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

Report of the United Nations High Commissioner for Human Rights on the obligation of States to investigate serious violations of human rights, and the use of forensic genetics

Summary

In its resolution 15/5, the Human Rights Council requested the High Commissioner for Human Rights to submit a report on the obligation of States to investigate serious violations of human rights and international humanitarian law in accordance with their international legal commitments in terms of identifying victims of such violations, including through the use of forensic genetics, with a view to considering further the possibility of drafting a manual that may serve as a guide for the most effective application of forensic genetics, including, where appropriate, the voluntary creation and operation of genetics banks, with the proper safeguards.

In accordance with the request, the present report focuses on the law pertaining to the obligation to investigate gross violations of human rights law and serious violations of international humanitarian law, through a survey of the applicable international and regional instruments and jurisprudence. Based on responses received from States and organizations, the report also outlines State law and practice regarding initiatives taken in order to investigate human rights and international humanitarian law violations, particularly through the use of forensic genetics and the establishment of genetic databanks.

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I. Introduction

1. In its resolution 15/5, the Human Rights Council requested the High Commissioner for Human Rights to submit a report on the obligation of States to investigate serious violations of human rights and international humanitarian law in accordance with their international legal commitments in terms of identifying victims of such violations, including through the use of forensic genetics, which a view to considering further the possibility of drafting a manual that may serve as a guide for the most effective application of forensic genetics, including, where appropriate, the voluntary creation and operation of genetic banks, with the proper safeguards. The present report is submitted pursuant to this request. It sets out the international and regional laws in respect of the obligation of States to investigate gross violations of human rights law and serious violations of international humanitarian law. It then draws on the contributions received from States in response to a note verbale transmitted by the Office of the United Nations High Commissioner for Human Rights (OHCHR),¹ as well as those received from the Argentine Forensic Anthropology Team (EAAF), the International Committee of the Red Cross (ICRC) and the International Commission on Missing Persons (ICMP), to present State law and practice regarding the use of forensic genetics in the context of the obligation to investigate, and some developments pertaining to the creation of a manual for the application of forensic genetics and the creation and operation of genetics banks.

2. This is the second report prepared by OHCHR regarding issues pertaining to forensic genetics and human rights.² The report considered by the Human Rights Council at its fifteenth session concluded, *inter alia*, that the use of forensic experts and, in particular, the use of forensic genetics and the voluntary creation of genetic databanks have a crucial role to play in identifying victims of gross violations of human rights law and serious violations of international humanitarian law (A/HRC/15/26, paras. 63 and 64).

II. Obligation to investigate gross violations of human rights law and serious violations of international humanitarian law

3. Article 2, paragraph 1, of the International Covenant on Civil and Political Rights requires States parties to ensure to all individuals within their territories and subject to their jurisdiction the rights recognized in the Covenant. In general comment No. 31, the Human Rights Committee noted that, in accordance with this provision, States parties must refrain from violating the rights recognized by the Covenant, and take positive steps to ensure that they are promoted and protected.³ In that regard, States parties must adopt laws and other measures as may be necessary to give effect to the rights.⁴

¹ Responses were received from the Governments of Argentina, Bahrain, Bosnia and Herzegovina, Canada, Colombia, Finland, Guatemala, Japan, Madagascar, Norway, Paraguay, Slovakia, Switzerland and Ukraine.

² For the relevant Human Rights Council resolutions, see in particular resolutions 9/11 (18 September 2008), 10/26 (27 March 2009) and 15/5 (29 September 2010).

³ Human Rights Committee, general comment No. 31, paras. 5-7. Other international human rights conventions also require States to provide effective protection of rights, see Convention on the Elimination of All Forms of Discrimination against Women, art. 2(c).

⁴ International Covenant on Civil and Political Rights, art. 2, para. 2; also Human Rights Committee, general comment No. 31, paras. 13 and 14.

4. Furthermore, the right to an effective remedy as established by article 2, paragraph 3, of the Covenant has been interpreted to include the obligation to investigate.⁵ The Human Rights Committee noted with regard to article 2, paragraph 3, that “administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through impartial bodies. A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.”⁶

5. In its jurisprudence, the Human Rights Committee has repeatedly evoked the obligation of States parties to the Covenant to investigate violations of human rights. In particular, they must investigate violations recognized as criminal and bring to justice those who are responsible.⁷ It has stated that this obligation arises notably in respect of violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (art. 7),⁸ summary and arbitrary killing (art. 6) and enforced disappearances (arts. 7 and 9, and frequently, art. 6).⁹ In this regard, failure to properly investigate alleged human rights violations has led the Human Rights Committee to find violations of articles 6,¹⁰ 7,¹¹ and 9,¹² read in conjunction with article 2, paragraph 3, of the Covenant.

