

## USE OF FORCE DURING ARMED CONFLICT

This chapter of the Handbook collects the observations and recommendations of the UN Special Rapporteur with respect to violations of the right to life during international and non-international armed conflict. The Handbook especially focuses on the obligations of States and armed non-state actors vis-à-vis civilians, the methods and means of warfare, and the complementary relationship between international human rights and humanitarian law.

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## **A. MANDATE OF THE SPECIAL RAPPORTEUR IN THE CONTEXT OF ARMED CONFLICT**

*Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (E/CN.4/2005/7, 22 December 2004, ¶¶ 5-11, 45):*

5. The principal activities foreseen under the Special Rapporteur's mandate are to collect information from all concerned, to respond effectively to reliable information, to undertake country visits, to follow up on communications and country visits, to seek the views and comments of Governments, and to reflect each of those factors in his overall report.

6. The terms of reference of this mandate are not best understood through efforts to define individually the terms "extrajudicial", "summary" or "arbitrary", or to seek to categorize any given incident accordingly. These terms had important roles to play in the historical evolution of the mandate but today they tell us relatively little about the real nature of the issues. The broad coverage of the mandate as it now exists reflects the very real needs perceived over time by the Commission to be able to respond to a range of contexts in which killings have taken place in circumstances which contravene international law and which the Commission has determined require a response. Thus, the most productive focus is on the mandate itself, as it has evolved over the years through the various resolutions of the General Assembly and the Commission.

7. On the basis of the agreed legal framework of the mandate, as reflected in the relevant resolutions of the Commission on Human Rights and the General Assembly, the Special Rapporteur's terms of reference include the following:

- (a) To examine situations of extrajudicial, summary or arbitrary executions and to submit findings, together with conclusions and recommendations, to the Commission;
- (b) To respond effectively to information, including situations when an extrajudicial, summary or arbitrary execution is imminent or seriously threatened, or has occurred;
- (c) To engage in a constructive dialogue with Governments, and to follow up on recommendations made after country visits;
- (d) To pay special attention to extrajudicial, summary or arbitrary executions of women and to ensure that a gender perspective is reflected in the work under the mandate;
- (e) To pay special attention to extrajudicial, summary or arbitrary executions of children, and of persons belonging to minorities;
- (f) To pay special attention to extrajudicial, summary or arbitrary executions where the victims are individuals carrying out peaceful activities in defence of human rights, including those participating in demonstrations and other peaceful public manifestations;
- (g) To monitor the implementation of international standards, including safeguards and restrictions, relating to the imposition of capital punishment, bearing in mind the comments

made by the Human Rights Committee in its interpretation of article 6 of the International Covenant on Civil and Political Rights, as well as the Second Optional Protocol thereto.

8. The Special Rapporteur follows the guidelines developed by his predecessors, which were restated most recently in the report to the Commission in 2002 (E/CN.4/2002/74, para. 8).<sup>1</sup>

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<sup>1</sup> *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (E/CN.4/2002/74, 9 January 2002, ¶ 8:*

8. During the reporting period, the Special Rapporteur acted in the following situations:

(a) Genocide;

(b) Violations of the right to life during armed conflict, especially of the civilian population and other non-combatants, contrary to international humanitarian law;

(c) Deaths due to attacks or killings by security forces of the State, or by paramilitary groups, death squads or other private forces cooperating with or tolerated by one or several States;

(d) Deaths due to the use of force by law enforcement officials or persons acting in direct or indirect compliance with the State, when the use of force is inconsistent with the criteria of absolute necessity and proportionality;

(e) Deaths in custody due to torture, neglect or use of force, or life-threatening conditions of detention;

(f) Death threats and fear of imminent extrajudicial executions by State officials, paramilitary groups, private individuals or groups cooperating with or tolerated by the Government, as well as by unidentified persons who may be linked to the categories mentioned above;

(g) Expulsion, refoulement or return of persons to a country or a place where their lives are in danger, as well as the prevention of persons seeking asylum from leaving a country where their lives are in danger through the closure of national borders;

(h) Deaths due to acts of omission on the part of the authorities, including mob killings. The Special Rapporteur may take action if the State fails to take positive measures of a preventive and protective nature necessary to ensure the right to life of any person under its jurisdiction;

(i) Breach of the obligation to investigate alleged violations of the right to life and to bring those responsible to justice;

(j) Breach of the additional obligation to provide adequate compensation to victims of violations of the right to life, and failure on the part of Governments to recognize compensation as an obligation;

(k) Violations of the right to life in connection with the death penalty. The Special Rapporteur intervenes where capital punishment is imposed in violation of articles 6.2 and 15 of the International Covenant on Civil and Political Rights and article 37 (a) of the Convention on the Rights of the Child, article 77.5 and other relevant articles of the Geneva Conventions of 1949 and the Additional Protocols thereto of 1977. In addition, the Special Rapporteur is guided by various resolutions of United Nations organs and bodies, in particular:

(i) General Assembly resolutions 2857 (XXVI) of 20 December 1971 and 32/61 of 8 December 1977 regarding capital punishment;

(ii) General Assembly resolution 44/128 of 15 December 1989, in which the Assembly adopted and opened for signature, ratification and accession the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty;

9. In addition to, and in conformity with, the relevant resolutions of the Commission and of the General Assembly, the work of the Special Rapporteur reflects the provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (especially articles 6, 14 and 15), and the Convention on the Rights of the Child (especially article 37), as well as other treaties, resolutions, conventions and declarations adopted by United Nations bodies relating to violations of the right to life.

10. The legal framework includes principles and guidelines specified in:

- (a) The Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions;
- (b) The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials;
- (c) The Rome Statute of the International Criminal Court;
- (d) The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

11. The Special Rapporteur's principal methods of work are: (i) sending "urgent appeals" requesting action by Governments in response to emergency cases; (ii) responding to individual complaints by communicating the details to Governments, with a summary of the facts and a request for clarification (methods (i) and (ii) are pursued only where sufficient information is available and has been provided by a well-known or credible source); (iii) issuing press statements where appropriate to the circumstances; (iv) undertaking country visits designed to ascertain the facts on a first-hand basis, to situate issues within a broader perspective, and to work in a spirit of cooperation with Governments; and (v) undertaking general promotional activities to advance the objectives identified by the Commission on Human Rights and the General Assembly.

[...]

45. These responses raise a number of matters which warrant clarification. The first concerns the place of humanitarian law within the Special Rapporteur's mandate. The fact is that it falls squarely within the mandate. All major relevant resolutions in recent years have referred explicitly to that body of law. Most recently, the General Assembly, in resolution 59/197 of 20 December 2004, dealing with the mandate of the Special Rapporteur, urged Governments "to take all necessary and possible measures, in conformity with international human rights law and international humanitarian law, to prevent loss of life ... during ... armed conflicts" (para. 8 (b)).

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(iii) Commission on Human Rights resolutions 1997/12, 1998/8, 1999/61 and 2000/65 regarding the death penalty;

(iv) The Safeguards guaranteeing protection of the rights of those facing the death penalty, adopted by the Economic and Social Council in resolution 1984/50 on 25 May 1984, and endorsed by the United Nations General Assembly in resolution 39/118, adopted on 14 December 1984;

(v) Economic and Social Council resolution 1989/64 adopted on 24 May 1989.

Consistent with this approach, every single annual report of the Special Rapporteur since at least 1992 has dealt with violations of the right to life in the context of international and non-international armed conflicts.<sup>2</sup>

***Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/HRC/4/20, 29 January 2007, ¶¶ 18, 20-24):***

18. An earlier report examined the law applicable to violations of the right to life in armed conflict and the role of the Special Rapporteur in response thereto.<sup>3</sup> This view has, however, been consistently rejected by one State. These objections, by the United States of America, have been raised in a wide range of contexts, thus underscoring the importance of carefully examining their validity. In essence, the United States position consists of four propositions: (a) the “war on terror” constitutes an armed conflict to which international humanitarian law applies; (b) international humanitarian law operates to the exclusion of human rights law; (c) international humanitarian law falls outside the mandate of the Special Rapporteur and of the Council; and (d) States may determine for themselves whether an individual incident is governed by humanitarian law or human rights law.<sup>4</sup> If accepted, these propositions would have far-reaching consequences for the Council and for its ability to contribute in any way to many of the situations that are currently most prominent on its agenda.

[...]

20. The Commission on Human Rights, with the consistent endorsement of the Economic and Social Council, regularly treated international humanitarian law as falling within its terms of reference. Examples of this practice abound,<sup>5</sup> and it suffices to cite three examples. First, in relation to the former Yugoslavia, the Commission, in 1992, “call[ed] upon all parties ... to ensure full respect for ... humanitarian law”<sup>6</sup> and “[r]emind[ed] all parties that they are bound to comply with their obligations under international humanitarian law ...”<sup>7</sup> This resolution was subsequently endorsed by the Economic and Social Council.<sup>8</sup>

21. Two years later, in relation to the same situation, the Commission “[c]ondemn[ed] categorically all violations of human rights and international humanitarian law by all sides.”<sup>9</sup> It then applied international humanitarian law to the situation and “denounce[d] continued

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<sup>2</sup> See: E/CN.4/1993/46, paras. 60-61; E/CN.4/1994/7, paras. 10 (l)-(m) and 11 (d); E/CN.4/1995/61, paras. 7 (d) and 8; E/CN.4/1996/4, para. 10 (f); E/CN.4/1997/60, paras. 9 (f) and 38-41; E/CN.4/1998/68, paras. 8 (f) and 42-43; E/CN.4/1999/39, paras. 6 (f) and 27; E/CN.4/2000/3, paras. 6 (f) and 30; E/CN.4/2002/74, paras. 8 (b) and 66-71; E/CN.4/2003/3, paras. 8 (b) and 35-44; E/CN.4/2004/7, paras. 9 (c) and 26-29.

<sup>3</sup> E/CN.4/2005/7, paras. 41-54.

<sup>4</sup> See, e.g., Communication of 4 May 2006 from the United States, A/HRC/4/20/Add.1, pp. 344-46.

<sup>5</sup> A lengthier list of examples is provided in the communication sent to the United States on 30 November 2006. See also Daniel O’Donnell, *Trends in the Application of International Humanitarian Law by United Nations Human Rights Mechanisms*, 324 *Int.l Rev. Red Cross* 481 (1998).

<sup>6</sup> CHR Res. 1992/S-1/1, para. 1.

<sup>7</sup> *Id.* at para. 9.

<sup>8</sup> ECOSOC Decision 1992/305.

<sup>9</sup> CHR Res. 1994/72, para. 4.

deliberate and unlawful attacks and uses of military force against civilians and other protected persons ... non-combatants, ... [and] ... relief operations.”<sup>10</sup>

22. Third, in relation to Rwanda, the Commission “[c]ondemn[ed] in the strongest terms all breaches of international humanitarian law ... and call[ed] upon all the parties involved to cease immediately these breaches.”<sup>11</sup> It also “[c]all[ed] upon the Government of Rwanda to ... take measures to put an end to all violations of ... international humanitarian law by all persons within its jurisdiction or under its control.”<sup>12</sup>

23. As these examples make clear, both the Commission and the Council clearly and repeatedly accepted that international humanitarian law formed part of the Commission’s terms of reference. In replacing the Commission by the Council, the General Assembly in no way undertook to narrow its competence in this respect.<sup>13</sup>

### 3. The Special Rapporteur’s mandate

24. The Special Rapporteur’s mandate is “to examine ... questions related to summary or arbitrary executions”. No reference is made to a limiting legal framework which would exclude certain such executions.<sup>14</sup> Instead, the mandate has been defined in terms of the phenomenon of executions, in whatever context they might occur. In contrast, the United States position is that “while the Special Rapporteur may have reported on cases outside of his mandate, this does not give [him] the competence to address such issues.” It is certainly correct that the Special Rapporteur’s practice does not, on its own, establish competence. But when based on the terms of the relevant resolutions, and reinforced by the actions and votes of Governments in the Commission, the Economic and Social Council and the General Assembly, the Special Rapporteur is clearly not acting unilaterally. Of the many possible illustrations of this process,<sup>15</sup> the following are indicative.

25. First, in 1983, in the very first report under the mandate, my distinguished predecessor, Mr. Amos Wako, included a substantive section on “Killings in war, armed conflict and states of emergency” under the heading of international legal standards.<sup>16</sup> In that section, he noted that “[t]he Geneva Conventions of 12 August 1949 are also relevant ... Each of the Geneva Conventions clearly prohibits murder and other acts of violence against protected persons. They explicitly provide that ‘willful killings’ are to be considered ‘grave breaches’ of the Geneva Conventions, that is, war crimes subject to universality of jurisdiction.”<sup>17</sup> His report was endorsed by the Commission.<sup>18</sup>

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<sup>10</sup> *Id.* at para. 7. Taking note of this resolution, the ECOSOC “approved ... [t]he Commission’s ... request that the Special Rapporteur ... continue to submit periodic reports ... on the implementation of Commission resolution 1994/72”, ECOSOC Res. 1994/262.

<sup>11</sup> CHR Res. S-3/1, para. 1.

<sup>12</sup> *Id.* This resolution was explicitly endorsed by ECOSOC Decision 1994/223.

<sup>13</sup> GA Res. 60/251 (2006).

<sup>14</sup> CHR Res. 1982/29, para. 2; ECOSOC Res. 1982/35, para. 2.

<sup>15</sup> See communication sent to the United States on 30 Nov. 2006.

<sup>16</sup> E/CN.4/1983/16, paras. 29-39.

<sup>17</sup> *Id.* at paras. 33-34.

<sup>18</sup> CHR Res. 1983/36, para. 3.

26. Second, in January 1992 Mr. Wako annexed to his annual report a “List of Instruments and other Standards which Constitute the Legal Framework of the Mandate of the Special Rapporteur”.<sup>19</sup> The Geneva Conventions appear as item 3 in a 14-point list. This report was also endorsed by the Commission which explicitly “welcome[d] his recommendations ...”,<sup>20</sup> some of which had focused explicitly on extrajudicial executions during armed conflict.<sup>21</sup>

***Communications to the U.S. Government (A/HRC/4/20/Add.1, 12 March 2007, pp. 343, 346-47, 351-58 ):***

*Allegation Letter dated 25 August 2005:*

In drawing the attention of your Excellency’s Government to this information and seeking clarification thereof, I am fully aware of the stance taken by your Government in correspondence with my predecessor with respect to the mandate’s competence regarding killings that are said to have occurred within the context of an armed conflict (I refer to your Government’s letters dated 22 April 2003 and 8 April 2004). As I have explained in my Report to the 61st Commission on Human Rights, however, both the practice of the General Assembly and of the independent experts successively holding the mandate since its creation in 1982 make it clear that questions of humanitarian law fall squarely within the Special Rapporteur’s mandate (See E/CN.4/2005/7, at par. 45).

*(Reply) Allegation Letter dated 30 November 2006:*

Your letter also stated that the communication concerning Haitham al-Yemeni exceeded my mandate as Special Rapporteur on extrajudicial, summary or arbitrary executions because: (1) international humanitarian law is applicable to that armed conflict and operates to the exclusion of human rights law; (2) issues governed by international humanitarian law do not fall within the terms of reference of the Commission on Human Rights (“Commission”), and thus by extension, of its successor, the Human Rights Council (“Council”); (3) the examination of questions related to alleged violations of international humanitarian law is not included in the mandate of the Special Rapporteur for extrajudicial, summary, or arbitrary executions; and (4) States may determine for themselves whether an individual incident is covered by the mandate of the Special Rapporteur.

If these positions were to be accepted, they would present a significant challenge not only to the work of this mandate but, more importantly, to a significant amount of the activities undertaken by the Human Rights Council. In brief, one of the consequences would be to disable the Council in relation to a large number of situations involving armed conflicts in which it has been actively involved over the past decade and more. In view of the potentially dramatic implications of the position put forward by your Excellency’s Government it is essential that they be subject to very careful scrutiny. That is the purpose of the present communication.

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<sup>19</sup> E/CN.4/1992/30, p. 176.

<sup>20</sup> CHR Res. 1992/72, para. 3.

<sup>21</sup> E/CN.4/1992/30, para. 649(f) and para. 651(b).

[...]

With regard to your position that the mandate of the Special Rapporteur for extrajudicial, summary, or arbitrary executions does not include the competence to review alleged violations of international humanitarian law, I would note that the mandate as stated in the resolutions creating the post of Special Rapporteur for extrajudicial, summary, or arbitrary executions is “to examine ... questions related to summary or arbitrary executions,” without reference to the specific legal framework within which that mandate is to be implemented.<sup>22</sup> The mandate thus has been defined in terms of a phenomenon — extrajudicial, summary or arbitrary executions — that was of concern to the Commission and now to the Council rather than by reference to a particular legal regime.

Your correspondence stated that “while the Special Rapporteur may have reported on cases outside of his mandate, this does not give the Special Rapporteur the competence to address such issues.” This position, however, does not accurately reflect the consultative process within which the legal framework supporting the mandate has been developed. While the Special Rapporteur alone cannot, and has not, determined the contours of the legal framework within which the mandate is to be implemented, neither may any single government do so. This power is held by the Council and was previously held by the Commission, which reviewed and accepted the interpretations provided by successive mandate-holders. The cases below provide illustrative examples:

- In the very first report under the mandate in 1983, Mr. S. Amos Wako observed that summary and arbitrary executions frequently occur during armed conflicts and that, therefore, international humanitarian law formed an important element of the mandate’s legal framework. With that in mind, he included a substantive section on “Killings in war, armed conflict, and states of emergency” under the heading “International legal standards”.<sup>23</sup> In that section, after discussing application of human rights law in accordance with the relevant derogation rules, he notes that “[t]he Geneva Conventions of 12 August 1949 are also relevant. .... Each of the Geneva Conventions clearly prohibits murder and other acts of violence against protected persons. They explicitly provide that ‘wilful killings’ are to be considered ‘grave breaches’ of the Geneva Conventions, that is, war crimes subject to universality of jurisdiction.”<sup>24</sup> The report was accepted in its entirety by the Commission.<sup>25</sup>

- In January 1992 the Special Rapporteur, Mr. S. Amos Wako, published a special annex to his annual report entitled *List of Instruments and other Standards which Constitute the Legal Framework of the Mandate of the Special Rapporteur*.<sup>26</sup> The Geneva Conventions appear as item three of that fourteen point list. This report was accepted in its entirety by the Commission.<sup>27</sup> Moreover, the Commission explicitly “welcome[d] his recommendations with a

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<sup>22</sup> Comm. Hum. Rts. Res. 1982/29, para. 2; ECOSOC Res. 1982/35, para. 2.

<sup>23</sup> Report by Mr. S. Amos Wako, Comm. Hum. Rts., 39th sess., UN Doc. E/CN.4/1983/16, pp. 8-10, paras. 29-39 (31 Jan. 1983).

<sup>24</sup> *Id.* at pp. 8-9, paras. 33-34.

<sup>25</sup> Comm. Hum. Rts., Res. 1983/36, para. 3 (8 Mar. 1983).

<sup>26</sup> Report by Mr. S. Amos Wako, Comm. Hum. Rts., 48th sess., UN Doc. E/CN.4/1992/30, p. 176 (31 Jan. 1992).

<sup>27</sup> Comm. Hum. Rts., Res. 1992/72, para. 3 (5 March 1992).

view to eliminating extrajudicial, summary, or arbitrary executions”.<sup>28</sup> These recommendations contained recommendations on extrajudicial executions during armed conflict.<sup>29</sup> If the Commission did not accept that international humanitarian law formed part of the legal framework within which the mandate is to be implemented, it is difficult to understand why the Commission would explicitly endorse recommendations of the Special Rapporteur as to extrajudicial executions in armed conflict.

- In December 1992, Mr. Bacre Waly Ndiaye in his first report as Special Rapporteur included a section on “Violations of the right to life during armed conflicts” under the heading “Legal framework within which the mandate of the Special Rapporteur is implemented”.<sup>30</sup> That section stated that “[t]he Special Rapporteur receives many allegations concerning extrajudicial, summary or arbitrary executions during armed conflicts. In considering and acting on such cases, the Special Rapporteur takes into account the Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 1977. Of particular relevance are common article 3 of the 1949 Conventions, which protects the right to life of members of the civilian population as well as combatants who are injured or have laid down their arms, and article 51 of Additional Protocol I and article 13 of Additional Protocol II concerning the protection of the civilian population against the dangers arising from military operations.”<sup>31</sup> This report was accepted in its entirety by the Commission.<sup>32</sup>

- In the first report of Ms. Asma Jahangir as Special Rapporteur in 1999, she adopted the legal framework elaborated by Mr. Ndiaye.<sup>33</sup> This report was accepted in its entirety by the Commission in its Resolution 1999/35 on extrajudicial, summary, or arbitrary executions.<sup>34</sup>

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<sup>28</sup> *Id.*

<sup>29</sup> Report by Mr. S. Amos Wako, *supra* note 40, at p. 173, para. 649(f), p. 174, para. 651(b).

<sup>30</sup> Report by R. Bacre Waly Ndiaye, Comm. Hum. Rts., 49th sess., UN Doc. E/CN.4/1993/46, p. 15, paras. 60-61 (23 Dec. 1992).

<sup>31</sup> *Id.* at p. 15, para. 60. Mr. Ndiaye repeatedly stated this interpretation in his report to the Commission each subsequent year. *See* Report by Mr. Bacre Waly Ndiaye, Comm. Hum. Rts., 50th sess., UN Doc. E/CN.4/1994/7, p. 8, para. 10(l) (7 Dec. 1993); Report by Mr. Bacre Waly Ndiaye, Comm. Hum. Rts., 51st sess., UN Doc. E/CN.4/1995/61, p. 8, para. 7(d), p. 121, paras. 394-96 (14 Dec. 1994); Report by Mr. Bacre Waly Ndiaye, Comm. Hum. Rts., 52nd sess., UN Doc. E/CN.4/1996/4, p. 7, para. 10(f), p. 138, paras. 587-89 (25 Jan. 1996); Report by Bacre Waly Ndiaye, Comm. Hum. Rts., 53rd sess., UN Doc. E/CN.4/1997/60, pp. 12-13, paras. 38-41 (24 Dec. 1996); Report of Mr. Bacre Waly Ndiaye, Comm. Hum. Rts., 54th sess., UN Doc. E/CN.4/1998/68, pp. 13-14, paras. 42-43, p. 31, paras. 126-127 (23 Dec. 1997)

<sup>32</sup> Comm. Hum. Rts., Res. 1993/71, para. 4 (10 Mar. 1993) (“T[aking] note with appreciation of the report of the Special Rapporteur and welcome[ing] his recommendations with a view to eliminating extrajudicial, summary or arbitrary executions”).

<sup>33</sup> Report of Ms. Asma Jahangir, Comm. Hum. Rts., 55th sess., UN Doc. E/CN.4/1999/39, p. 6, para. 7 (6 Jan. 1999). Ms. Jahangir repeatedly stated this interpretation in each subsequent year. *See* Report of Ms. Asma Jahangir, Comm. Hum. Rts., 56th sess., UN Doc. E/CN.4/2000/3, p. 8, para. 6(f), pp. 13-15, para. 30, p. 34, paras. 103-105 (25 Jan. 2000); Report of Ms. Asma Jahangir, Comm. Hum. Rts., 57th sess., UN Doc. E/CN.4/2001/9, p. 6, para. 7(b), pp. 18-19, paras. 51-53 (11 Jan. 2001); Report of Ms. Asma Jahangir, Comm. Hum. Rts., 58th sess., UN Doc. E/CN.4/2002/74, p. 7, para. 8(b), pp. 22-23, paras. 66-71 (9 Jan. 2002); Report of Ms. Asma Jahangir, Comm. Hum. Rts., 59th sess., UN Doc. E/CN.4/2003/3, p. 7, para. 8(b), pp. 15-17, paras. 35-44 (13 Jan. 2003); Report of Ms. Asma Jahangir, Comm. Hum. Rts., 60th sess., UN Doc. E/CN.4/2004/7, p. 11, paras. 27-29 (22 Dec. 2003).

<sup>34</sup> Comm. Hum. Rts., Res. 1999/35, para. 8 (26 April 1999).

• In my first report as Special Rapporteur in 2005, concerning your responses to my inquiries regarding alleged extrajudicial killings in Yemen and Iraq, in which your government maintained a similar legal position as in the present case, I stated that “[t]hese responses raise a number of matters which warrant clarification. The first concerns the place of humanitarian law within the Special Rapporteur’s mandate. The fact is that it falls squarely within the mandate.”<sup>35</sup> The Commission accepted this report in its Resolution 2005/34 on extrajudicial, summary, or arbitrary executions.<sup>36</sup> That resolution also explicitly “[a]cknowledg[ed]... that international human rights law and international humanitarian law are complementary and not mutually exclusive”.<sup>37</sup> This endorsement of the complementarity of human rights and international humanitarian law by the Commission – the body that determined my mandate – is unequivocal.

