

ACADEMY BRIEFING No. 6

What amounts to 'a serious violation of international human rights law'?

An analysis of practice and expert opinion
for the purpose of the 2013 Arms Trade Treaty

August 2014

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Introduction

Academy Briefings are prepared by staff at the Geneva Academy of International Humanitarian Law and Human Rights (the Geneva Academy), in consultation with outside experts, to inform government officials, officials working for international organizations, non-governmental organizations (NGOs), and legal practitioners, about the legal and policy implications of important contemporary issues.

The 2013 Arms Trade Treaty and 'a serious violation of international human rights law'

According to the 2013 United Nations (UN) Arms Trade Treaty (ATT), a proposed export that is likely to result in a serious violation of human rights should not be allowed to proceed. Accordingly, Article 7(1) of the treaty requires each state party, before it decides whether to authorize an export of conventional arms, ammunition/munitions, or parts or components that fall within the scope of the treaty, to assess the level of risk of the items in question being used to commit or facilitate a 'serious violation of international human rights law'. The desire to promote respect for human rights law is also a principle that guides the actions of states parties.¹

The text of the treaty does not define the notion of a 'serious violation', though it distinguishes between different violations of human rights in terms of their gravity. This raises a definitional question: what would constitute a serious violation of human rights law? Is a 'serious violation of

human rights' comparable to a 'grave', 'gross', or 'flagrant' violation? Do these notions name the same concept or threshold?

Related to this is a more practical challenge. How can the term be operationalized in the context of the ATT? What factors should be considered relevant for the purpose of assessing whether a serious violation might be committed or facilitated?

A clear understanding of the term is evidently needed, not least because Article 7 covers a broader range of crimes than Article 6(3) (which proscribes transfer of arms where they would be used to commit the gravest international crimes, including genocide, crimes against humanity, and certain war crimes). Since the treaty establishes the concept of 'serious violation' but does not define its content, its meaning may come to be defined by the practice of states parties.

Views expressed by UN member states about the responsible transfer of arms throw light on the context in which the treaty was drafted² and the origin of the wording of Article 7.³ Many states made references to 'serious violations', and few to 'grave' or 'grave and systematic' violations, for example.

The term 'serious violations of human rights law' (in plural) appeared in the Chairman's Draft Treaty Text after the First Preparatory Committee in July 2010, and was retained unaltered in the Chairman's draft papers and proposals⁴ until the President's Discussion Paper for the Diplomatic Conference of July 2012.⁵ The change from plural to singular (from 'serious violations' to 'a serious violation') appeared for the first time in Article 4 of the Comprehensive Draft Arms Trade Treaty of 26 July 2012.

¹ The treaty's preambular 'Principles' section declares that states parties to the ATT are determined to act in accordance with the principle of 'Respecting and ensuring respect for international humanitarian law in accordance with, inter alia, the Geneva Conventions of 1949, and respecting and ensuring respect for human rights in accordance with, inter alia, the Charter of the United Nations and the Universal Declaration of Human Rights'.

² See 'Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms, Report of the Secretary-General', UN doc. A/62/278 (part I and II), 17 August 2007; and 'Compilation of views on the elements of an arms trade treaty, Background document prepared by the Secretariat', UN doc. A/CONF.217/2, 10 May 2012 and UN doc. A/CONF.217/2/Add.1, 27 June 2012.

³ The source of the term 'serious violation of human rights' is debated. Some argue that it was imported from regional mechanisms (for example, the European Union's Code of Conduct on Arms Exports). Others suggest the term echoed the phrase 'serious violation of international humanitarian law' in the same provision. (See, for example, International Committee of the Red Cross, Aide-mémoire: ICRC-hosted Expert Meeting on Key Issues in the Draft Arms Trade Treaty, 6–7 February 2013, p. 6.) A third view is that NGO campaigns that promoted a 'golden rule' on human rights and IHL were responsible. (See, for example, Amnesty International, *Blood at the Crossroads: Making the Case for a Global Arms Trade Treaty*, 2008, p. 123.)

⁴ See Chairman's Draft Paper, Second Preparatory Committee, 28 February 2011; Chairman's Draft Paper, 3 March 2011; Chairman's Draft Arms Trade Treaty, Third Preparatory Committee, 14 July 2011. All at: <http://armstradetreaty.blogspot.ch/>.

⁵ President's Discussion Paper of 3 July 2012, and also Criteria/Parameters, Chairman's Paper, 16 July 2012.

The available records do not indicate that the merits of 'serious violations' rather than 'a serious violation', or the difference between them, were discussed. The record of discussions sheds little light on the meaning of the term. When negotiation of the ATT started, some of those involved asked what would constitute a violation of human rights law⁶ but this issue was not addressed later on. A proposal to replace 'serious' by 'gross and systematic' did not find wide support.⁷

Content of the Briefing

The Briefing begins with a Summary of Findings and Conclusions. Section A, which follows, proposes criteria and indices that might assist states parties to determine whether a serious violation of human rights law is likely to occur in the context of the ATT. It identifies where the term 'serious violation of human rights law' has been used in other contexts, and considers the extent to which similar terms are relevant to the ATT, drawing on international practice.

Section B reviews theoretical understandings of the notion of 'a serious violation of international human rights law'. It considers whether the term can be compared to 'gross' or 'grave' violations of human rights and similar terms. Given the paucity of precedent in human rights law, it draws on general international law for elements of a definition, and finds some common technical terminology in the work of the International Law Commission (ILC), whose elaboration of Draft Articles on State Responsibility for Internationally Wrongful Acts and a Draft Code of Offences against Peace and Security of Mankind provides useful material for analysing relevant international practice.

While international bodies and human rights scholars do not agree on what constitute 'serious violations' of human rights, states have often used the terms 'systematic', 'grave', and 'flagrant' when characterizing violations of human rights by others. International complaint procedures have also clarified the content and application of 'systematic' violations of human rights (when elaborating rules with respect to the exhaustion of local remedies, for example). Accordingly, Section C analyses international practice, drawing on the jurisprudence of the African Commission and the African Court of Human and Peoples' Rights, the European Court of Human Rights, the Inter-American Court of Human Rights, UN Charter bodies (such as the UN Security Council), the Human Rights Council's Universal Periodic Review and Special Procedures, fact-finding missions and commissions of inquiry, and UN human rights treaty bodies.

The report also considers the work of truth and reconciliation commissions. Though these bodies have an essentially domestic mandate, their investigations regularly examine the scope and character of serious human rights violations.

⁶ See the First Preparatory Committee for an Arms Trade Treaty (ATT), 13 July 2010. At the Arms Trade Treaty Legal Blog: <http://armstradetreaty.blogspot.ch/search?updated-min=2010-01-01T00:00:00-05:00&updated-max=2011-01-01T00:00:00-05:00&max-results=16>.

⁷ Proposals of Mexico, Second Preparatory Committee, March 2011, and Proposal of Uruguay, Third Preparatory Committee, July 2011. At: Arms Trade Treaty Legal Blog, <http://armstradetreaty.blogspot.ch/>.

Summary of findings and conclusions

General findings and conclusions: a low threshold and a broad concept

The term 'a serious violation of international human rights law' sets a low threshold. Though it covers violations of human rights that are international crimes, its scope is much broader and includes violations of social, economic, and cultural as well as civil and political rights.

In terms of criteria, it refers to a range of human rights violations and takes account of:

- The nature of obligations engaged.
- The scale/magnitude of the violations.
- The status of victims (in certain circumstances).
- The impact of the violations.

International practice indicates that many factors influence, and no single factor determines, whether a human rights violation is 'serious'. Context must be taken into account.

International practice

Competent international bodies tend to interpret the notion of 'serious violation' broadly. A review of different human rights systems reveals a significant degree of overlap in their interpretation of what it covers. Competent authorities concur in saying that the following violations are 'serious':

- Arbitrary arrests and detention.
- Deliberate targeting of civilians and civilian objects in situations of armed conflict.
- Enforced disappearance.
- Excessive use of force by police forces.
- Forced and large-scale population displacement.
- Indiscriminate attacks in situations of armed conflict.
- Rape and other sexual violence.
- Torture and other cruel, inhuman, or degrading treatment.
- Violations of the right to life, including murder and massacres, and extrajudicial and summary executions.

- Violations of the right to property, for example the destruction of houses and infrastructure.

They largely concur in saying that the following violations may be considered 'serious':

- Attacks on hospitals and health facilities and, more generally, failure to respect the right to health.
- Attacks on schools and education facilities and, more generally, failure to respect the right to education (including prolonged closure of schools).
- Blockades.
- Discrimination.
- Excessive use of force by police or other security forces, for example against demonstrators.
- Failure by states to address poverty and inadequate living standards.
- Failure by states to inquire into alleged violations of human rights.
- Failure by states to provide conditions of detention that meet international norms.
- Forced evictions.
- Gender-based violence.
- Obstruction of access to humanitarian aid.
- Pillage in situations of armed conflict.
- Recruitment of children into armed forces or groups.
- Restrictions on movement.
- Sexual and other forms of violence against children.
- Slave and forced labour.
- Use of civilians as 'human shields' in situations of armed conflict.
- Violations of the right to freedom of expression and freedom of association.
- Violations of the right to self-determination (exemplified by illegal settlements in occupied territories or military coups).

The Annex lists other circumstances that have been described less frequently as serious violations. When considering these lists, it is important to bear in mind the specific character of human rights bodies. They have limited mandates and the competence of each supervisory mechanism is governed by the instrument it supervises.

As a rule, international bodies have not concluded that violations must be 'widespread' or 'systematic' to be 'serious'. Provided that other international criminal law requirements are met, they tend to conflate 'widespread' and 'systematic' crimes with crimes against humanity. International practice typically holds that violations which entail individual criminal responsibility at international level are serious.

Though the jurisprudence of authoritative human rights bodies helps to clarify the meaning and application of 'serious violation', these bodies have also used the term variously. They frequently use modifiers such as 'gross', 'grave', 'flagrant', 'particularly serious', or 'egregious', and often do so interchangeably; all these terms may be relevant when assessing whether a particular violation is 'serious' for the purpose of the ATT.⁸

The term 'serious violation' includes economic and social rights

International practice suggests that the term 'a serious violation of human rights law' can be interpreted in more than one way. On one reading, the violation of any human right can amount to a serious violation. On another, the impact of arms and their misuse on enjoyment of human rights primarily affect the rights to life, to liberty, to security, and to freedom from torture.⁹

This may be an overly restrictive approach, nevertheless, and it is important to analyse forms of harm other than harms to life and physical security. Conventional arms cause harm to social and economic rights. For example with regard to the right to housing, competent human rights bodies have found that destruction of property, large-scale demolition of houses and infrastructure, and deliberate and indiscriminate attacks on civilian objects are serious violations of human rights.

Whether a violation is 'serious' cannot be answered in isolation, without considering context, as well as the object and purpose of the ATT. The ATT's preamble notes that states parties are '[g]uided by the purposes and principles of the Charter of the United Nations' and recognizes 'the security, social, economic and humanitarian consequences of the illicit and unregulated trade in conventional arms'.¹⁰ The Principles and Article 1 of the Arms Trade Treaty, which refers to the Treaty's object and purpose, are also instructive. Article 1 states that the purpose of the treaty is to contribute to international and regional peace, security, and stability, and to reduce human suffering. Perhaps even more significantly, the Principles of the ATT refer explicitly to respect for the Universal Declaration of Human Rights, which covers a very broad range of rights.¹¹

⁸ Criterion two of the 1998 European Union Code of Conduct on Arms Exports covers 'serious violations of human rights'. The following explanation is provided: 'Systematic and/or widespread violations of human rights underline the seriousness of the human rights situation. However, violations do not have to be systematic or widespread in order to be considered as "serious" for the Criterion Two analysis. According to Criterion Two, a major factor in the analysis is whether the competent bodies of the UN, the EU or the Council of Europe (as listed in Annex III) have established that serious violations of human rights have taken place in the recipient country. In this respect it is not a prerequisite that these competent bodies explicitly use the term "serious" themselves; it is sufficient that they establish that violations have occurred. The final assessment whether these violations are considered to be serious in this context must be done by Member States. Likewise, the absence of a decision by these bodies should not preclude Member States from the possibility of making an independent assessment as to whether such serious violations have occurred.'

⁹ The availability of conventional arms does not per se violate human rights. The implications of their availability, and their impact, depend on context and circumstances. Some years ago, the UN Special Rapporteur on the Prevention of Human Rights Violations Committed with Small Arms and Light Weapons studied the availability of light weapons and their impact on human rights. (See Barbara Frey, 'The Question of the Trade, Carrying and Use of Small Arms and Light Weapons in the Context of Human Rights and Humanitarian Norms', UN Sub-Commission on Human Rights, UN doc. E/CN.4/Sub.2/2002/39, 30 May 2002; B. Frey, 'Preliminary Report on the Prevention of Human Rights Violations Committed with Small Arms and Light Weapons', UN doc. E/CN.4/Sub.2/2003/29, 25 June 2003; B. Frey, 'Progress report on the prevention of human rights violations committed with small arms and light weapons', UN doc. E/CN.4/Sub.2/2004/37, 21 June 2004; and 'Prevention of human rights violations committed with small arms and light weapons, Final report submitted by Barbara Frey, Special Rapporteur, in accordance with Sub-Commission resolution 2002/25', UN doc. A/HRC/Sub.1/58/27, 27 July 2006.) These reports laid the foundation for draft Principles on prevention of human rights violations committed with small arms. 'Barbara Frey, Sub-Commission on the Promotion and Protection of Human Rights, Prevention of human rights violations committed with small arms and light weapons', UN doc. E/CN.4/Sub.2/2005/35, 2005.

¹⁰ ATT, preambular paragraphs 1 and 8. (Emphasis added.)

¹¹ It is significant that, when states commented on the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms, many states explicitly noted that the International Covenant on Economic, Social and Cultural Rights should be taken into account. For instance, Norway (in paragraph 4) stated that, under the UN Charter: 'All Member States have an obligation to encourage and promote universal adherence and respect for human rights and fundamental freedoms. Human rights include civil and political rights, as well as economic, social and cultural rights — all prerequisites for sustainable development.' Albania, Bangladesh, Bosnia and Herzegovina, Ecuador, Finland, Italy, Niger, Norway, the Republic of Korea, the United Kingdom, and Zambia also referred to the ICESCR. See 'Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms, Report of the Secretary-General', UN doc. A/62/278 (Parts I and II), 17 August 2007.

A single violation of human rights?

Article 7(1) of the ATT refers to 'a serious violation of international human rights law'. International practice refers in the singular to a serious violation of an individual right and in the plural to large-scale violations of one or more than one right. On this ground, the Treaty's use of the singular term might imply a broad interpretation of the notion of 'serious violation' that is not expected to meet the criteria of magnitude and scale that international bodies sometimes apply.¹²

¹² The issue of application of international human rights law to non-state actors and the interaction between international human rights law and international humanitarian law in a situation of armed conflict will both be addressed in a Commentary on the ATT to be published by Oxford University Press in 2015.