6. The obligation to investigate is also provided for in other international human rights instruments. According to article 3 of the International Convention for the Protection of All Persons from Enforced Disappearance, States parties shall take appropriate measures to investigate acts constituting enforced disappearance, and bring those responsible to justice.¹³ The Convention contains detailed provisions pertaining to the exercise of this obligation. For example, article 12 requires States parties to promptly and impartially examine and, where necessary, undertake a thorough and impartial investigation of any complaint or allegation of enforced disappearance where a formal complaint has been made or where there are reasonable grounds for believing that a person has been subjected to

⁵ Other international human rights conventions also provide for the right to an effective remedy; see Universal Declaration of Human Rights, art. 8; International Convention on the Elimination of All Forms of Racial Discrimination, art. 6.

⁶ Human Rights Committee, general comment No. 31, para. 15; see also para. 8.

⁷ See, for example, *Abubakar Amirov v. Russian Federation*, comm. No. 1447/2005, views adopted on 2 April 2009, para. 11.2; *Orly Marcellana and Daniel Gumanoy v. The Philippines*, comm. No. 1560/2007, views adopted on 30 October 2008, para. 7.2; *Vadivel Sathasivam and Parathesi Saraswathi v. Sri Lanka*, comm. No. 1436/2005, views adopted on 8 July 2008, para. 6.4.

⁸ See also Human Rights Committee, general comment No. 20, para. 14, which clear states that complaints of maltreatment prohibited by article 7 must be investigated promptly and impartially by competent authorities so as to make the remedy effective.

⁹ Human Rights Committee, general comment No. 31, para. 18.

¹⁰ See *Abubakar Amirov v. Russian Federation*, para. 11.2; *Anarbai Umetaliev and Anarkan Tashtanbekova v. Kyrgyzstan*, comm. No. 1275/2004, views adopted on 30 October 2008, para. 9.2; *Orly Marcellana and Daniel Gumanoy v. The Philippines*, paras. 7.2, 8; *Vadivel Sathasivam and Parathesi Saraswathi v. Sri Lanka*, para. 6.4; also general comment No. 6, para. 4.

¹¹ See *Dalkadura Arachchige Nimal Silva Gunaratna v. Sri Lanka*, comm. No. 1432/2005, views adopted on 17 March 2009, paras. 8.2-8.3, 9; *Abubakar Amirov v. Russian Federation*, paras. 11.6-11.7; *Mariam Sankara v. Burkino Faso*, comm. No. 1159/2003, views adopted on 28 March 2006, para. 12.2.

¹² See *Dalkadura Arachchige Nimal Silva Gunaratna v. Sri Lanka*, para. 8.4.

¹³ See also art. 11, which incorporates the general principle of *aut dedere aut judicare* (to extradite or prosecute), and art. 24, which provides for the victim’s right to know, and places an obligation on State parties to take appropriate measures in this regard; Declaration on the Protection of All Persons from Enforced Disappearance, General assembly resolution 47/133, arts. 3, 9, 13; E/CN.4/1996/38.

enforced disappearance.¹⁴ Article 12 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also expressly obliges States parties to investigate all allegations of torture, in stipulating that they ensure that their competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.¹⁵

7. With regard to serious violations of international humanitarian law, article 1 of the four Geneva Conventions of 1949 requires the High Contracting Parties to respect and ensure respect for the Geneva Conventions in all circumstances. Furthermore, the Geneva Conventions all contain a provision obliging the High Contracting Parties to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and to bring such persons, regardless of their nationality, before its own courts.¹⁶ Protocol I additional to the Geneva Conventions (1977) extends the same obligation to the acts defined in article 85 thereof. Article IV of the Convention on the Prevention and Punishment of the Crime of Genocide requires that persons charged with genocide be tried by a competent tribunal. These provisions are understood to include the obligations to both investigate and prosecute violations of international humanitarian law,¹⁷ and illustrate the close link between both obligations.¹⁸ Furthermore, in its study on customary international humanitarian law, the ICRC found that there is sufficient practice to establish the obligation on States to investigate war crimes, other than those that qualify as grave breaches, including those allegedly committed in non-international armed conflicts.¹⁹

8. The obligation on States to investigate gross violations of human rights law and serious violations of international humanitarian law has also been reinforced by the General Assembly and the Commission on Human Rights. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law define the scope of the obligation to respect, ensure respect for and implement international human rights and international humanitarian law as including the duty to investigate violations

¹⁴ See also arts. 10, 12, para. 3, 13-15, 23.

¹⁵ See also arts. 7, which incorporates the principle of *aut dedere aut judicare*, 2, para. 1, 11, 13, and 16 of the Convention; and Committee against Torture, general comment No. 2.

¹⁶ First Geneva Convention, art. 49; Second Geneva Convention, art. 50; Third Geneva Convention, art. 129; Fourth Geneva Convention, art. 146.