I note with respect that the United States did not object to Mr. Wako’s characterization of the legal framework when first published, nor did the United States ever object to the inclusion of international humanitarian law instruments in the legal framework supporting the mandate until 2003, two decades after international humanitarian law was first applied under the mandate.<sup>38</sup> Even my comments in the 2005 report, which were in direct response to the United States’ position on this question, received no objection from your Government. If your Government wished to take issue with my position on the mandate which I elaborated in the report, then as a member of the Commission your Government could have called for a rewording of this resolution so as to challenge my conclusions. Instead, the United States made a number of substantive interventions in the debate on the resolution, but none concerning this language.<sup>39</sup> In the vote on the resolution, your Government chose to abstain.<sup>40</sup>

It is abundantly clear that the United States did not, in fact, persuade the Commission to modify its long-standing interpretation of the mandate. It can also be added that, under the principle of good faith in international law, a State should not benefit from its own inconsistency.<sup>41</sup> After twenty-three years of silence on the topic while an unbroken line of Special Rapporteurs

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<sup>35</sup> Report of Mr. Philip Alston, Comm. Hum. Rts., 61st sess., UN Doc. E/CN.4/2005/7, p. 16, para. 45 (22 Dec. 2004).

<sup>36</sup> Resolution 2005/34 on extrajudicial, summary, or arbitrary executions, para. 12 (19 April 2005).

<sup>37</sup> *Id.* at Preamble.

<sup>38</sup> Letter dated 14 April 2003 from the Chief of Section, Political and Specialized Agencies, of the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the secretariat of the Commission on Human Rights (E/CN.4/2003/G/80).

<sup>39</sup> Commission des Droits de l’Homme, Compte Rendu Analytique de la 56e Séance, tenue au Palais des Nations, à Genève, le mardi 19 avril 2005, à 12 heures UN Doc. E/CN.4/2005/SR.56, p. 16, para. 88-89 (16 Feb. 2006).

<sup>40</sup> Comm. Hum. Rts., Report of the Sixty-First Session, UN Doc. E/CN.4/2005/135, Supp. 3, p. 136 (2005).

Under the principle of acquiescence in international law, such “tacit recognition manifested by unilateral conduct ... may[be] interpret[ed] as consent.” *Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984*, p. 246, at p. 305, para. 130. *See also Temple of Preah Vihear, I.C.J. Reports 1962*, p. 6, at 23 (finding that because Thailand did not object to maps provided by France delimitating the border at issue, they “thereby must be held to have acquiesced”); D.W. Bowett, *Estoppel Before International Tribunals and its Relation to Acquiescence*, BRIT. Y.B. INT’L L. 176, 201 (1957).

<sup>41</sup> For example, in the case of *The Mechanic*, the Ecuador-U.S. Claims Tribunal held that “Ecuador . . . having fully recognised and claimed the principle on which the case now before us turns, whenever from such a recognition rights or advantages were to be derived, could not in honour and good faith deny the principle when it imposed an obligation.” *Atlantic Hope Insurance Companies Claim (The Mechanic) (U.S. v. Ecuador)* (award of Aug. 17, 1865), reprinted in 3 Moore, *International Arbitration* (1898) at p. 3221, 3226. Similarly, in the *Meuse* Case, the Permanent Court of International Justice held that where two States were bound by the same treaty obligations, State A could

submitted legal frameworks including international humanitarian law to the Commission for public debate, it would be difficult to accept that your Government could now avoid responding to an individual communication simply by objecting that international humanitarian law falls outside the mandate.

States may not unilaterally determine that a specific incident complied with international law and is therefore not covered by the mandate

Under the reinterpretation of the mandate suggested by your Government, States are given the power unilaterally – without any external scrutiny – to determine whether a specific incident is covered by the mandate of the Special Rapporteur.

The response your letter gives regarding the killing of Haitham al-Yemeni provides a clear example of why this reinterpretation of the mandate would have unacceptable implications:

The United States respectfully submits that inquiries related to allegations stemming from military operations conducted during the course of an armed conflict with Al Qaida do not fall within the mandate of the Special Rapporteur. . . . [E]nemy combatants may be attacked unless they have surrendered or are otherwise rendered hors de combat. Al Qaida terrorists who continue to ploy attacks against the United States may be lawful subjects of armed attack in appropriate circumstances.

This response suggests that the Special Rapporteur should automatically accept a State's unsubstantiated assertion that a particular individual was an "enemy combatant" attacked in "appropriate circumstances". According to this understanding, a Government may target and kill any individual without any detailed explanation to the international community simply by stating that he was an enemy combatant.

In essence, your Government's position has the effect of placing all actions taken in the "global war on terror" in a public accountability void, in which no public and transparent international monitoring body would exercise oversight.<sup>42</sup> It is in the interest of all parties that no such void exists in international law. For this reason, the Special Rapporteur, in his capacity as an independent expert, would need to receive a full account of all incidents pertaining to his mandate, so that he may conduct an independent analysis of whether each incident falls within the scope of that mandate. That assessment cannot be left in the hands of each individual State. As I explained in my 2006 report:

[T]he Special Rapporteur cannot determine whether a particular incident falls within his mandate without first examining its facts. When he receives information alleging a

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not complain of an act by State B of which it itself had set an example in the past. *Diversion of Water from the Meuse (Netherlands v. Belgium)*, 1937 P.C.I.J. (ser. A/B) No. 70 at p. 4, 25. Finally, in the *North Atlantic Coast Fisheries Case*, the Permanent Court of Arbitration stated that if a State has sought the assistance of a second State to protect its interests or those of its nationals, it should not then dispute a claim to jurisdiction over the territory in question advanced by that second State. *The North Atlantic Fisheries Case (Gr. Brit. v. U.S.)*, *Hague Ct. Rep. (Scott)* at p. 141, 186 (Perm. Ct. Arb. 1910).

<sup>42</sup> The International Committee on the Red Cross (ICRC), although exercising significant oversight in matters of international humanitarian law, does not for tactical reasons do so in a public manner.

violation, he will often need to be informed by the State concerned of the evidentiary basis for its determination regarding any status or activity that may have justified the use of lethal force. Conclusory determinations that the deceased was a combatant or was taking part in hostilities when killed do not enable the Special Rapporteur to respond effectively to information and swiftly pursue the elimination of extrajudicial, summary or arbitrary executions.<sup>43</sup>

A State which receives a communication from the Special Rapporteur requesting information may, of course, express its opinion as to whether the given situation falls within the mandate, but it also has a duty to provide the requested information so that the Special Rapporteur can himself make this determination and communicate it to the Council. Any failure to do so is directly contrary to the repeated requests by the Commission to States to “cooperate with and assist the Special Rapporteur so that her or his mandate may be carried out effectively”.<sup>44</sup>

The reinterpretation of the mandate your Government is advocating would be detrimental to the effective protection of individuals

The reinterpretation of the mandate of the Special Rapporteur on extrajudicial, summary or arbitrary executions which your Government advocates would drastically limit the effectiveness of that mandate in protecting individuals. As has been noted, throughout the mandate’s history, “a very high proportion of summary or arbitrary executions occur in situations of armed conflict.”<sup>45</sup> These include, to name but a few cases:

- Rwanda – During the Rwandan civil war in 1993, Special Rapporteur Ndiaye conducted a mission to Rwanda to document extrajudicial executions taking place during that armed conflict.<sup>46</sup> The report of his mission is widely heralded for sounding the alarm bells to the world of the impending genocide in that country.<sup>47</sup>
- India/Pakistan – During the armed conflict between India and Pakistan in 1999, the Special Rapporteur transmitted to the Government of India thirteen allegations of violations of the right to life.<sup>48</sup> She sent sixteen allegations to Pakistan.<sup>49</sup>
- Ethiopia/Eritrea – During the armed conflict between Ethiopia and Eritrea from 1998-2000, the Special Rapporteur sent twelve individual allegations regarding extrajudicial executions in Ethiopia in 1998 and one regarding an alleged extrajudicial execution in 2000.<sup>50</sup>

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<sup>43</sup> Extrajudicial, summary or arbitrary executions, Report of the Special Rapporteur, Philip Alston, UN Doc. E/CN.4/2006/53, pp. 16-17, para. 42 (8 Mar. 2006).

<sup>44</sup> See, e.g., Comm. Hum. Rts., Res. 2004/37, para. 14 (19 April 2004).

<sup>45</sup> Report of the Special Rapporteur, Mr. S. Amos Wako, Comm. Hum. Rts., 42d sess., UN Doc. E/CN.4/1986/21, p. 89, para. 150 (7 Feb. 1986).

<sup>46</sup> Report by Mr. B.W. Ndiaye, Special Rapporteur, on his mission to Rwanda from 8 to 17 1993, UN Doc. E/CN.4/1994/7/Add.1 (11 August 1993).

<sup>47</sup> See Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda (15 Dec. 1999), online at <http://www.ess.uwe.ac.uk/documents/RwandaReport1.htm> (last accessed 9 Oct. 2006).

<sup>48</sup> *Id.* at p. 41, para. 225.

<sup>49</sup> *Id.* at p. 63, para. 348.

• Democratic Republic of the Congo (DRC) – In response to alleged extrajudicial executions during the civil war in the DRC, Special Rapporteur Jahangir conducted a mission to the DRC in June 2002. Her report provided crucial information concerning the massacre of civilians in Kisangani by the Rassemblement Congolais pour la Démocratie-Goma on 14 May 2002.<sup>51</sup>

• Israel/Occupied Palestinian Territories – international humanitarian law also applies to situations of occupation.<sup>52</sup> In this regard, the Special Rapporteur has intervened in many cases of alleged targeted killings by Israel in the Occupied Palestinian Territories, a total of 38 such interventions in 2005 alone.<sup>53</sup> Following the targeted killing of spiritual leader Sheikh Ahmed Yassin by an Israeli helicopter strike in 2004, the Special Rapporteur sent a communication which elicited a detailed response from Israel.<sup>54</sup>

The position of your Government appears to be that the Special Rapporteur on extrajudicial, summary or arbitrary executions was abusing his or her mandate in addressing each of these situations. Furthermore, the position of your Government appears to be that the Special Rapporteur should cease forthwith to consider any allegations of violations received from victims of the conflict in the Darfur region of Sudan, of the conflict in Sri Lanka, and of a great many other vitally important situations. I sincerely hope that I have misinterpreted the position adopted in the correspondence of your Government. If that is not the case I would nevertheless hope or that your Government might be prepared to reconsider its position in light of the compelling evidence offered above.

***Follow-up to Country Recommendations (E/CN.4/2006/53/Add.2, 28 February 2006, ¶¶ 9-10):***

(Discussing the lack of implementation of earlier recommendations and how Special Rapporteurs may craft country reports to better carry out their mandate and ensure higher compliance)

9. Nevertheless, it remains true that a consistent pattern of neglect of the relevant recommendations should ring alarm bells among those concerned to ensure that the international human rights regime is capable of making a positive difference. There are a number of steps which could be taken to address this situation and thus enhance the effectiveness and the credibility of the Council. The first rests with the mandate -holders who should be encouraged to rank their various recommendations in order of importance and urgency. As long as a large number of undifferentiated recommendations are made it is easy either to ignore them all or to

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<sup>50</sup> UN Doc. E/CN.4/1999/39/Add.1, UN Doc. E/CN.4/2001/9/Add.1, p. 25, para. 77 (6 January 1999); p. 40, para. 178 (17 Jan. 2001).

<sup>51</sup> Report of the Special Rapporteur, Ms. Asma Jahangir, submitted pursuant to Commission on Human Rights resolution 2002/36, Addendum, Mission to the Democratic Republic of the Congo, UN Doc. E/CN.4/2003/3/Add.3 (4 Nov. 2002).

<sup>52</sup> Geneva Conventions of 1949, Common Article 2; Hague Regulations of 1907, Arts. 42-56; Fourth Geneva Convention, Arts. 27-34 and 47-78.

<sup>53</sup> Report of the Special Rapporteur, Philip Alston, Extrajudicial, summary or arbitrary executions, Addendum, UN Doc. E/CN.4/2006/53/Add.1, Pp. 125-136 (27 March 2006).

<sup>54</sup> Philip Alston, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum, Summary of cases transmitted to Governments and replies received, UN Doc. E/CN.4/2005/7/Add.1, pp. 137-138, paras. 357-358 (17 March 2005).

give priority to the least significant. Thus the Council should request each mandate-holder to identify the five most important recommendations that result from each country visit and should then focus specifically on those issues in the relevant debate. The second step is to require Governments to respond to the Council, and not just to the mandate-holder, within twelve months of the submission of the report with an indication of why the recommended steps have or have not been taken. The third is for the Council to reflect this process as part of its regular reviews of the situation in the country concerned and to invite mandate-holders to make specific follow-up recommendations to indicate the steps that the Council should take in the context of those reviews.

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

## **B. FACTUAL BACKGROUND ON KILLINGS BY STATE AND NON-STATE ACTORS IN AREAS OF ARMED CONFLICT VISITED BY PROFESSOR ALSTON**

The Special Rapporteur visits several countries each year to investigate human rights violations, identify their causes, and recommend reforms. Among the countries Mr. Alston visited as Special Rapporteur, several were in situations recognized by international law as amounting to armed conflict, whether international or non-international. As the legal observations in this chapter of the Handbook deal with the use of force during armed conflict, the following summaries, as well as links to the relevant reports themselves, provide the factual context within which the observations were made.

### ***Report on Mission to Nigeria (E/CN.4/2006/53/Add.4, 7 January 2006):***

In Nigeria, the military regularly supplements or even replaces the police in establishing law and order in civilian disturbances. The armed forces have attacked towns to exact revenge on civilians for militia activity against the army. Further factual information on attacks by Nigerian armed forces against civilian populations can be found in the Special Rapporteur's report on Nigeria, available [here](#).

### ***Report on Mission to Sri Lanka (E/CN.4/2006/53/Add.5, 27 March 2006):***

Since the 1970s, a rebel group called the Liberation Tigers of Tamil Eelam (LTTE) has been in a conflict with the Sri Lankan government with the aim of establishing a Tamil State on part of the island of Sri Lanka. The conflict involved the intentional targeting of both combatants and civilians. Both parties reached a ceasefire agreement (CFA) in 2002 and until December 2005, the ceasefire between the parties' armed forces had been largely respected, with few exceptions. In contrast, the ceasefire in relation to civilians has consistently been broken by a series of so-called "political killings." The purpose of these killings has been to repress and divide the population for political gain. Further factual information on the killings by the LTTE and other non-state actors can be found in the Special Rapporteur's report on Sri Lanka, available [here](#).

### ***Report on Mission to Israel and Lebanon (A/HRC/2/7, 2 October 2006):***

The history of Lebanon and Israel is marked by tensions and a succession of conflicts, notably in 1978 and 1982. In May 2000, the Government of Israel withdrew its troops from Lebanon as requested by the UN Security Council in its resolutions, but the Lebanese group Hezbollah never disarmed, despite a Lebanese Cabinet Decision stipulating that "there will be no weapons or authority in Lebanon other than that of the Lebanese State." On 12 July 2006, Hezbollah fighters crossed the border into Israel, attacked an Israeli patrol near the village of Zarit, killed eight Israeli soldiers and returned to Lebanon with two captured Israeli soldiers. This triggered a major armed conflict between Hezbollah and Israel. Lebanon suffered air, sea and land attacks, and Hezbollah launched thousands of rockets on northern Israel. The conflict had far-reaching effects on the civilian population of both countries. Further information on the actions of Hezbollah and Israel during the 2006 conflict can be found in the Special Rapporteur's report on Israel and Lebanon, available [here](#).

***Report on Mission to the Philippines (A/HRC/8/3/Add.2, 16 April 2008):***

The government of the Philippines has been in conflict with a variety of armed insurgent groups for decades. Over the past six years, as a counterinsurgency strategy, there have been many extrajudicial executions of leftist activists from civil society organizations which the Government concludes are fronts for these armed groups. These killings have eliminated civil society leaders, including human rights defenders, trade unionists and land reform advocates, intimidated a vast number of civil society actors, and narrowed the country's political discourse. Depending on who is counting and how, the total number of such executions ranges from 100 to over 800. Further information on extrajudicial killings as a counterinsurgency tactic in the Philippines can be found in the Special Rapporteur's report on the Philippines, available [here](#).

***Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009):***

Afghanistan is experiencing armed conflict across a broad swath of its territory. Legally, it is a non-international armed conflict between the government, supported by international military forces, and various armed insurgent groups. An estimated 2,118 civilians were killed as result of the conflict in 2008 alone. They are assassinated by the Taliban, or shot near checkpoints and convoys by Afghan or international soldiers. They are blown up in Taliban suicide attacks carried out in public places or in poorly planned or disproportionate airstrikes by international forces. Further factual information about killings by all parties to the conflict can be found in the Special Rapporteur's report on Afghanistan, available [here](#).

***Report on Mission to Kenya (A/HRC/11/2/Add.6, 26 May 2009):***

The Mt. Elgon conflict began in Kenya in 2005, when an armed group called the Sabot Land Defence Force (SLDF) took up arms in objection to a land redistribution and settlement scheme by the government believed to be marred by corruption and unfair allocations. The Government launched a joint military-police operation in 2008 to quell the rebellion. During the conflict, the SLDF and government forces were both responsible for a substantial number of extrajudicial executions. Further factual information on the violent actions of both sides can be found in the Special Rapporteur's report on Kenya, available [here](#).

***Report on Mission to the Central African Republic (A/HRC/11/2/Add.3, 27 May 2009):***

The people of the Central African Republic have suffered through repeated violent coups since independence in 1960, widespread lawlessness and banditry, and, over the last three years, internal armed conflicts in the north of the country. During the crises, killings by security forces have been common. By the time the Special Rapporteur conducted his fact-finding mission to the CAR in February 2008, the conflict in the north-east had ended but a low intensity conflict continued in the north-west. As fighting between the Government and rebels ebbed, however, banditry took its place as the prime threat to civilians. Further information on killings in the Central African Republic in the context of the non-international armed conflict taking place at

the time in the north-west of the country can be found in the Special Rapporteur's report, available [here](#).

## C. RELATIONSHIP BETWEEN HUMAN RIGHTS AND HUMANITARIAN LAW

### *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/HRC/14/24, 22 December 2004, ¶¶ 38-42):*

38. In many of the countries I have visited, armed conflicts have resulted in many unlawful killings. These include Afghanistan, the Central African Republic, Colombia, the Democratic Republic of the Congo, Israel, Lebanon, the Philippines and Sri Lanka.

39. Much of the mandate's work on killings in armed conflict has sought to clarify the relationship between human rights and humanitarian law, starting with the basis for the mandate's coverage and investigation of armed conflict killings. In 2004 (E/CN.4/2005/7, paras. 5-11 and 45) and 2007 (A/HRC/4/20, paras. 18 and 20-24) I showed that, from the very beginning of the mandate, Special Rapporteurs have reviewed the legality of killings under international humanitarian law, and that the mandate covers, without exception, violations of the right to life in international and non-international armed conflicts. These analyses, as well as reports on Afghanistan, Israel and Lebanon, and Sri Lanka, explained the coextensive protections of, and complementary relationship between, human rights and humanitarian law.<sup>55</sup>

40. Another significant element of the mandate's work in this area has been to study the methods and means of warfare. Thus, for example, the 2007 report to the Council (A/HRC/4/20) examined "mercy killings" and explained the legal basis for their absolute prohibition. Reports have also addressed: the principles of distinction and proportionality; airstrikes; cluster bombs; raids; perfidy; suicide attacks; human shielding; issues arising in urban counter-insurgencies; and killings of persons *hors de combat*.<sup>56</sup> Mission reports on the Central African Republic (A/HRC/14/24/Add.5), Afghanistan (A/HRC/11/2/Add.4, paras. 9 and 23-24), and Israel and Lebanon (A/HRC/2/7, paras. 30 and 68-70), also addressed the requirement of reciprocity and the illegality of reprisal killings. As the discussions on reciprocity explained, one side's unlawful use of civilian shields, for example, does not affect the other side's obligation to ensure that airstrikes do not kill civilians in excess of the military advantage of killing the targeted fighters.

41. Over the course of the mandate, the responsibility of rebel or insurgent groups to observe international humanitarian law has repeatedly been explained and emphasized, including in country reports on Afghanistan (A/HRC/11/2/Add.4, para. 71), the Central African Republic (A/HRC/11/2/Add.3, para. 6), Colombia (A/HRC/14/24/Add.2), the Democratic Republic of the Congo (A/HRC/14/24/Add.3), Sri Lanka (E/CN.4/2006/53/Add.5, paras. 26, 30 and 33) and the Philippines (A/HRC/8/3/Add.2, para. 5). Too often, and especially in insurgency contexts, civilians are trapped between State and rebel forces, or between warring rebel factions, in a struggle to avoid being threatened or killed by one or more sides. This dynamic, together with the obligations of all sides to respect international law, was described in detail in the reports on Afghanistan, Colombia and the Democratic Republic of the Congo.

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<sup>55</sup> E/CN.4/2005/7, paras. 48-53; A/HRC/4/20, para. 19; A/HRC/2/7, paras. 15-16; E/CN.4/2006/53/Add.5, paras. 24-33; and A/HRC/11/2/Add.4.

<sup>56</sup> See A/HRC/2/7 and A/HRC/11/2/Add.4.

42. Reports have also addressed the importance of human rights-based security sector reform (A/HRC/11/2/Add.3), military recruitment and vetting of military personnel for war crimes,<sup>57</sup> humanitarian law training,<sup>58</sup> killings by private security contractors,<sup>59</sup> and the need for transparency and accountability mechanisms relating to right-to-life violations during armed conflict and occupation.<sup>60</sup>

***Report on Mission to Colombia (A/HRC/14/24/Add.2, 31 March 2010, ¶¶ 5-9):***

5. Colombia is a party to the International Covenant on Civil and Political Rights, the American Convention on Human Rights, the Geneva Conventions and Additional Protocols thereto, and the Rome Statute of the International Criminal Court.<sup>61</sup> In the context of armed conflict, customary and conventional international humanitarian law (IHL) also applies. Article 93 of the Constitution of Colombia gives the status of domestic constitutional law to applicable international treaties.<sup>62</sup>

6. The existence of an armed conflict in Colombia is the subject of some controversy. The Government's position is that Colombia is not engaged in an armed conflict and that the FARC and ELN are terrorists, not belligerents under IHL. Some officials were concerned that admitting the existence of an armed conflict would signal a failure of Colombian security policies and negate their successes.

7. It cannot be said as a categorical matter that an armed conflict does not exist in Colombia. As a matter of practice, Colombia does apply IHL, for example, in its operations against the guerrillas. Members of the military receive extensive IHL training. Ministry of Defence officials have engaged in sophisticated analysis of IHL rules, formulated detailed guidelines for their application and demonstrated a determination to grapple with the complexities that arise from the facts on the ground. The Government's application of the correct legal framework signals its willingness to abide by the rule of law and to act for the benefit of its citizens, especially those who have been displaced and are at risk of being caught in the midst of hostilities.

8. As a matter of law, application of IHL is not discretionary; it applies when the defining objective elements of a non-international armed conflict are met. Common article 3 of the Geneva Conventions, therefore, would apply when internal hostilities in Colombia reach a minimum level of intensity and duration and when the opposing armed group is organized and itself has the capacity to engage in military operations. Protocol II to the Geneva Conventions, which Colombia ratified in 1996, supplements common article 3; it applies when opposing forces

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<sup>57</sup> A/HRC/11/2/Add.3 and A/HRC/14/24/Add.3.

<sup>58</sup> A/HRC/11/2/Add.3 and A/HRC/11/2/Add.4.

<sup>59</sup> Ibid.

<sup>60</sup> See, for example, E/CN.4/2006/53, paras. 33-43.

<sup>61</sup> When Colombia ratified the Rome Statute in 2002, it declared, pursuant to article 124 of the Statute, that it did not accept the Court's jurisdiction for seven years. That limitation expired on 1 November 2009. The International Criminal Court's Chief Prosecutor has visited Colombia twice and Court prosecutors have repeatedly announced their willingness to investigate and prosecute war crimes by the guerrillas, former paramilitaries and State forces.

<sup>62</sup> "International treaties and agreements ratified by Congress that recognize human rights and prohibit their limitation in states of emergency prevail in the national law".

are under a responsible command, exercise enough control over territory to mount sustained and coordinated military actions and are able to implement Protocol II. This will often mean that IHL will apply in the context of military operations against the FARC or ELN.

9. Whether or not IHL applies in the context of actions against other armed non-State actors will also depend on whether the objective criteria are met. Generally, operations against such groups should be undertaken by the police, in accordance with human rights law.<sup>63</sup>

***Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (E/CN.4/2005/7, 22 December 2004, ¶¶ 48-53):***

48. The third matter concerns the relationship between human rights law and humanitarian law. The implications of the United States position in this regard would appear to be twofold: (i) extrajudicial, summary or arbitrary executions, falling within the Special Rapporteur's mandate, can take place only in situations where international human rights law applies; and (ii) where humanitarian law is applicable, it operates to exclude human rights law.