A. Possible origins of the term

The relevance of the 'gravity' of the violation

Different legal systems distinguish between breaches of obligation in various ways and for a variety of purposes. References to the 'gravity' of human rights violations have evolved over time. States often referred to the gravity of violations when they framed ethical foreign policies, or imposed conditions on financial, technical, or technological assistance, for example.¹³

The distinction between human rights violations with reference to their gravity has been developed by international human rights supervisory mechanisms. The UN started to take positions on human rights problems around the world, overcoming the domestic jurisdiction limitation in the UN Charter, when it began to distinguish 'gross and systematic' violations of human rights. Over time, egregious and systematic violations of human rights have come to be identified with violations of rights the international community considers fundamental. This is reflected in recognition of *erga omnes* obligations.¹⁴

Separately and also over time, international understanding of human rights violations was influenced by recent developments in international criminal law (particularly the notion of crimes against humanity) and the increasing links between international human rights law, international humanitarian law (IHL), and international criminal

law. These encouraged human rights bodies to import notions and concepts from other legal environments to 'enhance the possibility of seeking redress within the UN-based or regional human rights systems for serious violations of humanitarian law as well as human rights law'.¹⁵ It is clear that the notion of crimes against humanity, and the notion of serious violations of human rights, mutually influenced each other.¹⁶

At the same time, international human rights law and IHL differ structurally from international criminal law, with regard to the role and function that they assign to the state and the individual, their prohibitions, the remedies they provide, and the legal consequences that follow a breach of their rules (particularly for individuals). For example, international criminal law requires the prosecution to establish beyond reasonable doubt the identity of a perpetrator, subjective mental elements that establish individual culpability (*mens rea*), and proof of guilt. A criminal tribunal must establish 'in respect of each and every offence for which conviction is sought, that this offence entails the individual criminal responsibility of those who committed the acts'.¹⁷ Under human rights law and IHL, by contrast, the identity and culpability of perpetrators are less relevant factors. What must usually be established is whether a state can be held responsible for an act or omission that violates a right recognized in a human rights treaty to which the state is a party.¹⁸

¹³ For example, s. 116 of the United States Foreign Assistance Act (1961) prohibits assistance to a government 'which engages in a consistent pattern of gross human rights violations'. The Act refers explicitly to 'torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, causing the disappearance of persons by abduction and clandestine detention of those persons, or other flagrant denial of the right to life, liberty and the security of persons'.

¹⁴ G. Abi-Saab, 'The Concept of "International Crimes" and its Place in Contemporary International Law', in J. Weiler, M. Spinedi, and A. Cassese (eds.), *International Crimes of State: a Critical Analysis of the ILC's Draft Article 19 on State Responsibility*, W. de Gruyter, Berlin/New York, 1989, pp. 141–50. See also M. Ragazzi, *The Concept of International Obligations Erga Omnes*, Oxford University Press, 2000.

¹⁵ L. Físlér Damrosch, *Gross and Systematic Human Rights Violations*, Max Planck Encyclopaedia of Public International Law, February 2011.

¹⁶ International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Erdemovic*, Sentencing Judgment (Trial Chamber) (Case No. IT-96-22-T), 29 November 1996, para. 28.

¹⁷ G. Mettraux, 'Using human rights law for the purpose of defining international criminal offences – the practice of the international criminal tribunal for the former Yugoslavia', in M. Henzelin and R. Roth (eds.), *Le droit pénal à l'épreuve de l'internationalisation*, Librairie générale de droit et de jurisprudence, Bruylant, Paris and Brussels, 2002, p. 189.

¹⁸ IACtHR, *Caballero-Delgado and Santana v. Colombia*, Judgment, 8 December 1995, Dissenting opinion of Judge Nieto-Navia, para. 3. See also IACtHR, *Velasquez Rodriguez v. Honduras*, Judgment, 29 July 1988, para. 173, where the Court stated that: 'For the purposes of analysis, the intent or motivation of the agent who has violated the rights recognized by the Convention is irrelevant – the violation can be established even if the identity of the individual perpetrator is unknown. What is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible. Thus, the Court's task is to determine whether the violation is the result of a State's failure to fulfil its duty to respect and guarantee those rights, as required by Article 1(1) of the Convention.'

In consequence, international human rights law and international criminal law may overlap in terms of acts they prohibit, notwithstanding the structural differences between these two bodies of law. However, '[t]he fact that there may exist a partial overlap between [these] two legal regimes as to the types and categories of acts which they seek to prohibit – as there is between the regime of gross and large-scale violations of human rights and the law on crimes against humanity – does not yet mean that the definition of their respective prohibitions will be identical'.¹⁹

The notion of 'gross and systematic' human rights violations

In human rights law, the concept of 'gross' violations (and, more precisely, the term 'consistent pattern of gross violations of human rights') has been developed by UN human rights bodies,²⁰

principally to enable them to identify and respond to the 'most serious' violations.

In 1967, Resolution 1235 of the UN Economic and Social Council (ECOSOC) authorized the UN Commission on Human Rights and the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities 'to examine information relevant to gross violations of human rights and fundamental freedoms, as exemplified by the policy of apartheid', and decided that the Commission could study 'situations which reveal a consistent pattern of violations of human rights'.²¹ A further development occurred in 1970 when ECOSOC Resolution 1503 set up a procedure under which a working group of the Sub-Commission could, on a confidential basis, examine communications 'which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms'.²²

The UN's ability to scrutinize 'gross' violations of human rights was restricted because '[m]any states did not admit the concept of UN scrutiny for every single breach of human rights' but only when 'over a period of time, a systematic policy of violations reached a high degree of seriousness'.²³

¹⁹ G. Mettraux, 'Using human rights law for the purpose of defining international criminal offences: The practice of the international criminal tribunal for the former Yugoslavia', in M. Henzelin and R. Roth (eds.), *Le droit pénal à l'épreuve de l'internationalisation*, Librairie générale de droit et de jurisprudence, Bruylant, Paris and Brussels, 2002, p. 187. See also W. Schabas, 'Droit pénal international et droit international des droits de l'homme : faux frères?' in M. Henzelin et R. Roth, *ibid.*, pp. 165–81.

²⁰ The term first appeared in Resolution 8 (March 1967) of the UN Commission of Human Rights, and has since acquired currency.

²¹ ECOSOC Resolution 1235 (XLII), 6 June 1967. For details of the earlier Commission on Human Rights Resolution 8 (XXIII), 'Study and Investigation of Situations which Reveal a Consistent Pattern of Violations of Human Rights', and the debates surrounding it, see C. Medina Quiroga, *The Battle of Human Rights. Gross, Systematic Violations and the Inter-American System*, Martinus Nijhoff, Dordrecht, 1988, pp. 8–9.

²² ECOSOC Resolution 1503 (XLVIII), 27 May 1970.

²³ See M. E. Tardu, 'United Nations response to Gross Violations of Human Rights: The 1503 Procedure', *Santa Clara Law Review*, Vol. 20 (1980), p. 582.

B. Conceptions of 'a serious violation': parallels

The term 'serious violation' has no authoritative definition; nor has its content been formally determined (such as in a catalogue of rights). No method has therefore been agreed for deciding whether a given act should be characterized as a serious violation of human rights law. The role that different factors play is not clear either. Is the 'seriousness' of a violation determined by the obligations in play, the nature of the violations, their impact, or a combination of all three? It also has to be made clear whether a single violation of a single human right can be described as a 'serious violation'.

At international level, references related to the notion of 'serious violation' can be found in the Optional Protocol to the 1979 Convention on the Elimination of All Forms of Discrimination against Women (OP-CEDAW), and the Optional Protocol to the 1966 International Covenant on Economic, Social and Cultural Rights (OP-ICESCR). Article 8 of OP-CEDAW allows the UN Committee on the Elimination of Discrimination against Women 'to initiate a confidential investigation by one or more of its members where it has received reliable information of *grave or systematic violations* by a state party of rights established in the Convention'.²⁴ Article 11 of OP-ICESCR reproduces almost verbatim the language of OP-CEDAW. The UN Committee on Economic, Social and Cultural Rights may examine situations of 'grave' or 'systematic' violations of any of the economic, social, and cultural rights set out in the Covenant.²⁵

At regional level, the 1981 African Charter on Human and Peoples' Rights includes a procedure for drawing the attention of the Assembly of Heads

of State and Government to special cases 'which reveal the existence of a series of serious or massive violations of human and peoples' rights'.²⁶ In the context of the African Charter, one commentator has noted that the systematic or massive nature of violations will determine their seriousness, since this 'is the only way to avoid creating an arbitrary hierarchy between the various human or peoples' rights'.²⁷

The UN General Assembly resolution that set up the UN Human Rights Council mandates the Council to address situations of 'violations of human rights, including gross and systematic violations, and make recommendations thereon'.²⁸ The resolution also foresees legal consequences in cases of gross and systematic violations of human rights: the General Assembly may suspend the rights of membership in the Council of a member state that commits such violations.²⁹

The meaning of 'grave' and 'systematic' violations (as set out in the Optional Protocols cited above) has been little discussed in commentary. Instead, there has been a tendency to focus on the use of 'gross and systematic' or 'gross and large-scale' language in the early UN resolutions that established the 1235 and 1503 procedures. At the same time, the term 'serious violations of human rights' is now used more widely and broadly than related concepts. It appears in many decisions of international and regional judicial bodies; in the documents of UN bodies, including UN treaty bodies, the Human Rights Council and its special procedures; in government policy documents; in reports by non-governmental organizations

²⁴ OP-CEDAW, Art. 8. (Emphasis added.)

²⁵ In full, Article 11: Inquiry procedure states:

'1. A State Party to the present Protocol may at any time declare that it recognizes the competence of the Committee provided for under the present article.

2. If the Committee receives reliable information indicating grave or systematic violations by a State Party of any of the economic, social and cultural rights set forth in the Covenant, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.'

²⁶ Art. 58 of the African Charter states:

'1. When it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.

2. The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations.

3. A case of emergency duly noticed by the Commission shall be submitted by the latter to the Chairman of the Assembly of Heads of State and Government who may request an in-depth study.'

²⁷ F. Ougergouz, *The African Charter of Human and People's Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, Kluwer, 2003, p. 623.

²⁸ General Assembly Resolution 60/251, 3 April 2006, para. 3. Human Rights Council Resolution 5/1, Institution-building of the United Nations Human Rights Council, Annex, particularly dealing with the complaint procedure.

²⁹ *Ibid.*, para. 8.

(NGOs); and in newspaper articles and campaign slogans (albeit without adequate definition). Its ubiquity and prominence raise the question: does it possess an independent existence separate from international legal standards?

The term 'gross and systematic violations' seems to have preceded the appearance of 'serious violations'. However, it is not clear that one should be considered the progenitor of the other,³⁰ though analyses of 'gross and systematic violations' are frequently relevant to the effort to define 'serious violations'. In practice, though they differ in their context and application, the two terms appear to overlap conceptually.

To define 'serious violation', therefore, it is logical to start by exploring how the many qualifiers used to evaluate the gravity of a human rights violation interrelate.

Consistent terminology

International and regional bodies are not consistent in their use of language in this area, and do not apply a uniform terminology. UN bodies speak of 'gross', 'mass', or 'flagrant' violations without necessarily specifying the distinguishing characteristics of each term. A single text may use several adjectives to describe the gravity of violations.

The 1993 Vienna Declaration and Programme of Action referred to 'massive violations of human rights',³¹ 'continuing human rights violations',³² and 'gross and systematic violations'.³³ The Universal Periodic Review process has spoken interchangeably of 'grave' and 'serious' violations.³⁴ The report of the High-Level Mission on the situation of human rights in Darfur referred to 'grave', 'gross', 'gross and systematic', and 'serious' violations of human rights.³⁵

In summary, it appears that the terms 'gross', 'grave', and 'serious' are terms that international bodies have used interchangeably. The table overleaf provides a longer list in three languages.

Definitions based on enumeration

The content of 'serious violation' could be clarified by itemizing references in soft law instruments (declarations, guidelines and principles elaborated by international bodies, and expert opinions).

In the UN, the gravity of human rights violations was considered during the 1993 Vienna World Conference on Human Rights, which can be considered a source of references to 'gross and systematic' violations. The Declaration stated:

The World Conference on Human Rights also expresses its dismay and condemnation that gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of all human rights continue to occur in different parts of the world. Such violations and obstacles include, as well as torture and cruel, inhuman and degrading treatment or punishment, summary and arbitrary executions, disappearances, arbitrary detentions, all forms of racism, racial discrimination and apartheid, foreign occupation and alien domination, xenophobia, poverty, hunger and other denials of economic, social and cultural rights, religious intolerance, terrorism, discrimination against women and lack of the rule of law.³⁶

From the passage above, it seems that the Declaration distinguished violations from 'situations that constitute serious obstacles', and assigned to the latter a number of social and economic rights (including poverty, hunger, and other denials of economic, social and cultural rights).

The gravity of violations has been defined by enumeration elsewhere. The Council of Europe Guidelines on Eradicating Impunity for Serious Human Rights Violations listed the following as 'serious violations': extra-judicial killings; negligence leading to serious risk to life or health; torture or inhuman or degrading treatment by

³⁰ According to one authority, the notion of 'serious' violation can be traced to the notion of 'gross and systematic violation' that appeared in the resolution establishing the 1503 Procedure. Professor Eibe Riedel, interviewed on 29 October 2013.

³¹ Para. I.28.

³² Para. I.29.

³³ Para. I.30.

³⁴ Report of the Working Group on the Universal Periodic Review: Sierra Leone, UN doc. A/HRC/18/10, 11 July 2011, para. 81.42. The Working group recommended that the state reviewed should strengthen its 'domestic judicial and criminal law and its effective enforcement, with respect to the accountability and corresponding sanctions of those found responsible of *grave/serious human rights violations*'. (Emphasis added.)

³⁵ Report of the High-Level Mission on the situation of human rights in Darfur pursuant to Human Rights Council decision S-4/101, UN doc. A/HRC/4/80, 9 March 2007.

³⁶ The Vienna Declaration and Programme of Action, World Conference on Human Rights, 1993, para. 30.

Table 1. English, French, and Spanish equivalents of key terms

English	French	Spanish
Gross	Grave	Grave
Grave	Flagrant	Grave
Serious	Grave ³⁷	Grave
Flagrant	Flagrant	Flagrante
Extreme ³⁸	Extrême ³⁹	Extrema ⁴⁰
Egregious ⁴¹	Flagrante ⁴²	Grave
Severe ⁴³	Massive ⁴⁴	-
Very serious ⁴⁵	Très grave	-
Particularly grave	Particulièrement grave	-
Particularly serious	Particulièrement grave	-
Gravest	Le plus grave	-
Most serious ⁴⁶	Le plus grave	Más grave ⁴⁷

security forces, prison officers or other public officials; enforced disappearances; kidnapping; slavery, forced labour, or human trafficking; rape or sexual abuse; serious physical assault, including in the context of domestic violence; and the intentional destruction of homes or property.⁴⁸ The Guidelines state that: 'Member states have obligations under the Convention to provide protection by criminal law with regard to certain rights enshrined in the Convention'.⁴⁹

In a working paper submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Stanislav Chernichenko

attempted to define gross and large-scale human rights violations.⁵⁰ He proposed to include:

- Murder, including arbitrary execution.
- Torture.
- Genocide.
- Apartheid.
- Discrimination on racial, national, ethnic, linguistic, or religious grounds.
- Enslavement.
- Enforced and involuntary disappearances.
- Arbitrary or prolonged detention.

³⁷ Compare, for example, the English and French titles of Guidelines adopted by the Committee of Ministers of the Council of Europe (1110th meeting of Ministers' Deputies, 30 March 2011): 'Eradicating impunity for serious human rights violations' and 'Éliminer l'impunité pour les violations graves des droits de l'Homme'.

³⁸ Report of the Secretary-General to the Security Council on the protection of civilians in armed conflict, UN doc. S/2004/431, 28 May 2004, para. 3.

³⁹ *Ibid.*, French version.

⁴⁰ *Ibid.*, Spanish version.

⁴¹ Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, UN doc. S/1999/957, 8 September 1999. See also, ILC, Second report on State responsibility by Mr James Crawford, Special Rapporteur, UN doc. A/CN.4/498, 17 March 1999, p. 58.

⁴² *Ibid.*, French version.

⁴³ ACmHR, *Commission Nationale des Droits de L'homme et des Liberté v. Chad*, Comm. 74/92, October 1995, para. 1.

⁴⁴ *Ibid.*, French version.

⁴⁵ Parliamentary Assembly of the Council of Europe, Resolution 1463 on Enforced Disappearances, adopted on 3 October 2005, para. 2.

⁴⁶ See, for example, IACHR, *Gelman v. Uruguay*, Judgment, 24 February 2011, para. 98, referring to forced disappearances.

⁴⁷ *Ibid.*, Spanish version.

⁴⁸ Reference is made to Arts. 2, 3, 4, 5, and 8 of the 1950 European Convention on Human Rights (ECHR).

