region, Rivne oblast.

On 22 March 2015 representatives of the Ukrainian Greek Catholic Church (UGCC) supported by armed masked militants tried to break into the territory of the Nativity of the Most Holy Mother of God Church under the pretense of “a prayer”, in the village of Stinka, Buchach region, Ternopil oblast.

In mid-March 2015 militants of the Right Sector disseminated false information on the alleged removal of the miracle-working Pochaiv Icon from Pochaiv Lavra and called for seizure of the monastery.

In mid-March 2015 the Right Sector disseminated in the Internet information on the alleged storage of ammunition in St. Nicholas Cathedral in Stakhanov, Luhansk oblast (on 28 March that “information” was officially disproved by OSCE representatives who visited the Cathedral).

On 4 April 2015 Holy Transfiguration Church at Gusyntsya village, Boryspil region, Kyiv oblast, was desecrated. Persons wearing masks and holding weapons in their hands who said they were officers of the Ukrainian Security Service desecrated the Holy altar and searched the church.

On 8 April 2015 there was yet another attempt to seize Uspensky Church in the village of Ptycha, Rivne oblast.

On 9 April 2015 officers of the Ukrainian Security Service detained archpriest Georgii Dorosh, a senior priest of Transfiguration Church in Maiaki village, Bilyaivka region, Odessa oblast. The officers of the Ukrainian Security Service searched the priest’s house and brought him to Odessa’s detention facility.

On 26 April 2015 supporters of Kyiv Patriarchate, with the support of nationalist militants, attempted to seize St. Michael's Church at Bashuky village and St. John the Evangelist's Church at Kolosova village, Ternopil oblast.

In May and June 2015 there were repeated acts of vandalism at Reverend Anthony and Theodosius Pecherskyi's Cathedral and at St. Nicholas' Church in the city of Vasylkov, Kyiv oblast (doors were broken, windows were smashed).

On 5 and 10 May 2015 there were new attempts to seize St. Michael the Archangel's Church in the village of Bashuky, Ternopil oblast. On May 14, the church was ultimately seized with the support of militant nationalists.

On 20 May 2015 in Lviv the vandals desecrated and wrote "Putin's Satanists" along the perimeter of St. George's Cathedral of the UOC.

On 21 June 2015 in Katerynivka village, Ternopil oblast, followers of Kyiv Patriarchate, with the support of masked militants, organized an attempt to seize St. George's Church. In the course of the fight a cross was stripped off from a priest, a parishioner was beaten, the militants threatened parishioners with cold weapons and fighting dogs. The police was present at the scene but did not arrest the perpetrators of violence.

On 28 June 2015 priests of the Kyiv Patriarchate, with the support of militants from the Right Sector, seized the Intercession of the Holy Virgin Church at Kulykov village, Ternopil oblast.

On 26 July 2015 in Kyiv, at 43 Heroev Stalingrada Avenue, unidentified persons shot Mr. Roman Nikolaev, a priest of Great Martyr Tatiana's Church of Obolon diocese, in the head twice. He was taken to a hospital in critical condition but died in the hospital without regaining consciousness on 29 July 2015.

On 29 July 2015 in Kyiv, Alevtina, a nun of the Ascension Florovskyi Nunnery, was found dead in her apartment with her hands tied and signs of tortures.

On 12 August 2015 two priests and a nun of the UOC were detained at Buhas roadblock near the conflict line in Donbas; they were suspected of “aiding a terrorist organization”. Those detained turned out to be representatives of Donetsk eparchy Father Leonid and Father Nikon, and nun Varvara who accompanied them. The detainees represented Mercy Without Borders humanitarian mission (led by archpriest Zaharias) and distributed humanitarian aid along the conflict line.

On 23 August 2015 representatives of Kyiv Patriarchate, with the support of “local self-defense”, broke into St. Volodymyr’s Church in Mali Dmytrovychy village, Obukhiv region, Kyiv oblast, disrupting the service and kicking the priest and parishioners out. The police arrived to the scene but refused to interfere.

On 31 August 2015 in Kyiv representatives of Kyiv Patriarchate, along with radicals from VO Svoboda and militants from the Right Sector organization, destroyed a memorial cross in the Mariinskyi Park, which was installed there by representatives of the UOC.

On 6 September 2015 a group of radicals and representatives of Kyiv Patriarchate with the support of Ternopil oblast state administration, broke the fence of St. John the Evangelist’s Church in the village of Kolosova, Kremenets region, Ternopil oblast, and tried to disrupt the Sunday service of the UOC community.

On 20 September 2015 Kyiv Patriarchate supporters with the support of radicals attempted to seize Holy Intercession Church in the village of Hrybovytsa, Ivanychi region, Volyn oblast.

On 21 September 2015 in the village of Katerynivka, Kremenets region, Ternopil oblast, there was an escalation of the conflict in respect of St. George’s Church, which the supporters of Kyiv Patriarchate claimed in June 2015. The clergy of the UOC and their parishioners were not allowed to enter the church because of a “schedule of the services”, enacted by the order of the head of the local village civil administration. In the morning of 21 September, the community of the UOC headed by priest Sergii Gladun was praying at the territory near the church in order not to

provoke a conflict with supporters of Kyiv Patriarchate. After the service the parishioners went different ways, and then militants of the Right Sector entered Katerynivka village. They broke window gratings, broke into the church and opened it for the representatives of Kyiv Patriarchate who carried out their “service” in the church. Having found out about the seizure of the sanctuary, the parishioners of the UOC came back to the church and demanded to vacate the building, which legally belonged to their community. The militants prevented them from entering the territory of the church, while the police who arrived blocked the entry to the building. In the evening the believers of the UOC gathered near the church to carry out a sacred procession. Activists of the Right Sector, as well as servicemen of the National Guard and “Ternopil” Battalion who came to assist them, attacked the worshippers with tear gas and violent force. Consequently, one man received a head injury, another one had his arm broken, while dozens of the believers suffered serious injuries, and a lot of them requested medical assistance. The police did not interfere in the carnage, and, according to eyewitnesses’ accounts, even voiced their support of the actions by the attackers.

On 23 and 27 September 2015 there were provocations in Pilepets village, Mizhgyrya region, Transcarpathia oblast (eparchy of Hust) with attempted re-subordination of a religious community to Kyiv Patriarchate and attempted seizure of a church with the use of force.

On 28 September 2015 supporters of Kyiv Patriarchate with the support of dozens of extremists from the Right Sector made an attempt to seize forcefully St. John the Evangelist’s Church in the village of Kolosova, Kremenets region, Ternopil oblast.

On 4 October 2015 head of the Duliby village administration L. Myronchuk together with representatives of Kyiv Patriarchate and with the support of the Right Sector radicals sealed the Nativity of the Blessed Virgin Mary Church. The UOC believers were prevented from carrying out the service. According to the communications from the press office of the UOC Rivne eparchy, in July 2015 L.

Myronchuk illegally obtained documentation of the said church. On 6 October 2015 unidentified men, threatening with beatings, demanded from the church warden to surrender the keys from the church.

On 5 October 2015 in the village of Chudnytsa, Goscha region, Rivne oblast, parishioners of the UOC had to stand against the attempts of supporters of Kyiv Patriarchate to establish control forcefully over the congregational house. The building was used by the parishioners of the UOC to hold services after the 1 March 2015 seizure of St. Paraskeva's Church, which belonged to the community, by supporters of Kyiv Patriarchate.

On 14 October 2015 representatives of Kyiv Patriarchate with the support of servicemen from "Donbas" nationalist battalion seized the newly built Presentation of Jesus at the Temple Church in the city of Kostyantynivka, Donetsk oblast.

On 22 October 2015 there was an attempted seizure, with the support of paramilitary groups, of St. Nicholas' Church in the village of Rayhorodka, Luhansk oblast.

In the early hours of 22 October 2015 Mr. A. Borysenko, head of security of the Transfer of Our Savior Cathedral of the city of Sumy, was brutally beaten. According to the statement by the press service of Sumy diocese of the UOC, the attacker turned out to be a servicemen from unit A3057 of the Armed Forces of Ukraine, who demanded to open the Cathedral during the hours of darkness, removed a fire extinguisher from the wall and beat up Mr. Borysenko, who managed to call the police.

On 22 October 2015 a cache of bottles with incendiary liquid was found in Kharkiv near Pokrovsky Monastery. According to Kharkiv diocese of the UOC, such a founding could have been intended for preparation of arson of the church.

On the night of 23 October 2015 in Sumy Mr. S. Skorobahatskyi, who actively supported the UOC, was beaten. Having received serious injuries, he was delivered to intensive care.

On 26 October 2015 Archpriest Dmitriy Plotnikov was stabbed with a knife at St. Nicholas' Church in Darnytsia district of Kyiv.

On 1 November 2015 a Sunday school and the chapel of St. Sergius' Church burned down in the city of Sumy. The cause of the fire has not been established.

On 2 and 7 November 2015 there were more attempts to seize Uspensky Church in the village of Ptycha, Dubno region, Rivne oblast. Supporters of Kyiv Patriarchate tore off seals and locks from the doors of the church, and elderly female parishioners were beaten.

On 14 November 2015 in Zaluhov village, Ratne region, Volyn oblast, representatives of Kyiv Patriarchate supported by militants of the Right Sector organization attempted to seize forcefully St. Michael's Church.

On 15 November 2015 supporters of Kyiv Patriarchate again broke into Uspensky Church in the village of Ptycha, Dubno region, Rivne oblast, and refused to leave the premises voluntarily.

On 17 November 2015 during the extraordinary session of the village council in Ptycha a decision was made to introduce in Uspensky Church belonging to the UOC so-called "alternate services" and its "joint use" by the UOC believers and supporters of Kyiv Patriarchate. The argument of the UOC believers on inadmissibility of interference of the village council into the life of a religious community was ignored by the local authorities.

On 19 November 2015 in Rokytno town, Rivne oblast, unknown persons desecrated the Trinity Church. According to the press office of Sarny eparchy of the UOC, the vandals broke into the altar, burned the communion-table Gospel, tore and burned the church curtain, the floor and priestly vestments, as well as stole all the donations stored in the church.

On 30 November 2015 in Rokytno town, Rivne oblast, the Church of the Iverska Icon of the Blessed Virgin Mary was attacked by unknown individuals. According to the press office of Sarny eparchy of the UOC, the vandals desecrated the altar,

burnt the altar table, sacred objects of the church, antimensium with relics and the communion-table Gospel, as well as stole all donations.

On 6 December 2015 in village of Hrybovytsa, Ivanychi region, Volyn eparchy, supporters of Kyiv Patriarchate once again broke into Pokrovsky Cathedral, broke seals and locks, and seized the building.

On 18 December 2015 the situation in the village of Ptycha, Dubno region, Rivne oblast, was aggravated once again. Supporters of Kyiv Patriarchate aided by the Right Sector radicals attacked believers of the UOC when they tried to enter the territory of their church. Tear gas, batons, clubs and fire extinguishers were used against the parishioners. According to media reports, the police arrived to the scene but did not interfere. Later on, representatives of the UOC community managed to get inside the church where they held morning and evening service. After the service, some people stayed inside the church as a sign of protest against the aggressive actions of the representatives of Kyiv Patriarchate and radical nationalists who ignored the decision of the Kyiv Court of Appeals dated 2 December 2015, which reaffirmed the property rights of the UOC believers to the church and their right to carry out services there.

On 18 December 2015 representatives of Kyiv Patriarchate attempted to seize St. Nicholas' Church in the village of Kolodianka, Novograd-Volynsky region, Zhytomyr oblast.

On 21 December 2015 in the village of Ptycha, Dubno region, Rivne oblast, unknown individuals who presented themselves as "activists" of the Right Sector attacked the homes of believers of the UOC. They smashed windows in the houses and threw firebombs into some of them. According to media reports, the attackers fired air guns, and cut tires of the UOC believers' cars.

On 27 December 2015 militants of the Right Sector seized St. Nicholas' Church in the village of Kolodianka, Novograd-Volynsky region, Zhytomyr oblast.

On 3 January 2016 in Kutu village, Ternopil oblast, representatives of Kyiv Patriarchate blocked the entrance to the territory of Holy Righteous Anna's Church and prevented the UOC community from carrying out a service.

On 5 January 2016 unknown individuals committed arson of the wooden chapel dedicated to Holy Hierarch Petro Mohyla and the Icon of Holy Mother "Softening of Severe Hearts" located in Shevchenkovskyi district of Kyiv.

On 9 January 2016 in the village of Ptycha, Dubno region, Rivne oblast, supporters of Kyiv Patriarchate attacked pilgrims of the UOC and beat them.

On 10 January 2016 in Pidluzhya village, Dubno region, Rivne oblast, unknown individuals threw stones at the house of archpriest Ioann Savchuk, a priest of Pokrovskaya Church.

On 10 January 2016 in Kutu village, Shumsk region, Ternopil oblast, supporters of Kyiv Patriarchate four times blocked the entrance to the territory of Holy Righteous Anna's Church demanding to pay them UAH 2.5 millions of "compensation" for "earlier construction" of the church.

On 17 January 2016 there was a violent seizure of the Birth of the Blessed Virgin Mary Church in Krasnosillya village, Goscha region, Rivne oblast. Supporters of Kyiv Patriarchate disrupted the service, kicked the priest and parishioners out of the church, and shattered a news reporter's camera.

On 19 January 2016 the City Court in Rivne took a decision to impose custody on the building of Uspensky Church in the village of Ptycha, Dubno region, Rivne oblast, and prohibited to the religious community of the UOC to use and dispose of the property belonging to it. On 26 January 2016 the Supreme Commercial Court of Ukraine repealed that decision. On 20 February 2016 the City Court in Rivne imposed custody again. According to human rights advocates, such court decisions may be a specially developed legal plan aimed at blocking of the building and creation of conditions for its subsequent confiscation from the UOC community.

On 31 January 2016 in Chernigiv an assault took place against Archpriest Georgiy Shcherbatiuk of the Holy Transfiguration Cathedral of the UOC. As it turned out, one of the attackers was Mr. Yu. Askerov, a Deputy of Desniansky District Council of the city of Chernigiv. The archpriest was hit on the head, then the attackers started to break the doors of his car parked near the church. In the hospital the archpriest's wounds were stitched, and he was diagnosed with brain concussion.

On 31 January 2016 in Darnytsa district of Kyiv unknown individuals robbed the Church dedicated to Holy Mother Xenia of St. Petersburg. The perpetrators broke into the church through a window, scattered the altar vessels located in the altar and on the credence table, threw the holy sacraments on the floor and stole contributions to the church and other items.

On the night between 21 and 22 February 2016 the Church dedicated to the Icon of the Holy Mother "Pour Balm Into My Wounds" in Mykolaiv, Lviv oblast, was set on fire.

On 24 February 2016 in Odessa unknown individuals burned down a car used by the head of social department of Odessa eparchy archpriest Pavlo Poleshchuk, who also headed the Coordination Center of Humanitarian Aid for the Internally Displaced Persons from the Eastern Oblasts of Ukraine and Needy Residents of Odessa. The car was poured with gasoline in several places and torched.

On 22 March 2016 Mr. A. Zaharchuk, a legal council of the UOC Ternopol eparchy, was attacked in Ternopil after a sitting of Ternopil Court of Appeals concerning the case on seizure of the St. Michael's Church in Butyn village, Zbarazh region, Ternopil oblast, by supporters of Kyiv Patriarchate. An unidentified person wearing a balaclava came to A. Zaharchuk from behind and poured brilliant green solution onto him. As a result of direct contact with the eyes he suffered a retinal burn, which was certified at a hospital.

In March 2016 in village of Kybaky, Vizhnytskyi region, Chernivtsi oblast, supporters of Kyiv Patriarchate interfered with the construction of a new church of the UOC community. In particular, with the assistance of acolyte of Kyiv Patriarchate A. Fushtey they filled in trenches which were intended for the construction of the church.

In April 2016 the leadership of Sarny eparchy of the UOC declared that there had been 20 acts of vandalism on its territory alone during the previous year, none of which was solved.

On 24 April 2016 there an attempt of arson was made against Reverend Agapyt Pecherskyi's Church located in Kyiv in Pushkin Park.

On the night of 26 April 2016 in Kirovske town, Dnipropetrovsk region, Dnipropetrovsk oblast, there was an attack on Mr. A. Lysenko, a member of clergy of Dnipropetrovsk and Pavlograd eparchy, and a priest of the St. Andrew's Church. The attackers broke into his house, beat him and his father, and severely tortured his wife Irena, who died as a result.

On 4 May 2016 in Kamenytsa village, Dubno region, Rivne oblast, supporters of Kyiv Patriarchate prevented archpriest Ioann Savchuk, a priest of Pokrovskaya Church, from carrying out a burial service at a local cemetery, and attempted to push his car into a river using a towing truck. As a result of these actions, the burial service had to be carried out in the middle of the road at the distance of 2 km from the cemetery.

On the night of 4 May 2016 in Georgievka village, Maryinka region, Donetsk oblast, on the territory under the control of the Armed Forces of Ukraine, three RGD-5 grenades were thrown at All Saints' Church. As a result of the explosions, the roofs of the church and of an adjacent building were damaged at the moment when a novitiate was there.

On 23 May 2016 in Rachyn village, Dubno region, Rivne oblast, supporters of Kyiv Patriarchate assisted by radicals from the "Kozak Guard" and Mr. A.

Kryvychn, the chairman of the village council, while threatening and trying to provoke a conflict, demanded from the priest and the UOC believers to halt the construction of a church building and to cease holding services at St. Barbara's Chapel.

On 24 May 2016 in Obolon district in Kyiv unknown individuals committed arson of the Transfiguration of Christ Church. The attackers broke the doors and set the chapel on fire from the inside.

The Russian Side imperatively demands from the Ukrainian Side to provide information concerning measures taken with regard to the said facts, as well as to inform about bringing perpetrators to justice.

The Ministry avails itself of this opportunity to renew to the Embassy of Ukraine in Moscow the assurances of its highest consideration.

Moscow, 28 November 2016

Annex 121

Russian Federation Note Verbale No. 14453 to the Embassy of Ukraine in Moscow (29
December 2016)

*This document has been translated from its original
language into English, an official language of the Court,
pursuant to Rules of the Court, Article 51.*

The Ministry of Foreign Affairs of the Russian Federation presents its compliments to the Embassy of Ukraine in Moscow and with reference to the notes № 14279/2дснГ dated 16 October 2014, № 15642/2дснГ dated 27 November 2014, № 17004/2дснГ dated 8 December 2014, № 2697-н/дгпч dated 11 March 2015, № 3962-н/дгпч dated 1 April 2015, 4192-н/дгпч dated 6 April 2015, № 8761-н/дгпч dated 9 July 2015, № 11812-н/дгпч dated 28 September 2015, № 4413-н/дгпч dated 25 April 2016, № 5774-н/дгпч dated 27 May 2016, № 5787-н/дгпч dated 27 May 2016, № 11042-н/дгпч dated 10 October 2016, № 12772-н/дгпч dated 22 November 2016 and № 13091-н/дгпч dated 28 November 2016, as well as to the consultations which took place in Minsk, the Republic of Belarus, on 1 December 2016, has the honor to draw attention to a number of facts which allegedly may be relevant to fulfillment by Ukraine of its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, hereinafter referred to as the Convention.

In conformity with Article 1 of the Convention, as well as in compliance with the fundamental obligations laid down in Articles 2, 4 and 5 of the Convention, the States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights and guarantees:

- The States Parties to the Convention shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof (Article 4a);

- The States Parties to the Convention shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination (Article 4c).

In compliance with fundamental obligations under the Convention, the States Parties undertake to guarantee the right of everyone to equality before the law without any distinction with regard the enjoyment of the following rights:

- the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution (Article 5b);
- the right to freedom of thought, conscience and religion, the right to freedom of opinion and expression, the right to freedom of peaceful assembly and association, the right to own property alone as well as in association with others (Article 5d).

In this regard the Russian Side would like to draw attention to the following facts and information related to the situation involving the believers and the priesthood of the canonical Ukrainian Orthodox Church, hereinafter referred to as the UOC, as well as the property which belongs to the Church.

During the period from 2014 to November of 2016, around 40 temples which belong to the church were seized. These captures took place in Volyn, Rivne, Ternopil, Ivano-Frankivsk, Lviv, Chernivtsi, Khmelnytskyi, Zhytomyr, Cherkasy, Kherson and Luhansk oblasts. At that, the so-called raider plan involving the organization of alleged popular assembly of the residents of a locality and further “reregistration” of the documents of the community is still used.

Since 2015 there is ongoing conflict around the Uspensk Church in the village of Ptycha, Rivne oblast. During that period, representatives of a religious organization named “The Ukrainian Orthodox of Kyiv Patriarchate”, hereinafter referred to as Kyiv Patriarchate, have made repeated attempts to capture the

church in violation of the judicial decisions of 4 instances of the courts; there were facts of infliction of bodily injuries to the clergy and believers of the UOC using “non-lethal” weapons, and of blocking of the believers of the UOC in the church which belonged to them without access to food, water and medications. In April 2016, representatives of “Kiyv Patriarchate” and law enforcement agencies again blocked the believers in the church, depriving them from food and water for several days. Currently the church is sealed off in accordance with the decision of a local court, no church services have been carried out there.

The efforts of Ternopil Oblast Council to achieve transfer of all buildings of the St. Uspenskaya Pochaivska Lavra (Pochaiv city, Ternopil oblast) under control of a state conservancy area and to liquidate religious life in the cloister stand out. On 12 May 2016 the Council made an appeal to the President of Ukraine and the Cabinet of Ministers of Ukraine requesting alienation of the complex of Lavra’s buildings from the Ukrainian Orthodox Church and abolition of all regulations granting the UOC the right to use religious objects located on its territory.

Moreover, since 2014 the Department for Religion and Nationalities of the Ministry of Culture of Ukraine has been avoiding, under various pretexts, the registration of eparchies, monasteries and parishes of the canonical UOC. In this regard, the Holy Synod of the UOC sent an appeal to the Prime Minister of Ukraine V. B. Groyzman concerning the “prejudiced and biased treatment of the Ukrainian Orthodox Church by the Ministry of Culture of Ukraine”. The Ministry of Culture of Ukraine continues to exert pressure on the organizations being registered, requiring unofficially to amend their charters so that in the future it would be easier to carry out the so-called raider seizures of these organizations.

The Parliament of Ukraine, with participation of the Ministry of Culture of Ukraine, is working on a number of relevant bills, namely:

- bill № 4128 dated 23 February 2016 “On Amending the Law of Ukraine “On Freedom of Conscience and Religious Organizations” (Concerning the

Change of Subordination by Religious Organizations)” introduces to the Ukrainian legislation on religion the notion of “belonging of an individual to a religious community”, however, no exact definition of the notion was provided. Under the bill, it is proposed to empower individuals “belonging to a religious community” with a right to amend the charter of the community through voting by a simple majority. Therefore, the bill is aimed at legalization of the practice of carrying out of so-called veche and popular assemblies with the participation of “all” inhabitants of a locality, as well as nonresidents claiming to “belong to a religious community”. In practice, any nonresident stranger may call himself a member of one or another religious community and participate in “voting” concerning its transfer to another subordination. On 1 November 2016 the bill was included in the agenda of the 5th session of the Parliament of Ukraine of the VIIIth convocation.

Even before the bill was introduced, seizures of temples of the Ukrainian Orthodox Church took place in Ukraine using that scenario. Speaking at the Bishops' Council of the UOC on 29 January 2016, Metropolitan Onufryi underlined that during such “voting” of popular assemblies concerning the change of subordination of parishes “a substitution of notions takes place, and territorial community is equated to a religious one”.

– bill № 4511 dated 22 April 2016 “On Special Status of Religious Organizations, Administrative Centers of Which are Located in a State Which Was Declared Aggressor Country by the Verkhovna Rada of Ukraine” provides for a procedure of special “registration” of such religious organizations through conclusion “of a treaty (agreement) with the state” which stipulates their “obligation to respect sovereignty, territorial integrity and laws of Ukraine”. At that, it is proposed that the registration and reregistration of religious organizations, which have concluded the said agreement, should be carried out “after a relevant expert assessment of the registration documents”. In fact, the bill is aimed at fixation of interference of

state agencies into the procedure of appointment of the church hierarchs through “approval of the candidates for the offices of the central and regional leadership of the religious organizations by the central authority of the executive branch of power of Ukraine implementing the state policy in the sphere of religion”. Such body, under the bill, should be the Ministry of Culture of Ukraine. In addition, the bill provides that executive authority with the power to liquidate communities “with a special status” when the fact of “collaboration” with an “aggressor country” or “representatives of military terroristic groupings” is established. On 1 November 2016 the bill № 4511 was included in the agenda of the 5th session of the Parliament of Ukraine of the VIIIth convocation. The document was adopted by the Parliament in the first reading.

