



REGIONAL COURSES IN INTERNATIONAL LAW

Bangkok, Thailand
12 – 30 November 2012



STUDY MATERIALS PART IV

Codification Division of the United Nations Office of Legal Affairs

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- Buergenthal, Thomas, *International Human Rights In A Nutshell*, St. Paul, Minn., West Publishing Co., 1994, pp.17-23
- Henkin, Louis, *International Law: Politics & Values*, MartinusNijhoff, 1995, p. 168-173
- Onuma, Yasuaki, *A Transcivilizational Perspective on International Law*, coll. Pocketbooks of the Hague Academy of International Law, Leiden-Boston, MartinusNijhoff Publishers, 2010, 370-462, excerpts (432-445, 458-462)
- Sen, Amartya, *Human Rights and Asian Values*, Sixteenth Morgenthau Memorial Lecture on Ethics and Foreign Policy, excerpts (p. 24, 28-31)
- Engle Merry, Sally, *Human Rights and Gender Violence - Translating International Law into Local Justice*, The University of Chicago Press, 2006, excerpts (p. 89-92, 98-102)
- Sullivan, Donna, "Gender Equality And Religious Freedom: Toward A Framework For Conflict resolution", 24 *New York University Journal of International Law & Politics*, 1992, 795
- Pinto, Mónica, "Dealing with the Past – Democracies and Victims' Struggle to Deal with Past Human Rights Violations", in *La protection internationale des droits de l'homme et le droit des victimes/International protection of Human Rights and Victims' Rights*, J.-F. Flauss (éd), Publications de l'Institut International des droits de l'homme Institut René Cassin de Strasbourg, Bruxelles, Editions Bruylant, 2009, p.111-127
- Schlunk, Angelika, "Truth and Reconciliation Commissions", 4 *ILSA Journal of International and Comparative Law*, 415 at 419-422

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REGIONAL COURSES
IN INTERNATIONAL LAW

Bangkok, Thailand
19 – 20 November 2012

INTERNATIONAL HUMAN RIGHTS LAW
PROFESSOR MÓNICA PINTO

Codification Division of the United Nations Office of Legal Affairs

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INTERNATIONAL HUMAN RIGHTS LAW
PROFESSOR MÓNICA PINTO

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3. Convention on the Elimination of All Forms of Discrimination against Women, 1979
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4. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 1999
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8. Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 2000
For text, see *The Core International Human Rights Treaties*, Office of the High Commissioner for Human Rights, United Nations, New York and Geneva, 2006, p. 135
9. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990
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10. Convention on the Rights of Persons with Disabilities, 2006

For text, see *The New Core International Human Rights Treaties*, Office of the High Commissioner for Human Rights, United Nations, New York and Geneva, 2007, p. 3

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Course materials

Class 1 (Documents not reproduced in electronic version)

12. Jim Yardley, “Export Powerhouse Feels Pangs of Labor Strife”, *The New York Times*, August 23, 2012

Not reproduced here – please visit www.nytimes.com

13. Thomas Buergenthal, *International Human Rights In A Nutshell*, St. Paul, Minn., West Publishing Co., 1994, pp. 23-33

14. Louis Henkin, *International Law: Politics & Values*, Leiden, Martinus Nijhoff, 1995, pp. 168-173

15. Yasuaki Onuma, *A Transcivilizational Perspective on International Law*, Pocketbooks of the Hague Academy of International Law, Leiden, Martinus Nijhoff (2010), pp. 432-444 and 458-462

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22. Donna Sullivan, “Gender Equality And Religious Freedom: Toward A Framework For Conflict resolution”, *New York University Journal of International Law & Politics*, Vol. 24 (1992), pp. 795-856 (excerpts) (Documents not reproduced in electronic version)

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Class 4 (Documents not reproduced in electronic version)

29. Mónica Pinto, “Dealing with the Past – Democracies and Victims’ Struggle to Deal with Past Human Rights Violations”, in *La protection internationale des droits de l’homme et le droit des victimes/International protection of Human Rights and Victims’ Rights*, J.-F. Flauss (éd), Publications de l’Institut International des droits de l’homme Institut René Cassin de Strasbourg, Bruxelles, Editions Bruylant, 2009, p.111-127
30. Angelika Schlunk, “Truth and Reconciliation Commissions”, *ILSA Journal of International and Comparative Law*, Vol. 4, 1998, pp. 415-422

REGIONAL COURSE ON INTERNATIONAL LAW
INTERNATIONAL HUMAN RIGHTS LAW
Bangkok, Thailand, 19-20 November 2012

Professor Mónica Pinto
(University of Buenos Aires – Argentina)

1. Human Rights: A new concept? Human Rights Law: its sources. A normative system of human rights: individual rights and State's duties.
2. Protecting Human Rights: The treaty bodies and the monitoring mechanisms: the Periodical Reporting System; the Petition System; Preventive Mechanisms.
3. Protecting Human Rights: International organizations and human rights. UN Charter-based bodies. The Human Rights Council: the Universal Periodical Review and the Special Sessions.
4. Dealing with systematic human rights violations. Inquiry commissions. Judicial proceedings: national, international, mixed tribunals.

Class 1 - *Human Rights: A new concept? Human Rights Law: its sources. A normative system of human rights: individual rights and State's duties.*

Bangladesh, once poor and irrelevant to the global economy, is now an export powerhouse, second only to China in global apparel exports. Garments are critical to Bangladesh's economy, accounting for 80 percent of manufacturing exports and more than three million jobs. However, wages have not been raised and as workers have seen their meager earnings eroded by double-digit inflation, protests and violent clashes with the police have become increasingly common. Why are human rights invoked in this case? Is this a new notion? Are these rights the same all over the world and across different cultures or can their contents vary?

Readings:

- Yardley, Jim, "Export Powerhouse Feels Pangs of Labor Strife", *The New York Times*, August 23, 2012
- Buergenthal, Thomas, *International Human Rights In A Nutshell*, St. Paul, Minn., West Publishing Co., 1994, pp.17-23
- Henkin, Louis, *International Law: Politics & Values*, 1995, 168-173
- Onuma, Yasuaki, *A Transcivilizational Perspective on International Law*, coll. Pocketbooks of the Hague Academy of International Law, Leiden-Boston, Martinus Nijhoff Publishers, 2010, 370-462, excerpts
- Sen, Amartya, *Human Rights and Asian Values*, Sixteenth Morgenthau Memorial Lecture on Ethics and Foreign Policy, excerpts

Class 2 - *Protecting Human Rights: The treaty bodies and the monitoring mechanisms: the Periodical Reporting System; the Petition System; Preventive Mechanisms.*

Karen Vertido is a Filipino woman who was raped by a 60 year old man. When the rape took place, March 1996, she was serving as Executive Director of the Davao City Chamber of Commerce and Industry in Davao City, the Philippines, and her aggressor was a former President of that Chamber. Her case was brought to local tribunals and also to the Committee for the Elimination of All Forms of Discrimination Against Women (CEDAW), a special human rights body established by a UN human rights treaty which adopts guidelines relating to violence against women.

Karen's case will introduce us to the UN mechanisms for international protection of human rights. At the same time, we will discuss international standards and cultural approaches to women's rights.

Readings:

- CEDAW/46/D/18/2008, Communication 18/2008, Karen Tayag Vertido vs The Philippines.
- CEDAW, General Recommendation 19, 1992, Violence Against Women.
- Rape as a War crime, ICTY, Prosecutor v. Mucić *et al.* "Čelebići Camp", 16 Nov. 1998, # 475-497
- I/A Court HR, *Velasquez Rodríguez vs Honduras, Judgment July 29, 1988*, # 160-177
- Engle Merry, Sally, *Human Rights and Gender Violence - Translating International Law into Local Justice*, The University of Chicago Press, 2006, excerpts
- Sullivan, Donna, "Gender Equality And Religious Freedom: Toward A Framework For Conflict resolution", 24 *New York University Journal of International Law & Politics*, 1992, 795

Class 3 - *Protecting Human Rights: International organizations and human rights. UN Charter-based bodies. The Human Rights Council: the Universal Periodical Review and the Special Sessions.*

In Myanmar, stoning continues to be a punishment notwithstanding the numerous calls of the international community for the abolition of this practice. Does it amount to torture? In India, e-waste produces adverse effects on the enjoyment of human rights. Is India internationally responsible for the way in which this waste is stored? The situation of human rights worsened in the Islamic Republic of Iran. At the UN, a report by the Secretary-general is discussed.

All three situations have in common their consideration by a UN human rights body, the Human Rights Council. Established in 2006 to replace the old – and questioned Commission on Human Rights – the HRC started a new period.

Readings:

- A/60/251 – Human Rights Council
- A/HRC/RES/5.1 – Institution Building of the United Nations Human Rights Council
- Report of the *Special Rapporteur on the Situation of Human Rights in Myanmar*, A/66/365 (2011), excerpts
- Interim report of the Secretary-General on *the situation of human rights in Iran*, A/HRC/16/75 (2011), excerpts
- Human Rights Council Resolution 16/9, *Situation of Human Rights in the Islamic Republic of Iran*
- Report of the *Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights*, Okechukwu Ibeanu, Mission to India, A/HRC/15/22/Add.3 (2010), excerpts

Class 4 - *Dealing with systematic human rights violations. Inquiry commissions. Judicial proceedings: national, international, mixed tribunals.*

After gross and systematic human rights violations, public order has to be restored and steps taken to maintain it. At the same time, those who have been oppressed call for justice. How should States deal with violations from the past? How far should governments go in search of justice? Can other States or international bodies impose standards?

- Pinto, Mónica, “Dealing with the Past – Democracies and Victims’ Struggle to Deal with Past Human Rights Violations”, in *La protection internationale des droits de l’homme et le droit des victimes/International protection of Human Rights and Victims’ Rights*, J.-F. Flauss (éd), Publications de l’Institut International des droits de l’homme Institut René Cassin de Strasbourg, Bruxelles, Editions Bruylant, 2009, p.111-127

- Schlunk, Angelika, “Truth and Reconciliation Commissions”, 4 *ILSA Journal of International and Comparative Law*, 415 at 419-422

**Committee on the Elimination of Discrimination against
Women**

Communication No. 18/2008
Karen Tayag Vertido v. The Philippines
Views under article 7, paragraph 3,
of the Optional Protocol

16 July 2010



Convention on the Elimination of All Forms of Discrimination against Women

Distr.: Restricted
1 September 2010
Original: English

Committee on the Elimination of Discrimination

against Women
Forty-sixth session
12-30 July 2010

Views

Communication No. 18/2008¹*

Submitted by: Karen Tayag Vertido
Alleged victim: The author
State party: The Philippines
Date of the communication: 29 November 2007 (initial submission)
References: Transmitted to the State party on 5 February 2008 (not issued in document form)
Date of adoption of decision: 16 July 2010

The Committee on the Elimination of Discrimination against Women, established under article 17 of the Convention on the Elimination of All Forms of Discrimination against Women,

Meeting on 16 July 2010,
Adopts the following:

Views under article 7, paragraph 3, of the Optional Protocol

¹ Ms. Nicole Ameline, Ms. Ferdous Ara Begum, Ms. Magaly Arocha Dominguez, Ms. Violet Tsisiga Awori, Ms. Barbara Evelyn Bailey, Ms. Meriem Belmihoub-Zerdani, Mr. Niklas Bruun, Ms. Saisuree Chutikul, Ms. Dorcas Coker-Appiah, Mr. Cornelis Filinterman, Ms. Naela Mohammed Gabr, Ms. Ruth Halperin-Kaddari, Ms. Yoko Hayashi, Ms. Indira Jaising, Ms. Soledad Murillo de la Vega, Ms. Violeta Neubauer, Ms. Pramila Patten, Ms. Silvia Pimentel, Ms. Victoria Popescu, Ms. Zohra Rasekh, Ms. Dubravka Simonovic, Ms. Zou Xiaogao.

* The text of one individual opinion (concurring), signed by Yoko Hayashi, is included in the present document.

1. The author of the communication, dated 29 November 2007, is Karen Tayag Vertido, a Filipino national who claims to be a victim of discrimination against women within the meaning of article 1 of the Convention in relation to general recommendation No. 19 of the Committee on the Elimination of Discrimination against Women. She also claims that her rights under articles 2 (c), (d), (f) and 5 (a) of the Convention on the Elimination of All Forms of Discrimination against Women have been violated by the State party. The author is represented by counsel, Evelyn G. Ursua. The Convention and its Optional Protocol entered into force in the Philippines on 4 September 1981 and 12 February 2004, respectively.

Facts as presented by the author

2.1 The author is a Filipino woman who is now unemployed. She served as Executive Director of the Davao City Chamber of Commerce and Industry ("the Chamber") in Davao City, the Philippines, when J. B. C. ("the accused"), at that time a former 60-year-old President of the Chamber, raped her. The rape took place on 29 March 1996.

2.2 The accused offered to take the author home, together with one of his friends, after a meeting of the Chamber on the night of 29 March 1996. When the author realized that Mr. C. intended to drop off his friend first, she told him that she would rather take a taxi because she was in a hurry to get home. Mr. C., however, did not allow her to take a taxi and sped away. Shortly after the accused dropped off his friend, he suddenly grabbed the author's breast. This action caused her to lose her balance. While trying to regain her balance, the author felt something in the accused's left-hand pocket that she thought was a gun. She tried to stop him from driving her anywhere other than to her home, but he very quickly drove the vehicle into a motel garage. The author refused to leave the car but the accused dragged her towards a room, at which point he let her go in order to unlock the door (the car was only three to four metres away from the motel room). The author ran inside to look for another exit, but found only a bathroom. She locked herself in the bathroom for a while in order to regain her composure and, as she could hear no sounds or movements outside, she went out to look for a telephone or another exit. She went back towards the room, hoping that the accused had left, but then saw him standing in the doorway, almost naked, with his back to her and apparently talking to someone. The accused felt her presence behind him, so he suddenly shut the door and turned towards her. The author became afraid that the accused was reaching for his gun. The accused pushed her onto the bed and forcibly pinned her down using his weight. The author could hardly breathe and pleaded with the accused to let her go. While pinned down, the author lost consciousness. When she regained consciousness, the accused was raping her. She tried to push him away by using her nails, while continuing to beg him to stop. But the accused persisted, telling her that he would take care of her, that he knew many people who could help her advance in her career. She finally succeeded in pushing him away and freeing herself by pulling his hair. After washing and dressing, the author took advantage of the accused's state of undress to run out of the room towards the car, but could not manage to open it. The accused ran after her and told her that he would bring her home. He also told her to calm down.

2.3 On 30 March 1996, within 24 hours of being raped, the author underwent a medical and legal examination at the Davao City Medical Centre. A medical

certificate mentions the “alleged rape”, the time, date and place it was said to have occurred, as well as the name of the alleged perpetrator.

2.4 Within 48 hours of being raped, the author reported the incident to the police. On 1 April 1996, she filed a complaint in which she accused J. B. C. of raping her.

2.5 The case was initially dismissed for lack of probable cause by a panel of public prosecutors, which conducted a preliminary investigation. The author filed an appeal regarding the dismissal of her complaint with the Secretary of the Department of Justice, which reversed the dismissal and, on 24 October 1996, ordered that the accused be charged with rape. J. B. C. subsequently filed a motion for reconsideration, which was denied by the Secretary of Justice.

2.6 The information was filed in court on 7 November 1996 and the Court issued an arrest warrant for J. B. C. that same day. He was arrested more than 80 days later, after the chief of the Philippine National Police issued an order on national television directing the police to make the arrest within 72 hours.

2.7 The case remained at the trial court level from 1997 to 2005. The reasons for the prolonged trial included the fact that the trial court judge was changed several times and the accused filed several motions before the appellate courts. Three judges recused themselves from the case. The case was referred to Judge Virginia Hofileña-Europa in September 2002.

2.8 At the trial, an expert in victimology and rape trauma, Dr. June Pagaduan Lopez, testified that having counselled the author for 18 months prior to her testifying in court, she had no doubt that the author was suffering from post-traumatic stress disorder as a result of a rape. She also testified that she was sure that the author had not fabricated her claim. She explained that the lack of physical injury in the author’s case was due to the fact that the incident was an “acquaintance or confidence rape” and because the common coping mechanism was dissociation. Asked by the accused’s defence counsel if fantasies of rape were common among women, she replied unequivocally that this was not true. Another psychiatrist, Dr. Pureza T. Ohate, also found that the author was suffering from post-traumatic stress disorder. A witness for the defence, a room boy from the motel where the rape took place, testified that he had not heard any shouts or commotion from the room. A motel security officer testified he had not received any reports of an incident on the night of 29 March 1996. The accused also testified, claiming that the sexual intercourse was consensual and that he and the author had been flirting for a long time before the alleged rape took place. The case was submitted for resolution in June 2004. Both parties submitted their respective memorandums.

2.9 On 26 April 2005, the Regional Court of Davao City, presided by Judge Virginia Hofileña-Europa, issued a verdict acquitting J. B. C.. In her decision, Judge Hofileña-Europa was guided by the following three principles, derived from previous case law of the Supreme Court: (a) it is easy to make an accusation of rape; it is difficult to prove but more difficult for the person accused, though innocent, to disprove; (b) in view of the intrinsic nature of the crime of rape, in which only two persons are usually involved, the testimony of the complainant must be scrutinized with extreme caution; and (c) the evidence for the prosecution must stand or fall on its own merits and cannot be allowed to draw strength from the weakness of the evidence of the defence. The Court challenged the credibility of the author’s testimony. Although the Court allegedly took into account a Supreme Court ruling

according to which “the failure of the victim to try to escape does not negate the existence of rape”, it concluded that that ruling could not apply in this case, as the Court did not understand why the author had not escaped when she allegedly appeared to have had so many opportunities to do so. The Court found the allegations of the complainant as to the sexual act itself to be implausible. Guided by a Supreme Court ruling, the Court concluded that should the author really have fought off the accused when she had regained consciousness and when he was raping her, the accused would have been unable to proceed to the point of ejaculation, in particular bearing in mind that he was already in his sixties. It also concluded that the testimony of the accused was corroborated on some material points by the testimony of other witnesses (namely the motel room boy and the friend of the accused). The Court therefore concluded that the evidence presented by the prosecution, in particular the testimony of the complainant herself, left too many doubts in the mind of the Court to achieve the moral certainty necessary to merit a conviction. Again applying the guiding principles derived from other case law in deciding rape cases, the Court therefore declared itself unconvinced that there existed sufficient evidence to erase all reasonable doubts that the accused committed the offence with which he was charged and acquitted him.

Complaint

3.1 The author argues that she suffered revictimization by the State party after she was raped. She refers to article 1 of the Convention in relation to general recommendation No. 19 of the Committee on the Elimination of Discrimination against Women. She claims that by acquitting the perpetrator, the State party violated her right to non-discrimination and failed in its legal obligation to respect, protect, promote and fulfil that right. She further claims that the State party failed in its obligation to ensure that women are protected against discrimination by public authorities, including the judiciary. She submits that this shows the State party’s failure to comply with its obligation to address gender-based stereotypes that affect women, in particular those working in the legal system and in legal institutions. She further submits that the acquittal is also evidence of the failure of the State party to exercise due diligence in punishing acts of violence against women, in particular, rape.

3.2 The author argues that the defendant’s acquittal is a violation of the positive obligations of the State party under the following articles of the Convention: article 2 (c), “to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination”; article 2 (d), “to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation”; and article 2 (f), “to take all appropriate measures ... to modify or abolish ... customs and practices which constitute discrimination against women”.

3.3 The author submits that the decision of acquittal is discriminatory within the meaning of article 1 of the Convention in relation to general recommendation No. 19, in that the decision was grounded in gender-based myths and misconceptions about rape and rape victims, and that it was rendered in bad faith, without basis in law or in fact.

3.4 The author alleges that the decision was grounded in gender-based myths and misconceptions about rape and rape victims in violation of article 5 (a) of the Convention, which requires States parties "to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women". She also refers to the specific comments in general recommendation No. 19 on articles 2 (f), 5 and 10 (c).

3.5 The author further alleges that in her case, the Court relied on the gender-based myths and stereotypes described below, without which the accused would have been convicted.

3.5.1 The first myth and stereotype is that a rape victim must try to escape at every opportunity. The author argues that the evidence of her trying to escape has been distorted in the decision and alleges that Judge Hofleña-Europa discriminated against her because she insisted on what she considered to be the rational and ideal response of a woman in a rape situation, that is, to take advantage of every opportunity to escape. She submits that such a demand requires the woman to actually succeed in defending herself, thereby eliminating even the possibility of the rape, and notes that according to the Supreme Court, the failure of the victim to try to escape does not negate the existence of rape. She claims that Judge Hofleña-Europa did not consider the expert testimonies of Dr. Lopez or Dr. Onate, in which they explained that victims exhibit a wide range of behavioural responses when threatened with rape, as well as during and after the rape.

3.5.2 To be raped by means of intimidation, the victim must be timid or easily cowed is the second myth and stereotype challenged by the author. She argues that the Court perpetuated the stereotype of a rape victim, according to which women who are not timid or not easily cowed are less vulnerable to sexual attacks. She further submits that she found it difficult to understand the Court's attention to her character, which is not an element of the crime of rape.

3.5.3 A third myth and stereotype challenged by the author is that to conclude that a rape occurred by means of threat, there must be clear evidence of a direct threat. The author submits that, instead of employing a context-sensitive assessment of the objective existence of a gun. The author also submits that according to case evidence and looking at the circumstances as a whole, the Court focused on the lack of the objective existence of a gun. The author also submits that according to case law and legal theory, it is the lack of consent, not the element of force, that is seen as the constituent element of the offence of rape. She further contends that the element of force or intimidation in Philippine rape law should be construed broadly so as to include other coercive circumstances in a manner consistent with the commentary to the Anti-Rape Law of 1997 (Republic Act No. 8353). More generally, the author alleges that requiring proof of physical force or the threat of physical force in all circumstances risks leaving certain types of rape unpunished and jeopardizes efforts to effectively protect women from sexual violence.

