



General Assembly

Distr.: General
2 June 2010

Original: English

Human Rights Council

Fourteenth session

Agenda items 2 and 3

Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General

Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development

Report of the Office of the High Commissioner on the outcome of the expert consultation on the issue of protecting the human rights of civilians in armed conflict*

Summary

The present report summarizes the discussions held during the expert consultation on the issue of protecting the human rights of civilians in armed conflict, as requested by the Human Rights Council in resolution 12/5.

* The present report was submitted late in order to take into account the expert consultation held on 31 March 2010.

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I. Introduction

1. In its resolution 9/9 on the protection of the human rights of civilians in armed conflict, the Human Rights Council invited the United Nations High Commissioner for Human Rights to convene an expert consultation, open to the participation of Governments, regional organizations, relevant United Nations bodies and civil society organizations, and in consultation with the International Committee of the Red Cross, on the issue of protecting the human rights of civilians in armed conflict. As requested by the Council, the Office of the High Commissioner for Human Rights reported on the outcome of this consultation, in the form of a summary of discussions, to the Council at its eleventh session.

2. In its resolution 12/5 the Council took note with appreciation of the report of the Office of the United Nations High Commissioner for Human Rights (OHCHR) on the outcome of the expert consultation on the protection of the human rights of civilians in armed conflict (A/HRC/11/31) and invited the Office of the United Nations High Commissioner for Human Rights to convene, within the parameters set forth in paragraph 8 of Council resolution 9/9, a second expert consultation on the issue of protecting the human rights of civilians in armed conflict, with a view to enabling the completion of the consultations on this issue. The Council further requested the Office of the High Commissioner to report on the outcome of the consultation, in the form of a summary of discussions, to the Council at its fourteenth session. The present report is submitted in accordance with that request and provides a summary of the discussion by the experts. The draft was circulated to the experts for their comments.

3. The Office of the High Commissioner for Human Rights consulted with the International Committee of the Red Cross (ICRC) on the expert consultation and in a letter dated 3 March 2010, the High Commissioner brought the resolution to the attention of the President of the ICRC and invited him to appoint a focal point for the purpose of following-up the consultations.

4. The expert consultation was announced on the OHCHR website. On 9 March 2010, notes verbales were sent to all permanent missions in Geneva.

5. The expert consultation was held in Geneva on 31 March 2010. Representatives from 24 Member States of the United Nations: Argentina, Armenia, Austria, Azerbaijan, Bahrain, Bosnia and Herzegovina, Brazil, Canada, Egypt, Ethiopia, France, Germany, Greece, Pakistan, the Russian Federation, Saudi Arabia, Sri Lanka, Sweden, Switzerland, the Netherlands, Turkey, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Uruguay, as well as representatives the European Union and the European Council and representatives from civil society organizations, attended the expert consultation.

6. The expert consultation comprised one opening session and four substantive sessions. The substantive sessions were structured around the different human rights mechanisms: (a) Human Rights Council special procedures; (b) human rights treaty bodies; (c) international and regional judicial organs; and (d) other human rights mechanisms, including international fact-finding missions and commissions of inquiry, the universal periodic review of the Human Rights Council, and activities undertaken by international civil society organizations acting in the context of armed conflicts.

7. The Office of the High Commissioner for Human Rights opened the expert consultation. It was recalled that over the years, the General Assembly, the Security Council, the Commission on Human Rights and more recently the Human Rights Council, have considered that in situations or armed conflict, parties to the conflict have legally binding obligations concerning the rights of persons affected by the conflict. The Council

has recognized the importance and urgency of the effects of armed conflicts on the human rights of civilians. In line with international jurisprudence and the practice of relevant treaty bodies, the Council acknowledged that human rights law and international humanitarian law are complementary and mutually reinforcing, taking into account that human rights law continues to apply in armed conflict situations.

8. It was recalled that in the 2009 expert consultation, the question of the applicable legal framework in situations of armed conflict, in particular the continued application of international human rights law in situations of armed conflict, was thoroughly discussed. Against that background, the meeting aimed to discuss the way in which existing mechanisms for monitoring and ensuring compliance of human rights obligations and accountability for violations have undertaken their particular mandates when addressing situations of armed conflict.

9. In this respect, it was worth noting that the Office of the High Commissioner works to respond to human rights and humanitarian law concerns across the world. The Office engages with all relevant actors, including non-State actors, for the purpose of ensuring the observance of relevant international human rights and humanitarian law. OHCHR also monitors and reports on alleged violations by State and non-State actors. The High Commissioner also issues periodic reports referring to, *inter alia*, violations of international human rights law and international humanitarian law by parties to a conflict.