On 14 November 2016 the Holy Synod of the Ukrainian Orthodox Church requested President of Ukraine P. A. Poroshenko to exert all necessary efforts to preclude any attempt to use, at the nationwide level, the issues of religion and confessional choice of Ukrainian citizens for political manipulations and settling of scores between the political opponents. The request stated: “unfortunately, insults, threats, incitements to discrimination with regard to millions of believers of our Church have become a commonplace today in Ukraine. The state authorities have failed to provide a single legal assessment of such facts that are ignominious for a democratic society. Until now, there have been no cases when contemporary politicians were held responsible for numerous cases of incitement of religious hatred. The state of affairs makes us speak about the emergence of disturbing trends in the state-church relations”. It was also stated in the document that a number of forces in Ukraine, including representatives of supreme of state authorities, seek to use the UOC as a tool in their political fight.

The Russian Side also would like to draw attention to the following situations and incidents with regard to the believers and clergy of the UOC, as well as to the property belonging to it.

In May 2016 in the village of Kamenytsa, Dubno region, Rivne oblast, where an UOC church had been seized earlier, a community of “Kyiv Patriarchate” did not allow an archpriest and rector of the UOC St. Pokrovskiy Cathedral in the village of Podluzhie to enter the cemetery; he had been invited by local inhabitants to perform a memorial service. There was an attempt to throw his car into a river using a tow truck.

In May 2016 in the village of Rachyn, Dubno region, Rivne oblast, followers of “Kyiv Patriarchate” who illegally seized in 2014 a UOC temple in honor of Kazan Icon of Holy Mother, interfered with the construction of a new UOC temple and demanded to vacate Holy Great Martyr Barbara Chapel, which belonged to the UOC, located at the local village cemetery.

On 10 June 2016 in the village of Kolosova, Kremenets region, Ternopil oblast, a community of “Kyiv Patriarchate” with support from activists of the Right Sector once again carried out a forcible seizure of St. Apostle John the Evangelist’s Church, in spite of the UOC believers’ protests. In the evening of the same day, representatives of the community of “Kyiv Patriarchate” brutally beat Mr. I. Ramskyi, a parishioner of the local community of the UOC. The victim was delivered to intensive care (he was diagnosed with multiple beatings, broken ribs and hypertensive crisis).

On 26 June 2016 in the village of Duliby, Goscha region, Rivne oblast, followers of “Kyiv Patriarchate” with support from activists of radical nationalist organizations made an attempt to seize during a service the Nativity of the Most Holy Mother of God Church of the UOC. Parishioners of the church suffered bodily injuries.

In July 2016, a tree-meter cross was cut off at the entrance to Vinnitsa city; the cross had been established there earlier by UOC believers.

On 12 July 2016 near the village of Chutovo, not far from the administrative border between Kharkiv and Poltava oblasts, members of radical nationalist

organizations the Right Sector, OUN and Azov Civil Corps, while shouting “Death to the enemies!”, blocked the way to the members of the All-Ukrainian Cross Procession for Peace, which was carried out by UOC believers.

On 13 July 2016 Boryspil City Council in Kyiv oblast adopted an address to the members of the All-Ukrainian Cross Procession for Peace, which was carried out by UOC believers, in which requested them “not to enter Boryspil”.

On 18 July 2016 in the village of Mgar, Lubny region, Poltava oblast, a group of camouflaged individuals blocked members of the All-Ukrainian Cross Procession for Peace, which was carried out by UOC believers, upon their exit from the territory of Mgar St. Transfiguration Monastery.

On 18 July 2016 in Zhytomyr a group of activists of the Right Sector, “Automaidan-Zhytomyr”, OUN and other radical nationalist organizations blocked the movement of the All-Ukrainian Cross Procession for Peace, which was carried out by UOC believers, as they were proceeding to St. Transfiguration Cathedral in Zhytomyr. The UOC believers intended to carry out their procession in Chudnovskoho Street through the city center. Shouting “Death to the enemies!”, the radicals made these people change their route and proceed to the church through the city cemetery.

On 22 July 2016 there was an attempt to capture the chapel in honor of St. Volodymyr and Olga in the territory of the railway hospital of Uzhhorod city. As a result, the chapel was damaged and the door locks were broken.

On 19 August 2016 on the holiday of the Transfiguration of the Lord in the village of Novaya Moshchanytsa, Zdolbuniv region, Rivne oblast, the church in honor of the Nativity of the Blessed Virgin was desecrated and donations of parishioners were stolen.

On the night of 22 to 23 August 2016 in the village of Kopytkiv, Zdolbuniv region, Rivne oblast, the church in honor of Exaltation of the Holy Cross was robbed.

Donations for children suffering from oncological diseases were stolen from the church.

On 24 August 2016 in the village of Zdobvytsa, Zdolbuniv region, Rivne oblast, St. Michael's Cathedral was robbed and desecrated. Holy vessels were scattered in the Cathedral and parishioners' donations were stolen.

On 31 August 2016 in the city of Svitlovodsk, Kirovograd oblast, the church in honor of Introduction of the Blessed Virgin Mary, belonging to Aleksandriyska eparchy of the UOC and located at Yegorova Street 13, was desecrated, and the walls of the church were daubed.

On 9 September 2016 in the village of Borova, Fastiv region, Kyiv oblast, radicals destroyed the church in honor of Dormition of the Mother of God being constructed by an UOC community.

On 14 September 2016 in the village of Kutu, Shumsk region, Ternopil oblast, after a long standoff, the church in honor of Righteous Anna was finally seized by representatives of "Kyiv Patriarchate".

On the night of 23 to 24 October 2016 in the city of Reni, Odesa oblast, St. Constantine and Helena Church belonging to an UOC community was attacked. Unknown persons desecrated the church and scattered holy vessels. The attackers took the most valuable items along with donations.

On the night of 10 to 11 October 2016 in the village of Kamenka, Berezne region, Rivne oblast, for the second time during the same year St. Michael's Cathedral was robbed. The Cathedral belongs to Sarny eparchy of the UOC. Unknown persons broke down a side door, desecrated the Cathedral and stole donations. On the same night, another church was robbed – the one named in honor of the Archistratigus Michael in the village of Shchekychyn, Korets region, Rivne oblast, which also belonged to the Sarnenskaya eparchy of the UOC. Because of these incidents, Metropolitan of Sarny and Polesie Anatoly requested President of Ukraine P. O.

Poroshenko to protect religious feelings of believers and churches of Ukraine from attacks.

On the night of 21 to 22 October two churches of Ostrog diocese, Rivne eparchy of the UOC, were attacked in Rivne oblast. In St. Nickolas' Church in the village of Tesov, Ostrog region, unknown persons broke down the doors and stole donations of parishioners, as well as the money collected for children suffering from oncological diseases. In St. George's Church in the village of Seyantsy, Ostrog region, doors were also broken down and donations stolen.

On the night of 28 to 29 October, two churches of Rivne eparchy of the UOC were attacked in Rivne oblast. In particular, in the village of Hylcha Persha, Zdolbuniv region, unknown persons broke down the doors of the St. Nickolas' Church. In the village of Velbyvno, Ostrog region, the attackers broke down the doors of the St. Intercession of the Virgin Church, desecrated relics, overturned and scattered holy vessels.

On 7 November 2016 in the city of Pavlohrad, Dnipropetrovsk oblast, at night an attack on the UOC church in honor of Saints Cyril and Methodius was carried out. Unknown persons pelted the building of the church with firebombs, resulting in a fire: the choir with prayer books burned down, icons, windows, holy vessels, as well as heating system and temple paintings were damaged.

On 10 November 2016, in Kyiv at Bazhana Avenue 9, unknown persons broke into the UOC church in honor of Transfiguration of the Lord, braking down the entrance door and wresting the grating of the church shop. Afterwards, they stole holly vessels, decorations and donations of parishioners, with total amount of damage of approximately UAH 100,000.

The Russian Side imperatively demands from the Ukrainian Side to provide information concerning measures taken with regard to the said facts.

The Ministry avails itself of this opportunity to renew to the Embassy of Ukraine in Moscow the assurances of its highest consideration.

Moscow, 29 December 2016

Annex 122

Russian Federation Note Verbale No. 14500 to the Embassy of Ukraine in Moscow (30
December 2016)

*This document has been translated from its original
language into English, an official language of the Court,
pursuant to Rules of the Court, Article 51.*

The Ministry of Foreign Affairs of the Russian Federation presents its compliments to the Embassy of Ukraine in Moscow and with reference to the notes № 14279/2дснГ dated 16 October 2014, № 15642/2дснГ dated 27 November 2014, № 17004/2дснГ dated 8 December 2014, № 2697-н/дгпч dated 11 March 2015, № 3962-н/дгпч dated 1 April 2015, 4192-н/дгпч dated 6 April 2015, № 8761-н/дгпч dated 9 July 2015, № 11812-н/дгпч dated 28 September 2015, № 4413-н/дгпч dated 25 April 2016, № 5774-н/дгпч dated 27 May 2016 and № 5787-н/дгпч dated 27 May 2016, № 11042-н/дгпч dated 10 October 2016, № 12772 dated 22 November 2016 and № 13091-н/дгпч dated 28 November 2016, № 14453-н/дгпч dated 29 December 2016, as well as to the consultations which took place in Minsk, the Republic of Belarus, on 1 December 2016, has the honor to draw attention to a number of facts which allegedly may be relevant to fulfillment by Ukraine of its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, hereinafter referred to as the Convention.

In conformity with Article 1 of the Convention, as well as in compliance with the fundamental obligations laid down in Articles 2, 4 and 5 of the Convention, the States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights and guarantees:

- states shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hostility, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof (Article 4a);
- under the Convention, states shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and

- incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law (Article 4b);
- shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination (Article 4c).

In compliance with fundamental obligations under the Convention States Parties undertake to guarantee the right of everyone to equality before the law without any distinction with regard the enjoyment of the following rights:

- the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution (Article 5b);
- political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government (Article 5c);
- the right to freedom of thought, conscience and religion, the right to freedom of opinion and expression, the right to freedom of peaceful assembly and association, the right to own property alone as well as in association with others (Article 5d).

In this regard the Russian Side would like to draw attention to the following situations and information concerning acts or actions with regard to a number of political parties of Ukraine, which enjoyed a wide range of electoral support among ethnical groups of non-Ukrainian origin who reside in Ukraine, first of all, of Russian-speaking population, the parties declaring as their aim the development of good neighborly relations with Russia, the parties standing for ideas of internationalism, civic movements and their individual representatives, namely:

- on 30 April 2014 by the decision of the District Administrative Court of Kyiv, activity of the all-Ukrainian party “Russian Unity” was prohibited in the territory of Ukraine;

- on 13 May 2014 by the decision of the District Administrative Court of Kyiv, activity of the party “Russian Block”, which in conformity with the program documents advocated “civil peace, mutual understanding and renunciation of nationalist ideology in the state-building”, was prohibited in Ukraine;
- on 20 June 2014 the District Administrative Court in Zaporizhia satisfied the claim of Prosecutor's Office of Zaporizhia oblast and prohibited the activity of the youth public organization “Slavianskaya gvardiya” (Slavic Guards) because the activity of the organization allegedly “threatened security and territorial integrity of Ukraine”;
- on 9 April 2015 the Parliament of Ukraine adopted a package of laws №317-VIII “On the Condemnation of Communist and National-Socialist (Nazi) Totalitarian Regimes in Ukraine and Prohibition of Propaganda of Their Symbols”, №314-VIII “On Legal Status and Honoring the Memory of Participants of the Struggle for Independence of Ukraine in XX Century”, №315-VIII “On Perpetuating the Victory over Nazism in World War II 1939-1945”. In fact, these laws are aimed at creation of conditions for limitation of freedom of conscience, thought, opinion and expressions of a part of the Ukrainian society. The practice indicates the primordial one-sided orientation of the said laws which *de-facto* serve not as a valid tool of real condemnation and prohibition of propaganda of Nazism and neo-Nazism, but are used for the suppression of activity of political and public associations oppositional to the current Ukrainian government, which express the interests of the Russian-speaking population of Ukraine, as well as stand for the ideas of internationalism, and for the persecution of their representatives.

In reality, the competent authorities of Ukraine apply the legal regime of prohibition of usage of the symbols quite selectively. The public usage of the symbols of the Soviet period, which turned out to be equated to Nazi symbols, is punishable, while remaining elements of Soviet symbols in the architecture are eliminated. At the same time, a similar prohibition does not preclude the facts of free and unrestricted usage of signs related to Nazi symbols or copied from them, as well

as of Nazi symbols *per se*, by a number of participants of the so-called volunteer battalions, nationalist associations and radical football fans, while their public demonstration or copying, as a rule, are not condemned and punished. The competent authorities of Ukraine do not carry out relevant analysis and assessment of nationalist symbols as regards their possible use for the incitement of interethnic hatred.

At the same time, on 12 April 2016 Minister of Justice of Ukraine P. Petrenko signed order №1097/5 which affirmed a legal conclusion of a group of 10 experts resulting from analysis of symbols, activity and name of the Socialist Party of Ukraine. As a result of the expert assessment, the symbols of the Socialist Party, which contain the image of a hammer together with a composition of elements resembling a sickle, is recognized inconsistent with the Law “On the Condemnation of Communist and National-Socialist (Nazi) Totalitarian Regimes in Ukraine and Prohibition of Propaganda of Their Symbols”.

- On 17 April 2015 Ivano-Frankivsk Oblast Council prohibited in the territory of the oblast activities of the Party of Regions, Communist Party of Ukraine, the Opposition Block Party, and the Party of Development of Ukraine as parties, “activities of which contradict the national interests and violates rights and freedoms of the citizens of Ukraine”. The decision of the District Council included a proposal to submit to the bodies of the Ministry of Justice of Ukraine a motion to cancel the registration of local organizations of those parties;
- On 13 June 2015 in Odesa activists of the Right Sector, Automaidan, the Council of Public Security and other movements made an attempt of a raider seizure of a building used by the office of a local division of the Communist Party of Ukraine. Referring to an arrangement allegedly reached with the First Secretary of the Regional Party Committee Ye. Tsarkov on protection of the building, the representatives of the radical movements searched the premises

and burnt documents and symbols stored there. No measures were taken by the law enforcement authorities of Ukraine in this regard.

- On 23 July 2015 Minister of Justice of Ukraine P. Petrenko signed orders № 1312/5, № 1313/5, № 1314/5 on prohibition of the Communist Party of Ukraine, Communist Party of Ukraine (Revised) and the Communist Party of Workers and Peasants from participation in the electoral processes on all levels in Ukraine. On 29 July 2015 a written request concerning the non-admission of the communist parties to the elections was sent to the Central Electoral Commission of Ukraine. Due to these actions, the said parties were barred from participating in the local elections, which took place in October 2015;
- On 30 September 2015 by the decision of the District Administrative Court of Kyiv, the activities of the Communist Party of Ukraine (Revised) and the Communist Party of Workers and Peasants were prohibited;
- On 16 December 2016 by the decision of the District Administrative Court of Kyiv, the activity of the Communist Party of Ukraine (CPU), which, under its charter, stands “against any form of national extremism and chauvinism”, was prohibited. Earlier, on 24 July 2014, the fraction of the CPU in the Verkhovna Rada of Ukraine was dissolved on the basis of the legally formalized amendments to the Verkhovna Rada Rules of Procedure adopted by the Verkhovna Rada of Ukraine on 22 July 2014 and signed on the same day by President of Ukraine Petro Poroshenko. On 24 July 2014 Chairman of the Verkhovna Rada of Ukraine A. Turchynov declared that he would request the Ministry of Justice of Ukraine to check implication of the Communist Party of Ukraine to “the organization of separatism” and, if necessary, to prohibit its activity through a judicial procedure. On 1 April 2015 a representative of the Security Service of Ukraine O. Hytlianska announced at a briefing the SSU’s intent to initiate a criminal proceeding against the leader of the CPU P. Symonenko. The said steps were made following P. Symonenko’s public

opposition to the military operation in the South-East of Ukraine voiced in May 2014.

In addition to the prosecutions by the Ukrainian authorities of the Communist Party of Ukraine and movements allied to it, which stood for internationalism and represented interests of the Russian-speaking population, radical nationalists carry out attacks against members of these parties with the connivance of the authorities and law enforcement bodies, as demonstrated by a number of incidents, in particular:

- The Ministry of Justice of Ukraine promulgated information that in 2014 three hundred criminal proceedings were initiated against CPU representatives, including on charges of war propaganda and corruption.
- According to reports by representatives of the International Komsomol movement MSKO-VLKSM in 2014 there were around 1500 communists and komsomol members who left Ukraine being afraid of reprisals. According to them, in 2014 alone, 48 communists were killed, 152 communists and komsomols went missing, around 300 were put into custody, and about a thousand communists and komsomol members were facing criminal charges in Ukraine.
- On 23 July 2014 the body of Mr. V. Kovshun, secretary of the CPU primary organization in the village of Hlynky, and a member of Kumachovsk village council of Starobeshevo region of Donetsk oblast, was found with the signs of tortures. According to media reports, before his death he was tortured at the check-point of the Ukrainian National Guard in the village of Luzhky of Starobeshevo region of Donetsk oblast, after being repeatedly threatened by the Ukrainian nationalists.
- On 17 March 2016 in Kyiv national-radicals armed with clubs and re-rods attacked a rally of socialists and communists near the Historical Museum on Volodymyrska Street. Notwithstanding the fact that the rally was agreed with the city government, there were no policemen in the locality where the rally took place. The radicals beat with clubs the participants of the event, including

elderly and women, and poured kephir and white paint on them. Two men were injured to the extent that they needed hospitalization. The attackers introduced themselves as activists of the so-called “Azov Civil Corps” and “other patriots”.

- On 28 June 2016 Ms. A. Aleksandrovska, a leader of Kharkiv oblast committee of the CPU and a leader of “Slobozhanshchyna” movement, was detained by Security Service of Ukraine (SSU) officials in the hallway of her own house in Kharkiv. Following a lengthy search, Ms. Aleksandrovska was brought to the SSU Headquarters in Kharkiv oblast. She was accused of attempted bribery of leaders and members of local councils so that they would adopt appeals to the Parliament and to the President of Ukraine during their sessions as to amending the Ukrainian Constitution to decentralize the state power. The pretext was the fact of adoption by the City Council of Iuzhnyi, Kharkiv oblast, of an appeal to the central Ukrainian government on provision of broader powers to the local authorities.

At the same time, parties and associations, as well as the so-called volunteer battalions, which propagate the ideas of racial and national exceptionalism, radical nationalism, xenophobia and interethnic hatred, and which use Nazi and neo-Nazi symbols, operate in Ukraine freely, in particular:

- Since 22 March 2014 the Right Sector, a radical nationalistic movement, has been operating as a registered political party. On 26 October 2014, during the extraordinary elections to the Parliament of Ukraine, the leader of the party, famous radical D. Iarosh was elected a member of Parliament. Previously he used to be the leader of a nationalistic paramilitary group “S. Bandera’s “Tryzub”. D. Iarosh and his active followers openly propagate the ideology of integral Ukrainian nationalism and Ukrainian national exceptionalism.
- On 14 October 2016 the National Corps, a radical nationalistic party, was established. The core of the party was formed by the followers of the Azov Civil Corps association, as well as by former members of the so-called Azov

Volunteer Battalion and members of radical nationalistic groups. For its self-identification the party uses Nazi and Nazi-style symbols and signs. The party's program provides for discriminatory approach in the matters of granting of Ukrainian citizenship, introduction of censorship, direct limitation of dissenting views. Mr. Andriy Byletskyi, the party leader, is also a deputy of the Verkhovna Rada of Ukraine of VIII convocation.

- Since 14 February 2004 until the present day “All-Ukrainian Association “Svoboda”” political party had been operating in Ukraine. The party became the legal successor of the Social-National Party of Ukraine. Since 2010, the party has been represented in several local councils in Western Ukraine and between 2012 and 2014 it had a fraction in the Verkhovna Rada of Ukraine of VII convocation. Since 2014, members of the All-Ukrainian Association “Svoboda” have been forming the basis of Sich paramilitary association, which participated in the military operation in the South-East of Ukraine. Leaders of the party (O. Tiagnybok, I Faryon, A. Ilenko, I. Myroshnychenko., I. Mykhalchyshyn) afford themselves public statements based on the ideas of racial and ethnic intolerance, including those of anti-Semitic nature. The party members declare cultural and mental superiority of ethnic Ukrainians, and call for ethnic and language discrimination, as well as actively stand for glorification of a number of Ukrainians who had collaborated with the Nazis during the Second World War, including members of Galizien Division of the SS and of the Organization of Ukrainian Nationalists – the Ukrainian Insurgent Army (OUN-UPA).

Radical statements by party activists, as well as by officials and public persons who presumptively may contain elements of incitement of xenophobia and interethnic hatred don't receive competent legal evaluation by law enforcement agencies of Ukraine. Below are some examples of such statements:

- On 11 June 2014 Minister of Defense of Ukraine M. Koval in his interview to TSN news service (1+1 channel) said regarding residents of Donbas: “There

- will be complete screening. I mean large-scale screening measures. No residents, including women, may be tied to separatism”.
- On 14 November 2014 President of Ukraine P. Poroshenko in his speech at the “Strategy 2020” forum in Odesa regarding the situation in Donbass stated: “Because we shall have jobs and they shall not. We shall have pensions and they shall not. We shall take care of children and pensioners and they shall not. Our children shall go to kindergartens and schools and their children shall be sitting in basements! Because they can do nothing. In this way, namely in this way, we shall win the war”.
 - On 28 May 2015 Minister of Internal Affairs A. Avakov in his interview to LigaBusinessInform stated: “My position is as follows: the whole line of delimitation should be fully closed. Therefore, my radical point of view – junta-style, our style. To close the line. Go on foot, go in civil passenger cars, no goods. Let them receive goods from Russia. I have also suggested to impose 100% taxes on our goods for the occupied territories”.
 - On 29 May 2015 Deputy Head of Main Directorate of the Ministry of Internal Affairs of Ukraine in Donetsk oblast I. Kyva wrote on his Facebook page: “I address civic organizations and activists of Kyiv: block movement of busses of Sheriff-Tour company from Kyiv to Donetsk and from Donetsk to Kyiv, which facilitate the dissemination of terrorist plague and filth in Ukraine. P.S. If it were up to me, I would shoot these travelers to DPR, lovers of referenda and parades of Ukrainian prisoners of war. Only firm position of the society would make Donbas sober up!!! There are no halftones any more. There is only FRIEND-or-FOE! Only in this way we can overcome the plague!!!!” (spelling and punctuation of the original have been preserved);
 - On 1 February 2016 Ms. I. Farion, a member of the political council of Svoboda, and a deputy of the Verkhovna Rada of Ukraine of VII convocation, in her interview to ZIK channel declared that: “The guilt of the East of Ukraine is that the Ukrainian society is incapable to put out on the surface adequate politicians who would explain to the East that it is Ukraine, and that in both

Donetsk and Luhansk the Ukrainian language must dominate. For those who disagree – the borders are open, they can take a ride and depart”. Previously, on 3 June 2010 in an interview to UT-West channel I. Farion stated: “We have 14% of Ukrainians who indicated that Russian is their native tongue, i.e. the language of the occupant. This is an evidence of a horrible mutation of their conscience. These are 5 million of Ukrainians-degenerates”. In February 2010 I. Farion acting as a deputy of the Lviv Oblast Council at an open lesson in the kindergarten №67 in Lviv told children the following: “Never be Alyonka. Since if you become Alyonka, sweet young thing, then you will have to pack your bags and depart to Muscovy. <...> If Marychka – is ours, “Masha” is not our form: let her go there where Mashas live. <...> In case someone calls Petryk Petia – he is not a Ukrainian boy too; he should have left this place or learn how to correctly call himself in Ukrainian”.

- On 1 June 2016 Chairman of the Verkhovna Rada of Ukraine A. Parubiy stated the following concerning the renaming of Dnipropetrovsk and the initiative of a number of deputies to conduct a referendum on renaming of the city among local residents: “Moscow occupants laid in the ground millions of Ukrainians in the East of Ukraine. They killed millions of our grandfathers on those territories, which were colonized by settlers from different corners of another state. And today you suggest us to appeal to the opinion of the local residents? And today to appeal to the opinion of people who live there?”
- On 23 November 2016 Minister of Culture of Ukraine Ye. Nischuk said at Freedom of Speech show aired at ICTV channel in response to a question on Ukrainian culture in the South-East of Ukraine: “The situation on the South and in the East of Ukraine is an abyss of conscience. Moreover, when we are talking about genetics in Zaporizhia and Donbas – these are ecdemic cities. There is no genetics there. They were deliberately ecdemic. Cherkasy – is a glorious land of hetmans and Shevchenko. The city of Cherkasy is half-ecdemic. Why? Because they were afraid of the Shevchenko’s spirit”.

