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ANNUAL REPORT OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS AND REPORTS OF THE OFFICE OF THE HIGH COMMISSIONER AND THE SECRETARY-GENERAL

Outcome of the expert consultation on the issue of protecting the human rights of civilians in armed conflict*

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

* The present report was submitted late in order to take into account the expert consultation held on 15 April 2009.

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I. INTRODUCTION

1. In its resolution 9/9, the Human Rights Council invited the Office of the United Nations High Commissioner for Human Rights (OHCHR) to convene, within existing resources, an expert consultation, open to the participation of Governments, regional organizations, relevant United Nations bodies and civil society organizations, and in consultation with the International Committee of the Red Cross (ICRC), on the issue of protecting the human rights of civilians in armed conflict, and requested OHCHR to report on the outcome of that consultation, in the form of a summary of discussions on the above-mentioned issue, to the Council at its eleventh session.

2. The expert consultation was announced on the public website of OHCHR. On 9 April 2009, notes verbales were sent to all permanent missions in Geneva and the President of the Human Rights Council. The expert consultation was held in Geneva on 15 April 2009, in consultation with ICRC, in accordance with Council resolution 9/9. The expert consultation was chaired by Professor Georges Abi-Saab, former judge of the International Criminal Tribunal for the Former Yugoslavia Appeals Chamber and Honorary Professor, Graduate Institute of International and Development Studies (see also annex). Representatives from 16 Member States: Algeria, Belgium, Brazil, Canada, Egypt, Equatorial Guinea, Germany, Hungary, Pakistan, Qatar, the Russia Federation, Sri Lanka, Switzerland, the Syrian Arab Republic, Turkey and the United Kingdom of Great Britain and Northern Ireland and one from the United Nations Children's Fund (UNICEF) attended the meeting as observers. The present report provides a summary of the discussion by the experts. The draft was circulated to the experts for comments. All comments received were taken into consideration when finalizing the report. When reviewing the report, ICRC confirmed that the expert meeting had been organized in consultation with it. It further stated that many of the questions raised during the expert consultation were not, in its view, settled international law. Therefore, ICRC considered it difficult to draw any definitive conclusions at the current stage on many of the substantive legal matters involved or on procedural aspects on improving compliance, such as monitoring and similar mechanisms.

3. The expert consultation comprised one opening session and three substantive sessions. The substantive sessions were structured around three thematic issues: (a) the legal framework, namely the continued application of international human rights law in situations of armed conflict; (b) the relationship between international human rights law and international humanitarian law, including the complementary and mutually reinforcing application of human rights law and international humanitarian law, the question of lex specialis, issues arising from the application of article 4 of the International Covenant on Civil and Political Rights, and other rights of particular relevance; and (c) implementation and monitoring of human rights obligations in situations of armed conflict and accountability for violations, in particular appropriate mechanisms to monitor the implementation of human rights in situations of armed conflict, as well as mechanisms to ensure accountability for violations of human rights.

4. The United Nations High Commissioner for Human Rights opened the expert consultation. The High Commissioner recalled that, in recent decades, many millions of innocent lives of civilians had been claimed and tens of millions more have been permanently displaced. Homes

had been destroyed, while access to life-saving food, medicine and shelter had been denied. Grave violations of international humanitarian and human rights law were common to many armed conflicts. Civilians had become the primary target of attacks motivated by ethnic or religious hatred, political confrontation or simply the ruthless pursuit of economic interests. It was the duty of the international community as a whole to see how best it could enhance human rights and humanitarian law protections. International human rights law and international humanitarian law shared the common goal of preserving the dignity and humanity of all.

5. The High Commissioner recalled that, over the years, the General Assembly, the Commission on Human Rights and, more recently, the Human Rights Council had expressed the view that, in situations of armed conflict, parties to the conflict had legally binding obligations concerning the rights of persons affected by the conflict. The Council had also recognized the importance and urgency of these problems. In line with recent international jurisprudence and the practice of relevant treaty bodies, the Council acknowledged that human rights law and international humanitarian law were complementary and mutually reinforcing. It also considered that human rights law continued to apply in armed conflict situations, taking into account when international humanitarian law applies as lex specialis. The Council reiterated that effective measures to guarantee and monitor the implementation of human rights should be taken in respect of civilian populations in situations of armed conflict, and that effective protection against violations of their human rights should be provided in accordance with international human rights and applicable international humanitarian law.

