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**CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTION OF
DISAPPEARANCES AND SUMMARY EXECUTIONS**

Extrajudicial, summary or arbitrary executions

Report of the Special Rapporteur, Philip Alston

Addendum

FOLLOW – UP TO COUNTRY RECOMMENDATIONS* **

* The present document is being circulated as received in view of the fact that it greatly exceeds the page limitations currently imposed by the relevant General Assembly resolutions .

** The present report was submitted late in order to reflect the most recent information.

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INTRODUCTION

A. The importance of follow-up reports

1. This report discusses the follow up given to the recommendations made by my predecessor as Special Rapporteur on extrajudicial, arbitrary or summary executions in her reports on four country visits: Honduras (E/CN.4/2003/3/Add. 2), Jamaica (E/CN.4/2004/7/Add.2 and Corr.1), Brazil (E/CN.4/2004/7/Add.3) and the Sudan (E/CN.4/2005/7/Add.2).

2. In my main report to the 62nd Commission on Human Rights I have highlighted the importance of the obligation on Governments to give expeditious positive responses to Special Procedures requesting an invitation for a country visit.¹ While such country visits play a crucial fact finding role for the Commission, and will do so in the future for the Human Rights Council, they can only achieve their full potential if Governments give serious consideration to the recommendations made by Special Procedures as a result of their visits. In recognition of the indispensable role that follow up plays in ensuring that the resources invested by the United Nations are well spent, the Commission requested States that have been visited “to examine carefully the recommendations made ... [and] to report to the Special Rapporteur [on extrajudicial, arbitrary or summary executions] on the actions taken on those recommendations” (resolution 2004/37).

3. In the same resolution, the Commission requested the Special Rapporteur “to follow up on communications and country visits”. More recently, at the seminar on “Enhancing and Strengthening the Effectiveness of the Special Procedures of the Commission on Human Rights”, held in Geneva on 12 and 13 October 2005, “[i]t was commonly agreed [by the participating Governments] that it was crucial that the findings of special procedures following a country visit were not merely consigned to a report, but formed the basis of negotiation and

¹ E/CN.4/2006/53, para. 13.

constructive open dialogue with States, with a view to working together on overcoming obstacles. It was stressed by many participants that States should cooperate fully with special procedures and that this encompassed incorporating their findings into national policies. Where States did not implement recommendations, they should provide information on why.”²

4. As indicated in my previous report to the Commission (E/CN.4/2005/7 para. 30), I sought information as to the ways in which the Governments concerned had, or had not, followed up on the Special Rapporteur’s recommendations from appropriate sources, including inter-governmental organizations, non-governmental organizations and civil society groups. From 1 to 30 September 2005 I addressed the four Governments and requested their observations on efforts made to consider and implement the recommendations, as well as on the constraints relating thereto.³ The letter to the Governments included summaries of the information received from the various sources mentioned above. Initially, I requested Governments to submit their observations by 1 November 2005. Upon request, I extended this deadline to 15 December 2005, and in one case to 10 January 2006.

5. In view of the “common agreement” on the “crucial role” of follow up to recommendations by Special Procedures, it is disappointing that none of the four Governments submitted any observations. Despite the value of the information obtained from other sources, this report would certainly have benefited from the unique knowledge Governments have with regard to initiatives undertaken and obstacles encountered.⁴ Information provided by non-governmental organizations and civil society groups is no substitute for the views of

² Report of the Seminar on Enhancing and Strengthening the Effectiveness of the Special Procedures of the Commission on Human Rights (E/CN.4/2006/116), para. 49, available at http://portal.ohchr.org/pls/portal/docs/PAGE/SP_MH/E-CN4-2006-116.PDF.

³ Letters were sent to Honduras on 1 September 2005, Jamaica on 19 September 2005, Sudan on 21 September 2005, and Brazil on 30 September 2005.

⁴ I have however taken into account follow-up information submitted by Governments to the Commission on Human Rights in the wake of the visits. On 15 April 2003, the Government of Honduras submitted to the Commission on Human Rights an *Informe de la Comisión Permanente para la protección de la integridad física y moral de la niñez*, which had been established in May 2002 (E/CN.4/2003/G/78). On 16 April 2004, the Government of Jamaica submitted to the Commission on Human Rights a letter addressing the report (E/CN.4/2004/G/51).

Governments since those groups will, appropriately, generally see their role as one of providing critical stimulus to action by Governments, rather than acting as a substitute for them.

6. The order of the four country reports is determined by the chronological order of the visits (Honduras, Jamaica, Brazil, and the Sudan). Due to restrictions on the overall length of this document and in order to focus on the most relevant issues, I have decided not to discuss the follow up to all recommendations made by my predecessor as Special Rapporteur. The report relating to Honduras is in Spanish, the three others are in English.

7. The four individual follow up reports reflect measures adopted by the relevant Governments relating to the recommendations made by the Special Rapporteur. The overall picture that emerges is far from encouraging. Some minimal follow up has occurred but in general the recommendations appear to have made little impact. If the Special Rapporteur's recommendations have such a limited impact, questions must arise as to the role of the country visits by Special Procedures which play such an important part in the overall process. Questions also arise as to the reforms which should be considered as part of efforts to ensure that the new Human Rights Council will enjoy the credibility which the Commission is widely considered to have forfeited in recent years.

B. Lessons for the Human Rights Council?

8. In seeking to draw lessons from the present report in terms of future procedures to be adopted by the new Human Rights Council two caveats are in order. The first is that it is always going to be difficult to determine cause and effect between the recommendations made by the Special Procedures and the legal and policy reforms subsequently adopted by Governments. The second is that the value of visits by Special Procedure mandate holders should not be assessed solely in terms of the formal adoption of measures to give effect to the recommendations they make. The system of country visits has a variety of potentially helpful impacts over and above such impacts. One is to encourage all actors to see the issues in terms of human rights rather than only through alternative lenses such as the restoration of peace, the fight against crime, or the vindication of majoritarian political preferences. Another is to act as a catalyst to a domestic review of policy options. And another is to provide reassurance to civil society groups and to the victims of human rights violations that their struggles are legitimate and that international monitoring mechanisms are focused on their concerns.

9. Nevertheless, it remains true that a consistent pattern of neglect of the relevant recommendations should ring alarm bells among those concerned to ensure that the international human rights regime is capable of making a positive difference. There are a number of steps which could be taken to address this situation and thus enhance the effectiveness and the credibility of the Council. The first rests with the mandate-holders who should be encouraged to rank their various recommendations in order of importance and urgency. As long as a large number of undifferentiated recommendations are made it is easy either to ignore them all or to give priority to the least significant. Thus the Council should request each mandate-holder to identify the five most important recommendations that result from each country visit and should then focus specifically on those issues in the relevant debate. The second step is to require Governments to respond to the Council, and not just to the mandate-holder, within twelve months of the submission of the report with an indication of why the recommended steps have or have not been taken. The third is for the Council to reflect this process as part of its regular reviews of the situation in the country concerned and to invite mandate-holders to make specific follow-up recommendations to indicate the steps that the Council should take in the context of those reviews.

10. Starting to take the recommendations of the Special Procedures seriously would have two very positive therapeutic effects. First, it would place an onus on mandate-holders to make their recommendations specific and implementable, with consideration given to issues such as the appropriate time frame and the resource implications. The present system almost encourages mandate-holders to ignore the practicalities relating to the implementation of their recommendations. Second, it would oblige those Governments who feel that recommendations are misconceived, inappropriate, or unrealistic to spell out those concerns rather than simply ignoring the reports. Most importantly, this approach would ensure that the Special Procedures system is taken seriously by all concerned and would provide the necessary raw material to enable the Council to become an effective force for the promotion of respect for human rights by all Governments.

11. In devising strategies to increase the effectiveness of Special Procedures, the Human Rights Council will also have to give consideration to the support that can be provided by the United Nations system as a whole. The Plan of Action adopted in 2005 by the Office of the High Commissioner for Human Rights provides for “[g]reater country engagement through an

expansion of geographic desks, increased deployment of human rights staff to countries and regions, [...] human rights capacity-building, advice and assistance, and work on transitional justice and the rule of law”.⁵ The Office should thus have a central role to play in supporting the joint efforts of States and the Special Procedures.

I. HONDURAS

12. La Relatora Especial estuvo en misión en Honduras del 5 al 15 de agosto de 2001. La visita estuvo motivada principalmente por las alegaciones de ejecuciones extrajudiciales de muchas personas menores de 18 años ocurridas al parecer sobre todo en el período de 1998 a 2000. Las recomendaciones incluidas en su informe (E/CN.4/2003/3/Add.2) se concentran sobre la prevención de dichas ejecuciones.

13. El 15 abril de 2003, el Gobierno mandó a la Comisión de Derechos Humanos un Informe de la Comisión Permanente para la protección de la integridad física y moral de la niñez, creada en mayo de 2002 por el Presidente de la República, detallando las primeras medidas de la Comisión para contrarrestar dichas ejecuciones.

A. Divulgación de información sobre protección a los derechos de la niñez

14. La Relatora Especial recomendó que en los lugares frecuentados por niños deba divulgarse la información sobre las iniciativas gubernamentales y no gubernamentales y los proyectos destinados a proteger los derechos del niño (párrafo 76 del informe). Los medios de información, en cooperación con las autoridades gubernamentales competentes, tienen que sensibilizar la población y crear cultura de respeto de los derechos del niño y el adolescente, especialmente su derecho a la vida (párrafo 84).

15. El Estado no ha realizado esfuerzos sostenibles para difundir y promover los derechos de la niñez en lugares frecuentados por los niños. Se menciona el proyecto “Pacto por la Infancia” creado en 1995 mediante el cual los gobiernos municipales y la sociedad civil impulsan la

⁵ Plan of Action submitted by the United Nations High Commissioner for Human Rights (A/59/2005/Add.3), p. 2.

creación de Redes de Comunicadores Infantiles, quienes serían niños y jóvenes que divulgarían y promocionarían sus derechos. Sin embargo, estas redes no han tenido el impacto que se esperaba debido al poco apoyo que han tenido por parte del Estado.

16. El Equipo Asociado para el Fomento del Desarrollo Juvenil y la Prevención de la Violencia, del Programa Nacional de Prevención, Rehabilitación y Reinserción de Personas en Pandillas, no pudo realizar una jornada de sensibilización con los medios de comunicación, para mejorar y ampliar el manejo y enfoque de los temas de violencia, por la falta de apoyo gubernamental y carencia de recursos del mismo Programa. Es importante señalar que este Programa es el único esfuerzo gubernamental dirigido a realizar esfuerzos de prevención de la violencia.

17. No se tiene conocimiento sobre si se han realizado, hasta la fecha, esfuerzos gubernamentales por motivar a los medios de comunicación para divulgar información sobre iniciativas para proteger los derechos de la niñez. Sin embargo, informes recibidos indican que los medios que se han interesado por difundir información de este tipo, lo han hecho por motivación propia o por orientación de organizaciones no gubernamentales.