In addition, there were several situations and actions of representatives of radical nationalistic movements, which may also relate to the implementation by Ukraine of its obligations under the Convention, namely:

- On 25 February 2016 in Kyiv a group of radical nationalists from the so-called Azov Civil Corps attacked the building where Inter Ukrainian TV channel is located. The reason for dissatisfaction was the editorial politics of the company, as well as employment of Russian citizens. Around 50 activists of the association blocked the main entrance to channel's office, made an attempt to take it by storm and to break into it. Ukrainian law enforcement agencies did not take any measures in this regard. On 4 September 2016 a group of radicals burnt automobile tires near the building of Inter, pelting it with smoke flares. A fire broke out, and journalists were forced to evacuate urgently. After the action was over, an antipersonnel landmine was found near the entrance to Inter office.
- On 2 August 2015 several dozens of radicals headed by M. Hordienko and Ye. Rezvushkin in camouflage attacked participants of a rally in memory of casualties of the tragedy of 2 May in Odesa. The group of radicals attacked the activists who had brought traditional black balloons, which are launched in the sky each month in the memory of the dead. Ukrainian law enforcement officers did not take noticeable efforts to halt these actions.
- On 30 September 2015 militants and activists of the Right Sector made an attempt to limit the freedom of a group of Greek citizens by blocking the entrance to the building of Duke Hotel on Tchaikovsky Street. The radicals tried to break into the building of the hotel attempting to prevent the Greek delegation from participation in a round table dedicated to the prospects of reintegration in Odesa region, human rights, freedom of speech and fundamental European values. Deputies and important public persons from Greece were to participate in the event. Radicals and nationalists held "There is no place for Russophile-foreigners in Ukraine" banners. Law enforcement agencies of Ukraine did not suppress the incident.

- On 10 March 2016 in Odesa a group of radicals organized an attack on the activists of Odesa Antimaidan who were delivered to a session of Malynovskyi District Court on charges of organization of mass disruptions of public order during the events of 2 May 2014 near the House of Trade Unions in Odesa. During a lengthy break of the session, clashes erupted near the premises of the court. The radicals chased the defendants who exited from the court building. As a result, several defendants suffered: two Antimaidan activists were attacked with pepper spray (into eyes), another one received a blow to his head, while another one suffered brain concussion and could not continue participation in the court hearing. An old woman was also beaten. The Ukrainian police did not suppress the incident.
- On 2 April 2016 at the Kulykove Field in Odesa during the memorial events, organized by a small number of relatives of the victims of the tragedy in the House of Trade Unions in Odesa of 2 May 2014, a group of radicals who waited until their departure carried out an act of vandalism with regard to candles, lamps and flowers brought by the activists to the building. At the moment when relatives of the victims came back to return the flowers and lamps to their places, there was a small explosion. One man's hand was injured.
- On 9 May 2016 in a number of Ukrainian cities members of radical organizations made attempts to disrupt or debauch solemn events dedicated to the Victory Day – the holiday, which has a special meaning in the victory over Nazism based on the theory of racial and ethnic superiority. Law enforcement agencies of Ukraine did not suppress the incidents. Among others, the following examples may be provided:
 - In Zaporizhia unidentified persons tried to take away from an old man a copy of the Victory Banner, which he unwrapped during the ceremony celebrating 9 May. Policemen interfered into the conflict. Speaking about the incident at 112 TV Channel, A. Soloshenko, a representative of the press-service of national police in Zaporizhia

oblast, stated that representatives of the national police talked to the owner of the flag, persuaded him to furl the flag and then the incident was over.

- In Kharkov near the Glory Memorial nationalists carried attacked people with ribbons of Saint George.
- In Mykolaiv Ukrainian radicals from Azov Battalion attacked veterans of the Great Patriotic War who participated in the parade.
- In Kyiv a group of aggressive radicals attacked a 10-year old girl and her mother who joined the Immortal Regiment action in Kyiv. The reason of the attack were ribbons of Saint George on their clothing. The radicals took away the ribbons and burned them on the spot. In addition, a group of radical youngsters attempted to organize clashes with the Immortal Regiment action participants.
- On 10 May 2016 Kyiv national radicals broke the memorial of the Kyiv undergrounder T. Markus, who fought against the Nazi troops and was shot in 1943.

In addition, “military-patriotic” educational camps and “centers of leisure” for children and youth, where they are engrained with ideas related to xenophobia and radical nationalism, operate in Ukraine. Participants of military operations in Donbas and followers of radical nationalistic associations are engaged there as pedagogues and counselors. During the shifts, training courses on the use of weapons, organization of “catch a spy” and power trainings are organized for the children.

During the period of 2015-2016 in Ukraine in a number of regions several such “centers of leisure” were organized for the children. Thus, Azovets Camp operated at Pushcha-Vodytsa Park; Slobozhanyn Camp operated in the training camp of Azov Battalion in the city of Valky, Kharkiv oblast; Nord Corps Camp operated in the village of Klochkiv, Chernigiv oblast; Zaporizhia Camp operated in the village of Lunacharske, Zaporizhia oblast; Kuznia Unezh Camp operated in Dnister Canyon,

Kirovograd oblast; Gaidamak Circle Camp (the Right Sector tent camp) operated near Trakhtemyriv, Cherkassy oblast.

The Russian Federation consequently stands against displays of xenophobia and radical nationalism, as well as against attempts to glorify Nazism, Nazi movement in any form, neo-Nazism and former members of the Waffen-SS, including through construction of monuments and memorials and conduct of public demonstrations with a view to glorify the Nazi past, Nazi movement and neo-Nazism, as well as through declaration of the attempts to declare such members, and those who fought against the Anti-Hitler Coalition and collaborated with the Nazi movement, as members of the national liberation movements. These provisions are consolidated, inter alia, in the text of the annual resolutions of the UN General Assembly “Combating glorification of Nazism, Neo-Nazism and other practices that contribute to fuelling contemporary forms of racism, racial discrimination, xenophobia and related intolerance”. Most recently, the relevant resolution 71/179 was adopted on 19 December 2016.

In this regard the Russian Side would like to draw the attention of the Ukrainian Side to the following situations and events which allegedly may relate to the implementation by Ukraine of its obligations under the Convention:

- on 14 October 2014 President of Ukraine P. Poroshenko by his decree №806/2014 abolished the celebration of the Day of Defender of the Motherland on 23 February and established a new holiday – the Day of Defender of Ukraine “with a view to promoting continued strengthening of patriotic spirit in the society”; he signed bill №238-VIII “On amending article 73 of the Code of Laws on Labour” adopted by the Parliament of Ukraine on 5 March 2015. At that, 14 October is the day of establishment of the Ukrainian Insurgent Army, which collaborated with the Nazis during the Second World War.
- On 12 October 2007 President of Ukraine V. Yushchenko awarded posthumously one of the leaders of the national movement R. Shuhevych with

the title of Hero of Ukraine. In 2010 R. Shuhevych was recognized as the honorary citizen of the cities in the West of Ukraine – Khust, Ternopil, Ivano-Frankivsk and Lviv.

- On 22 January 2010 President of Ukraine V. Yushchenko awarded posthumously the leader of the Organization of Ukrainian Nationalists S. Bandera with the title of Hero of Ukraine. In 2010 S. Bandera was also recognized as the honorary citizen of Lviv, Ternopil, Ivano-Frankivsk and Khust.
- On 17 April 2015 in Odesa representatives of Svoboda and Euromaidan movement (around 300 people) carried out a march in the city center. The declared goal of the march was to honour the memory of Mr. M. Chaika, one of the activists of the nationalist movement and Odesa football fan. The participants of the march proceeded through the city center chanting the following slogans, which resembled Nazi ones: “Knife the Muscovites!” “White Man, Great Ukraine!”, “Glory to Ukraine! Glory to the Heroes!”. The participants of the march behaved aggressively and used pyrotechnics, however, the law enforcement agencies of Ukraine did not interfere.
- On 1 January 2016 in Kyiv, Lviv, Symy, Kherson, Dnepropetrovsk and Odesa there were torchlight processions on the occasion of 107th anniversary of the birthday of S. Bandera.
- On 7 July 2016 Kyiv City Council made a decision to rename Moscow Avenue into S. Bandera Avenue. In addition, streets of many cities in the West of Ukraine bear the names of S. Bandera and R. Shuhevych, while their birthdays are widely celebrated with the organizational support of local executive authorities.
- On 8 September 2016 Rivne Oblast Council requested to P. Poroshenko to award to S. Bandera the title of the Hero of Ukraine once again.
- On 14 October 2016 in Kyiv there was a torchlight procession dedicated to the Day of Establishment of the UPA and the Day of Defender. Around 5000 representatives of Azov Civil Corps, the Right Sector, as well as of Sich

nationalistic association (the so-called “March of the Nation”), who were chanting xenophobic slogans, participated in the event. Svoboda party organized a similar event on the same day.

The Russian Side imperatively demands from the Ukrainian Side to provide information concerning measures taken with regard to the said facts, as well as to inform about bringing perpetrators to justice.

The Ministry avails itself of this opportunity to renew to the Embassy of Ukraine in Moscow the assurances of its highest consideration.

Moscow, 30 December 2016

Annex 123

Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134 (Supreme Court of the United States, 2018)

Eighth Amendment concerns implicated by its finding that the *Hurst* violations in those cases are harmless, a conclusion that transforms those advisory jury recommendations into binding findings of fact. Although the Florida Supreme Court noted in *Truehill* that the defendant in that case “contends that he is entitled to relief pursuant to *Hurst v. Florida* because the jury in his case was repeatedly instructed regarding the non-binding nature of its verdict,” 211 So.3d, at 955, that was the first and last reference to that argument. There was absolutely no reference to the argument in *Oliver*. 214 So.3d 606.³

Therefore, the Florida Supreme Court has (again)⁴ failed to address an important and substantial Eighth Amendment challenge to capital defendants’ sentences post-*Hurst*. Nothing in its pre-*Hurst* precedent, nor in its opinions in *Truehill* and *Oliver*, addresses or resolves these substantial *Caldwell*-based challenges. This Court can and should intervene in the face of this troubling situation.

I dissent.



3. Tellingly, in neither *Franklin* nor *Guardado* did the Florida Supreme Court supply a pin-cite for its “consider[ation] and reject[ion]” in *Truehill* and *Oliver* of these *Caldwell*-based claims.

**ENCINO MOTORCARS,
LLC, Petitioner**

v.

Hector NAVARRO, et al.

No. 16–1362.

Argued Jan. 17, 2018.

Decided April 2, 2018.

Background: Employees, who were service advisors for automobile dealership, brought action against dealership, alleging that it violated Fair Labor Standards Act (FLSA) by failing to pay them overtime compensation. The United States District Court for the Central District of California, R. Gary Klausner, J., 2013 WL 518577, dismissed action. Employees appealed. The Court of Appeals for the Ninth Circuit, Graber, Circuit Judge, 780 F.3d 1267, affirmed in part and reversed in part, holding that service advisors were entitled to overtime compensation. Certiorari was granted. The Supreme Court of the United States, — U.S. —, 136 S.Ct. 2117, 195 L.Ed.2d 382, vacated and remanded. On remand, the Court of Appeals, Graber, Circuit Judge, 845 F.3d 925, affirmed in part, reversed in part, and remanded. Certiorari was granted.

Holding: The Supreme Court, Justice Thomas, held that car dealership service advisors are exempt from the FLSA’s overtime-pay requirement.

Reversed and remanded.

Justice Ginsburg filed a dissenting opinion in which Justices Breyer, Sotomayor, and Kagan joined.

4. “Toutes choses sont dites déjà; mais comme personne n’écoute, il faut toujours recommencer.” Gide, *Le Traité du Narcisse* 8 (1892), in *Le Traité du Narcisse* 104 (R. Robidoux ed. 1978) (“Everything has been said already; but as no one listens, we must always begin again”).

1. Labor and Employment ⇌2305

FLSA requires employers to pay overtime to covered employees who work more than 40 hours in a week. Fair Labor Standards Act of 1938, § 7(a), 29 U.S.C.A. § 207(a).

2. Labor and Employment ⇌2269

Automobile dealership service advisors, who interact with customers and sell them services for their vehicles, are salesmen primarily engaged in servicing automobiles and, as such, are exempt from the FLSA's overtime-pay requirement. Fair Labor Standards Act of 1938, § 13(b)(10)(A), 29 U.S.C.A. § 213(b)(10)(A).

3. Statutes ⇌1123

When a statutory term is not defined in the statute, courts give the term its ordinary meaning.

4. Labor and Employment ⇌2269

Term “salesman,” as used in the FLSA's overtime-pay exemption for “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles” at covered car dealerships, is someone who sells goods or services. Fair Labor Standards Act of 1938, § 13(b)(10)(A), 29 U.S.C.A. § 213(b)(10)(A).

See publication Words and Phrases for other judicial constructions and definitions.

5. Labor and Employment ⇌2269

Word “servicing,” as used in the FLSA's overtime-pay exemption for “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles” at covered car dealerships, can mean either the action of maintaining or repairing a motor vehicle, or the action of providing a service. Fair Labor Standards Act

of 1938, § 13(b)(10)(A), 29 U.S.C.A. § 213(b)(10)(A).

See publication Words and Phrases for other judicial constructions and definitions.

6. Labor and Employment ⇌2269

For employee of car dealership to be primarily engaged in servicing automobiles, within meaning of the FLSA's overtime-pay exemption for “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles” at covered car dealerships, the statutory language is not so constrained as to require the employee to spend most of his or her time “under the hood” physically repairing automobiles. Fair Labor Standards Act of 1938, § 13(b)(10)(A), 29 U.S.C.A. § 213(b)(10)(A).

7. Statutes ⇌1134

Word “or,” as used in a statute, is almost always disjunctive.

See publication Words and Phrases for other judicial constructions and definitions.

8. Statutes ⇌1134, 1153

Statutory context may overcome the ordinary, disjunctive meaning of “or.”

9. Statutes ⇌1134, 1153

Distributive canon of statutory interpretation recognizes that sometimes where a sentence contains several antecedents and several consequents, courts should read them distributively and apply the words to the subjects which, by context, they seem most properly to relate.

10. Statutes ⇌1134

Distributive canon of statutory interpretation has the most force when the statute allows for one-to-one matching of antecedents and consequents.

11. Statutes ⇔1134

Distributive canon of statutory interpretation has the most force when an ordinary, disjunctive reading is linguistically impossible.

12. Labor and Employment ⇔2251

Because the FLSA gives no textual indication that its exemptions should be construed narrowly, there is no reason to give them anything other than a fair, rather than “narrow,” interpretation. Fair Labor Standards Act of 1938, § 13, 29 U.S.C.A. § 213.

13. Statutes ⇔1153, 1241

Silence in legislative history of statute, no matter how “clanging,” cannot defeat the better reading of the text and statutory context.

14. Statutes ⇔1242

If text of statute is clear, it needs no repetition in the legislative history, and if text is ambiguous, silence in the legislative history cannot lend any clarity.

15. Statutes ⇔1342

Even if Congress did not foresee all applications of statute, that is no reason not to give statutory text a fair reading.

Syllabus *

Respondents, current and former service advisors for petitioner Encino Motorcars, LLC, sued petitioner for backpay, alleging that petitioner violated the Fair Labor Standards Act (FLSA) by failing to pay them overtime. Petitioner moved to dismiss, arguing that service advisors are exempt from the FLSA’s overtime-pay requirement under 29 U.S.C. § 213(b)(10)(A), which applies to “any salesman, partsman, or mechanic primarily

engaged in selling or servicing automobiles, trucks, or farm implements.” The District Court agreed and dismissed the suit. The Court of Appeals for the Ninth Circuit reversed. It found the statute ambiguous and the legislative history inconclusive, and it deferred to a 2011 Department of Labor rule that interpreted “salesman” to exclude service advisors. This Court vacated the Ninth Circuit’s judgment, holding that courts could not defer to the procedurally defective 2011 rule, *Encino Motorcars, LLC v. Navarro*, 579 U.S. —, — — —, 136 S.Ct. 2117, 2125–2127, 195 L.Ed.2d 382 (*Encino I*), but not deciding whether the exemption covers service advisors, *id.*, at —, 136 S.Ct., at 2127. On remand, the Ninth Circuit again held that the exemption does not include service advisors.

Held: Because service advisors are “salesm[e]n . . . primarily engaged in . . . servicing automobiles,” they are exempt from the FLSA’s overtime-pay requirement. Pp. 1139 – 1140.

(a) A service advisor is obviously a “salesman.” The ordinary meaning of “salesman” is someone who sells goods or services, and service advisors “sell [customers] services for their vehicles,” *Encino I, supra*, at —, 136 S.Ct., at 2121. P. 1140.

(b) Service advisors are also “primarily engaged in . . . servicing automobiles.” “Servicing” can mean either “the action of maintaining or repairing a motor vehicle” or “[t]he action of providing a service.” 15 Oxford English Dictionary 39. Service advisors satisfy both definitions because they are integral to the servicing process. They “mee[t] customers; liste[n] to their concerns about their cars; sugges[t] repair and maintenance services; sel[l] new ac-

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of

the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

cessories or replacement parts; recor[d] service orders; follo[w] up with customers as the services are performed (for instance, if new problems are discovered); and explai[n] the repair and maintenance work when customers return for their vehicles.” *Encino I, supra*, at —, 136 S.Ct., at 2122. While service advisors do not spend most of their time physically repairing automobiles, neither do partsmen, who the parties agree are “primarily engaged in . . . servicing automobiles.” Pp. 1140–1141.

(c) The Ninth Circuit invoked the distributive canon—matching “salesman” with “selling” and “partsman [and] mechanic” with “[servicing]”—to conclude that the exemption simply does not apply to “salesm[e]n . . . primarily engaged in . . . servicing automobiles.” But the word “or,” which connects all of the exemption’s nouns and gerunds, is “almost always disjunctive.” *United States v. Woods*, 571 U.S. 31, 45, 134 S.Ct. 557, 187 L.Ed.2d 472. Using “or” to join “selling” and “servicing” thus suggests that the exemption covers a salesman primarily engaged in either activity.

Statutory context supports this reading. First, the distributive canon has the most force when one-to-one matching is present, but here, the statute would require matching some of three nouns with one of two gerunds. Second, the distributive canon has the most force when an ordinary, disjunctive reading is linguistically impossible. But here, “salesman . . . primarily engaged in . . . servicing automobiles” is an apt description of a service advisor. Third, a narrow distributive phrasing is an unnatural fit here because the entire exemption bespeaks breadth, starting with “any” and using the disjunctive “or” three times. Pp. 1140–1142.

(d) The Ninth Circuit also invoked the principle that exemptions to the FLSA

should be construed narrowly. But the Court rejects this principle as a guide to interpreting the FLSA. Because the FLSA gives no textual indication that its exemptions should be construed narrowly, they should be given a fair reading. P. 1142.

(e) Finally, the Ninth Circuit’s reliance on two extraneous sources to support its interpretation—the 1966–1967 Occupational Outlook Handbook and the FLSA’s legislative history—is unavailing. Pp. 1142–1143.

845 F.3d 925, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, ALITO, and GORSUCH, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined.

Paul D. Clement, Washington, DC, for Petitioner.

James A. Feldman, Philadelphia, PA, for Respondents.

Karl R. Lindgren, Todd B. Scherwin, Wendy McGuire Coats, Fisher & Phillips LLP, Los Angeles, CA, Paul D. Clement, George W. Hicks, Jr., Matthew D. Rowen, Kirkland & Ellis LLP, Washington, DC, for Petitioner.

Keven Steinberg, Steinberg Law, Sherman Oaks, CA, James A. Feldman, Nancy Bregstein Gordon, University of Pennsylvania, Law School, Supreme Court Clinic, Philadelphia, PA, for Respondents.

For U.S. Supreme Court briefs, see:

2018 WL 347512 (Reply.Brief)

2017 WL 6376967 (Resp.Brief)

2017 WL 5127313 (Pet.Brief)

Justice THOMAS delivered the opinion of the Court.

The Fair Labor Standards Act (FLSA), 52 Stat. 1060, as amended, 29 U.S.C. § 201 *et seq.*, requires employers to pay overtime compensation to covered employees. The FLSA exempts from the overtime-pay requirement “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles” at a covered dealership. § 213(b)(10)(A). We granted certiorari to decide whether this exemption applies to service advisors—employees at car dealerships who consult with customers about their servicing needs and sell them servicing solutions. We conclude that service advisors are exempt.

I

A

[1] Enacted in 1938, the FLSA requires employers to pay overtime to covered employees who work more than 40 hours in a week. 29 U.S.C. § 207(a). But the FLSA exempts many categories of employees from this requirement. See § 213. Employees at car dealerships have long been among those exempted.

Congress initially exempted all employees at car dealerships from the overtime-pay requirement. See Fair Labor Standards Amendments of 1961, § 9, 75 Stat. 73. Congress then narrowed that exemption to cover “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft.” Fair Labor Standards Amendments of 1966, § 209, 80 Stat. 836. In 1974, Congress enacted the version of the exemption at issue here. It provides that the FLSA’s overtime-pay requirement does not apply to “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is em-

ployed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers.” § 213(b)(10)(A).

This language has long been understood to cover service advisors. Although the Department of Labor initially interpreted it to exclude them, 35 Fed.Reg. 5896 (1970) (codified at 29 C.F.R. § 779.372(c)(4) (1971)), the federal courts rejected that view, see *Brennan v. Deel Motors, Inc.*, 475 F.2d 1095 (C.A.5 1973); *Brennan v. North Bros. Ford, Inc.*, 76 CCH LC ¶ 33, 247 (E.D.Mich.1975), *aff’d sub nom. Dunlop v. North Bros. Ford, Inc.*, 529 F.2d 524 (C.A.6 1976) (table). After these decisions, the Department issued an opinion letter in 1978, explaining that service advisors are exempt in most cases. See Dept. of Labor, Wage & Hour Div., Opinion Letter No. 1520 (WH-467) (1978), [1978-1981 Transfer Binder] CCH Wages-Hours Administrative Rulings ¶ 31,207. From 1978 to 2011, Congress made no changes to the exemption, despite amending § 213 nearly a dozen times. The Department also continued to acquiesce in the view that service advisors are exempt. See Dept. of Labor, Wage & Hour Div., Field Operations Handbook, Insert No. 1757, 24L04(k) (Oct. 20, 1987), online at <https://perma.cc/5GHD-KCJJ> (as last visited Mar. 28, 2018).

In 2011, however, the Department reversed course. It issued a rule that interpreted “salesman” to exclude service advisors. 76 Fed.Reg. 18832, 18859 (2011) (codified at 29 C.F.R. § 779.372(c)). That regulation prompted this litigation.

B

Petitioner Encino Motorcars, LLC, is a Mercedes-Benz dealership in California. Respondents are current and former service advisors for petitioner. Service advisors “interact with customers and sell them services for their vehicles.” *Encino Mo-*

torcars, LLC v. Navarro, 579 U.S. —, —, 136 S.Ct. 2117, 2121, 195 L.Ed.2d 382 (2016) (*Encino I*). They “mee[t] customers; liste[n] to their concerns about their cars; sugges[t] repair and maintenance services; sel[l] new accessories or replacement parts; recor[d] service orders; follo[w] up with customers as the services are performed (for instance, if new problems are discovered); and explai[n] the repair and maintenance work when customers return for their vehicles.” *Ibid.*

In 2012, respondents sued petitioner for backpay. Relying on the Department’s 2011 regulation, respondents alleged that petitioner had violated the FLSA by failing to pay them overtime. Petitioner moved to dismiss, arguing that service advisors are exempt under § 213(b)(10)(A). The District Court agreed with petitioner and dismissed the complaint, but the Court of Appeals for the Ninth Circuit reversed. Finding the text ambiguous and the legislative history “inconclusive,” the Ninth Circuit deferred to the Department’s 2011 rule under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *Encino*, 780 F.3d 1267, 1275 (2015).

We granted certiorari and vacated the Ninth Circuit’s judgment. We explained that courts cannot defer to the 2011 rule because it is procedurally defective. See *Encino I*, 579 U.S., at — — —, 136 S.Ct., at 2125–2127. Specifically, the regulation undermined significant reliance interests in the automobile industry by changing the treatment of service advisors without a sufficiently reasoned explanation. *Id.*, at —, 136 S.Ct., at 2126. But we did not decide whether, without administrative deference, the exemption covers service advisors. *Id.*, at —, 136 S.Ct., at 2127. We remanded that issue for the Ninth Circuit to address in the first instance. *Ibid.*

C

On remand, the Ninth Circuit again held that the exemption does not include service advisors. The Court of Appeals agreed that a service advisor is a “‘salesman’” in a “generic sense,” 845 F.3d 925, 930 (2017), and is “‘primarily engaged in . . . servicing automobiles’” in a “general sense,” *id.*, at 931. Nonetheless, it concluded that “Congress did not intend to exempt service advisors.” *Id.*, at 929.