6. Concerning the legal framework, the High Commissioner recalled that, as an international criminal judge, she had witnessed the interaction between human rights norms and humanitarian law principles. In order to apply the adequate standards of international criminal accountability, it was useful and even essential to take into due account the different forms of protection offered by international human rights and international humanitarian law. The protection of the human rights of civilians was better served when this complementarity between international human rights and international humanitarian law were duly enforced. The International Court of Justice had recognized the dual and complementary application of international human rights law and international humanitarian law, in both its advisory opinions and its contentious cases. The Court, in its judgment on the Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v. Uganda*) case brought into its judgment the criteria defined in the legal consequences of the construction of a wall in the occupied Palestinian Territory advisory opinion concerning the complementary application of international human rights law and international humanitarian law in situations of armed conflict. Similarly, the International Criminal Court had also recognized the importance of human rights in its analysis of crimes against humanity, war crimes and genocide.

7. The High Commissioner pointed out that the issues dealt with during the expert consultation were, therefore, not purely theoretical. The impact of these issues on the ground was visible on a daily basis. The challenge ahead was, on the one hand, to reflect on more effective ways to ensure that human rights and humanitarian law obligations were respected by parties to a conflict. On the other hand, when violations did occur, the analysis should focus on the means to ensure accountability for those violations. Also important was the discussion on the relationship

between international human rights law and international humanitarian law, including the complementary and mutually reinforcing application of human rights law and international humanitarian law; the question of lex specialis; the issues arising from the application of article 4 of the International Covenant on Civil and Political Rights; and other rights of particular relevance. The High Commissioner referred to the list of non-derogable rights included in the International Covenant. Beyond that, however, she invited experts to consider other rights of particular relevance, including in the area of economic, social and cultural rights, for instance, the discussion on the rights of those persons detained in the context of armed conflict and the extent of judicial guarantees that should be provided to them, as well as the question of how to articulate access to food, medicine and shelter as rights during a situation of armed conflict. International criminal law had much to offer in that direction, particularly when it considered that deprivation of access to food and medicine may constitute, under certain circumstances, an international crime. Lastly, on the question of implementation and monitoring of human rights obligations in situations of armed conflict and the issue of accountability for violations, the High Commissioner indicated that this was the era for accountability and that the protection of human rights was significantly advanced when individuals were held to account for their acts.

8. Professor Georges Abi-Saab introduced the meeting by recalling the history of the evolution of the notion of protection of civilians. He indicated that, in 1968, the General Assembly, in its resolution 2444 (XXIII), invited the Secretary-General to, inter alia, study possible steps to secure the better application of existing protections in all armed conflicts. Several reports thereon were submitted by the Secretary-General to the General Assembly. Professor Abi-Saab also recalled that, more recently, the Commission on Human Rights acknowledged, in its resolution 2005/63, that human rights law and international humanitarian law were mutually reinforcing, and considered that the protection provided by human rights law continued in armed conflict situations, taking into account when international humanitarian law applied as lex specialis. The Subcommission on the Promotion and Protection of Human Rights took up the issue at its fifty-sixth session. A working paper on the relationship between human rights law and international humanitarian law was submitted at the fifty-seventh session dealing with the same issue, particularly from the perspective of their complementary application in the light of the practice of human rights treaty bodies and special procedures. Professor Abi-Saab also highlighted that the Human Rights Committee, in its general comments Nos. 29 (2001) and 31 (2004), dealt with the questions of the applicability of the International Covenant on Civil and Political Rights in situations of armed conflict, and recalled that the human rights obligations contained therein applied in situations of armed conflict to which the rules of international humanitarian law were applicable. Furthermore, the International Court of Justice, in its *Legality of the Threat or Use of Nuclear Weapons* and *The wall* advisory opinions, as well as in the *Democratic Republic of the Congo v. Uganda* case, also dealt with the question of the complementary application of international human rights law and international humanitarian law in situations of armed conflict. Lastly, Professor Abi-Saab pointed out that, in its resolution 9/9, the Council acknowledged that human rights law and international humanitarian law were complementary and mutually reinforcing, that all human rights require protection equally and that the protection provided by human rights law continued in armed conflict situations, taking into account when international humanitarian law applied as lex specialis. The Council also underlined the exceptional and temporary nature of derogations to human rights obligations and

reiterated that effective measures to guarantee and monitor the implementation of human rights should be taken in respect of civilian populations in situations of armed conflict, including people under foreign occupation, and that effective protection against violations of their human rights should be provided, in accordance with international human rights law and applicable international humanitarian law. The discussions are summarized in the paragraphs below.

II. THE LEGAL FRAMEWORK: INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW (SESSION 1)

9. The question of the complementary and mutually reinforcing nature of international human rights and international humanitarian law was thoroughly discussed. The relationship between the two bodies of law was analysed from the perspective of three different areas: (a) the scope of application; (b) the question of the subjects of the law; and (c) issues relating to the application of international human rights and international humanitarian law to particular cases.