10. It was stated that the Office of the High Commissioner is not alone in this endeavor. The human rights system has a wealth of different mechanisms that have developed, within the framework of their mandates, a solid experience concerning the implementation of human rights in situations of armed conflict. Special procedures of the Human Rights Council, treaty bodies, international and regional courts, and civil society organizations have all, in different ways, provided the operational mechanisms to monitor, promote and protect the human rights of civilians in the context of armed conflict. In that context the expert consultation aimed to address the experience of special-procedures mandate holders have had in reporting to the Human Rights Council on human rights issues in conflict situations. Indeed, a number of special rapporteurs have, through their legal analyses, contributed in clarifying the extent and nature of the legal obligations of parties to armed conflict. They have also provided the Council with relevant information and analyses and have proposed measures to tackle systematic violations of international human rights and international humanitarian law in different contexts.

11. The expert consultation also sought to address the case-law of treaty bodies, both through their general comments as well as in the context of their analysis of country reports and individual complaints. One issue of particular importance in this respect was the extra-territorial applicability of human rights treaties, in particular when a State party undertakes military operations on the territory of another State. Similarly important is the experience of treaty bodies in dealing with derogations from human rights treaties. Treaty bodies have clarified the extent, scope and limitations applicable to derogations.

12. Furthermore, the meeting also aimed to deal with the way in which judicial bodies, in particular the International Court of Justice, the International Criminal Tribunal for the Former Yugoslavia, and the European Court of Human Rights, within their respective jurisdictions have addressed questions of applicability of human rights and international humanitarian law. These issues are of particular importance, in light of the need to ensure accountability, both from the perspective of international State responsibility and in relation to individual criminal responsibility. Indeed, often the legal characterization of many acts can only be ascertained if the situation is analyzed from both perspectives. The protection of the human rights of civilians against those and other violations is better served when this complementarity between international human rights and international humanitarian law is duly recognized.

13. It was recalled that the impact of these issues on the ground is visible on a frequent basis. One challenge is to reflect on more effective ways to ensure that human rights and humanitarian law are respected by parties to conflicts. Another challenge is to focus on means of ensuring accountability for those violations when they occur.

14. Georges Abi-Saab introduced the meeting by recalling that during the first expert consultation of 2009, extensive reference was made to the combined application of international human rights law and international humanitarian law in situations of armed conflict. He noted that in practice only one norm applies to each concrete situation. When applicable international human rights norms and international humanitarian norms yield similar results, there is no need for a complex legal analysis. However, he noted that the international law system has evolved to greater specialization and that, therefore, in certain exceptional situations, principles such as that of *lex specialis* is required to determine which is most detailed norm that applies to each concrete and individual case. Therefore, the combined application of international human rights law and international humanitarian law does not mean two norms are to be applied simultaneously, but rather that one should seek to identify the norm that provides the most specific answer for each particular situation.

15. Mr. Abi-Saab pointed out that, given that the 2009 expert consultation had clarified the legal and substantive questions of the continuous and mutually reinforcing application of international human rights law and international humanitarian law in situations of armed conflict, the meeting was designed to address the question of how different human rights mechanisms have implemented, in their practice, their respective human rights mandates in the context of armed conflict, taking into account the complementary application of international human rights law and international humanitarian law. Such experience, in the form of judicial decisions, treaty bodies' general comments and concluding observations, special rapporteurs' reports to the United Nations bodies, and others, constitute a rich body of practice that should be incorporated in the work of the relevant United Nations organs, in particular the Human Rights Council.

II. Session 1: Special procedures' experience in protecting human rights in armed conflict

16. Concerning the experience of human rights special procedures in dealing with the protection of human rights in situations of armed conflict, experts stated that on a number of issues special procedures have applied both international human rights and international humanitarian law in a fully complementary manner.

17. In the case of internally displaced persons, for example, it was indicated that the normative framework applicable to internal displacement resulting from armed hostilities fully integrates relevant international humanitarian law norms and combines them with international human rights law. The fact that two bodies of law were applicable was not seen as a dilemma, but rather as an opportunity. In that respect, it was mentioned that the solution that had been adopted concerning internal displacement was to identify the relevant standards in international human rights law and international humanitarian law and to create a third norm. While in the field of internal displacement there is no specific convention dealing with the issue, the Guiding Principles on Internal Displacement, which have been acknowledged by the General Assembly as an important framework for this issue, are in fact the result of such combination of applicable standards deriving from both bodies of law.