B. Datos sobre violaciones a los derechos humanos de los niños

18. De acuerdo con las recomendaciones de la Relatora Especial, para comprender mejor la situación y disponer de una base sólida para adoptar decisiones acertadas en esta esfera, el Gobierno debe generar sistemáticamente datos globales fiables sobre los delitos y las violaciones de los derechos humanos cometidos contra niños, especialmente las ejecuciones extrajudiciales (párrafo 77).

19. A principios del año 2005, el Estado nombró una Fuerza de tarea del Ministerio Público para hacer una revisión de los expedientes de muertes violentas de niños y jóvenes desde 1998. Los listados de muertes tomados en cuenta por esta fuerza de tarea no están completos ya que se basen solamente sobre casos colectados en la prensa por ONGs, dejando por fuera los casos que no fueron publicados. Además en los datos en que el Estado se refiere a muertes violentas de niños y jóvenes, no se incluyen categorías relativas a ejecuciones arbitrarias a pesar de que haya casos comprobados y sentenciados donde hubo participación de agentes del Estado.

C. Defensor del niño

20. La Relatora Especial recomendó que el Gobierno de Honduras establezca una defensoría del niño con facultades cuasijudiciales y disponiendo de un mecanismo independiente de investigación para conocer de los casos individuales de ejecuciones extrajudiciales que las autoridades competentes no registren ni enjuicien, y de pronunciarse al respecto. La defensoría debería llevar un registro completo de las ejecuciones extrajudiciales y de otra índole de niños y seguir de cerca los progresos realizados en la investigación y el enjuiciamiento de cada caso. Tendría que publicar sus informes y presentar sus conclusiones y recomendaciones al Gobierno (párrafo 78).

21. Las Defensorías Municipales de la Infancia fueron creadas en 1995 en el marco del “Pacto por la Infancia”. Desde luego, el Gobierno no ha aumentado sus recursos, lo que se traduce en dificultades de funcionamiento de las mismas.

D. Investigaciones de ejecuciones de niños y creación de una comisión especializada

22. La Relatora Especial recomendó que el Gobierno establezca una comisión, en la que participaran ONG y el Comisionado Nacional de los Derechos Humanos, para estudiar la situación relativa a ejecuciones de niños con miras a formular recomendaciones concretas para que se investiguen de manera detenida e independiente, y que los responsables sean enjuiciados sin demora (párrafo 79).

23. Después de la visita de la Relatora Especial, se creó en el año 2002 la Comisión Permanente para la Protección de la Integridad Física y Moral de la Niñez compuesta por el Secretario de Estado en los Despachos de Gobernación y Justicia y el Secretario de Estado en el Despacho de Seguridad, la Fiscalía General de la República, el Instituto Hondureño de la Niñez y la Familia, el Comisionado Nacional de Derechos Humanos y la Coordinadora Institucional Pro los Derechos del Niño. Su función principal era procurar la investigación del fenómeno de muertes violentas de menores en el país y dar cumplimiento a las recomendaciones vertidas por la Relatora.

24. Esta Comisión creó una Unidad Especial de Investigación de Muertes de Menores, siempre en respuesta a la visita de la Relatora Especial en Septiembre de 2002. Esta Comisión es

un ente investigativo con cinco agentes de la Dirección General de Investigación criminal (DGIC) asignados a ella para efectuar investigaciones rigurosas para determinar las causas por las que los menores han sido ejecutados, y establecer la identidad de los responsables. Al crear esta Comisión, el ministro de Seguridad se comprometía a resolver en el plazo de 90 días 15 casos ya documentados por ONGs. Por lo tanto, solo comenzó su trabajo de investigación en julio de 2003 con el nombramiento de un coordinador independiente. Esta Unidad tiene en investigación un total de 670 casos. Sin embargo, se han registrado desde 1998 hasta junio de 2005 un total de 2,756 muertes violentas y/o ejecuciones de niños y jóvenes menores de 23 años.

25. De los 670 casos investigados o en estado de investigación, solo 147 de ellos han sido remitidos al Ministerio Público, para continuar un posible procedimiento judicial. En los 523 casos restantes, los responsables todavía no serán sancionados. De acuerdo a la Unidad de Investigación de Muertes de Menores, de los 147 casos investigados y remitidos al Ministerio Público se han obtenido solo 8 sentencias condenatorias y 40 casos se encuentran esperando una sentencia. Se menciona que hasta la fecha, y a pesar de que el gobierno ha reconocido que en muchos de estos asesinatos han participado agentes de la policía, sólo dos policías han sido declarado culpables mientras un policía está detenido, en la espera de juicio.

26. Informes indican que esta unidad no tiene los recursos necesarios para llevar a cabo investigaciones efectivas en todos los casos de muertes violentas y/o ejecuciones: cuenta con un número limitado de agentes de investigación a nivel nacional y no dispone de recursos logísticos y científicos para realizar investigaciones que obtengan resultados concretos y eficaces. A pesar de su anuncio en 2003 de que el gobierno se iba a establecer un programa nacional para la protección de los individuos que prestaran declaración como testigos en actuaciones judiciales, hasta hoy no se ha creado ningún mecanismo adecuado por este fin.

27. Por fin, la Comisión logró que se nombrara a un fiscal especial para impulsar acciones legales y agilizar procesos contra imputados en estas muertes.

E. Control de las compañías privadas de seguridad y utilización de armas de fuego

28. De acuerdo con la Relatora Especial, el Ministerio de Seguridad tiene la responsabilidad de vigilar el uso de armas de fuego por guardias perteneciendo a compañías privadas de

seguridad ya que son responsables de muchas ejecuciones de niños. La Relatora recomendó que en ninguna circunstancia se debería considerar que esas compañías son sustitutos de los organismos represivos ni se debería permitir que asumieran las funciones de éstos (párrafo 80).

29. Conforme con la resolución de la Relatora, el Gobierno de Honduras tiene que reducir el tráfico de armas y garantizar que su venta esté bajo estricto control estatal (párrafo 81).

30. Informes indican que las muertes de niños y jóvenes a manos de guardias de seguridad perteneciendo a compañías de seguridad privadas persisten. Se ha registrado que solo durante los primeros meses del año 2005 acontecieron 10 muertes de niños y jóvenes de menores de 23 años, siendo guardias de seguridad los presuntos responsables de estas muertes.

31. En cuanto al control de las armas de fuego, el Gobierno ha puesto en vigencia una ley para el control de armas y la ley contra el uso de armas prohibidas, entre estas la AK-47, que incluye su autorización, registro y control. Sin embargo, la ley no es suficiente para que el Estado pueda garantizar que toda la población haya registrado sus armas o que no existan armas de uso ilegal.

F. Independencia de la judicatura

32. La Relatora Especial recomendó que se refuerce el sistema judicial para que las víctimas de ejecuciones extrajudiciales obtengan justicia. El Gobierno tiene que estudiar las recomendaciones pertinentes formuladas por las varias comisiones designadas por el Parlamento y el Colegio de Abogados sobre el fortalecimiento del poder judicial así como las recomendaciones del Relator Especial sobre la independencia de los magistrados y abogados (párrafo 82).

33. El alto porcentaje de fallas en las investigaciones de ejecuciones extrajudiciales de niños y jóvenes se debería, en parte, al alto nivel de corrupción en los sistemas de administración de justicia, desde la policía hasta los tribunales. Asimismo, el control de la Dirección General de Investigación Criminal por el Ministerio de la Seguridad ha sido mencionado como un problema grave en la investigación de cualquier crimen, por su separación de las fiscalías del Ministerio Público que tienen la función de llevar adelante los procedimientos judiciales.

34. En los últimos años, el Estado ha realizado un proceso de reforma judicial tendiente a modernizar y actualizar sus estructuras. Esto ha incluido la independencia de la judicatura, con el amplio apoyo técnico y financiero de USAID, ILANUD, Cooperación Española entre otros. De acuerdo con las informaciones recibidas, las expectativas que este proceso generó se han quedado, sin embargo, únicamente en el papel.

G. Orientación y formación a funcionarios públicos

35. Según la Relatora, el Gobierno tendría que organizar cursos especiales de orientación que contengan un importante componente de derechos humanos para los funcionarios que estén en contacto directo con niños. Se alienta a los organismos de las Naciones Unidas a que presten un amplio apoyo técnico con ese fin (párrafo 83).

36. En 2005, el Instituto Hondureño de la Niñez y la Familia (IHNFA) ha solicitado la colaboración al Comisionado Nacional de los Derechos Humanos para que éste brinde cursos especiales en materia de derechos fundamentales para sus funcionarios. Estos cursos, aunque organizados tres años después de las recomendaciones de la Relatora especial, representan un avance. Para ser eficaz, esta capacitación y orientación al personal del IHNFA tendría que ser sistemática.

37. Agentes de la policía y de la Dirección General de Investigación Criminal también han recibido algunas capacitaciones con contenidos de derechos humanos con el apoyo y la cooperación de organizaciones de la sociedad civil. ONGs han brindado capacitaciones a policías penitenciarios que se encuentran en los Centros de Internamiento para Menores que han infringido la ley. Asimismo apoyan y promueven la capacitación de funcionarios como Fiscales del Ministerio Público.

H. Apoyo a la iglesia en su labor en favor de los niños de la calle

38. La Relatora Especial recomendó que se apoye y aliente a la iglesia en su labor para apoyar a los niños y adolescentes que estuviesen tratando de abandonar las pandillas callejeras (párrafo 86).

39. De acuerdo con las informaciones recibidas, el estado no ha brindado apoyo a la iglesia para potenciar sus acciones a favor de la niñez, lo que a menudo limita su labor por falta de recursos.

I. Prioridad a la niñez en la asignación de recursos

40. La Relatora Especial sugirió que el Gobierno establezca nuevas prioridades en la asignación de recursos para que la niñez ocupe un lugar preponderante en toda planificación presupuestaria para la protección de los derechos civiles y políticos, así como económicos, sociales y culturales de todos los niños (párrafo 87).

41. A finales del mes de junio de 2005, el Estado hondureño obtuvo una reducción importante de su deuda externa. El destino de estos fondos se está discutiendo. Sin embargo, el Estado no ha mostrado indicios de que la niñez será una prioridad en la asignación de recursos ya que se asigna más recursos a la represión de la llamada «delincuencia callejera» que a la protección integral de la niñez hondureña.

J. Desarrollo de una política integral en materia de derechos de la mujer

42. De acuerdo con la Relatora Especial, muchas de las víctimas de las ejecuciones extrajudiciales pertenecen a familias monoparentales que suelen estar encabezadas por la madre. La pérdida de autonomía de la mujer está estrechamente vinculada a la marginación del niño. Según la Relatora, el Gobierno debe formular y aplicar una política integral en materia de derechos de la mujer, haciendo especial hincapié en la emancipación de las madres solteras (párrafo 88).

43. Honduras formuló en el año 2002 una Política Nacional de la Mujer que se enfoca en los aspectos de salud, educación y comunicación, pobreza y empleo, violencia y participación política de mujeres. De acuerdo con la información recibida, hace falta recursos adecuados para desarrollar esta política.