10. With regard to the question of scope of application, it was generally indicated that international human rights law applied at all times, while international humanitarian law applied to situations of armed conflict, both international and non-international. The Human Rights Committee, in its general comment No. 31, reiterated that the International Covenant on Civil and Political Rights continued to apply in situations of armed conflict to which the rules of international humanitarian law were applicable. This position had been reiterated by the International Court of Justice in *The wall* advisory opinion, as well as in the *Democratic Republic of the Congo v. Uganda* decision.

11. It was noted that the International Covenant on Civil and Political Rights contained provisions dealing with states of emergency, including during situations of international or non-international armed conflict, which applied if and to the extent that the situation constituted a threat to the life of the nation. The International Covenant on Civil and Political Rights, for example, envisaged that certain treaty obligations could be derogated from in situations of public emergency that threaten the life of the nation and the existence of which is officially proclaimed. It was recalled that article 4, paragraph 2, of the Covenant explicitly indicated the Covenant obligations that were non-derogable, including the right to life, the prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent, the prohibition of slavery, slave trade and servitude, the prohibition of imprisonment on the ground of inability to fulfil a contractual obligation, the principle of legality in the field of criminal law, the recognition of everyone as a person before the law, and the freedom of thought, conscience and religion. It was pointed out, however, that even when derogations to human rights obligations were lawful, they were often not adequate to the situation they were trying to address. It was argued that it was often possible to achieve the same or more effective results through the application of lawful limitation clauses.

12. It was recalled that, in order for international humanitarian law to be applicable, it had to be demonstrated that the situation amounted to an armed conflict. It was noted that the International Criminal Tribunal for the Former Yugoslavia had indicated that, in order to be considered an armed conflict, hostilities had to be protracted rather than sporadic. Below this

threshold, international humanitarian law was not applicable and only human rights law applied. In recent cases, the International Criminal Tribunal for the Former Yugoslavia had alluded to a large variety of criteria that could be taken into account to determine the existence of a situation of armed conflict.

13. Concerning the concurrent application of international human rights and international humanitarian law to particular cases in situations of armed conflict, it was pointed out that both bodies of law were complementary and not mutually exclusive. In this context, it was recalled that, as the International Court of Justice had recognized in *The wall* advisory opinion and in the *Democratic Republic of the Congo v. Uganda* decision, the protection offered by human rights conventions did not cease in the event of armed conflict, save through the effect of provisions for derogation of the kind found in article 4 of the International Covenant on Civil and Political Rights. It was recalled that the Court envisaged three possible situations with regard to the relationship between international humanitarian law and human rights law: (a) some rights may be exclusively matters of international humanitarian law; (b) others may be exclusively matters of human rights law; (c) yet others may be matters of both these branches of international law. Some experts explained that bodies of law as such did not function as lex specialis. It was recalled that the lex specialis principle meant simply that, in situations of conflicts of norms, the most detailed and specific rule should be chosen over the more general rule, on the basis of a case-by-case analysis, irrespective of whether it was a human rights or a humanitarian law norm. The issue of complementarity was also further discussed in the session that followed.

14. It was recalled that the Human Rights Committee, in its general comment No. 29, indicated that the International Covenant on Civil and Political Rights applied also in situations of armed conflict to which the rules of international humanitarian law were applicable. Given that both bodies of law were complementary, with regard to certain rights envisaged by the International Covenant, more specific rules of international humanitarian law may be especially relevant for the purposes of the interpretation of those rights. It was highlighted that there had to be some type of test against which each situation would need to be assessed in order for the most adequate legal framework to be determined. There was a suggestion that such a test could be framed in the context of effective control: the more effective the control over persons or territory, the more applicable human rights law would be. In this respect, it was argued that the human rights law paradigm posited effective control over a population, while the international humanitarian law paradigm posited a breakdown of power as a result of armed conflict. As a way to inform the lex specialis principle in the context of armed conflict, it was suggested that, the more stable the situation, the more the human rights paradigm would be applicable; the less stability and effective control, the more the international humanitarian law paradigm would be applicable to supplement human rights law. This approach nevertheless may raise complex legal questions.

15. It was underscored that effective control over individuals could occur in a context of the overall lack of control of a territory. Lack of control over territory should not, however, lead to ignoring the human rights paradigm. Moreover, it is also possible to have real control over individuals in non-stable environments. In those situations, international humanitarian law may offer better protection than human rights law. In this respect, it should be taken into account that control over individuals did not mean that there was total control over territory. Similarly,

control over territory did not imply total control over individuals. Therefore, it was suggested that the more effective the control a State had over a territory or a population, the more the human rights paradigm applied. Nevertheless, some international humanitarian law rules may be the lex specialis, because it had the more specialized rules for a particular situation of armed conflict.