18. At the level of normative framework, the African Union Convention on Internally Displaced Persons adopts a similar approach. There are several articles in that Convention that contain language typically found in international humanitarian law, such as the

provision in article 7 of the Convention, which refers to protection and assistance to internally displaced persons in situations of armed conflict.

19. Experts recalled some examples of situations in which reference was made to both international human rights law and international humanitarian law obligations. For instance, it was recalled that in his report on the situation in Somalia (A/HRC/13/21/Add.2), the Representative of the Secretary-General on the human rights of internally displaced persons stated that the level of violence faced by civilians, including very serious violations of human rights and international humanitarian law, is a major trigger for displacement. He further noted the many alleged instances of arbitrary displacement of persons as a result of violations of international humanitarian and human rights law, contrary to the Guiding Principles on Internal Displacement. He referred to indiscriminate attacks, shelling of residential areas, generalized use of force without the necessary precautions to minimize the impact on the civilian population, prohibited methods of warfare, as well as targeted human rights violations and abuses, such as killings, rapes or forced recruitment, all taking place in a climate of impunity. Moreover, he indicated that such acts may also amount to war crimes or crimes against humanity under the Rome Statute of the International Criminal Court.

20. Experts also highlighted the strong and important interaction between special procedures mechanisms and the human rights treaty bodies. It was noted, for instance, that general comment 29 of the Human Rights Committee on states of emergency has become a reference, in particular in relation to the mandate concerning the promotion and protection of human rights while countering terrorism, because a number of States are currently dealing with terrorism related issues in the context of states of emergency. Similarly, it was mentioned that general comment 31 of the Human Rights Committee is also a fundamental interpretation of international human rights law, in particular its reference to the relation between international human rights law and international humanitarian law.

21. Experts noted that in the context of the fight against terrorism there is a need to assess specifically when a situation escalates to a point where it can be qualified as armed conflict with identifiable parties. These situations require, therefore, a careful evaluation of the most relevant rule to be applied, in order to ensure adequate protection of the rights of the persons concerned, based on the principle of complementarity of international human rights law and international humanitarian law.

22. It was noted in this connection that the Special Rapporteur on the promotion and protection of human rights while countering terrorism recalled in the report of his mission to the United States of America (A/HRC/6/17/Add.3) that it is a well-established principle that, regardless of issues of classification, international human rights law continues to apply in armed conflict. In that respect, he reminded the government that its conduct must therefore comply not only with international humanitarian law, but also with applicable international human rights law. In the report on his mission to Israel (A/HRC/6/17/Add.4) he stated that the legal framework against which Israeli measures against terrorism are to be addressed is the combined effect of international humanitarian law and international human rights law. He further noted with regard to the applicability of substantive norms of international humanitarian law that international humanitarian law norms pertaining to international armed conflict are also applicable and that the classification of an armed conflict as an international or non-international one can no longer be treated as having major substantive consequences for the international humanitarian law obligations of a State that is a party to an armed conflict.

23. Experts further recalled that the Special Rapporteur on the promotion and protection of human rights while countering terrorism has, in the context of his mandate, referred to issues such as the targeted killings of civilians and the notion of active participation in hostilities; the issue of detention without access to judicial review in relation to persons detained on charges of terrorism in the context of an armed conflict; the question of security

detention in armed conflict; and the issue of the qualification as unlawful alien enemy combatant to justify the non-recognition of prisoner of war status. In all these situations, the Special Rapporteur took into consideration both international human rights and international humanitarian law norms.

24. Concerning the issue of arbitrary detention in armed conflict situations, it was recalled that while the Working Group on Arbitrary Detention had decided in 1993 that it would not deal with situations of international armed conflict in so far as they are covered by international humanitarian law instruments (E/CN.4/1993/24), it has recently stated that its mandate is to deal with communications arising from a situation of international armed conflict in particular to the extent that the detained persons are denied the protection of the Third or the Fourth Geneva Conventions (E/CN.4/2006/7). For example, the Working Group applied both international human rights and international humanitarian law in relation to persons detained in Guantánamo Bay by the United States (E/CN.4/2006/120). It recalled, *inter alia*, that international humanitarian law and international human rights law are not mutually exclusive, but complementary.