K. Conclusiones

44. El Estado de Honduras ha realizado esfuerzos para dar cumplimiento a las recomendaciones de la Relatora Especial, como la creación de la Comisión Permanente de Protección a la Integridad Física y Moral de la Niñez y de la Unidad de Investigación de Muertes de Menores. Estos esfuerzos a pesar de ser avances importantes, requieren todavía de un fortalecimiento institucional y de una voluntad política manifiesta para contrarrestar el fenómeno de ejecuciones de niños, niñas y jóvenes que tendría que ocupar una posición de prioridad en la agenda estatal.

II. JAMAICA

45. The Special Rapporteur on extrajudicial, arbitrary and summary executions visited Jamaica from 17 to 27 February 2003 and published her report on the visit on 26 September 2003. The focus of the Special Rapporteur's visit and, accordingly, of her recommendations (E/CN.4/2004/7/Add.2, paras. 83-95) was on police shootings of criminal suspects. She also considered the question of the application of the death penalty in Jamaica. This follow-up report is structured as follows: part A summarises general information regarding developments in the use of lethal force by security forces in Jamaica; part B sets forth the information received with regard to measures taken to improve accountability for the use of lethal force by the security forces; part C describes the information received with regard to the death penalty.

A. General information regarding developments in the use of lethal force

46. In the years preceding the visit (2000-2002), an average of 150 persons had been killed by the police in Jamaica (para. 22 of the report). Statistics for the years 2003 and 2004 record a decrease in the number of casualties of police shooting.⁶ In 2005, however, police killed 167 persons and shot another 110 citizens non-fatally, the highest level since 1991. These figures have to be seen against the background of the critical violent crime situation faced by the

⁶ For the year 2003, the Constabulary Communications Network (CCN) reported 113 fatal police shootings. The Bureau of Special Investigations (BSI), the branch of Police charged with investigating fatal shootings, reported 111 fatal shooting incidents which resulted in 128 fatalities for the year 2003. For the year 2004, CCN reported 108 cases of 'Police Shooting Civilians', while BSI reported 114 fatal shooting incidents involving the police resulting in 130 fatalities.

country, with a homicide rate exceeding 54 per 100,000 persons in the year 2004. In the year 2005 homicides climbed even further, with reportedly 1,600 citizens killed – more than 58 per 100,000 persons. Well-armed gangs (often better equipped than the police) trafficking in narcotics and guns control many inner-city communities.

B. Measures to establish “a system that would ensure an acceptable level of accountability on the part of the security forces”

47. From October 1999 to February 2006 not a single police officer was found guilty on charges related to the fatal use of force, although more than 700 persons had been killed by the police during these six years. On 22 February 2006, a police constable was found guilty of murder and sentenced to life imprisonment for the killing of Michael Dorsett while on police patrol in November 2000. In this case, as in numerous others, the police officer claimed that the victim and another man had opened fire on the police patrol and he had returned fire only to protect himself and his colleagues. Scientific evidence presented by the prosecution, however, showed that no gunpowder residue was found on the deceased's hands.

48. There are two institutions in charge of investigating police shootings. Within the Jamaican Constabulary Force (JCF), the Bureau of Special Investigations (BSI) is responsible for investigating all police shooting incidents, both fatal and non-fatal. The BSI reports to the Commissioner of Police. The Police Public Complaints Authority (PPCA) is an external independent civilian body that investigates complaints against the police. It can also initiate its own investigations. Both BSI and PPCA draw up reports to the Director of Public Prosecution (DPP), who then decides whether to pursue criminal or disciplinary proceedings, or to send the matter to the Coroner's Court.

49. The Special Rapporteur had recommended a series of measures to strengthen accountability for the use of force, in particular lethal force, by the security forces. These measures concerned on the one hand strengthening the investigational capacity of the police (para. 91), and on the other hand reform of the procedures of the Director of Public Prosecutions (DPP), of the PPCA, and the Coroner's Court.

1. Strengthening investigational capacity into police shootings

50. The Special Rapporteur recommended that the capacity of investigating agencies should be enhanced, in particular in the areas of identification of witnesses, scene preservation and evidence gathering, and establishing the identity of the deceased.

51. According to the reports received, the failure to conduct thorough and impartial investigations of police killings persists as a virulent problem.

52. A first aspect of this is the failure to secure and protect the crime scene for the collection of evidence. As a consequence, evidence is frequently contaminated or lost. The BSI still does not have a crime scene team. For instance, information provided to me indicates that in September 2004, after Sandra Sewell and Gayon Alcott were allegedly shot by the police⁷, the investigative team from BSI were unable to retrieve from the scene the spent shells, which would have provided vital information for the investigation. The bodies were moved by soldiers and JCF officers without any attempt to protect the hands and clothing. Their bodies were stored for two and a half weeks in the mortuary unprotected by body bags and with their hands unprotected. The clothing worn by the deceased was not removed until the time of autopsy two weeks later. Jamaicans For Justice, an NGO, had to assist BSI in obtaining X-Rays of the victims' bodies to determine if bullet fragments were left in situ. The clothing and footwear of the soldiers involved in the incident has still not been collected.

53. The Jamaica Constabulary Force has operated without a ballistics machine, one of the most important tools for a forensic laboratory, for two-and-a-half years. The reason given for the delay is the cost of replacing the old machine, which no longer functions. Consequently, the police now conduct ballistics tests manually. Due to the lack of essential equipment, help is occasionally sought from Scotland Yard in some of the high profile cases. Over half of the cases of fatal and non-fatal police shootings are awaiting the completion of ballistics testing (ballistics tests have not been done on firearms pertaining to several incidents which occurred in 2004).

⁷ On 16 November 2004, I wrote a letter to the Government of Jamaica (E/CN.4/2005/7/Add.1, at para. 373) regarding the shooting of Mr. Alcott and Ms. Sewell. A reply from the Government was received on 21 April 2005 (E/CN.4/2006/53/Add.1). Neither my communication nor the Government's reply address the shortcomings in the handling of the crime scene discussed here.

54. The Special Rapporteur specifically recommended that pathology and forensic experts should be independent from the police (para. 92), but both the Forensic Pathology Department and the Forensic Laboratory remain part of the Ministry of National Security, which supervises both the JCF and the military Jamaica Defence Force (JDF). Autopsies are still routinely conducted without photographing the bodies and x-rays are most often not done.

55. Because of their limited personnel and training and the government's failure to provide them with adequate resources, the involvement of the BSI in investigating instances of police abuse is often mainly cosmetic.

2. With regard to the Coroner's Court

56. The Special Rapporteur further suggested that the Government take steps to reform the Coroner's Court. The main problems identified in the report in this respect were excessive delays in the proceedings, failure to obtain attendance of witnesses, obstacles to the participation of family members of shooting victims in the proceedings and the existence of a set of "professional jurors" in Coroner's Court.

57. Parliament enacted amendments to the Coroners Act in March of 2005. In order to reduce the delays in Coroner's Court proceedings attributable to the police, the reform provides that the commanding officer of each police station shall designate an officer ("designated officer") to carry out those pre-inquest tasks assigned to the police (i.e., notification of deaths to coroners and initiating investigations; ordering post-mortems and receiving autopsy reports, remitting police and autopsy reports to the coroner and authorizing or prohibiting burial). The concentration of responsibility for pre-inquest coroners' matters in the hands of a special officer should serve to rationalize the current bureaucracy and enhance the level of accountability for the disposition of coroners' cases. In this respect, concern has been expressed that, under the Act, a designated police officer rather than a civilian is responsible for notifying the Coroner and for the investigation into the circumstances relating to the death.

58. To further expedite Coroner's Court proceedings, the Act contains new provisions establishing "time-frames" for procedural steps for the submission of the autopsy and police

reports to the coroner. NGOs active in supporting families of victims state that it is too early to assess whether these amendments will produce positive results. The backlog in the Coroners' Courts is unchanged and inquisitions still take years to be completed. The concern is expressed, moreover, that while these amendments to the Act may reduce the delays in getting the case to Coroner's Court, they might not be able to affect the length of time it takes to actually start the inquest or complete it because (in the Attorney General's words) a "major cause of unacceptable delays in the hearing of cases is the perennial problem of absence of witnesses required to testify at inquests".⁸

59. The Act also attempts to address the problems encountered in securing the attendance of witnesses and the admissibility of evidence. The police often complain of difficulties experienced in locating witnesses, particularly when there is protracted delay between the death and the inquest. The coroner is empowered to appoint special bailiffs to carry out the work of serving summonses for witnesses. Observers object, however, that the reason many witnesses do not attend Coroner's Court is that they are afraid of reprisals from the police, and that the amendment is therefore unlikely to have a significant impact.

60. The amendments to the Coroners Act also contain various measures to allow the use of previous statements by witnesses who for one reason or another are not available to testify at the inquest (e.g. because of death or migration), even where such statements would not be admissible in criminal or civil proceedings (e.g. under hearsay rules).

61. The amendments to the Act further provide that interested parties, for example near relatives, have the right to cross-examine witnesses and to view material intended to be adduced in evidence with the coroner's permission. Moreover, interested parties are now granted *locus standi* to apply to the Supreme Court to quash a coroner's inquest verdict or inquisition. Hitherto such an application could only be made by the Director of Public Prosecutions. While it is early to assess whether this amendment will produce positive results, it is argued that its impact would be far greater if the Act also provided for attorneys to assist families who cannot afford to hire an attorney in the Coroner's Court proceedings, thereby enabling them to significantly take part in

⁸ Attorney General Senator A.J. Nicholson, QC, in the opening debate concerning the Coroners (Amendment) Bill, March 2005.

the proceedings as an interested party. Where victims' families can afford an attorney to represent them, the attorney will not be allowed to address the jury.

62. Finally, to address the concern regarding "professional jurors", the Act provides that jurors will now be selected randomly from the list of jurors kept by the Clerk of Courts under the Jury Act, which is revised every four years. Concern is expressed, however, that the act does not address the problem of the so-called "professional jurors". Some of the same jurors have been serving in the Court since at least December 1999.

3. With regard to the Director of Public Prosecutions (DPP)

63. With regard to the DPP, the Special Rapporteur recommended to put in place a procedure whereby the decision of the DPP not to send a case to trial can be reviewed (para. 83). According to the information received, the Government has not taken any steps to implement this recommendation. There have been, however, developments in this matter at the judicial level, in the *Patrick Genius* case, which the Special Rapporteur had mentioned in her Report to illustrate her concerns regarding DPP decisions not to prosecute (paras. 39-41). As reflected in the Special Rapporteur's Report (para. 40), and elaborated on in greater detail by the Government in its letter of 16 April 2004⁹, on 2 May 2003 the Supreme Court (i.e. the court of first instance) handed down a judgment finding that the DPP had not acted unreasonably in refusing to charge the police officers involved in the shooting that resulted in the death of Patrick Genius, and that the DPP should not be compelled to press charges. Attorneys acting on behalf of the estate of Patrick Genius filed an appeal. The Court of Appeal found that it would not be correct to interfere with the DPP's exercise of his constitutional powers in his decision not to initiate charges against the police officers. It observed, however, that "the DPP should have given fuller reasons to facilitate the proper examination of his decision". The attorneys then applied for leave to appeal to the Privy Council. On the 16 May 2005 the Court of Appeal granted leave to appeal to the Judicial Committee of the Privy Council, where the matter is pending at the time of writing.