⁴⁹ Council of Europe, Directorate General of Human Rights and Rule of Law, *Eradicating impunity for serious human rights violations: Guidelines and reference texts*, Strasbourg, 30 March 2011, p. 23.

⁵⁰ 'Definition of Gross and Large-scale Violations of Human Rights as an International Crime', Working Paper submitted by Mr Stanislav Chernichenko in accordance with Sub-Commission Decision 1992/109, UN doc. E/CN.4/Sub.2/1993/10, 8 June 1993, para. 42. The Sub-Commission on Prevention of Discrimination and Protection of Minorities requested Mr Chernichenko's paper in order to justify the inclusion of this category of violations among international crimes. The paper explained: 'The main point of declaring gross and large-scale human rights violations ordered or sanctioned by a Government to be international crimes is to highlight the fact that the responsibility of the State cannot be kept separate from the criminal responsibility of the individuals who perpetrate such violations'. See also an expanded version of the paper, 'Recognition of Gross and Massive Violations of Human Rights Perpetrated on the Orders of Governments or Sanctioned by them as an International Crime', Expanded working paper submitted by Mr Stanislav Chernichenko in accordance with decision 1996/116 of 29 August 1996 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN doc. E/CN.4/Sub.2/1997/29, 28 May 1997.

- Deportation or forcible population transfers.⁵¹

The content of 'gross', 'grave', or 'serious' violations of human rights has also been explored in the context of due diligence. Two UN documents are particularly relevant.

The first, an *Interpretative Guide on Corporate Responsibility*, was published by the Office of the UN High Commissioner for Human Rights (OHCHR). It states that, although '[t]here is no uniform definition of gross human rights violations in international law', the following practices 'would generally be included: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, enforced disappearances, arbitrary and prolonged detention, and systematic discrimination'. It also specifies that '[o]ther kinds of human rights violations, including of economic, social and cultural rights, can also count as gross violations if they are grave and systematic, for example violations taking place on a large scale or targeted at particular population groups'.⁵²

The second, the UN Human Rights Due Diligence Policy on UN support to non-UN security forces, adopted a complex definition of grave violations of human rights. It unified under 'grave violations' three different legal regimes—international humanitarian law, international human rights law, and international

refugee law—and in so doing appeared to merge elements of different legal regimes. The notion of 'gross violation' is subsumed within the category of grave violations and includes: summary executions and extrajudicial killings, acts of torture, enforced disappearances, enslavement, rape and sexual violence of a comparable serious nature, or acts of refoulement under refugee law that are committed on a significant scale or with a significant degree of frequency (that is, they are more than isolated or merely sporadic phenomena).⁵³ It is not clear what the terms 'significant scale' or 'significant degree of frequency' imply in practical terms.⁵⁴

In 1993, a study by Prof. Theo van Boven considered the notion of gross violations.⁵⁵ It argued: 'It appears that the word "gross" qualifies the term "violations" and indicates the *serious* character of the violations but that the word "gross" is also related to the type of human right that is being violated'.⁵⁶ In support, the study mentioned Articles 19, 20, and 21 of the ILC's 1991 draft of a Code of Crimes against the Peace and Security of Mankind (see below), noted that Common Article 3 of the 1949 Geneva Conventions contains minimum humanitarian standards that are to be respected 'at any time and in any place whatsoever',⁵⁷ and suggested guidance could be found in Section 702 of the Third Restatement of the Foreign Relations Law of the United States.⁵⁸

51 'Definition of Gross and Large-scale Violations of Human Rights as an International Crime', Working Paper submitted by Mr Stanislav Chernichenko in accordance with Sub-Commission Decision 1992/109, UN doc. E/CN.4/Sub.2/1993/10, 8 June 1993, para. 50.

52 OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretative Guide*, UN, 2012, UN doc. HR/PUB/12/02, p. 6. At: http://www.ohchr.org/Documents/Publications/HR_PUB_12_2_En.pdf.

53 UN, 'Human Rights Due Diligence Policy on UN support to non-UN security forces (HRDDP)', 2011, p. 3, para. 12. (Emphasis added.)

54 The full definition (HRDDP, 2011, p. 3, para. 12) reads:

"Grave violations" means, for the purposes of this policy:

- a. in the case of a unit:
 - i. commission of "war crimes" or of "crimes against humanity", as defined in the Rome Statute of the International Criminal Court, or "gross violations" of human rights, including summary executions and extrajudicial killings, acts of torture, enforced disappearances, enslavement, rape and sexual violence of a comparable serious nature, or acts of refoulement under refugee law that are committed on a significant scale or with a significant degree of frequency (that is, they are more than isolated or merely sporadic phenomena); or
 - ii. a pattern of repeated violations of international humanitarian, human rights or refugee law committed by a significant number of members of the unit; or
 - iii. the presence in a senior command position of the unit of one or more officers about whom there are substantial grounds to suspect: direct responsibility for the commission of "war crimes", "gross violations" of human rights or acts of *refoulement*; or command responsibility, as defined in the Rome Statute of the International Criminal Court, for the commission of such crimes, violations or acts by those under their command; or failure to take effective measures to prevent, repress, investigate or prosecute other violations of international humanitarian, human rights or refugee law committed on a significant scale by those under their command;
- b. in the case of civilian or military authorities that are directly responsible for the management, administration or command of non-UN security forces:
 - i. commission of grave violations by one or more units under their command;
 - ii. combined with a failure to take effective measures to investigate and prosecute the violators.'

55 'Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms', Final Report Submitted by Mr Theo van Boven, Special Rapporteur, UN doc. E/CN.4/Sub.2/1993/8, 2 July 1993, paras. 8-13.

56 *Ibid.*, para. 8. (Emphasis added.)

57 Common Article 3 confirms the following prohibitions: a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment; b) taking of hostages; c) outrages upon personal dignity, in particular humiliating and degrading treatment; and d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

58 The US Third Restatement is often quoted because it catalogues rights that are deemed to be 'core' human rights.

Prof. van Boven concluded that the scope of 'gross violations of human rights and fundamental freedoms' would be 'unduly circumscribed' if the notion were to be understood 'in a fixed and exhaustive sense'. Suggesting that preference should be given to 'indicative or illustrative formula without, however, stretching the scope of the study so far that no generally applicable conclusions in terms of rights and responsibilities could be drawn from it',⁵⁹ he argued that:

while under international law the violation of any human right gives rise to a right to reparation for the victim, particular attention is paid to gross violations of human rights and fundamental freedoms which include at least the following: genocide; slavery and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race or gender.⁶⁰

Interestingly, in a later introduction to *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (2005), Professor van Boven suggested that, when they had discussed the concept of 'gross violations of human rights', 'the authors had in mind the violations constituting international crimes under the Rome Statute of the International Criminal Court'.⁶¹ According to others, mentions of 'gross' violations of human rights in the *Basic Principles and Guidelines* referred to international humanitarian law and situations covered by that law.⁶²

Definitions based on general criteria

In the absence of an agreed understanding of what 'grave', 'gross', or 'serious' violations are, scholars have analysed the notion of 'gross and systematic violations' of human rights.

Tardu, for example, has interpreted the term 'consistent pattern of gross violations' based on debates concerning Resolutions 1235 and 1503. These highlighted several quantitative and qualitative characteristics of a 'consistent pattern of gross violations':

- Violations 'cannot easily involve a single victim'.
- A number of breaches occur, spread over a period.
- 'An element of planning or of sustained will on the part of the perpetrator' must be present.
- According to a qualitative test, the violation must inherently have an 'inhuman and degrading character'.⁶³

In addition, the qualitative test 'needs to be applied cumulatively or as an alternative to some of the preceding quantitative tests, in order to ascertain the "gross" character of violations'.

Professor Cecilia Medina has also defined 'gross and systematic' human rights violations. She suggested they are violations which are 'instrumental in the achievement of governmental policies perpetrated in such a quantity and in such a manner as to create a situation in which the rights to life, to personal integrity or to personal liberty of the population as a whole or of one or more sectors of the population of a country are continuously infringed'.⁶⁴ On this basis, she concluded that four elements must be present for a violation to qualify as 'gross and systematic': (a) quantity; (b) time; (c) quality; and (d) planning. Quality (expressed by the adjective 'gross') may be a combination of three factors: (1) the type of right(s) violated; (2) the character of the violation; and (3) the characteristics of the victims.

⁵⁹ Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms', Final Report Submitted by Mr Theo van Boven, Special Rapporteur, UN doc. E/CN.4/Sub.2/1993/8, 2 July 1993, para. 13.

⁶⁰ *Ibid.* [Footnotes omitted.]

⁶¹ T. van Boven, *The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Introductory Note, p. 2. At: http://legal.un.org/avl/ha/ga_60-147/ga_60-147.html.

⁶² Prof. Cherif Bassiouni, telephone interview, 10 December 2013.

⁶³ M. E. Tardu, 'United Nations response to Gross Violations of Human Rights: The 1503 Procedure', *Santa Clara Law Review*, Vol. 20 (1980), p. 583ff.

⁶⁴ C. Medina Quiroga, *The Battle of Human Rights, Gross, Systematic Violations and the Inter-American System*, Martinus Nijhoff, Dordrecht, The Netherlands, 1988, p. 16.

Adopting a similar approach, other scholars have highlighted three elements or criteria: time, quality, and quantity.⁶⁵ While the element of time may be necessary when considering whether there is a 'consistent pattern' of gross human rights violations, for this analysis the elements of quantity and quality seem to be more relevant. Qualitative evaluation can be further subdivided into analysis of the type of right(s) violated and the nature of the act.

Type of rights violated

A consideration of types of right leads inevitably to the complex and controversial question of whether human rights can or should be ordered hierarchically. In international law, this issue is sharply disputed.⁶⁶ Moreover, its examination necessarily involves an inquiry into the related concepts of *jus cogens*, *erga omnes*, non-derogable, and core rights—each of which is the subject of academic debate, none of which has an agreed identity.⁶⁷

As Professor Pierre-Marie Dupuy cautions, introducing a hierarchy of rights creates a trap because, being based on value judgements, it generates arbitrariness.⁶⁸ Nor is it reconcilable with affirming that rights are indivisible and interdependent.⁶⁹ Yet analysis of treaty texts suggests that, strictly on the basis of agreed international law, 'some rights are obviously more important than other human rights'.⁷⁰

Though no agreed criteria differentiate 'higher' from 'ordinary' rights, a widely used approach distinguishes derogable from non-derogable

rights.⁷¹ Drawing on Article 4(2) of the ICCPR, Article 15(2) of the 1950 European Convention on Human Rights, and Article 27 of the 1969 American Convention on Human Rights, non-derogable rights (common to all three treaties) include: the right to life,⁷² the prohibition of slavery, the prohibition of torture and cruel, inhuman or degrading treatment or punishment, and the prohibition of retroactive penal measures.

This distinction contains weaknesses. If the nature of the right were to determine the 'seriousness' of a violation, it might follow that a minor violation of a non-derogable or essential obligation would be considered a 'serious violation', whereas a major or sustained breach of a derogable right might not. Such an outcome would not be satisfactory. Recourse to additional criteria is therefore needed.

The Independent Expert on the Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms, Professor Cherif Bassiouni, has asserted that 'the term "gross violations of human rights" has been employed in the United Nations context not to denote a particular category of human rights violations per se, but rather to describe situations involving human rights violations by referring to the manner in which the violations may have been committed or to their severity'.⁷³

The character of a violation

The nature of the right violated is not the only factor, some suggest, that renders human rights violations

65 C. Medina Quiroga, *ibid.*, pp. 8–9; F. Ermacora, 'Procedures to Deal with Human Rights Violations: A Hopeful Start in the United Nations?', *Human Rights Journal*, Vol. 7 (1974), pp. 670–89. See also, H. Hey, *Gross Human Rights Violations: a Search for Causes: a Study of Guatemala and Costa Rica*, Martinus Nijhoff, Dordrecht, 1995. Chernichenko offered another classification. He suggested that: 'Attempts have been made to "measure" violations of human rights. One idea that merits attention is to use three indicators: the scope of violations, i.e. the degree of seriousness; their intensity, i.e. the frequency of occurrence over a given period of time; and their range, i.e. the size of the population affected.' However, he applies a caveat to this classification by stating that the intensity of human rights violations 'denotes less the frequency of occurrence than the degree of severity, or both'. See 'Recognition of Gross and Massive Violations of Human Rights Perpetrated on the Orders of Governments or Sanctioned by them as an International Crime', Expanded working paper submitted by Mr Stanislav Chernichenko in accordance with the decision 1996/116 of 29 August 1996 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN doc. E/CN.4/Sub.2/1997/29, 28 May 1997.

66 J. H. H. Weiler and Andreas L Paulus, 'The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?', *European Journal of International Law*, Vol. 8 (1997), pp. 545–65.

67 J. Crawford, *Brownlie's Principles of Public International Law*, 8th Edn., Oxford University Press, 2012.

68 P.-M. Dupuy, *Droit International Public*, 5th Edn., Dalloz, 2000, p. 213. Meron also considers that 'the characterisation of some rights as fundamental results largely from our own subjective perceptions of their importance'. T. Meron, 'On a Hierarchy of International Human Rights', *American Journal of International Law*, Vol. 80, No. 1 (1986), p. 8.

69 T. van Boven, 'Distinguishing Criteria of Human Rights', in K. Vasak (ed.), *The International Dimensions of Human Rights*, UNESCO, 1982, p. 43. The preambles of the Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights refer to each other and, since the 1968 Tehran Conference on Human Rights, the indivisibility of human rights has consistently been reaffirmed.

70 Meron, 'On a Hierarchy of International Human Rights', *American Journal of International Law*, Vol. 80, No. 1 (1986), p. 4.

71 For a critique of the concept of non-derogable rights as a legacy of colonialism, see B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance*, Cambridge University Press, 2003, pp. 176–7.

72 Leaving aside derogation of the right to life under Art. 15 of the ECHR for lawful acts of war.

73 'Report of the Independent Expert on the Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms, Mr M. Cherif Bassiouni, submitted pursuant to Commission on Human Rights Resolution 1998/43', para. 85.

gross or grave.⁷⁴ The character of the violation must also be considered. According to Medina, personal security provides a clear-cut illustration: 'The agreement as to massive violations of this right constituting "gross violations" is limited to torture, torture being the most serious manner in which personal security may be violated'.⁷⁵ Professor Dinah Shelton defines 'gross' violations as 'those that are particularly serious in nature because of their cruelty or depravity'.⁷⁶

When the character of violations is considered, several treaties provide useful guidance. For example, Article 4(2) of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires each State Party to 'make these offences punishable by appropriate penalties which take into account their grave nature'. Regional instruments on torture and forced disappearance demand that, in addition to recognizing that these are offences in domestic criminal law, a state must punish perpetrators and impose 'severe penalties that take into account their serious nature'.⁷⁷ Article III of the 1994 Inter-American Convention on Forced Disappearance of Persons requires that 'an appropriate punishment commensurate with its extreme gravity' must be imposed.

The Council of Europe may have considered that mandatory penalisation in domestic law is an indicator of the seriousness of a violation. Its *Guidelines on Eradicating Impunity for Serious Human Rights Violations* state, *inter alia*, that:

For the purposes of these guidelines, 'serious human rights violations' concern those acts in respect of which states have an obligation under the Convention [ECHR], and in the light of the Court's case-law, to enact criminal law provisions. Such obligations arise in the context of the right to life (Article 2), the prohibition of torture and inhuman or degrading treatment or punishment (Article 3), the prohibition of forced labour and slavery (Article 4) and with regard to certain aspects of the right to liberty and security (Article 5(1)) and of the right to respect for private and family life (Article 8).

However, the Guidelines also state that '[n]ot all violations of these articles will necessarily reach this threshold'.⁷⁸

At the same time, the character of a violation seems to be inextricably linked to the nature of the right. It is not clear, for example, whether a gross violation of a minor obligation might qualify as 'serious'.