49. Acceptance of this analysis would dramatically reduce the mandate of the Special Rapporteur since so many of the executions brought to his attention take place in contexts of armed conflict. It would mean that in many situations in which a Government declares itself to be under attack and argues that the resulting conflict is governed by the laws of armed conflict, the applicability of human rights law would be entirely excluded.

50. This proposition is not supported by general principles of international law. It is now well recognized that the protection offered by international human rights law and international humanitarian law are coextensive, and that both bodies of law apply simultaneously unless there is a conflict between them. In the case of a conflict, the *lex specialis* should be applied but only to the extent that the situation at hand involves a conflict between the principles applicable under the two international legal regimes. The International Court of Justice has explicitly rejected the argument that the International Covenant on Civil and Political Rights was directed only to the protection of human rights in peacetime:

“... [T]he protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 [derogation in a time of national emergency]. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.”<sup>64</sup>

51. The Court repeated and approved of this passage in its 2004 Advisory Opinion.<sup>65</sup>

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<sup>63</sup> IHL and human rights law are coextensive in an armed conflict; both impose a duty on States to investigate alleged violations of the right to life “promptly, thoroughly and effectively through independent and impartial bodies”. See E/CN.4/2006/53, paras. 33–43; A/61/311, paras. 33–45 (law enforcement officers may only apply lethal force to protect life and if it meets the requirements of necessity and proportionality).

<sup>64</sup> Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (8 July 1996), para. 25.

<sup>65</sup> *Lopez v. Uruguay*, op. cit., para. 105.

52. It follows that the application of international humanitarian law to an international or non-international armed conflict does not exclude the application of human rights law. The two bodies of law are in fact complementary and not mutually exclusive.

53. One additional matter warrants particular attention in this context. Governments which are criticized for violating the right to life under human rights law or for failing to respect humanitarian law by killing civilians who are not directly taking part in hostilities sometimes announce that they have initiated an investigation into the relevant incidents. In such cases it is essential that the results of the investigation be published, including details of how and by whom it was carried out, the findings, and any prosecutions subsequently undertaken. Broad, general statements of findings, or non-disaggregated information as to the number of investigations and prosecutions, are inadequate to satisfy the requirements of accountability in such contexts. Formalistic investigations are almost always the precursors of a degree of impunity.

***Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/HRC/4/20, 29 January 2007, ¶ 18, 19):***

18. An earlier report examined the law applicable to violations of the right to life in armed conflict and the role of the Special Rapporteur in response thereto.<sup>66</sup> This view has, however, been consistently rejected by one State. These objections, by the United States of America, have been raised in a wide range of contexts, thus underscoring the importance of carefully examining their validity. In essence, the United States position consists of four propositions: (a) the “war on terror” constitutes an armed conflict to which international humanitarian law applies; (b) international humanitarian law operates to the exclusion of human rights law; (c) international humanitarian law falls outside the mandate of the Special Rapporteur and of the Council; and (d) States may determine for themselves whether an individual incident is governed by humanitarian law or human rights law.<sup>67</sup> If accepted, these propositions would have far-reaching consequences for the Council and for its ability to contribute in any way to many of the situations that are currently most prominent on its agenda

19. Contrary to this proposition, it is widely agreed that the two bodies of law, far from being mutually exclusive, are complementary. The International Court of Justice has observed that the test of what is an arbitrary deprivation of life in the context of hostilities “falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.”<sup>68</sup> But it went on to clarify that “the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation ....”<sup>69</sup> In *Congo v. Uganda*, for example, it found separate violations of international humanitarian law and human rights law, thus conclusively underscoring the fact

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<sup>66</sup> E/CN.4/2005/7, paras. 41-54.

<sup>67</sup> See, e.g., Communication of 4 May 2006 from the United States, A/HRC/4/20/Add.1, pp. 344-46.

<sup>68</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996, para. 25.

<sup>69</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004, para. 106; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), I.C.J. Reports 2005, para. 216.

that the former does not wholly replace the latter during an armed conflict.<sup>70</sup> This is consistent with the conclusion of the Human Rights Committee that while “more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of [certain] Covenant rights, both spheres of law are complementary, not mutually exclusive.”<sup>71</sup> Similarly, the Commission and the General Assembly have regularly reaffirmed “that international human rights law and international humanitarian law are complementary and not mutually exclusive.”<sup>72</sup>

***Report on Mission to Israel and Lebanon (A/HRC/2/7, 2 October 2006, ¶¶ 15-16):***

15. Human rights law does not cease to apply in times of war, except in accordance with precise derogation provisions relating to times of emergency.<sup>73</sup> More specifically, the International Covenant on Civil and Political Rights (ICCPR) and other international human rights instruments allow for the possibility, in circumstances that threaten the life of the nation, to derogate from certain of its guarantees provided that the measures are strictly necessary and are lifted as soon as the public emergency or armed conflict ceases to exist.<sup>74</sup> Certain guarantees, in particular the prohibition of torture and cruel, inhuman or degrading treatment or the right to life, are non-derogable.<sup>75</sup> Lebanon has not declared an emergency in accordance with ICCPR article 4, but it did proclaim a national state of emergency on 12 July 2006. Israel remains in a state of public emergency proclaimed on 19 May 1948, four days after its Declaration of Establishment.<sup>76</sup> Upon ratifying the Covenant, it made a declaration regarding the existence of this state of emergency and noted a reservation to article 9 (liberty and security of person).<sup>77</sup> As regards economic, social and cultural rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR) does not explicitly allow for derogations in time of public emergency, but the guarantees of the Covenant may, in times of armed conflict, be limited in accordance with its articles 4 and 5 and because of the possible scarcity of available resources in the sense of article 2, paragraph 1.<sup>78</sup>

16. Human rights law and international humanitarian law are not mutually exclusive but exist in a complementary relationship during armed conflict, and a full legal analysis requires

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<sup>70</sup> *Id.*, at paras. 216-20, 345(3).

<sup>71</sup> Human Rights Committee, General Comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant (art. 2), CCPR/C/21/Rev.1/Add.13 (2004), para. 11.

<sup>72</sup> CHR Res. 2005/34 and GA Res. 61/173.

<sup>73</sup> International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion of 8 July 1996, I.C.J. Reports 1996 (I), p. 226, at p. 240, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004, I.C.J. Reports 2004, para. 106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, I.C.J. Reports 2005, para. 219 (finding substantive violations of human rights law during an armed conflict). Affirmations to the contrary by Israel are not persuasive. See concluding observations of the Human Rights Committee on the second periodic report of Israel (CCPR/C/ISR/2001/2), in Report of the Human Rights Committee, Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 40 (A/58/40), vol. I, p. 64, para. 11.

<sup>74</sup> ICCPR, art. 4, para. 1; Human Rights Committee, general comment No. 29 (2001), para. 3.

<sup>75</sup> ICCPR, art. 4, para. 2.

<sup>76</sup> CCPR/C/ISR/2001/2, para. 71.

<sup>77</sup> A/58/40, vol. I, p. 64., para. 12. The Human Rights Committee has expressed concern that the article 9 reservation is broader than is permissible under article 4 of ICCPR, and that Israeli policies related to the state of emergency appear to have unofficially derogated from additional provisions of ICCPR (*ibid.*).

<sup>78</sup> See Committee on Economic, Social and Cultural Rights (CESCR), general comment No. 14 (2000), paras. 28-29.

consideration of both bodies of law.<sup>79</sup> In respect of certain human rights, more specific rules of international humanitarian law may be relevant for the purposes of their interpretation.<sup>80</sup>

***Report on Mission to Sri Lanka (E/CN.4/2006/53/Add.5, 27 March 2006, ¶¶ 24-33):***

24. Within Sri Lanka the recent political killings have been discussed primarily in terms of the CFA. Insofar as the Government and the LTTE endeavour to comply with the agreement, it is an appropriate frame of reference. But international human rights and humanitarian law continue to apply and in some cases impose more exacting obligations.

25. Human rights law affirms that both the Government and the LTTE must respect the rights of every person in Sri Lanka. Human rights norms operate on three levels - as the rights of individuals, as obligations assumed by States, and as legitimate expectations of the international community. The Government has assumed the binding legal obligation to respect and ensure the rights recognized in the International Covenant on Civil and Political Rights (ICCPR). As a non-State actor, the LTTE does not have legal obligations under ICCPR, but it remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights.<sup>81</sup>

26. I have previously noted that it is especially appropriate and feasible to call for an armed group to respect human rights norms when it “exercises significant control over territory and population and has an identifiable political structure.”<sup>82</sup> This visit clarified both the complexity and the necessity of applying human rights norms to armed groups. The LTTE plays a dual role. On the one hand, it is an organization with effective control over a significant stretch of territory, engaged in civil planning and administration, maintaining its own form of police force and judiciary. On the other hand, it is an armed group that has been subject to proscription, travel bans, and financial sanctions in various Member States. The tension between these two roles is at the root of the international community’s hesitation to address the LTTE and other armed groups in the terms of human rights law. The international community does have human rights expectations to which it will hold the LTTE, but it has long been reluctant to press these demands directly if doing so would be to “treat it like a State”.

27. It is increasingly understood, however, that the human rights expectations of the international community operate to protect people, while not thereby affecting the legitimacy of the actors to

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<sup>79</sup> Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), I.C.J. Reports 2005, paras. 216-20, 345(3); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, I.C.J. Reports 2004, para. 106; and Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996, para. 25. Although the Court concluded in the Nuclear Weapons Advisory Opinion that “[t]he test of what constitutes an arbitrary deprivation of life ... falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict”, more recently, in Congo v. Uganda, it found independent violations of human rights law during armed conflict without applying the *lex specialis* principle (paras. 216-219).

<sup>80</sup> See Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant (art. 2).

<sup>81</sup> Consistent with this analysis, the LTTE created North East Secretariat on Human Rights released the final version of the *NESOHR Charter* of human rights in Oct 2005. Its stated objectives include promoting respect for human rights “according to the Universal Declaration of Human Rights and the International Covenants on human rights ...”, available at <http://nesohr.org/charter/Charter-English.PDF>

<sup>82</sup> E/CN.4/2005/7, para. 76.

whom they are addressed. The Security Council has long called upon various groups that Member States do not recognize as having the capacity to formally assume international obligations to respect human rights.<sup>83</sup> The LTTE and other armed groups must accept that insofar as they aspire to represent a people before the world, the international community will evaluate their conduct according to the Universal Declaration's "common standard of achievement".

28. Human rights law contributes two critical elements to the legal framework regulating the use of lethal force in this context. The first is that lethal force may never be used to suppress human rights. It violates human rights law to kill people for exercising their rights to freedom of expression, to peaceful assembly, to freedom of association with others, to family life, or to participate in public affairs and to vote. While the illegality of killing to suppress rights may appear obvious, it goes to the heart of many of the violations occurring in Sri Lanka.

29. The other element contributed by human rights law is that the intentional use of lethal force in the context of an armed conflict is prohibited unless strictly necessary. In other words, killing must be a last resort, even in times of war.

30. In an armed conflict, human rights law is complemented by the additional regime of humanitarian law. In 1959 the Government ratified the Geneva Conventions of 12 August 1949, and the LTTE has formally taken upon itself obligations under the Geneva Conventions and its Additional Protocols. All parties to the conflict are bound to comply with the terms of common article 3 of the Geneva Conventions of 1949 and of customary international humanitarian law. The Karuna group is a party to the conflict within the meaning of humanitarian law, regardless of whether it constitutes a paramilitary within the meaning of CFA article 1.8 and regardless of any support the Government may be providing. However, depending on the character of such support, the Government could also bear legal responsibility for its violations of humanitarian law.

31. Common article 3 prohibits the murder of persons taking no active part in hostilities. This prohibition is both more limited than sometimes hoped and more expansive than sometimes realized. It leaves the use of lethal force in the midst of combat - the "conduct of hostilities" - largely unregulated. However, in other contexts, it protects combatants as well as civilians, prohibiting the murder of all "[p]ersons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause". The killings that have taken place in which a person is abducted and subsequently killed violate this rule without exception. The bedrock legal principle that persons who are captured have a right to humane treatment should not be obscured by any implication that their execution is worse if they are civilians.

32. Motorcycle drive-by shootings have been a common tactic. It might be argued that when such a shooting occurs in territory controlled by an opposing party, it is governed by the principle of distinction whereby soldiers and military members of armed groups may be targeted

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<sup>83</sup> SC Res. 1265 (1999), preamble; SC Res. 1193 (1998), paras. 12, 14; SC Res. 814 (1993), para. 13.

but civilians may not be.<sup>84</sup> In most of these incidents, however, the persons killed have been going about their daily lives rather than taking part in combat, and it is more appropriate to view such killings as murders within the meaning of common article 3. Moreover, regardless of how these killings might be conceptualized in humanitarian law, the prohibition on killing unless it is strictly necessary continues to apply under human rights law. The grenade attacks that became increasingly common in late 2005 raise further issues. While these too have generally constituted murders violating common article 3, they would often violate the prohibition of indiscriminate attacks even were they considered to fall within the conduct of hostilities.

33. The CFA has played a crucial role in ensuring the right to life in Sri Lanka. This role should not, however, lead to a de-emphasis of the requirements of human rights and humanitarian law. This is partly because the CFA binds only the Government and the LTTE; whereas, human rights and humanitarian law apply to all armed groups. It is also because the CFA affirms the international legal obligations of the parties only with respect to “civilians”. In contrast, the right to life of “combatants” is only indirectly protected by the prohibition of offensive military operations.<sup>85</sup> Under international law, all Sri Lankans, regardless of whether they are civilians, are bearers of the right to life. This right must be respected by all the parties quite apart from the obligations of the Government and the LTTE to each other. Human rights law, humanitarian law, and the CFA are overlapping and mutually-reinforcing frameworks that together serve to protect human lives.

***Follow-up to Country Recommendations—Sri Lanka (A/HRC/8/3/Add.3, 14 May 2008, ¶¶ 10-11):***

10. It is possible to fight a conflict while complying with human rights and humanitarian law. International humanitarian law is framed by a balance between the demands of humanity and demands of military necessity. Similarly, while international human rights law applies during armed conflict, it permits specified limitations to accommodate national security concerns and derogations during times of public emergency. It was the considered judgement of the States parties to the treaties constituting these legal regimes that there is no legitimate military rationale for committing prohibited acts of violence.

11. Human rights and humanitarian law are applicable even if the conflict may be characterized as a “war on terror” (as the Government suggests) or as a “national liberation struggle” (as the LTTE suggests). Individuals who commit serious violations of these rules continue to run the risk of prosecution.

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<sup>84</sup> This acceptance is recorded in the Letter of Authorization for the Filing of a Legal Action and Representation of the Liberation Tigers of Tamil Eelam in the Judicial Review of the Terrorist Designation of the Organization Pursuant to Section 219 of the Anti-Terrorism and Effective Death Penalty Act of 1996 to the U.S. Court of Appeals, District of Columbia Circuit, from the LTTE International Secretariat, Nov. 6, 1997. The letter notes, *inter alia*, that the LTTE “never targets civilians who ‘take no active part in the conflict’”.

<sup>85</sup> Rule 1 of the ICRC’s study on *Customary International Humanitarian Law* (J.M. Henckaerts and L. Doswald-Beck, eds., 2005) p. 3 states that “The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.”; art. 13 (3) of Protocol II provides that “Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.” And Art. 8 (2) (e) (i) of the Rome Statute provides that it is a war crime to “Intentionally direct attacks against the civilian population as such or against individual civilians not taking direct part in hostilities”.

## **D. INTERNATIONAL HUMANITARIAN LAW AND KILLINGS BY ARMED OPPOSITION GROUPS**

***Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (E/CN.4/2005/7, 22 December 2004, ¶¶ 76):***

76. The fourth major group of non-State actors relevant to the Special Rapporteur's mandate is armed opposition groups. The traditional approach of international law is that only Governments can violate human rights and thus, such armed groups are simply committing criminal acts. And indeed this may be an accurate characterization. In reality, however, that is often not the end of the matter and in some contexts it may be desirable to address the activities of such groups within some part of the human rights equation.<sup>86</sup> This could mean addressing complaints to them about executions and calling for respect of the relevant norms.<sup>87</sup> This may be both appropriate and feasible where the group exercises significant control over territory and population and has an identifiable political structure (which is often not the case for classic "terrorist groups"). In cases in which such groups are willing to affirm their adherence to human rights principles and to eschew executions it may be appropriate to encourage the adoption of formal statements to that effect. And in reporting on violations committed by Governments it may be appropriate to provide details of the atrocities perpetrated by their opponents in order to provide the Commission with an accurate and complete picture of the situation. It goes without saying that any such approaches would in no way diminish the central human rights responsibilities of Governments, nor does it seek to give legitimacy to opposition groups. The condemnation of such groups and insisting that they respect international human rights law should not be taken as equating them with States. On the other hand, in an era when non-State actors are becoming ever more important in world affairs, the Commission risks handicapping itself significantly if it does not respond in a realistic but principled manner.

***Report on Mission to Central African Republic (A/HRC/11/2/Add.3, 27 May 2009, ¶ 6):***

6. In addition to the obligations imposed by human rights law, the conflicts in both the north-west and north-east were non-international armed conflicts to which international humanitarian law applied. All parties to these conflicts, including rebel groups, are bound by this body of law.<sup>88</sup> International humanitarian law requires the parties to distinguish between civilians and combatants at all times,<sup>89</sup> prohibits killing civilians except when they are directly participating in hostilities, and prohibits killing anyone, civilian or combatant, who has been detained or otherwise placed *hors de combat*.<sup>90</sup>

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<sup>86</sup> See, e.g., the approach of the United States State Department: "[w]e have made every effort to identify those groups (for example, government forces or terrorists) that are believed ... to have committed human rights abuses". United States Department of State, *Country Reports on Human Rights Practices 2003* (2004), Appendix A.

<sup>87</sup> A similar result is achieved in relation to international humanitarian law through the application of common article 3 of the Geneva Conventions of 1949.

<sup>88</sup> Common article 3 of the four Geneva Conventions of 1949; Protocol II; and customary rules applicable to non-international armed conflicts.

<sup>89</sup> Article 13 (2) of Protocol II, Rule 1 Customary Rules of International Humanitarian Law identified in the study of the International Committee of the Red Cross (Customary Rules).

<sup>90</sup> Common article 3 of the four Geneva Conventions of 1949, article 4 of Protocol II, and Rule 89 of the Customary Rules.

***Report on Mission to Sri Lanka (E/CN.4/2006/53/Add.5, 27 March 2006, ¶¶ 26, 30, 33):***

26. I have previously noted that it is especially appropriate and feasible to call for an armed group to respect human rights norms when it “exercises significant control over territory and population and has an identifiable political structure”.<sup>91</sup> This visit clarified both the complexity and the necessity of applying human rights norms to armed groups. The LTTE plays a dual role. On the one hand, it is an organization with effective control over a significant stretch of territory, engaged in civil planning and administration, maintaining its own form of police force and judiciary. On the other hand, it is an armed group that has been subject to proscription, travel bans, and financial sanctions in various Member States. The tension between these two roles is at the root of the international community’s hesitation to address the LTTE and other armed groups in the terms of human rights law. The international community does have human rights expectations to which it will hold the LTTE, but it has long been reluctant to press these demands directly if doing so would be to “treat it like a State”.

30. In an armed conflict, human rights law is complemented by the additional regime of humanitarian law. In 1959 the Government ratified the Geneva Conventions of 12 August 1949, and the LTTE has formally taken upon itself obligations under the Geneva Conventions and its Additional Protocols.<sup>92</sup> All parties to the conflict are bound to comply with the terms of common article 3 of the Geneva Conventions of 1949 and of customary international humanitarian law. The Karuna group is a party to the conflict within the meaning of humanitarian law, regardless of whether it constitutes a paramilitary within the meaning of Ceasefire Agreement (CFA) article 1.8 and regardless of any support the Government may be providing. However, depending on the character of such support, the Government could also bear legal responsibility for its violations of humanitarian law.

33. The CFA has played a crucial role in ensuring the right to life in Sri Lanka. This role should not, however, lead to a de-emphasis of the requirements of human rights and humanitarian law. This is partly because the CFA binds only the Government and the LTTE; whereas, human rights and humanitarian law apply to all armed groups. It is also because the CFA affirms the international legal obligations of the parties only with respect to “civilians”. In contrast, the right to life of “combatants” is only indirectly protected by the prohibition of offensive military operations.<sup>93</sup> Under international law, all Sri Lankans, regardless of whether they are civilians, are bearers of the right to life. This right must be respected by all the parties quite apart from the obligations of the Government and the LTTE to each other. Human rights law, humanitarian law, and the CFA are overlapping and mutually-reinforcing frameworks that together serve to protect human lives.

***Report on Mission to the Philippines (A/HRC/8/3/Add.2, 16 April 2008, ¶ 5):***

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<sup>91</sup> E/CN.4/2005/7, para. 76.

<sup>92</sup> This acceptance is recorded in the Letter of Authorization for the Filing of a Legal Action and Representation of the Liberation Tigers of Tamil Eelam in the Judicial Review of the Terrorist Designation of the Organization Pursuant to Section 219 of the Anti-Terrorism and Effective Death Penalty Act of 1996 to the U.S. Court of Appeals, District of Columbia Circuit, from the LTTE International Secretariat, Nov. 6, 1997. The letter notes, *inter alia*, that the LTTE “never targets civilians who ‘take no active part in the conflict’”.

<sup>93</sup> CFA art. 1.2.

5. All parties to the armed conflicts are bound by customary and conventional international humanitarian law and are subject to the demand of the international community that every organ of society respect and promote human rights.<sup>94</sup> Within this legal framework, both state and nonstate actors can commit extrajudicial executions.

***Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009, ¶ 71):***

71. The Taliban should cease employing means and methods of warfare that violate international humanitarian law, and result in the unlawful killing of civilians. The Taliban leadership should issue clear orders to those carrying out attacks to abide by international law. This particularly includes the following:

(a) To stop threatening and assassinating civilians in all circumstances, including for their alleged failure to cooperate with the Taliban or for their decision to cooperate with the Government;

(b) To cease using civilians as “human shields” to deter attacks by international and Afghan military forces;

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<sup>94</sup> On 5 July 1996, the NDF addressed the “NDFP Declaration of Understanding to Apply the Geneva Conventions on 1949 and Protocol I of 1977” to the Swiss Federal Council (the depositary for the Geneva Conventions) and to the International Committee of the Red Cross (ICRC), stating that, “We are the political authority representing the Filipino people and organized political forces that are waging an armed revolutionary struggle for national liberation and democracy, in the exercise of the right to self-determination within the purview of Article 1, paragraph 4, of Protocol I against the persistent factors and elements of colonial domination and against national oppression. . . .” In its declaration, the NDFP “solemnly declare in good faith to undertake to apply the Geneva Conventions and Protocol I to the armed conflict” and also affirmed that it was “bound by international customary law pertaining to humanitarian principles, norms and rules in armed conflict”. The declaration was signed by representatives of the NDF, CPP, and NPA. Previously, in 1991, the NDF had “formally declare[d] its adherence to international humanitarian law, especially Article 3 common to the Geneva Conventions as well as Protocol II additional to said conventions” (“Declaration of Adherence to International Humanitarian Law” (15 August 1991)).

The Government and the NDF signed the Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law (CARHRIHL) on 16 March 1998. The agreement affirms prohibitions on “summary executions”, “involuntary disappearances”, “massacres”, “indiscriminate bombardments”, and the targeting of “civilians or those taking no active part in the hostilities[,] persons who have surrendered[, and] those placed hors de combat by sickness, wounds, or any other cause” (Part III, Art. 2(4); Part IV, Arts. 2, 3(1), 4(2)). CARHRIHL also provided for the establishment of a Joint Monitoring Committee (JMC) that would be composed of three members chosen by the Government’s negotiating panel and three by the NDF’s negotiating panel. (Part V). The JMC was to “receive complaints of violations of human rights and international humanitarian law and all pertinent information and shall initiate requests or recommendations for the implementation” of CARHRIHL (Part V, Article 3). The members have been chosen, so that there are now Government and NDF “sections” of the JMC, but the JMC itself has never met.

The Government and the MILF entered into the “Agreement on peace between the government of the Republic of the Philippines and the Moro Islamic Liberation Front” on 22 June 2001, agreed to “[t]he observance of international humanitarian law and respect for internationally recognized human rights instruments. . . .” This commitment was further elaborated in article IV of the “Implementing Guidelines on the Humanitarian, Rehabilitation and Development Aspects of the GRP-MILF Tripoli Agreement on Peace of 2001” signed on 7 May 2002.

(c) To stop targeting civilians in suicide attacks, and cease engaging in perfidy (unlawful deception) during such attacks, including by disguising themselves as civilians, soldiers or police.