⁹ Letter dated 16 April 2004 from the Permanent Mission of Jamaica to the United Nations Office at Geneva addressed to the Acting High Commissioner for Human Rights (E/CN.4/2004/G/51).

4. With regard to the Police Public Complaints Authority (PPCA)

64. The Police Public Complaints Authority (PPCA) is an independent body headed by a retired judge. It is mandated to receive and investigate complaints against the police. The Special Rapporteur suggested that the PPCA should undertake to monitor all incidents of police killings and publish the results of the inquiries, investigations or trials in such cases (para. 93). For this purpose, the PPCA should be better resourced and its membership expanded (para. 90).

65. According to the Government's letter of 21 April 2004¹⁰, "this body was recently strengthened by the addition of 15 new investigators and training upgraded facilitated by international partners". As of August 2005, however, NGOs report that the PPCA continues to be seriously understaffed and under-funded. It reportedly has only 14 investigators and would, it has been suggested, need both more investigators and more resources per investigator (e.g. means allowing investigators to travel) to carry out its mandate effectively.

5. Transparency with regard to police shootings

66. The Special Rapporteur finally recommended that the information available to the public about police shootings and their investigation, and thus the transparency of the authorities' conduct in these matters, be increased (para. 94).

67. NGOs assisting the victims of police shootings report that their requests to BSI, DPP and PPCA about the status of investigations into incidents and related proceedings are not replied to regularly and then only with significant delays.

68. As for publicly available information, in January of 2005 the Commissioner and the Constabulary Communication Network (CCN) set up a website which included detailed information on Crime Statistics. The website initially had specific information regarding fatal police shootings. That information, however, is no longer posted. CCN also used to release, on request, copies of news releases on police fatal shooting incidents, but has discontinued this

¹⁰*ibid.*

practice. This decision makes it more difficult for the public to monitor the number of fatal and non-fatal shootings committed by police officers.

69. The PPCA has not tabled a report on its activities in Parliament (and thus in public) since the report for 2002-3 which was tabled in April of 2004. There has thus been not public accounting for the operations of the agency since the year 2003. BSI published in the course of the year 2005 a news letter giving a true reflection of their hard work over the year 2004.

C. The death penalty

70. The Special Rapporteur recommended that capital punishment should not be imposed on minors or the mentally ill (para. 95). She also asked for an investigation of the cases of the convicts on death row to ensure that safeguards and restrictions applying to the imposition of capital punishment had been observed (*ibid.*).

71. No information was received on any steps taken by the Government to implement these recommendations. The Government has not provided any information on the cases of Dean Nelson and Donovan Clarke, two inmates of the death row at St. Catherine District Prison in Spanish Town met by the Special Rapporteur in the course of her visit. The Government had expressed to the Special Rapporteur its commitment to investigate allegations that the two men were minors at the time of the crimes they were sentenced for (para. 57).

72. It would appear that in the period since the Special Rapporteur's report the death sentence has been imposed in a number of cases, but no executions have taken place.

73. An important development did, however, take place with regard to capital punishment. Jamaican criminal law provided for the mandatory death penalty for murder under certain aggravating circumstances, such as murder of a member of the security forces, or murders carried out in the furtherance of a robbery, house-breaking, or sexual abuse. The mandatory death sentence for those categories of murder was abolished by a decision of the Privy Council

on 7 July 2004, in the case *Lambert Watson v. the Queen*.¹¹ Mr. Watson successfully argued that there were mitigating factors in his case which (because of the mandatory death sentence for murder) could not be taken into account by the judges, who had no choice but to impose the death penalty once he was convicted of murder.

74. The decision affects the cases of 45 or more prisoners on death row in Jamaica. Their cases have to be re-evaluated by the Court of Appeal. As of 1 September 2005, the Court of Appeal had re-assessed 22 cases, confirming the death penalty in four cases¹², commuting it to prison sentences between 15 and 45 years in 11 cases, and confirming the decision of the Governor General to commute the death sentence to life imprisonment in seven cases. In at least 23 other cases, including the case of Lambert Watson, the re-assessment was still pending.

D. Conclusion

75. I welcome the amendments to the Coroner's Act adopted by the Jamaican legislature, and hope that the practice of the Coroners Courts over the coming years will dispel the doubts observers have expressed over the effectiveness of the amendments. The general picture, however, remains that very little was done to implement the recommendations of the Special Rapporteur. As a result, while the number of persons shot by the police reached a new all-time high in the year 2005, the inexcusable situation of nearly complete impunity for these killings persists, reinforcing the tendency of law enforcement officials to substitute extrajudicial executions for investigation and criminal procedure. Indeed, in a number of respects highlighted in this follow-up report, it would be difficult to devise a system more conducive to ensuring impunity for those committing extrajudicial executions.

¹¹ *Lambert Watson v. the Queen* (Privy Council Appeal No. 36 of 2003), Judgment delivered 7 July 2004, (available at < <http://www.privacy-council.org.uk/files/other/lambert%20watson.jud.rtf>>), particularly paras. 33-34. The Judicial Committee of the United Kingdom Privy Council is the court of final appeal for those Commonwealth countries, including Jamaica, that have retained the appeal to it.

¹² The four cases are Delroy Stewart (found guilty of the rape and murder of a 12-year-old girl), Mark Watson, for the murder of a 68-year-old security guard to cover up a robbery, Michael Asserope, found guilty of the rape and murder of a 10-year-old girl, and Ian Gordon, convicted for a double murder.

76. Also with regard to the death penalty, I note with regret that it would appear that no steps were taken by the Government to bring the application of capital punishment in Jamaica into compliance with international law.

III. BRAZIL

77. The Special Rapporteur visited Brazil from 16 September to 8 October 2003. She submitted her report on the visit on 8 January 2004 (E/CN.4/2004/7/Add.3).

78. The report and the recommendations (paras. 77-94 of the report) focused on extrajudicial executions by the police and “death squads” with ties to the security services, as well as on the impunity the perpetrators of such killings enjoy.

79. Brazil’s second periodic report under the International Covenant on Civil and Political Rights was reviewed by the Human Rights Committee in October 2005. The Committee’s concluding observations (CCPR/C/BRA/CO/2) provide a useful source of information about the extent to which the Government has followed up on the recommendations made by the Special Rapporteur two years earlier. The conclusion that emerges from the Committee’s views is a largely negative one in the sense that it reiterated concerns expressed and recommendations made by the Special Rapporteur (paras. 5, 7, 9, 12, 13, 17, and 18). The Committee also asked the Government to “give utmost consideration to the recommendations of the United Nations Special Rapporteur ... on extrajudicial, summary or arbitrary executions” (paragraph 12 d).

A. Statistical data on police lethality

80. The Special Rapporteur recommended that the Government establish a centralized database on human rights violations attributed to members of law enforcement agencies throughout the federative states. This information should be made public so as to provide a solid basis for future governmental policy (paragraph 80).

81. The Government has not yet created such a database.¹³ To date, statistical information relies on isolated non-governmental initiatives consisting of the collection of unverified press clippings. Civil society organizations keep stressing that a centralized database would be immensely helpful to elaborate comprehensive preventive policies against police lethality.

82. Some valuable initiatives at state level have been brought to my attention. The Rio de Janeiro Secretariat of Public Security and the Sao Paulo police ombudsman have created their own database on police lethality. In Pernambuco, a state Call and Denounce System (*Disque-denúncia*) was created in July 2000 in cooperation with NGOs. In May 2004, a total of 7,821 homicides had been recorded since its creation, 1,250 of which involved perpetrators belonging to death squads. Thanks to the information collected, 75 armed groups have been identified with half of their members belonging to the armed forces.

B. Recruitment and training of police officers

83. The Special Rapporteur recommended that the Government should review its police recruitment procedures in order to screen new entrants' criminal records (paragraph 77).

84. To date, the recruitment and screening of police officers has not undergone any change.

85. The Special Rapporteur recommended that the Government provide regular human rights training in conformity with relevant standards on the use of force and firearms by law enforcement officials. She recommended that this be done with the involvement of civil society groups (paragraphs 78 and 79).

¹³ That there has been little follow up to this recommendation is confirmed by the concluding observations of the Human Rights Committee, which regretted the general absence of specific data to permit evaluation of the practical enjoyment of human rights, especially in regard to alleged violations in the states of the Federative Republic of Brazil. It further recommended that Brazil "provide detailed information regarding the effectiveness of programmes [...] to protect and promote human rights, and [...] encouraged to strengthen mechanisms to monitor the performance of those measures at the local level. This should include statistical data on issues such as [...] police lethality" (E/CN.4/2004/7/Add.3, para. 5).

86. The Federal Government has initiated a Unified System for Public Security (*Sistema Único de Segurança Pública, SUSP*) as part of the National Public Security Plan (*Plano Nacional de Segurança Pública*) in order to harmonize public security and the criminal justice system at the federal, state and municipal levels. Among its tasks, the SUSP organizes police training within integrated academies. It uses a common curriculum (*Matriz Curricular Nacional*), which includes subjects such as human rights, citizenship, and social peace. It also concentrates on the role of the police to protect and promote human rights. In 2004, 540 police officers participated in human rights seminars in four different States. In 2005, seminars have been conducted in two States, for a total of 970 security officers. The Government is planning to expand its courses to the whole territory of Brazil in 2005.

87. Other state initiatives have been organized in partnership with the International Committee of the Red Cross and focused on human rights norms and humanitarian principles for Military Police. In 2004, a total of 500 policemen attended this course.

88. Despite these initiatives, however, Governmental financial support to police training is insufficient in many States, leaving most responsibility to under funded non-governmental human rights organizations.

C. Measures to strengthen accountability for extrajudicial executions

1. Independent investigations by Public Prosecutors

89. The Special Rapporteur recommended that the Government remove the legal obstacles that prevent public prosecutors from carrying out investigations into charges of extrajudicial executions by members of security forces independently from the security forces. She also recommended that public prosecutors' offices be better resourced. She stated that the Government should ensure that all complaints and reports of extrajudicial executions are investigated promptly, impartially and effectively by a thoroughly independent body. The public prosecutor should decide whether killings of civilians by the police are "intentional"¹⁴ or not after conducting an independent investigation (paragraphs 82 and 87).

¹⁴ As explained in the report (paragraph 59), article 125 of the Constitution grants the military courts

90. These recommendations were recently reiterated by the Human Rights Committee, which stated that Brazil should “ensure prompt and impartial investigations into all allegations of human rights violations committed by law enforcement officials. Such investigations should, in particular, not be undertaken by or under the authority of the police, but by an independent body”.¹⁵

91. Whether public prosecutors may proceed with independent criminal investigations is still subject to controversy. Although according to the Constitution public prosecutors have the power to proceed with an independent criminal investigation regardless of the pre-existence of a police inquiry, this position has been consistently challenged in court by the police who seek to maintain their prerogatives with regard to investigations. The question has been examined for several years by the Federal Supreme Court which has not yet come up with a final decision.