3.5.4 The fact that the accused and the victim are "more than nodding acquaintances" makes the sex consensual constitutes a fourth myth and stereotype. The author submits that it is a grave misconception that any relationship between the accused and the victim is valid proof of the victim's consent to the sexual act.

3.5.5 A fifth myth and stereotype identified by the author is that when a rape victim reacts to the assault by resisting the attack and also by covering in submission because of fear, it is problematic. The author submits that, contrary to the ruling issued by Judge Hofleña-Europa, there is no testimony indicating that she actually covered in submission. She alleges that, on the contrary, she resisted as much as she could and that although there were moments when she dissociated, this did not negate her many verbal and physical expressions of lack of consent. She submits that she was perceived by the Court as not being "a timid woman who could be easily cowed". She was deemed to have consented to the intercourse because she did not resist the advances of the accused and "she did not escape when she appeared to have had so many opportunities to do so". She also submits that the Court unjustly imposes a standard of "normal" or "natural" behaviour on rape victims and discriminates against those who do not conform to these standards.

3.5.6 The rape victim could not have resisted the sexual attack if the accused were able to proceed to ejaculation is a sixth myth and stereotype. The author claims that whether or not the accused ejaculated is completely immaterial to a prosecution for rape, as it is not an element of the crime, does not prove that the intercourse was consensual and does not negate the resistance of the victim. She further claims that the statement of the Court perpetuates the false notion that rape is a crime of lust or passion associated with love and desire.

3.5.7 The Court relied on a seventh myth and stereotype, according to which it is unbelievable that a man in his sixties would be capable of rape. The author claims that, as a rape victim, she does not have the burden of proving the sexual prowess of the accused, which is not an element of the crime of rape but a matter of the defence. She further claims that should such a myth be applied to all accused men in their sixties, every case where a person would claim to have been raped by an old man would invariably result in the acquittal of the accused.

3.5.8 With regard to the myths embodied in the "guiding principles in deciding rape cases" which were followed by the judge in deciding her case (see para. 2.9 above), the author claims that an accusation of rape is not easy to make and that to say that a rape charge is more difficult for the accused to disprove is unwarranted. She further claims that this presumption unjustifiably and immediately places rape victims under suspicion.

3.6 The author alleges that the decision was rendered in bad faith, without basis in law or in fact. She alleges that distortions of evidence, as well as inconsistencies between the findings and conclusions of Judge Hofleña-Europa, led to the acquittal of the accused. She further alleges that Judge Hofleña-Europa, while citing all the Supreme Court doctrine that favours the rape victim, ruled without an evidentiary basis that they were not applicable to the author's case. She submits that this legal manoeuvring under the pretence of fair reasoning amounts to bad faith and a gross disregard of the author's rights. She refers to article 2 (c) of the Convention, by which a "competent tribunal" is required to ensure the effective protection of women against any act of discrimination. She also submits that a decision grounded in gender-based myths and misconceptions or one rendered in bad faith can hardly be considered as one rendered by a fair, impartial and competent tribunal.

3.7 The author argues that she had to endure eight years of litigation and that she and her family suffered immeasurably from the public coverage of the case. She was also forced to resign from her job as Executive Director of the Davao City Chamber

shortly after the rape and was told by her former employer that they had hired a man (paying him double her salary) to avoid a repetition of her case. She also alleges that she and her family had to move to escape the community, which became hostile to her because she dared to prosecute a wealthy and influential man. She further alleges that all of these factors aggravated the post-traumatic stress disorder from which she had been suffering as a direct result of the rape and that the State did not protect her and her family. She also maintains that her physical and mental integrity were affected, and prevented her from rebuilding her life. She was unable to find a job after her dismissal. Finally, she alleges that the discriminatory decision of Judge Hofleña-Europa revictimized her all over again, that she suffered from a lengthy bout of depression after the decision and that she needed quite some time to find the will and energy to even consider filing her communication.

3.8 The author argues that her case is not an isolated one and that it is one among many trial court decisions in rape cases that discriminate against women and perpetuate discriminatory beliefs about rape victims. She further argues that those insidious judgements violate the rights and freedoms of women, deny them equal protection under the law, deprive them of a just and effective remedy for the harm they suffered and continue to force them into a position subordinate to men. The author presents as examples seven decisions of trial courts from 1999 to 2007 illustrating the systematic discrimination that rape victims experience when they seek redress. From those seven cases, she drew the following similarities with her case:

- (a) The “sweetheart defence” or a variation thereof, by which it is asserted that the sexual act is consensual because intimate or sexual relations existed or exist between the complainant and the accused;
- (b) The Court’s appreciation of the complainant’s conduct before, during and after the alleged rape, with the main line of reasoning being that the complainant did not exhibit the “natural” reaction of a woman who claims to have been violated;
- (c) The absence of injury, on the part of both the accused and the complainant;
- (d) The nature, amount or severity, and the perceived effects of the force, threat or intimidation as applied to the complainant;
- (e) The understanding of the concept of consent and how it is manifested or communicated.

3.9 The author submits that Philippine rape law and the way it has been interpreted by the Supreme Court is a collection of contradictions. She further submits that more than 25 years after the Philippines ratified the Convention, myths, misconceptions and discriminatory assumptions in jurisprudence continue to place rape victims at a legal disadvantage and significantly reduce their chances of obtaining redress for the violation they suffered. She explains that the reasons for the tremendously underreported number of rape cases include the fact that victims are afraid of the stigma that will most likely result from seeking justice, lack confidence in the legal process and often fail to obtain appropriate redress.

3.10 The author further alleges that because rape cases are subject to a rigorous screening process by law enforcement agencies and prosecutorial offices prior to reaching the judicial system, the dismissal by a court of a rape case grounded in

gender-based myths and misconceptions is the ultimate revictimization of the victim.

3.11 The author claims that Judge Hofleña-Europa and all judges responsible for deciding rape cases lack adequate training and therefore sufficient understanding of the dynamics of sexual abuse. She further claims that the legislative reforms, such as the penal code amendments on rape, as well as the protective measures put in place by Republic Act No. 8505, become insignificant, as the law still will not provide adequate and effective legal remedies for victims. While acknowledging and giving a very detailed account of all training undertaken by both the Philippine Judicial Academy and the Supreme Court Committee on Gender Responsiveness in the Judiciary, the author states that much still needs to be done, given the extent of the prejudice against the female victims of rape and other forms of sexual violence. This requires that training for the judiciary be specifically focused on sexual violence and rape. She alleges that no programmes are in place for training judges to hear cases of sexual violence or rape involving adults.

3.12 As to the exhaustion of domestic remedies, the author maintains that an acquittal puts an end to the process for the victim. She further submits that under Philippine law, she would be barred from filing any appeal against a judgement of acquittal because of the constitutional right of double jeopardy, which forbids a defendant from being tried twice for the same crime. Regarding the existence of an extraordinary remedy of certiorari under rule 65 of the Revised Rules of Court, which could be used in cases of acquittal under certain circumstances, the author argues that the requirements have not been met in the present case. Firstly, one must prove that the decision of the Court is null and void because an error in jurisdiction or one amounting to a lack of jurisdiction has occurred. Secondly, the remedy is available only to the people of the Philippines represented by the Office of the Solicitor General, but not to the victim herself. Thirdly, the Solicitor General should have used the remedy within 60 days of the date of the acquittal.

3.13 The author maintains that the matter has not been and is currently not being examined under any other international investigation or settlement procedure.

3.14 The author asks the Committee to find that she has been a victim of discrimination and that the State party has failed to fulfil its obligations under article 2 (c), (d) and (f) of the Convention. She also asks the Committee to recommend that the State party provide her with financial compensation in an amount proportionate to the physical, mental and social harm caused to her and to the seriousness of the violation of her rights, and to enable her to continue her therapy and other treatment.

3.15 She further asks that it be recommended to the State party’s judiciary to investigate Judge Hofleña-Europa to determine the regularity of her actions in rendering the judgement of acquittal, to include in that investigation a review of her other judicial decisions and administrative actions as a former executive judge, and to develop a specific sexual violence education and training programme for trial court judges and public prosecutors designed to make them understand sexuality issues and the psychosocial effects of sexual violence, properly appreciate medical and other evidence, adopt an interdisciplinary approach in investigating and deciding cases, and rid them of myths and misconceptions about sexual violence and its victims. Such a programme should include a system to monitor and evaluate the effectiveness of such education and training on the judges and prosecutors

concerned; undertake a serious review of jurisprudential doctrines on rape and other forms of sexual violence with a view to abandoning those that are discriminatory or that violate the rights guaranteed by the Convention and other human rights conventions; establish monitoring of trial court decisions in cases of rape and other sexual offences to ensure their compliance with the proper standards in deciding cases and their consistency with the provisions of the Convention and other human rights conventions; compile and analyse data on the number of sexual violence cases filed in the prosecution offices and in the courts, the number of dismissals and the reasons for such dismissals; and provide for the right to appeal for rape victims when the perpetrator has been acquitted owing to discrimination against the victim on grounds of her sex.

3.16 The author also asks the Committee to recommend that the Congress of the State party review the laws against rape and other forms of sexual violence, including their enforcement and implementation by law enforcement and prosecutorial agencies and the courts in order to remove or amend the provisions of laws that lead to discriminatory practices and doctrines; clarify that rape is about the lack of consent of the victims; and provide adequate funds for the implementation of the Rape Victim Assistance and Protection Act of 1998 (Republic Act No. 8505), in particular its mandate to establish a rape crisis centre in every province and city to ensure that appropriate support services are available and accessible to victims of rape and other sexual violence.

3.17 Finally, the author also requests, in general, the respect, protection, promotion and fulfilment of women's human rights, including their right to be free from all forms of sexual violence; the exercise of due diligence in investigating, prosecuting and punishing all complaints of rape and other sexual violence; efforts to ensure that victims of sexual violence have effective access to justice, including free, competent and sensitive legal aid, where necessary, as well as to just and effective complaints procedures and remedies; efforts to ensure that victims of sexual violence and their families receive appropriate protective and support services; and efforts to seriously address graft and corruption in law enforcement agencies, prosecutorial offices and the judiciary to ensure that rape and other cases of sexual violence are not compromised or dismissed.

State party's submission on admissibility and merits

4.1 In its submission of 7 July 2008, the State party explains that a verdict of acquittal is immediately final and that a re-examination of the merits of such an acquittal would place the accused in jeopardy for the same offence. It further explains that a verdict of acquittal, however, may be nullified through a proper petition for certiorari to show grave abuse of discretion. The remedy of certiorari is provided under section 1, rule 65, of the Rules of Court.

4.2 The State party challenges the author's assertion that the extraordinary remedy of certiorari "is available only to the People of the Philippines as party plaintiff, represented by the Office of the Solicitor General, but not to the victim herself" and that "she may not file a petition for certiorari on her own or through her private counsel". It argues that the Supreme Court has admitted petitions for certiorari filed by an offended party pursuant to section 1, rule 65, of the Rules of Court. Thus, the

Supreme Court, in *People v. Calo, Jr.*,² citing the earlier case of *Paredes v. Gopengco*,³ held that "the offended parties in criminal cases have sufficient interest and personality as 'person(s) aggrieved' to file the special civil action of prohibition and certiorari under sections 1 and 2 of rule 65 in line with the underlying spirit of the liberal construction of the Rules of Court in order to promote their object". The Supreme Court having, in a number of cases, relaxed the application of the provisions of the Rules of Court to better serve the ends of substantial justice, the State party submits that the author cannot claim that she has no legal remedy under Philippine law, as she is not prohibited from availing herself of the special remedy of certiorari.

Author's comments on the State party's observations on admissibility

5.1 In her submission of 26 September 2008, the author challenges the State party's assertion that she could have availed herself of the special remedy of certiorari. With regard to the role of the victim in criminal cases, she argues that criminal cases are prosecuted in the name of the "People of the Philippines", the offended party, who appears in court as the party plaintiff and that the victim's role is limited to that of a witness for the prosecution. The interest of the victim, also called the "private complainant", "private offended party" or "complaining witness", is limited to the civil liability that is instituted in the criminal action. Therefore, the author deems the State party's submission to be misleading, given that she has to pursue further processes after the accused has been acquitted on the merits of the case.

5.2 With regard to the exhaustion of domestic remedies, the author submits that the remedy of certiorari under rule 65 of the Rules of Court was neither available to her, nor likely to bring effective relief, assuming she could have availed herself of it. This remedy is not a matter of rights and is granted by judicial discretion only in rare cases. She cites numerous cases by the Supreme Court and draws from them the following strict requirements it applies, in addition to those already stated in the Rules of Court, to grant such a remedy: firstly, the petitioner must show that the recourse of appeal is not available, or that he or she has no plain, speedy or adequate remedy in the ordinary course of laws against his or her perceived grievances; and secondly, the sole office of the writ of certiorari is the correction of errors of jurisdiction, including the commission of a grave abuse of discretion amounting to a lack of jurisdiction and does not include correction of a public respondent's evaluation of the evidence and factual finding thereon. Therefore, the petition for certiorari must be based on jurisdictional grounds, because as long as the respondent acted within jurisdiction, any error committed by him, her or it in the exercise thereof will amount to nothing more than an error of judgement, which may be reviewed or corrected only by appeal. A special civil action for certiorari will prosper only if grave abuse of discretion is manifested and, for the abuse to be grave, the power must be exercised in an arbitrary or despotic manner by reason of passion or personal hostility. The abuse of discretion must be so patent and gross as to amount to an evasion of a positive duty, or a virtual refusal to perform the duty

² *People v. Calo, Jr.*, 186 Supreme Court Reports Annotated 620 (1990).

³ *Paredes v. Gopengco*, 29 Supreme Court Reports Annotated 688 (1969).

enjoined or to act in contemplation of law. In the present case, the author argues that, while it may be true that she, as victim, could have filed a petition for certiorari, she would have had to show that the acquittal was not about errors of judgement but about errors of jurisdiction and that the constitutional prohibition against double jeopardy therefore did not constitute a bar to the remedy. But in the author's case, the sex discrimination that she suffered can be easily dismissed as an error of judgement. Given the right of the accused against double jeopardy, the Court would have most likely considered any error ascribed by the victim to the judge as simply an error of judgement. Moreover, the author argues that she would have had to surmount the doctrinal rule that factual findings of trial courts must be respected. Finally, she submits that she would have had to pay prohibitive docket fees for a petition for certiorari, as well as expenses for the cost of printing and reproducing the pleadings and voluminous attachments in the required number of copies. The author therefore concludes that the remedy of certiorari was hardly the "available" and "effective" remedy contemplated by article 4, paragraph 1, of the Optional Protocol.

5.3 Furthermore, the author submits that the two cases referred to by the State party to show that she could have availed herself of the remedy of certiorari do not apply to her situation. Those cases involved interlocutory orders, specifically an order denying a motion for inhibition and an order granting bail, not a final judgement of acquittal after a trial on the merits duly promulgated by the trial court, as in the author's case. Therefore, none of those cases can be successfully invoked to support the legal standing of the victim before the Supreme Court in an action for certiorari involving a judgement of acquittal.

5.4 The author adds that the Supreme Court has not rendered a decision that specifically recognizes the legal standing of a rape victim or any other offended party in a criminal case to file the special civil action of certiorari to reverse or nullify the acquittal of an accused after a trial on the merits of the case based on the evidence presented. In fact, she explains that in the case *People v. Dela Torre*, the Supreme Court held that "the prosecution cannot appeal a decision in a criminal case whether to reverse an acquittal or to increase the penalty imposed in a conviction" because it would violate the right of the accused against double jeopardy. It further stated, in an obiter dictum, that "the only way to nullify an acquittal or to increase the penalty is through a proper petition for certiorari to show grave abuse of discretion", but clarified that "if the petition, regardless of its nomenclature, merely calls for an ordinary review of the findings of the court *a quo*, the constitutional right against double jeopardy would be violated. Such recourse is tantamount to converting the petition for certiorari into an appeal, contrary to the express injunction of the Constitution, the Rules of Court and prevailing jurisprudence on double jeopardy".⁴ She submits that if she had filed a petition for certiorari, she would have asked the Court to conduct a "review of the findings of the court *a quo*" using the standards of human rights and sex discrimination.

5.5 The author submits also that it is the State's obligation to properly and effectively prosecute crimes and that it is most unfair and improper to place the burden of the proper and effective prosecution of crimes on the victim, and to expect from her, when it had failed at the trial court level because of sex

⁴ *People v. Dela Torre*, 380 Supreme Court Reports Annotated 596 (2002), referring to *People v. CA and Maquilang*, G.R. No. 128986, 21 June 1999.

discrimination, to pursue it all the way to the appellate court despite her lack of resources and the obstacles placed in her way by substantive and procedural law.

Issues and proceedings before the Committee concerning admissibility

6.1 During its forty-fourth session (20 July-7 August 2009), the Committee considered the admissibility of the communication in accordance with rules 64 and 66 of its rules of procedure. It ascertained that the matter had not already been or was being examined under another procedure of international investigation or settlement.

6.2 With regard to article 4, paragraph 1, of the Optional Protocol requiring the exhaustion of domestic remedies, the Committee noted that authors must use the remedies in the domestic legal system that are available to them and that would enable them to obtain redress for the alleged violations. The Committee considered that the crux of the author's complaints related to the alleged gender-based myths and stereotypes about rape and rape victims, which had been relied upon in the judgement of the trial court and which had led, apart from the acquittal of the accused, to her revictimization. It noted both the author and the State party's explanations, according to which a verdict of acquittal was immediately final and a re-examination of the merits of such acquittal would have placed the accused in jeopardy for the same offence. It also noted the State party's argument that the communication ought to be declared inadmissible under article 4, paragraph 1, of the Optional Protocol on the grounds of non-exhaustion of domestic remedies because the author had not availed herself of the special remedy of certiorari provided under section 1, rule 65, of the Rules of Court. The Committee noted the author's reply, in which she stated that the remedy of certiorari was not available to her, criminal cases being prosecuted in the Filipino criminal legal system in the name of the "People of the Philippines" and the remedy of certiorari being available only to the "People of the Philippines" represented by the Office of the Solicitor General, but not to the victim herself. It also noted the author's assertion that, even if she could have availed herself of such a remedy, the sole office of the writ of certiorari was the correction of errors of jurisdiction, not errors of judgement, and that the sex-based discrimination she had suffered and on which the author could have based her petition for certiorari would have most likely been considered as an error of judgement. The Committee further noted that the State party had not contested this assertion. In addition, it noted that the writ of certiorari was a civil remedy. The Committee therefore found that the remedy of certiorari was not available to the author.

6.3 The Committee considered that the author's allegations relating to articles 2 (c), (d), (f) and 5 (a) of the Convention had been sufficiently substantiated, for purposes of admissibility, and declared the communication admissible on 28 July 2009.

Comments from the State party on the merits

7.1 On 3 September 2009, following the transmission of the 28 July 2009 admissibility decision to the State party, the latter was requested to submit its written explanations or statements on the substance of the matter by 31 October 2009. Since no reply was received, a reminder was sent to the State party on

15 January 2010, inviting it to submit additional comments no later than 28 February 2010. On 1 July 2010, the State party submitted comments, in which it reiterated its previous observation, that the author still had a recourse in certiorari available. While it is classified as a special civil action under the Rules of the Court, such recourse is also available in criminal cases. Therefore, a petition for certiorari, in which the author would have argued that there was a grave abuse of discretion, amounting to lack or excess of jurisdiction in the proceedings, may have annulled the acquittal verdict of the accused.

7.2 Regarding the author's contention that the Supreme Court's interpretation of the Philippines Rape Law is a "collection of contradictions", the State party observed that the fact that the Supreme Court decisions vary from one case to another only proves that the Court carefully examines situations on a case-by-case basis, by appreciating available evidence, and in the light of specific scenarios and individual behaviour. According to the State party, such individualized and subjective appraisal by the Courts is consistent with the principle of the presumption of innocence. The State party contends that embracing the contentions of the author would result in a conviction of even innocent persons accused of rape. Finally, the State party noted that it would consider developing trainings on gender responsiveness for the judiciary.

Consideration of the merits

8.1 The Committee has considered the present communication in the light of all the information made available to it by the author and by the State party, as provided in article 7, paragraph 1, of the Optional Protocol.

8.2 The Committee will consider the author's allegations that gender-based myths and misconceptions about rape and rape victims were relied on by Judge Hofliñá-Europa in the Regional Court of Davao City in its decision, under article 335 of the Revised Penal Code of 1930, leading to the acquittal of the alleged perpetrator, and will determine whether this amounted to a violation of the rights of the author and a breach of the corresponding State party's obligations to end discrimination in the legal process under articles 2 (c), 2 (f) and 5 (a) of the Convention. The issues before the Committee are limited to the foregoing. The Committee emphasizes that it does not replace the domestic authorities in the assessment of the facts, nor does it decide on the alleged perpetrator's criminal responsibility. The Committee will also not address the question of whether the State party has breached its obligations under article 2 (d), which the Committee deems of less relevance in the case at hand.

8.3 With regard to the author's claim in relation to article 2 (e), the Committee, while acknowledging that the text of the Convention does not expressly provide for a right to a remedy, considers that such a right is implied in the Convention, in particular in article 2 (c), by which States parties are required "to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination". The Committee notes the undisputed fact that the case remained at the trial court level from 1997 to 2005. It considers that for a remedy to be effective, adjudication of a case involving rape and sexual offenses claims should be dealt with in a fair, impartial, timely and expeditious manner.

8.4 The Committee further reaffirms that the Convention places obligations on all State organs and that States parties can be responsible for judicial decisions which violate the provisions of the Convention. It notes that by articles 2 (f) and 5 (a), the State party is obligated to take appropriate measures to modify or abolish not only existing laws and regulations, but also customs and practices that constitute discrimination against women. In this regard, the Committee stresses that stereotyping affects women's right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general. The Committee further recalls its general recommendation No. 19 on violence against women. This general recommendation addresses the question of whether States parties can be held accountable for the conduct of non-State actors in stating that "... discrimination under the Convention is not restricted to action by or on behalf of Governments ..." and that "under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation". In the particular case, the compliance of the State party's due diligence obligation to banish gender stereotypes on the grounds of articles 2 (f) and 5 (a) needs to be assessed in the light of the level of gender sensitivity applied in the judicial handling of the author's case.