25. Experts indicated that the application of international human rights law and international humanitarian law to conflict situations is not limited to questions dealing exclusively with civil and political rights. It was recalled that economic, social and cultural rights are also strongly affected by conflict. In that respect, special procedures have also dealt with issues related to, *inter alia*, housing, health, environment, access to water, and education. One expert indicated, for example, that a group of special rapporteurs, including the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, carried out a mission in Lebanon in the aftermath of the 2006 conflict with Israel (A/HRC/2/7). The Special Rapporteur looked at issues related to the armed conflict dealing with land confiscation, forced evictions and displacement, dispossession of property, as well as destruction of homes. In the joint report it was recalled, *inter alia*, that the demolition of homes in violation of international humanitarian law and subsequent displacement amounted to forcible eviction, called into question numerous international human rights requirements and, as stated by the Commission on Human Rights in its resolution 1993/77, constitute gross violations of human rights, in particular the right to adequate housing.

26. Finally, experts noted that special procedures have been quite effective and active in addressing human rights situations in armed conflict situations. Experts agreed that the most important challenge remained how their analyses and recommendations were followed up in the different political bodies of the United Nations, in particular the Human Rights Council. Experts noted that taking into account that relevant legal and factual information was regularly provided to the Council, it was for the Council to agree on the action that was required to effectively protect the rights of civilians in relation to particular armed conflicts.

III. Session 2: Treaty bodies' views concerning the protection of human rights in armed conflict

27. In relation to the experience of treaty bodies in protecting human rights in situations of armed conflict, experts pointed out that the different treaty bodies have, in the context of their relevant conventions, made important contributions to the clarification of States' treaty obligations. Experts noted that the Human Rights Committee has, through its general comments, greatly contributed to clarify the extent of States' legal obligations in relation to the application of the International Covenant on Civil and Political Rights in situations of armed conflict. In general comment 29, for instance, the Committee indicated that during armed conflict, whether international or non-international, rules of international

humanitarian law become applicable and help to prevent the abuse of a State's emergency powers. The Committee further indicated that the Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if, and to the extent that, the situation constitutes a threat to the life of the nation, after a careful analysis of its justification and why such a measure is necessary and legitimate in the circumstances. In relation to the mutually reinforcing nature of international human rights law and international humanitarian law, the Committee indicated, for example, that the Covenant requires that no measure derogating from the provisions of the Covenant may be inconsistent with the State party's other obligations under international law, particularly the rules of international humanitarian law. Moreover, States parties may in no circumstance invoke the Covenant's provisions on derogations as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.

28. Experts further noted that in general comment 31 the Human Rights Committee further confirmed that the Covenant applies in situations of armed conflict to which the rules of international humanitarian law are applicable. The Committee noted that while in respect of certain Covenant rights more specific rules of international humanitarian law may be especially relevant for the purposes of the interpretation of the Covenant, both bodies of law are complementary, not mutually exclusive. In relation to the territorial scope of the Covenant, experts recalled that the Human Rights Committee indicated that States parties are required to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party. Furthermore, the enjoyment of Covenant rights is not limited to citizens of States parties but must also be available to all individuals, who may find themselves in the territory or subject to the jurisdiction of the State party. This principle also applies to those within the power or effective control of the forces of a State party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State party assigned to an international peacekeeping or peace-enforcement operation.

29. Experts also recalled that the Human Rights Committee has issued concluding observations in which it has referred to the application of the Covenant to situations of armed conflict. In its concluding observations on the United States of America's periodic report (CCPR/C/USA/CO/3/Rev.1), for example, the Committee noted with concern the restrictive interpretation made by the State of its obligations under the Covenant, as a result, in particular, of its position that the Covenant does not apply with respect to individuals under its jurisdiction but outside its territory, nor in time of war, despite the contrary opinions and established jurisprudence of the Committee and the International Court of Justice. Experts further indicated that, in its concluding observations on Israel's periodic report (CCPR/CO/78/ISR), the Committee noted the State party's position that the Covenant does not apply beyond its own territory, notably in the West Bank and in Gaza, especially as long as there is a situation of armed conflict in these areas. The Committee reiterated the view that the applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of the Covenant. The Committee further noted that the applicability of the regime of international humanitarian law does not preclude accountability of States parties under the Covenant for the actions of their authorities outside their own territories, including in occupied territories.

30. It was also indicated that the Human Rights Committee had expressed its concern in relation to the use by Israel of targeted killings of those identified by the State party as

suspected terrorists in the Occupied Territories. In the view of the Committee such practice raised concerns in relation to the protection of the right to life under the Covenant. The Committee, therefore, recommended that the State party should not use targeted killings as a deterrent or punishment and that before resorting to the use of deadly force all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted. The Committee further recommended that complaints about disproportionate use of force should be investigated promptly by an independent body.