16. It was stated that measures taken by States in the "war on terror", which was not, as such, an armed conflict, had led to confusion concerning the applicable legal standards. When States pursue potential members of armed groups, or alleged terrorists, international human rights law remained applicable regarding all issues including, inter alia, detention, treatment and fair trial. In addition, international humanitarian law may be applicable, depending on the qualification of each specific situation on a case-by-case basis and on whether the pursuit had a link with an armed conflict.

17. The territorial scope of application of both bodies of law was discussed. It was recalled that, in conformity with the rules of interpretation laid out in the Vienna Convention on the Law of Treaties, the Human Rights Committee had interpreted article 2 of the International Covenant on Civil and Political Rights as calling for the application of States' human rights obligations concerning all individuals within their territory and to all individuals subject to their jurisdiction. This interpretation was consistent with the context and with the object and purpose of the treaty. Concerning international humanitarian law, it was pointed out that, in the case of international armed conflicts, it applied to parties to a conflict, irrespective of territorial considerations. In situations of non-international armed conflicts, international humanitarian law applied within the territory of the State engaged in armed conflict against non-State entities. Nevertheless, it was also highlighted that, increasingly, non-international armed conflicts had an international component owing to the phenomenon of cross-border hostilities. Also, the participation of foreign troops in non-international armed conflicts, with the consent of the territorial State or under the authority of the Security Council, added a transnational element to these conflicts that was not explicitly regulated in international humanitarian law.

18. With regard to the question of the subjects of the law, questions were raised about the obligations of non-State actors under international human rights law and international humanitarian law. While it was clear that both bodies of law mainly established legal obligations for States, it was discussed how each one also regulated the conduct of non-State actors and international organizations. Concerning non-State actors, it was highlighted that, in accordance with common article 3 to the Geneva Conventions, and more generally international humanitarian law rules applicable to non-international armed conflicts, non-State actors engaged in a non-international armed conflict had, as a minimum, international humanitarian law obligations to protect persons taking no active part in the hostilities, including members of armed forces who had laid down their arms and those placed *hors de combat*, as well as further obligations provided for in Additional Protocol II to the Geneva Conventions and customary international law. On the other hand, the extent of human rights obligations of non-State actors was not clear as they were not usually parties to human rights treaties.

19. Regarding the issue of whether international organizations participating in an armed conflict have human rights and international humanitarian law obligations, it was discussed

whether the obligations were actually incumbent upon the organization or the States contributing with military personnel, or upon both. In the context of international humanitarian law, it was considered that responsibility could be attributed to both the international organization and the contributing States. Concerning human rights obligations, it was indicated that the European Court of Human Rights decided in the case of *Behrami v. France* that human rights obligations could be attributed to international organizations. Experts noted that a similar issue was currently before the European Court in a number of cases. It was nevertheless recalled that, with regard to the United Nations, the Organization as a matter of policy sought to observe the highest standards of behaviour when conducting peacekeeping operations. In this respect, the bulletin of the Secretary-General on the observance by the United Nations forces of international humanitarian law provided some policy guidance as to the fundamental principles and rules of international humanitarian law that applied to United Nations forces when actively engaged in situations of armed conflict as combatants, to the extent and for the duration of their engagement, although this did not reflect the entire body of international humanitarian law obligations applicable to United Nations forces as a matter of international law. Moreover, it was underscored that it should be borne in mind that the Charter of the United Nations recognized the protection and promotion of human rights as one of the fundamental principles of the Organization. Some may argue that, although the United Nations was not a party to international human rights or international humanitarian law treaties, the Organization was nonetheless bound by customary international law.

III. THE RELATIONSHIP BETWEEN INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW (SESSION 2)

20. It was recalled that the discussion on the interaction between human rights law and international humanitarian law was part of a broader legal debate on the question of the fragmentation and unity of international law. On the one hand, there was normative fragmentation owing to the creation of functional areas in international law; on the other, all these areas were highly permeable and closely interrelated, as is the case between human rights law, international humanitarian law, international criminal law, refugee law, disarmament and arms control law, and environment law, among others. It was underscored that, in recent years, there had been the development of a public interest area in international law, in which the individual was at the centre. As a result, recent legal debates had concentrated on developing mechanisms to ensure maximum protection for the individual. For instance, it was recalled that, in a number of cases, one body of law required a *renvoi* to another body of law, for example common article 3 to the Geneva Conventions, which uses concepts also referred to in the Universal Declaration of Human Rights. Similarly, human rights law on certain occasions needed to be interpreted in the context of international humanitarian law, as done by the International Court of Justice in the context of the advisory opinion on nuclear weapons.