8.5 The Committee notes that, under the doctrine of *stare decisis*, the Court referred to guiding principles derived from judicial precedents in applying the provisions of rape in the revised penal code of 1930 and in deciding cases of rape with similar patterns. At the outset of the judgement, the Committee notes a reference in the judgement to three general guiding principles used in reviewing rape cases. It is its understanding that those guiding principles, even if not explicitly referred to in the decision itself, have been influential in the handling of the case. The Committee finds that one of them, in particular, according to which "an accusation for rape can be made with facility", reveals in itself a gender bias. With regard to the alleged gender-based myth and stereotypes spread throughout the judgement and classified by the author (see paras. 3.5.1-3.5.8 above), the Committee, after a careful examination of the main points that determined the judgement, notes the following issues. First of all, the judgement refers to principles such as that physical resistance is not an element to establish a case of rape, that people react differently under emotional stress, that the failure of the victim to try to escape does not negate the existence of the rape as well as to the fact that "in any case, the law does not impose upon a rape victim the burden of proving resistance". The decision shows, however, that the judge did not apply these principles in evaluating the author's credibility against expectations about how the author should have reacted before, during and after the rape owing to the circumstances and her character and personality. The judgement reveals that the judge came to the conclusion that the author had a contradictory attitude by reacting both with resistance at one time and submission at another time, and saw this as being a problem. The Committee notes that the Court did not apply the principle that "the failure of the victim to try and escape does not negate the existence of rape" and instead expected a certain behaviour from the author, who was perceived by the court as being not "a timid woman who could easily be cowed". It is clear from the judgement that the assessment of the credibility of the author's version of events

was influenced by a number of stereotypes, the author in this situation not having followed what was expected from a rational and “ideal victim” or what the judge considered to be the rational and ideal response of a woman in a rape situation as become clear from the following quotation from the judgement:

“Why then did she not try to get out of the car when the accused must have applied the brakes to avoid hitting the wall when she grabbed the steering wheel? Why did she not get out or even shout for help when the car must have slowed down before getting into the motel room’s garage? Why did she not stay in the bathroom after she had entered and locked it upon getting into the room? Why did she not shout for help when she heard the accused talking with someone? Why did she not run out of the motel’s garage when she claims she was able to run out of the hotel room because the accused was still NAKED AND MASTURBATING⁵ on the bed? Why did she agree to ride in the accused’s car AFTER⁶ he had allegedly raped her when he did not make any threats or use any force to coerce her into doing so?”

Although there exists a legal precedent established by the Supreme Court of the Philippines that it is not necessary to establish that the accused had overcome the victim’s physical resistance in order to prove lack of consent, the Committee finds that to expect the author to have resisted in the situation at stake reinforces in a particular manner the myth that women must physically resist the sexual assault. In this regard, the Committee stresses that there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence.

8.6 Further misconceptions are to be found in the decision of the Court, which contains several references to stereotypes about male and female sexuality being more supportive for the credibility of the alleged perpetrator than for the credibility of the victim. In this regard, the Committee views with concern the findings of the judge according to which it is unbelievable that a man in his sixties would be able to proceed to ejaculation with the author resisting the sexual attack. Other factors taken into account in the judgement, such as the weight given to the fact that the author and the accused knew each other, constitute a further example of “gender-based myths and misconceptions”.

8.7 With regard to the definition of rape, the Committee notes that the lack of consent is not an essential element of the definition of rape in the Philippines Revised Penal Code.⁷ It recalls its general recommendation No. 19 of 29 January

⁵ Capitalized as per judgement.

⁶ Idem.

⁷ Article 266-A of the Revised Penal Code of the Philippines. Rape: When And How Committed. Rape is committed:
1. By a man who shall have carnal knowledge of a woman under any of the following circumstances:

- (a) Through force, threat, or intimidation;
- (b) When the offended party is deprived of reason or otherwise unconscious;
- (c) By means of fraudulent machination or grave abuse of authority; and
- (d) When the offended party is under 12 years of age or is demented, even though none of the circumstances mentioned above be present.

2. By any person who, under any of the circumstances mentioned in paragraph 1 hereof, shall commit an act of sexual assault by inserting his penis into another person’s mouth or anal

1992 on violence against women, where it made clear, in paragraph 24 (b), that “States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity”. Through its consideration of States parties’ reports, the Committee has clarified time and again that rape constitutes a violation of women’s right to personal security and bodily integrity, and that its essential element was lack of consent.

8.8 The Committee finally would like to recognize that the author of the communication has suffered moral and social damage and prejudices, in particular by the excessive duration of the trial proceedings and by the revictimization through the stereotypes and gender-based myths relied upon in the judgement. The author has also suffered pecuniary damages due to the loss of her job.

8.9 Acting under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, and in the light of all the above considerations, the Committee is of the view that the State party has failed to fulfil its obligations and has thereby violated the rights of the author under article 2 (c) and (f), and article 5 (a) read in conjunction with article 1 of the Convention and general recommendation No. 19 of the Committee, and makes the following recommendations to the State party:

- (a) Concerning the author of the communication
 - Provide appropriate compensation commensurate with the gravity of the violations of her rights
- (b) General
 - Take effective measures to ensure that court proceedings involving rape allegations are pursued without undue delay
 - Ensure that all legal procedures in cases involving crimes of rape and other sexual offenses are impartial and fair, and not affected by prejudices or stereotypical gender notions. To achieve this, a wide range of measures are needed, targeted at the legal system, to improve the judicial handling of rape cases, as well as training and education to change discriminatory attitudes towards women. Concrete measures include:
 - (i) Review of the definition of rape in the legislation so as to place the lack of consent at its centre;
 - (ii) Remove any requirement in the legislation that sexual assault be committed by force or violence, and any requirement of proof of penetration, and minimize secondary victimization of the complainant/survivor in proceedings by enacting a definition of sexual assault that either:
 - requires the existence of “unequivocal and voluntary agreement” and requiring proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting; or

orifice, or any instrument or object, into the genital or anal orifice of another person.

- requires that the act take place in “coercive circumstances” and includes a broad range of coercive circumstances.”⁸

(iii) Appropriate and regular training on the Convention on the Elimination of All Forms of Discrimination against Women, its Optional Protocol and its general recommendations, in particular general recommendation No. 19, for judges, lawyers and law enforcement personnel;

(iv) Appropriate training for judges, lawyers, law enforcement officers and medical personnel in understanding crimes of rape and other sexual offences in a gender-sensitive manner so as to avoid revictimization of women having reported rape cases and to ensure that personal mores and values do not affect decision-making.

8.10 In accordance with article 7, paragraph 4, the State party shall give due consideration to the views of the Committee, together with its recommendations, and shall submit to the Committee, within six months, a written response, including any information on any action taken in the light of the views and recommendations of the Committee. The State party is also requested to publish the Committee’s views and recommendations and to have them translated into the Filipino language and other recognized regional languages, as appropriate, and widely distributed in order to reach all relevant sectors of society.

Individual opinion by Committee member Yokoi Hayashi (concurring)

I would like to make a few additional observations in order to emphasize that I do not consider it the function of the Committee to decide upon the criminal responsibility of the accused in any given case nor in the present case (Please refer to Paragraph 8.2).

I acknowledge that the judicial tradition in the State party is respectful of the principles of presumption of innocence, the right of the accused against double jeopardy, and other fundamental principles which permeate its criminal justice system. These principles for which women and men have fought for in the past centuries are essential for the human rights of women to flourish.

Therefore, I would like to make it clear that I do not agree with the author’s allegation that without the gender myths and stereotypes, the accused would have been convicted (Please refer to Paragraph 3.5). I do not consider it the task of the Committee to make such a judgment. The Committee is not equipped to examine the testimony of parties concerned, nor to evaluate the credibility of the accused or the author. Nor do I agree to the author’s request that the Committee should address “graft and corruption in law enforcement agencies, prosecutorial offices and the judiciary” (Please refer to Paragraph 3.17), since I do not believe that these elements arise in the present case.

However, having closely reviewed the court decision in the present case rendered on April 11th, 2005 by the Regional Court of Davao City, I agree with part of allegations of the author, in that the court proceedings were materially delayed, and that the reasoning which led to the conclusion may have been influenced by the so-called rape myths.

Therefore, I have joined the adoption of the Committee’s view to recommend that the State party review its rape law, including both the definition under its Criminal Code and its trial procedures, as well as to conduct gender-sensitive trainings for the legal profession.

In relation to the recommendation for monetary compensation (Please refer to Paragraph 8.9 (a)), it is my understanding that such a recommendation can be justified since the author has undergone lengthy legal proceedings to pursue her claim as a victim. However, I would like to clarify that the recommended monetary compensation does not include damages arising from the author’s economic loss, nor from the court sentence that acquitted the accused. The author is entitled to receive compensation because of the undue delays in the proceedings and the reasoning used by the court in its decision which could potentially victimize the

⁸ Handbook for legislation on violence against women, Department of Economic and Social Affairs, Division for the Advancement of Women, United Nations Publication, New York, 2009, p. 27

author. However, the State party cannot be held accountable because its judiciary acquitted the accused.

While admiring the courage of the author who has pursued her case all the way to the Committee, as well as recognizing the potential the present case may have in universalizing rape laws, I nevertheless felt duty bound to append the present individual opinion.

(Signed) Yoko **Hayashi**

General Recommendation 19, Violence against Women

**Committee on the Elimination of Discrimination
against Women, 11th session, 1992**

General Recommendation No. 19 (11th session, 1992)

Violence against women

Background

1. Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.
2. In 1989, the Committee recommended that States should include in their reports information on violence and on measures introduced to deal with it (General recommendation 12, eighth session).
3. At its tenth session in 1991, it was decided to allocate part of the eleventh session to a discussion and study on article 6 and other articles of the Convention relating to violence towards women and the sexual harassment and exploitation of women. That subject was chosen in anticipation of the 1993 World Conference on Human Rights, convened by the General Assembly by its resolution 45/155 of 18 December 1990.
4. The Committee concluded that not all the reports of States parties adequately reflected the close connection between discrimination against women, gender-based violence, and violations of human rights and fundamental freedoms. The full implementation of the Convention required States to take positive measures to eliminate all forms of violence against women.
5. The Committee suggested to States parties that in reviewing their laws and policies, and in reporting under the Convention, they should have regard to the following comments of the Committee concerning gender-based violence.

General comments

6. The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.
7. Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include:
 - (a) The right to life;
 - (b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment;
 - (c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict;
 - (d) The right to liberty and security of person;
 - (e) The right to equal protection under the law;

(f) The right to equality in the family;

(g) The right to the highest standard attainable of physical and mental health;

(h) The right to just and favourable conditions of work.

8. The Convention applies to violence perpetrated by public authorities. Such acts of violence may breach that State's obligations under general international human rights law and under other conventions, in addition to breaching this Convention.

9. It is emphasized, however, that discrimination under the Convention is not restricted to action by or on behalf of Governments (see articles 2(e), 2(f) and 5). For example, under article 2(e) the Convention calls on States parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.

Comments on specific articles of the Convention

Articles 2 and 3

10. Articles 2 and 3 establish a comprehensive obligation to eliminate discrimination in all its forms in addition to the specific obligations under articles 5-16.

Articles 2(f), 5 and 10(c)

11. Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. While this comment addresses mainly actual or threatened violence the underlying consequences of these forms of gender-based violence help to maintain women in subordinate roles and contribute to the low level of political participation and to their lower level of education, skills and work opportunities.

12. These attitudes also contribute to the propagation of pornography and the depiction and other commercial exploitation of women as sexual objects, rather than as individuals. This in turn contributes to gender-based violence.

Article 6

13. States parties are required by article 6 to take measures to suppress all forms of traffic in women and exploitation of the prostitution of women.

14. Poverty and unemployment increase opportunities for trafficking in women. In addition to established forms of trafficking there are new forms of sexual exploitation, such as sex tourism, the recruitment of domestic labour from developing countries to work in developed countries and organized marriages between women from developing countries and foreign nationals. These practices are incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity. They put women at special risk of violence and abuse.

15. Poverty and unemployment force many women, including young girls, into prostitution. Prostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalize them. They need the equal protection of laws against rape and other forms of violence.
16. Wars, armed conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women, which require specific protective and punitive measures.

Article 11

17. Equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace.

18. Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.

Article 12

19. States parties are required by article 12 to take measures to ensure equal access to health care. Violence against women puts their health and lives at risk.

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20. In some States there are traditional practices perpetuated by culture and tradition that are harmful to the health of women and children. These practices include dietary restrictions for pregnant women, preference for male children and female circumcision or genital mutilation.

Article 14

21. Rural women are at risk of gender-based violence because traditional attitudes regarding the subordinate role of women that persist in many rural communities. Girls from rural communities are at special risk of violence and sexual exploitation when they leave the rural community to seek employment in towns.

Article 16 (and article 5)

22. Compulsory sterilization or abortion adversely affects women's physical and mental health, and infringes the right of women to decide on the number and spacing of their children.

23. Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence, and coercion. These forms of violence put women's health at risk and impair their ability to participate in family life and public life on a basis of equality.

Specific recommendation

24. In light of these comments, the Committee on the Elimination of Discrimination against Women recommends that:

- (a) States parties should take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act;
- (b) States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity. Appropriate protective and support services should be provided for victims. Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention;
- (c) States parties should encourage the compilation of statistics and research on the extent, causes and effects of violence, and on the effectiveness of measures to prevent and deal with violence;
- (d) Effective measures should be taken to ensure that the media respect and promote respect for women;
- (e) States parties in their reports should identify the nature and extent of attitudes, customs and practices that perpetuate violence against women and the kinds of violence that result. They should report on the measures that they have undertaken to overcome violence and the effect of those measures;
- (f) Effective measures should be taken to overcome these attitudes and practices. States should introduce education and public information programmes to help eliminate prejudices that hinder women's equality (recommendation No. 3, 1987);
- (g) Specific preventive and punitive measures are necessary to overcome trafficking and sexual exploitation;
- (h) States parties in their reports should describe the extent of all these problems and the measures, including penal provisions, preventive and rehabilitation measures that have been taken to protect women engaged in prostitution or subject to trafficking and other forms of sexual exploitation. The effectiveness of these measures should also be described;
- (i) Effective complaints procedures and remedies, including compensation, should be provided;
- (j) States parties should include in their reports information on sexual harassment, and on measures to protect women from sexual harassment and other forms of violence of coercion in the workplace;
- (k) States parties should establish or support services for victims of family violence, rape, sexual assault and other forms of gender-based violence, including refuges, specially trained health workers, rehabilitation and counselling;
- (l) States parties should take measures to overcome such practices and should take account of the Committee's recommendation on female circumcision (recommendation No. 14) in reporting on health issues;
- (m) States parties should ensure that measures are taken to prevent coercion in regard to fertility and reproduction, and to ensure that women are not forced to seek unsafe medical procedures such as illegal abortion because of lack of appropriate services in regard to fertility control;
- (n) States parties in their reports should state the extent of these problems and should indicate the measures that have been taken and their effect;

- (o) States parties should ensure that services for victims of violence are accessible to rural women and that where necessary special services are provided to isolated communities;
- (p) Measures to protect them from violence should include training and employment opportunities and the monitoring of the employment conditions of domestic workers;
- (q) States parties should report on the risks to rural women, the extent and nature of violence and abuse to which they are subject, their need for and access to support and other services and the effectiveness of measures to overcome violence;
- (r) Measures that are necessary to overcome family violence should include:
 - (i) Criminal penalties where necessary and civil remedies in cases of domestic violence;
 - (ii) Legislation to remove the defence of honour in regard to the assault or murder of a female family member;
 - (iii) Services to ensure the safety and security of victims of family violence, including refuges, counselling and rehabilitation programmes;
 - (iv) Rehabilitation programmes for perpetrators of domestic violence;
 - (v) Support services for families where incest or sexual abuse has occurred;
- (s) States parties should report on the extent of domestic violence and sexual abuse, and on the preventive, punitive and remedial measures that have been taken;
- (t) States parties should take all legal and other measures that are necessary to provide effective protection of women against gender-based violence, including, inter alia:
 - (i) Effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including inter alia violence and abuse in the family, sexual assault and sexual harassment in the workplace;
 - (ii) Preventive measures, including public information and education programmes to change attitudes concerning the roles and status of men and women;
 - (iii) Protective measures, including refuges, counselling, rehabilitation and support services for women who are the victims of violence or who are at risk of violence;
- (u) States parties should report on all forms of gender-based violence, and such reports should include all available data on the incidence of each form of violence and on the effects of such violence on the women who are victims;
- (v) The reports of States parties should include information on the legal, preventive and protective measures that have been taken to overcome violence against women, and on the effectiveness of such measures

International Criminal Tribunal for the former Yugoslavia

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Judgement, paras 475-499**

Trial Chamber, 16 November 1998

“or with the consent or acquiescence of” and “or other person acting in an official capacity”. It is thus stated in very broad terms and extends to officials who take a passive attitude or turn a blind eye to torture, most obviously by failing to prevent or punish torture under national penal or military law, when it occurs.

(iv) Rape as Torture

475. The crime of rape is not itself expressly mentioned in the provisions of the Geneva Conventions relating to grave breaches, nor in common article 3, and hence its classification as torture and cruel treatment. It is the purpose of this section to consider the issue of whether rape constitutes torture, under the above mentioned provisions of the Geneva Conventions. In order to properly consider this issue, the Trial Chamber first discusses the prohibition of rape and sexual assault in international law, then provides a definition of rape and finally turns its attention to whether rape, a form of sexual assault, can be considered as torture.

a. Prohibition of Rape and Sexual Assault Under International Humanitarian Law

476. There can be no doubt that rape and other forms of sexual assault are expressly prohibited under international humanitarian law. The terms of article 27 of the Fourth Geneva Convention specifically prohibit rape, any form of indecent assault and the enforced prostitution of women. A prohibition on rape, enforced prostitution and any form of indecent assault is further found in article 4(2) of Additional Protocol II, concerning internal armed conflicts. This Protocol also implicitly prohibits rape and sexual assault in article 4(1) which states that all persons are entitled to respect for their person and honour. Moreover, article 76(1) of Additional Protocol I expressly requires that women be protected from rape, forced prostitution and any other form of indecent assault. An implicit prohibition on rape and sexual assault can also be found in article 46 of the 1907 Hague Convention (IV) that provides for the protection of family honour and rights. Finally, rape is prohibited as a crime against humanity under article 6(c) of the Nürnberg Charter and expressed as such in Article 5 of the Statute.

⁴⁹¹ See J. Herman Burgess and Hans Danelius, A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Martinus Nijhoff, Dordrecht 1988), p. 119.

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Case No.: IT-96-21-T

International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991



Date: 16 November 1998

Original: English

IN THE TRIAL CHAMBER

Before: Judge Adolphus G. Karibi-Whyte, Presiding
Judge Elizabeth Odio Benito
Judge Saad Saood Jan

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Judgement of: 16 November 1998

PROSECUTOR

v.

ZEJNIL DELALIĆ
ZDRAVKO MUCIĆ also known as “PAVO”
HAZIM DELIĆ
ESAD LANDŽO also known as “ZENGA”

JUDGEMENT

The Office of the Prosecutor:

Mr. Grant Niemann
Ms. Teresa McHenry

Counsel for the Accused:

Ms. Edina Rešidović, Mr. Eugene O’Sullivan, for Zejnil Delalić
Ms. Nihada Buturović, Mr. Howard Morrison, for Zdravko Mucić
Mr. Salih Karabdić, Mr. Thomas Moran, for Hazim Delić
Ms. Cynthia McMurrey, Ms. Nancy Bolter, for Esad Landžo

477. There is on the basis of these provisions alone, a clear prohibition on rape and sexual assault under international humanitarian law. However the relevant provisions do not define rape. Thus, the task of the Trial Chamber is to determine the definition of rape in this context.

b. Definition of Rape

478. Although the prohibition on rape under international humanitarian law is readily apparent, there is no convention or other international instrument containing a definition of the term itself. The Trial Chamber draws guidance on this question from the discussion in the recent judgement of the ICTR, in the case of the *Prosecutor v. Jean-Paul Akayesu*⁴⁹² (hereafter “*Akayesu Judgement*”) which has considered the definition of rape in the context of crimes against humanity. The Trial Chamber deciding this case found that there was no commonly accepted definition of the term in international law and acknowledged that, while “rape has been defined in certain national jurisdictions as non-consensual intercourse”, there are differing definitions of the variations of such an act. It concluded,

that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state sanctioned violence. This approach is more useful in international law. [...]

The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed under circumstances which are coercive. [...]

479. This Trial Chamber agrees with the above reasoning, and sees no reason to depart from the conclusion of the ICTR in the *Akayesu Judgement* on this issue. Thus, the Trial Chamber considers rape to constitute a physical invasion of a sexual nature, committed on a person under circumstances that are coercive. Having reached this conclusion, the Trial Chamber turns to a brief discussion of the jurisprudence of other international judicial bodies concerning rape as torture.

⁴⁹² *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Trial Chamber I, 2 Sept. 1998.

⁴⁹³ *Ibid.*, p. 241.

c. Decisions of International and Regional Judicial Bodies

480. In order for rape to be included within the offence of torture it must meet each of the elements of this offence, as discussed above. In considering this issue, the Trial Chamber finds it useful to examine the relevant findings of other international judicial and quasi-judicial bodies as well as some relevant United Nations reports.

481. Both the Inter-American Commission on Human Rights (hereafter “Inter-American Commission”) and the European Court of Human Rights have recently issued decisions on the question of whether rape constitutes torture. On 1 March 1996, the Inter-American Commission handed down a decision in the case of *Fernando and Raquel Mejia v. Peru*,⁴⁹⁴ which concerned the rape, on two occasions, of a schoolteacher by members of the Peruvian Army. The facts of the case are as follows.