31. Experts also referred to the experience of the Committee on the Elimination of Discrimination against Women. Armed conflict exacerbates inequalities that make women particularly vulnerable when armed conflict breaks out. Conflict is often accompanied by gender based violence and an increasing scale and brutality of sexual violence. Women and girls are increasingly targeted as a tactic of war to humiliate, dominate, terrorize, punish, disperse and forcibly relocate members of a given community or ethnic group.

32. Experts considered that the Convention on the Elimination of Discrimination against Women and Security Council resolutions 1325 and 1820 are critical tools for addressing gender equality in conflict and post-conflict situations. Security Council resolution 1325 helps to broaden the scope of the Convention's application by clarifying its relevance to all parties in conflict and in peace. The Convention, in turn, provides concrete strategic guidance for actions to be taken on the broad commitments outlined in Security Council resolutions 1325 (2000) and 1820 (2008).

33. It was recalled that in general recommendation 19 the Committee recognized the importance as a human rights issue of gender-based violence against women in all contexts, including throughout displacement. The Committee noted that wars, armed conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women, which requires specific protective and punitive measures. In general recommendation 24 the Committee recommended that special attention be given to the health needs and rights of women belonging to vulnerable and disadvantaged groups, such as refugees and internally displaced women. It also recommended that States parties ensure adequate protection and health services, including trauma treatment and counselling for women trapped in situations of armed conflict and women refugees.

34. Experts also referred to the experience of the Committee on the Elimination of Discrimination against Women in reviewing States' periodic reports. When it examined the report of Indonesia (A/53/38/Rev.1), for example, the Committee noted that the information provided on the situation of women in areas of armed conflict reflected a limited understanding of the problem. The Government's remarks were confined to the participation of women in the armed forces and did not address the vulnerability of women to sexual exploitation in conflict situations, as well as a range of other human rights abuses affecting women in such contexts.

35. The Committee has regularly expressed concern about the fact that in post-war transition periods the promotion of women's human rights and gender equality is not seen as a priority, in particular in efforts to address the consequences of the armed conflict and in the peace building and reconstruction processes. The Committee also recommended the government of Uganda to include in peace negotiations measures of accountability, redress and rehabilitation for women and girls who have been victims of violence, including enslavement, in those conflicts (A/57/38).

36. Recently, the Committee expressed concern that in Rwanda equal access to justice and appropriate protection and support may not be guaranteed for all women and girl victims within the framework of the comprehensive process of prosecution of perpetrators that is ongoing at international and national levels. The Committee urged the State party to

continue to ensure appropriate protection, support and equal access to justice for the women victims of sexual violence during the genocide (see CEDAW/C/SR.884 and 885).

37. Experts recalled that the Committee examined the report of Rwanda and focused on post-genocide reconstruction and prosecution of perpetrators (CEDAW/C/RWA/CO/6). The Committee expressed concern that women's participation and involvement in the post-conflict reconstruction and social economic development has not been fully realized owing to deeply entrenched stereotypes and gender-based violence, as well as other forms of discrimination against women.

38. Finally, some experts raised the issue of the application of international humanitarian law by human rights treaty bodies. It was indicated that the decision to apply international human rights law or international humanitarian law should be based on an analysis of the extent of protection that these bodies of law can offer in each distinct situation. Other experts noted, however, that some treaty bodies have avoided basing their analysis on international humanitarian law given their specific mandate to apply and interpret their relevant conventions. For example, the Human Rights Committee, in general comment 29, did not take an approach based in international humanitarian law but simply stated the conditions to be observed by States when applying the derogations provisions in the Covenant to situations of emergency in armed conflict.

IV. Session 3: The role of judicial organs in implementing human rights obligations in armed conflict

39. Concerning the application by judicial organs of human rights law and international humanitarian law to cases involving armed conflict situations, it was indicated that international and regional courts have a wealth of experience and have contributed to the clarification of how these two bodies of law interact in concrete situations.

40. The International Court of Justice has been requested to deal with a growing number of cases involving serious violations of human rights and humanitarian law and has focused on such disputes not only from the perspective of the rights and duties of States, but also from that of the rights of individuals, addressing human rights in armed conflict situations, the relationship between State and individual responsibility, as well as questions of restitution and compensation to individual persons. Recent cases include the Wall Advisory Opinion (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*); the Arrest Warrant case (*DRC vs. Belgium*); the Armed Activities on the Territory of the Congo (*DRC v. Uganda* case); the Application of the Convention on the Prevention and Punishment of the Crime of Genocide case (*Bosnia and Herzegovina v. Serbia and Montenegro*); Legality of Use of Force (*Yugoslavia v. NATO countries*); Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia v. Russian Federation*); and Jurisdictional Immunities of the State (*Germany v. Italy*).