¹⁷ ICRC, Customary IHL Database, rule 158, available at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule158#Fn2.

¹⁸ See Human Rights Committee, general comment No. 31, para. 18; *Arhaucos v. Colombia*, comm. No. 612/1995, views adopted on 29 July 1997, para. 8.8; *Bautista de Arellana v. Colombia*, comm. No. 563/1993, views adopted on 27 October 1995, para. 8.6. The duty to prosecute is not discussed in this report, but is found in the principle *aut dedere aut judicare*, as well as provisions of the treaties and conventions mentioned herein.

¹⁹ ICRC, Customary IHL Database, rule 158, available at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule158#Fn2. There are also provisions for the obligation to search for missing persons in Third Geneva Convention, art. 122; Fourth Geneva Convention, art. 136; First Geneva Convention, arts. 16 and 17; Second Geneva Convention, art. 19 referring to the information bureaux established in accordance with art. 122 of the Third Geneva Convention. See also Additional Protocol I, arts. 32, 33; ICRC, Customary IHL Database, rule 117, available at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule117, which states that each party to international or non-international armed conflict must take all feasible measures to account for persons reported as missing as a result of the armed conflict and must provide their family members with any information it has on their fate.

effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law.²⁰

9. According to the Updated Set of principles for the protection and promotion of human rights through action to combat impunity, impunity arises, inter alia, from a failure by States to meet their obligations to investigate violations of human rights and international humanitarian law.²¹ Principle 19 provides for States to undertake prompt, thorough, independent and impartial investigations of such violations.²²

10. Moreover, the preamble to the Rome Statute of the International Criminal Court affirms the responsibility of all States to ensure justice for the most serious crimes of concern to the international community, whether committed on their territory or against their nationals, stating that their effective prosecution must be ensured by measures at the national level and through international cooperation. It recalls that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. In this regard, article 17 of the Rome Statute, providing for the principle of complementarity, further reinforces the primary duty of States to investigate and prosecute international crimes.

11. Regional human rights instruments, including the American Convention on Human Rights (American Convention), the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), and the African Charter on Human and Peoples' Rights (African Charter)²³ provide for the obligation of States to investigate violations of human rights law. The obligation has also been repeatedly reaffirmed in the jurisprudence of the regional human rights bodies.

12. The Inter-American Court of Human Rights found, in the *Velásquez Rodríguez* case, that the obligation under article 1.1 of the American Convention to ensure the full enjoyment of the rights and freedoms recognized by the Convention creates a positive legal duty on States to, inter alia, "use all means at its disposal to carry out a serious investigation of violations committed within its jurisdiction."²⁴ The Court has also held that the legal duty exists as a procedural requirement of substantive rights contained in the American Convention, such as the right to life and the right to humane treatment.²⁵

13. The European Court of Human Rights found, in the case of *Aksoy v. Turkey*, that the requirement for States to ensure an "effective remedy," as provided for in article 13 of the European Convention, entails a "thorough and effective investigation capable of leading to the identification and punishment of those responsible [for the human rights violation], and

²⁰ General Assembly resolution 60/147, para. 3(b); see also para. 4, which provides as follows: "States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish him or her."

²¹ E/CN.4/2005/102/Add.1, principle 1.

²² See also E/CN.4/Sub.2/1997/20/Rev.1, annex 1, principles 1 and 5.

²³ See American Convention, art. 1.1; European Convention, arts. 1 and 13; African Charter, art. 1; see also Inter-American Convention to Prevent and Punish Torture, arts. 1, 6 and 8; and Inter-American Convention on Forced Disappearance of Persons, arts. 1 and 3.

²⁴ Inter-American Court of Human Rights, case of *Velásquez Rodríguez*, judgment of July 29 1988, paras. 174-177. The Court has affirmed the findings in this case in multiple instances, including in the case of *Godínez-Cruz v. Honduras*, judgment of January 20 1989, paras. 184-188; case of *González et al. v. Mexico*, judgment of November 16 2009, paras. 245-247, 287-291.

²⁵ See for example, Inter-American Court of Human Rights, case of *González et al. v. Mexico*, para. 292; case of *Kawas-Fernández v. Honduras*, judgment of April 3 2009, paras. 75-77, 100-102, 107, 139; case of *Cantoral-Huamani and García-Santa Cruz v. Peru*, judgment of July 10 2007, paras. 100-102, 124, 140; case of the *Pueblo Bello Massacre v. Colombia*, judgment of January 31 2006, paras. 120, 142-143, 145, 148.

including effective access for the complainant to the investigatory procedure”.²⁶ Furthermore, the Court has repeatedly recognized that the obligation to investigate exists as a result of the general duty of States, under article 1 of the Convention, to “secure” the rights and freedoms contained in the Convention, read in conjunction with the substantive right in question.²⁷ In relation to articles 2 and 3 of the European Convention, the Court has also held that the procedural obligation to carry out an effective investigation under these articles has evolved into a separate autonomous duty.²⁸