***Press Statement on Mission to Colombia (8-18 June 2009)***

As an independent expert reporting to the UN Human Rights Council, my mandate is to investigate killings committed in violation of international human rights or humanitarian law; to determine the extent and causes of impunity for such killings; and to propose specific and constructive reforms to reduce killings and promote accountability. In Colombia, I focused on killings by the security forces, guerrillas, paramilitaries and other armed non-state actors, and I examined the effectiveness of the criminal, civil and military justice systems in relation to those killings.

## E. EXTRATERRITORIAL APPLICABILITY OF HUMAN RIGHTS LAW

*Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (E/CN.4/2005/7, 22 December 2004, ¶¶ 46-47):*

46. [...] The Human Rights Committee has held that a State party can be held responsible for violations of rights under the Covenant where the violations are perpetrated by authorized agents of the State on foreign territory, “whether with the acquiescence of the Government of [the foreign State] or in opposition to it”.<sup>95</sup>

47. In 2004 in an Advisory Opinion the International Court of Justice approved of the Human Rights Committee’s reasoning and held that the Covenant “is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”.<sup>96</sup> It follows that any case involving the arbitrary deprivation of life of Iraqi or other nationals by United States military personnel (or other authorized government agents) may amount to a violation of the Covenant and would thus fall squarely within the Special Rapporteur’s mandate.

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<sup>95</sup> *Lopez v. Uruguay*, communication No. 52/1979, CCPR/C/OP/1 at 88 (1984), paras. 12.1-12.3.

<sup>96</sup> Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (9 July 2004), paras. 108-111.

## **F. HUMANITARIAN LAW OBLIGATIONS AND RECIPROCITY**

### ***Report on Mission to the Central African Republic (A/HRC/11/2/Add.3, 27 May 2009, 29):***

29. A number of other officials responded by asserting that the rebels also committed abuses. This is clearly true [...] but it is no answer to inquiries about abuses by State forces.

### ***Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009, ¶ 9, 23, 24):***

9. The Taliban should end the use of human shields and avoid locating its forces in areas populated by civilians. Nonetheless, Taliban usage of human shields does not affect the international forces' obligation to ensure that air strikes do not cause a loss of civilian life excessive in relation to the military advantage of killing the targeted fighters.

23. [...] The Taliban's perfidious acts render everyday activities for Afghan civilians highly dangerous. In addition to the deaths caused directly, perfidy affects the behaviour of international and Afghan troops vis-à-vis Afghan civilians. In this way, violations by one side make it more difficult for the other side to comply with its legal obligations. Thus, in many situations the IMF will have no reliable way of assessing whether an unknown person approaching is a civilian, or a Taliban member intending to attack. This heightens the caution with which IMF soldiers approach ordinary Afghans, and necessitates the IMF taking precautions to protect themselves.

24. The risk posed to the lives of IMF/Afghan soldiers by perfidious attacks has led the international forces to instruct civilians to keep at a distance from convoys and patrols. Defensive measures by soldiers will generally not be taken against vehicles and civilians who maintain the required distance and who do not otherwise pose a threat. Self-defensive measures may be taken against those who get too close. However, even when force is used in self-defense, it must comply with IHL norms, and, although perfidious attacks may increase the likelihood of mistakes, they do not justify any lowering of these standards for resorting to lethal force.

### ***Report on Mission to Israel and Lebanon (A/HRC/2/7, 2 October 2006, ¶ 30, 68-70):***

30. A violation of the obligation to take precautionary measures vis-à-vis the civilian population or their use as human shields by one side to a conflict does not change the obligations incumbent on the other party to the conflict to weigh what constitutes an excessive attack in relation to concrete and direct military advantage.

68. The public statements of the Secretary-General of Hezbollah, Hassan Nasrallah, explicitly reject the requirements of international humanitarian law, and Hezbollah's conduct appears to reflect this lawless approach to the conduct of armed conflict. While many of his statements do recognize that there are valid distinctions between civilians and combatants and between civilian and military objects, they argue that Hezbollah has a right, and even a duty to disregard these distinctions in the pursuit of victory.

69. First, these statements reject the absolute character of the principle of distinction. Second, these statements argue that Hezbollah has a right to violate humanitarian law in so far as Israel does so: when “the Zionists” in their conduct abandoned all rules, red lines and limits of engagement, it became Hezbollah’s right to respond in like fashion. This analysis leads to the conclusion that so long as Hezbollah’s violations of the law are “reactions” to Israeli excesses - whether violations of the law or of otherwise defined limits of engagement - they are justified.

70. The notion that one party’s violation of humanitarian law may justify the other party’s violation is called reprisal. Leaving aside the question of requirements for a reprisal to be legitimate, reprisals against civilians are absolutely prohibited.

## G. CEASEFIRE AGREEMENTS AND HUMAN RIGHTS AND HUMANITARIAN LAW

*Report on Mission to Sri Lanka (E/CN.4/2006/53/Add.5, 27 March 2006, ¶¶ 4, 7- 9, 21, 24-27, 30, 33-34):*

4. The conflict in Sri Lanka involves the intentional targeting of both combatants and civilians. The 2002 Ceasefire Agreement addressed both kinds of violence, committing the Government and the Liberation Tigers of Tamil Eelam (LTTE) to halt “offensive military operation[s]” as well as “hostile acts against the civilian population”. Until December 2005, the ceasefire between the parties’ armed forces had been largely respected, with only few exceptions. In contrast, the ceasefire in relation to civilians has consistently been broken by a series of so-called “political killings”.

[...]

7. The primary participants in the conflict have been the Government and the LTTE. The latter began fighting the Government in the late 1970s with the aim of establishing the state of Tamil Eelam in the north and east of the island.<sup>97</sup> Since the February 2002 ceasefire, its control of significant areas in the north and east has been acknowledged. Until December 2005 direct clashes between the Government and the LTTE had been extremely rare, and most post-ceasefire killings were of persons belonging to neither of these parties. Incidents in which LTTE cadres fired on the armed forces were generally understood by the latter as “provocations” designed to elicit a violent response rather than as serious attempts to resume hostilities.

8. The conflict-related killings taking place in Sri Lanka today should be seen in the context of the Ceasefire Agreement (CFA) signed by the Government and the LTTE in February 2002. Both parties to the CFA have sought to consolidate and improve their positions by exploiting the ambiguities and opportunities presented by the terms of the agreement as well as weaknesses in its monitoring mechanism, the Sri Lanka Monitoring Mission (SLMM). The parties have continued to advance their interests, in significant part, by committing or permitting widespread killing.

9. When I talked with Government officials, members of civil society, and representatives of the LTTE, killings were often discussed as violations of one or another of the CFA’s provisions. It was suggested implicitly that violations of one provision are justified by violations of some other provision by another group. This form of justification is without legal basis, but it is critical to understanding the logic of the post-ceasefire killings.

[...]

21. One of the most disturbing aspects of post-ceasefire violence has been the use of killing to control the Tamil population. CFA article 2.1 requires that the parties “in accordance with international law abstain from hostile acts against the civilian population” and, indeed, such

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<sup>97</sup> Sri Lanka has a population of 20 million, of whom 74% are Sinhalese, 13% Sri Lankan Tamil, 7% Sri Lankan Moor and Malay Muslims, 6% Indian Tamil, and 1% other.

killings are prohibited by international human rights and humanitarian law apart from the CFA. However, the LTTE and, to a lesser extent, other groups have elected to reinforce their political and financial support from the Tamil population through the use of violence.

[...]

24. Within Sri Lanka the recent political killings have been discussed primarily in terms of the CFA. Insofar as the Government and the LTTE endeavour to comply with the agreement, it is an appropriate frame of reference. But international human rights and humanitarian law continue to apply and in some cases impose more exacting obligations.

25. Human rights law affirms that both the Government and the LTTE must respect the rights of every person in Sri Lanka. Human rights norms operate on three levels - as the rights of individuals, as obligations assumed by States, and as legitimate expectations of the international community. The Government has assumed the binding legal obligation to respect and ensure the rights recognized in the International Covenant on Civil and Political Rights (ICCPR). As a non-State actor, the LTTE does not have legal obligations under ICCPR, but it remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights.<sup>98</sup>

26. I have previously noted that it is especially appropriate and feasible to call for an armed group to respect human rights norms when it “exercises significant control over territory and population and has an identifiable political structure”.<sup>99</sup> This visit clarified both the complexity and the necessity of applying human rights norms to armed groups. The LTTE plays a dual role. On the one hand, it is an organization with effective control over a significant stretch of territory, engaged in civil planning and administration, maintaining its own form of police force and judiciary. On the other hand, it is an armed group that has been subject to proscription, travel bans, and financial sanctions in various Member States. The tension between these two roles is at the root of the international community’s hesitation to address the LTTE and other armed groups in the terms of human rights law. The international community does have human rights expectations to which it will hold the LTTE, but it has long been reluctant to press these demands directly if doing so would be to “treat it like a State”.

27. It is increasingly understood, however, that the human rights expectations of the international community operate to protect people, while not thereby affecting the legitimacy of the actors to whom they are addressed. The Security Council has long called upon various groups that Member States do not recognize as having the capacity to formally assume international obligations to respect human rights.<sup>100</sup> The LTTE and other armed groups must accept that insofar as they aspire to represent a people before the world, the international community will

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<sup>98</sup> Consistent with this analysis, the LTTE created North East Secretariat on Human Rights released the final version of the *NESOHR Charter* of human rights in Oct 2005. Its stated objectives include promoting respect for human rights “according to the Universal Declaration of Human Rights and the International Covenants on human rights ...”, available at <http://nesohr.org/charter/Charter-English.PDF>

<sup>99</sup> E/CN.4/2005/7, para. 76.

<sup>100</sup> SC Res. 1265 (1999), preamble; SC Res. 1193 (1998), paras. 12, 14; SC Res. 814 (1993), para. 13.

evaluate their conduct according to the Universal Declaration's "common standard of achievement".

[...]

30. In an armed conflict, human rights law is complemented by the additional regime of humanitarian law. In 1959 the Government ratified the Geneva Conventions of 12 August 1949, and the LTTE has formally taken upon itself obligations under the Geneva Conventions and its Additional Protocols.<sup>101</sup> All parties to the conflict are bound to comply with the terms of common article 3 of the Geneva Conventions of 1949 and of customary international humanitarian law. The Karuna group is a party to the conflict within the meaning of humanitarian law, regardless of whether it constitutes a paramilitary within the meaning of CFA article 1.8 and regardless of any support the Government may be providing. However, depending on the character of such support, the Government could also bear legal responsibility for its violations of humanitarian law.

33. The CFA has played a crucial role in ensuring the right to life in Sri Lanka. This role should not, however, lead to a de-emphasis of the requirements of human rights and humanitarian law. This is partly because the CFA binds only the Government and the LTTE; whereas, human rights and humanitarian law apply to all armed groups. It is also because the CFA affirms the international legal obligations of the parties only with respect to "civilians". In contrast, the right to life of "combatants" is only indirectly protected by the prohibition of offensive military operations.<sup>102</sup> Under international law, all Sri Lankans, regardless of whether they are civilians, are bearers of the right to life. This right must be respected by all the parties quite apart from the obligations of the Government and the LTTE to each other. Human rights law, humanitarian law, and the CFA are overlapping and mutually-reinforcing frameworks that together serve to protect human lives.

34. The Government has failed to effectively investigate most political killings. This is due both to the police force's general lack of investigative ability and to other impediments. When I asked police officers why a particular killing had not been resolved, I generally received the same answer: the suspect escaped into an LTTE-controlled area. While it is true that the police are unable to enter these areas,<sup>103</sup> two observations are in order. First, in many cases the belief that the suspect was in an LTTE-controlled area was speculation inasmuch as no investigation had been carried out. Second, the police have lost much of their appetite for serious investigations of political killings. Many officers operate under the impression that investigating any crime presumed to involve the LTTE would imperil the ceasefire. These cases are simply too hot to handle. The Government should unambiguously instruct the police that, while they are obligated

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<sup>101</sup> This acceptance is recorded in the Letter of Authorization for the Filing of a Legal Action and Representation of the Liberation Tigers of Tamil Eelam in the Judicial Review of the Terrorist Designation of the Organization Pursuant to Section 219 of the Anti-Terrorism and Effective Death Penalty Act of 1996 to the U.S. Court of Appeals, District of Columbia Circuit, from the LTTE International Secretariat, Nov. 6, 1997. The letter notes, *inter alia*, that the LTTE "never targets civilians who 'take no active part in the conflict'".

<sup>102</sup> CFA art. 1.2.

<sup>103</sup> The Civil Rights Movement of Sri Lanka, a non-governmental organization, has brought these cases to the attention of the Human Rights Commission (HRC), which has entrusted a retired judge with an enquiry into some of the cases. The HRC enquiry is in course at the time of writing.

not to violate the CFA, they continue to be obligated to investigate crimes and apprehend suspects within the terms of the law, regardless of who those suspects might be.

## H. INTERNATIONAL ACTORS AND MECHANISMS OF ACCOUNTABILITY

*Follow-up to Country Reports (Sudan)(E/CN.4/2006/53/Add.2)(28 February 2006, ¶¶ 120-121, 155-158):*

120. The Special Rapporteur requested that all “[a]ll attacks against the civilian population must stop. The Government must immediately ensure that all militias are disarmed, that the actions of the PDF [People’s Defence Forces] remain under its firm control and that all members of the PDF are properly screened.”<sup>104</sup>

121. The Special Rapporteur was not alone in demanding that the Government stop attacks against the civilian population and disarm the militias. The Security Council has urged the Government to do so in resolutions 1556 (2004), 1590 (2005), and 1591 (2005).<sup>105</sup> In resolution 2005/82 on the situation of human rights in the Sudan, the Commission on Human Rights called upon the Government to “continue its efforts aimed at finding a durable and peaceful solution to the problem in Darfur”, “stop and investigate violations of human rights”, “disarm the Janjaweed militias and stop supporting them, in conformity with the relevant Security Council resolutions” and to “improve security in and around the internally displaced persons’ camps”.

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

156. In conclusion I would like to offer some comments of a general nature on the potential which the precedent of the Commission of Inquiry holds for similar situations in the future.<sup>106</sup>

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

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<sup>104</sup> E/CN.4/2005/7/Add.2, 6 August 2004, para. 59.

<sup>105</sup> In Resolution of 1591(2005) of 29 March 2005, acting under Chapter VII of the Charter, the Security Council “[d] *eplores strongly* that the Government of Sudan and rebel forces and all other armed groups in Darfur have failed to comply fully with their commitments and the demands of the Council referred to in resolutions 1556 (2004), 1564 (2004), and 1574 (2004), condemns the continued violations of the 8 April 2004 N’djamena Ceasefire Agreement and the 9 November 2004 Abuja Protocols, including air strikes by the Government of Sudan in December 2004 and January 2005 and rebel attacks on Darfur villages in January 2005, and the failure of the Government of Sudan to disarm Janjaweed militiamen”.

<sup>106</sup> The argument contained in the following two paragraphs is developed in greater detail in Philip Alston, The Darfur Commission as a Model for Future Responses to Crisis Situations, *Journal of International Criminal Justice* 3 (2005), pp. 600 -607.

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

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

***Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009, Summary, 2, 71-78):***

The concern of the Special Rapporteur during his fact-finding mission to Afghanistan in May 2008 was to understand how and why these killings are happening, and to formulate recommendations directed at reducing civilian casualties, however or by whomever they are caused. To achieve that, the Special Rapporteur adopted a civilian-centric view of the conflict and sought to understand how the tactics of each side lead to civilian deaths, how conduct by one side increases the likelihood of killings of civilians by the other, and how civilians are trapped in a struggle to avoid military confrontations. Each of the military actors in the conflict shifts blame to the other for civilian deaths. The truth, however, is that the Taliban, Afghan forces and international military forces all bear responsibility for unlawful killings, and each bears responsibility for reducing the numbers of civilians killed in the conflict.

[...]

2. Afghanistan is not an easy country in which to be a civilian. Everyday activities are life threatening, and civilians are killed by all sides to the conflict. My concern is to reduce all unlawful killings, however or by whomever they are committed. This requires an assessment of how all parties to the conflict can modify their conduct so as to reduce the insecurity the war poses to the civilian population.

[...]

71. The Taliban should cease employing means and methods of warfare that violate international humanitarian law, and result in the unlawful killing of civilians. The Taliban leadership should issue clear orders to those carrying out attacks to abide by international law. This particularly includes the following:

(a) To stop threatening and assassinating civilians in all circumstances, including for their alleged failure to cooperate with the Taliban or for their decision to cooperate with the Government;

(b) To cease using civilians as “human shields” to deter attacks by international and Afghan military forces;

(c) To stop targeting civilians in suicide attacks, and cease engaging in perfidy (unlawful deception) during such attacks, including by disguising themselves as civilians, soldiers or police.

72. A serious effort should be made - including by human rights groups and inter-governmental institutions - to pressure and persuade the Taliban and other armed groups to respect human rights and humanitarian law. This effort should include developing contacts with them for the sole, dedicated purpose of promoting respect for human rights. Such efforts should be undertaken subject to security feasibility and in conformity with the provisions of Security Council resolution 1267.

#### IMF responses to civilian casualties

73. The international forces should ensure that allegations that soldiers have committed unlawful killings are fully investigated, and ensure that soldiers who have committed unlawful killings are prosecuted.

74. The international military forces should cooperate more fully with outside efforts - especially those of UNAMA and of the Afghanistan Independent Human Rights Commission - to investigate killings. This should include the expedited declassification and more comprehensive sharing of relevant information, including video footage and mission story-boards.

75. At the conclusion of military investigations into killings of civilians, information on the findings and reasoning should be made public. Such information should be provided to the families of the victims. In particular, the reasoning of the US Court of Inquiry decision on the 4 March 2007 Nangarhar incident should be made public.

76. The international forces should ensure that, despite the complexity of multiple mandates and disparate national criminal justice systems, any directly affected person can go to a military base and promptly receive information on who was responsible for a particular operation, or what the status is of any investigation or prosecution. To this end:

(a) Where the actions of soldiers are investigated or prosecuted within the troop-sending country, the progress of national processes of investigation, discipline and prosecution should be reported back to ISAF headquarters in Afghanistan;

(b) The progress and outcomes of national processes of investigation or prosecution should be centrally tracked by ISAF;

(c) This information should be made available to the various regional commands, to the Provincial Reconstruction Teams under their command, and provided to directly affected persons when requested.

77. When a raid is conducted by foreign intelligence personnel and Afghan forces outside the ANA's chain-of-command, the responsible Government should publicly clarify its involvement when allegations of abuse are made.

78. The international military forces should provide public information on the estimated numbers of civilians killed and wounded in air strikes, raids, and other military operations.

***Report on Mission to Sri Lanka (E/CN.4/2006/53/Add.5, 27 March 2006, ¶¶ 26-27, 42-44, 72, 89):***

26. I have previously noted that it is especially appropriate and feasible to call for an armed group to respect human rights norms when it "exercises significant control over territory and population and has an identifiable political structure".<sup>107</sup> This visit clarified both the complexity and the necessity of applying human rights norms to armed groups. The LTTE plays a dual role. On the one hand, it is an organization with effective control over a significant stretch of territory, engaged in civil planning and administration, maintaining its own form of police force and judiciary. On the other hand, it is an armed group that has been subject to proscription, travel bans, and financial sanctions in various Member States. The tension between these two roles is at the root of the international community's hesitation to address the LTTE and other armed groups in the terms of human rights law. The international community does have human rights expectations to which it will hold the LTTE, but it has long been reluctant to press these demands directly if doing so would be to "treat it like a State".

27. It is increasingly understood, however, that the human rights expectations of the international community operate to protect people, while not thereby affecting the legitimacy of the actors to whom they are addressed. The Security Council has long called upon various groups that Member States do not recognize as having the capacity to formally assume international obligations to respect human rights.<sup>108</sup> The LTTE and other armed groups must accept that insofar as they aspire to represent a people before the world, the international community will evaluate their conduct according to the Universal Declaration's "common standard of achievement".

[...]

42. Many representatives of civil society pressed on me the need for international human rights monitoring. This proposal was motivated by dissatisfaction with the accountability provided by the SLMM and the police. Some favoured a strengthened SLMM while others made the case for a completely new mechanism.

43. Arguments made by the latter group included:

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<sup>107</sup> E/CN.4/2005/7, para. 76.

<sup>108</sup> SC Res. 1265 (1999), preamble; SC Res. 1193 (1998), paras. 12, 14; SC Res. 814 (1993), para. 13.

- Ceasefire monitoring is inherently bound up in the peace process and even de-linking the facilitator from the SLMM cannot remove this conflict of interest;
- Public findings of responsibility for violations have little impact on the LTTE or the support it enjoys;
- Conflict-related human rights violations occur frequently throughout the country, but SLMM field offices are located only in the north and east;<sup>109</sup>
- The SLMM's institutional inertia and low public standing call for an entirely new initiative;
- Human rights violations by the Karuna group must be investigated and exposed, but it is not bound by the CFA.

44. A range of candidates was identified as possible providers of a new human rights monitoring role. Foremost among these was the United Nations, which has both an established expertise in human rights monitoring and a lack of political involvement in the peace process. Other candidates were the Sri Lanka Donor Co-Chairs, some unspecified but non-Nordic country, and a "high-level panel" of human rights experts. There was a general consensus that, even were its resources greatly increased, the Sri Lanka Human Rights Commission would not be an appropriate body to investigate political killings countrywide.<sup>110</sup> Few of my interlocutors felt that effective monitoring could be conducted without the participation of the LTTE.

72. In any revision of the CFA, the monitoring role of the SLMM should be de-linked from the role of facilitating the peace process. As a more immediate measure, steps should be taken to strengthen the SLMM's work, including:

- (a) More sustained follow-up to killings with a view to identifying the party and persons responsible;
- (b) The prompt and accessible publication, within necessary limits, of complaints received and of the results of investigations;
- (c) The establishment of a protocol to better protect witness identities;
- (d) The designation of a senior human rights officer in each SLMM field office and a senior focal point in headquarters.

[...]

89. The Governments of all United Nations Member States in which there is a significant Tamil diaspora should enter into serious dialogue with those communities in light of the findings in this report. The diaspora has a responsibility to use its considerable political and financial influence and funding to promote and to insist upon respect for human rights.

***Follow-up to Country Recommendations (Sudan section) (E/CN.4/2006/53/Add.2, 28 February 2006, ¶¶ 126-128):***

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<sup>109</sup> See CFA art. 3.6.

<sup>110</sup> Following the 2003 peace talks in Hakone, it was envisioned that, with international support, the HRC would play the lead monitoring role. However, the HRC itself has stated "its belief that no national or regional human rights entity will be able to effectively monitor and implement human rights standards in the north and the east. No organization or individual enjoys that kind of universal authority and legitimacy." Human Rights Commission of Sri Lanka, *The Human Rights Situation in the Eastern Province (Dec. 2003)*, p. 33.

126. The Special Rapporteur recommended that “[t]he United Nations must continue to emphasize the need to protect the human rights of civilians. An international presence is of the utmost importance to guarantee consistency, impartiality and neutrality. The Government must ensure that immediate and complete access is provided to humanitarian actors as well as international human rights monitors, so that the international community has every opportunity, in cooperation with the Government, to protect the lives of vulnerable persons in Darfur.” (para. 59).

127. As highlighted above, both the Security Council and the Commission on Human Rights have continued to follow the situation in the Darfur and to urge the Government (as well as the other armed groups on the ground) to stop their attacks on the civilian population. The international presence in the Darfur (as far as inter-governmental organizations are concerned) consists of the African Union Mission in Sudan (AMIS) and the human rights monitors of the United Nations Mission in Sudan (UNMIS). AMIS was established by the African Union (AU) in April 2004 as a monitoring mission following the signing of the Humanitarian Ceasefire Agreement on 8 April 2004 between the Government and two rebel movements from the Darfur region. It is primarily charged with protecting internally displaced persons (IDPs) in camps from militia attacks.<sup>111</sup> In carrying out their mandate AMIS troops themselves have come under attack and suffered casualties.<sup>112</sup>

128. The first UN human rights monitors were deployed to Darfur in August 2004 after the Government and the United Nations signed a joint communiqué that committed the Government to allow their deployment. Security Council resolution 1590 (2005) of 24 March 2005, establishing UNMIS, “urges the Secretary-General and the High Commissioner for Human Rights to undertake to accelerate the deployment of human rights monitors to Darfur and augment their numbers and also to move forward with the formation of civilian monitoring protection teams”. The number of human rights monitors has since then grown considerably.<sup>113</sup>

***Follow-up to Country Recommendations—Sri Lanka (A/HRC/8/3/Add.3, 14 May 2008, ¶¶ 14, 35, 61-62):***

14. This would appear to explain why the recommendations of the Special Rapporteur to the Government and the LTTE have been almost completely disregarded. It does not, however, explain why there has been no meaningful responses by the Human Rights Council or the General Assembly. Even when the Special Rapporteur stated unambiguously that “[t]oday the alarm is sounding for Sri Lanka” and that “[i]t is on the brink of a crisis of major proportions” and provided recommendations as to how the General Assembly could take steps to avert this crisis, no action was taken. This follow-up report provides an opportunity for action. The international community, including the Human Rights Council, ought to make clear to both

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<sup>111</sup> The High Commissioner’s Second Periodic Report, p. 16, provides examples of how AMIS presence did in fact locally improve the human rights situation.