The Ninth Circuit began by noting that the Department’s 1966–1967 Occupational Outlook Handbook listed 12 job titles in the table of contents that could be found at a car dealership, including “automobile mechanics,” “automobile parts counter-men,” “automobile salesmen,” and “automobile service advisors.” *Id.*, at 930. Because the FLSA exemption listed three of these positions, but not service advisors, the Ninth Circuit concluded that service advisors are not exempt. *Ibid.* The Ninth Circuit also determined that service advisors are not primarily engaged in “servicing” automobiles, which it defined to mean “only those who are actually occupied in the repair and maintenance of cars.” *Id.*, at 931. And the Ninth Circuit further concluded that the exemption does not cover salesmen who are primarily engaged in servicing. *Id.*, at 933. In reaching this conclusion, the Ninth Circuit invoked the distributive canon. See A. Scalia & B. Garner, *Reading Law* 214 (2012) (“Distributive phrasing applies each expression to its appropriate referent”). It reasoned that “Congress intended the gerunds—selling and servicing—to be distributed to their appropriate subjects—salesman, partsman, and mechanic. A salesman sells; a partsman services; and a mechanic services.” *Id.*, at 934. Finally, the Court of Appeals noted that its interpretation was supported by the principle that

exemptions to the FLSA should be construed narrowly, *id.*, at 935, and the lack of any “mention of service advisors” in the legislative history, *id.*, at 939.

We granted certiorari, 582 U.S. —, 136 S.Ct. 890, 193 L.Ed.2d 783 (2017), and now reverse.

II

[2] The FLSA exempts from its overtime-pay requirement “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers.” § 213(b)(10)(A). The parties agree that petitioner is a “nonmanufacturing establishment primarily engaged in the business of selling [automobiles] to ultimate purchasers.” The parties also agree that a service advisor is not a “partsman” or “mechanic,” and that a service advisor is not “primarily engaged . . . in selling automobiles.” The question, then, is whether service advisors are “salesm[e]n . . . primarily engaged in . . . servicing automobiles.” We conclude that they are. Under the best reading of the text, service advisors are “salesm[e]n,” and they are “primarily engaged in . . . servicing automobiles.” The distributive canon, the practice of construing FLSA exemptions narrowly, and the legislative history do not persuade us otherwise.

A

[3, 4] A service advisor is obviously a “salesman.” The term “salesman” is not defined in the statute, so “we give the term its ordinary meaning.” *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 566, 132 S.Ct. 1997, 182 L.Ed.2d 903 (2012). The ordinary meaning of “salesman” is someone who sells goods or ser-

vices. See 14 Oxford English Dictionary 391 (2d ed. 1989) (“[a] man whose business it is to sell goods or conduct sales”); Random House Dictionary of the English Language 1262 (1966) (“a man who sells goods, services, etc.”). Service advisors do precisely that. As this Court previously explained, service advisors “sell [customers] services for their vehicles.” *Encino I*, 579 U.S., at —, 136 S.Ct., at 2121.

B

[5] Service advisors are also “primarily engaged in . . . servicing automobiles.” § 213(b)(10)(A). The word “servicing” in this context can mean either “the action of maintaining or repairing a motor vehicle” or “[t]he action of providing a service.” 15 Oxford English Dictionary, at 39; see also Random House Dictionary of the English Language, at 1304 (“to make fit for use; repair; restore to condition for service”). Service advisors satisfy both definitions. Service advisors are integral to the servicing process. They “mee[t] customers; liste[n] to their concerns about their cars; sugges[t] repair and maintenance services; sel[l] new accessories or replacement parts; recor[d] service orders; follo[w] up with customers as the services are performed (for instance, if new problems are discovered); and explai[n] the repair and maintenance work when customers return for their vehicles.” *Encino I, supra*, at —, 136 S.Ct., at 2122. If you ask the average customer who services his car, the primary, and perhaps only, person he is likely to identify is his service advisor.

[6] True, service advisors do not spend most of their time physically repairing automobiles. But the statutory language is not so constrained. All agree that partsmen, for example, are “primarily engaged in . . . servicing automobiles.” Brief for Petitioner 40; Brief for Respondents 41–44. But partsmen, like service advisors,

do not spend most of their time under the hood. Instead, they “obtain the vehicle parts . . . and provide those parts to the mechanics.” *Encino I, supra*, at —, 136 S.Ct., at 2122; see also 1 Dept. of Labor, Dictionary of Occupational Titles 33 (3d ed. 1965) (defining “partsman” as someone who “[p]urchases, stores, and issues spare parts for automotive and industrial equipment”). In other words, the phrase “primarily engaged in . . . servicing automobiles” must include some individuals who do not physically repair automobiles themselves but who are integrally involved in the servicing process. That description applies to partsmen and service advisors alike.

C

The Ninth Circuit concluded that service advisors are not covered because the exemption simply does not apply to “salesm[e]n . . . primarily engaged in . . . servicing automobiles.” The Ninth Circuit invoked the distributive canon to reach this conclusion. Using that canon, it matched “salesman” with “selling” and “partsm[a]n [and] mechanic” with “servicing.” We reject this reasoning.

[7] The text of the exemption covers “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements.” § 213(b)(10)(A). The exemption uses the word “or” to connect all of its nouns and gerunds, and “or” is “almost always disjunctive.” *United States v. Woods*, 571 U.S. 31, 45, 134 S.Ct. 557, 187 L.Ed.2d 472 (2013). Thus, the use of “or” to join “selling” and “servicing” suggests that the exemption covers a salesman primarily engaged in either activity.

[8, 9] Unsurprisingly, statutory context can overcome the ordinary, disjunctive meaning of “or.” The distributive canon, for example, recognizes that sometimes

“[w]here a sentence contains several antecedents and several consequents,” courts should “read them distributively and apply the words to the subjects which, by context, they seem most properly to relate.” 2A N. Singer & S. Singer, *Sutherland Statutes and Statutory Construction* § 47:26, p. 448 (rev. 7th ed. 2014).

[10, 11] But here, context favors the ordinary disjunctive meaning of “or” for at least three reasons. First, the distributive canon has the most force when the statute allows for one-to-one matching. But here, the distributive canon would mix and match some of three nouns—“salesman, partsman, or mechanic”—with one of two gerunds—“selling or servicing.” § 213(b)(10)(A). We doubt that a legislative drafter would leave it to the reader to figure out the precise combinations. Second, the distributive canon has the most force when an ordinary, disjunctive reading is linguistically impossible. Cf., e.g., *Huidekoper’s Lessee v. Douglass*, 3 Cranch 1, 67, 2 L.Ed. 347 (1805) (Marshall, C.J.) (applying the distributive canon when a purely disjunctive reading “would involve a contradiction in terms”). But as explained above, the phrase “salesman . . . primarily engaged in . . . servicing automobiles” not only makes sense; it is an apt description of a service advisor. Third, a narrow distributive phrasing is an unnatural fit here because the entire exemption bespeaks breadth. It begins with the word “any.” See *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 219, 128 S.Ct. 831, 169 L.Ed.2d 680 (2008) (noting the “expansive meaning” of “any”). And it uses the disjunctive word “or” three times. In fact, all agree that the third list in the exemption—“automobiles, trucks, or farm implements”—modifies every other noun and gerund. But it would be odd to read the exemption as starting with a distributive phrasing and then, halfway through and without

warning, switching to a disjunctive phrasing—all the while using the same word (“or”) to signal both meanings. See *Brown v. Gardner*, 513 U.S. 115, 118, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994) (noting the “vigorous” presumption that, “when a term is repeated within a given sentence,” it “is used to mean the same thing”). The more natural reading is that the exemption covers any combination of its nouns, gerunds, and objects.

D

[12] The Ninth Circuit also invoked the principle that exemptions to the FLSA should be construed narrowly. 845 F.3d, at 935–936. We reject this principle as a useful guidepost for interpreting the FLSA. Because the FLSA gives no “textual indication” that its exemptions should be construed narrowly, “there is no reason to give [them] anything other than a fair (rather than a ‘narrow’) interpretation.” Scalia, Reading Law, at 363. The narrow-construction principle relies on the flawed premise that the FLSA “‘pursues’” its remedial purpose “‘at all costs.’” *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 234, 133 S.Ct. 2304, 186 L.Ed.2d 417 (2013) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525–526, 107 S.Ct. 1391, 94 L.Ed.2d 533 (1987) (*per curiam*)); see also *Henson v. Santander Consumer USA Inc.*, 582 U.S. —, —, 137 S.Ct. 1718, 1725, 198 L.Ed.2d 177 (2017) (“[I]t is quite mistaken to assume . . . that whatever might appear to further the statute’s primary objective must be the law” (internal quotation marks and alterations omitted)). But the FLSA has over two dozen exemptions in § 213(b) alone, including the one at issue here. Those exemptions are as much a part of the FLSA’s purpose as the overtime-pay requirement. See *id.*, at —, 137 S.Ct., at 1725 (“Legislation is, after all, the art of compromise, the limitations expressed in

statutory terms often the price of passage”). We thus have no license to give the exemption anything but a fair reading.

E

Finally, the Ninth Circuit relied on two extraneous sources to support its interpretation: the Department’s 1966–1967 Occupational Outlook Handbook and the FLSA’s legislative history. We find neither persuasive.

1

The Ninth Circuit first relied on the Department’s 1966–1967 Occupational Outlook Handbook. It identified 12 jobs from the Handbook’s table of contents that it thought could be found at automobile dealerships. See 845 F.3d, at 930. The Ninth Circuit then stressed that the exemption aligns with three of those job titles—“[a]utomobile mechanics,” “[a]utomobile parts counterme[n],” and “[a]utomobile salesmen”—but not “[a]utomobile service advisors.” *Ibid.*

The Ninth Circuit cited nothing, however, suggesting that the exemption was meant to align with the job titles listed in the Handbook. To the contrary, the exemption applies to “any salesman . . . primarily engaged in selling or servicing automobiles.” It is not limited, like the term in the Handbook, to “automobile salesmen.” And the ordinary meaning of “salesman” plainly includes service advisors.

2

The Ninth Circuit also relied on legislative history to support its interpretation. See *id.*, at 936–939. Specifically, it noted that the legislative history discusses “automobile salesmen, partsmen, and mechanics” but never discusses service advisors. *Id.*, at 939. Although the Ninth Circuit had previously found that same legislative history “inconclusive,” *Encino*, 780 F.3d, at

1275, on remand it was “firmly persuaded” that the legislative history demonstrated Congress’ desire to exclude service advisors, 845 F.3d, at 939.

[13–15] The Ninth Circuit was right the first time. As we have explained, the best reading of the statute is that service advisors are exempt. Even for those Members of this Court who consider legislative history, silence in the legislative history, “no matter how ‘clanging,’” cannot defeat the better reading of the text and statutory context. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495, n. 13, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985). If the text is clear, it needs no repetition in the legislative history; and if the text is ambiguous, silence in the legislative history cannot lend any clarity. See *Avco Corp. v. Department of Justice*, 884 F.2d 621, 625 (C.A.D.C.1989). Even if Congress did not foresee all of the applications of the statute, that is no reason not to give the statutory text a fair reading. See *Union Bank v. Wolas*, 502 U.S. 151, 158, 112 S.Ct. 527, 116 L.Ed.2d 514 (1991).

* * *

In sum, we conclude that service advisors are exempt from the overtime-pay requirement of the FLSA because they are “salesm[e]n . . . primarily engaged in . . . servicing automobiles.” § 213(b)(10)(A). Accordingly, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice GINSBURG, with whom Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

Diverse categories of employees staff automobile dealerships. Of employees so engaged, Congress explicitly exempted from the Fair Labor Standards Act hours

requirements only three occupations: salesmen, partsmen, and mechanics. The Court today approves the exemption of a fourth occupation: automobile service advisors. In accord with the judgment of the Court of Appeals for the Ninth Circuit, I would not enlarge the exemption to include service advisors or other occupations outside Congress’ enumeration.

Respondents are service advisors at a Mercedes–Benz automobile dealership in the Los Angeles area. They work regular hours, 7 a.m. to 6 p.m., at least five days per week, on the dealership premises. App. 54. Their weekly minimum is 55 hours. Maximum hours, for workers covered by the Fair Labor Standards Act (FLSA or Act), are 40 per week. 29 U.S.C. § 207(a)(1). In this action, respondents seek time-and-a-half compensation for hours worked beyond the 40 per week maximum prescribed by the FLSA.

The question presented: Are service advisors exempt from receipt of overtime compensation under 29 U.S.C. § 213(b)(10)(A)? That exemption covers “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles.” Service advisors, such as respondents, neither sell automobiles nor service (*i.e.*, repair or maintain) vehicles. Rather, they “meet and greet [car] owners”; “solicit and sugges[t]” repair services “to remedy the [owner’s] complaints”; “solicit and suggest . . . supplemental [vehicle] service[s]”; and provide owners with cost estimates. App. 55. Because service advisors neither sell nor repair automobiles, they should remain outside the exemption and within the Act’s coverage.

I

In 1961, Congress exempted all automobile-dealership employees from the Act’s overtime-pay requirements. See

Fair Labor Standards Amendments of 1961, § 9, 75 Stat. 73.¹ Five years later, in 1966, Congress confined the dealership exemption to three categories of employees: automobile salesmen, mechanics, and partsmen. See Fair Labor Standards Amendments of 1966, § 209, 80 Stat. 836. At the time, it was well understood that mechanics perform “preventive maintenance” and “repairs,” Dept. of Labor, Occupational Outlook Handbook 477 (1966–1967 ed.) (Handbook), while partsmen requisition parts, “suppl[y] [them] to mechanics,” *id.*, at 312, and, at times, have “mechanical responsibilities in repairing parts,” Brief for International Association of Machinists and Aerospace Workers, AFL–CIO, as *Amicus Curiae* 30; see Handbook, at 312–313 (partsmen may “measure parts for interchangeability,” test parts for “defect[s],” and “repair parts”). Congress did not exempt numerous other categories of dealership employees, among them, automobile painters, upholsterers, bookkeeping workers, cashiers, janitors, purchasing agents, shipping and receiving clerks, and, most relevant here, service advisors. These positions and their duties were well known at the time, as documented in U.S. Government catalogs of American jobs. See Handbook, at XIII, XV, XVI (table of contents); Brief for International Association of Machinists and Aerospace Workers, AFL–CIO, as *Amicus Curiae* 34 (noting “more than twenty distinct [job] classifications” in the service department alone).

“Where Congress explicitly enumerates certain exceptions . . . , additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.” *TRW Inc. v. Andrews*, 534 U.S. 19,

1. The exemption further extended to all employees of establishments selling “trucks” and “farm implements.” Fair Labor Standards Amendments of 1961, § 9, 75 Stat. 73. When Congress later narrowed the provision’s scope

28, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) (internal quotation marks omitted). The Court thus has no warrant to add to the three explicitly exempt categories (salesmen, partsmen, and mechanics) a fourth (service advisors) for which the Legislature did not provide. The reach of today’s ruling is uncertain, troublingly so: By expansively reading the exemption to encompass all salesmen, partsmen, and mechanics who are “integral to the servicing process,” *ante*, at 1136, the Court risks restoring much of what Congress intended the 1966 amendment to terminate, *i.e.*, the blanket exemption of all dealership employees from overtime-pay requirements.

II

Had the § 213(b)(10)(A) exemption covered “any salesman or mechanic primarily engaged in selling or servicing automobiles,” there could be no argument that service advisors fit within it. Only “salesmen” primarily engaged in “selling” automobiles and “mechanics” primarily engaged in “servicing” them would fall outside the Act’s coverage. Service advisors, defined as “salesmen primarily engaged in the *selling of services*,” *Encino Motorcars, LLC v. Navarro*, 579 U.S. —, —, 136 S.Ct. 2117, 2129, 195 L.Ed.2d 382 (2016) (THOMAS, J., dissenting) (emphasis added), plainly do not belong in either category. Moreover, even if the exemption were read to reach “salesmen” “primarily engaged in *servicing* automobiles,” not just selling them, service advisors would not be exempt. The ordinary meaning of “servicing” is “the action of maintaining or repairing a

for automobile-dealership employees, it similarly diminished the exemption’s application to workers at truck and farm-implement dealerships. See, *e.g.*, Fair Labor Standards Amendments of 1966, § 209, 80 Stat. 836.

motor vehicle.” *Ante*, at 1136 (quoting 15 Oxford English Dictionary 39 (2d ed. 1989)). As described above, see *supra*, at 1138, service advisors neither maintain nor repair automobiles.²

Petitioner stakes its case on Congress’ addition of the “partsman” job to the exemption. See Reply Brief 6–10. That inclusion, petitioner urges, has a vacuum effect: It draws into the exemption job categories other than the three for which Congress provided, in particular, service advisors. Because partsmen, like service advisors, neither “sell” nor “service” automobiles in the conventional sense, petitioner reasons, Congress must have intended the word “service” to mean something broader than repair and maintenance.

To begin with, petitioner’s premise is flawed. Unlike service advisors, partsmen “‘get their hands dirty’ by ‘working as a mechanic’s right-hand man or woman.’” *Encino Motorcars*, 579 U.S., at —, n. 1, 136 S.Ct., at 2127, n. 1 (GINSBURG, J., concurring) (quoting Brief for Respondents in No. 15–415, p. 11; alterations omitted); see *supra*, at 1143–1144 (describing duties of partsmen). As the Solicitor General put it last time this case was before the Court, a mechanic “might be able to obtain the parts to complete a

repair without the real-time assistance of a partsman by his side.” Brief for United States as *Amicus Curiae* in No. 15–415, p. 23. But dividing the “key [repair] tasks . . . between two individuals” only “reinforces” “that both the mechanic and the partsman are . . . involved in repairing (‘servicing’) the vehicle.” *Ibid.* Service advisors, in contrast, “sell . . . services [to customers] for their vehicles,” *Encino Motorcars*, 579 U.S., at —, 136 S.Ct., at 2121 (emphasis added)—services that are later performed by mechanics and partsmen.

Adding partsmen to the exemption, moreover, would be an exceptionally odd way for Congress to have indicated that “servicing” should be given a meaning deviating from its ordinary usage. There is a more straightforward explanation for Congress’ inclusion of partsmen alongside salesmen and mechanics: Common features of the three enumerated jobs make them unsuitable for overtime pay.

Both salesmen and mechanics work irregular hours, including nights and weekends, not uncommonly offsite, rendering time worked not easily tracked.³ As noted in the 1966 Senate floor debate, salesmen “go out at unusual hours, trying to earn commissions.” 112 Cong. Rec. 20504

2. Service advisors do not maintain or repair motor vehicles even if, as the Court concludes, they are “integral to the servicing process.” *Ante*, at 1136. The Ninth Circuit provided an apt analogy: “[A] receptionist-scheduler at a dental office fields calls from patients, matching their needs (*e.g.*, a broken tooth or jaw pain) with the appropriate provider, appointment time, and length of anticipated service. That work is integral to a patient’s obtaining dental services, but we would not say that the receptionist-scheduler is ‘primarily engaged in’ cleaning teeth or installing crowns.” 845 F.3d 925, 932 (2017).

3. In addition to practical difficulties in calculating hours, a core purpose of overtime may

not be served when employees’ hours regularly fluctuate. Enacted in the midst of the Great Depression, the FLSA overtime rules encourage employers to hire more individuals who work 40-hour weeks, rather than maintaining a staff of fewer employees who consistently work longer hours. See *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577–578, 62 S.Ct. 1216, 86 L.Ed. 1682 (1942) (overtime rules apply “financial pressure” on employers to “spread employment”); 7 D. VanDeusen, *Labor and Employment Law* § 176.02[1] (2018). But if a position’s working hours routinely ebb and flow, while averaging 40 each week, then it does not make sense to encourage employers to hire more workers for that position.

(1966) (remarks of Sen. Bayh). See also *ibid.* (remarks of Sen. Yarborough) (“[T]he salesman . . . [can] sell an Oldsmobile, a Pontiac, or a Buick all day long and all night. He is not under any overtime.”). Mechanics’ work may involve similar “difficult[ies] [in] keeping regular hours.” *Ibid.* For example, mechanics may be required to “answe[r] calls in . . . rural areas,” *ibid.*, or to “go out on the field where there is a harvesting of sugarbeets,” *id.*, at 20505 (remarks of Sen. Clark).⁴ And, like salesmen, mechanics may be “subject to substantial seasonal variations in business.” *Id.*, at 20502 (remarks of Sen. Hruska).

Congress added “partsman” to the exemption because it believed that job, too, entailed irregular hours. See *ibid.* This is “especially true,” several Senators emphasized, “in the farm equipment business where farmers, during planting, cultivating and harvesting seasons, may call on their dealers for parts at any time during the day or evening and on weekends.” *Ibid.* (remarks of Sen. Bayh). See also *id.*, at 20503 (remarks of Sen. Mansfield). In Senator Bayh’s experience, for instance, a mechanic who “could not find [a] necessary part” after hours might “call the partsman, get him out of bed, and get him to come down to the store.” *Id.*, at 20504. See also *id.*, at 20503 (remarks of Sen. Hruska) (“Are we going to say to the farmer who needs a part . . . on Sunday: You cannot get a spark plug . . . because the partsman is not exempt, but you can have machinery repaired by a mechanic who is exempt[?]”). Although some Senators opposed adding partsmen to the exemption because, as they understood the job’s demands, partsmen did not work irregular hours, *e.g.*, *id.*, at 20505 (remarks of Sen. Clark), the crux of the debate underscores the exemption’s rationale.

4. Recall that the exemption extends to salesmen, mechanics, and partsmen at dealerships

That rationale has no application here. Unlike salesmen, partsmen, and mechanics, service advisors “wor[k] ordinary, fixed schedules on-site.” Brief for Respondents 47 (citing Handbook, at 316). Respondents, for instance, work *regular* 11-hour shifts, at all times of the year, for a weekly minimum of 55 hours. See App. 54. Service advisors thus do not implicate the concerns underlying the § 213(b)(10)(A) exemption. Indeed, they are precisely the type of workers Congress intended the FLSA to shield “from the evil of overwork,” *Barrentine v. Arkansas–Best Freight System, Inc.*, 450 U.S. 728, 739, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981) (internal quotation marks omitted).

I note, furthermore, that limiting the exemption to the three delineated jobs—salesman, partsman, and mechanic—does not leave the phrase “primarily engaged in selling or servicing,” § 213(b)(10)(A), without utility. Congress included that language to ensure that only employees who actually perform the tasks commonly associated with the enumerated positions would be covered. Otherwise, for example, a worker who acts as a “salesman” in name only could lose the FLSA’s protections merely because of the formal title listed on the employer’s payroll records. See *Bowers v. Fred Haas Toyota World*, 2017 WL 5127289, *4 (S.D.Tex., June 21, 2017) (“[An employee’s] title alone is not dispositive of whether he meets the . . . exemption.”). Thus, by partsmen “primarily engaged in . . . servicing automobiles,” Congress meant nothing more than partsmen primarily engaged in *the ordinary duties of a partsman, i.e.*, requisitioning, supplying, and repairing parts. See *supra*, at 1143–1144, 1144–1145. The inclusion of “partsman” therefore should not

selling farm implements and trucks, not just automobiles. See *supra*, at 1144, n. 1.

result in the removal of service advisors from the Act’s protections.

III

Petitioner contends that “affirming the decision below would disrupt decades of settled expectations” while exposing “employers to substantial retroactive liability.” Brief for Petitioner 51. “[M]any dealerships,” petitioner urges, “have offered compensation packages based primarily on sales commissions,” in reliance on court decisions and agency guidance ranking service advisors as exempt. *Id.*, at 51–52. Respondents here, for instance, are compensated on a “pure commission basis.” App. 55. Awarding retroactive overtime pay to employees who were “focused on earning commissions,” not “working a set number of hours,” petitioner argues, would yield an “unjustified windfal[.]” Brief for Petitioner 53.

Petitioner’s concerns are doubly overstated. As the Court previously acknowledged, see *Encino Motorcars*, 579 U.S., at 1138, 136 S.Ct., at 2126–2127, the FLSA provides an affirmative defense that explicitly protects regulated parties from retroactive liability for actions taken in good-faith reliance on superseded agency guidance. See 29 U.S.C. § 259(a). Given the Department of Labor’s longstanding view that service advisors fit within the § 213(b)(10)(A) exemption, see *ante*, at 1138, the reliance defense would surely shield employers from retroactive liability were the Court to construe the exemption properly.