14. The African Commission on Human and Peoples’ Rights considers that it is the duty of States to investigate violations as part of their general obligations under article 1 of the African Charter, which requires them to undertake to adopt legislative or other measures to give effect to the rights, duties and freedoms enshrined therein. In fact, in a decision concerning Zimbabwe, the Commission cited with approval the Inter-American Court’s finding in the *Velásquez Rodríguez* case that the State must, inter alia, “take reasonable steps to prevent human rights violations and use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction” and held that it represented an authoritative interpretation of an international standard on State duty. The Commission considered that the opinion of the Inter-American Court could also be applied, by extension, to article 1 of the African Charter.²⁹ Furthermore, the Commission found that the established standard of due diligence in the *Velásquez Rodríguez* case provided a way to measure whether a State has acted with sufficient effort and political will to fulfil its human rights obligations. Under this obligation, States must prevent, investigate and punish acts which impair any of the rights recognized under international human rights law.³⁰

²⁶ European Court of Human Rights, *Aksoy v. Turkey*, app. No. 21987/93, judgment of 18 December 1996, para. 98; see also, for example, *Ergi v. Turkey*, app. No. 23818/94, judgment of 28 July 1998, paras. 94 and 98.

²⁷ See for example, European Court of Human Rights, *Pastor and Țiclete v. Romania*, app. Nos. 30911/06 and 40967/06, judgment of 19 April 2011, paras. 48 and 70; *Matayeva and Dadayeva v. Russia*, app. No. 49076/06, judgment of 19 April 2011, para. 99; *Šilih v. Slovenia*, app. No. 71463/01, judgment of 9 April 2009 (Grand Chamber), paras. 153-159, 195-196; *Ranste v. Cyprus and Russia*, app. No. 25965/04, judgment of 7 January 2010, paras. 232-233; *McCann and Others v. United Kingdom*, app. No. 18984/91, judgment of 27 September 1999, para. 61; *Ergi v. Turkey*, para. 82.

²⁸ See for example, European Court of Human Rights, *Efimenko v. Ukraine*, app. No. 75726/01, judgment of 25 November 2010, paras. 75, 92; *Davydov and Others v. Ukraine*, app. Nos. 17674/02 and 39081/02, judgment of 1 July 2010, para. 276; *Pastor and Țiclete v. Romania*, para. 48; *Varnava and Others v. Turkey*, app. Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, judgment of 18 September 2009 (Grand Chamber), paras. 191, 194; *Salmanoğlu and Polattaş v. Turkey*, app. No. 15828/03, judgment of 17 March 2009, para. 99; *Šilih v. Slovenia*, para. 159; *Brecknell v. United Kingdom*, app. No. 32457/04, judgment of 27 November 2007, para. 65.

²⁹ African Commission on Human and Peoples’ Rights, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, comm. No. 245/02, para. 144.

³⁰ *Ibid.*, para. 146; see also African Commission on Human and Peoples’ Rights, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, comm. No. 155/96, paras. 44-48, in which the Commission explains the duties incumbent on States pursuant to art. 1 of the African Charter; *Amnesty International, Comité Loosli Bachelard, Lawyers’ Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan*, comm. No. 48/90-50/91-52/91-89/93, paras. 51-52, 56-57, in which the Commission found that failure to sufficiently investigate constituted violations of arts. 4 and 5 of the African Charter; *Mouvement Ivoirien des Droits Humains (MIDH) v. Côte d’Ivoire*, comm. No. 246/02, para. 98; also “Principles and guidelines on the right to a fair trial and legal assistance in Africa” (1999), sect. C, Right to an effective remedy; “Resolution on guidelines and measures for the prohibition and

15. In conclusion, international and regional instruments and jurisprudence establish the duty of States to investigate gross violations of human rights law and serious violations of international humanitarian law. In addition to being inextricably associated with the obligation to prosecute, the obligation to investigate is also linked to the right to the truth, which includes the right to know about the circumstances of, and the reasons for, gross human rights violations, the progress and results of the investigation carried out into the violations, the identity of the perpetrators and, in cases of enforced disappearances, the fate and whereabouts of the victims.³¹

III. Practice of States pertaining to the use of forensic genetics in the context of the obligation to investigate

16. This section brings together information contained in the contributions of States in response to a note verbale transmitted by OHCHR. It presents State law and practice pertaining to the use of forensic genetics in investigations of gross violations of human rights law and serious violations of international humanitarian law, including through the creation of genetic databanks, as well as the role of this field of science in other contexts, such as criminal justice systems. In addition to State contributions, it also includes related information provided by the Argentine Forensic Anthropology Team (EAAF), the International Committee of the Red Cross (ICRC) and the International Commission on Missing Persons (ICMP), which have particular experience and expertise in the use of forensic genetics to address gross violations of human rights law and serious violations of international humanitarian law.