2. Federalization of human rights crimes

92. As to assigning jurisdiction to Federal authorities over serious human rights violations, the Government of Brazil has not yet created an independent body to carry out Federal investigations into extrajudicial executions. A draft report by the Parliamentary Commission on investigation of death squads in the Northeast region of Brazil supports this initiative, and plans to create a specific department within the Federal Police to carry out investigations into killings perpetrated by death squads involving members of the police.¹⁶ However, for lack of nationwide political support, this project has not been adopted.

93. As part of the strategy to combat impunity, in December 2004 Congress amended article 109 of the Brazilian Constitution. It now grants the federal government jurisdiction over grave

jurisdiction over military police for military crimes. In 1996 a new law modified the Military Criminal Code and granted the civilian judiciary the power to judge cases of “intentional” attacks on life. Thus, all crimes less serious than “intentional” murder committed by military police against civilians - including manslaughter - remain under the jurisdiction of the military justice system.

¹⁵ E/CN.4/2004/7/Add.3, para. 12 b.

¹⁶ According to this Parliamentary Commission, between 2001 and 2002 death squads were active in 9 states in the Northeast region, involving 250 people resulting in some 1035 victims.

human rights violations.¹⁷ Thus, the Prosecutor-General of the Republic is able to seek permission from the Superior Court of Justice in any phase of the investigation for the transfer of a case to the competence of the federal authorities. The first seizure of jurisdiction under this new law occurred in February 2005 in the case of the killing of human rights defender Sister Dorothy Stang in Anapu, Para State. The Court decided that the evidence of the unwillingness or incapacity of the State of Para to investigate the killing was insufficient to grant jurisdiction to the Federal Government. On a positive note, the Government informed me that on 10 December 2005, the two murderers of Sister Stang were sentenced to 27 and 17 years of imprisonment. The three remaining suspected accomplices will face trial in 2006.

94. Concerns remain, however, regarding the effectiveness of this mechanism. The Human Rights Committee recommended that Brazil “should ensure that the constitutional safeguard of federalization of human rights crimes becomes an efficient and practical mechanism in order to ensure prompt, thorough, independent and impartial investigations and prosecution of serious human rights violations”.¹⁸

3. Protection of witnesses

95. The Special Rapporteur recommended that the Witness Protection Programme (PROVITA) be better resourced and that its security officers’ criminal records be screened (paras. 89 and 90).

96. The PROVITA witness protection program mainly protects witnesses in criminal cases, mostly against police officers, and is the only scheme designed to protect individuals testifying in criminal cases against members of the police. It exists in 17 out of the 26 Brazilian States. The Sub-Secretariat for Human Rights (formerly National Secretariat for Human Rights) is currently negotiating a programme for the protection of human rights defenders under threat. Yet, due to

¹⁷ Article 9 V of the Federal Constitution reads: “in case of grave human rights violations, the Prosecutor-General of the Republic, in order to ensure compliance with international obligations incumbent on the Government of Brazil, may seek permission from the Supreme Court of Justice in any phase of the investigation for the transfer of a case to the competence of Federal justice”.

¹⁸ E/CN.4/2004/7/Add.3, para. 13.

lack of resources, it will only concern the States of Espírito Santo, Pernambuco, and Para, instead of the seven previously planned by the Government.

97. A recent report of the Federal Court of Accounts (Tribunal de Contas da União) indicates that funding attributed to this programme decreased from 14,4 million reais in 2003 to 11,9 million reais in 2004. Overall, PROVITA is subject to various criticism: policemen involved are said to be reluctant to escort witnesses to judicial hearings; the judiciary often fails to speed up proceedings so as to conclude a case within the two years of protection granted by this programme; there is a lack of coordination between the different partners involved, especially during the transfer of witnesses from one State to another.

98. In the meantime, many reports received indicate that human rights defenders, public prosecutors¹⁹ and politicians²⁰ continue to be killed in Brazil for lack of adequate police protection. On this particular subject, the Human Rights Committee expressed its concerns about the widespread reports of threats against and murders of rural leaders, human rights defenders, witnesses, police ombudsmen and even judges.²¹

4. Independence and strengthening of forensic institutions

99. The Special Rapporteur recommended that forensic institutions should be autonomous and run by non-police professionals, as they are critical for conducting investigations. Their technical support should be increased and regularly upgraded (paragraph 91).

100. According to the information received, this recommendation has not been implemented. Most forensic institutions remain subordinate to each State's Secretariat for Public Security,

¹⁹ On 10 May 2005, Public Prosecutor Rossini Alves was executed in Cupira, Pernambuco State, allegedly in relation to the criminal investigation he was currently carrying out.

²⁰ On 1 July 2005, José Cândido de Amorim Filho, a politician member of the Carpina city council, Pernambuco State, was executed, allegedly as he was opposing the conclusion of a dubious project in his city. According to the information received, he had requested police protection which was denied to him for lack of resources.

²¹ E/CN.4/2004/7/Add.3, para. 14.

which also controls the police, and therefore cannot carry out fully independent medical examinations.

5. Suspension of indicted police officers

101. The Special Rapporteur recommended that police officers indicted on charges of extrajudicial killing should be suspended until the conclusion of their trial (paragraph 93).

102. On paper, internal rules of the police generally provide that officers indicted may be temporarily suspended until the conclusion of legal proceedings. Suspension can be initiated by the Internal Oversight Office, the Public Prosecutor's Office, or the State Secretary for Public Security. During their suspension, policemen receive a part of their salaries. In serious cases, suspension is coupled with preventive imprisonment, if ordered by a judge. In practice, however, suspension hardly ever takes place. This underscores the importance of truly independent Internal Oversight and Public Prosecutor's Offices which could require suspension measures. In this context, there is an urgent need for a nationwide legislation to unify the practice of suspending policemen indicted for executions. The lack of progress in this respect is underscored by the fact that in October 2005 the Human Rights Committee also insisted that law enforcement officials accused of human rights violations should be subject to suspension or re-assignment during the process of investigation.²²

6. Reorganisation and increased support from intelligence agencies

103. The Special Rapporteur noted that intelligence agencies have crucial information about the identity of members of the so-called "death squads". She therefore recommended that intelligence agencies be associated with the investigation of killings by the so-called "death squads", and that these services be re-organized by promoting individuals with integrity and by placing more resources at their disposal (paragraph 85).

104. I have not received any information on follow up to this recommendation.

²² E/CN.4/2004/7/Add.3, para. 12b.

7. Abolition of time bar on prosecutions of the crime of murder

105. The Special Rapporteur recommended that the statute of limitations be abolished for murder (paragraph 86).

106. To my knowledge, this recommendation has not been implemented.

8. Judicial inquiries

107. The Special Rapporteur recommended that the government should hold judicial inquiries (in addition to criminal proceedings) into massacres allegedly perpetrated by the police where witnesses refuse to testify or where there is insufficient evidence to identify individuals who carried out the crime, so as to at least allow the sequence of events to be determined and victims to be compensated (paragraph 83).

108. According to the information received, in case of lack of evidence and when witnesses do not want to testify, cases are generally not pursued. This is reasonable but imposes an obligation upon the State to pursue other means to establish responsibility and to provide victims with compensation.

9. Access to information relating to investigation

109. The Special Rapporteur recommended that methods and findings of criminal investigations in alleged cases of extrajudicial killings should be made public. Relatives of the victim should have access to information relevant to the investigation (paragraph 88).

110. This recommendation has not been implemented. The State Secretaries for Public Security remain reluctant to publish any figure relating to security issues. Relatives of victims can access information relating to a specific investigation through their lawyer. Yet, since most of them do not have the financial means to obtain legal counsel, in practice they have no access to information.

10. Police ombudsman

111. The Special Rapporteur recommended that the office of the police ombudsman be strengthened, its tenure increased and its annual report presented to the State parliament for discussion (paragraph 92).

112. As part of the objectives of the Unified System of Public Security, the Government is planning to create independent Police Ombudsman Offices (*Ouvidorias*) as well as unified Internal Oversight Offices (*Corregedorias*), in order to establish an effective external control over the police force. However, reports indicate that police ombudsmen and coordinators of Internal Oversight Offices continue to be appointed by State Governors or State Secretaries for Public Security. Both offices generally lack resources. Overall, Internal Oversight Offices are reportedly not assuming a decisive role in investigations concerning allegations of police misconduct. There is no report of any specific measure to reinforce Police Ombudsman Offices and there is no indication that their reports are actually discussed when transmitted to State Parliaments.

D. Compensation for victims of extrajudicial executions

113. The Special Rapporteur recommended that dependants of victims of extrajudicial executions receive fair, adequate and timely redress from the state, including financial compensation (paragraph 84).

114. The Support Centres for Victims of Crimes (Centros de Apoio a Vítimas de Crimes (CAVC) provide legal, social and psychological support to victims of crimes, including extrajudicial executions. They were established in the various States (i.e. Alagoas, Bahia, Espírito Santo, Goiás, Minas Gerais, Pará, Paraíba, Pernambuco, Rio de Janeiro, Rio Grande do Sul, Santa Catarina and Sao Paulo), but are reportedly under-funded. In December 2005, the Human Rights Committee reiterated the concern that victims of extrajudicial executions are not provided with compensation.²³

E. Visits by other Special Procedures mandate holders

²³ E/CN.4/2004/7/Add.3, para. 12.

115. The Special Rapporteur recommended that the Government invite the United Nations Special Rapporteur on the independence of judges and lawyers to undertake a visit to Brazil to assess its judicial system (paragraph 94). This visit took place in October 2004. The Special Representative of the Secretary General on human rights defenders visited Brazil in December 2005.

F. Conclusions

116. I welcome the constitutional amendment of December 2004 making human rights violations federal offences as an important step in addressing impunity.

117. Overall, however, most recommendations of the Special Rapporteur have not been implemented. Impunity continues to be the rule in Brazil, with few extrajudicial executions being effectively investigated and prosecuted. Police violence remains systematic and widespread, disproportionately affecting the most vulnerable parts of the population.

IV. SUDAN

118. The Special Rapporteur on extrajudicial, arbitrary and summary executions visited the Sudan from 1 to 13 June 2004 and published her report on the visit on 6 August 2004 (E/CN.4/2005/7/Add.2). The focus of her visit and report were on the violations of the right to life in the context of the conflict in the Darfur. The present follow up report deals in part I with the recommendation to put an end to attacks on civilians in the Darfur, followed in part II by developments related to accountability for extrajudicial executions in the Darfur, and in part III recommendations related to the death penalty.