482. On the evening of 15 June 1989, Peruvian military personnel, armed with submachine guns and with their faces covered, entered the Mejia home. They abducted Fernando Mejia, a lawyer, journalist and political activist, on suspicion of being a subversive and a member of the Tupac Amaru Revolutionary Movement. Shortly thereafter, one of these military personnel re-entered the home, apparently looking for identity documents belonging to Mr. Mejia. While his wife, Raquel Mejia, was searching for these documents, she was told that she was also considered a subversive, which she denied. The soldier involved then raped her. About 20 minutes later the same soldier returned, dragged her into her room and raped her again. Raquel Mejia spent the rest of the night in a state of terror. Her husband’s body, which showed clear signs of torture, was subsequently found on the banks of the Santa Clara River.

483. The Inter-American Commission found that the rape of Raquel Mejia constituted torture in breach of article 5 of the American Convention of Human Rights.⁴⁹⁵ In reaching this conclusion, the Inter-American Commission found that torture under article 5 has three constituent elements. First, there must be an intentional act through which physical or mental pain and suffering is

⁴⁹⁴ Annual Report of the Inter-American Commission on Human Rights, Report No. 5/96, Case No. 10.970, 1 March 1996.

⁴⁹⁵ *Ibid.*, p. 187.

inflicted on a person; secondly, such suffering must be inflicted for a purpose; and, thirdly, it must be inflicted by a public official or by a private person acting at the instigation of a public official.⁴⁹⁶

484. In considering the application of these principles to the facts, the Inter-American Commission found that the first of these elements was satisfied on the basis that:

[R]ape causes physical and mental suffering in the victim. In addition to the violence suffered at the time it is committed, the victims are commonly hurt or, in some cases, are even made pregnant. The fact of being made the subject of abuse of this nature also causes a psychological trauma that results, on the one hand, from having been humiliated and victimised, and on the other, from suffering the condemnation of the members of their community if they report what has been done to them.⁴⁹⁷

485. In finding that the second element of torture had also been met, the Inter-American Commission found that Raquel Mejía was raped with the aim of punishing her personally and intimidating her. Finally, it was held that the third requirement of the definition of torture was met as the man who raped Raquel Mejía was a member of the security forces.⁴⁹⁸

486. Two important observations may be made about this decision. First, in considering whether rape gives rise to pain and suffering, one must not only look at the physical consequences, but also at the psychological and social consequences of the rape. Secondly, in its definition of the requisite elements of torture, the Inter-American Commission did not refer to the customary law requirement that the physical and psychological pain and suffering be severe. However, this level of suffering may be implied from the Inter-American Commission's finding that the rape, in the instant case, was "an act of violence" occasioning physical and psychological pain and suffering that caused the victim: a state of shock; a fear of public ostracism; feelings of humiliation; fear of how her husband would react; a feeling that family integrity was at stake and an apprehension that her children might feel humiliated if they knew what had happened to their mother.⁴⁹⁹

487. The European Court has also recently considered the issue of rape as torture, as prohibited by article 3 of the European Convention, in the case of *Aydın v. Turkey*. In this case, a majority of the Court referred to the previous finding of the European Commission for Human Rights,

⁴⁹⁶ *Ibid.*, p. 185.

⁴⁹⁷ *Ibid.*, p. 186 (footnote omitted).

⁴⁹⁸ *Ibid.*, p. 187.

⁴⁹⁹ *Ibid.*, p. 186.

when it stated that, after being detained, the applicant was taken to a police station where she was:

blindfolded, beaten, stripped, placed inside a tyre and sprayed with high pressure water, and raped. It would appear probable that the applicant was subject to such treatment on the basis of suspicion of collaboration by herself or members of her family with members of the PKK, the purpose being to gain information and/or deter her family and other villagers from becoming implicated in terrorist activities.⁵⁰⁰

488. The European Court held that the distinction between torture and inhuman or degrading treatment in article 3 of the European Convention was embodied therein to allow the special stigma of torture to attach only to deliberate inhuman treatment causing very serious and cruel suffering.⁵⁰¹

It went on to state that:

[w]hile being held in detention the applicant was raped by a person whose identity has still to be determined. Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally.
[...]

Against this background the Court is satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of article 3 of the Convention. *Indeed the court would have reached this conclusion on either of these grounds taken separately.*⁵⁰²

489. By stating that it would have found a breach of article 3 even if each of the grounds had been considered separately, the European Court, on the basis of the facts before it, specifically affirmed the view that rape involves the infliction of suffering at a requisite level of severity to place it in the category of torture. A majority of the Court (14 votes to 7) thus found that there had been a breach of article 3 of the European Convention and, while those judges who disagreed with this finding were not convinced that the events alleged actually took place, they did not otherwise disagree with the reasoning of the majority on the application of article 3.⁵⁰³ Indeed, two of the dissenting judges

⁵⁰⁰ *Aydın v. Turkey*, para. 40, sub-para. 4.

⁵⁰¹ *Ibid.*, para. 82.

⁵⁰² *Ibid.*, paras. 83 and 86 (emphasis added).

⁵⁰³ *Ibid.*, p. 38. Joint Dissenting Opinion of Judges Gölcüklü, Matscher, Pettiti, De Meyer, Lopes Rocha, Makarczyk and Gótschev on the Alleged Ill-treatment (Art. 3 of the Convention), p.45.

explicitly stated that, had they found the acts alleged proven, they would constitute an extremely serious violation of article 3.⁵⁰⁴

490. In addition, the *Akayesu Judgement* referred to above expresses a view on the issue of rape as torture most emphatically, in the following terms:

Like torture rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment control or destruction of a person. Like torture rape is a violation of personal dignity, and rape in fact constitutes torture when 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.⁵⁰⁵

491. The view that rape constitutes torture, is further shared by the United Nations Special Rapporteur on Torture. In an oral introduction to his 1992 Report to the Commission on Human Rights, the Special Rapporteur stated that:

since it was clear that rape or other forms of sexual assault against women in detention were a particularly ignominious violation of the inherent dignity and the right to physical integrity of the human being, they accordingly constituted an act of torture.⁵⁰⁶

61 In his first report he also listed various forms of sexual aggression as methods of torture, which included rape and the insertion of objects into the orifices of the body.⁵⁰⁷

492. The profound effects of rape and other forms of sexual assault were specifically addressed in the Report of the Commission of Experts thus:

Rape and other forms of sexual assault harm not only the body of the victim. The more significant harm is the feeling of total loss of control over the most intimate and personal decisions and bodily functions. This loss of control infringes on the victim's human dignity and is what makes rape and sexual assault such an effective means of ethnic cleansing.⁵⁰⁸

⁵⁰⁴ *Ibid.*, Partly Concurring, Partly Dissenting Opinion of Judge Matscher, p. 40, and Partly Concurring, Partly Dissenting Opinion of Judge Pettiti, p. 41.

⁵⁰⁵ *Akayesu Judgement*, para. 597.

⁵⁰⁶ E/CN.4/1992/SR.21, para.35. See "Question of the human rights of all persons subjected to any form of detention or imprisonment, in particular: torture and other cruel, inhuman or degrading treatment or punishment" Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1992/32, E/CN.4/1995/34, para. 16.

⁵⁰⁷ Report of the Special Rapporteur, para. 119.

⁵⁰⁸ Commission of Experts Report, Annexes IX to XII S/1994/674/Add.2 (Vol.V), para. 25.

for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation. In the view of this Trial Chamber this is inherent in situations of armed conflict.

496. Accordingly, whenever rape and other forms of sexual violence meet the aforementioned criteria, then they shall constitute torture, in the same manner as any other acts that meet this criteria.

497. It is in the light of these findings that the evidence relating to the charges of torture contained in the Indictment is considered in Section IV below.

(c) Wilfully Causing Great Suffering or Serious Injury to Body or Health

498. The offence of wilfully causing great suffering or serious injury to body or health is expressly prohibited as a grave breach in each of the four Geneva Conventions. However, in order to attach meaning to the prohibition, it is necessary to analyse the circumstances in which particular actions may constitute the causing of such suffering or serious injury. This very issue is indeed the subject of contention between the parties in the present case.

(i) Arguments of the Parties

499. It is clear from the submissions of the Prosecution that it takes the position that there are two separate offences, one being “wilfully causing great suffering” and the second being “wilfully causing serious injury to body or health”. In its view, the elements of the first of these are as follows, first, the accused intended to inflict great suffering without the underlying intention and purposes of torture, with recklessness constituting a sufficient form of intention. Secondly, great suffering was in fact inflicted upon the victim, which need not be limited to physical suffering, but can also include mental or moral suffering.

500. The Prosecution further submits that the second offence of “wilfully causing serious injury to body or health” has two main elements. First, the accused intended to cause injury to the body or health of the victim, including his mental health, with recklessness constituting a sufficient form of such intention. Secondly, serious injury to body or health was in fact inflicted upon the victim.

Inter-American Court of Human Rights

**Velásquez Rodríguez v. Honduras
Merits, Judgment of July 29, 1988**

Paras. 160-177

INTER-AMERICAN COURT OF HUMAN RIGHTS

VELASQUEZ RODRIGUEZ CASE

JUDGMENT OF JULY 29, 1988

160. This requires the Court to examine the conditions under which a particular act, which violates one of the rights recognized by the Convention, can be imputed to a State Party thereby establishing its international responsibility.

161. Article 1 (1) of the Convention provides:

Article 1. Obligation to Respect Rights

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

162. This article specifies the obligation assumed by the States Parties in relation to each of the rights protected. Each claim alleging that one of those rights has been infringed necessarily implies that Article 1 (1) of the Convention has also been violated.

163. The Commission did not specifically allege the violation of Article 1 (1) of the Convention, but that does not preclude the Court from applying it. The precept contained therein constitutes the generic basis of the protection of the rights recognized by the Convention and would be applicable, in any case, by virtue of a general principle of law, *iura novit curia*, on which international jurisprudence has repeatedly relied and under which a court has the power and the duty to apply the juridical provisions relevant to a proceeding, even when the parties do not expressly invoke them ("**Lotus**", Judgment No. 9, 1927, P.C.I.J., Series A No. 10, p. 31 and Eur. Court H.R., **Handyside Case**, Judgment of 7 December 1976, Series A No. 24, para. 41).

164. Article 1 (1) is essential in determining whether a violation of the human rights recognized by the Convention can be imputed to a State Party. In effect, that article charges the States Parties with the fundamental duty to respect and guarantee the rights recognized in the Convention. Any impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention.

165. The first obligation assumed by the States Parties under Article 1 (1) is "to respect the rights and freedoms" recognized by the Convention. The exercise of public authority has

certain limits which derive from the fact that human rights are inherent attributes of human dignity and are, therefore, superior to the power of the State. On another occasion, this court stated:

The protection of human rights, particularly the civil and political rights set forth in the Convention, is in effect based on the affirmation of the existence of certain inviolable attributes of the individual that cannot be legitimately restricted through the exercise of governmental power. There are individual domains that are beyond the reach of the State or to which the State has but limited access. Thus, the protection of human rights must necessarily comprise the concept of the restriction of the exercise of state power (**The Word "Laws" in Article 30 of the American Convention on Human Rights**, Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para 21).

166. The second obligation of the States Parties is to "ensure" the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of judicially ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.

167. The obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation --it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights.

168. The obligation of the States is, thus, much more direct than that contained in Article 2, which reads:

Article 2. Domestic Legal Effects

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

169. According to Article 1 (1), any exercise of public power that violates the rights recognized by the Convention is illegal. Whenever a State organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect the rights and freedoms set forth in the Convention.

170. This conclusion is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.

171. This principle suits perfectly the nature of the Convention, which is violated whenever public power is used to infringe the rights recognized therein. If acts of public power that exceed the State's authority or are illegal under its own laws were not considered to compromise that State's obligations under the treaty, the system of protection provided for in the Convention would be illusory.

172. Thus, in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.

173. Violations of the Convention cannot be founded upon rules that take psychological factors into account in establishing individual culpability. For the purposes of analysis, the intent or motivation of the agent who has violated the rights recognized by the Convention is irrelevant --the violation can be established even if the identity of the individual perpetrator is unknown. What is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible. Thus, the Court's task is to determine whether the violation is the result of a State's failure to fulfill its duty to respect and guarantee those rights, as required by Article 1 (1) of the Convention.

174. The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.

175. This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party. Of course, while the State is obligated to prevent human rights abuses, the existence of a particular violation does not, in itself, prove the failure to take preventive measures. On the other hand, subjecting a person to official, repressive bodies that practice torture and assassination with impunity is itself a breach of the duty to prevent violations of the rights to

life and physical integrity of the person, even if that particular person is not tortured or assassinated, or if those facts cannot be proven in a concrete case.

176. The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.

177. In certain circumstances, it may be difficult to investigate acts that violate an individual's rights. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.

(.....)

**Human Rights Council, United Nations General Assembly
Resolution 60/251 of 15 March 2006**



General Assembly

Distr.: General
3 April 2006

Sixtieth session
Agenda items 46 and 120

Resolution adopted by the General Assembly

[without reference to a Main Committee (A/60/L.48)]

60/251. Human Rights Council

The General Assembly,

Reaffirming the purposes and principles contained in the Charter of the United Nations, including developing friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and achieving international cooperation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights and fundamental freedoms for all,

Reaffirming also the Universal Declaration of Human Rights¹ and the Vienna Declaration and Programme of Action,² and recalling the International Covenant on Civil and Political Rights,³ the International Covenant on Economic, Social and Cultural Rights³ and other human rights instruments,

Reaffirming further that all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing, and that all human rights must be treated in a fair and equal manner, on the same footing and with the same emphasis,

Reaffirming that, while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, all States, regardless of their political, economic and cultural systems, have the duty to promote and protect all human rights and fundamental freedoms,

Emphasizing the responsibilities of all States, in conformity with the Charter, to respect human rights and fundamental freedoms for all, without distinction of any kind as to race, colour, sex, language or religion, political or other opinion, national or social origin, property, birth or other status,

Acknowledging that peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being, and recognizing that development, peace and security and human rights are interlinked and mutually reinforcing,

¹ Resolution 217 A (III).

² A/CONF.157/24 (Part I), chap. III.

³ See resolution 2200 A (XXI), annex.

Affirming the need for all States to continue international efforts to enhance dialogue and broaden understanding among civilizations, cultures and religions, and emphasizing that States, regional organizations, non-governmental organizations, religious bodies and the media have an important role to play in promoting tolerance, respect for and freedom of religion and belief,

Recognizing the work undertaken by the Commission on Human Rights and the need to preserve and build on its achievements and to redress its shortcomings,

Recognizing also the importance of ensuring universality, objectivity and non-selectivity in the consideration of human rights issues, and the elimination of double standards and politicization,

Recognizing further that the promotion and protection of human rights should be based on the principles of cooperation and genuine dialogue and aimed at strengthening the capacity of Member States to comply with their human rights obligations for the benefit of all human beings,

Acknowledging that non-governmental organizations play an important role at the national, regional and international levels, in the promotion and protection of human rights,

Reaffirming the commitment to strengthen the United Nations human rights machinery, with the aim of ensuring effective enjoyment by all of all human rights, civil, political, economic, social and cultural rights, including the right to development, and to that end, the resolve to create a Human Rights Council,

1. *Decides* to establish the Human Rights Council, based in Geneva, in replacement of the Commission on Human Rights, as a subsidiary organ of the General Assembly; the Assembly shall review the status of the Council within five years;

2. *Decides* that the Council shall be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner;

3. *Decides also* that the Council should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon. It should also promote the effective coordination and the mainstreaming of human rights within the United Nations system;

4. *Decides further* that the work of the Council shall be guided by the principles of universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation, with a view to enhancing the promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development;

5. *Decides* that the Council shall, inter alia:

- (a) Promote human rights education and learning as well as advisory services, technical assistance and capacity-building, to be provided in consultation with and with the consent of Member States concerned;
- (b) Serve as a forum for dialogue on thematic issues on all human rights;
- (c) Make recommendations to the General Assembly for the further development of international law in the field of human rights;
- (d) Promote the full implementation of human rights obligations undertaken by States and follow-up to the goals and commitments related to the promotion and

protection of human rights emanating from United Nations conferences and summits;

(e) Undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies; the Council shall develop the modalities and necessary time allocation for the universal periodic review mechanism within one year after the holding of its first session;

(f) Contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies;

(g) Assume the role and responsibilities of the Commission on Human Rights relating to the work of the Office of the United Nations High Commissioner for Human Rights, as decided by the General Assembly in its resolution 48/141 of 20 December 1993;

(h) Work in close cooperation in the field of human rights with Governments, regional organizations, national human rights institutions and civil society;

(i) Make recommendations with regard to the promotion and protection of human rights;

(j) Submit an annual report to the General Assembly;

6. *Decides also* that the Council shall assume, review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain a system of special procedures, expert advice and a complaint procedure; the Council shall complete this review within one year after the holding of its first session;

7. *Decides further* that the Council shall consist of forty-seven Member States, which shall be elected directly and individually by secret ballot by the majority of the members of the General Assembly; the membership shall be based on equitable geographical distribution, and seats shall be distributed as follows among regional groups: Group of African States, thirteen; Group of Asian States, thirteen; Group of Eastern European States, six; Group of Latin American and Caribbean States, eight; and Group of Western European and other States, seven; the members of the Council shall serve for a period of three years and shall not be eligible for immediate re-election after two consecutive terms;

8. *Decides* that the membership in the Council shall be open to all States Members of the United Nations; when electing members of the Council, Member States shall take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto; the General Assembly, by a two-thirds majority of the members present and voting, may suspend the rights of membership in the Council of a member of the Council that commits gross and systematic violations of human rights;

9. *Decides also* that members elected to the Council shall uphold the highest standards in the promotion and protection of human rights, shall fully cooperate with the Council and be reviewed under the universal periodic review mechanism during their term of membership;

10. *Decides further* that the Council shall meet regularly throughout the year and schedule no fewer than three sessions per year, including a main session, for a total duration of no less than ten weeks, and shall be able to hold special sessions, when needed, at the request of a member of the Council with the support of one third of the membership of the Council;

11. *Decides* that the Council shall apply the rules of procedure established for committees of the General Assembly, as applicable, unless subsequently otherwise decided by the Assembly or the Council, and also decides that the participation of and consultation with observers, including States that are not members of the Council, the specialized agencies, other intergovernmental organizations and national human rights institutions, as well as non-governmental organizations, shall be based on arrangements, including Economic and Social Council resolution 1996/31 of 25 July 1996 and practices observed by the Commission on Human Rights, while ensuring the most effective contribution of these entities;

12. *Decides also* that the methods of work of the Council shall be transparent, fair and impartial and shall enable genuine dialogue, be results-oriented, allow for subsequent follow-up discussions to recommendations and their implementation and also allow for substantive interaction with special procedures and mechanisms;

13. *Recommends* that the Economic and Social Council request the Commission on Human Rights to conclude its work at its sixty-second session, and that it abolish the Commission on 16 June 2006;

14. *Decides* to elect the new members of the Council; the terms of membership shall be staggered, and such decision shall be taken for the first election by the drawing of lots, taking into consideration equitable geographical distribution;

15. *Decides also* that elections of the first members of the Council shall take place on 9 May 2006, and that the first meeting of the Council shall be convened on 19 June 2006;

16. *Decides further* that the Council shall review its work and functioning five years after its establishment and report to the General Assembly.

*72nd plenary meeting
15 March 2006*

**Institution-building of the United Nations Human Rights
Council, United Nations Human Rights Council Resolution 5/1
of 18 June 2007**



Human Rights Council

5/1. Institution-building of the United Nations Human Rights Council

The Human Rights Council,

Acting in compliance with the mandate entrusted to it by the United Nations General Assembly in resolution 60/251 of 15 March 2006,

Having considered the draft text on institution-building submitted by the President of the Council,

1. *Adopts* the draft text entitled “United Nations Human Rights Council: Institution-Building”, as contained in the annex to the present resolution, including its appendix(ces);
2. *Decides* to submit the following draft resolution to the General Assembly for its adoption as a matter of priority in order to facilitate the timely implementation of the text contained thereafter:

“The General Assembly,

“Taking note of Human Rights Council resolution 5/1 of 18 June 2007,

“1. Welcomes the text entitled ‘United Nations Human Rights Council: Institution-Building’, as contained in the annex to the present resolution, including its appendix(ces).”

*9th meeting
18 June 2007*

[Resolution adopted without a vote.]¹

Annex

UNITED NATIONS HUMAN RIGHTS COUNCIL: INSTITUTION-BUILDING

I. UNIVERSAL PERIODIC REVIEW MECHANISM

A. Basis of the review

1. The basis of the review is:
 - (a) The Charter of the United Nations;
 - (b) The Universal Declaration of Human Rights;
 - (c) Human rights instruments to which a State is party;

(d) Voluntary pledges and commitments made by States, including those undertaken when presenting their candidatures for election to the Human Rights Council (hereinafter “the Council”).

2. In addition to the above and given the complementary and mutually interrelated nature of international human rights law and international humanitarian law, the review shall take into account applicable international humanitarian law.

B. Principles and objectives

1. Principles

3. The universal periodic review should:
 - (a) Promote the universality, interdependence, indivisibility and interrelatedness of all human rights;
 - (b) Be a cooperative mechanism based on objective and reliable information and on interactive dialogue;
 - (c) Ensure universal coverage and equal treatment of all States;
 - (d) Be an intergovernmental process, United Nations Member-driven and action-oriented;
 - (e) Fully involve the country under review;
 - (f) Complement and not duplicate other human rights mechanisms, thus representing an added value;
 - (g) Be conducted in an objective, transparent, non-selective, constructive, non-confrontational and non-politicized manner;
 - (h) Not be overly burdensome to the concerned State or to the agenda of the Council;
 - (i) Not be overly long; it should be realistic and not absorb a disproportionate amount of time, human and financial resources;
 - (j) Not diminish the Council’s capacity to respond to urgent human rights situations;
 - (k) Fully integrate a gender perspective;
 - (l) Without prejudice to the obligations contained in the elements provided for in the basis of review, take into account the level of development and specificities of countries;
 - (m) Ensure the participation of all relevant stakeholders, including non-governmental organizations and national human rights institutions, in accordance with General Assembly resolution 60/251 of 15 March 2006 and Economic and Social Council resolution 1996/31 of 25 July 1996, as well as any decisions that the Council may take in this regard.
4. The objectives of the review are:
 - (a) The improvement of the human rights situation on the ground;
 - (b) The fulfilment of the State’s human rights obligations and commitments and assessment of positive developments and challenges faced by the State;
 - (c) The enhancement of the State’s capacity and of technical assistance, in consultation with, and with the consent of, the State concerned;

¹ See A/HRC/5/21, chap. III, paras. 60-62.