17. The Government of Argentina provided a comprehensive account of the law pertaining to the duty of States to investigate gross violations of human rights law and serious violations of international humanitarian law, including in the context of the right to the truth. In particular, it noted existing international standards and jurisprudence pertaining to investigations and related legal proceedings, such as the requirement to carry out an investigation, basic procedures to be followed in conducting the investigation, access to information about victims' remains, recording of information about the remains, and custody and treatment of the remains.³² It further noted that the Inter-American Court has ordered States to establish databases containing the personal information of missing persons, including DNA and tissue samples, for the purpose of locating a disappeared person, and has placed a duty on States to protect at all times the personal information contained in these databases.³³

18. Argentina referred to two primary instances where the use of forensic genetics contributes to the fulfilment of the obligation on the part of States to investigate violations, namely identification of victims, in cases where the victims have been killed or have disappeared, and restitution of the identity of victims. Argentina further indicated that as the sponsor of the Human Rights Council resolutions on forensic genetics and human rights, it

prevention of torture, cruel, inhuman or degrading treatment or punishment in Africa" (The Robben Island Guidelines) (2002), paras. 16 and 19.

³¹ E/CN.4/2006/91, paras. 42, 45, 56-57 and 59; Working Group on Enforced or Involuntary Disappearances, General comment on the right to the truth in relation to enforced disappearances, para. 1; also paras. 3-5.

³² In this regard, Argentina cited the United Nations Manual on the effective prevention and investigation of extra-legal, arbitrary and summary executions (E/ST/CSDHA/12) (1991), and case of *González et al. v. Mexico*, supra note 28, paras. 295, 300-301, 305, 310, 315-316, 318, 331-332.

³³ See for example, case of *González et al. v. Mexico*, paras. 511-512; also General Assembly resolution 61/155, paras. 5 and 6; 2010 OHCHR report, para. 63.

had constituted a working group composed, among others, of geneticists, forensic anthropologists and experts in bioethics, with the support and technical assistance of the ICRC. The working group developed a draft manual for the application of forensic genetics and the creation and management of genetic databases in the context of investigations of violations of human rights and international humanitarian law. In this context, Argentina organized a meeting with forensic genetics experts within the framework of the second Latin American Congress on Human Genetics, held in Costa Rica in May 2011, at which the opinions of the participants were sought on the relevance, usefulness and quality of the draft manual.

19. The Government of Bahrain stated that there had not been any cases of unidentified dead reported during the recent incidents in Bahrain, and that all the bodies had been identified and returned to the families. As such, no genetic analysis was required, although Bahrain does have a facility to carry out genetic identification and analysis.

20. The Government of Bosnia and Herzegovina noted that the Code of Criminal Procedure provides the legal framework for conducting DNA analysis. The Clinical Centre of the University of Sarajevo has been conducting forensic genetics analyses in respect of serious crimes since mid-1999, primarily on behalf of the Office of the Prosecutor. In addition, the Institute for Forensic Medicine at the University of Sarajevo uses DNA analysis to identify victims of the conflict in Bosnia and Herzegovina in the 1990s. The experience of the Institute indicates that the taking of DNA samples, their transportation to the place of analysis, the reporting of results, and access to genetic databases must be regulated. Furthermore, the Institute for Genetic Engineering and Biotechnology has been trying to help the Government to establish a genetic database. This Institute expressed the view that human rights must be taken into account when creating a genetic database, primarily those rights relevant to the entering of DNA profiles into the database and the preservation of biological traces. In this regard, it noted that there is a database for the identification of the victims of the conflict in Bosnia and Herzegovina and that the data stored therein should not be used in criminal forensic analysis. Finally, the Missing Persons Institute of Bosnia and Herzegovina expressed support for the development of a manual for the effective application of forensic genetics.

21. The Government of Canada noted that there is no legislation in Canada enabling the use of DNA analysis for the identification of missing persons. However, the Forensic Science and Identification Services, a unit of the Royal Canadian Mounted Police (RCMP), provides assistance in the identification of missing persons following conflicts and disasters, which typically involves the use of DNA analysis and fingerprinting, as well as other RCMP forensic science and investigative expertise. The RCMP was informed by the Department of Justice that there are no legal impediments to it providing such assistance, although legislation prevents the use of Canada's National DNA Data Bank (NDDB) and cross-referencing of its indices (Convicted Offender Index and Crime Scene Index) for humanitarian or missing person identification purposes. The statutory use of DNA information contained in the NDDB is for criminal investigation, and DNA profiles and genetic information must be removed if it is discovered that they are from a victim. Canada noted that it had one of the strongest provisions "in legislation and intent" for the protection of security and personal information, particularly regarding the use of DNA information and the principles and processes of its retention.