41. Experts recalled that the Court's decisions in the field of human rights have reflected a visible trend towards complementarity between international human rights law and international humanitarian law. The Court, for example, insisted on the application of human rights in armed conflict, thus continuing the trend developed in the context of human rights treaty bodies. In the *Nuclear Weapons* advisory opinion, it recognized the continued existence of the International Covenant on Civil and Political Rights in time of armed conflict, in particular the right to life. In the Wall advisory opinion, while confirming the continuing applicability of human rights instruments to the extent that they had not been derogated from, the Court stated that as regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some

issues may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law. This passage was reiterated in the *Congo v. Uganda* case, in which the Court found that both massive human rights violations and grave breaches of international humanitarian law had been committed by Ugandan military forces on the territory of the Democratic Republic of the Congo.

42. Moreover, experts indicated that in the *Wall* advisory opinion, the Court reaffirmed the application in time of armed conflict not only of the International Covenant on Civil and Political Rights, but also of all human rights instruments, including the Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child. This insistence on the indivisibility of human rights was further confirmed by the Court in the *DRC v. Uganda* case, which included in the list of applicable law, also the African Charter on Human and Peoples' Rights.

43. The Court has further pronounced on the extraterritorial nature of international human rights instruments. In the *Georgia v. Russia* case the Court observed in its decision on the request to issue provisional measures that there is no restriction of a general nature in Convention on the Elimination of All Forms of Racial Discrimination relating to its territorial application.

44. In the *Bosnia v. Serbia* case the Court underlined that the obligation of each State to prevent and to punish the crime of genocide under article 1 of the Genocide Convention is not territorially limited. In the *Wall* advisory opinion it also concluded that the major human rights instruments are applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory, particularly in occupied territories.

45. Finally, in relation to the obligation to pay reparations for international human rights and international humanitarian law violations, experts noted that in the *Wall* advisory opinion the Court declared that in the event of the impossibility of restitution, Israel was under an obligation to make reparation to all natural or legal persons who have suffered any form of material damage as a result of the wall's construction in the Occupied Palestinian Territory. This was a landmark decision for the Court in acknowledging the duty of a State to make such reparations to individuals, as opposed to the traditional right of diplomatic protection where the State had a right of reparation for breach of its own interests.

46. In relation to the experience of international criminal tribunals, experts referred to the important contribution of the International Criminal Tribunal for the Former Yugoslavia with regard to the application of human rights standards to situations of armed conflict. It was indicated, for example, that the International Criminal Tribunal has, *inter alia*, developed a strong practice concerning the application of notions of fair trial and due process in its own case-law, thus strengthening the Tribunal's position as one of the leading bodies for trying individuals for international crimes.

47. Experts noted that international human rights law, international humanitarian law and international criminal have evolved rapidly over the last few years and that cross-fertilization between the different legal regimes has strengthened the interaction and the complementarity between the three bodies of law. Moreover, the increased attention on accountability for human rights and international humanitarian law violations at the national and the international level has created a wealth of case-law in which elements of the three regimes can be identified. This has been the case not only for international tribunals, but also for United Nations agencies, such as OHCHR, and United Nations organs, including the Security Council and the Human Rights Council.

48. It was indicated, for example, that while the mandate of the International Criminal Tribunal was essentially to apply international humanitarian law, the fact that the Statute of the Tribunal included crimes against humanity and violations of common article 3 required that the Tribunal also refers in its analysis to international human rights law. The Tribunal's experience in dealing with human rights is illustrated, for instance, in the way in which it has dealt with the prohibition of torture as a crime against humanity. The Tribunal has borrowed extensively from the Committee Against Torture and the Human Rights Committee. The Tribunal has further elaborated on the notion of the link between the perpetrator and the State and has adopted a more flexible requirement concerning the characterization as an agent of the State. It was noted that while the Convention Against Torture requires an act of torture to have been inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity, the International Criminal Tribunal for the Former Yugoslavia decided that the definition of torture in the context of crimes against humanity is not identical to the definition in the Convention and that outside the framework of the Convention, customary international law does not impose a public official requirement in relation to criminal responsibility for torture.