21. It was also recalled that human rights courts, such as the European Court of Human Rights and the Inter-American Court of Human Rights, had developed further the applicable legal framework. The international criminal tribunals, developments in the peace and security sector, and Security Council resolutions, as was the case in resolution 1820 (2008) on violence against women, had further contributed to legal developments.

22. It was suggested that the question of the complementary and mutually reinforcing nature of international human rights and international humanitarian law had been interpreted in different ways. For example, in its resolution 5/1 on institution-building, the Human Rights Council referred to the complementary and mutually interrelated nature of international human rights law and international humanitarian law, while in its resolution 9/9, it acknowledged that both bodies of law were mutually reinforcing. It was questioned whether there is any real difference between "mutually interrelated", as indicated in resolution 5/1, and "mutually reinforcing", as mentioned in resolution 9/9. It was suggested that "mutually reinforcing" implied a reinforcement to do something. Since the aim of both bodies of law was to protect human dignity and in particular that of civilians taking no part in hostilities, it was pointed out that the Council had moved from a neutral statement about the interconnection between the two bodies of law to a more purposeful one. In that respect, it was suggested that, if the debate focused on the mutually reinforcing aspect, it would be easier to choose the best rules to achieve the goal of protecting the rights of civilians.

23. Concerning the question of complementarity, it was highlighted that both human rights law and international humanitarian law informed each other in a number of ways. For instance, in order to determine what constituted an arbitrary deprivation of life in the context of a given armed conflict, human rights law had to take into account the specific conditions set out by international humanitarian law applicable to the particular type of conflict. This test was particularly difficult in situations of non-international armed conflicts, because that type of conflict had to fulfil an intensity criterion (protracted armed violence as the International Criminal Tribunal for the Former Yugoslavia had indicated and as mentioned earlier) as well as the organization criterion (the determination that non-States parties to the conflict are sufficiently organized to confront the State or each other with military means). These criteria, however, raised difficulties because often Governments refused to acknowledge that violence had reached the level of a situation of "armed conflict" on their territory, nor the existence of armed groups with a certain degree of organization operating within their territory. These situations raised issues with regard to the respect of applicable law, since the Government's denial of the existence of an internal armed conflict made it difficult to argue in favour of the application of international humanitarian law as a complementary source for human rights law, which remained applicable. In this respect, it was pointed out that under international humanitarian law, the legal qualification of conflicts was based on facts and was independent of political determination by the parties.

24. In the light of the above-mentioned difficulties regarding situations of non-international armed conflicts, it was argued that human rights law and international humanitarian law were complementary to the extent that the latter reinforced the joint aim of protecting human dignity. In non-international armed conflicts, the traditional reciprocity approach of international humanitarian law was unworkable. It was underscored that there was a natural imbalance between a State party to an armed conflict and a non-State party, because the latter was accountable under criminal law for acts carried out against Government forces. Thus, since the reciprocity approach would be hardly acceptable in the context of non-international armed conflicts, the better paradigm to apply was that of human rights law. It was further recalled that, when discussing the relationship between human rights law and international humanitarian law,

it should be borne in mind that both bodies of law had very similar objectives. In that respect, while humanitarian law contained sufficient legal norms to regulate the use of force in international armed conflicts, there was no similar regulation in non-international armed conflicts and, therefore, human rights law was the most suitable legal framework.

25. The question of international legal standards applicable to detention in the context of armed conflicts was discussed as another example of the complex relationship between international human rights law and international humanitarian law. It was recalled that international humanitarian law, under certain conditions, allowed for a form of administrative detention designated as internment. The internment of prisoners of war and civilians in international armed conflict was regulated by the Third and Fourth Geneva Conventions. The Fourth Geneva Convention regulated issues concerning the internment of civilians in articles 42, 43 and 78 regarding situations of international armed conflict. Article 75 of Additional Protocol I to the Geneva Conventions further provided for certain guarantees to detained persons in the context of international armed conflicts. It was pointed out that, while international humanitarian law contained provisions dealing with detention in international armed conflicts, there were still gaps of protection that could only be filled in by human rights law, such as the issue of judicial review of detention. Moreover, international humanitarian law contained general rules on internment in situations of non-international armed conflicts in articles 5 and 6 of Additional Protocol II to the Geneva Conventions. It was further noted that the preamble to Additional Protocol II recalled that international instruments relating to human rights offered basic protection to the human person. Therefore, in view of the complementarity of human rights law and international humanitarian law, the extent of guarantees and protections to be observed with regard to civilian detainees during an armed conflict could be fleshed out by reference to both bodies of law.