The quantum of the violation

When considering the terms 'systematic' human rights violations or a 'consistent pattern' of violations, the volume or scale of the violation seems to be relevant. But would a quantity criterion help to establish what a 'serious' human rights violation is? There is evidence that in certain circumstances the answer is yes.

Discussing criteria for classifying human rights violations, Chernichenko's report on the 'Definition of Gross and Large-scale Violations of Human Rights as an International Crime' recognizes that it is difficult to distinguish individual cases from large-scale human rights violations. 'While defining an individual case presents no difficulties, no criteria for the definition of large-scale violations can be established while large-scale violations are made up of individual cases; it is not possible to lay down how many individual cases constitute a large-scale violation'.⁷⁹

The author goes on to say that 'experience shows that large-scale violations are always gross in character and gross violations of individuals' rights such as torture or arbitrary and prolonged detention, if unpunished, either lead to large-scale violations or indicate that such violations are already taking place'.⁸⁰ In contrast, in its report on *Ireland v. United Kingdom* (1977), the European Commission on Human Rights stated:

Although one single act contrary to the Convention is sufficient to establish a violation, it is evidence that the violation can be regarded as being *more* serious if it is not simply one outstanding event but forms part of a number of similar events which might even form a pattern.⁸¹

⁷⁴ Medina Quiroga, *The Battle of Human Rights, Gross, Systematic Violations and the Inter-American System*, Martinus Nijhoff, Dordrecht, The Netherlands, 1988, p. 15.

⁷⁵ *Ibid.*

⁷⁶ D. Shelton, *Remedies in International Human Rights Law*, Oxford University Press, 2006, p. 390.

⁷⁷ Inter-American Convention to Prevent and Punish Torture, 1985, Art. 6.

⁷⁸ Council of Europe, Directorate General of Human Rights and Rule of Law, *Eradicating impunity for serious human rights violations: Guidelines and reference texts*, Strasbourg, adopted 30 March 2011, p. 7.

⁷⁹ 'Definition of Gross and Large-scale Violations of Human Rights as an International Crime', Working Paper submitted by Mr Stanislav Chernichenko in accordance with Sub-Commission Decision 1992/109, UN doc. E/CN.4/Sub.2/1993/10, 8 June 1993, para. 13.

⁸⁰ *Ibid.*, para. 15.

⁸¹ ECmHR, *Ireland v. UK*, YECCHR (1977), p. 762. (Emphasis added.)

In other words, while a pattern of violations may constitute a serious breach, on this view a single violation may also be sufficient to create a serious violation.

'Serious breaches' in the work of the International Law Commission

For the purposes of its Draft Code of Offences against the Peace and Security of Mankind, the ILC took the view that a crime against the peace and security of mankind which attracts individual criminal responsibility is to be considered 'serious'. Mr Doudou Thiam, the Rapporteur, reaffirmed that 'seriousness' is a subjective concept and is not 'quantifiable'.⁸² It is to be deduced 'either from the character of the act defined as a crime (cruelty, atrocity, barbarity, etc.), or from the extent of its effects (its nature, when the victims are peoples, populations or ethnic groups), or from the intention of the perpetrator (genocide, etc.)'.⁸³ He further stated that the 'seriousness of a transgression is gauged according to the public conscience, that is to say the disapproval it gives rise to, the shock it provokes, the degree of horror it arouses within the national or international community'.⁸⁴ The ILC has attempted to identify some objective elements in the definition of seriousness.⁸⁵

Article 19 (in earlier drafts of the ILC Draft Articles on State Responsibility for Internationally Wrongful Acts) spoke of 'serious' breaches of international law. When discussing the draft, those present mentioned examples of international crimes, including a 'serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as [the prohibition of] slavery, genocide, and apartheid'.⁸⁶ Here, the ILC noted two indices: the 'essential importance' of the obligation involved and the 'seriousness' of the breach.

In the final version of the Draft Articles, the test of seriousness made its way into Article 40, which states that a breach of a peremptory norm of general international law is serious if it involves a 'gross' or 'systematic' failure by the responsible state to fulfil the relevant obligation.⁸⁷ The full text of Article 40 reads as follows:

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
2. A breach of such an obligation is serious if it involves a gross or systematic *failure by the responsible State to fulfil the obligation*.⁸⁸

The relevant part of the Commentary further specifies that the word 'serious' 'signifies that a certain order of magnitude of violation is necessary in order not to trivialize the breach' and that 'it is not intended to suggest that any violation of these obligations is not serious or is somehow excusable'.⁸⁹

The ILC proposes two criteria to distinguish serious breaches from other breaches. The first concerns the character of the obligation breached (in other words, an obligation deriving from a peremptory norm) and the second the intensity of the violation.⁹⁰ The commentary on the Draft Article provides some examples of the peremptory norms in question, including several drawn from human rights law, such as the right to self-determination and the prohibitions of genocide, racial discrimination, apartheid, and torture.

Of greater interest, the ILC's Commentary elaborates on the nature of a serious breach, which, under Article 40(2), involves a 'gross' or 'systematic' failure by the state responsible to fulfil relevant obligations. The commentary on the Article explains this as follows:

⁸² ILC, Fifth Report on the Draft Code of Offences against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur, UN doc. A/CN.4/404, 17 March 1987, p. 2.

⁸³ *Ibid.*

⁸⁴ *Ibid.*, para. 47.

⁸⁵ *Ibid.*, para. 49.

⁸⁶ ILC Yearbook 1976, Vol. I, p. 253. For the discussion, see J. Weiler, A. Cassese, and M. Spinedi (eds.), *International Crimes of States – A Critical Analysis of the International Law Commission's Article 19 on State Responsibility*, Walter de Gruyter, Berlin, 1989.

⁸⁷ Art. 40, Draft Articles on Responsibility of States for Internationally Wrongful Acts. This provision probably cannot be considered customary international law (which would bind all states).

⁸⁸ Emphasis added.

⁸⁹ ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries. Commentary to Article 40, p. 113.

⁹⁰ *Ibid.*, p. 112.

To be regarded as systematic, a violation would have to be carried out in an organized and deliberate way. In contrast, the term 'gross' refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule. The terms are not of course mutually exclusive; serious breaches will usually be both systematic and gross. Factors which may establish the seriousness of a violation would include the intent to violate the norm; the scope and number of individual violations; and the gravity of their consequences for the victims. It must also be borne in mind that some of the peremptory norms in question, most notably the prohibitions of aggression and genocide, by their very nature require an intentional violation on a large scale.⁹¹

In addition to the two criteria, the Commentary suggests that additional factors may be relevant when examining the 'seriousness' of a violation:

- The intent to violate the norm in question.
- The quantum (scope and number) of individual violations.
- The gravity of their consequences for the victims (i.e. their impact).

Though paragraph 2 of the Article uses the word 'or', the accompanying commentary states that serious breaches are 'usually' both systematic and gross. The ILC's definition of a 'serious' breach concentrates on the nature of the violation rather than the character of the obligation violated.

Assessment

Based on the discussion above, it is possible to draw a number of conclusions.

Definitions based on enumeration are not without problems. A first obvious danger is that enumeration cannot hope to be exhaustive. Second, it can date. It is far from clear, for example, that the distinction in the Vienna Declaration between *obstacles* to the achievement of economic, social, and cultural rights and *violations* of civil and political rights would be acceptable today. Similar reservations can be expressed about the OHCHR's *Interpretative Guide on Corporate Responsibility*, which suggested that violations of socio-economic rights can be considered 'grave', 'gross', or 'serious' only when they are large-scale or target a specific population. These rights have evolved considerably and current practice would probably consider such an approach inappropriate.

Definitions based on enumeration have a second major problem. Some lists include standards whose violation could be said to be inherently serious, such as genocide, apartheid, slavery, and forced deportation, as well as racial discrimination and violation of the right to self-determination. Crimes such as genocide, apartheid, and slavery have been granted a distinctive standing precisely because of their gross and systematic character.⁹² As a result, including them in a list that is designed to define serious or gross violations may be redundant.⁹³

With respect to definitions based on criteria, it is clear that quality and quantity are the two cardinal references: they represent starting points for understanding what constitutes a serious violation or serious violations. The work of the ILC is a useful source: its general definition of 'serious breach' in the commentary on Article 40 of its Draft Articles on State Responsibility is conceptually more systematic than other definitions and is likely to help efforts to define a 'serious violation of human rights law'. However, since the provision concerns a breach of peremptory norms, the test of seriousness suggested by the ILC is silent about the nature of the obligation.

⁹¹ *Ibid.*, p. 113, para. 8.

⁹² J. Salmon, 'Duration of the Breach', in J. Crawford, A. Pellet, and S. Olleson (eds.), *The Law of International Responsibility*, Oxford University Press, 2010, pp. 391–2.

⁹³ For an analysis of a breach, see P. Gaeta, 'The Character of the Breach', in J. Crawford, A. Pellet, and S. Olleson, *ibid.*, pp. 423ff.

C. Trends in international practice

With a view to identifying areas of convergence, this section compares the treatment of 'serious violations of human rights' by regional judicial bodies, UN political and expert bodies, fact-finding missions and inquiries, and domestic investigatory institutions, notably truth and reconciliation commissions. Such a comparison may help to identify core areas of shared practice.

'Serious human rights violations' as understood by international jurisprudence

It seems that no systematic rule makes it possible to distinguish less serious from more serious violations in terms of a breach (distinct from its consequences). The International Court of Justice, for example, has not distinguished serious from ordinary violations of human rights law. It has only once qualified the gravity of a violation, in the case of *Armed Activities on the Territory of the Congo*, where, on the basis of acts of torture and other forms of inhuman treatment as well as the destruction of civilian houses, it concluded that 'massive human rights violations' had been committed.⁹⁴

Although the legal material is sparse, practice and case law merit examination nonetheless.⁹⁵

The African system of human and peoples' rights protection

The African Commission on Human and Peoples' Rights and the African Court of Human and Peoples' Rights have delivered several rulings that refer to 'gross' or 'serious' violations of human rights. Like other international judicial and monitoring bodies, they have interchangeably used certain terms (notably 'gross', 'grave', 'flagrant', 'serious', or 'massive') to qualify the gravity of violations.

In some respects, the African Court and Commission have made findings that go beyond those of other judicial bodies. Specifically, they have found serious violations in a variety of contexts and have not focused only on the rights to life, to freedom from torture, and to liberty. In the case of *Centre for Minority Rights Development v. Kenya*, the Commission considered that the 'grave nature' of forced evictions amounted to a gross violation of human rights (in this instance, the right to property).⁹⁶ In *Jawara v. Gambia*, the Commission found that seizure of power by the country's military rulers constituted a 'grave violation of the right of the Gambian people to freely choose their government' as entrenched in Article 20(1) of the 1981 African Charter on Human and Peoples' Rights (ACHPR).⁹⁷

In another case, *Democratic Republic of Congo v Burundi, Rwanda and Uganda*, the DRC alleged that the armed forces of Burundi, Rwanda, and Uganda had committed 'grave and massive violations of human and peoples' rights' in Congolese provinces where rebel groups had been active since 2 August 1998 and that the DRC had been the victim of armed aggression by these states. The crimes included massacres, sexual violence, and systematic looting. The Commission found that grave violations of the right to life and to integrity had occurred but also stated that the conduct of respondent states constituted 'a flagrant violation of the right to the unquestionable and inalienable right of the peoples of the Democratic Republic of Congo to self-determination'.⁹⁸

Cases that have involved consequences on a widespread or massive scale may help to define what amounts to 'serious violations'. When it identified exemptions to the rule that requires complainants to exhaust local remedies, for example, the African Commission took into account the scale and nature of the human rights violations in question, as well as the number of victims involved.⁹⁹ In *Amnesty International et al. v Sudan*, it stated that:

⁹⁴ ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, para. 207: 'The Court therefore finds ... that massive human rights violations and grave breaches of international humanitarian law were committed by the UPDF on the territory of the DRC'. (UPDF: Uganda People's Defence Force.)

⁹⁵ The jurisprudence of the Inter-American Court of Human Rights has referred most frequently to this notion; the jurisprudence of the African Commission and Court and the European Commission and Court of Human Rights has done so to a lesser extent.

⁹⁶ ACmHPR, *Centre for Minority Rights Development v. Kenya*, Decision, 2009, para. 218. The Commission made reference to Resolutions 1993/77 and 2004/28 of the UN Commission on Human Rights, which affirmed that forced evictions amount to a gross violation of human rights, in particular the right to adequate housing.

⁹⁷ ACmHPR, *Jawara v. Gambia*, Decision, 2000, para. 73.

⁹⁸ ACmHPR, *DR Congo v. Burundi*, Decision, 2003, paras. 68, 79–80.

⁹⁹ See, for example, ACmHPR, Comm. Nos. 25/89, 47/90, 56/91 100/93, *International Human Rights Law Report*, Vol. 4 (1997), pp. 89, 92.

In applying this provision [exhaustion of local remedies], the Commission has elaborated through its jurisprudence criteria on which to base its conviction as to the exhaustion of internal remedies, if any. The Commission has drawn a distinction between cases in which the complaint deals with violations against victims identified or named and those cases of serious and massive violations in which it may be impossible for the complainants to identify all the victims.¹⁰⁰

In *Sudan Human Rights Organisation, Centre on Housing Rights and Evictions v. Sudan*, the Commission considered the situation where 'tens of thousands of people have allegedly been forcibly evicted and their properties destroyed'. The Commission found the alleged violations *prima facie* constituted 'serious and massive violations' and therefore determined that it was 'impracticable and undesirable to expect these victims to exhaust the remedies claimed by the State to be available'.¹⁰¹

In *World Organization against Torture v. Zaire*, which considered a number of communications together, the Commission ruled that the closure of universities and secondary schools for two years constituted 'serious or massive' violations of the right to education (specifically, of Article 17 of the ACHPR).¹⁰² Similarly, the 'failure of the government to provide basic services necessary for a minimum standard of health, such as safe drinking water and electricity and the shortage of medicine' was found to be a serious or massive violation of the right to health as set out in Article 16 of the Charter. Serious or massive violations were also found of the right to freedom of conscience (persecution of a religious group) and the right to fair trial.¹⁰³

Finally, in the case of *African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya*, the Commission instituted proceedings against Libya before the African Court for 'serious and massive' violations of human rights guaranteed under the Charter.¹⁰⁴

The allegations included, among others, the following: detention of an opposition lawyer; violent suppression of demonstrations in Benghazi, Al Baida, Ajdabiya, Zayiwa, and Derna (where security forces opened fire at random on demonstrators, killing and injuring many people); and use of heavy weapons and machine guns against the population by Libyan security forces, including targeted aerial bombardment and all types of attacks. The Commission found that these amounted to serious violations of the rights to life and personal integrity, the rights to demonstrate and assemble, and to freedom of expression.¹⁰⁵

In one case the Court referred to 'serious or massive', in the other to 'serious and massive' violations. It is not clear what significance this has. As noted earlier, the ACHPR includes a mechanism for addressing a 'series of serious or massive violations'. Is the Court drawing a distinction in regard to these qualifiers? If so, what is it?

European system of human rights protection

By comparison with the African Commission and Court of Human and Peoples' Rights, whose jurisprudence has focused more on cases with numerous victims, European human rights judicial bodies have examined serious violations in individual cases. Thematically, the cases include disappearances,¹⁰⁶ torture, ill-treatment,¹⁰⁷ inhuman or degrading treatment,¹⁰⁸ and conditions of detention¹⁰⁹ (which the court considered 'a particularly serious violation of the right to liberty and security of person guaranteed by Article 5 of the Convention taken as a whole'¹¹⁰).

The European Court of Human Rights has also developed jurisprudence on procedure, violation of which it has qualified as serious both in itself and when it occurs in conjunction with violation of a substantive right. In one case, for example, the Court found that 'unexplained failure to undertake

¹⁰⁰ *Amnesty International and Others v. Sudan*, ACmHPR, Comm. Nos. 48/90, 50/91, 52/91, 89/93 (1999).