- (d) The sharing of best practice among States and other stakeholders;
- (e) Support for cooperation in the promotion and protection of human rights;
- (f) The encouragement of full cooperation and engagement with the Council, other human rights bodies and the Office of the United Nations High Commissioner for Human Rights.

C. Periodicity and order of the review

5. The review begins after the adoption of the universal periodic review mechanism by the Council.
6. The order of review should reflect the principles of universality and equal treatment.
7. The order of the review should be established as soon as possible in order to allow States to prepare adequately.
8. All member States of the Council shall be reviewed during their term of membership.
9. The initial members of the Council, especially those elected for one or two-year terms, should be reviewed first.
10. A mix of member and observer States of the Council should be reviewed.
11. Equitable geographic distribution should be respected in the selection of countries for review.
12. The first member and observer States to be reviewed will be chosen by the drawing of lots from each Regional Group in such a way as to ensure full respect for equitable geographic distribution. Alphabetical order will then be applied beginning with those countries thus selected, unless other countries volunteer to be reviewed.
13. The period between review cycles should be reasonable so as to take into account the capacity of States to prepare for, and the capacity of other stakeholders to respond to, the requests arising from the review.
14. The periodicity of the review for the first cycle will be of four years. This will imply the consideration of 48 States per year during three sessions of the working group of two weeks each.^a

D. Process and modalities of the review

1. Documentation

15. The documents on which the review would be based are:
 - (a) Information prepared by the State concerned, which can take the form of a national report, on the basis of general guidelines to be adopted by the Council at its sixth session (first session of the second cycle), and any other information considered relevant by the State concerned, which could be presented either orally or in writing, provided that the written presentation summarizing the information will not exceed 20 pages, to guarantee equal treatment to all States and not to overburden the mechanism. States are encouraged to prepare the information through a broad consultation process at the national level with all relevant stakeholders;
 - (b) Additionally a compilation prepared by the Office of the High Commissioner for Human Rights of the information contained in the reports of treaty bodies, special procedures, including observations and comments by the State concerned, and other relevant official United Nations documents, which shall not exceed 10 pages;

^a The universal periodic review is an evolving process; the Council, after the conclusion of the first review cycle, may review the modalities and the periodicity of this mechanism, based on best practices and lessons learned.

- (c) Additional, credible and reliable information provided by other relevant stakeholders to the universal periodic review which should also be taken into consideration by the Council in the review. The Office of the High Commissioner for Human Rights will prepare a summary of such information which shall not exceed 10 pages.

16. The documents prepared by the Office of the High Commissioner for Human Rights should be elaborated following the structure of the general guidelines adopted by the Council regarding the information prepared by the State concerned.

17. Both the State's written presentation and the summaries prepared by the Office of the High Commissioner for Human Rights shall be ready six weeks prior to the review by the working group to ensure the distribution of documents simultaneously in the six official languages of the United Nations, in accordance with General Assembly resolution 53/208 of 14 January 1999.

2. Modalities

18. The modalities of the review shall be as follows:

- (a) The review will be conducted in one working group, chaired by the President of the Council and composed of the 47 member States of the Council. Each member State will decide on the composition of its delegation;^b
 - (b) Observer States may participate in the review, including in the interactive dialogue;
 - (c) Other relevant stakeholders may attend the review in the Working Group;
 - (d) A group of three rapporteurs, selected by the drawing of lots among the members of the Council and from different Regional Groups (*troika*) will be formed to facilitate each review, including the preparation of the report of the working group. The Office of the High Commissioner for Human Rights will provide the necessary assistance and expertise to the rapporteurs.
19. The country concerned may request that one of the rapporteurs be from its own Regional Group and may also request the substitution of a rapporteur on only one occasion.
20. A rapporteur may request to be excused from participation in a specific review process.

21. Interactive dialogue between the country under review and the Council will take place in the working group. The rapporteurs may collate issues or questions to be transmitted to the State under review to facilitate its preparation and focus the interactive dialogue, while guaranteeing fairness and transparency.

22. The duration of the review will be three hours for each country in the working group. Additional time of up to one hour will be allocated for the consideration of the outcome by the plenary of the Council.

23. Half an hour will be allocated for the adoption of the report of each country under review in the working group.

24. A reasonable time frame should be allocated between the review and the adoption of the report of each State in the working group.

25. The final outcome will be adopted by the plenary of the Council.

^b A Universal Periodic Review Voluntary Trust Fund should be established to facilitate the participation of developing countries, particularly the Least Developed Countries, in the universal periodic review mechanism.

E. Outcome of the review

1. Format of the outcome

26. The format of the outcome of the review will be a report consisting of a summary of the proceedings of the review process; conclusions and/or recommendations, and the voluntary commitments of the State concerned.

2. Content of the outcome

27. The universal periodic review is a cooperative mechanism. Its outcome may include, *inter alia*:
- (a) An assessment undertaken in an objective and transparent manner of the human rights situation in the country under review, including positive developments and the challenges faced by the country;
 - (b) Sharing of best practices;
 - (c) An emphasis on enhancing cooperation for the promotion and protection of human rights;
 - (d) The provision of technical assistance and capacity-building in consultation with, and with the consent of, the country concerned;^c
 - (e) Voluntary commitments and pledges made by the country under review.

3. Adoption of the outcome

28. The country under review should be fully involved in the outcome.
29. Before the adoption of the outcome by the plenary of the Council, the State concerned should be offered the opportunity to present replies to questions or issues that were not sufficiently addressed during the interactive dialogue.
30. The State concerned and the member States of the Council, as well as observer States, will be given the opportunity to express their views on the outcome of the review before the plenary takes action on it.
31. Other relevant stakeholders will have the opportunity to make general comments before the adoption of the outcome by the plenary.
32. Recommendations that enjoy the support of the State concerned will be identified as such. Other recommendations, together with the comments of the State concerned thereon, will be noted. Both will be included in the outcome report to be adopted by the Council.

F. Follow-up to the review

33. The outcome of the universal periodic review, as a cooperative mechanism, should be implemented primarily by the State concerned and, as appropriate, by other relevant stakeholders.
34. The subsequent review should focus, *inter alia*, on the implementation of the preceding outcome.
35. The Council should have a standing item on its agenda devoted to the universal periodic review.
36. The international community will assist in implementing the recommendations and conclusions regarding capacity-building and technical assistance, in consultation with, and with the consent of, the country concerned.

^c A decision should be taken by the Council on whether to resort to existing financing mechanisms or to create a new mechanism.

37. In considering the outcome of the universal periodic review, the Council will decide if and when any specific follow-up is necessary.
38. After exhausting all efforts to encourage a State to cooperate with the universal periodic review mechanism, the Council will address, as appropriate, cases of persistent non-cooperation with the mechanism.
- ## **II. SPECIAL PROCEDURES**
- ### **A. Selection and appointment of mandate-holders**
39. The following general criteria will be of paramount importance while nominating, selecting and appointing mandate-holders: (a) expertise; (b) experience in the field of the mandate; (c) independence; (d) impartiality; (e) personal integrity; and (f) objectivity.
40. Due consideration should be given to gender balance and equitable geographic representation, as well as to an appropriate representation of different legal systems.
41. Technical and objective requirements for eligible candidates for mandate-holders will be approved by the Council at its sixth session (first session of the second cycle), in order to ensure that eligible candidates are highly qualified individuals who possess established competence, relevant expertise and extensive professional experience in the field of human rights.
42. The following entities may nominate candidates as special procedures mandate-holders: (a) Governments; (b) Regional Groups operating within the United Nations human rights system; (c) international organizations or their offices (e.g. the Office of the High Commissioner for Human Rights); (d) non-governmental organizations; (e) other human rights bodies; (f) individual nominations.
43. The Office of the High Commissioner for Human Rights shall immediately prepare, maintain and periodically update a public list of eligible candidates in a standardized format, which shall include personal data, areas of expertise and professional experience. Upcoming vacancies of mandates shall be publicized.
44. The principle of non-accumulation of human rights functions at a time shall be respected.
45. A mandate-holder's tenure in a given function, whether a thematic or country mandate, will be no longer than six years (two terms of three years for thematic mandate-holders).
46. Individuals holding decision-making positions in Government or in any other organization or entity which may give rise to a conflict of interest with the responsibilities inherent to the mandate shall be excluded. Mandate-holders will act in their personal capacity.
47. A consultative group would be established to propose to the President, at least one month before the beginning of the session in which the Council would consider the selection of mandate-holders, a list of candidates who possess the highest qualifications for the mandates in question and meet the general criteria and particular requirements.
48. The consultative group shall also give due consideration to the exclusion of nominated candidates from the public list of eligible candidates brought to its attention.
49. At the beginning of the annual cycle of the Council, Regional Groups would be invited to appoint a member of the consultative group, who would serve in his/her personal capacity. The Group will be assisted by the Office of the High Commissioner for Human Rights.
50. The consultative group will consider candidates included in the public list; however, under exceptional circumstances and if a particular post justifies it, the Group may consider additional nominations with equal or more suitable qualifications for the post. Recommendations to the President shall be public and substantiated.
51. The consultative group should take into account, as appropriate, the views of stakeholders, including the current or outgoing mandate-holders, in determining the necessary expertise, experience, skills, and other relevant requirements for each mandate.

52. On the basis of the recommendations of the consultative group and following broad consultations, in particular through the regional coordinators, the President of the Council will identify an appropriate candidate for each vacancy. The President will present to member States and observers a list of candidates to be proposed at least two weeks prior to the beginning of the session in which the Council will consider the appointments.

53. If necessary, the President will conduct further consultations to ensure the endorsement of the proposed candidates. The appointment of the special procedures mandate-holders will be completed upon the subsequent approval of the Council. Mandate-holders shall be appointed before the end of the session.

B. Review, rationalization and improvement of mandates

54. The review, rationalization and improvement of mandates, as well as the creation of new ones, must be guided by the principles of universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation, with a view to enhancing the promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development.

55. The review, rationalization and improvement of each mandate would take place in the context of the negotiations of the relevant resolutions. An assessment of the mandate may take place in a separate segment of the interactive dialogue between the Council and special procedures mandate-holders.

56. The review, rationalization and improvement of mandates would focus on the relevance, scope and contents of the mandates, having as a framework the internationally recognized human rights standards, the system of special procedures and General Assembly resolution 60/251.

57. Any decision to streamline, merge or possibly discontinue mandates should always be guided by the need for improvement of the enjoyment and protection of human rights.

58. The Council should always strive for improvements:

- (a) Mandates should always offer a clear prospect of an increased level of human rights protection and promotion as well as being coherent within the system of human rights;
- (b) Equal attention should be paid to all human rights. The balance of thematic mandates should broadly reflect the accepted equal importance of civil, political, economic, social and cultural rights, including the right to development;
- (c) Every effort should be made to avoid unnecessary duplication;
- (d) Areas which constitute thematic gaps will be identified and addressed, including by means other than the creation of special procedures mandates, such as by expanding an existing mandate, bringing a cross-cutting issue to the attention of mandate-holders or by requesting a joint action to the relevant mandate-holders;

(e) Any consideration of merging mandates should have regard to the content and predominant functions of each mandate, as well as to the workload of individual mandate-holders;

(f) In creating or reviewing mandates, efforts should be made to identify whether the structure of the mechanism (expert, rapporteur or working group) is the most effective in terms of increasing human rights protection;

(g) New mandates should be as clear and specific as possible, so as to avoid ambiguity.

59. It should be considered desirable to have a uniform nomenclature of mandate-holders, titles of mandates as well as a selection and appointment process, to make the whole system more understandable.

60. Thematic mandate periods will be of three years. Country mandate periods will be of one year.

61. Mandates included in Appendix I, where applicable, will be renewed until the date on which they are considered by the Council according to the programme of work.^a

62. Current mandate-holders may continue serving, provided they have not exceeded the six-year term limit (Appendix II). On an exceptional basis, the term of those mandate-holders who have served more than six years may be extended until the relevant mandate is considered by the Council and the selection and appointment process has concluded.

63. Decisions to create, review or discontinue country mandates should also take into account the principles of cooperation and genuine dialogue aimed at strengthening the capacity of Member States to comply with their human rights obligations.

64. In case of situations of violations of human rights or a lack of cooperation that require the Council's attention, the principles of objectivity, non-selectivity, and the elimination of double standards and politicization should apply.

III. HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE

65. The Human Rights Council Advisory Committee (hereinafter "the Advisory Committee"), composed of 18 experts serving in their personal capacity, will function as a think-tank for the Council and work at its direction. The establishment of this subsidiary body and its functioning will be executed according to the guidelines stipulated below.

A. Nomination

66. All Member States of the United Nations may propose or endorse candidates from their own region. When selecting their candidates, States should consult their national human rights institutions and civil society organizations and, in this regard, include the names of those supporting their candidates.

67. The aim is to ensure that the best possible expertise is made available to the Council. For this purpose, technical and objective requirements for the submission of candidatures will be established and approved by the Council at its sixth session (first session of the second cycle). These should include:

- (a) Recognized competence and experience in the field of human rights;
- (b) High moral standing;
- (c) Independence and impartiality.

68. Individuals holding decision-making positions in Government or in any other organization or entity which might give rise to a conflict of interest with the responsibilities inherent in the mandate shall be excluded. Elected members of the Committee will act in their personal capacity.

69. The principle of non-accumulation of human rights functions at the same time shall be respected.

B. Election

70. The Council shall elect the members of the Advisory Committee, in secret ballot, from the list of candidates whose names have been presented in accordance with the agreed requirements.

^a Country mandates meet the following criteria:

- There is a pending mandate of the Council to be accomplished; or
- There is a pending mandate of the General Assembly to be accomplished; or
- The nature of the mandate is for advisory services and technical assistance.

71. The list of candidates shall be closed two months prior to the election date. The Secretariat will make available the list of candidates and relevant information to member States and to the public at least one month prior to their election.

72. Due consideration should be given to gender balance and appropriate representation of different civilizations and legal systems.

73. The geographic distribution will be as follows:

African States: 5

Asian States: 5

Eastern European States: 2

Latin American and Caribbean States: 3

Western European and other States: 3

74. The members of the Advisory Committee shall serve for a period of three years. They shall be eligible for re-election once. In the first term, one third of the experts will serve for one year and another third for two years. The staggering of terms of membership will be defined by the drawing of lots.

C. Functions

75. The function of the Advisory Committee is to provide expertise to the Council in the manner and form requested by the Council, focusing mainly on studies and research-based advice. Further, such expertise shall be rendered only upon the latter's request, in compliance with its resolutions and under its guidance.

76. The Advisory Committee should be implementation-oriented and the scope of its advice should be limited to thematic issues pertaining to the mandate of the Council; namely promotion and protection of all human rights.

77. The Advisory Committee shall not adopt resolutions or decisions. The Advisory Committee may propose within the scope of the work set out by the Council, for the latter's consideration and approval, suggestions for further enhancing its procedural efficiency, as well as further research proposals within the scope of the work set out by the Council.

78. The Council shall issue specific guidelines for the Advisory Committee when it requests a substantive contribution from the latter and shall review all or any portion of those guidelines if it deems necessary in the future.

D. Methods of work

79. The Advisory Committee shall convene up to two sessions for a maximum of 10 working days per year. Additional sessions may be scheduled on an ad hoc basis with prior approval of the Council.

80. The Council may request the Advisory Committee to undertake certain tasks that could be performed collectively, through a smaller team or individually. The Advisory Committee will report on such efforts to the Council.

81. Members of the Advisory Committee are encouraged to communicate between sessions, individually or in teams. However, the Advisory Committee shall not establish subsidiary bodies unless the Council authorizes it to do so.

82. In the performance of its mandate, the Advisory Committee is urged to establish interaction with States, national human rights institutions, non-governmental organizations and other civil society entities in accordance with the modalities of the Council.

83. Member States and observers, including States that are not members of the Council, the specialized agencies, other intergovernmental organizations and national human rights institutions, as well as non-governmental organizations shall be entitled to participate in the work of the Advisory Committee based on arrangements, including Economic and Social Council resolution 1996/31 and practices observed by the Commission on Human Rights and the Council, while ensuring the most effective contribution of these entities.

84. The Council will decide at its sixth session (first session of its second cycle) on the most appropriate mechanisms to continue the work of the Working Groups on Indigenous Populations; Contemporary Forms of Slavery; Minorities; and the Social Forum.

IV. COMPLAINT PROCEDURE

A. Objective and scope

85. A complaint procedure is being established to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances.

86. Economic and Social Council resolution 1503 (XLVIII) of 27 May 1970 as revised by resolution 2000/3 of 19 June 2000 served as a working basis and was improved where necessary, so as to ensure that the complaint procedure is impartial, objective, efficient, victims-oriented and conducted in a timely manner. The procedure will retain its confidential nature, with a view to enhancing cooperation with the State concerned.

B. Admissibility criteria for communications

87. A communication related to a violation of human rights and fundamental freedoms, for the purpose of this procedure, shall be admissible, provided that:

(a) It is not manifestly politically motivated and its object is consistent with the Charter of the United Nations, the Universal Declaration of Human Rights and other applicable instruments in the field of human rights law;

(b) It gives a factual description of the alleged violations, including the rights which are alleged to be violated;

(c) Its language is not abusive. However, such a communication may be considered if it meets the other criteria for admissibility after deletion of the abusive language;

(d) It is submitted by a person or a group of persons claiming to be the victims of violations of human rights and fundamental freedoms, or by any person or group of persons, including non-governmental organizations, acting in good faith in accordance with the principles of human rights, not resorting to politically motivated stands contrary to the provisions of the Charter of the United Nations and claiming to have direct and reliable knowledge of the violations concerned. Nonetheless, reliably attested communications shall not be inadmissible solely because the knowledge of the individual authors is second-hand, provided that they are accompanied by clear evidence;

(e) It is not exclusively based on reports disseminated by mass media;

(f) It does not refer to a case that appears to reveal a consistent pattern of gross and reliably attested violations of human rights already being dealt with by a special procedure, a treaty body or other United Nations or similar regional complaints procedure in the field of human rights;

(g) Domestic remedies have been exhausted, unless it appears that such remedies would be ineffective or unreasonably prolonged.

88. National human rights institutions, established and operating under the Principles Relating to the Status of National Institutions (the Paris Principles), in particular in regard to quasi-judicial competence, may serve as effective means of addressing individual human rights violations.

C. Working groups

89. Two distinct working groups shall be established with the mandate to examine the communications and to bring to the attention of the Council consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms.

90. Both working groups shall, to the greatest possible extent, work on the basis of consensus. In the absence of consensus, decisions shall be taken by simple majority of the votes. They may establish their own rules of procedure.

1. Working Group on Communications: composition, mandate and powers

91. The Human Rights Council Advisory Committee shall appoint five of its members, one from each Regional Group, with due consideration to gender balance, to constitute the Working Group on Communications.

92. In case of a vacancy, the Advisory Committee shall appoint an independent and highly qualified expert of the same Regional Group from the Advisory Committee.

93. Since there is a need for independent expertise and continuity with regard to the examination and assessment of communications received, the independent and highly qualified experts of the Working Group on Communications shall be appointed for three years. Their mandate is renewable only once.

94. The Chairperson of the Working Group on Communications is requested, together with the secretariat, to undertake an initial screening of communications received, based on the admissibility criteria, before transmitting them to the States concerned. Manifestly ill-founded or anonymous communications shall be screened out by the Chairperson and shall therefore not be transmitted to the State concerned. In a perspective of accountability and transparency, the Chairperson of the Working Group on Communications shall provide all its members with a list of all communications rejected after initial screening. This list should indicate the grounds of all decisions resulting in the rejection of a communication. All other communications, which have not been screened out, shall be transmitted to the State concerned, so as to obtain the views of the latter on the allegations of violations.

95. The members of the Working Group on Communications shall decide on the admissibility of a communication and assess the merits of the allegations of violations, including whether the communication alone or in combination with other communications appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms. The Working Group on Communications shall provide the Working Group on Situations with a file containing all admissible communications as well as recommendations thereon. When the Working Group on Communications requires further consideration or additional information, it may keep a case under review until its next session and request such information from the State concerned. The Working Group on Communications may decide to dismiss a case. All decisions of the Working Group on Communications shall be based on a rigorous application of the admissibility criteria and duly justified.

2. Working Group on Situations: composition, mandate and powers

96. Each Regional Group shall appoint a representative of a member State of the Council, with due consideration to gender balance, to serve on the Working Group on Situations. Members shall be appointed for one year. Their mandate may be renewed once, if the State concerned is a member of the Council.

97. Members of the Working Group on Situations shall serve in their personal capacity. In order to fill a vacancy, the respective Regional Group to which the vacancy belongs, shall appoint a representative from member States of the same Regional Group.

98. The Working Group on Situations is requested, on the basis of the information and recommendations provided by the Working Group on Communications, to present the Council with a report on consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms and to make recommendations to the Council on the course of action to take, normally in the form of a draft resolution or decision with respect to the situations referred to it. When the Working Group on Situations requires further consideration or additional information, its members may keep a case under review until its next session. The Working Group on Situations may also decide to dismiss a case.

99. All decisions of the Working Group on Situations shall be duly justified and indicate why the consideration of a situation has been discontinued or action recommended thereon. Decisions to discontinue should be taken by consensus; if that is not possible, by simple majority of the votes.