26. The situation was more problematic, however, when the question concerned which rules should be applied by non-State armed groups in cases of deprivation of liberty. It was indicated that some may oppose the application of human rights obligations on detention to armed groups, particularly because the issue of detention was closely tied to the question of justice, which was seen as a sovereign function of the State. Nevertheless, the application of the principle of humane treatment spelled out in common article 3 to the Geneva Conventions provided a minimum threshold of protection that non-State actors should be called to observe.

27. With regard to the framework for the conduct of non-State actors, it was further pointed out that certain international mechanisms, such as fact-finding commissions, could look at the application of both human rights law and international humanitarian law by States and non-State actors. Similarly, special rapporteurs had also looked at the conduct of non-State actors. It was further pointed out that there were examples of human rights treaties containing provisions explicitly related to obligations of non-State armed groups. For instance, article 4 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict clearly stipulated that armed groups that were distinct from Government armed forces should not, under any circumstance, recruit or use in hostilities persons under the age of 18 years. It was recalled that, during the negotiations on the Protocol, questions were raised as to whether that provision embodied a human rights or an international humanitarian law norm.

Parties to the negotiation clearly decided that it was a human rights provision rather than a humanitarian law rule. However, the wording of the provision in article 4 of the Protocol was carefully chosen. By using the word “should”, drafters had wished to differentiate between the obligations of non-State actors and those bestowed upon States, which were qualified by the word “shall”.

28. The consequences of armed conflict on other human rights, particularly economic and social rights, were also discussed. The question of armed conflict and the use of child labour was highlighted. It was pointed out that the United Nations Study on the Impact of Armed Conflict on Children established that the categories of children who became child soldiers were the same as those who were child labourers in peacetime. It was pointed out that, as recognized in Convention No. 182 of the International Labour Organization (ILO), child soldiering was a form of child labour. It was also indicated that the prohibition of child labour was an area in which human rights law and international humanitarian law were complementary and mutually reinforcing. Article 51 of the Fourth Geneva Convention provided that an occupying Power could not force children under 18 years of age to undertake compulsory labour. This provision was in line with the standards adopted by ILO, the norms contained in the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child. Optional Protocols I and II to the Geneva Conventions also contained provisions on the use of child labour. It was also recalled that the International Court of Justice, in its decision on *Democratic Republic of the Congo v. Uganda*, held that Uganda had violated its obligations under the Convention on the Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict by its recruitment and failure to prevent recruitment of children in areas under Ugandan control.

29. It was noted that certain rights were often neglected in discussions on the relationship between human rights law and international humanitarian law, such as the right to education. The monitoring and reporting mechanism on children affected by armed conflict established pursuant to Security Council resolution 1612 (2005), for example, addressed attacks on schools rather than the effects of armed conflict on the right to education, including the closure of schools owing to attacks and other threats.

IV. IMPLEMENTATION AND MONITORING OF HUMAN RIGHTS IN SITUATIONS OF ARMED CONFLICT AND ACCOUNTABILITY FOR VIOLATIONS (SESSION 3)

30. Regarding the issue of implementation and monitoring of human rights in situations of armed conflict, it was indicated that compliance was achieved if the elements of implementation, monitoring and accountability were observed. It was noted that the very important element of actual protection was lacking and that just to monitor respect and to ensure accountability for alleged violations of human rights and humanitarian law violations was, indeed, an important element for the victims, but not enough. It was emphasized that victims needed to be proactively protected from violations of their human rights. It was pointed out that the question was what mechanisms were capable of ensuring such protection. There were two categories of international actors with protection mandates: peacekeeping forces and police forces in

peacekeeping operations with a mandate to protect civilians (such as the United Nations Organization Mission in the Democratic Republic of the Congo); and humanitarian organizations, such as the Office of the United Nations High Commissioner for Refugees, ICRC, UNICEF and the protection clusters of the Inter-Agency Standing Committee.

31. The question to be clarified was what protection meant in terms of approaches and activities. According to ICRC and the Inter-Agency Standing Committee, protection denoted all activities aimed at ensuring equal access to and enjoyment by civilians in situations of armed conflict of their rights as human beings as embodied in international human rights instruments and international humanitarian law. This understanding of protection covered all categories of human rights, including action that prevented or put a stop to a specific pattern of abuse and/or alleviated its immediate effects, such as responsive measures, including protection through presence, advocacy and negotiations with relevant actors, triggering interventions at higher levels, and through public denunciation; protection activities aimed at restoring people's dignity and at ensuring adequate living conditions through reparation, restitution and rehabilitation, including by providing access to justice, ending impunity, setting up mechanisms for restitution of property, as well as creating and running institutions for the rehabilitation of victims; and activities aimed at fostering an environment conducive to respect for the rights of individuals. It was agreed that protection activities aimed to prevent violations of human rights; to stop ongoing violations; to prevent the recurrence of violations; and to repair, restore, rehabilitate or compensate victims and their families when violations had taken place.