¹⁰¹ ACmHPR, *Sudan Human Rights Org. v. Sudan*, 2010, paras. 100–02.

¹⁰² ACmHPR, *World Organization against Torture v. Zaire*, 1996, paras. 42–8.

¹⁰³ *Ibid.*

¹⁰⁴ ACtHR, *African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya*, App. 004/2011, Order For Provisional Measures, 25 March 2011.

¹⁰⁵ *Ibid.*, paras. 2–3.

¹⁰⁶ ECtHR, *Kurt v. Turkey*, Judgment, 22 May 1995, para. 212; *Cakici v. Turkey*, Judgment, 15 May 1995, para. 268; *Timurtas v. Turkey*, Judgment, 11 September 1995, para. 299; and *Cyprus v. Turkey*, Judgment, 28 June 1996, para. 205.

¹⁰⁷ ECtHR, *Kuzmenko v. Russia*, Judgment, 21 December 2010, para. 58.

¹⁰⁸ ECtHR, *Gadamauri and Kadyrbekov v. Russia*, Judgment, 5 July 2011, para. 61; and *Khatayev v. Russia*, Judgment, 11 October 2011, para. 125.

¹⁰⁹ *Kosityn v. Russia*, Judgment, 12 May 2010, para. 35.

¹¹⁰ ECmHR, *Tas v. Turkey*, Judgment, 5 March 1996, para. 229; ECmHR, *Akdeniz and Other v. Turkey*, Judgment, 3 April 1995, para. 501.

indispensable and obvious investigative steps' with regard to the death of a victim engaged the state's responsibility because it was 'a particularly serious violation of its obligation under Article 2 of the Convention to protect the right to life'.¹¹¹ The Court has developed its analysis of serious violations with respect to procedural rights (the obligation to effectively investigate and punish), Article 3 (prohibition of torture or inhuman or degrading treatment or punishment),¹¹² and Article 5 (the rights to liberty and security of the person¹¹³).

It has also found serious violations of social and economic rights when housing has been destroyed. In *Orhan v. Turkey*, the Court judged that the state had violated: Article 8 of the ECHR on the right to respect for private life and family; Article 1 of Protocol 1 to the Convention on the right to property;¹¹⁴ and, in conjunction with failure to conduct an effective investigation, Article 13 on the right to a remedy.¹¹⁵

In the case of *Moldovan and Others v. Romania*, the Court took several elements into consideration when it ruled that the victims' right to a private life, family and home had been seriously violated.¹¹⁶ Specifically, it concluded that the attitude and 'the repeated failure of the authorities to put a stop to breaches of the applicants' rights amount[ed] to a serious violation of Article 8 of the Convention of a continuing nature'.¹¹⁷

This factor, i.e. its systematic character, is evident in the finding of the European Court of an administrative practice, which exists where acts occur repeatedly with official tolerance. In *Ireland v. UK*, it defined administrative practice as 'consist[ing] of an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system'.¹¹⁸

In the past decade, the Court has also introduced pilot judgments, a procedure that allows it to group cases that reflect a systemic or structural dysfunction at national level. The procedure is designed 'to achieve a solution that extends beyond the particular case or cases so as to cover all similar cases raising the same issue'.¹¹⁹ According to the European Court, the pilot judgment procedure is:

[A]n accelerated execution process before the Committee of Ministers which would entail not just the obligation to eliminate for the future the causes of the violation, but also the obligation to introduce a remedy with retroactive effect within the domestic system to redress the prejudice sustained by other victims of the same structural or systemic violation.¹²⁰

It may be asked whether, when the Court finds a structural violation or 'administrative practice' or initiates the pilot judgment procedure, this amounts to finding a 'serious violation' of human rights. The practice of the Inter-American system of human rights appears to have addressed this issue more explicitly.

Inter-American system of human rights protection

The Inter-American system has made important contributions to jurisprudence with respect to 'serious' human rights violations. Scholars divide its jurisprudence on this subject into three stages.¹²¹ In the 1960s and 1970s, the system reported and documented massive and systematic violations of human rights, notably in countries that were ruled by military dictatorship or were undergoing situations of emergencies.¹²² In this period, the Inter-American Court of Human Rights developed jurisprudence on

111 ECtHR, *Velikova v. Bulgaria*, Judgment, 18 May 2000, para. 82. See also, on failure to investigate serious violations of Article 2 of the ECHR: *Eremiasova and Pechova v. Czech Republic*, Judgment, 16 February 2012, para. 132; *Ghimp and Others v. the Republic of Moldova*, Judgment, 30 October 2012, para. 68; *El-Masri v. The Former Yugoslav Republic of Macedonia*, Judgment, 13 December 2012, para. 269; and *Timus and Tarus v. Republic of Moldova*, Judgment, 15 October 2013, para. 68.

112 ECtHR, *Tyagunova v. Russia*, Judgment, 31 July 2012, para. 80.

113 ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia*, Judgment, 13 December 2012, para. 269.

114 ECtHR, *Orhan v. Turkey*, Judgment, 18 June 2002, para. 444.

115 ECtHR, *Ipek v. Turkey*, Judgment, 17 February 2004, para. 239.

116 ECtHR, *Moldovan and Others v. Romania (No. 2)*, Judgment, 12 July 2005, paras. 106–09.

117 *Ibid.*

118 *Ireland v. United Kingdom*, Judgment, 1978, para. 159.

119 Pilot Judgment Procedure. Information note issued by the Registrar, 1, para. 2. At: http://www.echr.coe.int/Documents/Pilot_judgment_procedure_ENG.pdf.

120 Position paper of the European Court of Human Rights on proposals for reform of the European Convention on Human Rights and other measures as set out in the report of the Steering Committee of Human Rights, 12 September 2003, CDDH-GDR(2003)024, para. 43.

121 O. Parra Vera, La jurisprudencia de la Corte Interamericana respecto a la lucha contra la impunidad: algunos avances y debates, in *Revista Jurídica de la Universidad de Palermo*, Vol. 13, No. 1 (November 2012), pp. 5–51. V. Abramovich, 'From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System', *SUR International Journal of Human Rights*, Vol. 11 (2009). At: http://www.surjournal.org/eng/contendos/getArtigo11.php?artigo=11.artigo_01.htm.

122 O. Parra Vera, a senior lawyer at the IACtHR, kindly provided this overview.

enforced disappearance, as a specific and complex human rights violation.¹²³ In the 1980s and 1990s, secondly, when many countries went through post-dictatorial transitions, the system established several legal standards on the issue of impunity for past human rights abuses. Most recently, the Inter-American system has examined structural patterns, notably 'serious violations' that result from or cause inequality and social exclusion.

The case law of the Inter-American Court generally uses the adjectives 'grave' and 'serious' interchangeably to qualify violations.¹²⁴ Analysis of its jurisprudence indicates that violations which involve enforced disappearance,¹²⁵ summary or arbitrary or extrajudicial killings or executions,¹²⁶ and torture are considered 'serious'.¹²⁷ The Court has frequently linked 'serious violations' to non-derogable rights.¹²⁸

When considering enforced disappearance, the Inter-American Court and Commission have both tried to elucidate factors that determine its gravity. In *Contreras et al. v. El Salvador*, the Court observed that enforced disappearances violate several rights simultaneously. It 'places a victim in a state of complete defencelessness, resulting in other related violations, with the situation being particularly serious when it forms part of a systematic pattern or practice that is applied or tolerated by the State'.¹²⁹

In a separate case, the Court stated that, 'due to the nature of the injured rights', enforced disappearance constitutes 'a violation of a *jus cogens* principle', which is 'especially serious because it occurred in the context of a systematic practice of "State-sponsored terrorism," at an interstate level'.¹³⁰ The Court appears to imply that the rights and prohibitions involved are such that an enforced disappearance is necessarily a serious

violation, and becomes particularly serious when 'framed within a systematic pattern or practice applied or consented to by the State'.¹³¹

In *Barrios Altos v. Peru*, the Court stated that amnesty laws were not admissible in cases of serious violations of human rights. It ruled that

[A]ll amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law'.¹³²

The Court has indicated on a number of occasions that state participation is an exacerbating factor. In *Rochela Massacre v. Colombia*, for example, it ruled that 'one of the main factors which augment the seriousness of the events described in the present case is that the State is responsible for a massacre which was carried out against its own judicial officers while they were performing their duty to investigate gross violations of human rights, and that State agents who were members of the armed forces were involved in the massacre'.¹³³

The Inter-American system has gradually come to focus on structural patterns, including patterns of inequality.¹³⁴ In *Maria da Penha Fernandes v. Brazil*, a landmark case that assessed violence against women, the Court highlighted impunity in cases of domestic violence due to ineffective judicial action.¹³⁵ In *Camba Campos et al. v. Ecuador*, it

123 O. Parra Vera, La jurisprudencia de la Corte Interamericana respecto a la lucha contra la impunidad: algunos avances y debates, in *Revista Jurídica de la Universidad de Palermo*, 13(1) (November 2012), p. 8.

124 For use of the term 'grave' with reference to extrajudicial executions and forced disappearances, see IACtHR, *Pueblo Bello Massacre v. Colombia*, Judgment, 31 January 2006, para. 143; and *Tiu Tojin v. Guatemala*, Judgment, 26 November 2008, para. 53.

125 See, for example, IACtHR, *Nicholas Chapman Blake v. Guatemala*, Judgment, 24 January 1998, para. 66.

126 IACtHR, *Rochela Massacre v. Colombia*, Judgment, 11 May 2007, para. 294.

127 IACtHR, *Vera-Vera et al. v. Ecuador*, Judgment, 19 May 2011, para. 117. See also, *La Cantuta v. Peru*, Judgment, 29 November 2006, para. 44.

128 See reference 139 in particular. The same language appeared in the earlier case of *Barrios Altos v. Peru* (Judgment of 14 March 2001, para. 41) and has been reconfirmed in several subsequent cases. See also: IACtHR, *Moiwana Village v. Suriname*, Judgment, 15 June 2005, para. 206; *Oscar Jose Blanco-Romero v. Venezuela*, Order, 28 November 2005, para. 98; *La Cantuta v. Peru*, Judgment, 29 November 2006, para. 44; *Rochela Massacre v. Colombia*, Judgment, 11 May 2007, para. 294.

129 IACtHR, *Contreras et al. v. El Salvador*, Judgment, 31 August 2011, para. 83.

130 IACtHR, *Gelman v. Uruguay*, Judgment, 24 February, 2011, 113, para. 99.

131 IACtHR, *Kenneth Ney Anzualdo Castro v. Peru*, Judgment, 22 September 2009, para. 59.

132 IACtHR, *Barrios Altos v. Peru*, Judgment, 14 March 2001, para. 41.

133 See, for example, *Rochela Massacre v. Colombia*, Judgment, 11 May 2007, para. 79.

134 V. Abramovich, 'From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System', *SUR International Journal of Human Rights*, Vol. 11 (2009). At: http://www.surjournal.org/eng/conteudos/getArtigo11.php?artigo=11.artigo_01.htm.

135 IACmHR, *Maria da Penha Fernandes v. Brazil*, Report, Case No. 12.051, Report No. 54/01, OEA/Ser.LV/II.111, doc. 20, rev. (2000), 16 April 2001.

examined structural problems that undercut judicial independence. Arguably the Court considers that such structural patterns enhance the 'seriousness' of associated human rights violations.¹³⁶

The Court has also ruled that some violations of social and economic rights are serious. In *Ituango Massacres v. Colombia*, it assessed the effect on villagers' lives of the theft of their livestock and the destruction of their houses, and found serious violations of the rights to property, to a home, and to privacy.¹³⁷

It ruled that 'the damage suffered by those who lost their livestock, from which they earned their living, is especially severe' and caused 'the loss of [the villagers'] main source of income and food'. In addition, crucially, it said that 'the way in which the livestock was stolen, with the explicit and implicit collaboration of members of the Army, increased the villagers' feelings of impotence and vulnerability'.¹³⁸ With respect to the villagers' homes, the Court found that their destruction not only caused the loss of material possessions, but destroyed 'the social frame of reference of the inhabitants, some of whom had lived in the village all of their lives'; the villagers lost their basic living conditions. For these reasons, it found that a particularly serious violation of the right to property had occurred.¹³⁹

It is of interest that the Court made reference to international humanitarian law. Specifically, it referred to rules applicable in non-international armed conflicts to support its conclusion that the violations in question were serious, in particular the prohibition 'to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population' (Article 14 of the 1977 Additional Protocol II).¹⁴⁰

The Inter-American Court has also judged that the nature of the victim (notably his or her vulnerability) influences the 'seriousness' of a violation. In several

cases, it has found that a violation was particularly serious because the victim was a child¹⁴¹ and that states have a duty to take special measures to protect and assist children who belong to a vulnerable group.¹⁴²

In sum, the practice of the Court appears to show that a violation may be considered serious because of the nature of the right(s) violated, the scale and magnitude of violations, the type and vulnerability of the victim(s), or a combination of these factors. Judge Sergio García Ramírez spelled out some of the circumstances in which a violation may be considered 'grave':

The violation of the right to humane treatment is extremely grave – owing to the importance of the juridical rights affected and the type of the acts that comprise this violation – when a victim is subjected to torture. The violation of the right to life becomes notoriously and intensely grave when it is the deprivation of the life of a series of individuals who are executed brutally. The violation of the right to liberty, among others, is very grave when it is practiced arbitrarily, prolonged for some time, and becomes forced disappearance in the terms of international law. It can also be maintained that the facts are more serious when the authors are senior State officials, from whom there are higher expectations of guarantee – hence, they are essential guarantors – from whom exemplary conduct is expected and who are called on to ensure the legitimacy of the acts of all public servants. Violations are also especially grave when they are perpetrated by those specifically responsible for certain obligations of respect and guarantee of human rights, or when they occur in circumstances in which the harmful conduct is extreme and when these circumstances even become part of the facts. All of this increases the 'gravity of the facts'.¹⁴³

¹³⁶ IACtHR, *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, Judgment, 28 August 2013.

¹³⁷ IACtHR, *Ituango Massacres v. Colombia*, Judgment, 1 July 2006, para. 178.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*, paras. 181–3, 192.

¹⁴⁰ *Ibid.*, paras. 179–80.

¹⁴¹ See *Villagran-Morales v. Guatemala* (case of 'Street Children'), Judgment, 19 November 1999, where the Court affirmed (para. 146) 'the particular gravity of [this] case since the victims were youths, three of them children, and because the conduct of the State not only violated the express provision of Article 4 of the American Convention, but also numerous international instruments, that devolve to the State the obligation to adopt special measures of protection and assistance for the children within its jurisdiction'. See also: *Gomez Paquiyauri v. Peru*, Judgment, 8 July 2004, para. 162; and *Bulacio v. Argentina*, Judgment, 18 September 2003, para. 133.

¹⁴² See note 149 and *Dilcia Oliven Yean and Violeta Bosico Cofi v. Dominican Republic*, Judgment, 8 September 2005, para. 134.

¹⁴³ Separate Opinion of Judge Sergio García Ramírez concerning *Goiburú et al. v. Paraguay*, Judgment, 22 September 2006, para. 6. Official Translation.

Practice of the UN system

UN Security Council

The UN Security Council speaks of 'serious', 'grave', and 'gross' violations of human rights as well as 'abuses' of human rights, but its practice is not consistent.¹⁴⁴ It tends to use 'grave' and 'serious' as synonyms.¹⁴⁵

Of Côte d'Ivoire, for instance, it spoke of 'serious' human rights abuses and crimes, listing extrajudicial killing, maiming, arbitrary arrest and abduction of civilians, enforced disappearances, acts of revenge, sexual and gender-based violence, including against children, and the alleged recruitment and use of children in the conflict.¹⁴⁶ In other statements concerning the same situation, however, it listed identical or similar crimes but described them only as 'human rights violations'.¹⁴⁷

UN usage does not imply that the omission of 'serious' means that a violation is not grave; violations normally considered 'grave' or 'serious' may be called simply 'human rights violations' in UN reports.