5. The current FLSA minimum wage, for example, is \$7.25 per hour. See 29 U.S.C. § 206(a)(1)(C). The only commission-based service advisors at retail or service establishments who are *not* already exempt under § 207(i)—and who thus remain eligible for overtime—are those earning less than \$10.88 per hour. Providing such workers time-and-

Congress, moreover, has spoken directly to the treatment of *commission*-based workers. The FLSA exempts from its overtime directives any employee of a “retail or service establishment” who receives more than half of his or her pay on commission, so long as the employee’s “regular rate of pay” is more than 1½ times the minimum wage. § 207(i). Thus, even without the § 213(b)(10)(A) exemption, many service advisors compensated on commission would remain ineligible for overtime remuneration.⁵

In crafting the commission-pay exemption, Congress struck a deliberate balance: It exempted *higher* paid commissioned employees, perhaps in recognition of their potentially irregular hours, see *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1176–1177 (C.A.7 1987); cf. *supra*, at 1145–1147, but it maintained protection for *lower* paid employees, to vindicate the Act’s “principal . . . purpose” of shielding “workers from substandard wages and oppressive working hours,” *Barrentine*, 450 U.S., at 739, 101 S.Ct. 1437.⁶ By stretching the § 213(b)(10)(A) exemption to encompass even the lowest income service advisors compensated on commission, the Court upsets Congress’ careful balance, while stripping away protection for the most vulnerable workers in this occupation.

* * *

This Court once recognized that the “particularity” of FLSA exemptions “preclude[s] their enlargement by implication.” *Addison v. Holly Hill Fruit Products*,

a-half pay, as Congress directed, would confer, at most, \$5.44 per overtime hour.

6. Congress struck a similar balance in 29 U.S.C. § 207(f), which exempts employees whose duties “necessitate irregular hours of work,” but only if they receive specified minimum rates of pay.

Inc., 322 U.S. 607, 617, 64 S.Ct. 1215, 88 L.Ed. 1488 (1944). Employees outside the Act’s “narrow and specific” exemptions, the Court affirmed, “remain within the Act.” *Powell v. United States Cartridge Co.*, 339 U.S. 497, 517, 70 S.Ct. 755, 94 L.Ed. 1017 (1950).⁷ The Court today, in adding an exemption of its own creation, veers away from that comprehension of the FLSA’s mission. I would instead resist, as the Ninth Circuit did, diminishment of the Act’s overtime strictures.



Andrew KISELA

v.

Amy HUGHES.

No. 17–467.

April 2, 2018.

Background: Woman shot by police officer, during response to 911 emergency call reporting that a woman was engaging in erratic behavior with a knife, brought § 1983 action against officer, alleging excessive force in violation of Fourth Amendment. The United States District Court for the District of Arizona, Frank R. Zapata, Senior District Judge, 2012 WL 1605904, denied officer’s motion for summary judgment based on qualified immunity, but granted officer’s renewed motion for sum-

7. This Court has long held that FLSA “exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those [cases] plainly and unmistakably within their terms and spirit.” *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S.Ct. 453, 4 L.Ed.2d 393 (1960). This principle is a well-grounded application of the general rule that an “exception to a general statement of policy is usually read . . .

mary judgment, 2013 WL 12188383. Woman appealed. On denial of rehearing en banc, the United States Court of Appeals for the Ninth Circuit, William K. Sessions III, District Judge, sitting by designation, 862 F.3d 775, reversed and remanded.

Holding: Upon granting certiorari, the Supreme Court held that officer’s use of force did not violate clearly established law, and thus, officer was entitled to qualified immunity.

Certiorari granted; reversed and remanded.

Justice Sotomayor filed a dissenting opinion, in which Justice Ginsburg joined.

1. Arrest ⇔68.1(4)

Where the police officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. U.S.C.A. Const. Amend. 4.

2. Arrest ⇔68.1(4)

The question whether a police officer has used excessive force in violation of the Fourth Amendment requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to

narrowly in order to preserve the primary operation of the provision.” *Maracich v. Spears*, 570 U.S. 48, 60, 133 S.Ct. 2191, 186 L.Ed.2d 275 (2013) (internal quotation marks omitted). In a single paragraph, the Court “reject[s]” this longstanding principle as applied to the FLSA, *ante*, at 1142, without even acknowledging that it unsettles more than half a century of our precedent.

Annex 124

Theodor Meron, *The Incidence of the Rule of Exhaustion of Local Remedies*, British Yearbook of International Law, Vol. 35 (1959)

THE INCIDENCE OF THE RULE OF EXHAUSTION OF LOCAL REMEDIES¹

By THEODOR MERON, M.J., LL.M., S.J.D.

Assistant Legal Adviser to the Israel Ministry for Foreign Affairs

THE object of this paper is to examine briefly some aspects of the incidence of the rule of exhaustion of local remedies. While the rule itself is well established in international jurisprudence and has recently been applied by the International Court of Justice in the *Interhandel* case (*Switzerland v. United States of America*) (Preliminary Objections),² both its basis and the limits of its applicability are rather vague. Lord McNair has cogently observed that the rule which is 'both ancient and commonplace . . . is so fundamental that it has become almost a cliché and it is difficult to find any real analysis of its meaning'.³ Bearing in mind the practical importance of the rule in international law, it is to be regretted that comparatively little thought has so far been given to its detailed examination and to the precise delimitation of its scope. A notable exception is Judge Bagge's article in the previous number of this *Year Book*.⁴ That article was concerned primarily with the principles governing the operation of the local remedies rule, given that the conditions exist for applying the rule. It is also necessary, however, to examine under what conditions the rule is brought into play at all. The need for such an examination becomes even greater in view of the recent tendency to regard the rule of local remedies as applicable to all, or almost all cases of so-called diplomatic protection of citizens abroad, and as being the condition *sine qua non* for the institution of any international proceedings by the State whose national has been injured abroad by another State in alleged violation of international law.⁵ It is common nowadays to pay little attention to the historical evolution of the rule and to consider it a formal, technical rule of most general applicability, which must be followed before diplomatic protection may be exercised.⁶ At the same time, it has become increasingly difficult to plead successfully before international tribunals that justice would be denied in the courts of the respondent

¹ © T. Meron, 1960.

² *I.C.J. Reports*, 1959, p. 6.

³ *International Law Opinions* (1956), vol. 2, p. 312.

⁴ See also an important note by Fawcett, 'The Exhaustion of Local Remedies: Substance or Procedure?', this *Year Book*, 31 (1954), p. 452.

⁵ See in this connexion the Dissenting Opinion of Judge Armand-Ugon in the *Interhandel* case, *I.C.J. Reports*, 1959, p. 89.

⁶ Compare Judge Armand-Ugon, *ibid.*, at p. 87: 'The principle of the exhaustion of local remedies is not absolute and rigid; it has to be applied flexibly according to the case. Some situations or facts may entitle the Court to accede to a request, even if the remedies have not been completely exhausted.'

State, even when there appeared to exist no remedy in the domestic law of that State for the alleged wrong.¹ It would probably be even more difficult to convince an international tribunal that in certain cases it would be unjust or unreasonable to compel the injured individual to seek justice in the courts of the wrong-doing State.

Injuries Caused by One State to Another

It may be convenient to begin these observations by recalling the well-known proposition, according to which the rule of local remedies is applicable only to cases which are genuine cases of diplomatic protection, and is not applicable to cases primarily based on a direct breach of international law, causing immediate injury by one State to another² (hereinafter referred to as cases of 'direct injury'). The distinction between cases of diplomatic protection and cases of direct injury is generally recognized.³ Professor Jessup observes that 'various situations in the history of international claims reveal that in addition to the rights of its nationals a state has, in its relations with other states, certain rights which appertain to it in its collective or corporate capacity. The typical cases are those in which injury is done to an official of the state, particularly a consular or diplomatic official.'⁴ Treatises on international law contain many examples of categories of acts of one State considered to involve a direct injury to another State, and as such not subject to the local remedies rule.⁵ One of the more common examples is an injury to a State's national flag.⁶ Professor Jessup has suggested that: 'It should be one of the tasks in the codification of international law to catalogue the types of direct injuries to states for which the state would be privileged to require another state to pay such indemnity as might be determined by an international tribunal to be appropriate to the case.'⁷ It is submitted that such a task—desirable as it may be—would be extremely difficult. For not only the subject of the dispute but also the nature of the claim would be relevant in drawing up such a catalogue. Moreover, new categories of direct injuries evolve constantly according to the necessities of international life. It seems preferable to define cases of direct injury by reference to general legal principle.

The principal reason for the non-applicability of the rule of exhaustion of local remedies to cases of direct injury is that in such cases the injured

¹ See the Separate Opinion of Judge Sir Hersch Lauterpacht in the *Certain Norwegian Loans* case, *I.C.J. Reports*, 1957, pp. 39-41.

² See Eagleton, *The Responsibility of States in International Law* (1928), pp. 51, 103; Freeman, *The International Responsibility of States for Denial of Justice* (1938), p. 404.

³ See, for example, Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (2nd ed., 1947), vol. 2, p. 888: 'Claims may be divided into two broad classes: first, those which are based upon private complaints of individuals whose government acts as their representative in espousing their cause; secondly, those which "concern the State itself considered as a whole".'

⁴ *A Modern Law of Nations* (1952), p. 118.

⁵ See, for example, *ibid.*, pp. 118-20.

⁶ Eagleton, *op. cit.*, p. 80.

⁷ *Op. cit.*, p. 120.

State represents principally its own interests rather than the interests of its nationals and is the real claimant. It follows that a request by the respondent State that the claimant State should exhaust the legal remedies available in the former State¹ would run counter to the principle *par in parem non habet imperium, non habet jurisdictionem*.

Admittedly, approached from the point of view of the Vattelien theory that 'whoever ill-treats a citizen indirectly injures the State'² (which still appears to be the major theory of the law of responsibility of States for injuries to aliens³), there is a degree of inconsistency in distinguishing between cases of diplomatic protection and cases of direct injury. After all, it can be argued that in both cases it is the State itself which sustained the injury, and that in espousing the cause of its national the State does no more than protect its own interests. Despite this criticism,⁴ the logic of which cannot be entirely denied, the distinction between cases of direct injury caused by one State to another and cases of diplomatic protection in which the State espouses the cause of its national who has been injured by another State, is real and necessary and is supported by both practice and literature.

An attempt to formulate a general theoretical distinction between cases of direct injury and cases of diplomatic protection is bound to be difficult. In the first place it should be observed that there is an extremely close connexion between all the facts of a given case and the classification of that case as one belonging to either of these two categories. A single set of facts giving rise to international legal proceedings may contain elements of both diplomatic protection and direct injury. There may be facts giving rise principally to a case of diplomatic protection which do not, except in the Vattelien sense, contain distinct elements of direct injury. One could conceive also of an opposite case in which the facts give rise primarily to

¹ Instances of this are rare. For a recent example of a claim which was alleged to be inadmissible because the Applicant Government had not exhausted legal remedies in the courts of the Respondent State see the Pleadings of the Parties in the case of the *Aerial Incident of 27th July, 1955 (Israel v. Bulgaria)* (Preliminary Objections). The following statement was made on behalf of the Applicant Government: 'We can recall no precedent in which a government complaining of actions performed by another government *jure imperii* has been referred to the Courts of the respondent State as a preliminary condition to the obtaining of international satisfaction. Our claim is for a declaration of Bulgarian responsibility under *international law*, and we submit that no domestic court . . . is competent to make such a declaration which alone can lead to the satisfaction of our international claim. *Par in parem non habet imperium, non habet jurisdictionem*' (26 March 1959), *Oral Arguments*, p. 154.

² *Le Droit des Gens* (1758), liv. 2, sec. 71, Carnegie Translation, p. 136.

³ See Art. 1 of the 'Harvard Research on the Law of Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners', *American Journal of International Law*, 23 (1929), Supp., p. 133: 'A state is responsible . . . when it has a duty to make reparation to another state for the injury sustained by the latter state as a consequence of an injury to its national.' See also the case concerning the *Factory at Chorzów* (Claim for Indemnity—Merits) (*Germany v. Poland*), *P.C.I.J.*, Series A, No. 17, pp. 27–28, and the *Mavrommatis Palestine Concessions* case (*Greece v. Great Britain*) *ibid.*, No. 2, p. 12.

⁴ For criticism of the Vattelien theory see generally, Jessup, *op. cit.*, p. 116; Briggs, *The Law of Nations* (2nd ed., 1953), p. 735.

a case of direct injury and in which the element of diplomatic protection is rather indistinct. But most cases of direct injury contain, in a certain degree, also elements of diplomatic protection. It may well be that at the bottom of almost every international claim there is the motivating factor of interests of individuals which need protection. It is suggested that the classification of a case as one of direct injury or as one of diplomatic protection depends on the element or elements which are preponderant. It is further suggested that once a case has been classified in this way, the international claim, including all its elements, must generally be regarded as a unity and may not be split into its constituent elements, such as those of direct injury and those of diplomatic protection.

Before proceeding further to examine the theoretical distinction between cases of direct injury and of diplomatic protection, it is proposed to illustrate some of the observations made in the immediately preceding paragraph. A case of an injury caused to an individual alien in State A by an organ of that State and resulting in a claim for pecuniary compensation by State B (of which the injured person is a national) would normally be regarded as a case of diplomatic protection. However, if the diplomatic negotiations between the two States prove unsuccessful, and State B applies to the International Court of Justice complaining of a breach of certain treaty obligations by State A (as shown by its conduct towards the injured alien) and asking principally for a declaratory judgment based on the interpretation of the treaty, this would appear to be a case of direct injury to which the rule of local remedies would not be applicable. Or let us consider the case in which an ambassador of State A would be imprisoned by the organs of the receiving State B. This case would contain elements both of direct injury and of diplomatic protection, but since the former would be overwhelmingly preponderant, the case would be considered as one of direct injury and not subject to the rule of local remedies. Even a classic case of direct injury, such as that of damage caused to a naval vessel of one State by a mine illegally planted in time of peace by another State on an international waterway, would not be entirely devoid of elements of diplomatic protection by the flag State of the naval personnel aboard the vessel. It thus appears clearly that the classification follows the elements which are preponderant.

Generally speaking, it is suggested that in classifying a case as one of direct injury or of diplomatic protection, regard must be had to two main factors: the action which is impugned in the proceedings or the *subject of the dispute*, and the *nature of the claim*.¹ As regards both these factors, what

¹ See, in this connexion, Article 32, paragraph 2, of the Rules of the International Court of Justice: 'When a case is brought before the Court by means of an application, the application must, as laid down in Article 40, paragraph 1, of the Statute, indicate the party making it, the party against whom the claim is brought and the *subject of the dispute*. It must also, as far as

matters is the judicial appreciation of their true substance rather than their formulation by a party to the proceedings.

In the consideration of the *subject of the dispute*, much guidance can be found in international practice. Certain categories of acts have been considered to amount to direct injuries, such as (in certain circumstances) injuries caused by one State to officials of another State, and particularly its consular or diplomatic representatives,¹ violations of treaties² or the destruction of property owned by a State and serving public functions.³ Other categories of acts, normally injuries caused to private individuals, have been considered as giving rise only to cases of diplomatic protection.

Turning to the significance of the *nature of the claim* for the classification of a case, it is suggested that the true test is to be found in the real interests and objects pursued by the claimant State. In this respect there is a distinction of substance to be drawn between the case in which the claimant State is prompted to bring the claim in order to secure objectives principally its own, and the case in which the claimant State is only espousing or adopting the cause of its subject, 'and is proceeding in virtue of the right of diplomatic protection'.⁴ On this basis, it would appear that when the

possible, specify the provision on which the applicant founds the jurisdiction of the Court, state the precise *nature of the claim* and give a succinct statement of the facts and grounds on which the claim is based, these facts and grounds being developed in the Memorial, to which the evidence will be annexed.' Italics added. Note that the present paper is concerned with the substantive significance of the factors involved, not with the more formal and procedural features concerning the jurisdiction of the International Court of Justice and the relationship between the Application, the Memorial and the Pleadings.

¹ See Jessup, *op. cit.*, pp. 118-20.

² See the discussion of the subject of the dispute by the Permanent Court of International Justice in the case of *Phosphates in Morocco (Italy v. France)* (Preliminary Objections), *P.C.I.J.*, Series A/B, No. 74, pp. 25-29. Note particularly the following statement of the Court: 'The Court cannot regard the denial of justice alleged by the Italian Government as a factor giving rise to the present dispute. In its Application, the Italian Government has represented the decision of the Department of Mines as an unlawful international act, because that decision . . . constituted a violation of the vested rights placed under the protection of the international conventions. That being so, it is in this decision that we should look for the violation of international law—a definitive act which would, by itself, directly involve international responsibility. This act being attributable to the State and described as contrary to the treaty right of another State, international responsibility would be established immediately as between the two States. In these circumstances the alleged denial of justice . . . merely results in allowing the unlawful act to subsist. It exercises no influence either on the accomplishment of the act or on the responsibility ensuing from it.' *Ibid.*, at p. 28.

³ E.g. the destruction of a naval vessel. See also Wortley, *Expropriation in Public International Law* (1959), p. 140: 'It is clear from the assessment of compensation in the *Corfu Channel* case that where property owned by State *A* is directly injured by a breach of international law committed by State *B*, there can be no question of compelling State *A*, the State injured, to resort to the local courts of State *B*. Despite the claim of Albania to the contrary, the International Court of Justice has power to assess compensation arising from a liability in international law which it has found to exist between one State and another, without resorting to local tribunals.' It is suggested that while the circumstances involved in the *Corfu Channel* case clearly support the existence of a direct injury, it may well be that having regard to the special circumstances in which jurisdiction was accepted by Albania, the case cannot be regarded as an authority for the rule of local remedies.

⁴ See the Order of the International Court of Justice of 5 July 1951 indicating interim measures of protection in the *Anglo-Iranian Oil Co. case (United Kingdom v. Iran)*, *I.C.J. Reports*, 1951, p. 92.

claimant State is proceeding in virtue of the right of diplomatic protection, and despite a certain refinement of the doctrinal position,¹ that State has no distinct interest in the claim apart from the interest of its national whose cause is thus espoused. But the position would appear to be entirely different in a case which is not one of diplomatic protection in that sense, i.e. in a case where the initial act of the respondent State is a direct infringement of the rights of the claimant State according to international law. Such an immediate breach of international law is actionable at once, and the rules regarding denial of justice and exhaustion of local remedies do not come into operation at all. Here the State has a distinct reason of its own for the institution of the international claim, and only direct satisfaction to that State can lead to the settlement of the dispute.

In connexion with this test, consideration of the final submission²—the 'precise and direct statement of a claim'³—can be of some assistance. They should give a clear indication of the relief sought, and hence of the real interests and objects pursued by the claimant State. Yet this must be met with reserve. Admittedly, the significance of the relief sought by itself, as expressed in the submissions, may be limited because of their purely subjective character. It is doubtful whether the Court would allow itself to be persuaded exclusively by questions of form and of legal ingenuity by reference to the relief sought, if the result would be to avoid the application of the local remedies rule to a genuine case of diplomatic protection. However, although the question whether the State is *entitled* to a particular type of relief is a matter for judicial determination, the fact that the State *desires* a particular type of relief can be indicative of the real interest of that State in pursuing the case. That expression of its desire illustrates how it regards the possible settlement of the dispute. For instance, in cases of diplomatic protection the State normally seeks pecuniary compensation or possibly restitution of property, which would satisfy the claims arising from injuries originally caused to the individuals. But this—at least by itself—would rarely be an appropriate form of relief to a claim arising from a direct injury to the State. In such cases, an award of pecuniary compensation for its nationals who were incidentally injured by the impugned act is a secondary object; the primary object is to obtain from an international tribunal some

¹ In the *Mavrommatis Palestine Concessions* case (*Greece v. Great Britain*), the Permanent Court of International Justice made the following statement: 'By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.' *P.C.I.J.*, Series A, No. 2, p. 12. This was reaffirmed by the Permanent Court in the *Serbian Loans* case (*France v. Kingdom of Serbs, Croats and Slovenes*), Series A, No. 20, p. 17, and by the International Court of Justice in the *Nottebohm* case (*Liechtenstein v. Guatemala*) (Second Phase), *I.C.J. Reports*, 1955, p. 24.

² See Articles 42 and 74 of the Rules of the International Court of Justice.

³ *Fisheries* case (*United Kingdom v. Norway*), *I.C.J. Reports*, 1951, p. 126.

declaration of the responsibility of the respondent State in international law,¹ or the establishment of an arbitral tribunal,² or some other remedy such as a binding interpretation of a treaty,³ or an official apology due to the claimant State in its quality as a State.⁴ The claim for pecuniary compensation, designed to satisfy private claims, if any, arising out of the same set of impugned actions would be merely consequential. Moreover, owing to the difference between the interests of the State and of the injured individuals, the fate of such domestic claims as may have been filed by them in the courts of the respondent State would have no decisive importance for the international claim.

Now, it is admitted that a claimant State, in order to escape the applicability of the local remedies rule, could attempt to formulate its claim in such a way as to indicate a separate interest of its own and the existence of a direct damage caused to itself in breach of international law. But this is not an insuperable difficulty. International tribunals can distinguish between a mere form of words and the real substance of the claim, in order to determine whether it is indeed based on a direct injury or merely on the exercise of the right of diplomatic protection. The Court may thus consider the object of the claim, not merely its formulation.

In fact, this was one of the problems with which the International Court of Justice was confronted in the *Interhandel* case⁵ which involved the expropriation of assets in the United States of a Swiss Company (Interhandel). The Court regarded the subject of the dispute submitted to it as restitution of the assets of Interhandel vested in the United States.⁶ This type of a

¹ See, for example, *Corfu Channel* case (*United Kingdom v. Albania*) (Merits), *I.C.J. Reports*, 1949, pp. 9-10; *Aerial Incident of 27th July, 1955* case (*Israel v. Bulgaria*) (Preliminary Objections), *I.C.J. Reports*, 1959, p. 129.

² E.g. *Ambatielos* case (*Greece v. United Kingdom*) (Merits: Obligation to Arbitrate), *I.C.J. Reports*, 1953, p. 10.

³ See, for instance, the case of the *Aargauische Hypothekenbank* (*Swiss Confederation v. Federal Republic of Germany*) decided by the Arbitral Tribunal for the Agreement on German External Debts, *Reports of Decisions and Advisory Opinions*, No. 1, 1958. The Arbitral Tribunal held unanimously that the rule requiring the exhaustion of local remedies did not apply to the case at all, because Switzerland 'has not made a claim for damages against the Federal Republic . . . but merely requests a decision of the Arbitral Tribunal on the interpretation and application of Annex VII in conjunction with Annex II to the Debt Agreement in a particular dispute'. *Ibid.*, p. 24.

⁴ Compare generally, Garcia Amador, 'First Report on International Responsibility, U.N. Doc. A/CN.4/96', *Yearbook of the International Law Commission* (1956), vol. 2, chapter viii, paras. 192-218, particularly paras. 200, 211; 'Third Report on International Responsibility, U.N. Doc. A/CN.4/111', *ibid.*, (1958), vol. 2, chapter ix, paras. 13-16. For an illustration of a case where the destruction of a Canadian merchant vessel by the United States Coast Guard was considered to constitute an injury caused to Canada, necessitating an official apology and material amend by the United States, see *The I'm Alone* (*Canada v. U.S.A.*), *R.I.A.A.*, 1935, vol. 3, p. 1611, at p. 1618.

⁵ *I.C.J. Reports*, 1959, p. 6.

⁶ See *ibid.*, pp. 21 et seq. This concept of the subject of the dispute was not accepted by several judges who believed that the real dispute concerned the legal status of Interhandel (enemy or neutral). See, for example, Separate Opinions of Judge Córdova, *ibid.*, p. 41, and of Judge Hackworth, *ibid.*, pp. 38-40.

case would normally be regarded as one particularly suited for espousal by the national State in exercise of the right of diplomatic protection. Indeed, despite Swiss contentions to the contrary, the Court regarded the case as one of diplomatic protection. The subject of the Swiss claim was summarized by the International Court of Justice as follows:

'(1) as a principal submission, the Court is asked to adjudge and declare that the Government of the United States is under an obligation to restore the assets of . . . Interhandel . . . ;

'(2) as an alternative submission, the Court is asked to adjudge and declare that the United States is under an obligation to submit the dispute to arbitration or to a conciliation procedure. . . .'