32. The issue of how certain monitoring and investigation mechanisms could contribute not only to establishing accountability for human rights and humanitarian law violations, but also help prevent such violations in the future was also discussed. While it was recognized that accountability mechanisms did not directly address prevention measures, they should not be seen in a vacuum. Instead, what was needed was a multipronged and multisectoral approach whereby measures for ongoing protection, rehabilitation and accountability were regarded as a package. The Human Rights Council and human rights treaty bodies had adjusted their mechanisms to respond to situations of armed conflict. For example, the Council had held special sessions to analyse the human rights situations in different parts of the world and had dispatched, on a number of occasions, fact-finding missions and commissions of inquiry comprising of independent persons or building upon the specialist expertise of thematic special rapporteurs. It had also brought a number of thematic rapporteurs together to provide a joint assessment of the factual and legal responsibility of the parties to a conflict from their different perspectives. It was argued that the underlying rationale was presumably twofold: on the one hand, providing the Council and the international community with an independent and authoritative statement of what had occurred; on the other, a change of behaviour was sought by naming and shaming those allegedly responsible for human rights and humanitarian law violations.

33. Concerning fact-finding missions and commissions of inquiry, it was argued that they had a mandate that was mainly oriented towards the victims and survivors of human rights abuses. They provided a forum for individuals to express themselves and to explain what had happened to them, even if not directly to the perpetrators. The process offered an opportunity to provide and make available a record of events and their consequences that had been carefully considered

and corroborated by independent outsiders. A report of a human rights fact-finding mission could thus become integral to building a file of authoritative information for subsequent use. The mission could provide a bridge between the commission of human rights abuses at a specific time and place and some future time when other processes for accountability and justice become politically possible. The need to have a true process of accountability as a result of a fact-finding mission was further stressed. It was recalled that the Human Rights Council and the Security Council had appointed a number of fact-finding missions, but only on rare occasions had their findings led to criminal investigations at the national or the international level, such as in the case of Darfur. It was also pointed out that, while international fact-finding missions and commissions of inquiry had been effective in addressing human rights and humanitarian law violations, national commissions of inquiry could also be effective in addressing issues related to violations of the rights of civilians in armed conflict. It was indicated that very few good practices had unfortunately been identified at the national level.

34. The fundamental role of judicial mechanisms and the contribution of courts in terms of establishing knowledge of human rights violations, in particular, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, was acknowledged. Some domestic courts in Latin America had also been instrumental in clarifying facts relating to enforced disappearances. Emphasis was put on the experience of hybrid courts, such as the courts in Sierra Leone and in Cambodia, where the combination of international and national justice could bear positive results while respecting both international legal standards and national sensitivities.

35. It was recalled that, besides treaty obligations, there was another normative framework applicable to situations of armed conflict. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (General Assembly resolution 60/147) and the Updated Set of Principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1) established important parameters that needed to be observed in the context of armed conflict. The Reparations Principles were of particular importance because they were adopted by the General Assembly by consensus. In its resolution 60/147, the Assembly further indicated that the principles did not entail new international or domestic legal obligations, but identified mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law, which are complementary though different as to their norms. According to the Reparations Principles, States had an obligation to respect, ensure respect and implement human rights and international humanitarian law. The Principles also provided for the duty to investigate violations effectively, thoroughly, promptly and impartially. It was also recalled that the Impunity Principles established three main fundamental rights that States should observe regarding human rights violations: the right to the truth; the right to justice; and the right to reparations for victims. The Human Rights Committee had further analysed the question of the right to reparation, including from the perspective of guarantees of non-repetition, satisfaction and compensation, as mechanisms to ensure protection of the human rights of civilians in armed conflict. It was pointed out that the right to truth was an evolving issue in the context of the Human Rights Council, which had adopted a number of resolutions on this matter.

36. It was indicated that the establishment of the right to the truth through judicial mechanisms as well as non-judicial mechanisms, such as truth commissions, should be underscored. It was also pointed out that the right to justice entailed the duty of States to undertake prompt, thorough, independent and impartial investigations of alleged human rights and humanitarian law violations, and to take appropriate measures with respect to perpetrators, in particular in the area of criminal justice. It was highlighted that the prosecution of human rights and humanitarian law violations had proved to be an important deterrent of further violations and, therefore, an important mechanism for ensuring the protection of civilians. Moreover, measures to enhance national accountability systems were of great importance because they constituted a first layer of protection, particularly in the area of investigation and prosecution. Having functioning and capable judicial systems was also fundamental because they were an entry point for the investigation and prosecution of gross violations of human rights, crimes against humanity, war crimes and genocide. By virtue of the complementarity principle contained in the statute of the International Criminal Court, States had an interest in ensuring that their legal systems were capable and willing to undertake criminal investigations of gross violations of human rights and serious violations of international humanitarian law if they wished to retain jurisdiction over such cases.