<sup>112</sup> On 8 October 2005, Sudan Liberation Army (SLA) forces killed three AMIS soldiers and two civilian drivers, and a JEM splinter faction detained 38 others.

<sup>113</sup> As of 30 November there were fifty-seven human rights officers working for UNMIS. The majority of staff were located in the four UNMIS Darfur field offices in El Fasher (North Darfur), El Geneina and Zalingei (both in West Darfur), and Nyala (South Darfur).

parties to the conflict that impunity is impossible in the long-run and that international support and condemnation are tied to respect for human rights.

[...]

35. In the Special Rapporteur's report on his visit to Sri Lanka, he recommended the establishment of an international human rights monitoring mission.<sup>114</sup> In a subsequent report to the General Assembly, following the expulsion of EU nationals from the SLMM, he emphasized the urgency of this need and elaborated on why international human rights monitoring could play an important role in Sri Lanka.<sup>115</sup> He observed that the conflict between the Government and LTTE is ultimately a struggle for legitimacy, not territory. In other words, the conflict has no military solution, and mere adjustment of the facts on the ground will not fundamentally change either party's position in future negotiations. Thus, precisely because the struggle for legitimacy, including international legitimacy, is so central to this conflict, the international community is exceptionally well positioned to contribute to its amelioration and, ultimately, to its resolution. Thus the critical need is for international human rights monitoring that would definitively identify those responsible for abuses. Effective monitoring would stand a real chance of inducing genuine rather than simulated respect for human rights. Such respect - worthwhile in its own right - would, in turn, also create an environment in which the country's communities might be able to envision a future in which they did not fear peace as well as war. These considerations remain valid today as an increase in human rights abuse has been accompanied by a decrease in human rights monitoring of any form.

[...]

61. In his report, the Special Rapporteur noted that Governments as well as armed opposition groups are generally constrained to take account of human rights by the need to retain popular support within their constituencies. He observed that the LTTE has, however, been able to circumvent many of these constraints by relying so heavily for its financial and political support on a constituency that is largely exempted from its violence, the Sri Lankan Tamil diaspora. The Special Rapporteur stated that the diaspora must accept the responsibility that comes with influence and insist on being a positive force for human rights. With this in mind, he recommended that the Governments of the states in which they live should enter into a serious dialogue with them on the findings in this report and the opportunities they might have to promote respect for human rights.

62. Since that time, some of the relevant Governments have made efforts to improve dialogue with members of the Tamil diaspora. Particularly notable has been the inclusion of members of the Tamil diaspora holding a range of political views in hearings held by the Parliament of the United Kingdom and the Congress of the United States of America.

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<sup>114</sup> See also A/61/311, paras. 18-23, 67.

<sup>115</sup> A/61/311, para. 21.

## I. METHODS AND MEANS OF WARFARE

1. “Mercy killings”
2. Cluster Bombs
3. Principles of distinction and proportionality; obligation to take precautions
4. “Drone” killings
5. Airstrikes
6. Raids
7. Use of perfidy and effects on civilians
8. Suicide attacks
9. Human shields
10. Killing of persons *hors de combat*
11. Urban counter-insurgency

### 1. “Mercy killings”

*Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/HRC/4/20, 29 January 2007, ¶¶ 29-38 ):*

29. The expression “mercy killings” has recently been used to characterize certain killings by the military in the context of armed conflicts. One example concerns the court martial of Capt. Rogelio Maynulet for the shooting of an Iraqi man in Baghdad in May 2004. A “mercy killing” argument was central to the defence.<sup>116</sup> Although originally charged with murder for shooting twice at point-blank range,<sup>117</sup> Maynulet was ultimately convicted of assault with intent to commit voluntary manslaughter and sentenced to dismissal from the army and no confinement.<sup>118</sup> Another example, also from Iraq, is the invocation of a mercy killing defence for two soldiers who mistakenly opened fire on what appears to have been a group of non-combatant teenagers. Realizing their mistake, medics hurried to treat the injured, when, according to reports,

“[a] dispute broke out among a handful of soldiers standing over one severely wounded young man who was moaning in pain. An unwounded Iraqi claiming to be a relative of the victim pleaded in broken English for soldiers to help him. But to the horror of bystanders, Alban, 29, a boyish-faced sergeant who joined the Army in 1997, retrieved an M-231 assault rifle and fired into the wounded man’s body. Seconds later, another soldier, Staff Sgt. Johnny Horne, Jr., 30, of Winston-Salem, NC, grabbed an M-16 rifle and also shot the victim”.<sup>119</sup>

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<sup>116</sup> “Charges Reduced in Iraq Killing”, *Los Angeles Times*, Dec. 8, 2004; “U.S. Officer Calls Killing an Act of Mercy”, *New York Times*, 9 September, 2004.

<sup>117</sup> *Id.*

<sup>118</sup> “Army Officer Convicted in Iraqi’s Death Is Freed”, *New York Times*, April 2, 2005.

<sup>119</sup> “‘Mercy killing’ of Iraqi revives GI conduct debate”, *Los Angeles Times*, Nov. 5, 2004.

30. On this basis United States officials characterized the shooting as a “mercy killing”, citing statements by Alban and Horne that they had shot the wounded Iraqi “to put him out of his misery”.<sup>120</sup> Subsequently, other soldiers present at the scene expressed surprise that the victims were not rushed to hospital.<sup>121</sup> In January 2005, Alban was convicted of murder and conspiracy to commit murder after a one-day court martial in Baghdad. He was sentenced to one year’s confinement, demotion to private and a bad-conduct discharge.<sup>122</sup>

31. A third example concerns a recommendation that Specialist Juston R. Graber be court-martialled for killing an Iraqi in a raid on a potential insurgent stronghold north-west of Baghdad. Informed reports suggest that the “mercy killing” defence would also be raised in this case, as Graber allegedly shot the Iraqi in the head as the man lay dying.<sup>123</sup>

32. Despite the extent to which military officials, commentators, and even military judges seem willing to entertain a “mercy killing” defence, it is clear that such a characterization is entirely unacceptable under the applicable rules of international humanitarian law. In international armed conflicts, article 12 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention) is clear that the wounded or sick “shall be respected and protected in all circumstances ... Any attempts upon their lives, or violence to their persons, shall be strictly prohibited; in particular, they shall not be murdered ...”.<sup>124</sup> The ICRC Commentary on this provision, based on the *travaux préparatoires*, considers such “derelictions of duty ... [to be] the gravest a belligerent can commit in regard to the wounded and sick in his power”.<sup>125</sup> It notes that “the heinous crimes in question were already prohibited in the 1929 text, which established the principle of respect and protection in all circumstances - a principle which is general and absolute in character”.<sup>126</sup>

33. Although the Geneva Conventions of 1949 limited most protection of the wounded and sick to a narrow class of “protected persons”, the First Additional Protocol to the Geneva Conventions expanded the scope of protection to cover all persons affected by international armed conflict. Article 75 of Additional Protocol I extends protection to those persons who do not qualify for the status of “protected persons” under the 1949 Conventions; this article includes protection against “violence to ... life, health, or physical or mental well-being ... in particular, murder”.<sup>127</sup> Similarly, article 8 (a) of Protocol I expands the definition of “wounded and sick” to

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> “U.S. soldier convicted in ‘mercy killing’”, *Desert News* (Salt Lake City), Jan. 15, 2005.

<sup>123</sup> “Army Officer Calls for Death In Slaying Case”, *New York Times*, September 3, 2006.

<sup>124</sup> Geneva Convention I, 1949, Art. 12. Article 12 of Geneva Convention II contains an equivalent prohibition concerning wounded or shipwrecked at sea.

<sup>125</sup> *ICRC Commentary to the First Geneva Convention of 1949*, p. 138.

<sup>126</sup> *Id.*

<sup>127</sup> Additional Protocol I to the Geneva Conventions (1977), Art. 75(2)(a)(i). The Commentary to this provision states explicitly that “cases in which the status of prisoner of war or of protected person were denied to certain individuals, the protection of Article 75 must be applied to them as a minimum”. *Commentary to the First Additional Protocol to the Geneva Conventions*, p. 866, para. 3014. For a similar situation with respect to another provision of the Geneva Conventions (Fourth Geneva Convention, Art. 4), See *Congo v. Uganda, I.C.J. Reports 2005, Judgment of 19 Dec. 2005*, Separate Opinion of Judge Simma, para. 26 (“The gap thus left by Geneva Convention Article 4 has in the meantime been - deliberately - closed by Article 75 of Protocol I Additional to the Geneva Conventions of 1949.”).

include civilians as well as soldiers.<sup>128</sup> Such persons would also benefit from the protection of common article 3 to the Geneva Conventions, as discussed below, which constitute “a minimum yardstick” applicable to all armed conflicts.<sup>129</sup>

34. In non-international armed conflicts, common article 3 to the Geneva Conventions requires that “members of armed forces ... placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely ... . To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds”.<sup>130</sup> Additional Protocol II further states that “[a]ll the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict, shall be respected and protected”<sup>131</sup> and “all possible measures shall be taken ... to search for and collect the wounded ... [and] protect them against ... ill-treatment”.<sup>132</sup>

35. The prohibition of murder of persons *hors de combat* and the obligation to protect the wounded from adverse treatment are norms of customary international law applicable in both international and non-international armed conflicts.<sup>133</sup>

36. Although such “mercy killings” are sometimes presented as a “necessary evil” of war, such an analysis contradicts the foundations of the applicable law. Once enemy combatants have been rendered *hors de combat* by injury, they are no longer a threat to the opposing combatants, and there is simply no reason why it would be “necessary” to kill them.<sup>134</sup>

37. Proponents of “mercy killings” often justify them out of compassion, but in practice they are much more likely to reflect an underlying dehumanization of the enemy. For example, Iraqis who witnessed the shootings by Alban and Horne said that “rather than provide medical help to an injured civilian, the soldiers had treated the Iraqi as if he were an animal struck by a car”.<sup>135</sup>

38. It warrants underlining the fact that international humanitarian law does not allow – under any circumstances - the taking of the life of another as a purported act of “mercy”. The obligation to treat injured soldiers “humanely” and the obligation to “respect and protect” the

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<sup>128</sup> Protocol I, Art. 8(a). As the ICRC Commentary makes clear, the Protocol therefore “does not retain the distinction made between these two categories by the Conventions as regards the wounded and sick. On this basis a wounded soldier and a wounded civilian are entitled to identical protection.” *Commentary to Protocol I*, p. 117, para. 304. See also First Additional protocol to the Geneva Conventions, Article 10.

<sup>129</sup> Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), 1986 I.C.J. Reports, p. 114, para. 218.

<sup>130</sup> Geneva Conventions of 1949, Common Article 3.

<sup>131</sup> Additional Protocol II, Art. 7(1).

<sup>132</sup> Additional Protocol II, Art. 8.

<sup>133</sup> International Committee of the Red Cross, *Customary International Humanitarian Law* (Jean-Marie Henckaerts & Louise Doswald-Beck, eds. 2005) (hereinafter “ICRC Study on Customary law”), pp. 306-308 (Rule 87 - civilians and persons *hors de combat* must be treated humanely), pp. 311-314 (Rule 89 - prohibition of murder of persons *hors de combat*), pp. 403-405 (Rule 111 - protection of wounded, sick, and shipwrecked).

<sup>134</sup> See, e.g., *ICRC Commentary to the First Geneva Convention of 1949*, p. 136 (“It is only the soldier who is himself seeking to kill who may be killed. The abandonment of all aggressiveness should put an end to aggression.”).

<sup>135</sup> “‘Mercy Killing’ of Iraqi Revives GI Conduct Debate”, *supra* note 34.

wounded are incompatible with the idea of “mercy killings”. Rather, the obligation of parties to a conflict, in the presence of injured persons, is (i) to “take all possible measures to search for, collect and evacuate the wounded, sick and shipwrecked without adverse distinction”<sup>136</sup> and (ii) to seek the appropriate medical care to the fullest extent practicable and with the least possible delay.<sup>137</sup> Individual parties to the conflict, who lack medical training, may not take the medical care of the wounded into their own hands by deciding to end the life of an injured person on the battlefield. Such killings are an unequivocal violation of international humanitarian law.

## 2. Cluster bombs

*Report on Mission to Israel and Lebanon (A/HRC/2/7, 2 October 2006, ¶¶ 52, 55-57, 87,103, 107):*

52. The principal concern of many of the mission’s interlocutors in Lebanon was the massive use by IDF of cluster munitions and the ongoing impact of unexploded sub-munitions (bomblets) on the civilian population.

[...]

55. The justification given by the Government of Israel for the use of cluster bombs is that they were the most effective weapon against Hezbollah rocket launch sites. This argument is, in the abstract, compatible with a military rationale for the use of anti-personnel cluster bombs, as the radius of damage extends to the size of a football field and thus is able to neutralize mobile rocket launchers. The IDF interlocutors of the mission did not provide any information that would confirm that these weapons were in practice used in a manner consistent with this military rationale.

56. Regardless of whether the military rationale was sound, the use of cluster munitions was inconsistent with principles of distinction and proportionality. Israel could not reasonably have been ignorant of the fact that the sub-munitions dispersed by cluster munitions have a high failure (dud) rate. In effect, then, the decision was taken to blanket an area occupied by large numbers of civilians with small and volatile explosives. The impact of these bomblets would obviously be indiscriminate and the incidental effects on civilians would almost certainly be disproportionate. Nothing the mission heard from IDF suggests that their long-term effects on the civilian population was considered problematic before the decision to use cluster munitions was made. The mere fact that cluster munitions are not a banned weapon should not have led Israel to overlook other requirements of international humanitarian law.

57. Moreover, one government official acknowledged that cluster bombs were used in part to prevent Hezbollah fighters from returning to the villages after the ceasefire. As these sites were

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<sup>136</sup> First Geneva Convention, art. 15; Second Geneva Convention, Art. 18; Fourth Geneva Convention, Art. 16(2); Additional Protocol I, Art. 10; Geneva Conventions, Common Art. 3; Additional Protocol II, Art. 8, *ICRC Study on Customary Law*, *supra* note 49, at pp. 396-399 (Rule 109).

<sup>137</sup> First Geneva Convention, Arts. 12(2), 15(1); Second Geneva Convention, Arts. 12(2), 18; Fourth Geneva Convention, Art. 16(1); Geneva Conventions, Common Art. 3; Additional Protocol II, Arts. 7-8; *ICRC Study on Customary law*, *supra* note 49, at pp. 400-403.

often located in civilian built-up or agricultural areas, the long-term effect on the civilian population should have been obvious.<sup>138</sup> This rationale would be consistent with reports from UNMACC and other sources that the majority of the cluster munitions were delivered in the final 72 hours of the conflict, when a ceasefire was imminent. While some Government of Israel interlocutors denied the allegation, others spoke of a gradual crescendo in the use of cluster bombs during the last 10 days of the conflict.

[...]

87. The existence of highly volatile, unexploded cluster bomb sub-munitions constitutes a threat to clearing building rubble and, more generally, to the rights to life and health of the population, as evidenced by the 104 casualties they caused as of 23 September 2006, 14 of which were fatal.<sup>139</sup> Until the identification of cluster bomb strike locations and the clearance of the sites are completed, or at least significant progress made (a process which UNMACC estimates will take 12-15 months<sup>140</sup>), people will not be able to go back to their homes, children will not be able to go to school and returnees previously active in agriculture will be deprived of a livelihood.<sup>141</sup>

[...]

103. The mission makes the following recommendations to the Government of Israel: (a) The Government should provide the full details of its use of cluster munitions in order to facilitate the destruction of the unexploded ordnance and to minimize civilian casualties. Despite claims that the relevant “maps” have been provided to the Lebanese authorities, the evidence indicates that the information provided has been inadequate and largely unhelpful. The Government should immediately provide comprehensive information, including the grid references of the targets, and should cooperate fully in the programme to eliminate the remaining unexploded bomblets....

(d) The Human Rights Council should request the relevant international bodies - including the Meetings of States Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects and to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction - to take urgent action to add cluster munitions to the list of weapons banned under international law.

[...]

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<sup>138</sup> On the question of the adequacy of the provision of maps by Israel, see the conclusions addressed to the Government of Israel below.

<sup>139</sup> <http://www.mineaction.org/overview.asp?o=540>.

<sup>140</sup> UNMACC estimate dated 23 September 2006.

<http://www.maccsl.org/reports/Leb%20UXO%20Fact%20Sheet%2023%20September%202006.pdf>.

<sup>141</sup> The situation regarding the livelihood of the affected populations in particular in the south of the country raises important concerns. According to the *Rapid Preliminary Damage Assessment*, see note 52 above, the armed conflict resulted in the destruction of 545 cultivated fields in South Lebanon, with an overall 10.6 ha of land damaged. Additionally, and possibly more seriously, access to agricultural land is hampered due to the high number of road sections destroyed or damaged in rural areas. The most serious problem for the resumption of agriculture, and thus for the livelihood of returnees, is however represented by the hundreds of thousands of unexploded cluster bomb sub-munitions, a good portion of which lies in fields and olive groves.

107. (b) While cluster munitions do not per se violate international law, the manner in which they were used by Israel appears to have been inconsistent with the principles of distinction and proportionality. If proven, the widely reported claim that the great majority of these bombs were dropped in the final 72 hours of the campaign, when a ceasefire was imminent, would indicate an intention to inhibit and prevent the return of civilians and a reckless disregard for the predictable civilian casualties that have occurred. These issues warrant in-depth analysis by the Commission.

### 3. Principles of distinction and proportionality; obligation to take precautions

*Report on Mission to Israel and Lebanon (A/HRC/2/7, 2 October 2006, ¶¶ 25-28, 35, 37-51, 66, 68, 75):*

25. First, under the principle of distinction, the parties to a conflict must at all times distinguish between civilians and combatants,<sup>142</sup> and attacks may be directed only at military objectives, defined as those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.<sup>143</sup> The only circumstance in which civilians may be targeted is for such time as they take a direct part in hostilities.<sup>144</sup> Thus, attacks on civilian objects<sup>145</sup> are unlawful unless at the time of the attack they were used for military purposes and their destruction offered a definite military advantage.

26. Indiscriminate attacks are similarly prohibited.<sup>146</sup> They are those which (i) are not directed at a specific military objective; (ii) employ a method or means of combat which cannot be directed at a specific military objective; or (iii) employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.<sup>147</sup> Attacks by bombardment, including with rockets, which treat as a single military objective a number of clearly separated and distinct military objectives located in an urban area or rural village are prohibited.<sup>148</sup> The prohibition of indiscriminate attacks must not only determine the strategy adopted for a particular military operation but also limit the use of certain weapons in situations where the civilian population will be affected.

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<sup>142</sup> International Committee of the Red Cross, *Customary International Humanitarian Law*, Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), Cambridge University Press, 2005 (hereafter “ICRC Study”), pp. 3-8 (Rule 1), 25-36 (Rules 7-10). This study was prepared upon recommendation of the twenty-sixth International Conference of the Red Cross and Red Crescent (December 1995) and is based on an extensive analysis of State practice (e.g. military manuals) and documents expressing *opinion iuris*. The application of these customary standards to the present conflict has been the subject of extensive analysis by civil society groups. See for example Human Rights Watch, *Fatal Strikes: Israel’s Indiscriminate Attacks Against Civilians in Lebanon* (August 2006); Human Rights Watch, *Hezbollah Must End Attacks on Civilians* (August 2006); Amnesty International, *Deliberate destruction or “collateral damage”? Israeli attacks on civilian infrastructure* (August 2006); and Amnesty International, *Under fire: Hizbullah’s attacks on northern Israel* (September 2006).

<sup>143</sup> *Ibid.*, pp. 25-32 (Rules 7-8).

<sup>144</sup> *Ibid.*, pp. 19-24 (Rule 6).

<sup>145</sup> *Ibid.*, pp. 32-34 (Rule 9).

<sup>146</sup> *Ibid.*, p. 37 (Rule 11).

<sup>147</sup> *Ibid.*, pp. 40-43 (Rule 12).

<sup>148</sup> *Ibid.*, pp. 43-45 (Rule 13).

27. Second, under the principle of proportionality, attacks on legitimate military objectives which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, are prohibited.<sup>149</sup>

28. Third, an attacker must take all feasible precautions to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.<sup>150</sup> A number of specific precautionary measures are prescribed by humanitarian law in relation to the planning and conduct of attacks.<sup>151</sup> In addition, an attacker is required to give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit.<sup>152</sup>

[...]

35. Both for principled and pragmatic reasons, Israel set certain limits on the conduct of its hostilities with Hezbollah.<sup>153</sup> The mission was informed by IDF representatives that Israel followed its practice of drawing up lists of potential targets, with each individual target, as well as the type of weapon to be used, being reviewed by an IDF expert in humanitarian law.

36. Israel made extensive use of leaflets dropped from the air and of telephone calls to warn civilians of impending attacks, an obligation which applies unless circumstances do not permit.<sup>154</sup> While the mission found some aspects of the warnings to be highly problematic (see para. 66 below), they certainly saved many lives, both in south Beirut and south of the Litani river.

37. But despite Israel's stated goal of conducting hostilities within the parameters set by international humanitarian law,<sup>155</sup> the actual practice fell short in various respects, including:

- A refusal to consistently distinguish Hezbollah fighters from civilians, including civilian members of Hezbollah;
- An approach to vetting targets that appears to have treated entire categories of dual-use objects as legitimate military objectives; and

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<sup>149</sup> Ibid., p. 48 (Rule 14).

<sup>150</sup> Ibid., p. 51 (Rule 15).

<sup>151</sup> Ibid., pp. 51-67 (Rules 15-21).

<sup>152</sup> Ibid., pp. 62-65 (Rule 20).

<sup>153</sup> As the Government of Lebanon has stated: "Israel has largely avoided some types of targets: major power plants, water treatment facilities, telephone systems, central government buildings and most factories. The bombing has focused on Shiite areas of southern Lebanon and the Beirut suburbs". Government of Lebanon, "Setting the stage for long-term reconstruction: The national early recovery process", Stockholm Conference for Lebanon's Early Recovery, 31 August 2006.

<sup>154</sup> ICRC Study, see note 21 above, Rule 20.

<sup>155</sup> The mission also took note of statements by some Israeli officials that are incompatible with international humanitarian law. For example, Haim Ramon, at the time Israeli Justice Minister, is reported to have said that "in order to prevent casualties among Israeli soldiers battling Hezbollah militants in southern Lebanon, villages should be flattened by the Israeli air force before ground troops moved in" (BBC, 27 July 2006).

- The reckless, perhaps even deliberately reckless, use of cluster munitions

## 2. Attacks on Hezbollah and the principle of distinction

38. One well-informed analysis of Israel's targeting policies concluded that they were premised upon the permissibility of targeting the whole of Hezbollah's infrastructure: "Targets belonging to the Hezbollah infrastructure which support the terrorist-operative apparatus in the Shi'ite neighborhoods of south Beirut (e.g., Dahiya) and other locations in Lebanon [are]: headquarters, offices, buildings serving Hezbollah's various branches, leaders' residences and the bunkers they are hiding in, as well as the organization's 'information' infrastructure (Al-Manar TV) and offices of the organization's social and financial infrastructure."<sup>156</sup>

39. Such an enumeration of permissible targets is inconsistent with the principle of distinction.

40. While Hezbollah was in conflict with Israel, it does not follow that every member of Hezbollah could be justifiably targeted. Individuals do not become legitimate military objectives unless they are combatants or civilians directly participating in hostilities. Many members and supporters of Hezbollah do not meet either criterion. Similarly, not every building owned by or associated with Hezbollah constituted a legitimate military objective. Hezbollah is, in addition to being an organization using violence, a political movement and social services enterprise, particularly in the *Dahiye* and the areas of southern Lebanon with a Shiite majority population. It runs medical facilities, schools, groceries, an orphanage, a garbage service and a reconstruction programme for homes damaged during Israel's invasion. It is the country's second-largest employer,<sup>157</sup> holds 14 seats in parliament and, since 2005, is part of the Government.

41. Various Israeli targeting decisions operationalized this failure to distinguish military from civilian objectives. For example, some of the warnings stated that, "[a]ny vehicle of any kind travelling south of the Litani River will be bombarded, on suspicion of transporting rockets, military equipment and terrorists".<sup>158</sup> Israel's responsibility to distinguish between combatants and civilians is in no way discharged by warning civilians that they will be targeted. Warnings are required for the benefit of civilians, but civilians are not obligated to comply with them. A decision to stay put — freely taken or due to limited options — in no way diminishes a civilian's legal protections. It is categorically and absolutely prohibited to target civilians not taking a direct part in hostilities.