D. Working modalities and confidentiality

100. Since the complaint procedure is to be, *inter alia*, victims-oriented and conducted in a confidential and timely manner, both Working Groups shall meet at least twice a year for five working days each session, in order to promptly examine the communications received, including replies of States thereon, and the situations of which the Council is already seized under the complaint procedure.

101. The State concerned shall cooperate with the complaint procedure and make every effort to provide substantive replies in one of the United Nations official languages to any of the requests of the Working Groups or the Council. The State concerned shall also make every effort to provide a reply no later than three months after the request has been made. If necessary, this deadline may however be extended at the request of the State concerned.

102. The Secretariat is requested to make the confidential files available to all members of the Council, at least two weeks in advance, so as to allow sufficient time for the consideration of the files.

103. The Council shall consider consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms brought to its attention by the Working Group on Situations as frequently as needed, but at least once a year.

104. The reports of the Working Group on Situations referred to the Council shall be examined in a confidential manner, unless the Council decides otherwise. When the Working Group on Situations recommends to the Council that it consider a situation in a public meeting, in particular in the case of manifest and unequivocal lack of cooperation, the Council shall consider such recommendation on a priority basis at its next session.

105. So as to ensure that the complaint procedure is victims-oriented, efficient and conducted in a timely manner, the period of time between the transmission of the complaint to the State concerned and consideration by the Council shall not, in principle, exceed 24 months.

E. Involvement of the complainant and of the State concerned

106. The complaint procedure shall ensure that both the author of a communication and the State concerned are informed of the proceedings at the following key stages:

(a) When a communication is deemed inadmissible by the Working Group on Communications or when it is taken up for consideration by the Working Group on Situations; or when a communication is kept pending by one of the Working Groups or by the Council;

(b) At the final outcome.

107. In addition, the complainant shall be informed when his/her communication is registered by the complaint procedure.

108. Should the complainant request that his/her identity be kept confidential, it will not be transmitted to the State concerned.

F. Measures

109. In accordance with established practice the action taken in respect of a particular situation should be one of the following options:

- (a) To discontinue considering the situation when further consideration or action is not warranted;
- (b) To keep the situation under review and request the State concerned to provide further information within a reasonable period of time;
- (c) To keep the situation under review and appoint an independent and highly qualified expert to monitor the situation and report back to the Council;
- (d) To discontinue reviewing the matter under the confidential complaint procedure in order to take up public consideration of the same;
- (e) To recommend to OHCHR to provide technical cooperation, capacity-building assistance or advisory services to the State concerned.

V. AGENDA AND FRAMEWORK FOR THE PROGRAMME OF WORK

A. Principles

Universality
Impartiality
Objectivity
Non-selectiveness
Constructive dialogue and cooperation
Predictability
Flexibility
Transparency
Accountability
Balance
Inclusive/comprehensive
Gender perspective
Implementation and follow-up of decisions

B. Agenda

- Item 1. Organizational and procedural matters
- Item 2. Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General
- Item 3. Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

- Item 4. Human rights situations that require the Council's attention
- Item 5. Human rights bodies and mechanisms
- Item 6. Universal Periodic Review
- Item 7. Human rights situation in Palestine and other occupied Arab territories
- Item 8. Follow-up and implementation of the Vienna Declaration and Programme of Action
- Item 9. Racism, racial discrimination, xenophobia and related forms of intolerance, follow-up and implementation of the Durban Declaration and Programme of Action
- Item 10. Technical assistance and capacity-building

C. Framework for the programme of work

- Item 1. Organizational and procedural matters
 - Election of the Bureau
 - Adoption of the annual programme of work
 - Adoption of the programme of work of the session, including other business
 - Selection and appointment of mandate-holders
 - Election of members of the Human Rights Council Advisory Committee
 - Adoption of the report of the session
 - Adoption of the annual report
- Item 2. Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General
 - Presentation of the annual report and updates
- Item 3. Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development
 - Economic, social and cultural rights
 - Civil and political rights
 - Rights of peoples, and specific groups and individuals
 - Right to development
 - Interrelation of human rights and human rights thematic issues
- Item 4. Human rights situations that require the Council's attention
- Item 5. Human rights bodies and mechanisms
 - Report of the Human Rights Council Advisory Committee
 - Report of the complaint procedure

Item 6. Universal Periodic Review

Item 7. Human rights situation in Palestine and other occupied Arab territories

Human rights violations and implications of the Israeli occupation of Palestine and other occupied Arab territories

Right to self-determination of the Palestinian people

Item 8. Follow-up and implementation of the Vienna Declaration and Programme of Action

Item 9. Racism, racial discrimination, xenophobia and related forms of intolerance, follow-up and implementation of the Durban Declaration and Programme of Action

Item 10. Technical assistance and capacity-building

VI. METHODS OF WORK

110. The methods of work, pursuant to General Assembly resolution 60/251 should be transparent, impartial, equitable, fair, pragmatic; lead to clarity, predictability, and inclusiveness. They may also be updated and adjusted over time.

A. Institutional arrangements

1. Briefings on prospective resolutions or decisions

111. The briefings on prospective resolutions or decisions would be informative only, whereby delegations would be apprised of resolutions and/or decisions tabled or intended to be tabled. These briefings will be organized by interested delegations.

2. President's open-ended information meetings on resolutions, decisions and other related business

112. The President's open-ended information meetings on resolutions, decisions and other related business shall provide information on the status of negotiations on draft resolutions and/or decisions so that delegations may gain a bird's eye view of the status of such drafts. The consultations shall have a purely informational function, combined with information on the extranet, and be held in a transparent and inclusive manner. They shall not serve as a negotiating forum.

3. Informal consultations on proposals convened by main sponsors

113. Informal consultations shall be the primary means for the negotiation of draft resolutions and/or decisions, and their convening shall be the responsibility of the sponsor(s). At least one informal open-ended consultation should be held on each draft resolution and/or decision before it is considered for action by the Council. Consultations should, as much as possible, be scheduled in a timely, transparent and inclusive manner that takes into account the constraints faced by delegations, particularly smaller ones.

4. Role of the Bureau

114. The Bureau shall deal with procedural and organizational matters. The Bureau shall regularly communicate the contents of its meetings through a timely summary report.

5. Other work formats may include panel debates, seminars and round tables

115. Utilization of these other work formats, including topics and modalities, would be decided by the Council on a case-by-case basis. They may serve as tools of the Council for enhancing dialogue and mutual understanding on certain issues. They should be utilized in the context of the Council's agenda and annual programme of work, and reinforce and/or complement its intergovernmental nature. They shall not be used to substitute or replace existing human rights mechanisms and established methods of work.

6. High-Level Segment

116. The High-Level Segment shall be held once a year during the main session of the Council. It shall be followed by a general segment wherein delegations that did not participate in the High-Level Segment may deliver general statements.

B. Working culture

117. There is a need for:

- (a) Early notification of proposals;
- (b) Early submission of draft resolutions and decisions, preferably by the end of the penultimate week of a session;
- (c) Early distribution of all reports, particularly those of special procedures, to be transmitted to delegations in a timely fashion, at least 15 days in advance of their consideration by the Council, and in all official United Nations languages;
- (d) Proposers of a country resolution to have the responsibility to secure the broadest possible support for their initiatives (preferably 15 members), before action is taken;
- (e) Restraint in resorting to resolutions, in order to avoid proliferation of resolutions without prejudice to the right of States to decide on the periodicity of presenting their draft proposals by:
 - (i) Minimizing unnecessary duplication of initiatives with the General Assembly/Third Committee;
 - (ii) Clustering of agenda items;
 - (iii) Staggering the tabling of decisions and/or resolutions and consideration of action on agenda items/issues.

C. Outcomes other than resolutions and decisions

118. These may include recommendations, conclusions, summaries of discussions and President's Statement. As such outcomes would have different legal implications, they should supplement and not replace resolutions and decisions.

D. Special sessions of the Council

119. The following provisions shall complement the general framework provided by General Assembly resolution 60/251 and the rules of procedure of the Human Rights Council.

120. The rules of procedure of special sessions shall be in accordance with the rules of procedure applicable for regular sessions of the Council.

121. The request for the holding of a special session, in accordance with the requirement established in paragraph 10 of General Assembly resolution 60/251, shall be submitted to the President and to the secretariat of the Council. The request shall specify the item proposed for consideration and include any other relevant information the sponsors may wish to provide.

122. The special session shall be convened as soon as possible after the formal request is communicated, but, in principle, not earlier than two working days, and not later than five working days after the formal receipt of the request. The duration of the special session shall not exceed three days (six working sessions), unless the Council decides otherwise.

123. The secretariat of the Council shall immediately communicate the request for the holding of a special session and any additional information provided by the sponsors in the request, as well as the date for the convening of the special session, to all United Nations Member States and make the information available to the specialized agencies, other intergovernmental organizations and national human rights institutions, as well as to non-governmental organizations in consultative status by the most expedient and expeditious means of communication. Special session documentation, in particular draft resolutions and decisions, should be made available in all official United Nations languages to all States in an equitable, timely and transparent manner.

124. The President of the Council should hold open-ended informative consultations before the special session on its conduct and organization. In this regard, the secretariat may also be requested to provide additional information, including, on the methods of work of previous special sessions.

125. Members of the Council, concerned States, observer States, specialized agencies, other intergovernmental organizations and national human rights institutions, as well as non-governmental organizations in consultative status may contribute to the special session in accordance with the rules of procedure of the Council.

126. If the requesting or other States intend to present draft resolutions or decisions at the special session, texts should be made available in accordance with the Council's relevant rules of procedure. Nevertheless, sponsors are urged to present such texts as early as possible.

127. The sponsors of a draft resolution or decision should hold open-ended consultations on the text of their draft resolution(s) or decision(s) with a view to achieving the widest participation in their consideration and, if possible, achieving consensus on them.

128. A special session should allow participatory debate, be results-oriented and geared to achieving practical outcomes, the implementation of which can be monitored and reported on at the following regular session of the Council for possible follow-up decision.

VII. RULES OF PROCEDURE^e

SESSIONS

Rules of procedure

Rule 1

The Human Rights Council shall apply the rules of procedure established for the Main Committees of the General Assembly, as applicable, unless subsequently otherwise decided by the Assembly or the Council.

REGULAR SESSIONS

Number of sessions

Rule 2

The Human Rights Council shall meet regularly throughout the year and schedule no fewer than three sessions per Council year, including a main session, for a total duration of no less than 10 weeks.

Assumption of membership

Rule 3

Newly-elected member States of the Human Rights Council shall assume their membership on the first day of the Council year, replacing member States that have concluded their respective membership terms.

Place of meeting

Rule 4

The Human Rights Council shall be based in Geneva.

SPECIAL SESSIONS

Convening of special sessions

Rule 5

The rules of procedure of special sessions of the Human Rights Council will be the same as the rules of procedure applicable for regular sessions of the Human Rights Council.

Rule 6

The Human Rights Council shall hold special sessions, when needed, at the request of a member of the Council with the support of one third of the membership of the Council.

PARTICIPATION OF AND CONSULTATION WITH OBSERVERS OF THE COUNCIL

Rule 7

(a) The Council shall apply the rules of procedure established for committees of the General Assembly, as applicable, unless subsequently otherwise decided by the Assembly or the Council, and the participation of and consultation with observers, including States that are not members of the Council, the specialized agencies, other intergovernmental organizations and national human rights institutions, as well as non-governmental organizations, shall be based on arrangements, including Economic and Social Council resolution 1996/31 of 25 July 1996, and practices observed by the Commission on Human Rights, while ensuring the most effective contribution of these entities.

(b) Participation of national human rights institutions shall be based on arrangements and practices agreed upon by the Commission on Human Rights, including resolution 2005/74 of 20 April 2005, while ensuring the most effective contribution of these entities.

ORGANIZATION OF WORK AND AGENDA FOR REGULAR SESSIONS

Organizational meetings

Rule 8

(a) At the beginning of each Council year, the Council shall hold an organizational meeting to elect its Bureau and to consider and adopt the agenda, programme of work, and calendar of regular sessions for the Council year indicating, if possible, a target date for the conclusion of its work, the approximate dates of consideration of items and the number of meetings to be allocated to each item.

(b) The President of the Council shall also convene organizational meetings two weeks before the beginning of each session and, if necessary, during the Council sessions to discuss organizational and procedural issues pertinent to that session.

^e Figures indicated in square brackets refer to identical or corresponding rules of the General Assembly or its Main Committees (A/520/Rev.16).

PRESIDENT AND VICE-PRESIDENTS

Elections

Rule 9

(a) At the beginning of each Council year, at its organizational meeting, the Council shall elect, from among the representatives of its members, a President and four Vice-Presidents. The President and the Vice-Presidents shall constitute the Bureau. One of the Vice-Presidents shall serve as Rapporteur.

(b) In the election of the President of the Council, regard shall be had for the equitable geographical rotation of this office among the following Regional Groups: African States, Asian States, Eastern European States, Latin American and Caribbean States, and Western European and other States. The four Vice-Presidents of the Council shall be elected on the basis of equitable geographical distribution from the Regional Groups other than the one to which the President belongs. The selection of the Rapporteur shall be based on geographic rotation.

Bureau

Rule 10

The Bureau shall deal with procedural and organizational matters.

Term of office

Rule 11

The President and the Vice-Presidents shall, subject to rule 13, hold office for a period of one year. They shall not be eligible for immediate re-election to the same post.

Absence of officers

Rule 12 [105]

If the President finds it necessary to be absent during a meeting or any part thereof, he/she shall designate one of the Vice-Presidents to take his/her place. A Vice-President acting as President shall have the same powers and duties as the President. If the President ceases to hold office pursuant to rule 13, the remaining members of the Bureau shall designate one of the Vice-Presidents to take his/her place until the election of a new President.

Replacement of the President or a Vice-President

Rule 13

If the President or any Vice-President ceases to be able to carry out his/her functions or ceases to be a representative of a member of the Council, or if the Member of the United Nations of which he/she is a representative ceases to be a member of the Council, he/she shall cease to hold such office and a new President or Vice-President shall be elected for the unexpired term.

SECRETARIAT

Duties of the secretariat

Rule 14 [47]

The Office of the United Nations High Commissioner for Human Rights shall act as secretariat for the Council. In this regard, it shall receive, translate, print and circulate in all official United Nations languages, documents, reports and resolutions of the Council, its committees and its organs; interpret speeches made at the meetings; prepare, print and circulate the records of the session; have the custody and proper preservation of the documents in the archives of the Council; distribute all documents of the Council to the members of the Council and observers and, generally, perform all other support functions which the Council may require.

RECORDS AND REPORT

Report to the General Assembly

Rule 15

The Council shall submit an annual report to the General Assembly.

PUBLIC AND PRIVATE MEETINGS OF THE HUMAN RIGHTS COUNCIL

General principles

Rule 16 [60]

The meetings of the Council shall be held in public unless the Council decides that exceptional circumstances require the meeting be held in private.

Private meetings

Rule 17 [61]

All decisions of the Council taken at a private meeting shall be announced at an early public meeting of the Council.

CONDUCT OF BUSINESS

Working groups and other arrangements

Rule 18

The Council may set up working groups and other arrangements. Participation in these bodies shall be decided upon by the members, based on rule 7. The rules of procedure of these bodies shall follow those of the Council, as applicable, unless decided otherwise by the Council.

Quorum

Rule 19 [67]

The President may declare a meeting open and permit the debate to proceed when at least one third of the members of the Council are present. The presence of a majority of the members shall be required for any decision to be taken.

Majority required

Rule 20 [125]

Decisions of the Council shall be made by a simple majority of the members present and voting, subject to rule 19.

Appendix I

**RENEWED MANDATES UNTIL THEY COULD BE CONSIDERED
BY THE HUMAN RIGHTS COUNCIL ACCORDING TO ITS
ANNUAL PROGRAMME OF WORK**

- Independent expert appointed by the Secretary-General on the situation of human rights in Haiti
- Independent expert appointed by the Secretary-General on the situation of human rights in Somalia
- Independent expert on the situation of human rights in Burundi
- Independent expert on technical cooperation and advisory services in Liberia
- Independent expert on the situation of human rights in the Democratic Republic of the Congo
- Independent expert on human rights and international solidarity
- Independent expert on minority issues
- Independent expert on the effects of economic reform policies and foreign debt on the full enjoyment of all human rights, particularly economic, social and cultural rights
- Independent expert on the question of human rights and extreme poverty
- Special Rapporteur on the situation of human rights in the Sudan
- Special Rapporteur on the situation of human rights in Myanmar
- Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea
- Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 (The duration of this mandate has been established until the end of the occupation.)
- Special Rapporteur on adequate housing as a component of the right to an adequate standard of living
- Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance
- Special Rapporteur on extrajudicial, summary or arbitrary executions
- Special Rapporteur on freedom of religion or belief
- Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights
- Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children
- Special Rapporteur on the human rights of migrants
- Special Rapporteur on the independence of judges and lawyers

- Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism
- Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression
- Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health
- Special Rapporteur on the right to education
- Special Rapporteur on the right to food
- Special Rapporteur on the sale of children, child prostitution and child pornography
- Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people
- Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment
- Special Rapporteur on violence against women, its causes and consequences
- Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises
- Special Representative of the Secretary-General for human rights in Cambodia
- Special Representative of the Secretary-General on the situation of human rights defenders
- Representative of the Secretary-General on human rights of internally displaced persons
- Working Group of Experts on People of African Descent
- Working Group on Arbitrary Detention
- Working Group on Enforced or Involuntary Disappearances
- Working Group on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

Appendix II

TERMS IN OFFICE OF MANDATE-HOLDERS

Mandate-holder	Mandate	Terms in office
Charlotte Abaka	Independent Expert on the situation of human rights in Liberia	July 2006 (first term)
Yakin Ertürk	Special Rapporteur on violence against women, its causes and consequences	July 2006 (first term)
Manuela Carmena Castrillo	Working Group on Arbitrary Detention	July 2006 (first term)
Joel Adebayo Adekanye	Working Group on Enforced or Involuntary Disappearances	July 2006 (second term)
Saeed Rajaei Khorasani	Working Group on Enforced or Involuntary Disappearances	July 2006 (first term)

Mandate-holder	Mandate	Terms in office	Mandate-holder	Terms in office	Mandate	Terms in office
Joe Frans	Working Group on people of African descent	July 2006 (first term)	Okechukwu Ibeanu	July 2006 (first term)	Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights	July 2007 (first term)
Leandro Despouy	Special Rapporteur on the independence of judges and lawyers	August 2006 (first term)	Vernor Muñoz Villalobos	August 2006 (first term)	Special Rapporteur on the right to education	July 2007 (first term)
Hina Jilani	Special Representative of the Secretary-General on the situation of human rights defenders	August 2006 (second term)	Juan Miguel Petit	August 2006 (second term)	Special Rapporteur on the sale of children, child prostitution and child pornography	July 2007 (second term)
Soledad Villagra de Biedermann	Working Group on Arbitrary Detention	August 2006 (second term)	Vitit Muntarbhorn	September 2006 (second term)	Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea	July 2007 (first term)
Miloon Kothari	Special Rapporteur on adequate housing as a component of the right to an adequate standard of living	September 2006 (second term)	Leila Zerrougui	September 2006 (second term)	Working Group on Arbitrary Detention	August 2007 (second term)
Jean Ziegler	Special Rapporteur on the right to food	September 2006 (second term)	Santiago Corcuera Cabezat	December 2006 (second term)	Working Group on Enforced or Involuntary Disappearances	August 2007 (first term)
Paulo Sérgio Pinheiro	Special Rapporteur on the situation of human rights in Myanmar	December 2006 (second term)	Walter Kälin	January 2007 (first term)	Representative of the Secretary-General on the human rights of internally displaced persons	September 2007 (first term)
Darko Götlicher	Working Group on Enforced or Involuntary Disappearances	January 2007 (first term)	Sigma Huda	April 2007 (second term)	Special Rapporteur on trafficking in persons, especially in women and children	October 2007 (first term)
Tamás Bán	Working Group on Arbitrary Detention	April 2007 (second term)	Bernards Andrew Nyamwaya Mudho	May 2007 (second term)	Independent Expert on the effects of economic reform policies and foreign debt on the full enjoyment of human rights, particularly economic, social and cultural rights	November 2007 (second term)
Ghanim Alnajjar	Independent Expert appointed by the Secretary-General on the situation of human rights in Somalia	May 2007 (second term)	Manfred Nowak	June 2007 (second term)	Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment	November 2007 (first term)
John Dugard	Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967	June 2007 (second term)	Louis Joinet	June 2007 (second term)	Independent Expert appointed by the Secretary-General on the situation of human rights in Haiti	February 2008 (second term)
Rodolfo Stavenhagen	Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people	June 2007 (second term)	Rudi Muhammad Rizki	July 2007 (first term)	Independent Expert on human rights and international solidarity	July 2008 (first term)
Arjun Sengupta	Independent Expert on the question of human rights and extreme poverty	July 2007 (first term)	Gay McDougall	July 2007 (first term)	Independent Expert on minority issues	July 2008 (first term)
Akic Okola	Independent Expert on the situation of human rights in Burundi	July 2007 (first term)	Doudou Diène	July 2007 (first term)	Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance	July 2008 (second term)
Titinga Frédéric Pacéré	Independent Expert on the situation of human rights in the Democratic Republic of the Congo	July 2007 (first term)	Jorge A. Bustamante	July 2007 (first term)	Special Rapporteur on the human rights of migrants	July 2008 (first term)
Philip Alston	Special Rapporteur on extrajudicial, summary or arbitrary executions	July 2007 (first term)				
Asma Jahangir	Special Rapporteur on freedom of religion or belief	July 2007 (first term)				

Mandate-holder	Mandate	Terms in office	Mandate-holder	Mandate	Terms in office
Martin Scheinin	Special Rapporteur on the promotion and protection of human rights while countering terrorism	July 2008 (first term)	Yash Ghai	Special Representative of the Secretary-General for human rights in Cambodia	November 2008 (first term)
Sima Samar	Special Rapporteur on the situation of human rights in the Sudan	July 2008 (first term)			
John Ruggie	Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises	July 2008 (first term)			
Seyyed Mohammad Hashemi	Working Group on Arbitrary Detention	July 2008 (second term)			
Najjat Al-Hajjaji	Working Group on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination	July 2008 (first term)			
Amada Benavides de Pérez	Working Group on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination	July 2008 (first term)			
Alexander Ivanovich Nikitin	Working Group on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination	July 2008 (first term)			
Shaista Shameem	Working Group on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination	July 2007 (first term)			
Ambeyi Ligabo	Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression	August 2008 (second term)			
Paul Hunt	Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health	August 2008 (second term)			
Peter Lesa Kasanda	Working Group on people of African descent	August 2008 (second term)			
Stephen J. Toope	Working Group on Enforced or Involuntary Disappearances	September 2008 (second term)			
George N. Jabbour	Working Group on people of African descent	September 2008 (second term)			
Irina Zlatescu	Working Group on people of African descent	October 2008 (second term)			
José Gómez del Prado	Working Group on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination	October 2008 (first term)			

Report of the Special Rapporteur on the situation of human rights in Myanmar, A/66/365, 16 September 2011 (excerpts)



General Assembly

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Report of the Special Rapporteur on the situation of human rights in Myanmar

Summary

This is a key moment in Myanmar's history and there are real opportunities for positive and meaningful developments to improve the human rights situation and deepen the transition to democracy. The new Government has taken a number of steps towards these ends. Yet, many serious human rights issues remain and they need to be addressed. The new Government should intensify its efforts to implement its own commitments and to fulfil its international human rights obligations. The international community needs to continue to remain engaged and to closely follow developments. The international community also needs to support and assist the Government during this important time. The Special Rapporteur reaffirms his willingness to work constructively and cooperatively with Myanmar to improve the human rights situation of its people.