The Security Council seems to consider the status of victims when it assesses the gravity of a violation. This can be seen from the Monitoring and Reporting Mechanism (MRM),¹⁴⁸ which the Security Council oversees. The MRM monitors six 'grave violations' against children in situations of armed conflict: the killing or maiming of children; recruitment or use of children as soldiers; rape and other grave sexual abuse of children; abduction of children; attacks against schools or hospitals; and denial of humanitarian access for children.¹⁴⁹

Universal Periodic Review

The practice of states throws light on how the UN and UN human rights bodies understand the scope of 'serious' human rights violations. In particular, the Universal Periodic Review (UPR), an inter-state review mechanism, provides insights into the *opinio juris* of UN member states.

A review of recommendations so far suggests that the following violations tend to be viewed as 'serious': summary execution,¹⁵⁰ extrajudicial killings,¹⁵¹ destruction of homes,¹⁵² torture, ill-treatment,¹⁵³ failure to provide food and health care in prisons,¹⁵⁴ sexual violence,¹⁵⁵ recruitment

¹⁴⁴ For example, Resolution 2042 of 14 April 2012 begins by condemning 'the widespread violations of human rights by the Syrian authorities, as well as any human rights abuses by armed groups', principally to distinguish the authors of the breaches. For the qualification of 'serious' see Resolution 2053 of 27 June 2012 on the situation in the DR Congo, where the Council stressed 'that serious challenges remain, particularly in the eastern provinces, including the continued presence of armed groups in the Kivu and Oriental Province, *serious abuses and violations of human rights and acts of violence against civilians*'. [Emphasis added.] For use of the term 'gross', see, for example, Resolution 1894 of 11 November 2009.

¹⁴⁵ This is evident from analysis of Resolution 2000 of 27 July 2011. Compare, for instance, preambular para. 13 and operative para. 12, where the resolution refers to both 'grave' and 'serious' violations of human rights as apparent synonyms. Also, in Resolution 2062 (2012) the Council refers to 'serious abuses of human rights and violations of international humanitarian law' and in the same text uses the notion of 'grave abuses of human rights and violations of international humanitarian law in Côte d'Ivoire' in the same context of bringing perpetrators of violations to justice.

¹⁴⁶ Resolution 2000, 27 July 2011.

¹⁴⁷ See Resolution 2062 [on extension of the mandate of the UN Operation in Côte d'Ivoire (UNOCI) until 31 July 2013], 26 July 2012.

¹⁴⁸ The MRM is arguably the Security Council's most significant institutional initiative addressing the behaviour and responsibilities of parties to conflict. Resolution 1612 (26 July 2005) created a monitoring and reporting mechanism at country level and a Council working group on children and armed conflict. See also Resolutions 1882 (2009) and 1998 (2011).

¹⁴⁹ Report of the Secretary-General, 'Children and Armed Conflict', UN doc. A/59/695-S/2005/72, 9 February 2005, para. 68; Security Council, Resolution 1612, para. 2.

¹⁵⁰ Recommendation of Sweden, Report of the Working Group (WG) on the UPR, Central African Republic, UN doc. A/HRC/12/2, 4 June 2009, para. 23.

¹⁵¹ Recommendation of Canada, Report of the WG on the UPR, Myanmar, UN doc. A/HRC/17/9, 24 March 2011, para. 107.46; Recommendation of Hungary, Report of the WG on the UPR, Nepal, UN doc. A/HRC/17/5, 8 March 2011; Recommendation of Cuba, Report of the WG on the UPR, United States of America, UN doc. A/HRC/16/11, 4 January 2011.

¹⁵² Recommendation of Sweden, Report of the WG on the UPR, Central African Republic, UN doc. A/HRC/12/2, 4 June 2009, para. 23.

¹⁵³ Recommendation of USA, Report of the WG on the UPR, DR Congo, UN doc. A/HRC/13/8, 4 January 2010, para. 77; Recommendation of Canada, Report of the WG on the UPR, Myanmar, UN doc. A/HRC/17/9, 24 March 2011, para. 107.46; Recommendation of Hungary, Report of the WG on the UPR, Nepal, UN doc. A/HRC/17/5, 8 March 2011; Recommendation of Japan, Report of the WG on the UPR, Somalia, UN doc. A/HRC/18/6, 11 July 2011, para. 97.60; Recommendation of Iran, Report of the WG on the UPR, Spain, UN doc. A/HRC/15/6, 16 June 2010, para. 87.2; Recommendation of Cuba, Report of the WG on the UPR, USA, UN doc. A/HRC/16/11, 4 January 2011.

¹⁵⁴ Recommendation of USA, Report of the WG on the UPR, DR Congo, UN doc. A/HRC/13/8, 4 January 2010, para. 77.

¹⁵⁵ Recommendation of Republic of Korea, Report of the WG on the UPR, Guinea, UN doc. A/HRC/15/4, 14 June 2010, para. 71.67. Recommendation of Canada, Report of the WG on the UPR, Myanmar, UN doc. A/HRC/17/9, 24 March 2011, para. 107.46.

of child soldiers,¹⁵⁶ forced labour,¹⁵⁷ enforced disappearances,¹⁵⁸ arrest without warrant,¹⁵⁹ inadequate care for victims who have suffered gender-based violence,¹⁶⁰ forced marriage,¹⁶¹ female genital mutilation,¹⁶² blockade,¹⁶³ retaliation for dissent,¹⁶⁴ attacks on human rights defenders and journalists,¹⁶⁵ excessive use of force during peaceful demonstrations,¹⁶⁶ and abuse of force by state actors ('execution of criminals').¹⁶⁷

States sometimes refer in an ambiguous manner to serious violations of human rights. For example, they sometimes speak interchangeably of 'serious human rights violation' and crimes under international law,¹⁶⁸ or crimes more generally.¹⁶⁹

Treaty Bodies

This section considers the work of UN treaty bodies, expert committees that are mandated to clarify the meaning of the treaties that established them and examine whether states which are parties

to the treaty the committee monitors have fulfilled their obligations under it. The section considers what the Human Rights Committee, the Committee against Torture, the Committee on Elimination of Racial Discrimination, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Discrimination against Women, the Committee on the Rights of the Child, and the Committee on Migrant Workers have said about the 'gravity' or 'seriousness' of violations, focusing on their concluding observations. Other treaty bodies that were established more recently have not yet expressed views on this issue.

On the basis of a (sample) review,¹⁷⁰ the Human Rights Committee has described the following violations as 'serious': massacres,¹⁷¹ extra-judicial executions,¹⁷² torture and ill-treatment,¹⁷³ detention in degrading conditions,¹⁷⁴ sexual violence,¹⁷⁵ rapes,¹⁷⁶ disappearances,¹⁷⁷ sexual abuse of children,¹⁷⁸ abduction of children,¹⁷⁹ arbitrary detention,¹⁸⁰ recruitment of children for use as fighters in armed conflict,¹⁸¹ excessive use

¹⁵⁶ Recommendation of Canada, Report of the WG on the UPR, Myanmar, UN doc. A/HRC/17/9, 24 March 2011, para. 107.46; Recommendation of Sweden, Report of the WG on the UPR, Sri Lanka, UN doc. A/HRC/8/46, 5 June 2008.

¹⁵⁷ Recommendation of Canada, Report of the WG on the UPR, Myanmar, UN doc. A/HRC/17/9, 24 March 2011, para. 107.46.

¹⁵⁸ Recommendation of Hungary, Report of the WG on the UPR, Nepal, UN doc. A/HRC/17/5, 8 March 2011; Recommendation of Sweden, Report of the WG on the UPR, Sri Lanka, UN doc. A/HRC/8/46, 5 June 2008.

¹⁵⁹ Recommendation of Hungary, Report of the WG on the UPR, Nepal, UN doc. A/HRC/17/5, 8 March 2011.

¹⁶⁰ Recommendation of Japan, Report of the WG on the UPR, Somalia, UN doc. A/HRC/18/6, 11 July 2011, para. 97.60.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ Recommendation of Cuba, Report of the WG on the UPR, USA, UN doc. A/HRC/16/11, 4 January 2011.

¹⁶⁴ Recommendation of Israel, Report of the WG on the UPR, Venezuela, UN doc. A/HRC/19/12, 7 December 2011, para. 96.25.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ Recommendation of Denmark, Report of the WG on the UPR, DR Congo, UN doc. A/HRC/13/8, 4 January 2010, para. 83.

¹⁶⁹ Recommendation of the USA, Report of the WG on the UPR, DR Congo, UN doc. A/HRC/13/8, 4 January 2010, para. 4.

¹⁷⁰ The term 'serious violations of human rights' was found in 34 Concluding Observations, a tally that should not be considered exhaustive.

¹⁷¹ Human Rights Committee, Concluding Observations: Algeria, UN doc. CCPR/C/DZA/CO/3, 12 December 2007, para. 7; HRC, Concluding Observations: Guatemala, UN doc. CCPR/CO/72/GTM, 27 August 2001, para. 8.

¹⁷² HRC, Concluding Observations: Colombia, UN doc. CCPR/C/COL/CO/6, 4 August 2010, paras. 12, 14.

¹⁷³ HRC, Concluding Observations: Algeria, UN doc. CCPR/C/DZA/CO/3, 12 December 2007, para. 7; HRC, Concluding Observations: Cameroon, UN doc. CCPR/C/CMR/CO/4, 4 August 2010, para. 18; HRC, Concluding Observations: Colombia, UN doc. CCPR/C/COL/CO/6, 4 August 2010, paras. 12, 14; HRC, Concluding Observations: Chile, UN doc. CCPR/C/CHL/CO/5, 18 May 2007, para. 9; HRC, Concluding Observations: Ethiopia, UN doc. CCPR/C/ETH/CO/1, 19 August 2011, para. 16; HRC, Concluding Observations: Peru, UN doc. CCPR/C/PER/CO/5, 29 April 2013 paras. 11, 15.

¹⁷⁴ HRC, Concluding Observations: Israel, UN doc. CCPR/C/ISR/CO/3, 3 September 2010, para. 9.

¹⁷⁵ HRC, Concluding Observations: Peru, UN doc. CCPR/C/PER/CO/5, 29 April 2013, paras. 11, 15.

¹⁷⁶ HRC, Concluding Observations: Algeria, UN doc. CCPR/C/DZA/CO/3, 12 December 2007, para. 7; HRC, Concluding Observations: Colombia, UN doc. CCPR/C/COL/CO/6, 4 August 2010, paras. 12, 14; HRC, Concluding Observations: Ethiopia, UN doc. CCPR/C/ETH/CO/1, 19 August 2011, para. 16.

¹⁷⁷ HRC, Concluding Observations: Algeria, UN doc. CCPR/C/DZA/CO/3, 12 December 2007, para. 7; HRC, Concluding observations: Argentina, UN doc. CCPR/C/ARG/CO/4, 31 March 2010, paras. 9, 21; HRC, Concluding Observations: Colombia, UN doc. CCPR/C/COL/CO/6, 4 August 2010, paras. 12, 14; HRC, Concluding Observations: Ethiopia, UN doc. CCPR/C/ETH/CO/1, 19 August 2011, para. 16.

¹⁷⁸ HRC, Concluding Observations: Argentina, UN doc. CCPR/C/ARG/CO/4, 31 March 2010, paras. 9, 21.

¹⁷⁹ *Ibid.*

¹⁸⁰ HRC, Concluding Observations: Ethiopia, UN doc. CCPR/C/ETH/CO/1, 19 August 2011, para. 16; HRC, Concluding Observations: Peru, UN doc. CCPR/C/PER/CO/5, 29 April 2013, paras. 11, 15.

¹⁸¹ HRC, Concluding Observations: Colombia, UN doc. CCPR/C/COL/CO/6, 4 August 2010, paras. 12, 14.

of force (inter alia by the security forces, including the police),¹⁸² attacks on civilian populations,¹⁸³ manslaughter/murder/killings,¹⁸⁴ discrimination,¹⁸⁵ destruction of property,¹⁸⁶ forced displacement,¹⁸⁷ arrest of journalists,¹⁸⁸ direct targeting of civilians and civilian infrastructure (waste water, plants and sewage facilities),¹⁸⁹ use of civilians as 'human shields',¹⁹⁰ refusal to evacuate wounded,¹⁹¹ firing live bullets during demonstrations,¹⁹² and removal of children from their parents for purposes of illegal adoption or trafficking.¹⁹³

The Human Rights Committee sometimes refers explicitly to the quantum or scale of violations when it determines the seriousness of violations, speaking of 'massive' or 'widespread' violations, for example. It criticised a state for failing to punish incitement to ethnic hatred that led to '*serious* breaches of human rights, such as the violation of the right to life and *massive* population displacement'.¹⁹⁴ It expressed concern 'at the persistent allegations of serious human rights violations, including *widespread instances* of extrajudicial killings and ill-treatment by the police and members of armed forces ... the *extraordinarily large number* of killings during the "war on drugs"'.¹⁹⁵ In another case, it referred to serious violations of human rights in the context of 'large-scale' and 'indiscriminate' abuses.¹⁹⁶

At the same time, the Committee has noted 'serious' violations that were at the same time widespread and systematic. In a Concluding Observation on Sudan, it referred to 'widespread and systematic serious human rights violations, including murder, rape, forced displacement and attacks against the civil population', implying that these acts were inherently serious.¹⁹⁷

The Committee against Torture has also described violations of the Convention against Torture as 'serious'. An illustrative list, like that of the Human Rights Committee, includes extrajudicial executions,¹⁹⁸ massacres,¹⁹⁹ acts of torture,²⁰⁰ other forms of ill-treatment,²⁰¹ forced disappearance,²⁰² forced displacement, sexual violation and rape, and recruitment of children in the context of armed conflict.²⁰³

Violations described as 'serious' by the Committee on Elimination of Racial Discrimination include killings, extra-judicial executions, forced recruitment and enforced disappearances of indigenous people and minorities,²⁰⁴ and torture and cruel, inhuman or degrading treatment of non-citizens.²⁰⁵

182 HRC, Concluding Observations: Brazil, UN doc. CCPR/C/BRA/CO/2, 1 December 2005, para. 9; HRC, Concluding Observations: Cameroon, UN doc. CCPR/C/CMR/CO/4, 4 August 2010, para. 18.

183 HRC, Concluding Observations: Ethiopia, UN doc. CCPR/C/ETH/CO/1, 19 August 2011, para. 16.

184 HRC, Concluding Observations: Brazil, UN doc. CCPR/C/BRA/CO/2, 1 December 2005, para. 9; HRC, Concluding Observations: Chile, UN doc. CCPR/C/CHL/CO/5, 18 May 2007, para. 9; HRC, Concluding Observations: Ethiopia, UN doc. CCPR/C/ETH/CO/1, 19 August 2011, para. 16; HRC, Concluding Observations: Peru, UN doc. CCPR/C/PER/CO/5, 29 April 2013, paras. 11, 15.

185 HRC, Concluding Observations: Chile, UN doc. CCPR/C/CHL/CO/5, 18 May 2007, para. 9.

186 HRC, Concluding Observations: Ethiopia, UN doc. CCPR/C/ETH/CO/1, 19 August 2011, para. 16.

187 *Ibid.*

188 *Ibid.*

189 HRC, Concluding Observations: Israel, UN doc. CCPR/C/ISR/CO/3, 3 September 2010, para. 9.

190 *Ibid.*

191 *Ibid.*

192 *Ibid.*

193 HRC, Concluding Observations: Argentina, CCPR/CO/70/ARG, 15 November 2000, para. 5.

194 HRC, Concluding Observations: Togo, UN doc. CCPR/C/TGO/CO/4, 18 April 2011, para. 9. (Emphasis added.)

195 HRC, Concluding Observations: Thailand, UN doc. CCPR/CO/84/THA, 8 July 2005, para. 10. (Emphasis added.)

196 HRC, Concluding Observations: Russia, UN doc. CCPR/C/RUS/CO/6, 24 November 2009, para. 13.

197 HRC, Concluding Observations: Sudan, UN doc. CCPR/C/SDN/CO/3 29 August 2007, para. 9.

198 CAT, Concluding Observations: Colombia, UN doc. CAT/C/COL/CO/4, 4 May 2010, para. 11; CAT, Concluding Observations: Ethiopia, UN doc. CAT/C/ETH/CO/1, 20 January 2011, para. 15; CAT, Concluding Observations: Yemen, UN doc. CAT/C/YEM/CO/2, 17 December 2009, para. 15.