42. As regards the destruction of high-rise buildings in the south-eastern suburbs (*Dahiye*) of Beirut, Israeli bombing destroyed about 150 apartment buildings and damaged approximately the same number. Because the buildings, which would normally have housed between 30,000 and

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<sup>156</sup> IDF, Intelligence and Terrorism Information Center at the Center for Special Studies (CSS), "The IDF-Hezbollah confrontation (Updated on the morning of Thursday, July 20)," 20 July 2006.

<sup>157</sup> Robin Wright, "Inside the Mind of Hezbollah", *The Washington Post*, 16 July 2006, at <http://www.washingtonpost.com>.

<sup>158</sup> Translation from Arabic provided in Israel Ministry of Foreign Affairs, "IDF warns Lebanese civilians to leave danger zones" (25 July 2006) at <http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Terrorism+from+Lebanon+Hizbullah/IDF+warns+Lebanese+civilians+to+leave+danger+zones+3-Aug-2006.htm>.

60,000 persons,<sup>159</sup> had been nearly entirely evacuated before they were struck, the loss of life was limited. Because the mission was not able to obtain from the Lebanese authorities disaggregated data about the geographical distribution within Lebanon of the overall 1,191 deaths, a more precise statement is not possible at this stage. It also remains, moreover, unclear how many of those killed were Hezbollah fighters.<sup>160</sup>

43. The IDF position is that each building targeted constituted a specific military target according to the definition of Hezbollah infrastructure outlined above, the most important being the Hezbollah headquarters and the bunkers with alleged long-range rocket launch sites. They argue that the fact that individual buildings remain standing next to others completely destroyed shows that IDF targeting was appropriately selective. The mission's requests for specific information as to the military objective pursued with the destruction of each building and the concrete and direct military advantage anticipated at the time of attack, however, remained unanswered on the grounds that such information must remain classified. This response is inadequate, however, in light of the evidence available.<sup>161</sup>

44. In South Lebanon,<sup>162</sup> thousands of buildings were destroyed and many others damaged by IDF attacks.<sup>163</sup> The mission did not obtain any precise data as to the overall number of persons killed in South Lebanon during the conflict although it is clear that a great many civilians were killed. As to the number of Hezbollah fighters among the dead, figures contained in Hezbollah statements vary widely from those provided by the Government of Israel.<sup>164</sup>

45. The mission drove through a stretch of South Lebanon from Tyre to Ayta ash-Shab through Qana and Bint Jbeil and its members witnessed the destruction of hundreds of houses, some of which had been bulldozed.

46. According to Israel, buildings were targeted in the "air war" primarily on the basis that they served as launching or storage sites for rockets or other materiel, and secondarily on the basis that they hosted Hezbollah fighters. Video footage provided by Israel shows instances of rockets being fired from residential buildings and thus confirms instances of Hezbollah abusing civilian

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<sup>159</sup> Different sources provide varying data about the number of buildings and housing units destroyed in the *Dahiye*, as well as on the population of the destroyed and damaged buildings. For details, see note 60 below.

<sup>160</sup> Information referred to by the Government of Israel named some 400 alleged Hezbollah fighters as being among the total and claimed that an additional 200 of those killed were also fighters.

<sup>161</sup> See the recommendation in para. 103 (b) of the Report.

<sup>162</sup> The term South Lebanon is used to refer to the three districts of Tyre, Bint Jbeil and Marjayoun.

<sup>163</sup> These figures are taken from the *Rapid Preliminary Damage Assessment* (p. 6) prepared by the European Commission Joint Research Centre (JRC) and the European Union Satellite Centre (EUSC) with a view to the 31 August 2006 Stockholm Conference on Lebanon's Early Recovery, <http://www.lebanonundersiege.gov.lb/Documents/rapidpreliminarydamageassessment.pdf>. Buildings include residential buildings, medical facilities, industrial buildings and greenhouses. In Tyre, the only district for which disaggregated data are available, 292 of the 306 destroyed buildings were residential.

<sup>164</sup> According to statements by Hezbollah, 74 Hezbollah combatants were killed – in all of Lebanon – in the course of the armed conflict (Amal also announced the death of 17 fighters; the Popular Front for the Liberation of Palestine-General Command (PFLP-GC) announced the deaths of two fighters). IDF, on the other hand, IDP informed the mission that 600 fighters were killed (400 of whom it reports having identified by name). In statements to the media, the IDF Chief of Staff reportedly stated that 650 Hezbollah fighters were killed, adding that this was not a final figure (YnetNews, "Halutz: I don't need a lawyer", 20 September 2006 <http://www.ynetnews.com/Ext/CompArticleLayout/CdaArticlePrintPreview/1,2506.L-3306396.00.html>.)

objects in its military operations. But this cannot be dispositive justification for the destruction of hundreds of civilian houses in South Lebanon, nor other distant houses or infrastructure. In order to show that the attacks did not violate the principles of distinction and proportionality and the prohibition of indiscriminate attacks Israel would need to provide substantially more and qualitatively different information relating to questions such as the kind of information on the basis of which specific houses and villages were targeted, the time lapse between the firing of a rocket from a house or village and the IDF attack in response, and the estimate by IDF of civilian presence in and around the target at the time of the strike. In the absence of such information the mission cannot conclude that the widespread targeting of civilian houses by IDF complied with international humanitarian law. In the absence of systematic evidence of any type, however, it is impossible to confirm the validity of the claim that every target was a legitimate military objective or that the principle of distinction was respected.<sup>165</sup>

47. The same conclusion must be drawn regarding the reports of 12 destroyed and 38 severely damaged health facilities, notably in Bent Jbeil, Marjayoun and Nabatieh.<sup>166</sup> Ambulances and medical convoys were, according to ICRC, also hit during the conflict.<sup>167</sup> In the absence of concrete evidence to the contrary, it must be assumed that the health facilities and ambulances attacked were not legitimate targets. In this context it is important to stress that killing persons placed *hors de combat* is prohibited at any time and in any place whatsoever.<sup>168</sup>

48. There are well-documented reports of IDF strikes on civilian convoys fleeing villages in the South as a result of IDF warnings, including that which killed 21 civilians fleeing Marwahin.<sup>169</sup> Israel has generally not disputed that these strikes occurred or that deaths resulted, but it has argued that if civilian convoys were attacked it was justified by Hezbollah's abuse of civilian convoys to move around fighters and materiel. The mission could not carry out any significant

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<sup>165</sup> For international humanitarian law prohibitions on destroying civilian property, including homes, see articles 53 and 147 of the Fourth Geneva Convention and article 52 of Additional Protocol I.

<sup>166</sup> Lebanon crisis: Service Availability Assessment, Ministry of Health and WHO, 29 August 2006. For international humanitarian law prohibitions on attacking civilian hospitals, see e.g. article 18 of the Fourth Geneva Convention, article 12 of Additional Protocol I and Rule 28 in the ICRC Study.

<sup>167</sup> During the evening of 23 July, for example, two Lebanese Red Cross (LRC) ambulances carrying six wounded to Tebnine Governmental Hospital were hit by Israeli aircraft in two separate attacks, wounding six LRC volunteers (ICRC press release, 29 August 2006). On 11 August, an LRC ambulance was hit directly by two projectiles, injuring two LRC volunteers; no hostilities were taking place in the vicinity at the time. That night, a convoy of hundreds of cars occupied mostly by civilians fleeing the area of Marjayoun came under fire from Israeli aircraft; one LRC first aid volunteer, Mikhael Jbayieh, was killed in the attack. LRC continued its work, taking six dead and 32 wounded to nearby hospitals (ICRC press release, 12 August 2006). For international humanitarian law prohibitions on attacking medical transports, see e.g. articles 21 and 22 of the Fourth Geneva Convention, article 21 of Additional Protocol I and Rule 29 in the ICRC Study, see note 131 above.

<sup>168</sup> Common article 3 to the Geneva Convention (preventing "violence to life and person, in particular murder of all kinds" of those placed *hors de combat* by sickness, wounds, detention, or any other cause"). Common article 3 is considered by the International Court of Justice to "constitute a minimum yardstick ... which, in the Court's opinion, reflects what the Court in 1949 called 'elementary conditions of humanity'". *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. *I.C.J. Reports 1986*, para. 218. See also ICRC Study, note 131 above, p. 312. ("The prohibition on killing civilians and persons *hors de combat* is set forth in numerous military manuals. It is also contained in the legislation of a large number of States. This prohibition has been upheld extensively in national and international case-law. Furthermore, it is supported by official statements and other practice.")

<sup>169</sup> See Human Rights Watch, *Fatal Strikes*, pp. 37-38.

fact-finding to assess whether Hezbollah did in fact misuse the Marwahin or other convoys in this way. But it is important to note that the answer to this question would not by itself resolve the matter. To do so Israel would need to detail how many fighters were estimated to be among the civilians, the kind of materiel they were transporting, what precautions were taken to limit the impact of the strike on the civilians in the convoy, the concrete and direct military advantages anticipated at the time of attack and how did they outweighed the expected civilian casualties, and whether full consideration was given to other options designed to obtain the desired military effect.

49. The conflict was characterized, inter alia, by large-scale aerial attacks on parts of the Lebanese infrastructure, in particular roads and bridges.<sup>170</sup> The mission notes that such attacks on the transportation infrastructure had a particularly debilitating effect on the safe transportation of IDPs, the provision of humanitarian assistance and access to medical care, and thus raises questions from a human rights perspective. Israel justifies these attacks with reference to the military use of these objects, turning them into so-called dual-use objects that can be legitimately attacked.

50. In characterizing objects, in particular objects that serve primarily civilian purposes, as legitimate military objectives (see para. 38 above), Israel relies heavily on the “list of categories of military objectives” included in the ICRC Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War (1956). The list is relevant, but it cannot be seen as the end point of an analysis. The current legal rule, adopted in Additional Protocol I and recognized as customary, not only requires that the targeted objects, due to “their nature, location, purpose or use make an effective contribution to military action”, but also demands that their “partial or total destruction, capture or neutralization, in the circumstances ruling at the time, [offer] a definite military advantage”.<sup>171</sup> The law in force thus imposes a test that requires an object-specific and context-specific assessment of each target rather than a test based on an object’s generic classification.

51. The distinction between a categorical and a context-specific approach is crucial to evaluating Israel’s targeting practice during this conflict. For example, a road connecting southern Lebanon to the rest of the country could be considered to contribute to Hezbollah’s military action and a bridge along such a road may thus be a legitimate military objective.<sup>172</sup> But no such justification is plausible for most other areas, including targets in areas inhabited by populations with no links to Hezbollah. The mission notes that such attacks on the transportation infrastructure have a particularly debilitating effect on the safe transportation of IDPs, the provision of humanitarian assistance and access to medical care.

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<sup>170</sup> According to Lebanon, Israel destroyed 107 bridges and overpasses and 137 roads over an area of 445,000 m2. Government of Lebanon, “Setting the stage...”, p. 12, available at <http://www.lebanonundersiege.gov.lb/Documents/StockholmConferenceDocument.pdf>.

<sup>171</sup> ICRC Study, see note 131 above, Rule 8; Additional Protocol I, art. 52 (2). Israel agrees that this definition is “generally accepted”. Israel Ministry of Foreign Affairs, Jerusalem, “Responding to Hizbullah attacks from Lebanon: Issues of proportionality, Legal Background”, 25 July 2006.

<sup>172</sup> However, once a transportation artery has been severed, future attacks on that artery will provide, at the most, severely diminished military advantage. The only area in which a more general degradation of the transportation infrastructure could plausibly have been legitimate is in the area of ground confrontation between Israeli and Hezbollah forces.

[...]

66. While some IDPs left on their own initiative, others were warned by IDF which dropped leaflets from planes or made individual telephone calls (see para. 41 above).<sup>173</sup> International human rights law prohibits arbitrary displacement - a notion which includes displacement in situations of armed conflict - which is not warranted by the need to ensure the security of the civilians involved or imperative military reasons.<sup>174</sup> The principle of precaution requires each party to the conflict to give effective advance warning of attacks which may affect the civilian population, and give it enough time and the opportunity to evacuate safely, unless circumstances do not permit.<sup>175</sup> Reported cases of civilians attacked while fleeing cast doubt as to whether these obligations were always met.<sup>176</sup>

[...]

68. The public statements of the Secretary-General of Hezbollah, Hassan Nasrallah, explicitly reject the requirements of international humanitarian law, and Hezbollah's conduct appears to reflect this lawless approach to the conduct of armed conflict. While many of his statements do recognize that there are valid distinctions between civilians and combatants and between civilian and military objects,<sup>177</sup> they argue that Hezbollah has a right, and even a duty to disregard these distinctions in the pursuit of victory.

[...]

75. Overall, there emerges a clear picture of Hezbollah rocket attacks on Israeli civilians and civilian buildings and infrastructure in violation of the applicable norms of international humanitarian law, and in many instances of the prohibition on indiscriminate attacks and of the principle of distinction.

#### **4. "Drone" killings**

##### ***Report on Targeted Killings (A/HRC/14/24/Add.6, 28 May 2010, ¶¶ 79-86):***

79. The use of drones for targeted killings has generated significant controversy. Some have suggested that drones as such are prohibited weapons under IHL because they cause, or have the

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<sup>173</sup> On 25 July 2006, for example, leaflets warned that anyone present in areas from which rockets are being launched would endanger his or her life. Another leaflet dropped on the same day called upon "all citizens south of the Litani river ... to evacuate your villages and move north of the Litani river." Similar warnings were addressed to the population of South Beirut. See [www.mfa.gov.il/MFA/Terrorism](http://www.mfa.gov.il/MFA/Terrorism).

<sup>174</sup> Guiding Principles on Internal Displacement, see note 20 above, principle 6, restating ICCPR article 12, and customary international humanitarian law (see ICRC Study, note 21 above, pp. 74-76, 457-468 (Rules 24 and 129-131)).

<sup>175</sup> ICRC Study, see note 21 above, pp. 62-65 (Rule 20). The duty to warn as part of the duty to protect life may also be derived from ICCPR article 6.

<sup>176</sup> Human Rights Watch, *op. cit.*, pp. 35-40.

<sup>177</sup> "On the first day our missiles were focused on shelling military sites only, excluding Israeli settlements and colonies in north occupied Palestine. Yet, the enemy army, unable to confront our warriors, started from the first day targeting towns, villages, civilians, civilian installations and infrastructure."

effect of causing, necessarily indiscriminate killings of civilians, such as those in the vicinity of a targeted person.<sup>178</sup> It is true that IHL places limits on the weapons States may use, and weapons that are, for example, inherently indiscriminate (such as biological weapons) are prohibited.<sup>179</sup> However, a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles. The critical legal question is the same for each weapon: whether its specific use complies with IHL.

80. The greater concern with drones is that because they make it easier to kill without risk to a State's forces, policy makers and commanders will be tempted to interpret the legal limitations on who can be killed, and under what circumstances, too expansively. States must ensure that the criteria they apply to determine who can be targeted and killed – i.e., who is a lawful combatant, or what constitutes “direct participation in hostilities” that would subject civilians to direct attack – do not differ based on the choice of weapon.

81. Drones' proponents argue that since drones have greater surveillance capability and afford greater precision than other weapons, they can better prevent collateral civilian casualties and injuries. This may well be true to an extent, but it presents an incomplete picture. The precision, accuracy and legality of a drone strike depend on the human intelligence upon which the targeting decision is based.

82. Drones may provide the ability to conduct aerial surveillance and to gather “pattern of life” information that would allow their human operators to distinguish between peaceful civilians and those engaged in direct hostilities. Indeed, advanced surveillance capability enhances the ability of a State's forces to undertake precautions in attack.<sup>180</sup> But these optimal conditions may not exist in every case. More importantly, a drone operation team sitting thousands of miles away from the environment in which a potential target is located may well be at an even greater human intelligence gathering disadvantage than ground forces, who themselves are often unable to collect reliable intelligence.

83. It was clear during my mission to Afghanistan how hard it is even for forces on the ground to obtain accurate information. Testimony from witnesses and victims' family members, showed that international forces were often too uninformed of local practices, or too credulous in interpreting information, to be able to arrive at a reliable understanding of a situation.<sup>181</sup> International forces all too often based manned airstrikes and raids that resulted in killings on faulty intelligence. Multiple other examples show that the legality of a targeted killing operation is heavily dependent upon the reliability of the intelligence on which it is based.<sup>182</sup> States must,

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<sup>178</sup> Murray Wardrop, Unmanned Drones Could be Banned, Says Senior Judge, *The Telegraph*, 6 July 2009.

<sup>179</sup> The general prohibition under IHL is against weapons that violate the principle of distinction or cause unnecessary suffering. See HPCR Commentary, section C.

<sup>180</sup> Michael N. Schmitt, Precision Attack and International Humanitarian Law, 87 *Int'l Rev. Red Cross* 445 (Sept. 2005).

<sup>181</sup> A/HRC/11/2/Add.4, paras. 14-18, 70.

<sup>182</sup> See, e.g., Israel Ministry of Foreign Affairs Website, “Findings of the inquiry into the death of Salah Shehadeh”

<http://www.mfa.gov.il/MFA/Government/Communiques/2002/Findings%20of%20the%20inquiry%20into%20the%20death%20of%20Salah%20Sh.>

therefore, ensure that they have in place the procedural safeguards necessary to ensure that intelligence on which targeting decisions are made is accurate and verifiable.

84. Furthermore, because operators are based thousands of miles away from the battlefield, and undertake operations entirely through computer screens and remote audiofeed, there is a risk of developing a “Playstation” mentality to killing. States must ensure that training programs for drone operators who have never been subjected to the risks and rigors of battle instill respect for IHL and adequate safeguards for compliance with it.

85. Outside the context of armed conflict, the use of drones for targeted killing is almost never likely to be legal. A targeted drone killing in a State’s own territory, over which the State has control, would be very unlikely to meet human rights law limitations on the use of lethal force.

86. Outside its own territory (or in territory over which it lacked control) and where the situation on the ground did not rise to the level of armed conflict in which IHL would apply, a State could theoretically seek to justify the use of drones by invoking the right to anticipatory self-defence against a non-state actor.<sup>183</sup> It could also theoretically claim that human rights law’s requirement of first employing less-than-lethal means would not be possible if the State has no means of capturing or causing the other State to capture the target. As a practical matter, there are very few situations outside the context of active hostilities in which the test for anticipatory self-defence – necessity that is “instant, overwhelming, and leaving no choice of means, and no moment of deliberation”<sup>184</sup> – would be met. This hypothetical presents the same danger as the “ticking-time bomb” scenario does in the context of the use of torture and coercion during interrogations: a thought experiment that posits a rare emergency exception to an absolute prohibition can effectively institutionalize that exception. Applying such a scenario to targeted killings threatens to eviscerate the human rights law prohibition against the arbitrary deprivation of life. In addition, drone killing of anyone other than the target (family members or others in the vicinity, for example) would be an arbitrary deprivation of life under human rights law and could result in State responsibility and individual criminal liability.

***Allegation letter sent on 26 August 2005,(reproduced from E/CN.4/2006/53/Add.1, 27 March 2006, pp. 264–265):***

Letter of allegation sent in relation to information received that Haitham al-Yemeni, an alleged al-Qaeda senior figure, was killed on the Pakistan-Afghanistan border on or around the 10 May 2005 by a missile fired by an un-manned aerial drone operated by the US Central Intelligence Agency. Mr. al-Yemeni had reportedly been under surveillance for more than a week by US intelligence and military personnel. Reports indicate that the Predator drone, operated from a secret base hundreds of kilometers from the target, located and fired on him in Toorikhel, Pakistan, an area where Pakistani forces had allegedly been looking for al-Qaeda leader, Osama Bin Laden. It is my understanding that the CIA is authorized to operate such Predator operations under presidential authority signed after the September 11, 2001 terrorist attacks.

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<sup>183</sup> Infra III.B in original report.

<sup>184</sup> See R.Y. Jennings, *The Caroline and McLeod Cases*, 32 Am. J. Int’l L. 82, 92 (1938).

According to the information received, although Mr. al-Yemeni was not listed by that name neither in the FBI's, nor in Pakistan's, "most wanted" list, the active surveillance of his activities would suggest that he was playing an important role inside the al-Qaeda organization. It has been suggested that those undertaking the surveillance were hoping that he would lead them to Osama bin Laden. However, after Abu Faraj al-Libbi, another suspected al-Qaeda leader, was arrested by Pakistani authorities a month before, it is reported that a decision was taken to kill Mr. al-Yemeni for fear that he would go into hiding and thus be lost track of. My understanding is that the CIA reportedly refused to comment on the situation. Similarly, Sheik Rashid Ahmed, Pakistan's Information Minister denied that any such incident had ever happened near the Pakistan-Afghanistan border.

In drawing the attention of your Excellency's Government to this information and seeking clarification thereof, I am fully aware of the stance taken by your Government in correspondence with my predecessor with respect to the mandate's competence regarding killings that are said to have occurred within the context of an armed conflict (I refer to your Government's letters dated 22 April 2003 and 8 April 2004). As I have explained in my Report to the 61st Commission on Human Rights, however, both the practice of the General Assembly and of the independent experts successively holding the mandate since its creation in 1982 make it clear that questions of humanitarian law fall squarely within the Special Rapporteur's mandate (See E/CN.4/2005/7, at par. 45).

In the light of these considerations, I would reiterate my concern that empowering Governments to identify and kill "known terrorists" places no verifiable obligation upon them to demonstrate in any way that those against whom lethal force is used are indeed terrorists, or to demonstrate that every other alternative has been exhausted. (See E/CN.4/2005/7, at par. 41). I would also recall that the Human Rights Committee has held that a State party can be held responsible for violations of rights under the Covenant where the violations are perpetrated by authorized agents of the State on foreign territory, "whether with the acquiescence of the Government of [the foreign State] or in opposition to it". (See *Lopez v. Uruguay*, communication No.52/1979, CCPR/C/OP/1 at 88 (1984), paras. 12.1-12.3.)

Finally, I wish to stress that, while Governments have a responsibility to protect their citizens against the excesses of non-State actors or other entities, efforts to eradicate terrorism must be undertaken within a framework clearly governed by international human rights law as well as by international humanitarian law.

Without in any way wishing to pre-judge the accuracy of the information received, I would be grateful for a reply to the following questions:

1. What rules of international law does your Excellency's Government consider to govern this incident? If your Excellency's Government considers the incident to have been governed by humanitarian law, please clarify which treaty instruments or customary norms are considered to apply.
2. What procedural safeguards, if any, were employed to ensure that this killing complied with international law?

3. On what basis was it decided to kill, rather than capture, Haitham al-Yemeni?
4. Did the government of Pakistan consent to the killing of Haitham al-Yemeni?

***Report on Mission to the United States of America (A/HRC/11/2/Add.5, 28 May 2009, ¶¶ 71-73, 83):***

71. The Government has credibly been alleged to have engaged in targeted killings on the territory of other States.<sup>185</sup> Senior Government officials have confirmed the existence of a program through which drones are used to target particular individuals, but have also caused civilian casualties.<sup>186</sup> On several occasions I have asked the Government to explain the legal basis on which a particular individual was targeted.<sup>187</sup> While I have welcomed the Government's willingness to engage in dialogue on targeted killings, it has been evasive about its grounds for targeting, and I am disturbed by the broader implications of its positions. Briefly, those positions are that: (a) the Government's actions against al-Qaeda constitute a world-wide armed conflict to which international humanitarian law applies; (b) international humanitarian law operates to the exclusion of human rights law; (c) international humanitarian law falls outside the mandate of the Special Rapporteur and of the Human Rights Council; and (d) States may determine for themselves whether an individual incident is governed by humanitarian law or human rights law.

72. I responded to these positions in detail both directly to the Government and in my 2007 report to the Council.<sup>188</sup> I have discussed the extent to which these positions constitute a radical departure from past practice, and the highly negative consequences that would flow from them.<sup>189</sup> Under the Government's reinterpretation of the law and the Council's and my mandate, the United States would function in a public accountability void - as could other States - to the detriment of the advances made by the international human rights and humanitarian law regimes over the past sixty years.

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<sup>185</sup> On 17 September 2001, the President signed a "presidential finding" pursuant to the authority of which the CIA developed the concept of "high-value targets" for whom "kill, capture or detain" orders could be issued in consultation with lawyers in DOJ, CIA, and the administration. Council of Europe, *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States*, report submitted by Mr. Dick Marty, Doc. 11302 Rev. (7 June 2007), paragraphs 58-64. I asked the Inspector General of the CIA about this program, but he refused to confirm or deny any aspect of this account.

<sup>186</sup> Eric Schmitt and Christopher Drew, *More Drone Attacks in Pakistan Planned*, The New York Times, April 7, 2009; Jane Perlez, *Pakistan Rehearses Its Two-Step on Airstrikes*, The New York Times, April 15, 2009.

<sup>187</sup> A/HRC/4/20/Add.1, pp. 342-58 (one targeted killing in Pakistan); see also E/CN.4/2006/53/Add.1, pp. 264-65); A/HRC/4/20/Add.1, pp. 358-61 (three targeted killings in Pakistan).

<sup>188</sup> A/HRC/4/20 29; A/HRC/4/20/Add.1, pp. 342-58.