Sixty-sixth session

Agenda item 69 (c)

Promotion and protection of human rights: human rights situations and reports of special rapporteurs and representatives

Situation of human rights in Myanmar

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the report of the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana, in accordance with paragraph 30 of General Assembly resolution 65/241.

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I. Introduction

1. The mandate of the Special Rapporteur on the situation of human rights in Myanmar was established by the Commission on Human Rights in its resolution 1992/58 and extended most recently by the Human Rights Council in its resolution 16/24. The current Special Rapporteur, Tomás Ojea Quintana (Argentina), officially assumed the function on 1 May 2008.
2. The present report is submitted pursuant to Human Rights Council resolution 16/24 and General Assembly resolution 65/241, and covers human rights developments in Myanmar since the Special Rapporteur's fourth report to the Council in March 2011 (A/HRC/16/59) and his report to the Assembly in September 2010 (A/65/368).
3. The first regular session of Myanmar's new national Parliament was convened on 31 January 2011 and ended on 23 March. On 30 March, the State Peace and Development Council was officially dissolved and power was transferred to the new Government; the new President, two Vice-Presidents, and 55 other cabinet members were sworn into office in an inauguration ceremony in Nay Pyi Taw. Myanmar thus reached the last step of its seven-step road map to a "genuine, disciplined, multi-party democratic system".
4. President Thein Sein's inaugural speeches to Parliament on 30 March, to cabinet members and Government officials on 31 March and to chief ministers of regional and State Governments on 6 April set out a number of commitments to reform and outlined the new Government's public policy agenda. Of note, the safeguarding of fundamental human rights and freedoms, respect for the rule of law and an independent and transparent judiciary, respect for the role of the media, good governance, the protection of social and economic rights, the development of infrastructure and delivery of basic services, including in ethnic areas, and the improvement of health and education standards, were among the priorities identified.
5. From 16 to 23 May 2011, the Special Rapporteur travelled to Bangkok, Chiang Mai and Mae Hong Son, in Thailand, to meet with various stakeholders, including representatives of ethnic minority groups, community-based and civil society organizations, diplomats and other experts. The Special Rapporteur thanks the Government of Thailand for facilitating his visit, including a meeting with the Minister for Foreign Affairs, Mr. Kasit Piromya.
6. From 21 to 25 August 2011, following an exchange of communications with the Government arising from his previous visit, in February 2010, the Special Rapporteur conducted his fourth mission to Myanmar at the invitation of the Government. In Nay Pyi Taw, the Special Rapporteur met with the Minister for Foreign Affairs, the Minister for Home Affairs, the Minister for Defence, the Deputy Chief of Police, the Minister for Social Welfare, Relief and Resettlement, who also holds the position of the Minister for Labour, the Attorney General, the Chief Justice of the Supreme Court, the Union Election Commission and with some of the presidential advisers. He also met the Speakers and members of the Pyithu and Amyotha Hluttaws, including representatives of ethnic political parties, and observed the second regular session of the Pyithu Hluttaw. He delivered a lecture on international human rights at a training course organized by the Ministry of Home Affairs, which was attended by officials of different ministries and townships. In Yangon, the Special Rapporteur met Daw Aung San Suu Kyi to discuss a range of important human rights issues, conducted a visit to Insein prison, where he met with

seven prisoners of conscience, met with representatives of civil society organizations, former prisoners of conscience and the United Nations country team, briefed the diplomatic community and held a meeting with director-generals of different ministries, at the conclusion of his mission.

7. Following legislative elections, held on 7 November 2010, and the formation of the new Government on 1 April 2011, the Special Rapporteur notes that a number of steps have been taken that have the potential to deepen Myanmar's transition to democracy and to improve the human rights situation. As such, at the end of his mission to the country, the Special Rapporteur welcomed the Government's stated commitments to reform and the priorities set out by President Thein Sein, which included the protection of social and economic rights; the protection of fundamental human rights and freedoms, including through the amendment and revocation of existing laws; good governance and fighting corruption, in cooperation with the people; respect for the rule of law; and an independent and transparent judiciary. He also welcomed the President's emphasis on the need for peace talks with armed groups and the open door for exiles to return to the country. The Special Rapporteur reiterates, however, that these commitments must be translated into concrete action.

8. The Special Rapporteur thanks the Government of Myanmar for its invitation and for the cooperation and flexibility shown during his visit, particularly with respect to the organization of his programme. In addition to the visit, he continued to engage with the Government through meetings with its ambassadors in Geneva and Bangkok, and through written communications.

9. These communications include a joint urgent action letter with the Special Rapporteurs on torture and other cruel, inhuman or degrading treatment or punishment and on the promotion and protection of the right to freedom of opinion and expression, regarding the hunger strike by political prisoners in Insein prison, on 1 June 2011; and a joint urgent action letter with the Chair-Rapporteur of the Working Group on Arbitrary Detention and the Special Rapporteurs on the right to freedom of opinion and expression, on the situation of human rights defenders, on torture and on violence against women, its causes and consequences, on the case of Hnin May Aung, on 21 July 2011. In addition, on 30 June 2011, the Special Rapporteur sent a letter to the Government requesting an update on the status of the prisoners of conscience mentioned in his previous reports.

10. The Special Rapporteur would like to thank the Office of the United Nations High Commissioner for Human Rights (OHCHR), in particular at Geneva, Bangkok and New York, for assisting him in discharging his mandate.

II. Assessing the transition to democracy

11. In its resolution 16/24, the Human Rights Council requested the Special Rapporteur to make "an assessment of any progress made by the Government in relation to its stated intention to transition to a democracy". As a thorough assessment may be beyond the scope of the present report, the Special Rapporteur proposes to address a number of key issues, which, in his view, are essential features of democratic transition in Myanmar: the functioning of key State institutions and bodies; the situation of ethnic minorities, including ongoing tensions in ethnic border areas and armed conflict with some armed ethnic groups; the human rights situation, and truth, justice and accountability.

12. The Special Rapporteur holds the view that central to any democratic transition, anchored in important human rights principles, including participation, empowerment, transparency, accountability and non-discrimination, is the effective functioning and integrity of State institutions and bodies.

13. Many critics have noted that the new Government is comprised of many officials from the previous military Government. Together with military appointees who automatically occupy a quarter of seats, it is reported that 89 per cent of all seats in the legislature are occupied by people with affiliations to the former Government. Yet, the political landscape has changed. The new Government is nominally civilian and there is an emergence of different actors and parties engaging in the political process. Additionally, decision-making has supposedly been decentralized to various ministries, and new institutions and bodies, such as the National Defence and Security Council and the Supreme State Council, have been created. These developments could further the process of transition, and they require close observation, to see how they unfold.

14. Given their central role in any democracy, the Special Rapporteur has paid particular attention to the establishment and functioning of the new national, regional and State legislatures. He is encouraged that the national legislature (comprised of the upper and lower houses — the Amyotha Hluttaw and Pyithu Hluttaw) has begun exercising its powers within the framework of the Constitution and notes what seems to be an opening of space for different actors and parties to engage in the political process. For instance, Government ministers have appeared before Parliament to answer questions, and parliamentary debates are covered by the official media.

15. During its first regular session, important and sensitive issues relevant to the promotion and protection of human rights were discussed, including land tenure rights and land confiscation; the registration of associations and other local organizations, as well as trade unions; discrimination against ethnic minorities in civil service recruitment; the need for the teaching of ethnic minority languages in schools in minority areas; the question of amnesty to Shan political prisoners; and the granting of national identification cards to the Rohingya. Parliamentary committees, in which opposition party members comprised one third of membership, were established, including the Bill Committee, the Rights Committee, the Public Accounts Committee and the Government's Guarantees, Pledges and Undertakings Vetting Committee.

16. During its second regular session, which began on 22 August 2011, additional committees, including the Fundamental Rights, Democracy and Human Rights Committee, were formed. Important issues were also debated, including the provision of medicines to hospitals, the rebuilding of primary schools in certain constituencies, a private school registration bill and environmental conservation. A member of the Pyithu Hluttaw presented motions to release all prisoners of conscience and to deliberate the creation of a "prison bill for the twenty-first century", which would guarantee human dignity to all prisoners. The Speaker of the House rejected the latter motion, stating that the Ministry of Home Affairs was already drafting a revised prisons act.

17. While welcoming these developments, the Special Rapporteur notes the crucial need to clarify a number of the Parliament's practices and its internal rules and procedures, including how often it will meet, the right of members to place items for legislation and policy debate on the parliamentary agenda, and the precise role and

functions of the various committees established. Also of importance is the need to establish clear rules governing parliamentary immunity, particularly the specific instances in which such immunity could be lifted. In this respect, he notes that laws signed by then Senior General Than Shwe, in November 2010, stipulate that parliamentarians will be allowed freedom of expression unless their speeches endanger national security or the unity of the country or violate the Constitution. The Special Rapporteur notes that these are broad categories that are not clearly defined and could be used to limit debate. Members of Parliament should be able to exercise their freedom of speech in the course of discharging their duties. This is essential to ensure a properly functioning parliamentary culture — one in which transparent, open and inclusive debates can be held on all matters of national importance — an issue that the Special Rapporteur emphasized to the Speakers and Members of Parliament.

18. There is also a strong need to enhance the capacity and functioning of the new institution and its members. This was echoed by many interlocutors from different sectors during the Special Rapporteur's mission to Myanmar, some of whom acknowledged a serious lack of knowledge and expertise of parliamentary practices among Members of Parliament and the need for support by professional parliamentarian staff. Accordingly, the Special Rapporteur strongly encourages the Parliament to proactively seek cooperation and assistance from the international community in this regard.

19. Another key institution is the judiciary. The Special Rapporteur observes that the judiciary's capacity, independence and impartiality remain outstanding issues in Myanmar. The Special Rapporteur notes that there do not appear to be any major structural transformations within the judiciary. The new Chief Justice was formerly one of the justices on the Supreme Court, and the new Attorney General was previously a Deputy Attorney General, with no further information on new appointments to the courts.

20. Concerns regarding the functioning of the judiciary also remain. The Special Rapporteur continues to receive information of criminal cases being heard behind closed doors. In one case, the family of former army captain, Nay Myo Zin, was barred from the closed court inside Insein prison, on 2 June 2011. Nay Myo Zin, who left the army in 2005 and then volunteered for a blood donor group headed by a member of the National League for Democracy, had been charged under the Electronics Act. During the proceedings, judges heard a statement from Deputy Police Commander, Swe Linn, who had conducted the search at his house, in early April 2011, and found a document in his e-mail inbox entitled "National Reconciliation". On 26 August 2011, he was sentenced to 10 years in prison. According to reports, he appears to have been subjected to torture resulting in shattered lower vertebrae and a broken rib, which led to his attending court on a hospital stretcher. His requests for external hospitalization have also been reportedly denied.

21. Another concern regarding fair trials is the access to counsel. During the Special Rapporteur's meeting with Daw Aung San Suu Kyi and the Executive Committee of the National League for Democracy, he was informed of the problem of the arbitrary revocation of licences of lawyers who defend prisoners of conscience. The Special Rapporteur urges the Government to reconsider these revocations and to guarantee the effective right to counsel and to allow lawyers to practise their profession freely.

22. The Special Rapporteur therefore encourages the Government of Myanmar to implement his previous recommendations on the judiciary, the fourth core human rights element as contained in his earlier report (A/63/341), and to undertake the series of measures proposed, in order to enhance its independence and impartiality. These include guarantees for due process of law, especially public hearings in trials against prisoners of conscience. These and other measures are detailed in the Basic Principles on the Independence of the Judiciary (1985); the Basic Principles on the Role of Lawyers (1990); the Guidelines on the Role of Prosecutors (1990); the Procedures for the effective implementation of the Basic Principles on the Independence of the Judiciary (1989); and the Beijing Statement of Principles of the Independence of the Judiciary (1997). He also encourages the Government to seek technical assistance, particularly in the area of capacity-building and training of judges and lawyers.

23. Further, the Special Rapporteur is concerned at allegations of widespread corruption, which, according to many sources, is institutionalized and pervasive. According to studies by civil society organizations, payments are made at all stages in the legal process and to all levels of officials, for such routine matters as access to a detainee in police custody or determining the outcome of a case. As Myanmar achieves greater economic development, there will likely be more conflicts and contests that will need to be resolved in the courts. The Special Rapporteur therefore welcomes the Government's stated commitment to combating corruption and urges that priority attention be given to the judiciary in this respect.

24. The Special Rapporteur notes that Myanmar has yet to establish complete civilian control over the military, another key feature of democratic transition. While there have been developments, such as changes within its leadership and the abolishment of supra-ministerial policy committees, he notes the military's role in the legislatures (with military appointees occupying 25 per cent of seats), as well as the role of the new Commander-in-Chief, General Min Aung Hlaing, who independently administers and adjudicates all matters pertaining to the armed forces and must be consulted by the President on appointments of the Ministers for Defence, Home Affairs and Border Affairs (as provided in the 2008 Constitution). Additionally, the Constitution establishes permanent military tribunals, separate from oversight of the civilian justice mechanism, for which the Commander-in-Chief will exercise appellate power. Further, and as outlined in greater detail below, the Special Rapporteur has continued to receive reports of human rights violations committed by the military, particularly in ethnic border areas. The Special Rapporteur refers to his third core human rights element and encourages the adoption by the military of the measures proposed, which could help to address the above concerns.

25. The Special Rapporteur's previous report to the Human Rights Council (A/HRC/16/59) stated that the national elections, held in November 2010, failed to meet international standards and highlighted restrictions on the freedoms of expression, assembly and association. The Special Rapporteur's previous report to the General Assembly (A/65/368) stated that the electoral legal framework and its implementation by the Election Commission and other relevant authorities in many ways handicapped party development and participation, in the context of Myanmar's first election in over two decades. During his visit to Myanmar, the Union Election Commission acknowledged difficulties and flaws in the conduct of the elections, partly due to the number of polling stations and the inexperience of officials. The

Special Rapporteur was also informed that 29 complaints had been filed with the Election Commission, with decisions made in several cases. No further information was provided although it was noted that such decisions had been published in the official gazette.

26. Since the elections, the Special Rapporteur has received reports that the Union Election Commission, despite new members appointed by Parliament, continues to discourage the role of parties in the political process. For example, on 6 July 2011, three elected representatives of the Rakhine Nationalities Development Party were disqualified, by tribunal, following complaints by Union Solidarity and Development Party representatives. The Election Commission also ordered the Rakhine Nationalities Development Party representatives to pay compensation of 1.5 million kyat (about US\$ 1,765) each to the representatives of the Union Solidarity and Development Party, reportedly for attacking the previous military Government and the Union Solidarity and Development Party in their election campaigns during 2010.

27. With by-elections expected later this year for some 40 Pyithu Hluttaw, Amyotha Hluttaw and State or regional Hluttaw seats, the Special Rapporteur strongly urges the Union Election Commission to learn lessons from the November 2010 elections and to play a role in ensuring that the upcoming by-elections are held in a more participatory, inclusive and transparent manner. Complaints filed to the Election Commission should be addressed in a timely, open and transparent manner. Significant improvements to the electoral process would be important for Myanmar's democratic transition.

28. Finally, one new institution that has received positive attention is the new Presidential Advisory Board, whose members include U Myint, as head of the Economic Advisory Group, Sit Aye, who heads the Legal Advisory Group and Ko Ko Hlaing, who heads the Political Advisory Group. The Special Rapporteur met with some of the presidential advisers during his mission and held a frank and fruitful exchange of views, including on important future initiatives. He believes that they have played a key role in advising the President on the challenges facing Myanmar and the priorities for reform. He therefore encourages them to continue their important functions and to provide suggestions on how to translate or implement commitments into concrete action.

III. The situation of ethnic minorities

29. The situation of ethnic minority groups, including armed conflict in the border areas, presents serious limitations to the Government's intention to transition to democracy. In his previous reports, the Special Rapporteur highlighted concerns regarding the systematic and endemic discrimination faced by ethnic and religious minority groups, in particular in northern Rakhine and Chin States. Such concerns included policies preventing the teaching of minority languages in schools, the denial of citizenship to and restriction of movement of the Rohingya, restrictions on the freedom of religion or belief and economic deprivation. The Special Rapporteur has called upon the Government to ensure that ethnic minorities are granted fundamental rights.

30. The Government has said that parliaments are the only venue for discussion on national reconciliation. While ethnic political parties are represented in the national, regional and State legislatures, the November 2010 electoral process excluded

**Interim report of the United Nations Secretary-General on the
situation of human rights in Iran, A/HRC/16/75,
14 March 2011 (excerpts)**

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Sixteenth session
Agenda item 2

Human rights situations that require the Council's attention

Interim report of the Secretary-General on the situation of human rights in Iran*

Summary

The present report is submitted in accordance with General Assembly resolution 65/226, in which the General Assembly requested the Secretary-General to submit an interim report to the Human Rights Council at its sixteenth session. The report reflects the patterns and trends in the human rights situation in the Islamic Republic of Iran and provides information on the progress made in the implementation of the present resolution, including recommendations to improve its implementation. In its resolution 65/226, the General Assembly called upon the Government of the Islamic Republic of Iran to address the substantive concerns highlighted in the previous report of the Secretary-General (A/65/370) and the specific calls to action found in previous resolutions of the Assembly (resolutions 63/191, 62/168 and 64/176), and to respect fully its human rights obligations, in law and in practice, in relation to a number of specifically identified concerns.

* Late submission.

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I. Introduction

1. The Present report on the situation of human rights in the Islamic Republic of Iran is submitted pursuant to General Assembly resolution 65/226, in which the General Assembly requested the Secretary-General to submit an interim report to the Human Rights Council at its sixteenth session. The report reflects the patterns and trends in the human rights situation in the Islamic Republic of Iran and provides information on the progress made in the implementation of the present resolution, including recommendations to improve its implementation. The report also draws upon observations made by treaty monitoring bodies and the Special Procedures of the Human Rights Council¹.
2. Since the last report of the Secretary-General to the General Assembly dated 15 September 2010, the human rights situation in Iran has been marked by an intensified crackdown on human rights defenders, women's rights activists, journalists and government opponents. Concerns about torture, arbitrary detentions and unfair trials continue to be raised by UN human rights mechanisms. There was a noticeable increase in application of the death penalty, including in cases of political prisoners, since the beginning of the year 2011. Discrimination persisted against minority groups, in some cases amounting to persecution. Against this backdrop, there were however some positive developments including Iran's signing of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict in September 2010, its examination before the Committee for the Elimination of Racial Discrimination in August 2010, and the conduct of a judicial colloquium together with OHCHR in December 2010.
3. The following sections of the report highlight relevant developments in the thematic areas outlined in paragraph 4 of the resolution: torture and cruel, inhuman or degrading treatment or punishment, including flogging and amputations; death penalty including public executions; executions of juvenile offenders; stoning as method of execution; women's rights; rights of minorities; freedom of religion, freedom of peaceful assembly and association, freedom of opinion and expression and due process rights. The report also surveys recent developments in Iran's engagement with the international human rights system pursuant to paragraphs 6, 7 and 8 of the resolution. It concludes with some recommendations on issues of concern and measures to improve the implementation of the resolution.
4. The Secretary-General met with Mr. Mohammad Javad Ardeshir Larjani, Senior Adviser to the Head of the Judiciary and Secretary-General of the High Council for Human Rights, Iran, on 19 November 2010 in New York. The Secretary-General raised several human rights issues, such as constraints on human rights advocates, capital punishment, juvenile execution and concerns related to minority rights. Mr. Larjani conveyed that Iran appreciated the general cooperation with the United Nations on Human Rights both with the Secretary-General and the High-Commissioner for Human Rights. Mr. Larjani, however, insisted that Iran strongly rejected the recent General Assembly resolution on human rights in Iran.

¹ During the period since the Secretary-General's last report to the General Assembly, a number of UN Special Procedures mandate-holders have reported on their communications with the Government on cases of concern. These are flagged in relevant sections of the report and detailed in Annex One.