22. With regard to the development of a manual on the application of forensic genetics, Canada noted that several manuals regarding mass disaster victim identification already existed, and that a new manual on the application of forensic genetics would essentially contain the same information. However, it suggested that a clear legal definition of serious human rights violations, such as enforced disappearances, and how this is integrated with other United Nations programmes relating to the exploitation of persons and transborder

smuggling would be beneficial. Furthermore, Canada referred to the G8 Lyon Roma DNA Search Request Working Group, which was tasked with identifying barriers for forensic DNA information exchange and developing a more effective sharing process. In addition, Canada is currently chairing Justice Rapid Response, an intergovernmental entity that is able to rapidly deploy to active duty criminal justice experts, many of whom are forensic scientists, and which offers a training programme for forensic scientists.

23. The Government of Colombia explained that, in 2009, the National Council on Economic and Social Policy approved a document on the consolidation of mechanisms for the search and identification of disappeared persons in Colombia, and the return of victims' remains to their families, which provides for short-, medium- and long-term interventions to be taken by the State. Obstacles hindering the determination of the fate of disappeared persons and clarification of cases of disappeared persons will be addressed through these interventions. In 2010, legislation to create a centralized genetic databank for genetic profiles obtained from the remains of disappeared persons and biological reference samples obtained from families of disappeared persons came into force. Biological reference samples must be provided voluntarily by the family member and on the basis of informed consent. Any genetic material obtained must be managed in accordance with international standards. An inter-institutional working group, established through the work of the Commission for the Search for Disappeared Persons, has developed a proposal for the implementation of this legislation.

24. Furthermore, Colombia referred to the work of the National Institute of Legal, Medical and Forensic Science, which investigates deaths relating to gross violations of human rights law and serious violations of international humanitarian law, including through exhumations and identification of victims. It also noted the Plan for Research on the Crime of Forced Disappearance (March 2011), developed by the Prosecutor's Office, the Commission for the Search for Disappeared Persons, the United Nations Office on Drugs and Crime, OHCHR and the British Embassy in Colombia. The Plan contains international best practice and is intended as a guide that will improve criminal investigations of enforced disappearances.

25. The Government of Finland noted that it has been at the forefront of developing the application of forensic genetics to the identification of victims in post-conflict situations, and it continues to support the objectives of Human Rights Council resolution 15/5. In Finland, the Act on Inquest into the Cause of Death (459/1973) and the Act on the Medical Use of Human Organs and Tissues (101/2001) pertain to the use of forensic genetics. In accordance with this legislation, tissue samples are collected when establishing cause of death and are stored by forensic doctors working with the National Institute for Health and Welfare and departments of forensic science in universities. A bill on the establishment of genetic databanks is before Parliament. If approved, genetic databanks will be established for medical research purposes. As such, they will not be used for identifying victims. However, the bill also proposes amendments to the Act on the Medical Use of Human Organs and Tissues to allow for the use of collected samples for identification purposes in situations of, for example, major natural disasters.

26. The Government of Guatemala noted that one of the recommendations of the Commission for Historical Clarification (CEH) in its 1999 report, "Memory of Silence," was the development of a policy for exhumations of the remains of victims of the armed conflict, particularly from clandestine and hidden cemeteries, noting that exhumation is an act of justice and reparation, and an important step towards reconciliation. It described various entities that have been created to implement the recommendations of CEH and the peace agreements, namely the National Compensation Programme (PNR), National Institute of Forensic Science (INACIF), and the unit for special cases from the armed conflict in the Public Ministry. INACIF was created in 2006 to carry out forensic research

and expert forensic analysis in accordance with international standards. In 2010, INACIF entered into an agreement with the Peace Secretariat and PNR to identify the victims of forced disappearances. It has created a genetic databank and has exclusive use of the information contained in the databank. These initiatives respond to the order of the Inter-American Court in the *Molina-Theissen v. Guatemala* case, in which the State was ordered to find and deliver to the next of kin the mortal remains of the victim, and to adopt legislative, administrative and other measures as may be necessary to establish a genetic information system.

27. Guatemala further detailed initiatives undertaken by government entities, including with civil society, regarding investigations of violations of human rights, the use of forensic analysis, as well as the work of the World Congress on Psychosocial Work in Exhumation Processes, Forced Disappearance, Justice and Truth, held in Bogota in 2010. The current situation of exhumation processes worldwide was analysed at the congress and a document was produced that includes best practices for forensic genetics concerning, inter alia, conservation and security of remains, timely identification of victims, compliance with international protocols and recommendations, custodial chains and protection of evidence, and international cooperation.