<sup>189</sup> These consequences include: (a) many of the worst human rights and humanitarian law violations in the world today would be removed from the purview of the Special Rapporteur and the Human Rights Council; (b) a State could target and kill any individual, anywhere in the world, whom it deemed to be an "enemy combatant" and it would not be accountable to the international community; (c) a State could unilaterally decide that a particular incident complied with international law - as interpreted solely by the State - and would not therefore be covered by the mandate; (d) it is widely agreed that international human rights and humanitarian law are complementary, not mutually exclusive. *Ibid.*

73. The new administration should reconsider these positions and move to ensure the necessary transparency and accountability. Withholding such information replaces public accountability with unverifiable Government assertions of legality, inverting the very idea of due process.

[...]

83. (Recommendations) Enhancing transparency in targeted killings:

- The Government should explicate the rules of international law it considers to cover targeted killings. It should specify the bases for decisions to kill rather than capture particular individuals, and whether the State in which the killing takes place has given consent. It should specify the procedural safeguards in place, if any, to ensure in advance of drone killings that they comply with international law, and the measures the Government takes after any such killing to ensure that its legal and factual analysis was accurate and, if not, the remedial measures it would take.
- The Government should make public the number of civilians collaterally killed as a result of drone attacks, and the measures in place to prevent such casualties.

## 5. Airstrikes

***Report on Mission to Israel and Lebanon (A/HRC/2/7, 2 October 2006, ¶¶ 46-48):***

46. According to Israel, buildings were targeted in the “air war” primarily on the basis that they served as launching or storage sites for rockets or other materiel, and secondarily on the basis that they hosted Hezbollah fighters. Video footage provided by Israel shows instances of rockets being fired from residential buildings and thus confirms instances of Hezbollah abusing civilian objects in its military operations. But this cannot be dispositive justification for the destruction of hundreds of civilian houses in South Lebanon, nor other distant houses or infrastructure. In order to show that the attacks did not violate the principles of distinction and proportionality and the prohibition of indiscriminate attacks Israel would need to provide substantially more and qualitatively different information relating to questions such as the kind of information on the basis of which specific houses and villages were targeted, the time lapse between the firing of a rocket from a house or village and the IDF attack in response, and the estimate by IDF of civilian presence in and around the target at the time of the strike. In the absence of such information the mission cannot conclude that the widespread targeting of civilian houses by IDF complied with international humanitarian law. In the absence of systematic evidence of any type, however, it is impossible to confirm the validity of the claim that every target was a legitimate military objective or that the principle of distinction was respected.<sup>190</sup>

47. The same conclusion must be drawn regarding the reports of 12 destroyed and 38 severely damaged health facilities, notably in Bent Jbeil, Marjayoun and Nabatieh.<sup>191</sup> Ambulances and

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<sup>190</sup> For international humanitarian law prohibitions on destroying civilian property, including homes, see articles 53 and 147 of the Fourth Geneva Convention and article 52 of Additional Protocol I.

<sup>191</sup> Lebanon crisis: Service Availability Assessment, Ministry of Health and WHO, 29 August 2006. For international humanitarian law prohibitions on attacking civilian hospitals, see e.g. article 18 of the Fourth Geneva Convention, article 12 of Additional Protocol I and Rule 28 in the ICRC Study.

medical convoys were, according to ICRC, also hit during the conflict.<sup>192</sup> In the absence of concrete evidence to the contrary, it must be assumed that the health facilities and ambulances attacked were not legitimate targets. In this context it is important to stress that killing persons placed *hors de combat* is prohibited at any time and in any place whatsoever.<sup>193</sup>

48. There are well-documented reports of IDF strikes on civilian convoys fleeing villages in the South as a result of IDF warnings, including that which killed 21 civilians fleeing Marwahin.<sup>194</sup> Israel has generally not disputed that these strikes occurred or that deaths resulted, but it has argued that if civilian convoys were attacked it was justified by Hezbollah's abuse of civilian convoys to move around fighters and materiel. The mission could not carry out any significant fact-finding to assess whether Hezbollah did in fact misuse the Marwahin or other convoys in this way. But it is important to note that the answer to this question would not by itself resolve the matter. To do so Israel would need to detail how many fighters were estimated to be among the civilians, the kind of materiel they were transporting, what precautions were taken to limit the impact of the strike on the civilians in the convoy, the concrete and direct military advantages anticipated at the time of attack and how did they outweighed the expected civilian casualties, and whether full consideration was given to other options designed to obtain the desired military effect.

***Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009, ¶ 5-6, 9, 14-18):***

5. In 2008, 64% of civilian casualties (552 people) caused by pro-Government forces were due to air strikes and close air support for troops in contact with Taliban fighters. These deaths have galvanized widespread outrage against international military action. Civilian casualties may result from attacks on those mistakenly believed to be combatants, or because of collateral damage. IHL provides that attacks on legitimate military objectives may be lawful even when they result in civilian deaths, as long as they are proportional.<sup>195</sup>

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<sup>192</sup> During the evening of 23 July, for example, two Lebanese Red Cross (LRC) ambulances carrying six wounded to Tebnine Governmental Hospital were hit by Israeli aircraft in two separate attacks, wounding six LRC volunteers (ICRC press release, 29 August 2006). On 11 August, an LRC ambulance was hit directly by two projectiles, injuring two LRC volunteers; no hostilities were taking place in the vicinity at the time. That night, a convoy of hundreds of cars occupied mostly by civilians fleeing the area of Marjayoun came under fire from Israeli aircraft; one LRC first aid volunteer, Mikhael Jbayieh, was killed in the attack. LRC continued its work, taking six dead and 32 wounded to nearby hospitals (ICRC press release, 12 August 2006). For international humanitarian law prohibitions on attacking medical transports, see e.g. articles 21 and 22 of the Fourth Geneva Convention, article 21 of Additional Protocol I and Rule 29 in the ICRC Study, see note 21 above.

<sup>193</sup> Common article 3 to the Geneva Convention (preventing “violence to life and person, in particular murder of all kinds” of those placed *hors de combat* by sickness, wounds, detention, or any other cause”). Common article 3 is considered by the International Court of Justice to “constitute a minimum yardstick ... which, in the Court’s opinion, reflects what the Court in 1949 called ‘elementary conditions of humanity’”. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. *I.C.J. Reports 1986*, para. 218. See also ICRC Study, note 131 above, p. 312. (“The prohibition on killing civilians and persons *hors de combat* is set forth in numerous military manuals. It is also contained in the legislation of a large number of States. This prohibition has been upheld extensively in national and international case-law. Furthermore, it is supported by official statements and other practice.”)

<sup>194</sup> See Human Rights Watch, *Fatal Strikes*, pp. 37-38.

<sup>195</sup> With respect to the proportionality requirement, the “expected” resulting “incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof” must not be “excessive in relation to the concrete and direct military advantage anticipated” (ICRC Study), Rule 14). With respect to the required precautions in carrying

6. These rules also apply in situations such as that in Kunar province, where the Taliban fires rockets from residential areas directed at international forces bases and the latter then respond by firing back at the source. I heard no claim that the international forces deliberately held the civilian population accountable for these attacks, but the perception was that their responses displayed insufficient concern for civilian casualties. One official opined that while the local people did not “support” the AGEs they were in no position to interfere when armed men decided to fire from the area. He stated that for the international forces to return fire served no useful military purpose inasmuch as the AGEs would slip away immediately after firing and return across the border to Pakistan. The international forces have procedures for vetting targets and selecting an appropriate method of attack. I was not provided specifics on procedures, and am in no position to assess their formal compliance with international law. But regardless of the written procedures, it is not clear that sufficient caution is shown *in practice* to ensure that attacks are not indiscriminate and that civilian casualties will not be excessive in relation to the military advantage anticipated.

[...]

9. The Taliban should end the use of human shields and avoid locating its forces in areas populated by civilians. Nonetheless, Taliban usage of human shields does not affect the international forces’ obligation to ensure that air strikes do not cause a loss of civilian life excessive in relation to the military advantage of killing the targeted fighters.

[...]

14. While air strikes and raids on legitimate military objectives cause many civilian casualties, too many attacks also target civilians who are mistakenly believed to be combatants.<sup>196</sup> This

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out an attack, the general rule is that “constant care” and “[a]ll feasible precautions” must be taken “to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects” (ICRC Study, Rule 15). This general rule is supplemented by a number of more specific rules. These include rules requiring that a party to the conflict make the “choice of means and methods of warfare” such as to minimize such harm to civilians (ICRC Study, Rule 17), do “everything feasible to assess” whether the proportionality requirement will be satisfied (ICRC Study, Rule 18), and “give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit” (ICRC Study, Rule 20). Furthermore, even as an operation is underway, there is an obligation to do “everything feasible to cancel or suspend an attack if it becomes apparent” that the target is not a military objective or that the proportionality requirement would not be satisfied (ICRC Study, Rule 19). On the issue of verifying that the target is a legitimate military objective, the rule is that each “party to the conflict must do everything feasible to verify that targets are military objectives” (ICRC study, Rule 16).

<sup>196</sup> Pursuant to the rules of international humanitarian law applicable to non-international armed conflicts, attacks may only be directed at legitimate military objectives (ICRC Study, Rule 7). In addition to certain objects (*see* ICRC Study, Rule 8), legitimate military objectives may include combatants and civilians taking a direct part in hostilities (ICRC Study, Rules 1, 6). Combatants are “members of the armed forces of a party to the conflict” (excluding those forces’ “medical and religious personnel”) (ICRC Study, Rule 3). Many of those who belong to or are aligned with a party to the conflict - whether the Government or an armed opposition group - are neither combatants nor would be considered to be directly participating in hostilities while carrying out their roles. (When an individual is a civilian immune from attack, this does not mean that they may not be detained for violations of national law; however, the rules governing such law enforcement operations are principally provided by international human rights law rather than by international humanitarian law.)

seem to happen because the IMF were too hasty in concluding that suspicious activity was connected to the Taliban and too credulous in interpreting information provided by civilians.

15. A number of civilians from conflict-affected areas with whom I spoke - including elders, witnesses to specific incidents, and the family members of victims - alleged that the international forces' ignorance of local practices sometimes resulted in civilians being targeted based on only superficially suspicious conduct.<sup>197</sup>

16. Residents of communities struck by the IMF often complained that attacks had been undertaken on the basis of fabricated information provided by individuals pursuing personal grudges.<sup>198</sup> Numerous Government officials also claimed that civilian casualties had often been caused by international forces acting on false tips. One governor stated that there were people in his province who make a business of acting as intermediaries who would give false tips to the international forces in return for payment from individuals holding grudges. A number of security officials raised the issue in more general terms.<sup>199</sup> Civilians from conflict-affected areas confirmed that there is a tendency for attacks on persons wrongly believed to belong to the Taliban to work as self-fulfilling prophecies when those targeted decide to cultivate some countervailing source of military support.

17. Understandably, the international forces do not detail why particular targets were selected. Publicly releasing the source of intelligence information would often be tantamount to imposing a death sentence on the source. But this also makes it extremely difficult to confirm the authenticity or otherwise of intelligence relied upon. This does not mean that the problem should be ignored.<sup>200</sup> Government officials at all levels repeatedly argued that tighter cooperation between the international forces and the NDS in vetting targets and planning operations was the

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<sup>197</sup> I heard multiple accounts of individuals who were irrigating fields at night - a common practice to prevent the evaporation of scarce water - being targeted by ground forces and in air strikes. The witnesses believed that these killings took place because international forces had jumped to the conclusion that a man moving about at night must be an insurgent. I received similar allegations about persons targeted while traveling at night (in one case, the individual was going to a hospital to obtain medication for a woman who had gone into labor) and others who were camping in remote areas because they were engaged in herding or road construction. Elders and other witnesses also claimed that international forces would misinterpret guns carried for self-defense as demonstrating that an individual was an insurgent and explosives possessed for road construction or gemstone mining - a significant industry in Nuristan - as evidence that an individual was involved in producing roadside bombs. One witness pleaded that the international forces should look at the ground reality in the area: "We are poor, we graze sheep, we have emergencies and need to walk at night - but we cannot."

<sup>198</sup> An elder from Nuristan accused a district governor of feeding false information to international forces leading them to raid his local opponents. An elder from the Korengal Valley in Kunar asserted that "resistance" to the Government was stimulated by an IMF attack on the home of a prominent local leader. No compensation was provided and the leader responded by aligning himself with AGEs and facilitating attacks on the international forces. A witness from the Ghani Khel district of Nangarhar described a similar incident based on false information. An individual from the Maywand district of Kandahar claimed that Afghan interpreters for the international forces would extort money by threatening to label as Taliban those who would not pay. Air strikes and raids would follow.

<sup>199</sup> One senior official who claimed that reports of civilian casualties were frequently exaggerated stated that sometimes local residents genuinely perceived the victims as civilians involved in family feuds even when, in his view, those "feuds" were part and parcel of the conflict between the Taliban and the Government.

<sup>200</sup> One witness whom I interviewed stated that, in his area, people trying to get their personal enemies attacked would sometimes go to the District Governor, but that he knew too much to believe their stories, would sometimes go to the Provincial Governor, but that he too was hard to persuade, and would then go to the international forces, who would conduct raids without adequately verifying the information received.

surest path toward reducing civilian casualties caused by false tips.<sup>201</sup> The merits of corroborating intelligence with as many sources as possible were not disputed by international military commanders, although one characterized the NDS's information as being more copious than reliable.

18. Existing procedures for ensuring that strikes targeting Taliban fighters are based on reliable information are insufficient to ensure respect for IHL requirements.<sup>202</sup> The current approach renders civilians vulnerable to attack and pushes personal and tribal rivals into opportunistic participation in the armed conflict.

## 6. Raids

### *Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009, ¶ 10, 11, 14-18):*

10. Night-time raids on housing compounds are routinely used by the international forces to capture individuals suspected of links to the Taliban. The international forces generally conduct a raid in one of two ways.<sup>203</sup> The most common method, employed without any prior warning or request to enter, is to blow off a housing compound's door with explosives. The other method is to land on a roof in a helicopter and then climb down into the house on ladders. Night raids are always dangerous for civilians. Many Afghans keep guns for personal protection from criminals, and to assure their self-protection within their own homes and compounds. Given that it is common for people to sleep with guns due to fear of intruders and local attackers, there is a high likelihood that they will fire on anyone, including troops, breaking down the compound's door at night. The results can be devastating.<sup>204</sup>

11. Raids must be conducted in accordance with the stringent safeguards required by international human rights and humanitarian law.<sup>205</sup> A commander in the international forces

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<sup>201</sup> I discussed the existing coordination mechanisms with a number of Governors and security officials. While arrangements vary, typically there is a weekly meeting bringing together the Governor and senior representatives of the international forces, ANA, ANP, and NDS, among others. This weekly meeting is sometimes supported by a standing body of lower-level representatives. Called a Provincial Coordination Committee (PCC), similar mechanisms also exist at the regional level and, less often, at the district level. All concerned stated that whether these mechanisms work well depends largely on the personal relationships and trust among the participants, and many of the Government officials with whom I spoke stressed with concern that the international forces continued to conduct some operations without prior consultation.

<sup>202</sup> ICRC Study, Rule 16.

<sup>203</sup> During raids, the international forces are often accompanied by ANA units, and, in many cases, ANP forces will secure the perimeter. In some areas, the NDS will perform prior surveillance. There are also raids conducted directly by the Afghan security forces, including the NDS. While the NDS collects and analyses intelligence, it also has an operational dimension. NDS officials informed me that they are authorized to conduct arrest operations and do so, especially in the areas of counterterrorism, organized crime, and counter-espionage. I did not gather information on the conduct of these raids.

<sup>204</sup> The most common complaints that I heard regarding night raids fall outside my mandate – that they are an invasion of privacy and the sanctity of a family's home, and result in women being treated inappropriately by foreigners. Many Afghans with whom I spoke indicated that these were some of their greatest concerns with respect to the conduct of the IMF, and expressed a strong desire for more cross-cultural training for the IMF, and for raids to be led by Afghan forces.

<sup>205</sup> The applicable body of law will depend on a raid's objective. If the raid is targeting a legitimate military objective, such as a combatant, then the raid is primarily governed by the same IHL governing other attacks,

with whom I spoke defended surprise night raids as the safest available method, because sleeping men could be apprehended before they had a chance to respond with violence. But Afghans with whom I spoke maintained that such raids unnecessarily endangered the targeted individual's relatives and gave examples in which they believed that the target could readily have been captured in a less dangerous manner.<sup>206</sup>

[...]

14. While air strikes and raids on legitimate military objectives cause many civilian casualties, too many attacks also target civilians who are mistakenly believed to be combatants.<sup>207</sup> This seem to happen because the IMF were too hasty in concluding that suspicious activity was connected to the Taliban and too credulous in interpreting information provided by civilians.

15. A number of civilians from conflict-affected areas with whom I spoke - including elders, witnesses to specific incidents, and the family members of victims - alleged that the international forces' ignorance of local practices sometimes resulted in civilians being targeted based on only superficially suspicious conduct.<sup>208</sup>

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including rules and principles pertaining to verification of the target, proportionality, precautions in attack, and military necessity (*see* note 4). Thus, for example, when the IMF plans a raid, "everything feasible" must be done "to verify" that the target is a military objective (ICRC Study, Rule 16). And, in choosing the means and methods of conducting a military raid or detaining a combatant, the IMF must "take all feasible precautions" with a "view to avoiding, and in any event to minimizing, incidental loss of civilian life" (ICRC Study, Rule 17), and must "do everything feasible to assess whether the attack may be expected to cause incidental loss of civilian life ... which would be excessive in relation to the concrete and direct military advantage anticipated" (ICRC Study, Rule 18). If the raid's target is not a legitimate military objective - e.g., if the target is a civilian who is not directly participating in hostilities - the operation is governed by international human rights law. In a law enforcement context, lethal force may be used only when it is clear that an individual is about to kill someone (making lethal force proportionate) and there is no other available means of detaining him or her (making lethal force necessary). (*See* A/61/311, paras. 33-45; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 9; Code of Conduct for Law Enforcement Officials, art. 3.)

<sup>206</sup> For example, witnesses to raids and family members of suspects suggested that suspects could have been picked up from their place of work or while walking to work, where women and children would be at significantly less risk of being exposed to the threat or use of force.

<sup>207</sup> Pursuant to the rules of international humanitarian law applicable to non-international armed conflicts, attacks may only be directed at legitimate military objectives (ICRC Study, Rule 7). In addition to certain objects (*see* ICRC Study, Rule 8), legitimate military objectives may include combatants and civilians taking a direct part in hostilities (ICRC Study, Rules 1, 6). Combatants are "members of the armed forces of a party to the conflict" (excluding those forces' "medical and religious personnel") (ICRC Study, Rule 3). Many of those who belong to or are aligned with a party to the conflict - whether the Government or an armed opposition group - are neither combatants nor would be considered to be directly participating in hostilities while carrying out their roles. (When an individual is a civilian immune from attack, this does not mean that they may not be detained for violations of national law; however, the rules governing such law enforcement operations are principally provided by international human rights law rather than by international humanitarian law.)

<sup>208</sup> I heard multiple accounts of individuals who were irrigating fields at night - a common practice to prevent the evaporation of scarce water - being targeted by ground forces and in air strikes. The witnesses believed that these killings took place because international forces had jumped to the conclusion that a man moving about at night must be an insurgent. I received similar allegations about persons targeted while traveling at night (in one case, the individual was going to a hospital to obtain medication for a woman who had gone into labor) and others who were camping in remote areas because they were engaged in herding or road construction. Elders and other witnesses also claimed that international forces would misinterpret guns carried for self-defense as demonstrating that an individual was an insurgent and explosives possessed for road construction or gemstone mining - a significant industry in

16. Residents of communities struck by the IMF often complained that attacks had been undertaken on the basis of fabricated information provided by individuals pursuing personal grudges. Numerous Government officials also claimed that civilian casualties had often been caused by international forces acting on false tips. One governor stated that there were people in his province who make a business of acting as intermediaries who would give false tips to the international forces in return for payment from individuals holding grudges.<sup>209</sup> A number of security officials raised the issue in more general terms.<sup>210</sup> Civilians from conflict-affected areas confirmed that there is a tendency for attacks on persons wrongly believed to belong to the Taliban to work as self-fulfilling prophecies when those targeted decide to cultivate some countervailing source of military support.

17. Understandably, the international forces do not detail why particular targets were selected. Publicly releasing the source of intelligence information would often be tantamount to imposing a death sentence on the source. But this also makes it extremely difficult to confirm the authenticity or otherwise of intelligence relied upon. This does not mean that the problem should be ignored.<sup>211</sup> Government officials at all levels repeatedly argued that tighter cooperation between the international forces and the NDS in vetting targets and planning operations was the surest path toward reducing civilian casualties caused by false tips.<sup>212</sup> The merits of corroborating intelligence with as many sources as possible were not disputed by international military commanders, although one characterized the NDS's information as being more copious than reliable.

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Nuristan - as evidence that an individual was involved in producing roadside bombs. One witness pleaded that the international forces should look at the ground reality in the area: "We are poor, we graze sheep, we have emergencies and need to walk at night - but we cannot."

<sup>209</sup> An elder from Nuristan accused a district governor of feeding false information to international forces leading them to raid his local opponents. An elder from the Korengal Valley in Kunar asserted that "resistance" to the Government was stimulated by an IMF attack on the home of a prominent local leader. No compensation was provided and the leader responded by aligning himself with AGEs and facilitating attacks on the international forces. A witness from the Ghani Khel district of Nangarhar described a similar incident based on false information. An individual from the Maywand district of Kandahar claimed that Afghan interpreters for the international forces would extort money by threatening to label as Taliban those who would not pay. Air strikes and raids would follow.

<sup>210</sup> One senior official who claimed that reports of civilian casualties were frequently exaggerated stated that sometimes local residents genuinely perceived the victims as civilians involved in family feuds even when, in his view, those "feuds" were part and parcel of the conflict between the Taliban and the Government.

<sup>211</sup> One witness whom I interviewed stated that, in his area, people trying to get their personal enemies attacked would sometimes go to the District Governor, but that he knew too much to believe their stories, would sometimes go to the Provincial Governor, but that he too was hard to persuade, and would then go to the international forces, who would conduct raids without adequately verifying the information received.

<sup>212</sup> I discussed the existing coordination mechanisms with a number of Governors and security officials. While arrangements vary, typically there is a weekly meeting bringing together the Governor and senior representatives of the international forces, ANA, ANP, and NDS, among others. This weekly meeting is sometimes supported by a standing body of lower-level representatives. Called a Provincial Coordination Committee (PCC), similar mechanisms also exist at the regional level and, less often, at the district level. All concerned stated that whether these mechanisms work well depends largely on the personal relationships and trust among the participants, and many of the Government officials with whom I spoke stressed with concern that the international forces continued to conduct some operations without prior consultation.

18. Existing procedures for ensuring that strikes targeting Taliban fighters are based on reliable information are insufficient to ensure respect for IHL requirements.<sup>213</sup> The current approach renders civilians vulnerable to attack and pushes personal and tribal rivals into opportunistic participation in the armed conflict.

## **7. Use of perfidy and effects on civilians**

*Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009, ¶ 23-24):*

23. Many Taliban attacks also involve perfidy, a prohibited method of warfare.<sup>214</sup> The Taliban regularly violate the prohibition against perfidy by feigning a civilian or other protected status for the purpose of carrying out suicide attacks. The Taliban's perfidious acts render everyday activities for Afghan civilians highly dangerous. In addition to the deaths caused directly, perfidy affects the behaviour of international and Afghan troops vis-à-vis Afghan civilians. In this way, violations by one side make it more difficult for the other side to comply with its legal obligations. Thus, in many situations the IMF will have no reliable way of assessing whether an unknown person approaching is a civilian, or a Taliban member intending to attack. This heightens the caution with which IMF soldiers approach ordinary Afghans, and necessitates the IMF taking precautions to protect themselves.

24. The risk posed to the lives of IMF/Afghan soldiers by perfidious attacks has led the international forces to instruct civilians to keep at a distance from convoys and patrols. Defensive measures by soldiers will generally not be taken against vehicles and civilians who maintain the required distance and who do not otherwise pose a threat. Self-defensive measures may be taken against those who get too close. However, even when force is used in self-defense, it must comply with IHL norms, and, although perfidious attacks may increase the likelihood of mistakes, they do not justify any lowering of these standards for resorting to lethal force.

## **8. Suicide attacks**

*Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009, ¶ 19-23):*

19. In the four months prior to my visit, 214 of the estimated 381 civilians killed by the Taliban were killed in suicide attacks.<sup>215</sup> Both the number of suicide attacks and the number of civilians killed during such attacks have increased as the conflict has progressed: 2006 (123 attacks; 237 killed), 2007 (160 attacks; 321 killed), first four months of 2008 (34 attacks 214 killed).<sup>216</sup>

20. Taliban suicide attacks are often employed in a disproportionate or indiscriminate manner, and large numbers of civilians are injured or killed as a result. Because they are carried out through a suicide body-borne or vehicle-borne IED ("incendiary explosive device") by

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<sup>213</sup> ICRC Study, Rule 16.