199 CAT, Concluding Observations: Guatemala, UN doc. CAT/C/GTM/CO/5-6, 21 June 2013, para. 10.

200 CAT, Concluding Observations: Guatemala, UN doc. CAT/C/GTM/CO/5-6, 21 June 2013, para. 10; CAT, Concluding Observations: Sri Lanka, UN Doc. CAT/C/LKA/CO/3-4, 8 December 2011, para. 21.

201 CAT, Concluding Observations: Colombia, UN doc. CAT/C/COL/CO/4, 4 May 2010, para. 11.

202 *Ibid.*; and CAT, Concluding Observations: Guatemala, UN doc. CAT/C/GTM/CO/5-6, 21 June 2013, para. 10.

203 CAT, Concluding Observations: Colombia, UN doc. CAT/C/COL/CO/4, 4 May 2010, para. 11.

204 CERD, Concluding Observations: Colombia, UN doc. CERD/C/COL/CO/14, 28 August 2009, para. 14.

205 CERD, Concluding Observations: Italy, UN doc. CERD/C/ITA/CO/15, 16 May 2008, para. 18.

The Committee on the Elimination of Discrimination against Woman has described rape and incest as serious violations of women's human rights.²⁰⁶

The Committee on Migrant Workers has only used the term 'serious violations' specifically to refer to kidnappings.²⁰⁷

The Committee on the Rights of the Child has referred to 'serious' violations in several contexts. They include violence against children (at home and when they work and live on the streets); violence against children exacerbated by state failure to investigate;²⁰⁸ the 'use of children as human shields, as bodyguards for army commanders, as sexual slaves and for committing the most serious human rights abuses, including massacres and mass rapes';²⁰⁹ child poverty (among Palestinian children);²¹⁰ and large-scale demolition of houses and infrastructure, which constitutes 'a serious violation of the right to an adequate standard of living for children'.²¹¹

With regard to military operations, the Committee on the Rights of the Child expressed its grave concern over 'serious violations suffered by children ... owing to disproportionate violence, the lack of distinction for civilians [sic] and the obstruction of humanitarian and medical aid'.²¹²

The Committee on Economic, Social and Cultural Rights has qualified as 'serious' violations: attacks by military and settlers on school children and educational facilities (in the Occupied Palestinian

Territories);²¹³ prevention of access to humanitarian aid;²¹⁴ and impunity for domestic and sexual violence.²¹⁵

This survey reveals that the various bodies speak in different ways of 'serious violations'. However, common threads can be found in their approaches. Implicitly or explicitly, they all link the 'severity' of a violation to its 'scale'. This observation should be contextualized, however, because treaty reporting, by definition, assesses the general situation of human rights in a state. Violations considered under the individual communications procedure have sometimes been described as 'serious', notably when they concern the right to life,²¹⁶ conditions of detention,²¹⁷ torture,²¹⁸ and prolonged delay in providing domestic remedies.²¹⁹

In a few cases the Human Rights Committee has stated that violation of basic human rights, in particular the right to life, is 'particularly serious'.²²⁰ This raises the broader and more complex question as to which human rights are 'basic'.²²¹ Potentially, nonetheless, 'seriousness' could be measured in terms of the importance of the obligation violated; violations of more 'important' obligations would be more 'serious'.

A second point can be made about 'serious' violations in situations of armed conflict. In many cases, 'serious' violations have been associated with violations of international humanitarian law. In some instances, human rights treaty bodies have used

²⁰⁶ CEDAW, Concluding Observations: Estonia, UN doc. A/57/38, 2002, para. 96.

²⁰⁷ CMW, Concluding Observations: Mexico, UN doc. CMW/C/MEX/CO/2, 3 May 2011, para. 30.

²⁰⁸ CRC, Concluding Observations: Guatemala, UN doc. CRC/C/15/Add.154, 9 July 2001, paras. 30–1.

²⁰⁹ CRC, Concluding Observations (OP-CAC): DRC, UN doc. CRC/C/OPAC/COD/CO/1, 7 March 2012, para. 8.

²¹⁰ CRC, Concluding Observations: Israel, UN doc. CRC/C/ISR/CO/2-4, 4 July 2013, paras. 36, 56. The CRC found that the occupying power's policies caused 'serious violations of their right to an adequate standard of living'.

²¹¹ CRC, Concluding Observations: Israel, UN doc. CRC/C/15/Add.195, 9 October 2002, para. 50.

²¹² CRC, Concluding Observations (OP-CAC): Israel, UN doc. CRC/C/OPAC/ISR/CO/1, 4 March 2010, para. 10. Speaking of accountability for 'serious violations' in Sudan, the CRC criticised the 'deliberate targeting of civilians and the indiscriminate use of force against them, including through the aerial bombardment of villages and other civilian infrastructure, by Government-supported militia, Government security forces as well as armed groups' and 'the high incidence of rape and other forms of sexual violence committed against children, as well as the recruitment of children by armed groups and their use in hostilities'. CRC, Concluding Observations: Sudan, UN doc. CRC/C/SDN/CO/3-4, 1 October 2010, para. 72.

²¹³ CESCR, Report of Israel, (Third Periodic Report/List of Issues and Written Replies), UN doc. E/C.12/ISR/Q/3/Add.1, pp. 4–5, para. 36.

²¹⁴ CESCR, Concluding Observations: Sri Lanka, UN doc. E/C.12/LKA/CO/2-4, 9 December 2010, para. 28.

²¹⁵ CESCR, Concluding Observations: Jamaica, UN doc. E/C.12/1/Add.75, 6 December 2001, para. 14.

²¹⁶ HRC, *Chaparro v. Colombia*, Views (Comm. 612/1995), 1997, para. 5.2; *Andreu v. Colombia*, Views (Comm. 563/1993), 1995, para. 8.2.

²¹⁷ HRC, *Wilson v. The Philippines*, Views (Comm. 868/1999), 2003, para. 7.3; *Dunaway v. Nicaragua*, Views (Comm. 328/1988), 1995, para. 10.5.

²¹⁸ HRC, *Rodriguez v. Uruguay*, Views (Comm. 322/1988), 1994, para. 12.3; *Dunaway v. Nicaragua*, Views (Comm. 328/1988), 1995, para. 10.5.

²¹⁹ See CEDAW, *B. J. v. Germany*, Decision on Admissibility, 14 July 2004, para. 14.

²²⁰ See HRC, *Coronel v. Colombia*, Views (Comm. 778/1997), 2002, para. 6.2; *Chaparro v. Colombia*, Views (Comm. 612/1995), 1997, para. 5.2.

²²¹ See, for example, the fundamental rights listed in ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts. Article 50 sets out obligations that are not subject to lawful countermeasures, including the protection of fundamental human rights in paragraph 1(b). ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10) with commentaries.

IHL concepts (attacks directed against civilians and civilian objects) to strengthen the case for saying that certain violations are 'grave' or 'serious'.²²²

Human Rights Council Special Procedures

To complete this description of the practice of UN bodies, it is worth looking at what the UN Human Rights Council's Special Procedures have said about 'serious' violations. In summary, the reports of Special Procedures have described as 'serious violations': extrajudicial executions,²²³ killing,²²⁴ arbitrary detention, torture or ill-treatment, enforced disappearances,²²⁵ slave labour,²²⁶ and discrimination²²⁷ (particularly in the context of accessing basic economic, social, and cultural rights²²⁸).

The Special Representative of the Secretary-General on the situation of human rights defenders, Hina Jilani, referred to the daily occurrence in Israel and the Occupied Palestinian Territory of 'serious violations', including: extrajudicial and custodial killings; torture and cruel, inhuman, and degrading treatment of prisoners and detainees; administrative detentions on a large scale; severe restrictions on freedom of movement; discrimination; lack of citizenship and civil status; confiscation of land

and property; loss of livelihood; the building of the Wall and other barriers; evictions and house demolitions; disproportionate and excessive use of force against all forms of protest; and denial of humanitarian access.²²⁹

The Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana, found that 'the ongoing conflict and tensions' in the country engendered 'serious' human rights violations, including attacks against civilian populations, extrajudicial killings, sexual violence, arbitrary arrest and detention, internal displacement, land confiscation, the recruitment of child soldiers, and forced labour and portering.²³⁰

Fact-finding Missions and Commissions of Inquiry

Like other human rights bodies examined in this paper, fact-finding missions and commissions of inquiry have not employed terms consistently when they have referred to 'grave' or 'serious' human rights violations. Some commissions of inquiry frequently describe violations as 'gross'.²³¹ Others qualify human rights violations as both 'serious and gross'.²³² In most cases, terms such as 'gross', 'grave', and 'serious' are used interchangeably.²³³

²²² See, for example, CESCR, Concluding observations: Sri Lanka, UN doc. E/C.12/LKA/CO/2-4, 9 December 2010, para. 28; CRC, Concluding observations: DRC, Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, UN doc. CRC/C/OPAC/COD/CO/1, 7 March 2012, para. 8; HRC, Concluding observations: Sudan, UN doc. CCPR/C/SDN/CO/3 29 August 2007, para. 9.

²²³ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, Follow-up country recommendations: Colombia, UN doc. A/HRC/20/22/Add.2, 15 May 2012, para. 16.

²²⁴ Report of the Special Rapporteur on the situation of human rights defenders, M. Sekaggya, UN doc. A/HRC/13/22/Add.2, 25 February 2010, paras. 96, 98.

²²⁵ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, M. Scheinin, UN doc. A/HRC/10/3/Add.2, 16 December 2008, para. 42; see also Report of the Working Group on Enforced or Involuntary Disappearances, Mission to El Salvador, UN doc. A/HRC/4/41/Add.3, 6 March 2007, para. 8.

²²⁶ Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, G. Shahinian, Mission to Brazil, UN doc. A/HRC/15/20/Add.4, 30 August 2010, paras. 65, 104.

²²⁷ Report of the Independent Expert on minority issues, Mission to Hungary, UN doc. A/HRC/4/9/Add.2, 4 January 2007, para. 96.

²²⁸ Report of the Special Rapporteur on the human right to safe drinking water and sanitation, C. de Albuquerque, Addendum Mission to Slovenia, UN doc. A/HRC/18/33/Add.2, 4 July 2011, para. 24.

²²⁹ Report submitted by the Special Representative of the Secretary-General on the situation of human rights defenders, Hina Jilani, Mission to Israel and the Occupied Palestinian Territory, UN doc. /CN.4/2006/95/Add.3, 10 March 2006, paras. 15, 48–50.

²³⁰ Progress report of the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana, UN doc. A/HRC/19/67, 7 March 2012, para. 59.

²³¹ This seems to be particularly true of the Independent International Commission of Inquiry on the Syrian Arab Republic, which consistently referred to 'gross' human rights violations in its reports in 2012 and 2013 – but used the terms 'most serious' and 'grave' human rights violations inconsistently. For example, it referred to 'grave human rights violations, war crimes and crimes against humanity' in para. 1, and to 'serious violations of international human rights and humanitarian law' on p. 127. In another passage, it stated that: 'Crimes against humanity, breaches of international humanitarian law and gross human rights violations have been perpetrated in the Syrian Arab Republic' (para. 164). Report of the independent international commission of inquiry on the Syrian Arab Republic, UN doc. A/HRC/22/59, 5 February 2013. See also, Report of the International Commission of Inquiry on Côte d'Ivoire, UN doc. A/HRC/17/48, 1 July 2011, paras. 1 and 66.

²³² Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, para. 413.

²³³ The High-level Fact-Finding Mission to Beit Hanoun called certain events 'gross violations of human rights and international humanitarian law' and others 'grave human rights violations'. See Report of the high-level fact-finding mission to Beit Hanoun established under Council resolution, UN doc. A/HRC/9/26, 1 September 2008, para. 44, and the Report of the High-Level Fact-Finding Mission to Beit Hanoun established under resolution S-3/1, UN doc. A/HRC/5/20, 18 June 2007, para. 14.

A review of their reports suggests that fact-finding missions and commissions of inquiry consider that 'serious' violations of human rights include killing,²³⁴ murder, torture, enforced disappearances, destruction of houses/property, pillaging, rape and other forms of sexual violence, forced displacement, deliberate and indiscriminate attacks on civilians and civilian objects,²³⁵ abduction, and arbitrary detention.²³⁶

The High-Level Fact-Finding Mission to Beit Hanoun stated that the 'extremely difficult conditions of life facing all Gazans in many instances constitute gross violations of human rights and international humanitarian law'.²³⁷ The Mission attributed the 'difficult conditions of life' to the combined effects of military operations and a blockade on Gaza's population.²³⁸ The Mission that investigated the shelling of Beit Hanoun considered that the deaths and destruction of housing that it caused were 'grave' human rights violations.²³⁹

A recent mission to the Occupied Palestinian Territory followed UN treaty bodies in describing restrictions on freedom of movement as amounting to 'gross violations of economic, social and cultural rights'.²⁴⁰ With regard to settlements, the mission concluded that 'Israel is committing serious breaches of its obligations under the right to self-determination'.²⁴¹

A Commission of Inquiry on Libya described as serious violations of international human rights and humanitarian law incidents in which excessive use of force had been used against demonstrators: they 'represented a *serious* breach of a range of rights under international human rights law, including the

right to life, the right to security of person, the right to freedom of assembly and the right to freedom of expression'.²⁴² The Commission also found examples of torture, enforced disappearances, and violations of the right to an adequate standard of health, all of which it described as serious violations of international human rights and humanitarian law. It concluded the right to health had been violated on the basis of a 'range of actions taken by Government forces [that] had the effect of impeding or preventing altogether access to medical care, whether by refusing assistance in the immediate aftermath of demonstrations or by later obstructing access to hospitals, taking action against medical personnel or allegedly abducting people from hospitals'.²⁴³ 'In such actions,' it concluded, 'there have been clear violations of the right to an adequate standard of health, as well as other serious violations involved in the particular actions taken against medical personnel or patients'.²⁴⁴

The work of these investigative bodies suggests that the scope of 'serious violations' coincides or nearly coincides with violations that engage individual criminal responsibility under international law, notably crimes against humanity and war crimes. In effect, the language used by a number of fact-finding missions and commissions of inquiry suggests their scope is identical. The Commission of Inquiry on Lebanon, for example, stated that: 'Serious violations of international human rights law and international humanitarian law are regulated *inter alia* by the Rome Statute of the International Criminal Court, as well as customary international law'.²⁴⁵ Similarly, the report of the Commission on Inquiry on Darfur asserted that 'serious violations'

²³⁴ Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1, UN doc. A/HRC/3/2, 23 November 2006, para. 68.

²³⁵ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, p. 3.

²³⁶ Report of the United Nations Fact-Finding Mission on the Gaza Conflict, UN doc. A/HRC/12/48, 25 September 2009, para. 80; Report of the International Commission of Inquiry on Libya, UN doc. A/HRC/19/68, 8 March 2012, para. 125; Report of the independent international commission of inquiry on the Syrian Arab Republic, UN doc. A/HRC/19/69, 22 February 2012; Report of the independent international commission of inquiry on the Syrian Arab Republic, UN doc. A/HRC/21/50, 16 August 2012, paras. 37 and 134 and Summary.

²³⁷ Report of the high-level fact-finding mission to Beit Hanoun, UN doc. A/HRC/9/26, 1 September 2008, para. 44.

²³⁸ In the same report, the Mission stated that it was 'also able to see how Israel effectively controls basic aspects of the daily life of Gazans, notably through the fuel blockade in force when the mission visited the territory. The situation was described to the mission by one resident in the following terms: "Israel decides what Gazans eat for dinner, whether they walk or drive, whether their children go to school or not".' Report of the high-level fact-finding mission to Beit Hanoun, UN doc. A/HRC/9/26, 1 September 2008, para. 11.