28. The Government of Japan noted that, in accordance with its international human rights commitments, it has used forensic genetics to identify victims of human rights violations, in particular in the context of the abduction issue between Japan and the Democratic People's Republic of Korea. Japan expressed the view that Japanese nationals abducted by the Democratic People's Republic of Korea were victims of enforced disappearance and human rights violations, and the use of forensic genetics has played an important role in identifying them. Furthermore, forensic genetics can support and enhance efforts by all relevant stakeholders to identify similar victims, thereby further enabling them to execute their international human rights and humanitarian law obligations in this regard. Japan described the cases of three abductees in which it used forensic analysis to determine the identity of remains provided by the Democratic People's Republic of Korea. In two of the cases, it found that the remains also contained DNA belonging to another person, while in the third case, the analysis positively identified the victim of the abduction.

29. The Government of the Republic of Madagascar noted that the Ministry of Public Health does not have the means to perform forensic DNA analysis. In the rare cases that such expertise has been required, it has been carried out externally.

30. The Government of Norway explained that regarding the use of genetics and cross-border investigations, the National Authority for Prosecution of Organized and Other Serious Crime has overall responsibility for handling organized, high-tech and international crime cases. The Prosecution Instructions Act 1995 governs the national DNA register, including when and how information in it can be used and how long the genetic material can be stored. This register is located at the National Bureau of Crime Investigation and comprises the Identity Register (DNA profiles from persons convicted of certain crimes), the Investigation Register (DNA profiles from persons who are suspected, with just cause, of any act punishable by custodial sentence), and the Tracing Register (DNA profiles from unknown persons where there is reason to believe that the person was involved in a crime).

31. Norway also noted that it is bound by the European Union (EU) Data Protection Directive of 1995, the rules of which have been incorporated in the Norwegian Personal Data Act of 2000. Currently, the definition of "personal data" in the Directive does not include DNA material, nor is the processing of personal data in the areas of police and judicial cooperation covered by the Directive. However, in November 2010, the EU published a strategy aimed at strengthening its data protection rules, which includes revising the rules in these areas to ensure that personal data is protected. Under the revision, data retained for law enforcement purposes should be covered by a new legislative

framework. The EU is also reviewing the provisions on “sensitive data” and intends to examine whether genetic data should be included in this category.

32. The Government of Paraguay described a series of initiatives relating to the exhumation and identification of disappeared persons and those killed extrajudicially in Paraguay during the period 1954-1989. In particular, the work of the Office of the Ombudsman’s General Directorate of Truth, Justice and Reparation (DGVJR) was detailed, including that undertaken in conjunction with EAAF. DGVJR was mandated to, inter alia, search for disappeared persons and victims of politically motivated extrajudicial killings between 1954 and 1989, in partnership with other State institutions, and to establish a genetic database for this task. In this regard, DGVJR entered into agreements with the Ministry of Health and Welfare and the Ministry of the Interior, with the support of EAAF, with the aim of obtaining the genetic profiles of the Paraguayan population so as to facilitate identification of the remains of disappeared persons, and to support the search, exhumation and identification of victims of enforced disappearances and extrajudicial killings. Three full genetic profiles were obtained from human remains found in a common grave in July and December 2009, setting an important precedent in Paraguay for the identification of disappeared persons. Paraguay also described a number of cases of enforced disappearance and torture brought to the attention of the Public Prosecutor, in which forensic genetics have played a role in determining the identity of the victims.

33. Furthermore, Paraguay provided information regarding DGVJR participation in the Mercosur Permanent Commission of Memory, Truth and Justice. DGVJR is to incorporate all resolutions adopted by the Permanent Commission. In one resolution, the Permanent Commission called on States to use forensic genetics in conformity with international standards to contribute to the identification of human remains of the victims of gross human rights violations and those who were separated from their families. It has also called for the creation, in the context of the Human Rights Council, of a new non-binding international instrument on the right to the truth that will advance the systemization of the content and scope of the right, as well as the development of good practices to ensure its effective implementation.

34. In Slovakia, the DNA Analysis Act of 2002 establishes the conditions for the use of DNA analysis for the identification of persons and the competence required to perform such analysis. Under this Act, DNA analysis may only be performed by the Ministry of Interior or another legal or natural person authorized to perform expert activities. Furthermore, a national DNA database, maintained and administered by the police, was established under the Act. The database contains DNA profiles of samples taken in the context of criminal proceedings and from biological parents, children and other relatives in connection with the search for missing persons. Data from the database is destroyed once the case is discontinued or the person is acquitted or the proceedings against a convicted person are found inadmissible. With regard to tracing persons, Slovakia stated that any natural person may apply to the police and the Slovak Red Cross for assistance. Any personal data provided to the Red Cross is protected by legislation.