D. Stoning as a method of execution

21. The application of stoning as a method of execution in Iran was again a focus of concern during this period. Under the existing Islamic Penal Code of Iran, adultery while married is punishable by stoning. Despite a moratorium on stoning declared by the head of Judiciary in 2002, the Judiciary continues to sentence both men and women to execution by stoning. The instruction serves as guidance for individual judges but lacks binding legal effect.
22. The Human Rights Committee holds the view that stoning to death for adultery is a punishment that is grossly disproportionate to the nature of the crime.³⁰ Likewise, the Special Rapporteur on Torture stressed that states cannot invoke provisions of domestic law to justify the violation of human rights obligations under international law, including the prohibition of corporal punishment.³¹ Iran however maintains that the punishment of stoning for married persons who commit adultery serves as deterrence in order to maintain the strength of family and society and that such charges are, by design, very difficult to prove. At a judicial colloquium held in December 2010 (detailed below), Dr Mohamad Javad Larjani argued that stoning should not be categorised as a 'method of execution', but rather a method of punishment which is actually more lenient because 50 per cent of persons survive. Nevertheless, the authorities have indicated that parliament is currently reviewing the punishment of death by stoning.
23. The case of Sakineh Mohammadi Ashtiani, who was sentenced to death by stoning in 2006, received considerable international attention. Ms Ashtiani was convicted of the murder of her husband, but was also charged with adultery while being married and sentenced to death by stoning. She has already spent five years in prison and received 99 lashes. Following an international outcry, the authorities confirmed, most recently on 17 January 2011, that the "stoning penalty of Ms Ashtiani is suspended since families of her husband have forgiven her, but she was sentenced to 10-years imprisonment."³² On 9 February 2011, Iran's Prosecutor General announced that the sentence of Ms Ashtiani has not been revoked.³³ During the trial proceedings, the authorities however arrested Mr Javid Houtan Kiyan, her defense attorney, and Mr Sajjad Qaderzadeh, her son, and also aired her confessions on television, which raised serious concerns about the fairness of the trial proceedings.

E. Women's rights

24. In his previous reports to the General Assembly, the Secretary-General has reported in detail on concerns relating to the protection of women's rights in Iran. In particular, he has raised concern with the suppression of women's rights activists as well as female journalists, many of whom have faced intimidation and harassment, and in some cases detention or travel bans. In her report to the Human Rights Council in June 2010, the Special Rapporteur on violence against women, its causes and consequences reported on several past communications with the Iranian authorities which are detailed in Annex One, particularly in relation to arrested members of the Campaign for Equality, also known as the "one million signatures" campaign. The Iranian authorities contest that there is a wide

³⁰ Human Rights Committee, General Comment 20.

³¹ A/60/316 Para 28

³² According to Iranian press, the Chairwoman of the Iranian Parliament Human Rights Committee wrote in these terms to Brazilian President Dilma Rousseff.

³³ <http://www.isna.ir/isna/NewsView.aspx?ID=News-1696800&Lang=E>
<http://www.isna.ir/isna/newsview.aspx?id=news-1711851&lang=p>

perform their professional duties, and the value of exchanges of international experiences and practice of this kind. The High Commissioner encouraged Iran to engage fully with the UN human rights mechanisms, by facilitating country visits by Special Rapporteurs and allowing independent observers access to high profile trials.

54. Discussions among the participants addressed a wide range of issues, with considerable attention to various elements of fair trial procedure in the light of the main element of the General Comment 32 made by the United Nations Human Rights Committee on Article 14 of the ICCPR. The discussion also touched on pre-trial investigation, arrest procedure, issuance of warrants, judicial review and supervision of investigation, time limits for temporary detention, notification and communication with families, access to lawyers, the role of prosecutors vis-à-vis judges, the right not to be coerced into making self-incriminatory statements and confessions, the supervision of places of detention and separation of pre-trial detainees from convicted prisoners, prison conditions, protection needs of women prisoners, and children with women in detention, as well as judicial training and in-service professional development. The experts noted the safeguards provided in Iran's Constitution, as well as executive directives since passed as law, but also considerable ambiguity and lack of clarity in their implementation. There was no official outcome or communiqué from the meeting.

IV. Conclusion and recommendations

55. The present report highlights many areas of continuing concern for human rights in the Islamic Republic of Iran. The Secretary-General has been deeply troubled by reports of increased executions, amputations, arbitrary arrest and detention, unfair trials, and possible torture and ill-treatment of human rights activists, lawyers, journalists and opposition activists.

56. The Secretary-General encourages the Government to address the concerns highlighted in the report and the specific calls to action found in previous resolutions of the General Assembly as well as the Universal Periodic Review process. The Secretary-General notes the important and constructive role the human rights lawyers and activists play in protecting human rights and encourages the Government of Iran to fully guarantee freedom of expression and assembly and to open up greater space for human rights lawyers and activists.

57. In relation to other concerns identified in the report, the Secretary-General notes that the authorities have taken some positive steps, for instance to prevent stoning as a method of execution or limit the application of the death penalty to juvenile offenders. The Secretary-General expresses concern, however, that these measures have not been systematically enforced and cases of this nature continue to arise. He encourages the Government to revise national laws, particularly the Penal Code and juvenile justice laws, to ensure compliance with international human rights standards and prevent these applications of the death penalty and other punishments which are prohibited under international law.

58. The Secretary-General welcomes the recent signing of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict, and calls upon the Government to also ratify other international human rights treaties, in particular the Convention on the Elimination of All Forms of Discrimination against Women and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and to withdraw the reservations it has made upon the signature and ratification of various human rights treaties, as recommended by the respective treaty bodies.

59. The Secretary-General welcomes Iran's recent efforts to update its periodic reporting to the human rights treaty bodies. He encourages Iran to act upon the concluding observations made in August 2010 by the Committee for the Elimination of Racial Discrimination with respect to discriminatory practices against women, ethnic and religious minorities and other minority groups.

60. Although the Government issued a standing invitation to the Special Procedures mandate holders of the Human Rights Council in 2002, the Secretary-General regrets that no visit has taken place since 2005 and encourages the Government to facilitate their requested visits to the country as a matter of priority in order that they might conduct more comprehensive assessments. The Secretary-General is also concerned about the low rate of reply to the large number of communications sent by the Special Procedures, alleging very serious human rights violations and calls upon the Government to strengthen its collaboration with the Human Rights Council in this particular area. The Secretary-General underscores the valuable contribution special procedures mandates can make to monitoring and reporting on the human rights situation in Iran, as well as facilitating technical assistance in relevant areas.

**Situation of human rights in the Islamic Republic of Iran,
United Nations Human Rights Council Resolution 16/9
of 24 March 2011**



General Assembly

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Human Rights Council

Sixteenth session

Agenda item 4

Human rights situations that require the Council's attention

Resolution adopted by the Human Rights Council*

16/9

Situation of human rights in the Islamic Republic of Iran

The Human Rights Council,

Guided by the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenants on Human Rights and other relevant international human rights instruments,

Recalling General Assembly resolution 65/226 of 21 December 2010, and regretting the lack of cooperation of the Islamic Republic of Iran with the requests of the Assembly made in that resolution,

Welcoming the interim report of the Secretary-General on the situation of human rights in the Islamic Republic of Iran submitted to the Human Rights Council,¹ and expressing serious concern at the developments noted in that report,

Recalling Human Rights Council resolutions 5/1, on the institution-building of the Council, and 5/2, on the code of conduct for special procedures mandate holders of the Council, of 18 June 2007, and stressing that mandate holders are to discharge their duties in accordance with those resolutions and the annexes thereto,

1. *Decides* to appoint a special rapporteur on the situation of human rights in the Islamic Republic of Iran, to report to the Human Rights Council and to the General Assembly, to present an interim report to the Assembly at its sixty-sixth session and to submit a report to the Council for its consideration at its nineteenth session;

2. *Calls upon* the Government of the Islamic Republic of Iran to cooperate fully with the Special Rapporteur and to permit access to visit the country as well as all information necessary to allow the fulfilment of the mandate;

* The resolutions and decisions adopted by the Human Rights Council will be contained in the report of the Council on its sixteenth session (A/HRC/16/2), chap. I.

¹ A/HRC/16/75.

3. *Requests* the Secretary-General to provide the Special Rapporteur with the resources necessary to fulfil the mandate.

*45th meeting
24 March 2011*

[Adopted by a recorded vote of 22 to 7, with 14 abstentions. The voting was as follows:

In favour:

Argentina, Belgium, Brazil, Chile, France, Guatemala, Hungary, Japan, Maldives, Mexico, Norway, Poland, Republic of Korea, Republic of Moldova, Senegal, Slovakia, Spain, Switzerland, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Zambia

Against:

Bangladesh, China, Cuba, Ecuador, Mauritania, Pakistan, Russian Federation

Abstaining:

Bahrain, Burkina Faso, Cameroon, Djibouti, Gabon, Ghana, Jordan, Malaysia, Mauritius, Nigeria, Saudi Arabia, Thailand, Uganda, Uruguay]

Report of the Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, Okechukwu Ibeanu, Addendum, Mission to India, A/HRC/15/22/Add.3, 2 September 2010 (excerpts)



Distr.: General
2 September 2010
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Human Rights Council

Fifteenth session

Agenda item 3

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

Report of the Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, Okechukwu Ibeanu*

Addendum

Mission to India**

Summary

At the invitation of the Government, the Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights conducted a country visit to India from 11 to 21 January 2010. The purpose of the mission was to examine the adverse effects that hazardous activities, such as shipbreaking and the recycling of electrical and electronic waste (e-waste), have on the enjoyment of human rights of countless individuals working in these sectors or living close to the places where these activities take place. During the mission, the Special Rapporteur met with a wide range of Government representatives and non-State actors, and visited an e-waste recycling facility in Roorkee, informal small-scale laboratories for the dismantling and recycling of electronic products at Shastri Park in the suburb of the capital, a facility for the treatment, storage and disposal of hazardous wastes in Ankleshwar, and a number of shipbreaking yards in Alang and Mumbai.

The Special Rapporteur welcomes the significant progress the country has made in the area of the management and disposal of hazardous products and wastes. India has developed a comprehensive legal framework to protect human rights and ensure the

* Late submission.

** The summary is being circulated in all official languages. The report itself, contained in the annex to the summary, is being circulated in the language of submission only.

environmentally sound management of hazardous products and wastes throughout their life cycle. With specific regard to shipbreaking, the Special Rapporteur notes with satisfaction the improvement of the health and safety conditions in Alang/Sosiyā, as well as the efforts made by the regulatory authority and the industry to improve the health and quality of life of workers and their families. With regard to e-waste, the Special Rapporteur welcomes the various initiatives undertaken by Indian authorities to address the e-waste problem in India, and in particular the elaboration of the draft rules on the environmentally sound management and disposal of e-waste.

Despite the progress made, the Special Rapporteur identifies a number of key challenges. National legislation on waste management and health and safety at work is not effectively implemented, and the current institutional framework appears inadequate to respond to the health and environmental challenges posed by the generation, management, handling, transport and disposal of toxic and dangerous products and wastes. The health and safety situation prevailing at the shipbreaking yards continues to remain critical, especially in Mumbai, where the working conditions and the quality of facilities remain highly inadequate for guaranteeing health and safety at work and an adequate standard of living for those employed in the shipbreaking sector. The Special Rapporteur notes that at present, the existing legal framework is not sufficient to ensure the environmentally sound management and disposal of e-waste and expresses his concerns about the extremely dangerous recovery processes and techniques used in the informal e-waste recycling sector, as well as about the widespread contamination caused by the unsound disposal of e-waste into the environment.

The Special Rapporteur concludes with a series of recommendations aimed to assist the Government in its efforts to promote the effective enjoyment of human rights by those individuals and communities who may be adversely affected by the unsound management and disposal of hazardous products and wastes.

Annex

Report of the Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights on his mission to India (11 to 21 January 2010)

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I. Introduction

1. The Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights conducted a country visit to India from 11 to 21 January 2010. He would like to express his gratitude to the Government of India for the invitation, as well as for the support provided to him throughout the visit. The Special Rapporteur also wishes to thank representatives of the United Nations Development Programme (UNDP) in India for their valuable cooperation and assistance in arranging the agenda for the mission.

2. The purpose of the visit was to examine the progress made, and the difficulties encountered, by the country in implementing its obligations under human rights and environmental law to ensure the sound management and disposal of hazardous products and wastes. In particular, the aim of the mission was to gather first-hand information on the adverse effects that hazardous activities, such as shipbreaking and the recycling of electrical and electronic waste (e-waste), have on the enjoyment of human rights of the countless individuals working in these sectors or living close to the places where these activities take place.

3. During his visit, the Special Rapporteur met with senior representatives of the following: the Ministry of External Affairs; the Ministry of Environment and Forests; the Ministry of Labour and Employment; the Ministry of Steel; the Ministry of Shipping; the Ministry of Agriculture; the Central Pollution Control Board; and the State Pollution Control Boards in Gujarat and Maharashtra. The Special Rapporteur also met representatives of several United Nations specialized agencies, programmes and bodies, representatives of the donor community, academics, and members of civil society organizations, trade unions and the private sector.

4. The Special Rapporteur had the opportunity to visit an e-waste recycling facility in Roorkee, Uttarakhnad, and a number of informal small-scale laboratories for the dismantling and recycling of electrical and electronic products at Shastri Park, in the suburbs of Delhi. He also visited a facility for the treatment, storage and disposal of hazardous wastes in Ankleshwar, Gujarat, and a number of shipbreaking yards in Alang/Sosiya, Gujarat, and Mumbai, Maharashtra.

II. Legal and institutional framework

A. International obligations

5. India is a party to a number of international human rights treaties, including the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. Pursuant to these treaties, the country has undertaken an obligation to protect individuals and communities within its jurisdiction by eliminating, or reducing to a minimum, the risks that hazardous products and wastes may pose to the enjoyment of human rights, including the right to life, the right to the enjoyment of the highest attainable standard of physical and mental health, the right to safe and healthy working conditions, the right to food and safe drinking water, the right to adequate housing, the right to information and public participation and other human rights enshrined in the Covenants and the Universal Declaration of Human Rights.

6. India has ratified some multilateral environmental agreements regulating the sound management and disposal of toxic and dangerous products and wastes, including the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and

updated scientific data from the regulatory authorities concerned and the State Pollution Control Boards with regard to the actual impact of shipbreaking activities in Alang/Sosiya and Mumbai on environmental media.

63. He also notes with concern that according to information provided by the International Metalworkers' Federation, unscrupulous yards owners at times circumvent the costs associated with the environmentally sound disposal of asbestos and other hazardous wastes generated during the dismantling process by illegally dumping these toxic wastes in neighbouring villages.

B. E-waste

64. The term "e-waste" is generally used to describe obsolete, broken or discarded appliances using electricity, such as computers, mobile phones and household appliances. Electrical and electronic equipment (EEE) are made of a large number of different substances and materials. Metals (including iron, copper, aluminium and gold) account for 60 per cent of e-waste, while plastics account for 20 per cent. E-waste also contains a number of hazardous substances, which can be released in the workplace and in the surrounding environment during the separation and recovery process. Three levels of toxic emissions can be distinguished, namely:

- (a) Primary emissions: hazardous substances that are contained in e-waste (for example, lead, mercury, arsenic and PCBs);
- (b) Secondary emissions: hazardous reaction products of e-waste substances as a result of improper treatment (for example, dioxins or furans formed by incineration/inappropriate smelting of plastics with halogenated flame retardants);
- (c) Tertiary emissions: hazardous substances or reagents that are used during recycling (for example, cyanide or other leaching agents, mercury for gold amalgamation) and that are released because of inappropriate handling and treatment.

65. The adverse effects that these hazardous substances may have on human health and the environment have already been considered in previous reports of the Special Rapporteur.¹⁶

1. E-waste in India: facts and figures

66. UNEP estimates that 20 to 50 million tons of e-waste are generated worldwide on an annual basis. This volume is expected to increase at 3 to 5 per cent a year, that is, at a rate nearly three times faster than the growth in municipal waste streams.¹⁷ In comparison to the European and American markets, the increase in e-waste generation is slower in India, due to the late technological surge in the country and the tendency to use products for longer periods. However, in the first quarter of 2010, India's personal computer sales touched 2.2 million, a growth of 33 per cent from the same period in 2009,¹⁸ and worldwide mobile phone sales increased by 17 per cent, thanks in part to the growth of emerging markets, including India.¹⁹

¹⁶ See for example A/HRC/15/22, paras. 43-44 (lead) and 38-40 (mercury), and A/HRC/12/26, para. 19 (PCBs, polyvinyl chloride and heavy metals).

¹⁷ UNEP, "E-waste: the hidden side of IT equipment's manufacturing and use", Environment Alert Bulletin No. 5 (January 2005), p. 1.

¹⁸ "India's computer sales up 33 per cent in first quarter", *Economic Times*, 23 May 2010.

¹⁹ "Mobile phone sales grows 17 pc in Q1 2010", *Voice of India*, 20 May 2010.

67. The ongoing technological modernization of Indian society has increased the replacement frequency of electronic products, and has in turn led to a dramatic growth in the generation of e-waste. It has been estimated that 330,000 tons of e-waste are generated annually in India. By 2012, India is expected to cross the 800,000-ton mark.²⁰ The generation of e-waste appears to be unevenly distributed, with the west and the south of India generating 65 per cent of this waste. Mumbai alone generates around 19,000 tons of e-waste per annum, and a substantial part of it is sent to recycling markets located in other parts of the country.²¹ The Government, banking and financial institutions and the industrial sector account for some 70 per cent of the e-waste produced.

68. In addition to locally generated e-waste, it appears that an additional 50,000 tons of end-of-life or obsolete EEE, especially computers, are illegally imported from countries where more restrictive legislation makes it more expensive to recycle locally.²² Such countries include the United States of America and European Union members.

69. At present, it appears that only 3 to 5 per cent of e-waste is recycled in authorized recycling facilities. The vast majority of EEE is currently collected, dismantled and processed in the informal sector by some 80,000 workers, including women and children, who earn their livelihood by breaking down old computers and other high-tech devices to recover precious metals such as gold, copper and silver. The work is done largely by hand, using rudimentary techniques. Workers recovering glass by hammering cathode ray tubes or heating PCBs to remove capacitors are a common sight in most workshops dismantling e-waste. Workers do not use any protective gear to guard against hazardous substances released during the breaking of obsolete EEE.

70. The Delhi area is the main hub for informal recycling of e-waste in India, with about 25,000 workers engaged in the various stages of the process. The recycling business is based on a network of collectors, traders and recyclers. Each phase of the process adds value to the materials and creates job opportunities for a great number of people. The e-waste market is not centred in one main area, but is spread around different zones, each handling a specific stage of the process (for example storage, component separation, plastic shredding, acid processing/leaching, open burning and residue dumping).

2. Legal framework

71. So far, India has not adopted any specific environmental laws or regulations on e-waste. Existing laws and regulations on waste management do not contain any direct reference to e-waste nor do they provide any guidance on its sound management and disposal. However, since e-waste, or its constituents, fall under the category of "hazardous" and "non-hazardous waste", they are covered under the purview of existing legislation, such as the Hazardous Wastes Rules, 2008, and the Municipal Solid Waste Rules, 2000.

72. In 2008, the Ministry of Environment and Forests issued the "Guidelines for the Environmentally Sound Management of E-waste". Although not legally binding, the Guidelines contain a set of recommendations for all those who handle e-waste, including generators, collectors, transporters, dismantlers, and recyclers, irrespective of their scale of operation, to ensure the environmentally sound management of e-waste. The Guidelines incorporate the notion of extended producer responsibility, an environmental policy

²⁰ Nivi Shrivastava, "E-waste on the rise", *Asian Age*.

²¹ Toxics Link, *Mumbai: Choking on E-waste: A Study on the Status of E-waste in Mumbai* (2007), p. 12.

²² For example, it has been estimated that recycling a computer in the United States of America costs about US\$ 20 whereas the same operation in India costs US\$ 2. See www.mait.com/admin/press_images/press77-ty.htm.

developing informal social security schemes to ensure a minimum level of coverage of risks and contingencies for all workers in the yards.

98. The Special Rapporteur urges regulatory authorities in Alang/Sosiya and the industry to allocate additional human, technical and financial resources to existing health facilities in Alang/Sosiya. Since no facilities of a permanent nature, except first-aid and ambulance services, exist in Mumbai, the Special Rapporteur urges MPT and the shipbreaking industry to establish such facilities with no further delay.

99. The Special Rapporteur is seriously concerned at the poor conditions in which most workers live, especially in Mumbai. He calls on GMB and MPT to provide appropriate plots of lands, and to facilitate – with the financial help of the shipbreaking industry – the construction of adequate housing facilities for those who work in the yards. Adequate access to safe drinking water and sanitation facilities should also be provided within and outside the yards. Taking into account that about 20 per cent of workers are accompanied by their families, the Special Rapporteur also calls on the Government of India and regulatory authorities to establish and maintain schools or formal education facilities for the children of those employed in the yards.

100. Finally, the Special Rapporteur recommends that an independent study be carried out to assess the actual and potential adverse effects caused by the discharge of hazardous substances and materials into the natural environment. Such a study should also assess the steps that need to be taken for the gradual phasing out of “beaching” in favour of more environmentally friendly methods of shipbreaking.

E. E-waste

101. The Special Rapporteur calls on the Ministry of Environment and Forests to finalize, as a matter of priority and in close consultation with civil society organizations and the e-waste informal recycling sector, the adoption of the e-waste (management and handling) rules, 2010.

102. The Special Rapporteur also recommends that India develop a national implementation plan to ensure the sound management and disposal of e-waste. Such a plan should identify appropriate incentives to ensure that obsolete electrical and electronic equipment (EEE) be dismantled and recycled only in authorized recycling facilities, and facilitate the integration of the informal sector – which at present recycles at least 95 per cent of e-waste generated or imported into the country – in the new Government policies on the sound management and disposal of e-waste.

103. The Special Rapporteur urges Indian authorities to adopt all appropriate measures to improve health and safety working conditions in small-scale informal workshops. Such measures should include the organization of safety trainings for workers and awareness-raising campaigns on the risks associated with the improper handling and disposal of hazardous substances contained in obsolete EEE, as well as on the precautions to adopt in order to minimize any adverse effects on health and the environment.

104. Lastly, the Special Rapporteur considers that the new draft rules might be ineffective in controlling illegal trade, since they prohibit only the import of EEE in India for charity. He recommends that the current draft be reviewed to include specific provisions to prohibit the import of obsolete EEE – in particular computers – as scrap metal or second-hand products.