119. Since my predecessor's visit several highly authoritative reports have described the developments in the Sudan within the area of competence of the mandate, among others the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, dated 25 January 2005, the Report of the High Commissioner for Human Rights on Access to Justice for Victims of Sexual Violence of 29 July 2005, the Report to the 62nd Session of the Commission on Human Rights by the Commission's Special Rapporteur on the situation of human rights in the Sudan (E/CN.4/2006/111), dated 11 January 2006, the Second Periodic Report of the High Commissioner for Human Rights on the Human Rights Situation in Sudan,

also published in January 2006, as well as the Secretary-General's monthly reports on the situation in the Darfur²⁴. As already mentioned, the Government has not replied to my request to submit information on the steps it has taken to follow up on my predecessor's recommendations. The reports mentioned above, however, include substantial information on the matter, and I have reflected it in the present report.

A. Recommendations related to putting an end to attacks on civilians in the Darfur

1. Ending attacks against the civilian population and disarming militias

120. The Special Rapporteur requested that all "[a]ll attacks against the civilian population must stop. The Government must immediately ensure that all militias are disarmed, that the actions of the PDF [People's Defence Forces] remain under its firm control and that all members of the PDF are properly screened." (para. 59).

121. The Special Rapporteur was not alone in demanding that the Government stop attacks against the civilian population and disarm the militias. The Security Council has urged the Government to do so in resolutions 1556 (2004), 1590 (2005), and 1591 (2005)²⁵. In resolution 2005/82 on the situation of human rights in the Sudan, the Commission on Human Rights called upon the Government to "continue its efforts aimed at finding a durable and peaceful solution to the problem in Darfur", "stop and investigate violations of human rights", "disarm the Janjaweed militias and stop supporting them, in conformity with the relevant Security Council resolutions" and to "improve security in and around the internally displaced persons' camps".

²⁴ Available at < <http://www.un.org/Depts/dpko/mismissions/unmis/reports.html> >.

²⁵ In Resolution of 1591(2005) of 29 March 2005, acting under Chapter VII of the Charter, the Security Council "[d]eplores strongly that the Government of Sudan and rebel forces and all other armed groups in Darfur have failed to comply fully with their commitments and the demands of the Council referred to in resolutions 1556 (2004), 1564 (2004), and 1574 (2004), condemns the continued violations of the 8 April 2004 N'djamena Ceasefire Agreement and the 9 November 2004 Abuja Protocols, including air strikes by the Government of Sudan in December 2004 and January 2005 and rebel attacks on Darfur villages in January 2005, and the failure of the Government of Sudan to disarm Janjaweed militiamen".

122. Despite these resolutions, attacks involving the use of lethal force against the civilian population continued unabated during the second half of 2004. The first half of 2005 saw a marked decrease in such attacks, which was attributed to the Commission of Inquiry investigation and to the Security Council referral of the situation in Darfur to the International Criminal Court. Since September 2005 there has, however, been a resurgence of large scale attacks against the civilian population. As to disarming the militias, the High Commissioner's January 2006 report introduces its section on human rights abuses by militias with the observation that "[t]he human rights situation for Darfurians was made worse by the failure of the Government to prevent and protect the internally displaced and villagers from being killed, assaulted, and raped by armed militias."²⁶

123. Three attacks on villages in the South Darfur after my predecessor's visit, as investigated by the International Commission of Inquiry and the UNMIS human rights observers, illustrate the forces involved and the methods used:

*Amaki Sara, South Darfur, 30 October 2004.*²⁷ At 1 p.m. that day, soldiers on foot attacked the village. An hour later, the soldiers were joined by an air attack by two helicopters and two planes. The helicopters shot the people who were working in the fields but did not fire on the village. The planes only circled without firing weapons. As soon as the attack started, the villagers rapidly evacuated the area. Continuing to circle, the helicopters fired 57mm rockets at the escaping villagers who the witnesses insist were unarmed. The helicopters appeared to deliberately target people hiding beneath trees and bushes. Janjaweed later looted the village.

*Adwa village, South Darfur, 23 November 2004.*²⁸ At 6 a.m. governmental armed forces and Janjaweed launched an attack on Adwa village. Rebel forces reportedly held a base on top of the mountains near Adwa, and a battle between Government soldiers and rebel forces ensued. Two helicopter gun-ships and an Antonov plane were used during the attack, possibly for reconnaissance purposes. Ground forces used various weapons including assault rifles, machine guns, and 12,7 mm machine guns mounted on vehicles. According to witness reports, civilians

²⁶ High Commissioner's Second Periodic Report, p. 13.

²⁷ Commission of Inquiry report, para. 243, FN 119.

²⁸ Commission of Inquiry report, para. 253.

including women, children and elderly persons were targeted during the attack. Men were summarily shot, as was anyone who attempted to escape. Young girls were taken by the attackers to another location and many were raped in the presence of other women. The attackers looted the village. Many were forced to flee to a nearby mountain where they remained for several days. While in the mountains, several of the victims reportedly were shot by Government soldiers and Janjaweed. Following the attack, representatives of an international organization searched the village and found several injured women and children, whom they escorted to hospital. They also found the bodies of between 20 and 30 civilians who had been killed during the attack, including women and children. All of the victims were reportedly from Adwa and belonged to the Fur tribe.

*Villages surrounding Gereida, South Darfur, mid-November 2005.*²⁹ Following a number of attacks against Falata tribe members during 2005, allegedly by the rebel Justice and Equality Movement (JEM), the Falata leadership in Tulus, South Darfur, attacked villages surrounding Gereida from early to mid-November. In some of the attacks there was clear Government involvement. Eyewitnesses in one of the villages, Dar es Salam, saw members of the People's Defence Forces (PDF) participating in the attacks. They also saw military vehicles and helicopters dropping off military personnel. In other villages attackers were seen wearing military and police uniforms. Approximately twenty civilians were reportedly killed during the ten days of fighting and 11,000 to 20,000 people were reportedly displaced. Despite JEM activities in the area surrounding the villages which were attacked, there was no evidence that the attack targeted the JEM. On the contrary, civilian facilities were targeted (schools, crops, market, huts) with the apparent intention of destroying whole villages and displacing the population, which was perceived by the attackers to be supportive of the JEM.

124. The reports regarding these three incidents highlight four key elements. Firstly, as to the identity of perpetrators, regular Governmental armed forces, auxiliary forces (such as the PDF) and Arab militias worked and continue to work hand in hand. Secondly, “[c]ontrary to [...] assertions made by various Government officials, it is apparent from consistent accounts of reliable eyewitnesses that no precautions have ever been taken by the military authorities to

²⁹ High Commissioner's Second Periodic Report, p. 11.

spare civilians when launching armed attacks on villages.”³⁰ Thirdly, attacks were patently not proportionate to any purported military objective. “In fact, attacks were most often intentionally directed against civilians and civilian objects.”³¹ In a majority of cases, victims of the attacks belonged to African tribes, in particular the Fur, Masaalit and Zaghawa tribes. Finally, while the number of persons killed directly in the course of armed attacks generally remains in the tens, the livelihood of thousands is intentionally and systematically destroyed.³²

125. In addition to cases where Governmental armed forces attack villages together with militias, numerous other reports describe the security forces’ systematic refusal to protect civilians, particularly IDPs, under attack from militias. The Government, from the capital down to the regional and local level, continues to lack the political will to confront the militias that kill, rape, loot and terrorise the civilian population.³³

2. Protection activities of the international community

126. The Special Rapporteur recommended that “[t]he United Nations must continue to emphasize the need to protect the human rights of civilians. An international presence is of the

³⁰ Commission of Inquiry report, para. 265.

³¹ Commission of Inquiry report, para. 267.

³² Report of the Special Rapporteur on the situation of human rights in the Sudan (E/CN/2006/111), para. 64; High Commissioner’s Second Periodic Report, p. 34.

³³ The attack on Aro Sharow IDP camp and Guzminu village, West Darfur, is a particularly dramatic case of denial of protection. On 28 September 2005, at 2 p.m., around 350 heavily armed men wearing military uniforms raided the market in Aro Sharow IDP camp. The militia members who were on camel and horseback chased and shot at people, and looted the property and livestock of IDPs. At least 27 people were killed as a result of the attack. After the attack in Aro Sharow, the same group traveled two kilometers south to Guzminu village, which is located approximately 300 meters from an army camp. Throughout the attack the military remained inside the barracks. When the attackers approached the area, people started running away towards the military camp and were pursued by the attackers. When the soldiers saw the people approaching, they began shooting at the crowd to repel them. This prompted the attackers to retreat back to Guzminu village where they looted property and burned houses. A total of seven men were killed on the day of the attack (High Commissioner’s Second Periodic Report, p. 15). The High Commissioner’s Second Periodic Report, p. 16, also describes numerous other ways in which security forces refuse to protect IDPs under attack from armed militias.

utmost importance to guarantee consistency, impartiality and neutrality. The Government must ensure that immediate and complete access is provided to humanitarian actors as well as international human rights monitors, so that the international community has every opportunity, in cooperation with the Government, to protect the lives of vulnerable persons in Darfur.” (para. 59).

127. As highlighted above, both the Security Council and the Commission on Human Rights have continued to follow the situation in the Darfur and to urge the Government (as well as the other armed groups on the ground) to stop their attacks on the civilian population. The international presence in the Darfur (as far as inter-governmental organizations are concerned) consists of the African Union Mission in Sudan (AMIS) and the human rights monitors of the United Nations Mission in Sudan (UNMIS). AMIS was established by the African Union (AU) in April 2004 as a monitoring mission following the signing of the Humanitarian Ceasefire Agreement on 8 April 2004 between the Government and two rebel movements from the Darfur region. It is primarily charged with protecting internally displaced persons (IDPs) in camps from militia attacks.³⁴ In carrying out their mandate AMIS troops themselves have come under attack and suffered casualties.³⁵

128. The first UN human rights monitors were deployed to Darfur in August 2004 after the Government and the United Nations signed a joint communiqué that committed the Government to allow their deployment. Security Council resolution 1590 (2005) of 24 March 2005, establishing UNMIS, “urges the Secretary-General and the High Commissioner for Human Rights to undertake to accelerate the deployment of human rights monitors to Darfur and augment their numbers and also to move forward with the formation of civilian monitoring protection teams”. The number of human rights monitors has since then grown considerably.³⁶

³⁴ The High Commissioner’s Second Periodic Report, p. 16, provides examples of how AMIS presence did in fact locally improve the human rights situation.

³⁵ On 8 October 2005, Sudan Liberation Army (SLA) forces killed three AMIS soldiers and two civilian drivers, and a JEM splinter faction detained 38 others.

³⁶ As of 30 November there were fifty-seven human rights officers working for UNMIS. The majority of staff were located in the four UNMIS Darfur field offices in El Fasher (North Darfur), El Geneina and Zalingei (both in West Darfur), and Nyala (South Darfur).