35. The Government of Switzerland noted that it has only been required to practise forensic medicine in the context of massive human rights violations on rare occasions, such as the Katyn massacre. However, it regularly sends experts to participate in the Justice Rapid Response, where forensic anthropological techniques are always used. Regarding relevant bilateral activities, Switzerland explained that it consults institutions that follow best practices, for example, EAAF, the Forensic Anthropology Foundation of Guatemala, and ICMP, thereby promoting exchanges on best practices and assisting governments in the adoption of norms and standards so that exhumations, particularly in cases involving missing persons or the existence of mass graves, can be conducted according to established standards. Regarding multilateral activities, Switzerland is cooperating with Argentina to

strengthen the principles on combating impunity, particularly those relating to the right to know and the responsibility of States to guarantee access to information. In this regard, it recommends that the proposed document maintain a link between forensic anthropology practices and each of the pillars of the principles for combating impunity.

36. The Government of Ukraine provided detailed information on various State activities undertaken to continue to further the fulfilment of its international human rights obligations and the implementation of mechanisms for monitoring conduct by State agencies, with particular reference to activities in the criminal justice area.

37. EAAF stated that in 1998 it had commenced building a genetic databank of relatives of disappeared people in Argentina. In 2007, it began collaboration with national institutions on the databank, and entered into an agreement with the Ministry of Health and the National Memory Archive of the National Secretary of Human Rights which created the Archive of blood samples from relatives of victims of forced disappearance between 1974 and 1983, established standard operational procedures, including technical and bioethical guidelines, for the collection, shipment and storage of blood samples and traceability, and created a tripartite coordination commission for the purpose of implementing the agreement.

38. EAAF noted that forensic genetics has a vital role to play in identifying the remains of victims of human rights violations or persons missing as a result of conflict. Creating genetic databanks is crucial to conducting large-scale identification projects. EAAF welcomed the initiative of the Government of Argentina in support of the use of forensic genetics for the identification of victims of human rights and international humanitarian law violations. However, it noted that in light of the “complexity, controversies and by-products” that may arise in the establishment of genetics databanks, it strongly supports the holding of an international symposium to discuss best practices and the adoption of a protocol or guidelines for the establishment of such databanks. In this regard, EAAF provided a number of considerations for a symposium, which are fully reflected in the 2010 OHCHR report.

39. Referring to the Geneva Conventions, Additional Protocol I, and the Convention on the Prevention and Punishment of the Crime of Genocide, the ICRC noted that the obligation to investigate crimes under international law is found in a number of treaties that apply to acts committed in both international and non-international armed conflicts. It also noted that international humanitarian law contains treaty and customary law provisions dealing with various aspects related to the dead, and that the obligation to identify the dead is an obligation of means, such that parties to a conflict must use their best efforts and all means at their disposal. Current practice suggests that exhumation combined with the application of forensic methods, including DNA testing, may be an appropriate method of identifying the dead after burial. In this regard, the ICRC continues to actively promote the development, dissemination and implementation of best practices in forensic sciences, including forensic genetics, applied to the identification of human remains.³⁴

40. The ICMP noted that States are not currently obliged under international law to use forensic genetics when investigating gross violations of human rights law and serious

³⁴ In this regard, ICRC noted the recommendations from the International Conference of Governmental and Non-Governmental Experts on the Missing and Their Families (2003); see also ICRC, *Missing people, DNA analysis and identification of human remains: A guide to best practice in armed conflicts and other situations of armed conflict* (2009); *Guiding principles/Model law on the missing, Principles for legislating the situation of persons missing as a result of armed conflict or internal violence: Measures to prevent persons from going missing and to protect the rights and interests of the missing and their families* (2009).

violations of international humanitarian law. However, a report of the National Research Council entitled, “Strengthening Forensic Science in the United States: A path forward” (2009), which underlines that DNA analysis is the only forensic method capable of consistently linking evidence to specific individuals and with a high degree of certainty, would suggest that the obligation to investigate includes making use of forensic genetics where necessary. Regarding the development of a manual, ICMP reaffirms the position that it had expressed in its contribution to the 2010 OHCHR report, and which is reflected in that report. It further stated that forensic genetics stands as the most rigorously established scientific basis for victim identification. Accordingly, the international community should seek mechanisms by which this tool can be used to maximum benefit. Taking steps that would create an obligation on States to use forensic genetics to investigate violations of human rights and international humanitarian law would be a desirable outcome.

IV. Conclusions

41. **The obligation to investigate gross violations of human rights law and serious violations of international humanitarian law is clearly established in international human rights and humanitarian law, and regional human rights instruments and jurisprudence. Linked to the duty to prosecute, it is also an aspect of the right to the truth.**

42. **Forensic genetics, including the creation and operation of genetic databanks, plays a central role in the investigation of gross violations of human rights law and serious violations of humanitarian law, in the identification of victims, where the victim has been killed or has disappeared, and in the restitution of the identity of victims. As a tool, it becomes ever more relevant and important in light of the technological advances made in the field in recent years, enabling large-scale identification to take place.**