²³⁹ Report of the High-Level Fact-Finding Mission to Beit Hanoun, UN doc. A/HRC/5/20, 18 June 2007, para. 14.

²⁴⁰ Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem, UN doc. A/HRC/22/63, 7 February 2013, para. 76.

²⁴¹ *Ibid.*, para. 104.

²⁴² Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, UN doc. A/HRC/17/44, 1 June 2011, p. 4.

²⁴³ *Ibid.*, p. 5 and para. 99.

²⁴⁴ Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, UN doc. A/HRC/17/44, 1 June 2011, p. 5 and para. 139.

²⁴⁵ Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1, UN doc. A/HRC/3/2, 23 November 2006, para. 68.

of human rights law and humanitarian law are 'largely codified in the ICC Statute'.²⁴⁶

Sometimes, fact-finding bodies have treated 'serious violations' as a composite term, whose scope draws from several bodies of law. For example, the Independent International Commission of Inquiry on Syria found that '[war crimes and gross violations of international human rights and humanitarian law — including arbitrary arrest and detention, unlawful attack, attacking protected objects, and pillaging and destruction of property — were also committed'.²⁴⁷ From this sentence, it is not entirely clear whether the Commission considers that pillaging and destruction of property, governed by the law of armed conflict, also constitute gross violations under international human rights law.²⁴⁸ In a similar manner, after elections in Côte d'Ivoire in 2010, the International Commission of Inquiry on Côte d'Ivoire stated that the destruction of houses and property was a serious violation of human rights, alongside killings, executions, use of weapons of war against demonstrators, restriction of movement, and other acts of violence against the civilian population.²⁴⁹

The Independent International Commission of Inquiry on Syria 'found reasonable grounds to believe that Government forces and the Shabbiha had committed the crimes against humanity of murder and of torture, war crimes and gross violations of international human rights law and international humanitarian law, including unlawful killing, torture, arbitrary arrest and detention, sexual violence, indiscriminate attack, pillaging and destruction of property'.²⁵⁰ It also stated that:

While the commission focused on *most serious violations* of human rights, it wishes to note the overall deteriorating human rights situation. In

addition to the right to life and the right to liberty and personal security, other fundamental human rights continue to be violated. Increased violence has further restricted the freedoms of expression, association and peaceful assembly, which had initially sparked the March 2011 uprising. The Syrian population is generally deprived of basic economic, social and cultural rights.²⁵¹

Truth and reconciliation commissions

The mandates of truth commissions vary widely, but some are responsible for investigating alleged serious violations of human rights, which requires them to define such violations. The examples given here are confined to those that distinguish violations in terms of gravity (using the modifiers 'serious' or 'gross'). Many truth commissions do not draw a distinction between 'a violation' and a 'gross' or 'serious' violation.²⁵²

The Chilean National Commission for Truth and Reconciliation was mandated to find out the truth about the most serious human rights violations, defined as 'situations of those persons who disappeared after arrest, who were executed, or who were tortured to death, in which the moral responsibility of the state is compromised as a result of actions by its agents or persons in its service, as well as kidnappings and attempts on the life of persons committed by private citizens for political purposes'.²⁵³

The Haitian Truth and Justice Commission adopted a slightly longer list of serious violations, which included arbitrary detention,²⁵⁴ while the Paraguayan Commission was authorized to investigate cases of

²⁴⁶ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, para. 175. The Commission also states (para. 147) that: 'Accountability for serious violations of both international human rights law and international humanitarian law is provided for in the Rome Statute of the International Criminal Court'.

²⁴⁷ Report of the independent international commission of inquiry on the Syrian Arab Republic, UN doc. A/HRC/22/59, 5 February 2013, Summary.

²⁴⁸ Similarly, in a more recent report, the Commission of Inquiry found that 'Government forces have committed *gross violations of human rights and the war crimes* of torture, hostage-taking, murder, execution without due process, rape, attacking protected objects and pillage'. Report of the independent international commission of inquiry on the Syrian Arab Republic, UN doc. A/HRC/24/46, 16 August 2013, Summary. (Emphasis added.)

²⁴⁹ Report of the International Commission of Inquiry on Côte d'Ivoire, UN doc. A/HRC/17/48, 1 July 2011, paras. 39–65 and 66.

²⁵⁰ Report of the independent international commission of inquiry on the Syrian Arab Republic, UN doc. A/HRC/21/50, 16 August 2012, Summary.

²⁵¹ *Ibid.*, para. 37. (Emphasis added.)

²⁵² See, for example, Part III, s. 5(3) of the Truth and Reconciliation Commission Act 2008 of the Solomon Islands (No. 5, 2008), which lists most of the 'serious violations' identified and discussed in this section.

²⁵³ Art. 1, Supreme Decree No. 355, Executive Branch Ministry of Justice, Undersecretary of the Interior, Creation of the Commission on Truth and Reconciliation, Santiago, 25 April 1990.

²⁵⁴ Art. 2, Arrêté, Jean-Bertrand Aristide, Président, 28 March 1995.

exile.²⁵⁵ Article 3 of the decree that established the Truth Commission of Peru listed among the serious violations it would investigate 'violations of the collective rights of the country's Andean and native communities'.²⁵⁶ The Ecuadorian Commission provided a non-exhaustive definition by adding to the list of 'serious violations' 'other serious violations of human rights' committed as part of the policy of the state.²⁵⁷

The Liberia Truth and Reconciliation Act authorized the Commission it established to investigate 'gross human rights violations ... as well as abuses that occurred, including massacres, sexual violations, murder, extra-judicial killings and economic crimes, such as the exploitation of natural or public resources to perpetuate armed conflicts, during the period January 1979 to October 14, 2003'.²⁵⁸ It was asked, in addition, to 'determine whether these were isolated incidents or part of a systematic pattern; establishing the antecedents, circumstances factors and context of such violations and abuses; and determining those responsible for the commission of the violations and abuses and their motives as well as their impact on victims'.²⁵⁹

The Kenyan Truth, Justice and Reconciliation Commission Bill, which established Kenya's Truth Commission and determined its powers and functions, set out a definition of 'gross human rights violations' which included:

- (a) violations of fundamental human rights, including but not limited to acts of torture, killing, abduction and severe ill-treatment of any person;
- (b) imprisonment or other severe deprivation of physical liberty;
- (c) rape or any other form of sexual violence;
- (d) enforced disappearance of persons;

- (e) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or gender or other grounds universally recognized as impermissible under international law; or
- (f) any attempt, conspiracy, incitement, instigation, command, or procurement to commit an act referred to in paragraph (a) and (c), which was committed during the period between 12th December, 1963 and 28th February, 2008, and the commission of which was advised, planned, directed, commanded or ordered, by any person acting with a political motive.²⁶⁰

Like Kenya, the South African Commission of Truth and Reconciliation introduced a definition of 'gross violation of human rights'. It included: a) 'killing, abduction, torture or severe ill-treatment of any person', and b) 'any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a), which emanated from conflicts of the past and which was committed during the period 1 March 1960 to the cut-off date within or outside the Republic, and the commission of which was advised, planned, directed, commanded or ordered, by any person acting with a political motive'.²⁶¹

The peace agreement that established El Salvador's Truth Commission mandated the Commission to take into account the 'exceptional importance that may be attached to the acts to be investigated, their characteristics and impact, and the social unrest to which they gave rise'.²⁶² The mention of impact in this definition is noteworthy.

Although their mandates define 'serious violations' variously, truth commissions tend to agree that certain violations are 'grave' or 'serious'. They include murder; extrajudicial execution; torture and cruel, inhuman or degrading treatment; abduction; enforced disappearance; arbitrary detention; and rape or any other form of sexual violence.

²⁵⁵ In Spanish: 'La Comisión aplicará las reglas de debido proceso en sus investigaciones. La Comisión enfocará su trabajo sobre los casos de violaciones de derechos humanos ocurridos en el período mayo de 1954 hasta la promulgación de la Ley en especial sobre: a) desapariciones forzadas; b) ejecuciones extrajudiciales; c) torturas y otras lesiones graves; d) exilios; e) otras graves violaciones de derechos humanos'. Art. 3, Law No. 2225, Por La Cual Se Crea La Comisión De Verdad Y Justicia, 15 October 2003.

²⁵⁶ Art. 3, Decree No. 065-2001-PCM, 4 June 2001.

²⁵⁷ Ministerial Accord No. 305, 3 May 2007. It states: 'Que en Ecuador durante el período democrático, y en particular entre 1984 y 1988, se han denunciado torturas, desapariciones, ejecuciones extrajudiciales y otros delitos graves y atentatorios a los derechos humanos, como parte de una política de Estado para la violación de los Derechos Humanos, que debe ser esclarecida'. See also Art. 3, Law No. 2225, Por La Cual Se Crea La Comisión De Verdad Y Justicia, 15 October 2003; and Art. 3, Decree No. 065-2001-PCM, 4 June 2001, establishing the Peruvian Truth Commission.

²⁵⁸ Art. IV, Truth and Reconciliation Commission Act, 12 May 2005.

²⁵⁹ *Ibid.*

²⁶⁰ Art. 2, Part I, The Truth, Justice and Reconciliation Commission Bill, 2008.

²⁶¹ South Africa, Promotion of National Unity and Reconciliation Act 1995 [Act 95-34, 26 July 1995].

²⁶² El Salvador: Mexico Peace Agreements—Provisions Creating the Commissions on Truth, 27 April 1999.

Analysis: what might amount to 'a serious violation of international human rights law'?

Having examined the practice of a range of expert human rights bodies, what conclusions can be drawn?

First of all, they do not use a uniform terminology. 'Gross', 'flagrant', 'grave', 'serious', and other qualifiers ('egregious', 'massive') are often used interchangeably and sometimes cumulatively.

Furthermore, the spectrum of rights where a serious violation has been found is extensive and covers most rights, whether civil, political, economic, social, or cultural and in their individual or collective dimension. They include violations of economic, social and cultural as well as civil and political rights, and individual as well as collective violations.

International bodies sometimes draw on other bodies of law (such as IHL) to strengthen legal claims that a given violation of human rights is 'severe' or 'grave'. This issue requires more research.

The review of examples suggests that some violations (such as torture) are considered intrinsically serious.

The seriousness of other violations tends to be determined by context and circumstances. The list of 'serious violations' in this category is necessarily in evolution.

The analysis undertaken for this report suggests that expert human rights bodies apply several criteria when they distinguish 'serious' violations, though their use is often implicit and no set of criteria has been formally agreed. 'Serious' violations are determined by:

- The character of the right.
- The magnitude of the violation.
- The type of victim (vulnerability).
- The impact of the violation.

These elements can be regarded as merely descriptive. It is not presumed that they should be prescriptive criteria or are indicators that a violation must fulfil in order to be described as 'serious'.

The first and second criteria (that is, the character of the right and the magnitude or quantum of the violation) are prominent considerations. They often, and often evidently, influence decisions to describe a violation as 'serious'. Those decisions may also be influenced by the interplay of several factors. It is not clear what patterns of interplay qualify a violation to be called 'serious', however, because a violation's impact and gravity are often context specific.²⁶³

Though the notion of 'serious violation' has usually been approached from the perspective of human rights law, other bodies of law, such as criminal law, are clearly relevant. This is evident in the work of some of truth and reconciliation commissions; for example, the South African, Liberian, and Kenyan truth commissions included criminal intent in their definitions of 'gross violation'.²⁶⁴ Similarly, the Inter-American Court of Human Rights has come to take account of 'aggravated state responsibility' when it judges the seriousness of violations. It seems to have drawn on elements of criminal law, albeit in an adapted form, to identify and highlight more serious forms of abuse.²⁶⁵

If a criminal law approach is adopted, 'seriousness' is to be measured in both subjective and objective terms. Subjective factors include intention and motive, awareness, and the foreseeability of a crime.²⁶⁶ Objective factors include interests and property protected by law (such as rights, physical persons, and property).²⁶⁷

²⁶³ In the context of the ATT, see User's guide to the EU Code of Conduct on Arms Exports, 3 July 2007, Annex III, s. 3.2.6.

²⁶⁴ For instance, the Kenyan Truth, Justice and Reconciliation Commission Bill's definition of 'gross violations' includes the clause: 'any attempt, conspiracy, incitement, instigation, command, or procurement to commit an act referred to in paragraph (a) and (c) ... the commission of which was advised, planned, directed, commanded or ordered, by any person acting with a political motive'.

²⁶⁵ The IACtHR found 'aggravated' state responsibility in several of the cases mentioned in this report. At the same time (see below), the Court has clearly affirmed the IACtHR's distinctive character. In *La Cantuta v. Peru*, for example, it noted that the Court 'is not a criminal court with power to ascertain liability of individual persons for criminal acts. International liability of the States arises automatically with an international wrong attributable to the State and, unlike under domestic criminal law, in order to establish that there has been a violation of the rights enshrined in the American Convention, it is not necessary to determine the responsibility of its author or their intention, nor is it necessary to identify individually the agents who are attributed with the violations. In this context, the Court ascertains the international liability of the State in this case, which may not be made modelled after structures that belong exclusively to domestic or international criminal law, which in turn defines responsibility or individual criminal liability; nor is it necessary to define the scope of action and rank of each state officer involved in the events.' (Judgment, 29 November 2006, para. 156.)

²⁶⁶ Prof. Cherif Bassiouni, interviewed on 10 December 2013.

²⁶⁷ See discussion in the Third Report on the Draft Code of Offences against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur, UN doc. A/CN.4/387, paras. 48–50.

The degree to which it is appropriate and possible to import rules and principles of international criminal law for the purpose of defining the gravity of a violation has not often been discussed. However, there are reasons to be cautious about importing into human rights practice concepts that are extraneous to human rights law. This is primarily because international human rights law differs structurally from international criminal law. The Inter-American Court has tried to capture the differences:

Violations of the Convention cannot be founded upon rules that take psychological factors into account in establishing individual culpability. For the purposes of the analysis, the intent or motivation of the agent who has violated the rights recognized by the Convention is irrelevant – violation can be established even if the identity of the individual perpetrator is unknown. What is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible. Thus, the Court's task is to determine whether the violation is the result of a State's failure to fulfil its duty to respect and guarantee those rights...²⁶⁸

Despite its structural differences, criminal law can help clarify the definition of 'serious violation of human rights'. The term is frequently invoked in the context of impunity, and its meaning (or elements of its meaning) can be inferred from a range of human rights violations that engage criminal responsibility. As has been noted, certain authoritative international bodies sometimes conflate 'serious violations of human rights' with the prohibitions contained in the Rome Statute.

Although conceptions of 'serious violation' differ, opinion seems to converge with respect to certain practices. The lists that result are not exhaustive but show a significant degree of agreement, even if they constantly evolve (see Annex).

268 *Velazquez Rodriguez case*, Judgment, 29 July 1988, para. 173.

Mass expulsion.

Massacres/extraordinarily large number of killings.

Obstruction of humanitarian and medical aid.

Pillage.

Rape (incl. mass rape) and other forms of sexual violence/violations.

Recruitment of children.

Repeated failure of authorities to end breaches of a right.

Seizure of children.

Severe restrictions on freedom of movement/violation of the right to leave and to return to one's country.

Torture and other cruel, inhuman and degrading treatment/physical abuse.

Use of civilians as "human shields"/refusal to evacuate wounded.

Violation of children's rights/sexual abuse of children/violence against children.

Violation of freedom of expression.

Violation of the right to an adequate standard of living/deprivation of basic services.

Violation of the right to associate freely.

Violation of the right to food.

Violation of the right to health and social security/attacks on hospitals.

Violation of the right to housing.

Violation of the right to humane treatment in custody, detention in degrading conditions.

Violation of the right to life/killing/murder/manslaughter.

Violation of the right to private and family life, home and correspondence (mainly with regard to property).

Violation of the right to property/destruction of property and houses/large scale demolition of houses and infrastructure.

Violation of the right to self-determination.

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