**B. Recommendations related to ensuring accountability for
extrajudicial, arbitrary and summary executions in the Darfur**

129. The Report found that “[a]ccountability is crucial in any peace process, as many of the key causes of the conflict relate to perceptions of injustice and discrimination. The Government of the Sudan must make every effort to end the culture of impunity. In the context of Darfur, a positive development is the setting up of the National Commission of Inquiry, and I hope that the Commission will take into account violations of human rights allegedly committed by the security forces. However, the Commission of Inquiry can only partly address the issue of accountability. Ultimately, it is the obligation of the Government to ensure the delivery of justice and that witnesses and victims are protected. However, it is my impression that the accountability process in the Sudan will be seriously flawed unless the international community closely monitors it, and possibly even assists. In this regard, it is of the utmost importance that investigations be carried out to ascertain the details of the events in Darfur, including extrajudicial killings, and to bring the alleged perpetrators to justice. International actors are best suited to carry out these investigations in order to ensure that they are carried out in accordance with international legal standards and to send a public message that they will be impartial.” (para. 60)

**1. Action taken by the Government of the Sudan
to ensure accountability for extrajudicial executions**

130. Since May 2004, the Government has established “a plethora of mechanisms [...] to help bring about accountability for crimes committed during the conflict”³⁷, both judicial and non-judicial. As explained in the following paragraphs, however, these mechanisms are not adequate to discharge the Government’s obligations under international law.

(a) The National Commission of Inquiry

³⁷ High Commissioner’s Second Periodic Report, p. 27.

131. The first of these mechanisms was the National Commission of Inquiry set up by the President of the Sudan on 8 May 2004. The National Commission met 65 times over eight months, listened to 228 witnesses, and visited the three states of Darfur several times. It visited 30 incident locations and met with the local authorities, particularly the armed forces. It requested documents from various governmental bodies and reviewed the reports of the organizations that visited the Sudan, including the United Nations, the Organization of African Unity and the Organization of the Islamic Conference, as well various human rights groups, particularly Amnesty International and Human Rights Watch, as well as reports by some Governments, particularly the United States and the European Union.³⁸

132. The Executive Summary of the final Report of the National Commission states that serious violations of human rights were committed in the three Darfur States. It stresses that all parties to the conflict committed such violations and that what happened did not constitute genocide. The numbers of persons killed were exaggerated: losses of life incurred by all parties, including the armed forces and police, did not exceed a few thousands. Rape and crimes of sexual violence were committed but were not widespread or systematic and fell short of amounting to crimes against humanity. The National Commission recommended judicial investigations into some specific incidents.³⁹

133. The International Commission of Inquiry on Darfur gave the following assessment of the National Commission's Report: "While it is important for the National Commission to acknowledge some wrong-doings, its findings and recommendations are insufficient and inappropriate to address the gravity of the situation. Simply put, they provide too little too late. The massive scale of alleged crimes committed in Darfur is hardly captured by the report of the National Commission. As a result, the report attempts to justify the violations rather than seeking effective measures to address them. [...] The report of the National Commission provides a glaring example of why it is impossible under the current circumstances in Sudan for a national body to provide an impartial account of the situation in Darfur, let alone recommend effective measures."⁴⁰

³⁸ Commission of Inquiry report, para. 457.

³⁹ Commission of Inquiry report, para. 461.

⁴⁰ Commission of Inquiry report, para. 462.

(b) Criminal proceedings

134. There are currently multiple judicial systems in Sudan competent for criminal cases arising out of the extrajudicial, arbitrary and summary executions in the Darfur since 2002. In addition to the ordinary courts, there are the Specialised Courts for the three Darfur States, created by decree of the Chief Justice in 2003. Yet another court, the Special Criminal Court for the Events in Darfur, was established by the Chief Justice on 7 June 2005. On 18 September 2005, the Minister of Justice issued a decree that established a Specialized Prosecution for Crimes against Humanity.⁴¹

135. The Special Criminal Court for the Events in Darfur appears to be the main jurisdiction for the prosecution of war crimes and crimes against humanity committed in the Darfur. However, the cases before it nearly exclusively concern incidents that occurred in the course of the year 2005, and not the major crimes committed during the height of the Darfur conflict in 2003-2004.⁴² Furthermore, only one of the cases included charges brought against a high ranking official—who was acquitted.⁴³ The court is also inadequately staffed and resourced.⁴⁴

136. Serious concerns arise with regard to the fairness of the proceedings before these courts – both from the perspective of the defendants and from the point of view of the victims.⁴⁵ On 17 November 2005, the Special Criminal Court for the Events in Darfur sitting in AlFashir

⁴¹ For more details *see* High Commissioner's Second Periodic Report, p. 28.

⁴² High Commissioner's Second Periodic Report, p. 28.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ The OHCHR Access to Justice Report, para. 72, reports that the first case to go to trial before the Court, on 18 June 2005, was the case of eight members of the Popular Defence Forces and two military servicemen charged, *inter alia*, with the rape of a 16-year-old girl during an attack on two buses on 20 December 2004. The victim, her lawyers and the Office of the Prosecutor were only informed about the hearing on the morning of 18 June 2005. The lawyers regretted not having been informed earlier and asked for the case to be adjourned to the following day. However, the Chief Justice rejected the request, arguing that as it was a special court, "even five minutes notice" would be considered enough. The lawyers withdrew from the case in protest.

reportedly found two lance corporals of the Sudanese army guilty of torturing a suspected rebel to death and sentenced them to death. On 23 December 2005, I wrote to the Government welcoming the fact that two soldiers were being held accountable for torture and murder. At the same time, I expressed my concerns regarding the fairness of the proceedings: there appears to be no rule clearly establishing the right not to be coerced to admit guilt, the right to effective legal representation appears not to be fully guaranteed, and the deadline for appeals was reported to be only two weeks, which risks compromising the effectiveness of the right to appeal. As of to date, I have not received any reply to my letter.

137. A panoply of immunities granted by Sudanese law to officials who engage in human rights violations risks undermining, or at least seriously delaying, war crimes proceedings before any court in the Sudan. Current procedures make the investigation and subsequent prosecution of members of security forces subject to the permission of the executive bodies responsible for their conduct.⁴⁶ Section 33 of the National Security Forces Act gives wide immunities to members of the security and intelligence services and their collaborators. None of them shall be compelled to give information about the organisation's activities which they have come by in the course of their duty. Except with the approval of the director of the service, no civil or criminal action shall lie against either of them for any acts they may have committed in connection with their work.⁴⁷ When the accused is a member of the armed forces, the ordinary criminal court should report the case to the local military authority.⁴⁸ The military authority must then conduct an investigation and report back to the court without delay. If the criminal court does not agree that the case should be heard by the military court, an application for permission to hear the case is required from the head of the judiciary. Moreover, the new Interim Constitution provides for new immunities for the highest offices of the State.⁴⁹

⁴⁶ Article 46 of the Police Force Act 1999 states that "no criminal procedure will be taken against any police officer ... for a crime committed while executing his official duty as a consequence of those official duties, without the permission of the Minister of the Interior or [someone] whom he has delegated".

⁴⁷ Commission of Inquiry report, para. 453.

⁴⁸ Criminal Circular No. 3/1995 on the prosecution of members of the armed forces with reference to the Peoples' Armed Forces Act of 1986, Article 19.

⁴⁹ Article 60 of the Interim Constitution grants immunity from prosecution to the President and First Vice President of the Republic of the Sudan for all crimes except those of high treason, gross misconduct in relation to State affairs,

138. The gravest impediment to effective and fair prosecution of war crimes and crimes against humanity committed in the Darfur, however, is the total absence of protection for victims and witnesses.⁵⁰ The absence of witness protection mechanisms is aggravated by the likelihood of delay created by immunity provisions and by the circumstance that, reportedly, while an investigation is under way, no official action, such as suspension from duty, is taken against the alleged perpetrator.⁵¹ Requests by the prosecutor to withdraw the immunity of the officials concerned often meet with no response or are rejected. Similarly, an official will generally only be suspended if permission to prosecute is granted.⁵²

139. For all these reasons, the ICC Prosecutor concluded as recently as 13 December 2005 in his report to the Security Council that the Sudan is unwilling or unable to genuinely investigate and prosecute war crimes and crimes against humanity committed in the Darfur.⁵³

and gross violations of the Constitution. In these cases, action against alleged perpetrators can only be undertaken with the approval of three quarters of National Legislature members. Article 92 grants similar immunity for members of the National Legislature.

⁵⁰ OHCHR Access to Justice Report, para. 48. In addressing the Security Council on 13 December 2005, the Prosecutor of the International Criminal Court (ICC) stressed that “[w]itness protection is an issue of paramount concern to [the ICC]”, and that the prevailing climate of insecurity and the current absence of an effective system of witness protection constitute a major impediment to both his Office’s investigation and any investigations by Sudanese authorities. As a consequence, the ICC Prosecutor’s investigative activities have so far taken place only outside the Sudan. Address to the United Nations Security Council by the ICC Prosecutor, New York, 13 December 2005, available at <http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20051213_En.pdf>.

⁵¹ OHCHR Access to Justice, para. 46.

⁵² OHCHR Access to Justice, para. 77.

⁵³ Address to the United Nations Security Council by the ICC Prosecutor, New York, 13 December 2005, available at <http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20051213_En.pdf>. The ICC Prosecutor stated that ...“the work of the Special Court does not suggest that cases likely to be prosecuted before the International Criminal Court would be inadmissible in terms of Article 53(2)(b) of the Statute”. Article 53(2)(b) refers back to the grounds of inadmissibility in Article 17 of the Statute, including, under Article 17 (a) and (b) that the case is or has been investigated by a State which has jurisdiction, “unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”.

2. Action by the rebels to end impunity for violations they committed

140. The International Commission of Inquiry reported that the SLM/A, JEM and other rebel groups have taken no action whatsoever to investigate and repress the crimes committed by their members. The justifications offered by the rebels for such failure are either that no such crimes have been perpetrated, or else that they may have been committed by members of military units who were acting on their own and outside or beyond the instructions given by the political and military leaders.⁵⁴ No reports that would change this picture have been received since release of the Commission of Inquiry report.

3. Action by the United Nations and the International Criminal Court to end impunity

(a) The Commission of Inquiry

141. Acting under Chapter VII of the United Nations Charter, on 18 September 2004 the Security Council adopted resolution 1564 requesting, *inter alia*, that the Secretary-General “rapidly establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable”.

142. In October 2004, the Secretary General appointed the Chairperson and the four members of the International Commission of Inquiry on Darfur. The Commission was supported in its work by a Secretariat, a legal research team and an investigative team composed of investigators, forensic experts, military analysts, all appointed by the Office of the United Nations High Commissioner for Human Rights. The Commission assembled in Geneva and began its work on 25 October 2004. It visited the Sudan from 7 to 21 November 2004 and 9 to 16 January 2005, including travel to the three Darfur States. The investigative team remained in Darfur from

⁵⁴ Commission of Inquiry report, para. 488.

November 2004 through January 2005. The Commission submitted its Report to the Security Council on 25 January 2005.