The third Preliminary Objection of the United States, which was upheld by the Court, read as follows: '. . . there is no jurisdiction in this Court to hear or determine the matters raised by the Swiss Application and Memorial, for the reason that Interhandel, whose case Switzerland is espousing, has not exhausted the local remedies available to it in the United States courts'.² Subsequently to the filing of the Swiss Application instituting proceedings in the International Court of Justice, the Supreme Court of the United States reversed the judgment of the Court of Appeals dismissing Interhandel's suit and remanded the claim of Interhandel to the District Court, thus opening to it remedies available in United States law.

Referring to the principal submission of Switzerland, the Court made the following statement:

'The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system. *A fortiori* the rule must be observed when domestic proceedings are pending, as in the case of Interhandel, and when the two actions, that of the Swiss company in the United States courts and that of the Swiss Government in this Court, in its principal Submission, are designed to obtain the same result: the restitution of the assets of Interhandel vested in the United States.'³

The underlying reasoning is clear: The Court stressed the essential similarity of the interests and actions of Interhandel (in the proceedings instituted by it in the courts of the United States) and of Switzerland (in the International Court of Justice), and the absence of any distinct interest of Switzerland as a State in the claim. The Court considered that the claim before it was designed—in the exercise of the right of diplomatic protection—to achieve the same object as that pursued by Interhandel in the courts of the United States.

¹ *I.C.J. Reports*, 1959, p. 19.

² *Ibid.*, p. 11.

³ *Ibid.*, p. 27.

The Swiss Government argued also that its principal submission was a claim for the implementation of a decision based on an international agreement. The failure by the United States to implement such an international decision 'constitutes a direct breach of international law, causing immediate injury to the rights of Switzerland' and the rule of local remedies is not applicable.¹ The Court rejected this argument and stated that:

'Without prejudging the validity of any arguments which the Swiss Government seeks . . . to base upon that decision, the Court would confine itself to observing that such arguments do not deprive the dispute which has been referred to it of the character of a dispute in which the Swiss Government appears as having adopted the cause of its national, Interhandel, for the purpose of securing the restitution to that company of assets vested by the Government of the United States. This is one of the very cases which give rise to the application of the rule of the exhaustion of local remedies.'²

It rather appears as if the Swiss argument that the case was one of direct injury remained not entirely answered in the Judgment of the Court.³ The Court satisfied itself with stressing the representative character of the claim of Switzerland, which was designed to secure the restitution of Interhandel's assets in the United States, and regarded the case as a typical case of diplomatic protection, to which the rule of local remedies is applicable.

The Court followed similar reasoning in discussing the alternative submission of Switzerland. Following on this point arguments put forward by the United States,⁴ the Court held that

' . . . one interest, and one alone, that of Interhandel, which has led the latter to institute and to resume proceedings before the United States courts, has induced the Swiss Government to institute international proceedings. This interest is the basis for the present claim and should determine the scope of the action brought before the Court by the Swiss Government in its alternative form as well as in its principal form. On the other hand, the grounds on which the rule of the exhaustion of local remedies is based are the same, whether in the case of an international court, arbitral tribunal, or conciliation commission. In these circumstances, the Court considers that any distinction

¹ Ibid., p. 28.

² Ibid., pp. 28-29.

³ This part of the Judgment was forcefully criticized by Judge Armand-Ugon in his Dissenting Opinion. Judge Armand-Ugon stressed that: 'The Interhandel claim seeks to obtain by methods of local redress a decision by the American courts that the . . . act of vesting is a violation of domestic law, whilst the Application of the Swiss Government is based upon damage caused by the breach of an international agreement and of the law of nations . . . the local remedies sought . . . might not afford a final redress to satisfy the case put forward by the Swiss Government. Where a question of international law is involved, only an international court can give a final decision . . . the Court cannot enter the field of hypotheses; it must abide by the terms of the Interhandel claim. The Application of the Swiss Government seeks (rightly or wrongly) reparation for direct damage caused to a State. . . . The examination of the Third Objection means prejudging a point which can only be dealt with along with the merits. The rule of the exhaustion of local remedies does not apply to a case in which the act complained of directly injures a State. Is that act or is it not a breach of international law?' Ibid., pp. 88-89.

⁴ ' . . . this claim, while not identical with the principal claim, is designed to secure the same object, namely, the restitution of the assets of Interhandel . . . and . . . for this reason the Third Objection applies equally to it.' Ibid., p. 29.

so far as the rule of the exhaustion of local remedies is concerned between the various claims or between the various tribunals is unfounded.¹

Before completing this discussion of the *Interhandel* case, it is proposed to examine briefly the Opinion of Judge Basdevant. Concurring in the conclusion of the Court regarding the non-admissibility of the Swiss Application, but not in the reasoning of the Court, Judge Basdevant considered 'that, in order to assess the validity of the objections advanced, he should direct his attention to the subject of the dispute and not to any particular claim put forward in connection with the dispute'.² He satisfied himself with the statement in the Swiss Application which indicated the subject of the dispute submitted to the Court as 'the restitution by the United States of the assets' of *Interhandel*. While refraining from considering any particular claim put forward in connexion with the dispute so defined, Judge Basdevant concluded that 'the subject of the dispute justifies . . . the requirement of the preliminary exhaustion of local remedies on the ground that if, through them, *Interhandel* obtains satisfaction, the subject of the dispute will disappear.'³ It is suggested that while Judge Basdevant's approach may have considerable practical value, this approach—which omits to consider the claim and bases itself exclusively on the definition of the dispute in order to decide whether the rule of local remedies is applicable—is too narrow. It would appear that both the dispute and the claim are of relevance in this connexion. Indeed, the Court considered the applicability of the objection relating to non-exhaustion of local remedies not only in the light of the subject of the dispute, but also by reference to both the principal and the alternative Swiss submissions.

At this juncture, to complete this part of the paper, it is proposed to turn briefly to the Pleadings in the case of the *Aerial Incident of 27th July, 1955 (Israel v. Bulgaria)* (Preliminary Objections).⁴ The principal facts which gave rise to the dispute in this case were summed up as follows in the

¹ *Ibid.*, p. 29. The decision of the Court concerning the alternative submission of Switzerland was strongly criticized by several judges. Thus Judge Winiarski stated in his Dissenting Opinion that: 'The Court is not required to consider what was the purpose of the Swiss Government in formulating its alternative claim regarding arbitration and conciliation Here there is no question of the protection of the rights and interests of the national whose cause its Government is espousing; the rights and interests at stake derive directly from international instruments which the States have signed, and to that kind of dispute the rule of the exhaustion of local remedies does not apply.' *I.C.J. Reports*, 1959, p. 83. See also the following statement by Judge Sir Hersch Lauterpacht: 'I cannot accept the contention of the United States that the demand for restitution which forms the subject-matter of the Swiss Application and which, in substance, is now being litigated before the Courts of the United States and the demand by the Swiss Government for arbitration and conciliation are essentially one dispute. . . . An international award may give to a State satisfaction different from restitution of the property seized; a State may have a legal interest, independent of any material compensation and restitution, in vindicating the remedy of arbitration provided for in the Treaty. It may also have a legal interest in having its right to arbitral proceedings determined as soon as possible. . . .' *Ibid.*, p. 120.

² *Ibid.*, p. 30.

³ *Ibid.*, pp. 30-31.

⁴ *Ibid.*, p. 127.

Judgment of the Court: 'It was stated to the Court that on the morning of July 27th, 1955, the civil Constellation aircraft No. 4X-AKC, wearing the Israel colours and belonging to the Israel Company El Al Israel Airlines Ltd., making a scheduled commercial flight between Vienna, Austria, and Lod . . . in Israel, having, without previous authorization, penetrated over Bulgarian territory, was shot down by aircraft of the Bulgarian anti-aircraft defence forces.'¹ The first principal submission of both the Israel Application and Memorial sought a declaration of Bulgarian responsibility in international law for the destruction of the aircraft.² The claim for pecuniary compensation for the individuals who suffered as a consequence of the shooting down of the aircraft was relegated by Israel to a secondary place. Among the objections put forward by Bulgaria, the one of relevance to us here read, in its final form, as follows: 'Whereas the nationals of Israel whose claims are presented by the Government of Israel have not exhausted the remedies available to them in the Bulgarian Courts before applying to the International Court of Justice . . . the claim of the Government of Israel cannot, at the present stage, be submitted to the Court.'³ In its pleading before the International Court of Justice, the Government of Israel argued that the case was one of direct injury rather than of diplomatic protection,⁴ and relied, for this purpose, not only on the injury itself, but also on the nature of its claim as reflected in its first submission. Israel submitted that the case being based on a direct injury, it was reparable without regard to the position of individuals who may have suffered as a result of the injury. It argued that it is a question of priority⁵ whether a case should be regarded as one of direct injury or of diplomatic protection. In this case the injury to the State was said to have preceded both in time and in substance the injury to the individuals. Reparation for the latter injury was considered to be part of the broader satisfaction claimed by Israel and the whole claim and all the submissions were regarded as a unity. The case thus differed from cases of diplomatic protection, in which the injury to the individual precedes the injury to the State and in which the former forms the substance, in fact and in law, of the injury to the State.

¹ Ibid., p. 134. For a fuller statement of the facts see Dissenting Opinion of Judge (*ad hoc*) Goitein, *ibid.*, p. 195.

² Ibid., pp. 129-131.

³ Ibid., p. 134.

⁴ 'The action of the Bulgarian authorities has violated rights which are the intrinsic attribute of Israel as a State, the right that an Israel aircraft going about its lawful business should not be improperly obstructed . . . and certainly not destroyed, in the course of its voyage . . . The State of Israel also has the right . . . to expect that the Bulgarian authorities, as the authorities of any other State through which its aircraft should pass, would comport themselves in accordance with international law and not exceed what is permitted by international law.' Statement of Mr. Rosenne, the Agent of Israel (26 March 1959), *Oral Arguments*, p. 154. See also *ibid.*, pp. 150-5. For the Bulgarian position see *ibid.*, pp. 189-96 (2 April 1959).

⁵ This attitude was not contested by the Respondent Government, whose Counsel, Professor Cot, argued instead that Israel gave priority to the claim for pecuniary damages. *Ibid.*, pp. 195-6.

The Court did not find it necessary to go into the question of exhaustion of local remedies, since the case was decided on other grounds.

The Individual's Link with the Respondent State

From now onwards, the discussion will be limited to genuine cases of diplomatic protection, to which cases alone the rule of local remedies can be applicable. It is suggested that in international law, no less than in domestic law, it is dangerous and misleading to draw from precedents general conclusions going beyond the specific facts involved in those cases. While it is possible to find the broadest formulations of the rule of local remedies, an examination of the precedents reveals the following common basis of facts: In all of them the injured alien has voluntarily established, or may be deemed to have established, either expressly or impliedly, a link with the State whose actions are impugned. Such a link could be established in a variety of ways which it is not necessary to enumerate here exhaustively. It will suffice to refer to the more common examples. These include cases in which an alien resides, either permanently or temporarily, in the territory of the respondent State, engages there in business, owns there property¹ or enters into contractual relations with the Government of that State.² It appears that in all the reported cases which are relevant to the rule of local remedies and in which it was considered necessary that the allegedly wrong-doing State should in the first place be given an opportunity to redress the alleged wrong by means furnished by its own courts, a link of this character did in fact exist.³

As Fawcett points out, 'the local remedies rule is really a conflict rule. It is, when properly constructed, a rule for resolving conflicts of jurisdiction between international law and municipal tribunals and authorities; the rule determines when and in what circumstances the local courts, on the one hand, and international tribunals, on the other, must or may assume jurisdiction over the issue'.⁴ It is suggested that the voluntary link is

¹ See, in this connexion, the cases in which the International Court of Justice and its predecessor, the Permanent Court of International Justice, considered the rule of local remedies applicable: the *Panevezys-Saldutiskis Railway (Estonia v. Lithuania)*, *P.C.I.J.*, Series A/B, No. 76; *Interhandel (Switzerland v. United States of America)* (Preliminary Objections), *I.C.J. Reports*, 1959, p. 6.

² E.g. *Ambatielos award (Greece v. United Kingdom)*, decided under the Agreement of 24 February, 1956, London, H.M. Stationery Office (1956). See also the type of situation involved in the case of *Certain Norwegian Loans (France v. Norway)*, *I.C.J. Reports*, 1957, p. 9.

³ Of course, the idea of 'link' is not strange also in other branches of international law. It has been recognized and resorted to by the International Court of Justice in the *Nottebohm case (Liechtenstein v. Guatemala)* (Second Phase), *I.C.J. Reports*, 1955, p. 4, and has recently been incorporated in an important multilateral international convention. See Article 5, paragraph 1, of the Convention on the High Seas, adopted in 1958 by the United Nations Conference on the Law of the Sea. *Official Records*, vol. 2 (A/CONF. 13/38), p. 136.

⁴ *Loc. cit.*, p. 454.

similar to the connecting factor in private international law.¹ Not only does it confer jurisdiction on the courts of a particular State, but it renders the issue subject to the application of the local law.

The establishment of such a voluntary link appears to have been one of the main—even if often unexpressed—justifications for the local remedies rule. It is thus stated in the *Harvard Research on . . . Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners* that among the several reasons for the rule of exhaustion of local remedies there is: ‘. . . first, [that] the citizen going abroad is *presumed* and should ordinarily be required to take into account the means furnished by local law for the redress of wrongs’.² A similar idea is expressed by Borchard who says that: ‘The principle of international law by virtue of which the alien is *deemed to tacitly submit* and to be subject to the local law of the State of residence implies as its corollary that the remedies for a violation of his rights must be sought in the local courts.’³

Whatever the proper limits to the applicability of the rule of local remedies—which, except for the main questions with which this paper is concerned,⁴ it is impossible to discuss here—and however widely the rule has been expressed in decided cases, those cases themselves can only properly be considered as precedents for applying the rule within the limits of the facts and, as pointed out above, all those cases appear to have been based on the fact of the existence of a clearly established link between the alien and the respondent State. There is no authority for applying the rule to such cases of diplomatic protection in which this link is absent. To attempt to do so would be both unjust and unreasonable.

The most common case in which the genuine link exists and the rule of local remedies is applicable is that involving the physical presence in the territory of the wrong-doing State of either the alien or his property. In such a typical case it can be presumed that the link has been properly established. This, of course, is merely a presumption of fact which can be refuted by the circumstances of each specific case. It is in this context that the link theory proves to be particularly helpful. It not only helps us to understand why the rule of local remedies would be applicable to the case of a contractual relationship between a State and a non-resident alien, but

¹ See generally, Dicey, *Conflict of Laws* (7th ed., 1958), pp. 41 et seq.

² Loc. cit., pp. 152–3. Italics added.

³ *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (1915), p. 817. Italics added. See also the well-known *Salem* case (*United States v. Egypt*), in which the Arbitral Tribunal stated that ‘As a rule, a foreigner must acknowledge as applicable to himself the kind of justice instituted in the country in which he did *choose his residence*. . .’. *R.I.A.A.*, 1932, vol. 2, p. 1202. Italics added. See also Moore, *A Digest of International Law* (1906), vol. 6, pp. 658, 660.

⁴ This paper is not concerned with non-availability of local remedies or other instances of denial of justice.

is also essential for the necessary exclusion of the applicability of the rule in the case of an alien who, although present in person in the territory of the respondent State, has not established a genuine link between himself and that State. Surely the rule of local remedies is applicable to the case, for instance, of an alien who built a factory in a State, which factory is expropriated by that State without compensation. No question could legitimately be raised as to the existence of the genuine link in such a case. But let us consider the case in which the injured alien came to be in a certain State against his will, for instance, if he was brought there against his will and in violation of international law from the territory of another State or from the high seas by the agents of the former State, or, if his yacht travelling through an international waterway within the limit of the territorial waters of that State was destroyed by a mine illegally planted there by the armed forces of the territorial State. As in neither case a genuine link had been established, there would be no justification for the applicability of the local remedies rule.

The link theory was relied upon by Israel in the case already mentioned of the *Aerial Incident of 27th July, 1955*.¹ While the principal Israel argument regarding the non-applicability of the local remedies rule to that case² rested on the theory that its claim was founded on a direct injury caused by Bulgaria to Israel in its quality as a State, and not on the exercise of the right of diplomatic protection of its citizens abroad, the pleading went on to add that even on the basis of the Bulgarian thesis, according to which the injury had not been caused to Israel in its quality as a State, the rule of local remedies could not be applicable. Basing itself on the facts of the case as stated in its Memorial, and relying on the link theory, Israel argued that

‘There is no link of any kind between any of the victims and any of the individual claimants and the Bulgarian State. The victims of the Bulgarian action had no voluntary, conscious and deliberate connection with Bulgaria. To the contrary. Such connection as they did have, if such it can be called, was involuntary, unknown and completely unpremeditated. They were concerned with 4X-AKC and its journey to Lod. They constituted an integral whole with 4X-AKC on that voyage. Their death was the result of the unlawful interference with 4X-AKC in the course of that voyage.’³

It is also suggested that according to general principles of law, it would be very strange indeed if a State which interfered illegally with an alien, who did not—except for that interference—have any connexion with it, should be allowed to derive any advantage from its illegal acts.

¹ For the Bulgarian argument that the ‘link’ theory has no basis in international law see statement by Professor Cot (2 April 1959), *Oral Arguments*, p. 189.

² See also above, p. 92.

³ Statement of Mr. Rosenne (26 March 1959); *Oral Arguments*, p. 156. As mentioned above, the Court did not consider the question of exhaustion of local remedies. See *I.C.J. Reports*, 1959, p. 127.

Admittedly there may be border-line cases in which difficult questions of fact¹ and of law would arise regarding whether the circumstances support the existence of the genuine link. These difficulties, however, are not unsurmountable and to resolve them would be the function and the duty of the litigants and of the international tribunal. On the whole, the link theory—with all the difficulties which border-line cases may involve—is preferable to a rigid application of the local remedies rule to cases of diplomatic protection, a course of action which, in cases where a genuine link is absent, may lead to a travesty of justice.²

The link theory can be of importance also in another way. As it is well known, the law of State responsibility developed in close connexion with the practice of diplomatic protection of citizens abroad.³ It has been concerned principally with injuries suffered by aliens within the territory of the respondent State.⁴ Thus, it is understandable that the full title of the *Harvard Research* of 1929 reads: 'The Law of Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners'.⁵ The rule of local remedies developed in connexion with the alien who, of his own volition, either came to be in a foreign country, or established some other relationship with it, for instance by lending money to its Government. In view of the genuine link which undoubtedly existed in such cases, it was considered both just and necessary that local remedies available in that State should be exhausted by the alien before any international proceedings could be instituted against it by the State of which he was a national.

Today the position is different. The law of State responsibility appears to be broad enough to cover cases of injuries inflicted in violation of international law by one State upon nationals of another State who are outside the territory of the former.⁶ It is probably thus that what at one time were

¹ E.g. the question whether a foreign vessel was fishing within or without the territorial waters of a State.

² It is suggested that no genuine link can be established, not only when such connexion as there may be between the alien and a State was established by the wrongful act of the latter—which act is subsequently impugned in international proceedings—but also when an alien has been driven into that State's territory by *force majeure*, for instance, if his ship or aircraft has been forced by an irresistible storm and winds to cross the frontier. In a different connexion, regarding the entry through *force majeure* of a foreign vessel into the territorial waters of a State, and the resulting immunity of the former from the jurisdiction of the latter, see Briggs, *op. cit.*, p. 354.

³ See generally de Visscher, *Theory and Reality in Public International Law* (1957), Corbett's translation, pp. 269–86.

⁴ See also Meron, 'Some Reflections on the Status of Forces Agreements in the Light of Customary International Law', in the *International and Comparative Law Quarterly*, 6 (1957), p. 689, at p. 691.

⁵ *Loc. cit.*, p. 133.

⁶ Typical of the modern concept of State responsibility are the lectures of Professor Freeman delivered in The Hague Academy of International Law on 'Responsibility of States for Unlawful Acts of their Armed Forces', *Recueil des Cours*, 88 (1955) (ii), p. 267. Professor Freeman discusses not only responsibility of the State for injuries caused by its armed forces to an alien in its territory, but also the responsibility of the State for unlawful acts of its forces abroad.

'local' remedies to be exhausted in the State in which the alien suffered injuries, came to be commonly considered as equivalent to the 'legal' remedies to be sought by the alien in the courts of the respondent State, regardless of where the injury may have been caused, or whether a link had been established between him and that State. This broadening of the law of State responsibility¹ is an important reason for the re-examination of both the basis and the scope of the rule of local remedies. Surely it would be unreasonable to refer individuals injured by a foreign State outside its territory to its courts as a condition precedent to the institution of international proceedings by the State of which the victim was a national; and this, despite the absence of a genuine link between the injured individual and the respondent State.²

In connexion with the 'dis-localization' of the local remedies rule, and the extension of the rule to cases in which the injured individual is not present in the territory of the respondent State, reference may be made to the Pleadings of the Parties in the case of *Certain Norwegian Loans (France v. Norway)*. In its Reply, the Government of France sought to establish that the rule of exhaustion of local remedies can be applicable only to cases in which the injured alien of his own volition entered and established his residence in the territory of the wrong-doing State. The French Government argued that the fact that the rule of local remedies is as frequently, or

See also Garcia Amador, 'Second Report on State Responsibility, U.N. Doc. A/CN.4/106', *Yearbook of the International Law Commission* (1957), vol. 2, chapter i, paras. 6-7, and chapter ii, Article 3.

¹ Note the broad conception of the local remedies rule in the Separate Opinion of Judge Córdova in the *Interhandel* case: 'A State may not even exercise its diplomatic protection, and much less resort to any kind of international procedure of redress until its subject has previously exhausted the legal remedies offered him by the State of whose action he complains.' *I.C.J. Reports*, 1959, p. 46. See also the following statement by Professor Bourquin in the case of *Certain Norwegian Loans*: 'Quel est l'objet de cette règle? Lorsqu'un Etat s'est plaint d'un acte internationalement illicite, imputé à un Etat étranger et dont la victime est une personne privée, son action sur le plan international n'est recevable que si la personne lésée a préalablement épuisé les voies de recours que le droit interne de l'Etat incriminé met à sa disposition.' *Pleadings, Oral Arguments, Documents*, vol. 2, p. 156. Compare the more limited statement of the Court in the *Interhandel* case: 'the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means. . . .' *I.C.J. Reports*, 1959, p. 27. Italics added.

² The unreasonableness of such a course of action may be illustrated by two hypothetical cases: (a) Radiation released by a hydrogen bomb exploded in State A by the Government of that State causes damage to the inhabitants of a village in the neighbouring State B. Even if the possible violation of the territorial sovereignty of State B were disregarded and the case dealt with as a straight case of diplomatic protection, it is suggested that the institution of international proceedings by State B against State A would not be dependant upon prior exhaustion by the victims of the legal remedies available in the latter State. Compare *Trail Smelter case (United States v. Canada)*, *R.I.A.A.*, 1935, vol. 3, p. 1907. (b) Nationals of State A are injured by the naval forces of State B on the high seas in circumstances involving the international responsibility of State B. It appears that the institution of international proceedings by State A against State B would not depend upon the exhaustion of local remedies in State B by the victims.

even more frequently, referred to as 'épuisement des recours locaux' as it is referred to as 'épuisement préalable des recours internes', indicates 'une nuance qui touche au fond même de cette règle, à sa justification'.¹ In support of this, the French Government relied on the views of certain authorities on the law of State responsibility, who justify the subjection of the alien to the local jurisdiction by the fact that he has voluntarily chosen to establish his residence in that State and that by entering a certain country, the alien is deemed to have taken into account the local law. The French Government concluded that

'la seule explication de la règle réside dans l'exigence qu'un étranger qui se trouve en litige avec l'Etat sous la souveraineté duquel *il a voulu vivre* ne puisse provoquer le transfert de son affaire sur le plan international sans avoir épuisé au préalable tous les moyens de la régler par les voies locales'.²

In its Rejoinder, the Government of Norway argued, *inter alia*, that practice did not support the French thesis and relied mainly on the well-known arbitral awards in the *Finnish Shipowners*³ and the *Ambatielos*⁴ cases, in which the rule of local remedies was held to be applicable despite the fact that the individual claimants did not reside in the respondent State.

The Court, in the *Norwegian Loans* case, did not find it necessary to go into the question of the exhaustion of local remedies, since the case was decided on other grounds. The only reference to the argument of the parties regarding the above-mentioned issue was made by Judge Read in the course of his Dissenting Opinion. Judge Read stated that 'France has not been able to put forward any persuasive authority . . . and, indeed, the weight of authority is the other way'.⁵

It is submitted that while France, in discussing the basis for the local remedies rule, stressed quite correctly the voluntary character of the relationship between the injured individuals and the respondent State, it appears that she gave too limited a definition to the rule. The relationship between the injured individual and the respondent State must certainly be of a voluntary character. But this does not mean that establishment of residence is necessarily the only way in which the link can be established. It surely can be, and indeed often is established in other ways. For apt illustrations, reference can again be made to the *Norwegian Loans* case in which the Norwegian Government relied on the *Finnish Shipowners* arbitration, and on the *Ambatielos* case in order to refute the French thesis. In the first case,⁶ the ships which were requisitioned had sailed into territory

¹ *Pleadings, Oral Arguments, Documents*, vol. 1, p. 408.