49. In the case of rape as a crime against humanity, the Tribunal has focused its analysis from the perspective of the human rights of women. In this respect, it was recalled that the Tribunal's statute was the first landmark document that contained a provision classifying rape as a crime against humanity. Experts highlighted that previously rape was traditionally treated as a war crime. While rape was not mentioned in Nuremberg Charter nor prosecuted as a war crime under customary international law, it was prosecuted in Tokyo and was included in Control Council Law No. 10 as a crime against humanity. Nevertheless, although both the Fourth Geneva Convention and the Additional Protocols prohibit rape, they do not list it as a grave breach to the Geneva Conventions subject to universal jurisdiction. In that respect, the experience of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda have greatly contributed through their jurisprudence to understand the legal confines of sexual crimes, in particular rape as a crime against humanity, rape as a war crime, and rape as violation of common article 3, which reflects customary law.

50. Experts also recalled that International Criminal Tribunal for the Former Yugoslavia jurisprudence has established that humiliating and degrading treatment could also be characterized as a crime against humanity. According to the above Tribunal, certain types of treatment could fall under the crime of persecution, which is considered as a crime against humanity in the Statute of the Tribunal. Other acts described as "inhumane acts" also introduce gross violations of human rights to the jurisdiction of the Tribunal.

51. Experts referred to the experience of regional human rights courts in applying international and regional human rights instruments and international humanitarian law to conflict situations. Some experts recalled that the Inter-American Commission of Human Rights, the Inter-American Court of Human Rights and the European Court of Human Rights have a wealth of case-law dealing with the application of the relevant human rights instruments to situations of armed conflict. The European Court of Human Rights, for example, has had some opportunities to deal with cases of violation of human rights during armed conflict. For instance, in the case of *Loizidou v. Turkey*, the Court ruled in favour of the applicant who was no longer able to have access to her properties situated in the northern part of Cyprus after the occupation of the island by Turkish troops in 1974. In the case of *Ergi v. Turkey*, the Court employed standards such as the principles of legitimacy, proportionality and necessity. The Court also referred to the principle of distinction between civilians and combatants; the principle of limitation in the choice of means and methods of war; and also the principle of precaution and of proportionality to be used in *jus in bello*.

52. Experts recalled that the principle of proportionality plays a very important role in the European Court's case-law. In several cases the Court examined whether the use of force was proportionate to the legitimate aims pursued, whether a fair equilibrium was reached between the aim expected and the means employed, and whether this use was absolutely necessary.

53. It was also pointed out that the European Court's case-law insists on procedural aspects of the rights to life, one of them being the right of the family to a thorough, prompt and effective investigation into the killing of a person. The procedural aspect comprises a State's obligation to investigate, prosecute and punish violations of the right to life. In the Court's case-law all serious human rights violations must be subject to a prompt, impartial, thorough and independent official investigation. The Court has not hesitated to apply the requirement to investigations in situations of armed conflicts. Indeed, the fact that a killing might be justified under international humanitarian law does not preclude the right to an investigation. This was indicated in particular in the case of *Kaya v. Turkey*, in which the Court stated that neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation to ensure that an effective, independent investigation is conducted into death arising out of clashes involving the security forces.

V. Session 4: Other actors that contribute to the implementation of human rights in armed conflicts

54. Concerning the contribution of other mechanisms to the implementation of international human rights in armed conflict situations, experts pointed out to the important work done by international commissions of inquiry. Mention was made to the Commission of Inquiry on Darfur established pursuant to Security Council resolution 1564 (2004), as well as to commissions of inquiry established under the Human Rights Council mandate, including the United Nations Fact Finding Mission on the Gaza Conflict.

55. It was pointed out that commissions of inquiry do not operate as a court of law, but instead use different methods and investigating procedures, including in relation to gathering, analysis and evaluation of information. The Darfur and the Gaza commissions of inquiry, for example, based their conclusions on credible information that showed that violations had occurred. Commissions of inquiry use standards for evaluating prima facie evidence that are less strict than those used by courts. The information they gather provide sufficient factual grounds to support findings related to allegations of human rights and humanitarian law violations. Moreover, evidence produced in the context of investigations of commissions of inquiry may further serve as a starting point for criminal investigations at the domestic and international levels.

56. Experts further indicated that investigations and conclusions of commissions of inquiry often lead to an in-depth analysis of domestic justice mechanisms in order to assess whether accountability for gross human rights violations and serious violations of international humanitarian law can be guaranteed, in line with States' international law obligations to investigate, prosecute and punish alleged perpetrators of such violations. For instance, both the Darfur factfinding mission and the Gaza commission of inquiry assessed whether the relevant parties had established mechanisms to ensure accountability for violations, taking into account fairness and due process obligations.