143. The attitude of the Government authorities towards the Commission was generally cooperative. The Commission met with high-level authorities of the Sudan and received relevant documents relating to the conflict in Darfur.⁵⁵ In some instances, middle-level officials refused the Commission access to persons in detention, but were overruled by higher-level authorities.⁵⁶ The Commission remarks, however, that despite assurances from the Government it was not provided access to some documents it considered highly important to its mandate: the minutes of the meetings of the Security Committees in the three States of Darfur, and records of the deployment of military aircraft and helicopter gunships in Darfur since February 2003.⁵⁷ The Commission also stresses that there have been episodes indicative of pressure put by some regional or local authorities on prospective witnesses, or on witnesses already interviewed by the Commission.⁵⁸

144. The Commission was in contact with the two main rebel movements, the JEM and the SLM/A, and generally considers that both groups cooperated with the Commission. The Commission met with representatives and members of the two groups on a number of occasions in the Sudan, as well as outside the country. The Commission was never refused access to areas under the control of the rebels and was able to move freely in these areas. The rebel groups did not interfere with the Commission's investigations of reported incidents involving the rebels.⁵⁹

145. Relevant parts of the Commission's conclusions, as summarised in the Executive Summary of the Report, read:

⁵⁵ Commission of Inquiry report, paras. 30-36.

⁵⁶ Commission of Inquiry report, para. 32.

⁵⁷ Commission of Inquiry report, paras. 33-34.

⁵⁸ Commission of Inquiry report, para. 35.

⁵⁹ Commission of Inquiry report, paras. 37-39.

“[T]he Commission established that the Government of the Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law. In particular, the Commission found that Government forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur. These acts were conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity.

[...]

The Commission strongly recommends that the Security Council immediately refer the situation of Darfur to the International Criminal Court, pursuant to article 13(b) of the ICC Statute. As repeatedly stated by the Security Council, the situation constitutes a threat to international peace and security. Moreover, as the Commission has confirmed, serious violations of international human rights law and humanitarian law by all parties are continuing. The prosecution by the ICC of persons allegedly responsible for the most serious crimes in Darfur would contribute to the restoration of peace in the region.”

(b) Referral to the International Criminal Court

146. On 31 March 2005, by resolution 1593 (2005) the Security Council referred the situation in Darfur to the International Criminal Court (ICC). On 6 June 2005, the Prosecutor of ICC declared that he would open an official investigation into the situation in Darfur. On 13 December 2005, the ICC Prosecutor reported to the Security Council on progress in the investigation.⁶⁰ As the Commission of Inquiry and the High Commissioner’s Second Periodic Report, he concluded that the Sudan is unwilling or unable to genuinely investigate and prosecute war crimes and crimes against humanity committed in the Darfur.⁶¹ The Prosecutor also stressed that “[w]itness protection is an issue of paramount concern to [the ICC]”, and that the prevailing climate of insecurity and the current absence of an effective system of witness protection constitute a major impediment to both his Office’s investigation and any

⁶⁰ Address to the United Nations Security Council by the ICC Prosecutor, New York, 13 December 2005, available at < http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20051213_En.pdf >.

⁶¹ See note 53 above.

investigations by Sudanese authorities. As a consequence, the ICC Prosecutor's investigative activities have so far taken place only outside the Sudan.

The Government, on the other hand, has "stood in constant opposition to the Security Council's referral of the situation in Darfur to the ICC, claiming that Sudan was able and willing to bring to justice perpetrators of human rights abuses and international humanitarian law".⁶²

C. Recommendations related to the death penalty

147. The Special Rapporteur recommended that the Government undertake a comprehensive revision of the legislation concerning the death penalty with a view to ensuring that it conforms to international standards. She also recommended a comprehensive review of the cases of all persons on death row to ensure that international minimum standards were met in the course of their trials. (para. 61)

148. The Government has recently informed the UNMIS human rights observers that as of 18 September 2005 there were 479 persons in Sudan sentenced to death and awaiting execution.⁶³ Notwithstanding the new interim Constitution of Sudan ratified on 6 July 2005, the use of the death penalty in the Sudan continues to fall short of the requirements established by international law with regard to (1) the age of offenders, (2) respect for fair trial guarantees in capital cases, and (3) the "most serious crimes" requirement.

1. Death penalty for offences committed by minors

149. On 6 July 2005, a new Interim National Constitution was ratified. It makes the ICCRP, as well as the Convention on the Rights of the Child (CRC), which both prohibit sentencing someone to death if he or she was less than 18 years old at the time of the offence, an integral part of the constitutional bill of rights. Article 32(5) of the Interim National Constitution affirms that the state shall "protect the rights of the child as provided in the international and regional conventions ratified by Sudan." But the Constitution itself and criminal laws provide for

⁶² High Commissioner's Second Periodic Report, p.27.

⁶³ High Commissioner's Second Periodic Report, p.26.

exceptions to this principle which are incompatible with international law.⁶⁴ On 31 August 2005, two persons were executed in Khartoum who were reported by their relatives to have been less than 18 years old when they committed the capital offences.

2. The “most serious crimes” requirement

150. The death penalty appears to continue to be applicable for the offences of apostasy, homosexual acts and adultery⁶⁵, which were all found by the Human Rights Committee not to fulfil the criteria of “most serious crimes” when it considered, in 1997, Sudan’s Second Periodic Report under the Covenant.⁶⁶

3. Concerns relating to respect for fair trial guarantees in proceedings in which the death penalty is imposed

151. Reports indicate that fair trial guarantees are not respected in criminal proceedings resulting in death sentences being imposed, in particular with regard to the right not to be coerced to admit guilt, the right to legal representation, and the effectiveness of the right to appeal. These concerns are particularly acute in the case of trials before the specialised criminal courts created specifically for Darfur and Kordofan.⁶⁷ The reason for their establishment may be described as ‘fast tracking’, particularly in light of the fact that, according to reports, the hearing of a charge punishable by death may take no more than one hour.⁶⁸ One flaw inherent in the 2003 Decree which established the Specialised Courts is its failure to ensure that confessions extracted

⁶⁴ High Commissioner’s Second Periodic Report, pp.26-27.

⁶⁵ High Commissioner’s Second Periodic Report, p. 27.

⁶⁶ Concluding Observations on Sudan, (1997) UN Doc. CCPR/C/79/Add. 85, para. 8.

⁶⁷ Initially established as Special Courts by decrees under the State of Emergency in Darfur in 2001, the courts were in 2003 transformed into Specialised Courts. A decree issued by the Chief Justice on 28 March 2003 first established the Specialised Court in West Darfur, and later did the same in North and South Darfur. Specialised Courts have been established also for the Kordofan states.

⁶⁸ Commission of Inquiry report, para. 444.

extracted under torture or other forms of duress are excluded from the evidence.⁶⁹ According to the decree establishing the Specialised Courts, an appeal must be filed within seven days to the head of the judiciary, who delegates the case to members of the Court of Appeal. This is a rather short period, considering that court records and grounds for appeal need to be prepared before completing filing. Also interlocutory decisions are not subject to any appeal. There is no possibility of further judicial review.⁷⁰

D. Conclusions

152. As the reports summarised here show, the Government's follow up to the recommendations made by my predecessor with regard to the situation in the Darfur is ambiguous. On the one hand, it has cooperated with the numerous international mechanisms mandated to deal with the human rights situation in the Darfur. In the year-and-half following the visit of the Special Rapporteur on extrajudicial, summary and arbitrary executions it has received four further special procedures mandate holders⁷¹; it has agreed with the United Nations on the deployment of a substantial number of human rights observers; it has cooperated with the International Commission of Inquiry (although it appears not to accept the results of the inquiry); and it has accepted the deployment of the African Union peacekeeping mission.

153. On the other hand, the Government has clearly failed to implement its principal obligation which is to take effective steps to stop the attacks against the civilian population and to ensure that all militias are disarmed. Indeed, authoritative reports based on on-the-ground investigation establish beyond any doubt that the Government has continued to attack and kill civilians without any military necessity and has made no good faith effort to

⁶⁹ Commission of Inquiry report, para. 445.

⁷⁰ Commission of Inquiry report, para. 447.

⁷¹ The Representative of the Secretary General on the human rights of internally displaced persons visited the Sudan in July 2004; the Independent Expert on the situation of human rights in the Sudan in August 2004; the Special Rapporteur on violence against women in September 2004; and the Special Rapporteur on the human rights situation in the Sudan in October 2005.

disarm the militias, but instead continues to use them as a proxy, inter alia to carry out extrajudicial executions of civilians.

154. With regard to the recommendations concerning accountability for the atrocities committed in the Darfur, the Government has undoubtedly been very active in creating mechanisms mandated to pursue investigations and prosecutions. However, the unanimous conclusion of the International Commission of Inquiry, of the Prosecutor of the International Criminal Court, and of the High Commissioner for Human Rights is that the Government is “unwilling or unable” (probably both) to genuinely investigate and prosecute war crimes and crimes against humanity. In considering the situation in the Sudan, the Commission and the Human Rights Council will be well advised to take this finding as the foundation for its further action in this compelling situation.

155. My predecessor as Special Rapporteur also addressed recommendations to the United Nations, including to secure an international presence to monitor the human rights situation and to protect the lives of vulnerable people, and to assist the Government in ensuring accountability for human rights violations. In line with these recommendations, the Security Council has established UNMIS and mandated it to deploy human rights observers to the Darfur and to support the African Union mission. As for efforts towards accountability for violations of international humanitarian law and human rights law, the appointment of the International Commission of Inquiry, its investigation and report, and the subsequent Security Council referral of the situation in the Darfur to the International Criminal Court constitute an innovative and promising response to the situation.

156. In conclusion I would like to offer some comments of a general nature on the potential which the precedent of the Commission of Inquiry holds for similar situations in the future.⁷²

157. The special procedures of the Commission have played a vital role with regard to Darfur. Their potential to investigate such a situation of chronic, serious and widespread

⁷² The argument contained in the following two paragraphs is developed in greater detail in Philip Alston, The Darfur Commission as a Model for Future Responses to Crisis Situations, *Journal of International Criminal Justice* 3 (2005), pp. 600-607.

violations of human rights, however, is very different from what can be achieved by a commission of inquiry. There is almost no comparison between special procedures and the International Commission of Inquiry in terms of the scale of resources, the expertise mobilized, the amount of detail contained in the report, the precision and weight of the legal analysis, and the consequent power of the final product to set in motion inter-governmental action.

158. International commissions of inquiry along the model of the one established for Darfur also have an important role to play in expanding the bridge between the United Nations human rights mechanisms and the Security Council. The practice of appointing commissions of inquiry has immense potential in that it can provide the type of specialist input necessary if the human rights machinery and the Security Council are to form part of a continuum. Commission of inquiry reports may contribute to promoting transparency and accountability in the work of both the future Human Rights Council and the Security Council. Particularly the Security Council, when determining whether or not to take action in a human rights situation, has to respond to a carefully documented and a well argued analytical report. Finally, the establishment of such commissions to evaluate whether or not a situation warrants referral to the International Criminal Court provides an appropriate filtering mechanism before the Security Council takes a decision.

159. These considerations about the value of the International Commission of Inquiry in mobilizing inter-governmental action and about the potential it holds as a precedent for future human rights crises, must not distract, however, from the fact that widespread and massive human rights violations, including summary executions, are ongoing in Darfur, and require urgent action from the Commission on Human Rights, the Human Rights Council, and the Security Council.

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