² *Ibid.*, 1934. Italics added.

⁴ See Award of 6 March 1956, H.M. Stationery Office (1956).

⁵ *I.C.J. Reports*, 1957, p. 97.

⁶ It should be noted that the *Finnish Shipowners* case was also relied upon heavily by the

³ *R.I.A.A.*, vol. 3, p. 1481.

of Great Britain as a result of the voluntary act of their owners. In the second case, a contractual relationship had been established between Ambatielos and the Government of Great Britain. The existence of the proper link in either case cannot be denied.

Conclusions

In the foregoing pages an attempt has been made to indicate some limitations on the incidence of the rule of exhaustion of local remedies. The conclusions may now be summarized.

In principle, that rule is not applicable to all cases of State responsibility, but only to cases of diplomatic protection in which the State espouses the cause of its national and is proceeding in virtue of the right of diplomatic protection. The applicability of the rule to cases of direct injury caused by one State to another is precluded by the maxim *par in parem non habet imperium, non habet jurisdictionem*. Therefore it becomes necessary to classify each case as one of diplomatic protection or one of direct injury. Since it is common for elements of diplomatic protection and of direct injury to appear in one and the same case, and since it is necessary to maintain the unity of the claim and not to split it into its constituent elements, the classification of the case as pertaining to one of the above-mentioned categories must follow the preponderant elements. In the process of classification regard must be had to the subject of the dispute and the nature of the claim. What matters regarding both these factors is not so much their formulation by the interested party as the judicial appreciation of their true substance.

Even from the classification of the case as one of diplomatic protection it does not necessarily follow that it must always be subject to the exhaustion of the local remedies rule. The very fact of the injury caused by a State to an alien does not inevitably render the latter subject to the jurisdiction of the former as a condition precedent to the exercise of diplomatic protection by his national State. The State may not be allowed to derive an advantage from its own wrong. Even before the question of the availability of local remedies arises, it must be considered whether, apart from the injury, the relationship between the injured individual and the respondent State

respondent Government in the case concerning the *Aerial Incident of 27th July, 1955 (Israel v. Bulgaria)*, see *Oral Arguments*, p. 71. For the reply of Israel see *ibid.*, pp. 214-15. The *Finnish Shipowners* arbitration is often regarded as an important authority for the question when local remedies must be exhausted. It is submitted that the case may not be so regarded, because the only issue decided by the arbitrator was whether the shipowners, who had themselves instituted proceedings in the appropriate domestic tribunal of Great Britain, had in fact exhausted the remedies available to them in that country. Having found that the local remedies had in fact been exhausted, the arbitrator did not consider the second question submitted to him, namely, whether the non-exhaustion of local remedies would have constituted an obstacle to the institution of international proceedings by the Government of Finland.

justifies the applicability of the rule. It has been suggested that in order to render the rule of local remedies applicable, it is necessary for the alien to have voluntarily established some link (e.g. by residence or contract) with the State whose actions are impugned. This link is not unlike the connecting factor in private international law. It renders the injured individual subject to the jurisdiction of the tribunals of the respondent State and to its law. The link theory offers a much-needed limitation of the incidence of the local remedies rule. The rule must be applied with caution, and only after all the facts of the case have been adequately considered. Not only is a rigid application of the rule to all cases of diplomatic protection not supported by either the reasons for the rule or by the practice, but it also does not serve the interests of justice.

Annex 125

A.A. Cançado Trindade, *Origin and Historical Development of the Rule of Exhaustion of Local Remedies in International Law*, Belgian Review of International Law, Vol. 12 (1976)

Pursuant to Rules of the Court Article 50(2), this annex is comprised of such extracts of the whole document as are necessary for the purpose of the pleading. A copy of the whole document has been deposited with the Registry.

ORIGIN AND HISTORICAL DEVELOPMENT OF THE RULE OF EXHAUSTION OF LOCAL REMEDIES IN INTERNATIONAL LAW *

by

A.A. Cançado TRINDADE **

1. INTRODUCTION

The growing contemporary concern with the proper application of the rule of exhaustion of local remedies in international law (particularly in such experiments as those on the international protection of human rights) calls for a careful consideration of the origin and historical development of the rule. The task is made even more necessary by the fact that specialized literature on the subject¹ has so far been more heavily concentrated on

* The present article is based upon part of the first chapter of the author's PH.D. Thesis on « *The Rule of Exhaustion of Local Remedies in International Law* » (Cambridge, 1976-77).

** B.A., LL.B. (Cantab), PH.D. cand. ; fourth-year researcher, University of Cambridge ; former research fellow, The Hague Academy of International Law ; diplômé de l'Institut International des Droits de l'Homme, Strasbourg.

¹ It is impossible to list within the confines of this study the immense specialized literature on the subject. But reference can be made to some of the more comprehensive works, such as the following doctoral theses : PANAYOTACOS C.P., « *La règle de l'épuisement des voies de recours internes* », Marseille, Moullot, 1952 ; LAW C.H.P., « *The Local Remedies Rule in International Law* », Geneva, Droz, 1961 ; SARHAN A., « *L'épuisement des recours internes en matière de responsabilité internationale* », Université de Paris, 1962 (mimeographed) ; GAJA G., « *L'esaurimento dei ricorsi interni nel Diritto internazionale* », Milan, Giuffrè, 1967 ; CHAPPEZ J., « *La règle de l'épuisement des voies de recours internes* », Paris, Pédone, 1972 ; GIEBELER U., « *Die Erschöpfung der innerstaatlichen Rechtsbehelfe als zulässigkeitsvoraussetzung der Menschenrechtsbeschwerde zugleich ein vergleich mit der entsprechenden Regel des allgemeinen Völkerrechts und des Verfassungsbeschwerderechts* », University of Marburg, 1972 (Foto-Druck). Reference can also be made to the following relevant monographs : FRIEDMANN H., « *Epuisement des voies de recours internes* », *Revue de Droit international et de législation comparée* (1933) 318 ; TENEKIDES C. G., « *L'épuisement des voies de recours internes comme condition préalable de l'instance internationale* », *Revue de Droit international et de législation comparée* (1933) 514 ; AGO R., « *La regola del previo esaurimento dei ricorsi interni in tema di responsabilità internazionale* », *Archivio di Diritto pubblico* (1938) 181 ; TAMMES A.J.P., « *The Obligation to Provide Local Remedies* », *Volkenrechterlijke opstellen aangeboden aan G. van der Molen*, Kampen, 1962 ; MIAJA DE LA MUELA A., « *El Agotamiento de los Recursos Internos como Supuesto de las Reclamaciones Internacionales* », *Anuario Uruguayo de Derecho In-*

questions relating to the nature and scope of the local remedies rule than on its historical background. Yet, an examination of this aspect, to some extent overlooked, may not only help to clarify some of the problems surrounding the application of the rule, but also pave the way for a deeper understanding of an important question of international law.

In ancient law, the force of habit, the awe of traditional command and a sentimental attachment to it, the urge to satisfy the opinion of the social group, have all with some degree of speculation been conjointly accounted for as grounds for the binding force of custom, the formation of customary rules and *opinio necessitatis*². In this sense and context one has spoken of « law-creating facts », particularly in presence of a certain uniformity of conduct in similar circumstances, a reasonably long-established behaviour, and a pronounced psychological tendency towards behaving in accordance with custom³. Gradually a social machinery of binding force appears to take shape and become discernible in the strands of multiple relationships, the arrangement of reciprocal services, the ceremonial manner of performance of most transactions ; it is of course at a subsequent stage that organised society seems to recognize the obligations of one person in relation to the rightful *claims* of another, before one can speak of rights and even less of remedies⁴. But it is particularly in the legal framework of relations *between* social groups (rather than within them), or, more precisely, between members of different groups, that the essence of the subject under study lies. Thus, when nowadays one refers to the practice of States as custom, surely one has

oernacional (1963) 9 ; DAHM G., « Die Subsidiarität des internationalen Rechtsschutzes bei Völkerrechtswidriger Verletzung von Privatpersonen. *Vom Deutschen zum Europäischen Recht — Festschrift für Hans Dölle*, II, Tübingen, 1963 ; AMERASINGHE C.F., « The Formal Character of the Rule of Local Remedies », *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1965) 445 ; AMERASINGHE C.F., « The Rule of Exhaustion of Domestic Remedies in the Framework of International Systems for the Protection of Human Rights », *Zeitschrift für ausländisches öffentliches Recht* (1968) 257 ; HAESLER T., « *The Exhaustion of Local Remedies in the Case Law of International Courts and Tribunals* », Leyden, Sijthoff, 1968 ; AMERASINGHE C.F., « The Rule of Exhaustion of Local Remedies and the International Protection of Human Rights », *Indian Yearbook of International Affairs* (1974) 3 ; TRINDADE A.A.C., « The Burden of Proof with regard to Exhaustion of Local Remedies in International Law », *Revue des droits de l'homme/Human Rights Journal* (1976) 81. Cf. further : VERZIJL J.H.W., « La règle de l'épuisement des recours internes » (rapports), *Annuaire de l'Institut de Droit International* (1954) 5 and (1956) 1 ; FAWCETT J.E.S., « The Exhaustion of Local Remedies : Substance or Procedure », *British Yearbook of International Law* (1954) 452 ; MERON T., « The Incidence of the Rule of Exhaustion of Local Remedies », *British Yearbook of International Law* (1959) 83 ; MUMMERY D.R., « The Content of the Duty to Exhaust Local Judicial Remedies », *American Journal of International Law* (1964) 389.

² MALINOWSKI B., « *Crime and Custom in Savage Society* », London, Kegan Paul, 1947, pp. 52, 55 and 59 ; Sir VINOGRADOFF Paul, « *Custom and Right* », Oslo, H. Aschehong & Co., 1925, pp. 27, 21 and 36.

³ KELSEN H., « *Pure Theory of Law* » (transl. 2nd German ed. by M. Knight), University of California Press, Berkeley/L.A., 1967, pp. 9, 225 and 53.

⁴ MALINOWSKI B., *op. cit.*, pp. 55 and 59 ; Sir VINOGRADOFF Paul, *op. cit.*, pp. 68/69, 73 and 87/89 ; and, on the importance attached to modes of redressing wrongs in archaic society, cf. Sir MAINE Henry, « *Ancient Law* », London, Dent, 1972, p. 216.

in mind not merely factual conduct, but more properly a general practice accepted as law (custom supported by *opinio juris*), comprising such elements as concordant and repetitive practice expressing a conviction of obligation, generally acquiesced by other States and consistent with prevailing international law ⁵.

It is generally accepted today that the international responsibility of a State (for injuries to aliens) can only be enforced at the international level after the exhaustion of local remedies by the individual concerned, *i.e.*, after the respondent State has availed itself of the opportunity of redressing the alleged wrong by its own means and within the framework of its own domestic legal system. The historical roots of the long evolution of this rule, as this latter is commonly understood today, can be traced back to the ancient practice of reprisals. Originally, reprisals constituted a blend of two notions, that of self-help and that of civic or communal solidarity and responsibility of individuals for acts of their co-nationals ⁶. They were noticeable in virtually all primitive legal systems ⁷, in the pre-history of international law ⁸ in Europe. In the earliest cases, probably due to a lack of coercion by the competent authorities, reprisals were carried out without the imposition of restrictions. Later they became associated with the idea that aliens (usually merchants) had a right to be accorded justice. Reprisals were then restricted to cases of denial of justice, which became a condition precedent to their application ⁹.

At that stage private reprisals were no longer « private » in their entirety ; an element of public authority could be detected in cases where reprisals became admissible in view of refusal by the sovereign of the wrongdoer to accord justice to the foreigner. More than that, reprisals became legitimate — in such cases of denial of justice — providing that the sovereign of the injured individual warranted them, recognizing them as justified. Such was the practice of the so-called *letters of marque*, granted by the sovereign for that purpose ¹⁰.

The injured foreigner, thus, was not entitled to make justice by his own hands. Public authority intervened to limit private vengeance. Subsequently, the granting of reprisals became associated with the notion of right (reparation to the injured individual), and jurists started referring to it as the *right* of

⁵ PARRY C., « *The Sources and Evidences of International Law* », Manchester, Manchester University Press, 1965, pp. 61/62.

⁶ SPIEGEL H.W., « Origin and Development of Denial of Justice », *American Journal of International Law* (1938) p. 64 ; de la BRIERE Yves, « Evolution de la doctrine et de la pratique en matière de représailles », *Recueil des Cours de l'Académie de Droit International* (1928)-II pp. 253 and 255.

⁷ SPIEGEL H.W., *op. cit.*, p. 64. The author refers to traces of denial of justice of great antiquity, in periods « immediately following the migration of nations » (*ibid.*, p. 63).

⁸ Lord McNAIR, « *International Law Opinions* », vol II, Cambridge, University Press, 1956, p. 297.

⁹ de la BRIERE Yves, *op. cit.*, p. 254 ; SPIEGEL H.W., *op. cit.*, pp. 64 and 81.

¹⁰ Lord McNAIR, *op. cit.*, vol. II, p. 297 ; la BRIERE Y. de, *op. cit.*, pp. 253 and 255.

reprisals. An injured alien, thus, should first have recourse to the local judges and authorities, and only if they denied him his rights — *ubi jus denegatur* — could he appeal to his sovereign for the sanction of reprisals ¹¹.

The ultimate relationship in question was one of private law, of individuals in their relations with each other, even though the idea of public authority became more and more present ¹². The default of the magistrates of a community became the ground for reprisals. For centuries denial of justice remained the only condition precedent to reprisals, for it was not until much later that one became detached from the other ; once this happened the definition of denial of justice gradually contracted, coming to mean what it had originally meant, namely, a failure of protective justice. Denial of justice no longer provided the basis for self-help or reprisals, but rather for a reclamation by the State on behalf of its citizen abroad ¹³.

Transposed into the more familiar language of the twentieth century, the culmination of the historical development of reprisals is tantamount to the view that although contentions of denial of justice may have the effect of engaging the international responsibility of a State, the *mise en œuvre* of that responsibility by the exercise of diplomatic protection cannot in principle be applied until it is clearly established that the requirement of prior exhaustion of local remedies has been duly complied with ¹⁴. Let us examine more closely how this evolution came about in practice.

2. EARLY ANTECEDENTS FROM THE NINTH TO THE SIXTEENTH CENTURIES

As early as the ninth century, two treaties between Italian sovereign territories ¹⁵ limited the application of reprisals to denial of justice suffered by a subject of one party within the territory of the other : one of the treaties allowed reprisals in such cases to be carried out even against the judges who denied the alien justice, whereas the other treaty prohibited reprisals against merchants ¹⁶. The twelfth and thirteenth centuries witnessed early attempts

¹¹ la BRIERE Y. de, *ibid.*, p. 253 ; Lord McNAIR, *op. cit.*, vol. II, p. 297 ; SPIEGEL H.W., *op. cit.*, pp. 64/65.

¹² la BRIERE Y. de, *op. cit.*, pp. 248/249 and 252/253.

¹³ SPIEGEL H.W., *op. cit.*, pp. 67/68, 77 and 81.

¹⁴ FREEMAN A.V., « *The International Responsibility of States for Denial of Justice* », London, Longmans, 1938, p. 56.

¹⁵ Treaty of 836 between Sicard of Benevent and the Neapolitans, and treaty of 840 between Emperor Lotar I (on behalf of certain cities of the Italian Kingdom) with the Doge Petrus Tradenicus of Venice.

¹⁶ SPIEGEL H.W., *op. cit.*, pp. 64/65. They were followed in 1001 by a treaty of the same kind between Venice and the Bishop Grausa of Ceneda (*ibid.*, pp. 68/69).

more modern works on international law the law dealing with reprisals became distinct from the law on denial of justice⁸². The modern theory of international responsibility became visibly detached from the old notion and practice of reprisals⁸³.

The second half of the eighteenth century witnessed further illustrations from treaty practice⁸⁴. One could recall, for example, Article VI of the Jay Treaty of 1794 between the United States and Great Britain⁸⁵ — which marked the beginning of the modern stream of arbitrations⁸⁶, — concerning recovery of debts due to British creditors, which espoused the view that non-exhaustion of local remedies by the claimants was to be regarded as « a predominant causation of the losses », therefore not justifying compensation⁸⁷.

Thus, the requirement of the exhaustion of local remedies — prior to reprisals (in the Middle Ages mainly) and to intervention by the prince of the State (in modern times) — developed within the context of the relationship of communities or States with foreigners, particularly in the framework of relations stimulated by international trade and disputes arising therefrom, in whose settlement political factors and considerations could hardly be overlooked. Such considerations may have in fact played an important role in the gradual crystallization of the local remedies rule, reflected in modern times in, e.g., the assumed need to safeguard the sovereignty of States, or the desirability (on behalf of peaceful coexistence of States) to avoid as much as possible recourse to forceful measures in the settlement of international claims by insisting on the internal redress of wrongs within the State's own

⁸² SPIEGEL H.W., *ibid.*, p. 77.

⁸³ DE VISSCHER Ch., « Le déni de justice en Droit international », *Recueil des Cours de l'Académie de Droit International* (1935)-II, p. 373.

⁸⁴ E.g., Article XVIII of the treaty of peace and commerce of 1767 between the King of Denmark and the Emperor of Morocco, in *Consolidated Treaty Series*, vol. 44, p. 42 ; Article XIX of a treaty of 1784 between the Prince Sultan of the Kingdom of Johore and the Dutch East Indies Company (United Provinces of the Netherlands), in MARTENS Ch. DE, « *Recueil des principaux traités* », 2e ed. rev., vol. V, Gottingue, Librairie de Dieterich, 1826, p. 97 ; Article XXVII of the 1798 treaty of friendship, commerce and navigation between Portugal and Russia, in *Consolidated Treaty Series*, vol. 54, p. 371.

⁸⁵ In MOORE J.B., « *History and Digest of International Arbitrations* », vol. I, Washington, Government Printing Office, 1898, pp. 275/276.

⁸⁶ DUNN F.S., « *The Protection of Nationals* », Baltimore, Johns Hopkins Press, 1932, pp. 58/59 ; PARRY C., « Some Considerations upon the Protection of Individuals in International Law », *Recueil des Cours de l'Académie de Droit International* (1956)-II, p. 658 ; ROLIN H., « Le contrôle international des juridictions nationales », *Revue Belge de Droit International* (1967) pp. 4/5.

⁸⁷ HAESLER T., *op. cit.*, pp. 139/140. In fact, shortly before the Jay Treaty of 1794, the United States Secretary of State (Mr. Jefferson) reported to the British Minister (on 18 April 1793) that « a foreigner, before he applies for extraordinary interposition, should use his best endeavours to obtain the justice he claims from the ordinary tribunals of the country » ; in John Bassett Moore, « *Digest of International Law* », vol. VI, Washington, Government Printing Office, 1906, p. 259. The local remedies rule was further upheld in two statements by the U.S. Attorney-General (in 1792 and in 1794) ; in MOORE J.B., *ibid.*, vol. VI, pp. 657 and 259, respectively.

domestic legal system. But it was mainly in the course of the nineteenth century, as it will be seen next, that the practice of States began to accord to the local remedies rule a clearer shape, or at least the more familiar one as it is presented today as a generally recognized principle of international law.

4. NINETEENTH- AND TWENTIETH-CENTURY STATE PRACTICE ⁸⁸

a) EUROPE

The practice of the United Kingdom throughout the nineteenth century is illustrative of the observance of the requirement of exhaustion of local remedies prior to the exercise of diplomatic protection. The 97 volumes of facsimiles of the « *Law Officers' Opinions to the Foreign Office (1793-1860)* » ⁸⁹ contain not less than *thirty* cases concerning the application of the rule of exhaustion of local remedies. Several of those cases of strict observance of the local remedies rule pertained to the duty of British citizens abroad (e.g., in Bavaria ⁹⁰, Brazil ⁹¹, France ⁹², Cuba ⁹³, Spain ⁹⁴) to exhaust all local remedies before becoming entitled to diplomatic intervention on their behalf ⁹⁵. Likewise, the local remedies rule was held applicable in regard to aliens in Britain, who were in the same way bound to exhaust domestic remedies as they claimed for protection to their own respective governments ⁹⁶. On much fewer occasions was the local remedies rule considered as

⁸⁸ The present section's heading indicates not only what it covers but also what it excludes. The numerous arbitral awards and decisions of the International Court (PCIJ and ICJ) touching on the local remedies rule in the period considered are left outside the scope and purposes of the present study : while they have been widely discussed by contemporary expert legal writing on the subject (cf. footnote 1, *supra*), the practice of States, perhaps surprisingly, seems to have been to some extent neglected. This appears as a compelling reason for devoting the present examination to that practice in particular, to the exclusion of the more explored areas of the subject.

⁸⁹ Hereinafter referred to as « *Law Officers' Opinions* », edited by Clive Parry, Gregg International Publ. Ltd., 1970 ; vols. 96 and 97, ed. 1973.

⁹⁰ *Law Officers' Opinions*, vol. 12, p. 55, see pp. 53/55.

⁹¹ *Law Officers' Opinions*, vol. 17, p. 9, see pp. 5/15.

⁹² *Law Officers' Opinions*, vol. 32, pp. 225/226 and 593/594, and *ibid.*, vol. 34, pp. 174/181.

⁹³ *Law Officers' Opinions*, vol. 83, p. 123, see pp. 122/124.

⁹⁴ *Ibid.*, vol. 83, p. 209, see pp. 203/209.

⁹⁵ For further decisions consistently upholding the local remedies rule in regard to British citizens abroad, see *Law Officers' Opinions*, vol. 22, pp. 414/416, 486/488 and 506/507 ; vol. 43, pp. 208/218 ; vol. 53, pp. 114/116, 188/193 and 200/209 ; vol. 59, pp. 505/507 ; vol. 72, pp. 240/243 ; vol. 79, pp. 20/23 ; vol. 80, pp. 252/253 and 298/300, and pp. 5/8 and 73/76 ; vol. 81, pp. 293/295 ; vol. 82, pp. 162/165 ; vol. 83, pp. 9/11 ; vol. 94, pp. 199/201 ; vol. 95, pp. 40/43 ; and see further Lord McNAIR, *op. cit.*, vol. II, pp. 312/313.

⁹⁶ E.g., the case of the Russian vessel « *Alexander Newski* » (1806), reported in *Law Officers' Opinions*, vol. 62, pp. 17/19. And see further : *Law Officers' Opinions*, vol. 54, pp. 225/227 ; « *A British Digest of International Law* » (compiled principally from the archives of the Foreign Office), edited by Clive Parry and Sir Gerald Fitzmaurice, part VI, vol. 6, London, Stevens, 1965, p. 278.

International Law that Govern the Responsibility of the State ». The study was confined to the practice of Latin American countries, which the Committee deemed in many respects distinct from that of the United States (the latter based on principles upheld by European countries in the nineteenth century, rather than representing a new departure). The 1961 Majority Opinion represented the views of *sixteen* Latin American countries on the matter, while those of the United States were set forth in a subsequent Opinion delivered by the Committee in 1965¹⁵⁹. The Majority Opinion of 1961 emphatically subordinated all diplomatic claims to the principle of prior exhaustion of local remedies, a principle which in the American continent, the Opinion stated, « is not merely procedural but substantive »¹⁶⁰.

5. CONCLUSIONS

The study of State practice, often overlooked in the present context, is of fundamental importance for a proper understanding of the local remedies rule. If in the practice of arbitral and judicial organs on the subject legal principles have been applied in order to establish responsibility and determine the measure of reparation for the alleged injuries, in diplomatic practice, somewhat distinctly, the contending States have faced each other for the same purpose. Although there might arguably be an imperfect parallelism between the two practices as sources of law on the subject, there appears nevertheless to be a certain equilibrium between them in the shaping of customary rules of international law, for which both are equally important¹⁶¹. But if the case-law of international courts and tribunals on the topic may at times have been inconclusive¹⁶² (not to speak of juristic writing), State practice seems to provide reasonably clear indications for an understanding of the meaning, content and purposes of the rule of exhaustion of local remedies. However much arbitral and judicial decisions may have helped to clarify some of the obscure points surrounding the incidence of the local remedies rule, it is always advisable to embark on such a study with a clear outlook of the historical context within which the rule evolved in the course of many centuries¹⁶³.