37. The Human Rights Council and its special procedures had contributed substantially to protecting civilian populations in armed conflict. Special rapporteurs had played a key role in identifying violations and showing where national systems could be improved. It was pointed out that many States had unfortunately not adequately followed up on the recommendations of special rapporteurs, nor had they used them as a framework for reform.

38. It was recalled that the universal periodic review mechanism, in accordance with Council resolution 5/1, had also a mandate to take into account applicable international humanitarian law, given the complementary and mutually interrelated nature of international human rights law and international humanitarian law.

39. The Commission of Inquiry on Darfur had addressed two main recommendations to the Security Council: the first, to refer the situation of Darfur to the International Criminal Court, which was followed by the Security Council; the second, to establish an international compensation commission. The latter recommendation was not implemented. In this respect, it was pointed out that the aspect of the rights of victims had not been paid sufficient attention in the international debate. This situation needed to be addressed urgently.

40. Another mechanism that had functioned effectively to protect the civilian population, such as minorities, indigenous populations, farmers and displaced persons, from the effects of armed conflict in the Latin American context had been the application of provisional measures adopted by the Inter-American Court of Human Rights. The mechanism, implemented in conjunction with other protection measures, had put pressure on Governments to take measures to protect the civilian population.

41. It was pointed out that, while the international system provided for mechanisms of accountability for human rights violations, there was no similar mechanism for violations of international humanitarian law. In this respect, while human rights violations were dealt with by

regional human rights courts, human rights treaty bodies and other quasijudicial mechanisms, as well as the Council's own mechanisms, the right to justice and reparation of victims of violations of international humanitarian law beyond what constituted international crimes did not have equivalent international mechanisms. Some pointed out that the problem seemed to be more political than legal, because it was difficult for some States to accept to hold parties to a conflict accountable for violations of humanitarian law.

42. It was argued that there were two options to address the above issue. First, to create, instead of ad hoc commissions of inquiry, a permanent commission of inquiry with a mandate to investigate violations of international humanitarian law. It was also pointed out that the international fact-finding commission established by article 90 of Protocol I to the Geneva Conventions had the potential to fulfil this task. Owing to the dual consent required by article 90, the commission had never functioned since its creation. As a result of the absence of adequate mechanisms of accountability for international humanitarian law, the Security Council decided to create ad hoc tribunals to ensure that crimes against humanity, war crimes and genocide in the contexts of the former Yugoslavia and Rwanda were duly investigated and those responsible prosecuted. It was pointed out that these existing international criminal law mechanisms and human rights monitoring and fact-finding mechanisms did not have compulsory jurisdiction. What was required were mechanisms that could ensure protection when potential violations could take place, namely, the means to prevent and mechanisms of early warning of potential human rights and humanitarian law violations. The second option was to encourage the existing international human rights machinery to look into violations of both human rights and international humanitarian law. It was recalled that the Inter-American and the European human rights systems, as well as the Human Rights Committee, had already started using the international humanitarian law framework to interpret their respective human rights law framework. Such a course of action could require judges and human rights experts to be given adequate training to be able to interpret and apply the correct rules of human rights and/or humanitarian law to a specific situation. It was also considered that these mechanisms did not have a specific mandate to apply international humanitarian law, which explained why regional human rights courts sometimes had difficulty in reconciling obligations under both bodies of law.

43. It was recalled that, in 2003, ICRC held a regional expert seminar on improving compliance with international humanitarian law. The report on the seminar highlighted different options to tackle gaps in compliance. The experts participating in the seminar were of the opinion that the obstacles to the establishment of accountability mechanisms were mainly posed by lack of political will rather than by legal considerations.

V. FINAL REMARKS

44. In sum, the experts explored in detail the position already affirmed, inter alia, by the International Court of Justice and by the human rights treaty bodies regarding the complementary application of international human rights and international humanitarian law to situations of armed conflict as two interrelated and mutually reinforcing bodies of law. It was pointed out that, in the era of global media, the spread of information had allowed for these violations to reach the public opinion, which had put significant pressure on States to act to end them.

Annex

LIST OF EXPERTS PARTICIPATING IN THE CONSULTATION

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