57. Experts also highlighted that civil society organizations have been actively involved in the application of international human rights and international humanitarian law in their evaluation of the effects and consequences of armed conflict situations. Some international non-governmental organizations, for example, have undertaken field missions and have submitted analytical reports in relation to a number of conflicts. Their analyses take into

account the complementary and mutually reinforcing nature of international human rights and international humanitarian law. In particular, reports prepared by non-governmental organizations have taken into account that each body of law contains specific legal provisions that provide better protection depending on the specific circumstances. Furthermore, taking into account that civil society organizations may be more reactive to specific situations in the field, it was indicated that information gathered in their investigations is often taken into account by other human rights mechanisms and bodies dealing with the same situation.

58. Experts also recalled that international humanitarian law is one of the bases for consideration of the human rights record of member States in the universal periodic review (UPR). Protection of civilians in armed conflict has been one of the subjects of specific recommendations. In particular, recommendations have been issued concerning, *inter alia*, the obligation to strictly adhere to international humanitarian law obligations; to take measures to ensure access to humanitarian assistance for vulnerable populations and take measures to protect civilians; to protect religious freedom in accordance with article 27 of the Fourth Geneva Convention; and to take every possible measure to ensure the protection of the civilian population, in particular vulnerable groups, such as children, women and internationally displaced persons.

59. It was further indicated that recommendations formulated in the context of the UPR are often based on the concluding observations of human rights treaty bodies and recommendations issued by special procedures. The importance of the linkages between mechanisms is that their recommendations are inter-linked and could, therefore, be reinforced in the different mechanisms. For instance, experts recalled that under the UPR mechanism States are invited to explicitly indicate those recommendations that it is willing to accept. States' commitments in the UPR context may be followed-up by treaty bodies or special procedures in their analysis of States' reports or mission reports. Similarly, recommendations issued by human rights treaty bodies and special procedures are systematically included in the UPR compilation reports.

VI. Final remarks

60. In sum, experts explored in detail how the different human rights mechanisms, as well as judicial organs and civil society organizations have applied international human rights and international humanitarian law in a complementary way to concrete armed conflict situations. Experts agreed that there has been an evolution over the years and that the practice of the different mechanisms has clearly led to a better understanding of how such complementarity can be implemented in a way that ensures better protection for the rights of civilians. It was furthermore indicated that the practice judicial organs, human rights mechanisms, international commissions of inquiry and civil society organizations, has also reaffirmed that the application of international human rights is not limited to the territory of the State, but that it can be applied extraterritorially in relation to persons who are under the jurisdiction or the effective control of the State. Experts also agreed that the complementary and mutually reinforcing nature of international human rights and international humanitarian law have ensured, in practice, that the protection gap has been much reduced. Experts stated that the main challenge is how to ensure the recommendations formulated by the different mechanisms are taken into account and lead to action by the relevant United Nations political organs.

61. Finally, in relation to the gathering of evidence and other information concerning violations of international human rights and international humanitarian law, experts agreed that the existing mechanisms play an essential role given their ability to verify facts, interview witnesses and victims and communicate with Government officials. It was

recognized that each of these bodies have different mandates and different methods of work and that the information and evidence that each mechanism gathers should allow the different United Nations political organs to have a clear understanding of the human rights situation in a number of armed conflict situations in order to adopt the relevant measures.

Annex

List of experts participating in the consultation

Georges Abi-Saab, Former Judge ICTY Appeals Chamber, Honorary Professor Graduate Institute of International and Development Studies

Mads Andenas, Member Working Group on Enforced or Involuntary Disappearances

Peter Bouckaert, Emergencies Director, Human Rights Watch

Rachel Brett, Representative for Human Rights and Refugees, Quaker United Nations Office

Andrew Clapham, Director, Geneva Academy of International Humanitarian Law and Human Rights

Avner Gidron, Senior Policy Adviser, Amnesty International

Vera Gowlland-Debbas, Honorary Professor, Graduate Institute of International and Development Studies

Hina Jilani, Former member Fact-finding mission on Gaza, former Special Rapporteur on Human Rights Defenders

Walter Kälin, Representative of the Secretary-General on the human rights of internally displaced persons

Miloon Kothari, Former Special Rapporteur on Adequate Housing

Giorgio Malinverni, Judge, European Court of Human Rights

Theodor Meron, Judge, International Criminal Tribunal for the Former Yugoslavia

Pramila Patten, Member of the Committee on the Elimination of Discrimination Against Women

Nigel Rodley, Member of the Human Rights Committee

Martin Scheinin, Special Rapporteur on the promotion and protection of human rights while countering terrorism

Ian Seiderman, International Commission of Jurists