¹⁵⁹ Majority Opinion of 1961 in OAS doc. cit., ref. CIJ-61, pp. 37/41 ; cf. also *Yearbook of the International Law Commission* (1969)-II, para. 19, p. 129. For the opposition of the United States government to the Latin American views (at the time the Majority Opinion was being drafted), cf. *Department of State Bulletin* (1959) pp. 666/669. Supplementary Opinion of 1965 (embodying the U.S. views) in OAS doc. cit., ref. CIJ-78, pp. 1/12.

¹⁶⁰ OAS doc. OEA/Ser.I/VI.2 - CIJ-61, of 1962, p. 37, see pp. 37/41.

¹⁶¹ REITZER L., « *La réparation comme conséquence de l'acte illicite en Droit international* », Paris, Sirey, 1938, pp. 131/133.

¹⁶² VERZIJL J.H.W., « *International Law in Historical Perspective* », vol. VI, Leiden, Sijthoff, 1973, pp. 634/636, see also pp. 637/639 and 731/735.

¹⁶³ Particularly in view of the seemingly growing influence of generally recognized rules of international law upon the formulation of foreign policy ; see EUSTATHIADES C.Th., « *Evolution des rapports entre le Droit international et la politique étrangère* », in « *Mélanges offerts à Henri*

Some conclusions can be submitted from the examination of the evidence assembled in this study of the origin and historical development of the local remedies rule. First, in medieval times and up to the end of the seventeenth century the requirement of prior exhaustion of local means of redress was commonly applied before the taking of reprisals, and subsequently and in modern times prior to intervention. Secondly, the local remedies rule (as it came to be known) applied only to the relationships between a State or a community and foreigners. In elder times, princes and sovereigns issued letters of reprisal only to their subjects (abroad), not to foreigners¹⁶⁴, and after they had exhausted all means of settling the case in the country of residence. In modern times, the rule has applied within the context of the law on State responsibility for injuries to aliens. In all cases one had a claimant complaining of an injury suffered in another country and allegedly engaging the latter's responsibility. Cases involving the local remedies rule always had a *private* origin, even if subsequently the claim was espoused by the sovereign or the State of the injured individual ; even though « internationalized » by means of the espousal of the claim, the dispute remained originally one between an injured alien and the host State. Such was the classical field of application of the local remedies rule, with a foreigner requesting his sovereign or his State protection and assistance to obtain reparation for an injury suffered in another country.

These cases should be distinguished from two other kinds of situation. A dispute could also arise directly between two States (*e.g.*, for an alleged direct breach of international law causing immediate injury to one of them), in which case one could hardly expect, by virtue of their very sovereignty, that one State would be bound to exhaust available remedies in the territory of the other. This was sufficiently pointed out by Bynkershoek as early as 1737¹⁶⁵. Another type of situation, much more recent, occurs when an injured individual complains against his own country before an international organ. The local remedies rule has been called upon to apply in such cases as well. This presents many and difficult problems, which it is impossible to examine within the confines of the present study. At this stage it may be submitted as a cautionary remark that, throughout its historical development, the scope of the local remedies rule has been invariably limited to situations concerning foreigners (often wealthy merchants and businessmen or companies) residing or carrying business in another State. Historically, nationals fell outside the scope of the local remedies rule. The proposition that the rule should be applied *ipso facto* in the new situation as it has in the law on State responsibility for injuries to aliens requires careful reexamination.

Rolin », Paris, Pédone, 1964, pp. 80/92. On the role of foreign offices in complying or not with remedies rule, see F.G. DAWSON and I.L. HEAD, « *International Law, National Tribunals and the Rights of Aliens* », Syracuse University Press, 1971, pp. 23/24 and *cf.* p. 50.

¹⁶⁴ NYSE., *op. cit.*, p. 71.

¹⁶⁵ BYNKERSHOEK C. VAN, *op. cit.*, pp. 134/135, see pp. 133/137. And *cf.* further subsequent remarks by Vattel (in 1758) : VATTEL E. DE, *op. cit.*, vol. II, p. 313.

The third conclusion relates to the *preventive* character of the rule. By constituting a *conditio sine qua non* for the exercise of reprisals (in older times) and of diplomatic protection (in modern times), not seldom the rule impeded intervention, at a time when sovereigns and States were less reluctant to resort to physical force than they seem to be today. The rule thus played a prominent role in securing some measure of respect for the sovereignty of States, minimizing tensions and favouring conditions for peaceful intercourse and trade relations¹⁶⁶ among sovereigns and States, and setting up claims courts and remedies. Excepted from the application of the rule were cases of denial of justice, undue delays and other grave procedural irregularities.

Fourthly, by the end of the nineteenth century, as the rule had become consistently relied upon by States in their frequent insistence on settlements within the framework of their own internal legal system, it became difficult to deny that it had gradually crystallized into a customary rule of international law, as undisputedly acknowledged by State practice nowadays. Fifthly, there is some evidence in the surveyed State practice (particularly in the Americas) that the rule of exhaustion of local remedies, *in the context of diplomatic protection*, has had a substantive character. The question has led to endless doctrinal controversy (with which we are not concerned here), but, as to State practice, some States have maintained that the *birth* of a State's international responsibility (for the subsequent exercise of diplomatic protection) is contingent upon prior exhaustion of all available local remedies¹⁶⁷. Distinctly, however, in present-day experiments under treaties on human rights protection, for example, the rule has clearly operated as a dilatory objection or temporal bar of a procedural nature.

Sixthly and finally, it was after a long historical evolution that the local remedies rule acquired the shape and features familiar to us in modern days, including its contemporary denomination. In this regard, it seems that Anglo-American practice and juristic writing originally accorded to the rule a larger scope than did the countries and writers of continental Europe and Latin America. This is suggested by the terms used to define the rule¹⁶⁸. The English expressions¹⁶⁹ were wider in scope than their continental cor-

¹⁶⁶ On the influence of the rule upon the creation and development of « minimum standards », see SCHWARZENBERGER G., « *Foreign Investments and International Law* », London, Stevens, 1969, p. 23.

¹⁶⁷ The relationship of the local remedies rule to the *birth* of the international responsibility of States being always a different matter from that of its relation to the *exercise* of that responsibility by means of diplomatic protection.

¹⁶⁸ MUELA M. DE LA, *op. cit.*, pp. 33 and 9; PANAYOTACOS C.P., *op. cit.*, p. 52; TENEKIDES C.G., *op. cit. supra*, p. 520.

¹⁶⁹ *Local redress rule and rule of exhaustion of local remedies.*

responding terms ¹⁷⁰. It seems that — at least originally — while the continental expressions comprised only the jurisdictional *recours* (judicial and administrative), the Anglo-American « means of redress » embraced jurisdictional as well as non-jurisdictional means ¹⁷¹. Nowadays, however, after vast international practice and numerous decisions on the matter, the expressions seem to be used almost synonymously.

¹⁷⁰ *Die Erschöpfung der innerstaatlichen Rechtsbehelfe (or Rechtsweges), la règle de l'épuisement des voies de recours internes, la regola del esaurimento dei ricorsi interni, la regla del agotamiento de los recursos internos, a regra do esgotamento dos recursos internos.*

¹⁷¹ SARHAN A., *op. cit.*, p. 11.

Annex 126

Dinah Shelton, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW (3rd ed., 2015)

Pursuant to Rules of the Court Article 50(2), this annex is comprised of such extracts of the whole document as are necessary for the purpose of the pleading. A copy of the whole document has been deposited with the Registry.

Remedies in
International Human
Rights Law

Third Edition

DINAH SHELTON

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For Chris, Philip, and Elizabeth

It is thus appropriate and probably inevitable that international tribunals draw upon national law, as well as international law, to develop remedies. In turn, as national tribunals hear and decide more cases alleging violations of international human rights norms, they look to international agreements binding on them and the jurisprudence of international tribunals. The result is a complex interplay and mutual influence of national and international law.

Remedial rules on the national level are intertwined with legal procedure and the social, historical, economical, and technological environment of the legal system. State liability in most legal systems has been built on the framework of tort law, which addresses the same set of problems everywhere: the foundation of liability, causation, justifications or excuses, and remoteness of damage. The relatively homogeneous framework of remedies, including declaratory relief, damages, restitution, specific performance, and injunction, is founded on considerations of compensatory justice, deterrence, punishment, and the relationship with other systems of compensation, such as insurance and welfare.¹⁵

The different aims of compensatory justice and deterrence may lead to different forms of relief. Remedies may compensate without deterring (insurance) or deter without compensating (fines). Generally, 'there is probably widespread agreement that loss-spreading through compensation is singularly justified when citizens are injured through no fault of their own by officials whose capacity (and perhaps even motivation) to injure has been created by the public for public ends'.¹⁶ In public law, however, private law notions such as enterprise liability, contractual risk-shifting, strict liability, punitive damages, and efficiency have been slow to take root and the compensation of victims has often been subordinated to other goals. Still, there is a growing view that damages against large entities must be correlated to the entity's size and capacity for harm to have a deterrent effect.¹⁷

This chapter examines international human rights law concerning the right to a domestic remedy and the requisites for effective and adequate remedies, including for economic and social rights.¹⁸ As the discussion will indicate, human rights law has come to distinguish situations of gross and systematic violations of human rights from other violations.

4.1 The Requirement to Exhaust Local Remedies

Exhaustion of local remedies is both a procedural criterion for the admissibility of an international claim, whether that claim proceeds as a matter of diplomatic protection or

¹⁵ European states commonly have social security systems and universal health insurance that may affect compensatory damages and the entitlement to pursue actions against wrongdoers. See Bernhard Koch and Helmut Koziol (eds.), *Compensation for Personal Injury in a Comparative Perspective* (Wien, 2003), 407.

¹⁶ Peter Schuck, *Suing Government: Citizen Remedies for Official Wrongs* (New Haven, 1983), 23.

¹⁷ See the *M. C. Mehta* case, AIR (SC) 1086 (1987).

¹⁸ Res. 22/5 of the Human Rights Council asked for a study on the right of access to justice and effective remedy for violations of economic, social and cultural rights. Although the ICESCR lacks a specific article requiring states parties to provide effective remedies, unlike the ICCPR, the ESC Committee insists that 'the United Nations human rights system has consistently recognized the right to an effective remedy for violations of ESC rights. General Comment 3, para. 2. See also ICESCR General Comment 3, para. 5; General Comment 9, para. 2; General Comment 12, para. 32; General Comment 14, para. 59; General Comment 15, para. 55; General Comment 18, para. 48; and General Comment 19, para. 77. Notably, also, the Reporting Guidelines for ESC Rights in the African Charter recommends that states report on the 'judicial and other appropriate remedies in place' enabling victims to obtain redress in cases where their rights have been violated. Para. 2(d).

as an individual complaint, and the potential source of a substantive claim for denial of the right to a remedy.¹⁹ The two functions, while separate, overlap considerably and it has long been recognized that '[t]he relationship between the local remedy rule and the State's duty of providing an adequate judicial protection for... rights... is so close as to promote continuous confusion'.²⁰

One possible source of the confusion is the fact that, if a domestic procedure reaches a final merits conclusion in accordance with domestic law and after fair procedures, the incompatibility of the judgment with international human rights standards may not be considered to be a violation of the right to a remedy. Courts are obliged to follow the law as it exists in the state. The outcome may be reviewed internationally, but not necessarily for denying the right to a remedy.²¹ International tribunals are not 'fourth instance' appellate tribunals, where every judicial error is considered to amount to a denial of a fair trial; international tribunals generally will not examine whether a court correctly applied domestic law or made procedural mistakes not amounting to a violation of due process.²²

The jurisprudence is not consistent, however. In Europe, it may be legitimate for a state to deny access to courts under ECHR Article 6 for claims that have no substantive basis in its national legal order, but if the lack of substantive protection arguably concerns a right guaranteed by the ECHR and no other remedial process is established, the state may be in breach of the right to a remedy²³ and the Court may find a violation of Article 13.²⁴

There is no obligation for victims to have recourse to remedies that are inadequate or ineffective.²⁵ Additionally, the European Court applies what it calls a 'generally

¹⁹ A. Vermeer-Kunzli, 'Exhaustion of Local Remedies and Denial of Justice', (2007) 18 *EJIL* 37–68. See also R. Pisillo Mazzeschi, *Esaurimento dei ricorsi interni e diritte umani* (Torino, 2004).

²⁰ A.V. Freeman, *International Responsibility of States for Denial of Justice* (London, 1938) (reprinted 1970), 406.

²¹ See C.F. Amerasinghe, *Local Remedies in International Law* (Cambridge, 2004), 98.

²² For a rare decision that accepted that mere error could be examined as a possible due process violation, see IACHR, Report No. 68/11, Petition 1095-03 (Admissibility) *Simeón Miguel Caballero Denegri and Andrea Victoria Denegri Espinoza v. Peru* (2011). In general, the IACHR insists that the mere fact that the petitioner lost a case in the national courts is not grounds for bringing a petition to the Inter-American system. The Commission will not substitute its judgment for that of the trier of fact nor will it substitute its interpretation of a domestic statute or Constitutional norm for that of a domestic court. The Commission will accept a case if the proceedings in domestic court violated human rights guarantees of due process or fair hearing or were ineffective to remedy the violation, for example, if the domestic court lacked the power to strike down legislation incompatible with the Convention.

²³ See European Court of Human Rights, *Powell and Rayner v. United Kingdom* (1990) Series A 106.

²⁴ See European Court of Human Rights, *Kurt v. Turkey*, judgment of 25 May 1998, Reports 1998-III, p. 1152, (1999) 27 EHRR 373. In this disappearance case, the Court found that the failure to account for her son was a violation of the applicant mother's Art. 3 rights and of Art. 13, which imposes an obligation to conduct for the benefit of relatives a thorough investigation. Art. 13 was seen as broader than the substantive right, requiring an effective investigation into the disappearance of a person in government custody, entailing a thorough and effective investigation capable of leading to the identification and punishment of those responsible with effective access for the relatives. Para. 140.

²⁵ European Court of Human Rights, *Akdivar and others v. Turkey*, 1996-IV Reports, 23 EHRR 365, paras. 65–76, citing *Ireland v. United Kingdom* (1978) Series A 25, 64, para. 159; *Aksoy v. Turkey*, judgment of 18 Dec. 1996, Reports 1996-VI, 2275–6, paras. 51–53, (1997) 23 EHRR 553; *Mentes and others v. Turkey*, judgment of 28 Nov. 1997, para. 57, 59, Reports 1997-VIII 2693, (1998) 26 EHRR 595.

recognized rule of international law'²⁶ that absolves an applicant from the obligation to exhaust domestic remedies where there are 'special circumstances'.²⁷ Such circumstances may include the passivity of national authorities in the face of serious allegations of misconduct or infliction of harm by state agents, for example, where they have failed to undertake investigations or offer assistance.²⁸ Similarly, the African Commission accepts that the sheer number of violations may demonstrate the absence of local remedies. Thus, in a case involving Mauritania, the Commission stated that '[t]he gravity of the human rights situation in Mauritania and the great number of victims involved renders the channels of remedy unavailable in practical terms...'²⁹

In complaints procedures, human rights tribunals apply a shifting burden of proof with regard to the exhaustion of local remedies.³⁰ The applicant must first indicate what efforts were made to exhaust local remedies. It is then incumbent on the government claiming non-exhaustion to demonstrate the existence of a remedy that was an effective one available in theory and in practice at the relevant time, one that was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. Once this burden has been satisfied, it falls to the applicant to establish that the remedy was in fact exhausted or was for some reason inadequate or ineffective in the particular circumstances of the case or that there existed 'special circumstances' absolving him or her from the requirement.

Human rights bodies apply the rule of exhaustion of remedies with some flexibility, referring to the 'due allowance' that must be made for the fact that the rule is applied in the context of human rights proceedings. According to the European Court, this flexibility and absence of 'excessive formalism' means undertaking a realistic assessment of the general legal and political context in which the remedies operate and the personal circumstances of the applicant. In a series of Turkish cases, the general situation of violence in the regions in question was seen to create obstacles to the proper functioning of the system of the administration of justice, including the securing of probative evidence, making the pursuit of judicial remedies futile.³¹

In the African system,³² the African Commission considers that one of its main functions is to redress complaints not remedied at the domestic level, despite the absence of an express provision in the Charter on the Commission's authority to indicate remedies.³³ The African Charter states that applicants must exhaust local remedies 'if any, unless it is obvious that this procedure is unduly prolonged'. (Art. 22(5)). In addition to applying this

²⁶ European Court of Human Rights, *Van Oosterwijck v. Belgium* (1980) Series A 40, 18–19, paras. 36–40.

²⁷ *Akdivar v. Turkey*, *supra* n. 25, para. 68; *Mentes v. Turkey*, *supra* n. 25 para. 57; *Austria v. Italy (Admissibility)*, 11 Jan. 1961, 4 Y.B. 166. The Court in *Akdivar* cites the Inter-American Court of Human Rights, *Velásquez-Rodríguez Case (Preliminary Objections)* (1987) Series C No. 1 and the Inter-American Court's Advisory Opinion on exceptions to the exhaustion of local remedies, (1990) Series C No. 11.

²⁸ European Court of Human Rights, *Selçuk and Asker v. Turkey*, 24 Apr. 1998 71 Reports 1998-II 891, (1998) 26 EHRR 477; *Akdivar and others*, *supra* n. 25, 1210–11, paras. 65–9 and *Mentes*, *supra* n. 25, 2706, para. 57.

²⁹ *Malawi Afr. Association v. Mauritania*, Comm. Nos. 54/91, 61/91, 98/93, 164/97, 210/98, para. 38, 1999–2000 Afr. Ann. Act. Rep., Annex V; *Amnesty Int'l v. Sudan*, Comm. No. 48/90, 50/91, 52/91, 89/93, Afr. Ann. Act. Rep., Annex V para. 39.

³⁰ See: *Velásquez-Rodríguez*, *supra* n. 27.

³¹ See, e.g., the cases cited *supra*, n. 27.

³² See, generally, Nsongurua Udombana, 'So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights' (2003) 97 *Am. J. Int'l L.* 1; Gino Naldi, 'Reparations in the Practice of the African Commission on Human and Peoples' Rights' (2001) 14 *Leiden J. Int'l L.* 681.

³³ *Free Legal Assistance Group v. Zaire*, Comm. No. 23/89, (1997) 4 IHRR 89.

express exception to the exhaustion requirement, the Commission has held that internal remedies need not be pursued in those cases in which it is 'neither practicable nor desirable' for the complainants or the victims to pursue such internal channels of remedy.³⁴ Instead, the admissibility requirement must be applied concomitantly with Article 7, which establishes the right to fair trial.³⁵ Thus, like other international tribunals, the Commission requires that 'the remedy must be available, effective and sufficient'.³⁶ Moreover, the African Commission insists that remedies must be obtainable from judicial bodies.³⁷

According to the African Commission, a remedy is considered to be available if the petitioner can pursue it without impediments or make use of it and if its availability is evident.³⁸ Where the substantive right itself is not provided for or is only inadequately part of domestic law, 'there cannot be effective remedies, or any remedies at all'.³⁹ If national procedures are ousted or wilfully obstructed no remedy exists.⁴⁰ A remedy to be effective must offer a prospect of success.⁴¹ Effectiveness includes the ability of the tribunal to decide the issue presented after a fair hearing, including on appeal; thus,

the right to appeal, being a general and non-derogable principle of international law must, where it exists, satisfy the conditions of effectiveness. An effective appeal is one that, subsequent to the hearing by the competent tribunal of first instance, may reasonably lead to a reconsideration of the case by a superior jurisdiction, which requires that the latter should, in this regard, provide all necessary guarantees of good administration of justice.⁴²

Finally, a remedy must be sufficient, i.e. capable of redressing the violation. If the procedure is discretionary and incapable of vindicating the right then it is not sufficient.⁴³

4.2 International Standards

The nature and gravity of arguable claims has implications for the range of domestic remedies that may be required. International tribunals agree that where there are allegations of serious violations, including infringements of the right to life, freedom from torture, and deliberate destruction of homes and possessions, the right to a remedy imposes, without prejudice to any other remedy, an obligation on the respondent state to carry out a thorough and effective investigation of allegations brought to its attention, an investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigative procedure.⁴⁴

³⁴ *Amnesty Int'l v. Sudan*, *supra* n. 29, para. 31.

³⁵ *Ibid.*

³⁶ *Jawara v. The Gambia*, Comm. Nos. 147/95, 149/96, para. 31, 1999–2000 Afr. Ann. Act. Rep., Annex V.

³⁷ *Cudjoe v. Ghana*, Comm. No. 221/98, para. 13, 1998–9 Afr. Ann. Act. Rep., Annex V.

³⁸ *Ibid.*, paras. 33–4.

³⁹ *Soc. & Econ. Rights Action Center v. Nigeria*, Comm. No. 155/96, 2001–2 Afr. Ann. Act. Rep., Annex V, para. 37 [hereinafter *SERAC v. Nigeria*].

⁴⁰ *Constitutional Rights Project v. Nigeria*, Comm. No. 102/93, 1998–9 Afr. Ann. Act. Rep., Annex V, paras. 6–7; *Modiste v. Botswana*, Comm. No. 97/93, 1996–7 Afr. Ann. Act. Rep., Annex X; *Jawara v. The Gambia*, *supra* n. 36, para. 34.

⁴¹ *Jawara v. The Gambia*, *supra* n. 36, paras. 32, 38.

⁴² *Amnesty Int'l v. Sudan*, *supra* n. 29, para. 37.

⁴³ *Constitutional Rights Project v. Nigeria*, *supra* n. 40, para. 10.

⁴⁴ In *Aksoy v. Turkey*, *supra* n. 25, the European Court established a link between the prohibition of torture in Article 3 and the Article 13 requirement of a remedy. According to the Court, the fundamental importance of the ban on torture means that Article 13 imposes, without prejudice to any other domestic remedy, 'an obligation on states to carry out a thorough and effective investigation of incidents of torture', *ibid.*, para. 98. The Inter-American and African systems concur. See e.g. *Velásquez-Rodríguez*, *supra* n. 27 (duty to investigate disappearances) and *SERAC v. Nigeria*, *supra* n. 39 (duty to investigate killings and forced evictions).

Annex 127

The Explanatory Dictionary of the Russian Language, *улу* (Sergey Ivanovich Ozhegov ed., 2011)

This document has been translated from its original language into English, an official language of the Court, pursuant to Rules of the Court, Article 51.

Pursuant to Rules of the Court Article 51(3), Ukraine has translated only an extract of the original document constituting this Annex. In further compliance with this Rule, Ukraine has provided two certified copies of the full original-language document with its submission. Ukraine has omitted from translation those portions of the document that are not materially relied upon in its Written Submission, but stands ready to provide additional translations should the Court so require.



S.I. OZHEGOV

**RUSSIAN
DICTIONARY**



ИЗДАТЕЛЬСТВО

[...]

OR. 1. individual or repeated conjunction. Connects two or more sentences, as well as homogeneous parts of a sentence that are mutually exclusive. He or I. Either he goes, or I. Tomorrow or the day after tomorrow. On Monday, Tuesday or Wednesday. Either on Monday or on Wednesday. 2. individual or repeated conjunction. Used to connect the last part of an enumeration, to add to the preceding part of an enumeration. Look on the table, on the shelves or in the cupboard. 3. individual or repeated conjunction. Used in opposition: otherwise, or else. Leave or we will have a falling out. 4. conjunction. Used to connect different names of the same concept, to clarify, in the sense of in other words, that is. Airplane, or aircraft. S. [Translator's note: this should probably be "5."] particle. Used at the start of a sentence in the sense of is that so (in sense 1), really (in sense 1) with a suggestion of opposition to something else, something possible (colloquial). Don't you know about it? Or you decided to stay? * Either - or - (colloquial) expression of a necessary selection of something, one of two. Are you staying or going? Decide: either or.

[...]

Annex 128

Xinhua Dictionary of the Chinese Language, 或 (11th ed., 2011)

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Or huò ① Conjunction, represents choice: agree ~ disagree. ② Adverb, maybe: tomorrow morning ~ can arrive. ③ Classical pronoun, certain person, there is someone: ~ said that day: “Why not study?”

Annex 129

Royal Spanish Academy Dictionary of the Spanish Language, *o* (online ed., 2018)

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Royal Spanish Academy
Dictionary of the Spanish
Language

[. . .]

Or³

From Latin *ubi*.

1. Disjunctive conjunction. It denotes difference, separation, or alternative between two or more persons, things, or ideas. *Antonio or Francisco. White or black. To make or to break. To win or to die.*
2. Disjunctive conjunction. Generally used before each one of two or more opposed terms. *You will do it either* ["o" in Spanish] *by choice or by obligation.*
3. Disjunctive conjunction. It denotes equivalence, meaning 'that is, or what is the same.' *The protagonist, or the main character in the fable, is Hercules.*

[. . . .]