<sup>214</sup> Perfidy is a deception that is designed to lead one party in the conflict to believe that they must accord protected status to the enemy. AP I; ICC. And see J Ashley Roach, "Ruses and Perfidy Deception During Armed Conflict", 23 U. Tol. L. Rev. 395 (1991-1992).

<sup>215</sup> UNDSS recorded 381 civilian casualties during the first four months of 2008 (214 of these were a result of suicide attacks).

<sup>216</sup> UN, UNDSS Afghanistan (8 May 2008).

insurgents who feign civilian status, Afghan and international forces are hard pressed to distinguish potential suicide bombers from civilians, leading to the accidental killing of civilians.

21. Suicide bombing, as a method of attack during an armed conflict, is not prohibited *per se*.<sup>217</sup> But a suicide attack violates IHL when it targets civilians, may be expected to result in disproportionate civilian casualties, or is carried out in a perfidious manner.

22. Data on suicide attacks from January 2007 to March 2008 indicates that 15% of attacks targeted civilians, including government officials, and thus violated IHL. In addition, many of the attacks on legitimate military objectives disregarded the principle of proportionality by taking place in public areas where there are large numbers of civilians. Thus, although the suicide attack may target an IMF convoy or a member of the ANA, large numbers of civilian bystanders are often wounded and killed in a manner wholly excessive to any possible anticipated military advantage. The organizers of such attacks simply fail to take all feasible precautions to minimize incidental loss of civilian life. The manner in which suicide attacks have been employed also appear to have become more reckless in recent years.

23. Many Taliban attacks also involve perfidy, a prohibited method of warfare.<sup>218</sup> The Taliban regularly violate the prohibition against perfidy by feigning a civilian or other protected status for the purpose of carrying out suicide attacks....

## 9. Human shields

### ***Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009, ¶¶ 7-9):***

7. IHL also requires each party to the conflict to take certain steps to limit the risk to civilians of attacks by the opposing party.<sup>219</sup> These requirements are routinely disregarded by the Taliban. While there are cases in which Taliban fighters have warned civilians to leave an area prior to an attack, I received multiple witness accounts of the Taliban intentionally using civilians as “human shields” to deter attacks on their forces. In some instances, the Taliban have launched rocket-propelled attacks at IMF bases, convoys or other military targets from civilian compounds and villages, thereby making it difficult for international forces to respond militarily - via return fire or air strike - without causing civilian casualties or damaging civilian objects. Human shielding is also employed when the Taliban are in direct military engagement with international ground forces, and fire upon soldiers from homes or compounds. In this situation, the presence of

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<sup>217</sup> Just as it does not violate humanitarian law for a Taliban fighter to drive up to a checkpoint and shoot at a soldier, it does not violate humanitarian law for a Taliban fighter to drive up to a checkpoint and blow up both the soldier and himself.

<sup>218</sup> Perfidy is a deception that is designed to lead one party to the conflict to believe that they must accord protected status to an enemy. AP 1; ICC. And see J Ashley Roach, “Ruses and Perfidy Deception During Armed Conflict”, 23 U. Tol. L. Rev. 395 (1991-1992).

<sup>219</sup> Customary international humanitarian law prohibits “the use of human shields” (ICRC Study, Rule 97) meaning the “intentional collocation of military objectives and civilians or persons *hors de combat* with the specific intent of trying to prevent the targeting of those military objectives” (ICRC Study, Rule 97, discussion p. 340).

civilians within the compound - generally a family or group of families - has been used by the insurgents to deter return fire from international or ANA ground forces located nearby.<sup>220</sup>

8. The Taliban also sometimes hide from the IMF in civilian homes. Witnesses in Kandahar, for example, told me that it was common in certain areas for the Taliban to ask families to hide them within their homes and compounds. One woman recounted how her relatives refused to do so, and asked the Taliban not to enter, saying that they feared being killed in potential cross-fire. But the Taliban entered the home by force. In the absence of direct military engagement such actions are less likely to lead to civilian casualties, but in other circumstances endangerment will occur and various binding IHL obligations will be violated.

9. The Taliban should end the use of human shields and avoid locating its forces in areas populated by civilians. Nonetheless, Taliban usage of human shields does not affect the international forces' obligation to ensure that air strikes do not cause a loss of civilian life excessive in relation to the military advantage of killing the targeted fighters.

***Report on Mission to Israel and Lebanon (A/HRC/2/7, 2 October 2006, ¶¶ 29, 30, 58):***

29. International humanitarian law also imposes obligations on defenders. The use of human shields is prohibited.<sup>221</sup> Violation of this rule may be understood to require the defender's specific intent to use civilians to immunize otherwise legitimate military objectives from lawful attack.<sup>222</sup> In addition to this prohibition, the defender also has affirmative obligations to protect civilians by keeping them away from military targets.<sup>223</sup>

30. A violation of the obligation to take precautionary measures vis-à-vis the civilian population or their use as human shields by one side to a conflict does not change the obligations incumbent on the other party to the conflict to weigh what constitutes an excessive attack in relation to concrete and direct military advantage.

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<sup>220</sup> For instance, one witness with whom I spoke in Kandahar lost 17 family members in an airstrike when the Taliban used his home to launch attacks on the international forces. During the evening, 15-20 Taliban insurgents came to the witness's home, armed with AK-47s and rockets. The witness noticed airplanes flying overhead. Some of the Taliban told the family members to hide them, and others fired at the planes. They would not let the family leave the house. The witness told me that his sister-in-law begged the Taliban to stop firing at the planes from the home, fearing the planes would drop bombs on the family while attempting to strike the insurgents. Shortly after, she took her children out into the courtyard believing it would be safer, but they were all killed in the ensuing air strike.

<sup>221</sup> International Committee of the Red Cross, *Customary International Humanitarian Law*, Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), Cambridge University Press, 2005 (hereafter "ICRC Study"). pp. 337-340 (Rule 97). This study was prepared upon recommendation of the twenty-sixth International Conference of the Red Cross and Red Crescent (December 1995) and is based on an extensive analysis of State practice (e.g. military manuals) and documents expressing *opinion iuris*. The application of these customary standards to the present conflict has been the subject of extensive analysis by civil society groups. See for example Human Rights Watch, *Fatal Strikes: Israel's Indiscriminate Attacks Against Civilians in Lebanon* (August 2006); Human Rights Watch, *Hezbollah Must End Attacks on Civilians* (August 2006); Amnesty International, *Deliberate destruction or "collateral damage"? Israeli attacks on civilian infrastructure* (August 2006); and Amnesty International, *Under fire: Hizbullah's attacks on northern Israel* (September 2006).

<sup>222</sup> *Ibid.*, p. 340 (Rule 97).

<sup>223</sup> ICRC Study, p. 340.

58. It is clear that Hezbollah made at least some use of houses and other civilian sites to hide or conceal military activities. Although systematic evidence was not presented to the mission in this regard, the Government of Israel has provided it with video material unmistakably showing rockets being launched from civilian residential buildings in South Lebanon. This conduct was a violation of international humanitarian law obligations. The question of whether Hezbollah used human shields is more complicated, and the mission did not receive clear evidence on that issue. Under international law, the term “human shield” is appropriate when there is “an intentional collocation of military objectives and civilians or persons *hors de combat* with the specific intent of trying to prevent the targeting of those military objectives”.<sup>224</sup> This relatively precise definition of the term should be maintained, especially in light of the distinction between war crimes and other violations of humanitarian law.<sup>225</sup>

### **10. Killings of persons *hors de combat***

#### ***Report on Mission to Israel and Lebanon (A/HRC/2/7, 2 October 2006, ¶ 47):***

47. The same conclusion must be drawn regarding the reports of 12 destroyed and 38 severely damaged health facilities, notably in Bent Jbeil, Marjayoun and Nabatieh.<sup>226</sup> Ambulances and medical convoys were, according to ICRC, also hit during the conflict.<sup>227</sup> In the absence of concrete evidence to the contrary, it must be assumed that the health facilities and ambulances attacked were not legitimate targets. In this context it is important to stress that killing persons placed *hors de combat* is prohibited at any time and in any place whatsoever.<sup>228</sup>

#### ***Report on Mission to Central African Republic (A/HRC/11/2/Add.3, 27 May 2009, ¶ 6):***

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<sup>224</sup> ICRC Study, p. 340.

<sup>225</sup> Ibid., pp. 568-603 (Rule 156).

<sup>226</sup> Lebanon crisis: Service Availability Assessment, Ministry of Health and WHO, 29 August 2006. For international humanitarian law prohibitions on attacking civilian hospitals, see e.g. article 18 of the Fourth Geneva Convention, article 12 of Additional Protocol I and Rule 28 in the ICRC Study.

<sup>227</sup> During the evening of 23 July, for example, two Lebanese Red Cross (LRC) ambulances carrying six wounded to Tebnine Governmental Hospital were hit by Israeli aircraft in two separate attacks, wounding six LRC volunteers (ICRC press release, 29 August 2006). On 11 August, an LRC ambulance was hit directly by two projectiles, injuring two LRC volunteers; no hostilities were taking place in the vicinity at the time. That night, a convoy of hundreds of cars occupied mostly by civilians fleeing the area of Marjayoun came under fire from Israeli aircraft; one LRC first aid volunteer, Mikhael Jbayieh, was killed in the attack. LRC continued its work, taking six dead and 32 wounded to nearby hospitals (ICRC press release, 12 August 2006). For international humanitarian law prohibitions on attacking medical transports, see e.g. articles 21 and 22 of the Fourth Geneva Convention, article 21 of Additional Protocol I and Rule 29 in the ICRC Study, see note 131, above.

<sup>228</sup> Common article 3 to the Geneva Convention (preventing “violence to life and person, in particular murder of all kinds” of those placed *hors de combat* by sickness, wounds, detention, or any other cause”). Common article 3 is considered by the International Court of Justice to “constitute a minimum yardstick ... which, in the Court’s opinion, reflects what the Court in 1949 called ‘elementary conditions of humanity’”. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. *I.C.J. Reports 1986*, para. 218. See also ICRC Study, note 21 above, p. 312. (“The prohibition on killing civilians and persons *hors de combat* is set forth in numerous military manuals. It is also contained in the legislation of a large number of States. This prohibition has been upheld extensively in national and international case-law. Furthermore, it is supported by official statements and other practice.”)

6. In addition to the obligations imposed by human rights law, the conflicts in both the north-west and north-east were non-international armed conflicts to which international humanitarian law applied. All parties to these conflicts, including rebel groups, are bound by this body of law.<sup>229</sup> International humanitarian law requires the parties to distinguish between civilians and combatants at all times,<sup>230</sup> prohibits killing civilians except when they are directly participating in hostilities, and prohibits killing anyone, civilian or combatant, who has been detained or otherwise placed *hors de combat*.<sup>231</sup>

## 11. Urban counter-insurgency

### *Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009, ¶ 6-9):*

6. These rules also apply in situations such as that in Kunar province, where the Taliban fires rockets from residential areas directed at international forces bases and the latter then respond by firing back at the source. I heard no claim that the international forces deliberately held the civilian population accountable for these attacks, but the perception was that their responses displayed insufficient concern for civilian casualties. One official opined that while the local people did not “support” the AGEs they were in no position to interfere when armed men decided to fire from the area. He stated that for the international forces to return fire served no useful military purpose inasmuch as the AGEs would slip away immediately after firing and return across the border to Pakistan. The international forces have procedures for vetting targets and selecting an appropriate method of attack. I was not provided specifics on procedures, and am in no position to assess their formal compliance with international law. But regardless of the written procedures, it is not clear that sufficient caution is shown *in practice* to ensure that attacks are not indiscriminate and that civilian casualties will not be excessive in relation to the military advantage anticipated.

7. IHL also requires each party to the conflict to take certain steps to limit the risk to civilians of attacks by the opposing party.<sup>232</sup> These requirements are routinely disregarded by the Taliban. While there are cases in which Taliban fighters have warned civilians to leave an area prior to an attack, I received multiple witness accounts of the Taliban intentionally using civilians as “human shields” to deter attacks on their forces. In some instances, the Taliban have launched

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<sup>229</sup> Common article 3 of the four Geneva Conventions of 1949; Protocol II; and customary rules applicable to non-international armed conflicts.

<sup>230</sup> Article 13 (2) of Protocol II, Rule 1 Customary Rules of International Humanitarian Law identified in the study of the International Committee of the Red Cross (Customary Rules).

<sup>231</sup> Common article 3 of the four Geneva Conventions of 1949, article 4 of Protocol II, and Rule 89 of the Customary Rules.

<sup>232</sup> Customary international humanitarian law prohibits “the use of human shields” (ICRC Study, Rule 97) meaning the “intentional collocation of military objectives and civilians or persons *hors de combat* with the specific intent of trying to prevent the targeting of those military objectives” (ICRC Study, Rule 97, discussion p. 340). In addition to this prohibition, each party also has various affirmative obligations. There is a general obligation to “take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks” (ICRC Study, Rule 22). The specific implications of this rule in the context of non-international armed conflicts are open to some interpretation; however, the rules required in international armed conflicts provide guidance. These rules include that each party must “to the extent feasible, avoid locating military objectives within or near densely populated areas” (ICRC Study, Rule 23) and “to the extent feasible, remove civilian persons and objects under its control from the vicinity of military objectives” (ICRC Study, Rule 24).

rocket-propelled attacks at IMF bases, convoys or other military targets from civilian compounds and villages, thereby making it difficult for international forces to respond militarily - via return fire or air strike - without causing civilian casualties or damaging civilian objects. Human shielding is also employed when the Taliban are in direct military engagement with international ground forces, and fire upon soldiers from homes or compounds. In this situation, the presence of civilians within the compound - generally a family or group of families - has been used by the insurgents to deter return fire from international or ANA ground forces located nearby.<sup>233</sup>

8. The Taliban also sometimes hide from the IMF in civilian homes. Witnesses in Kandahar, for example, told me that it was common in certain areas for the Taliban to ask families to hide them within their homes and compounds. One woman recounted how her relatives refused to do so, and asked the Taliban not to enter, saying that they feared being killed in potential cross-fire. But the Taliban entered the home by force. In the absence of direct military engagement such actions are less likely to lead to civilian casualties, but in other circumstances endangerment will occur and various binding IHL obligations will be violated.

11. Raids must be conducted in accordance with the stringent safeguards required by international human rights and humanitarian law.<sup>234</sup> A commander in the international forces with whom I spoke defended surprise night raids as the safest available method, because sleeping men could be apprehended before they had a chance to respond with violence. But Afghans with whom I spoke maintained that such raids unnecessarily endangered the targeted individual's relatives and gave examples in which they believed that the target could readily have been captured in a less dangerous manner.<sup>235</sup>

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<sup>233</sup> For instance, one witness with whom I spoke in Kandahar lost 17 family members in an airstrike when the Taliban used his home to launch attacks on the international forces. During the evening, 15-20 Taliban insurgents came to the witness's home, armed with AK-47s and rockets. The witness noticed airplanes flying overhead. Some of the Taliban told the family members to hide them, and others fired at the planes. They would not let the family leave the house. The witness told me that his sister-in-law begged the Taliban to stop firing at the planes from the home, fearing the planes would drop bombs on the family while attempting to strike the insurgents. Shortly after, she took her children out into the courtyard believing it would be safer, but they were all killed in the ensuing air strike.

<sup>234</sup> The applicable body of law will depend on a raid's objective. If the raid is targeting a legitimate military objective, such as a combatant, then the raid is primarily governed by the same IHL governing other attacks, including rules and principles pertaining to verification of the target, proportionality, precautions in attack, and military necessity (*see* note 4). Thus, for example, when the IMF plans a raid, "everything feasible" must be done "to verify" that the target is a military objective (ICRC Study, Rule 16). And, in choosing the means and methods of conducting a military raid or detaining a combatant, the IMF must "take all feasible precautions" with a "view to avoiding, and in any event to minimizing, incidental loss of civilian life" (ICRC Study, Rule 17), and must "do everything feasible to assess whether the attack may be expected to cause incidental loss of civilian life ... which would be excessive in relation to the concrete and direct military advantage anticipated" (ICRC Study, Rule 18). If the raid's target is not a legitimate military objective - e.g., if the target is a civilian who is not directly participating in hostilities - the operation is governed by international human rights law. In a law enforcement context, lethal force may be used only when it is clear that an individual is about to kill someone (making lethal force proportionate) and there is no other available means of detaining him or her (making lethal force necessary). (*See* A/61/311, paras. 33-45; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 9; Code of Conduct for Law Enforcement Officials, art. 3.)

<sup>235</sup> For example, witnesses to raids and family members of suspects suggested that suspects could have been picked up from their place of work or while walking to work, where women and children would be at significantly less risk of being exposed to the threat or use of force.

28. Civilians experience far more pervasive and violent intimidation by the Taliban, elders and others, especially in Kunar province, claimed international forces had threatened collective consequences for failures to cooperate.<sup>236</sup> In one instance, international forces were cited as saying that unless various weapons were brought to them within 24 hours, they would demolish several villages. The villagers refused, and a funeral ceremony was then attacked by a helicopter, killing six people. International forces in Kunar province would not meet with me, so it was not possible to obtain their response. Arguably, if villagers have Taliban in their midst they will inevitably be endangered by military operations no matter what safeguards are adopted. Nonetheless there is reason for serious concern that international forces take a cavalier attitude toward such safeguards precisely because they view the civilian population as complicit with the Taliban.

29. The international forces in Afghanistan should take seriously the principles of accountability and transparency, the importance of which they so frequently proclaim in other contexts.<sup>237</sup> I saw no evidence that the ISAF commit widespread intentional killings in violation of human rights or IHL. But their response to alleged civilian casualties combines great seriousness of intent and adherence to the applicable law with surprisingly opaque and unsatisfactory outcomes.

30. First, when I asked relatives or witnesses which particular international force had carried out the killing, even those who had tried to follow up their cases at PRTs and other military bases were often unable to answer. Seeking clarification from the international forces is like entering a maze, one that I also experienced myself.<sup>238</sup>

31. Second, the situation is even worse when it comes to the accountability of individual soldiers. There is a dual system, involving both the ISAF and national commands, for incidents in which there are grounds to believe that unlawful force may have been used. An ISAF commander will convene a Mission Review Board in response to formal allegations, internal information that

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<sup>236</sup> There is no exception to the rule prohibiting attacks directed at civilians who are not directly participating in hostilities. Indeed, the international humanitarian law applicable to non-international armed conflicts expressly prohibits any “resort to belligerent reprisals” as well as any other “countermeasures against persons who do not or who have ceased to take a direct part in hostilities” (ICRC Study, Rule 148).

<sup>237</sup> Human rights law imposes a duty on States to investigate alleged violations of the right to life “promptly, thoroughly and effectively through independent and impartial bodies” (Human Rights Committee, general comment No. 31, “Nature of the legal obligation on States Parties to the Covenant” (2004), (CCPR/C/21/Rev.1/Add.13), para. 15.) This duty is entailed by the general obligation to ensure the right to life of each individual. The right to life is non-derogable regardless of circumstance (ICCPR, art. 4 (2)); thus, armed conflict and occupation do not discharge the State’s duty to investigate and prosecute human rights abuses. It is undeniable that during armed conflicts circumstances will sometimes impede investigation. Such circumstances will never discharge the obligation to investigate - this would eviscerate the non-derogable character of the right to life - but they may affect the modalities or particulars of the investigation. On a case-by-case basis a State might utilize less effective measures of investigation in response to concrete constraints. For example, when hostile forces control the scene of a shooting, conducting full forensic examinations may prove impossible. Regardless of the circumstances, however, investigations must always be conducted as effectively as possible and never be reduced to mere formality. (E/CN.4/2006/53, paras. 33-43.)

<sup>238</sup> One ISAF commander explained that while he could confirm whether a particular operation was conducted by conventional ISAF troops and then clarify which national contingent they belonged to, he would have to pass the case up the chain of command to clarify whether it had been conducted by ISAF special forces, and that I would have to ask the commander in charge of Operation Enduring Freedom (OEF) to determine whether and which coalition forces were responsible.

raises concerns, or even a newspaper report on an incident. The perspective of this inquiry is not legal, but addresses incidents that may undermine the mission. The board evaluates whether the force used was appropriate. Findings go to the ISAF commander and the command of the relevant national contingent. The responsibility for prosecuting any crime committed then belongs to the sending country. There is, however, no requirement that the outcomes of these national processes of investigation, discipline, and prosecution be reported back to ISAF. The result is that *no one* in Afghanistan systematically tracks the outcome of investigations and prosecutions.<sup>33</sup> This is a wholly unsatisfactory situation. investigation in response to concrete constraints. For example, when hostile forces control the scene of a shooting, conducting full forensic examinations may prove impossible. Regardless of the circumstances, however, investigations must always be conducted as effectively as possible and never be reduced to mere formality. (E/CN.4/2006/53, paras. 33-43.)

## **J. HUMAN RIGHTS BASED SECURITY SECTOR REFORM**

***Report on Mission to Central African Republic (A/HRC/11/2/Add.3, 27 May 2009, ¶ 20, 48, 68-78):***

30. A number of other Government officials stated that reports of violence were exaggerated. The officials admitted that some acts of violence by the military occurred, but stated that it was difficult to control individuals out in the field, or to know who did what to whom. This may be true, but it is not an acceptable excuse for inaction by the Government, nor can it form the basis of a credible denial of the accuracy of the many accounts of violence received. Rather, the Government's admissions of lack of control and lack of knowledge of events - in the face of comprehensive human rights reporting and the statements of many witnesses - indicate instead that it needs to undertake far-reaching security sector reforms so that the failings of command and control structures and investigative processes can be remedied.

48. Fourth, deaths occur during law enforcement operations. Encouragingly, at the time of the visit, both Government and civil society interlocutors noted improvements in the operations of the *Office central de repression du banditisme* (OCRB), which was set up to address banditry in Bangui. Theoretically, it has national jurisdiction, but in practice its efforts are limited to the capital. Civil society representatives reported that police in the OCRB have sometimes used excessive force, killing, rather than arresting, criminal suspects. Government officials admitted that in the past some police had "gone too far". However, the Special Rapporteur was told that unlawful incidents had decreased, especially after BONUCA conducted human rights training for police. Civil society representatives also stated that abuses by the OCRB had reduced over the previous year. Continued training, and the implementation of effective police oversight mechanisms are essential to ensure that the OCRB develops as a reliable institution.

68. In conjunction with the reform of the justice system, it is crucial to reform the security sector - including the FACA, the GP, the gendarmerie, and the police - and regain the trust of the population. While the population, especially in the north, rightly distrusts the current armed forces in light of their past conduct, they desperately want the presence of security forces that can protect them from bandits and lawlessness.

69. Most interlocutors were fundamentally pessimistic with respect to whether the Government had the will to implement the necessary transformation. One foreign soldier who had helped train the FACA at various points throughout the past 20 years said that he had witnessed zero progress in terms of tactical competence or of respecting the rule of law. While this is sobering, it is encouraging that interlocutors did believe that change is possible if the international community eschews "quick fixes" in favour of a long-term strategy and commitment.

70. A seminar on security sector reform held in Bangui in April 2008 was a significant step forward. It brought together members of civil society and Government to discuss wide-ranging reforms. The detailed timetables for reforms to each institution that were developed provide a promising basis for future efforts. However, while reform efforts must focus on precise measures, the big picture must always be kept in mind as those steps are taken. Reforms must

result in security forces that can both ensure and respect human rights. In what follows, the key lessons learned during the mission are outlined.

### Principles to guide human rights-based reform of the security sector

71. It is necessary to start by recognizing that, while the steps taken by the President to reduce abuses were positive, change that is rooted in a single individual's words cannot be expected to endure. Reforms must be institutionalized. This requires that decision-making based on personal relationships be replaced with decision-making based on stable institutional structures.

72. First, there is a fundamental problem with the very concept of a GP directed personally by and loyal to the President, which not only provides close protection to him but also carries out wide-ranging security activities. These problems are compounded by the fact that the GP takes orders from the President rather than through the regular chain-of-command and is recruited through an ad hoc process.

73. As long as a single individual is permitted to control what amounts to a private army, there will always be a danger that large-scale abuses will recommence as quickly as they were brought to an end. Moreover, the pattern in which each new president remakes this critical component of the security sector in his own image will continue, meaning that every transition will threaten to undo all previous efforts at reform. Nevertheless, it must be candidly acknowledged that the GP will not be permanently eliminated until incoming presidents feel that they can rely on the existing FACA and do not need to form ad hoc units to ensure their regime's survival. This suggests that an element of sequencing is pragmatically reasonable. As the FACA is reformed, the elimination of the GP will be facilitated. There is not, however, anything inevitable about this progression. An end to the use of the GP for any purpose other than the President's close protection must be treated as a key aim of security sector reform, and donors should link the issues.

74. The limited efficacy of formal legal proscription in making permanent the elimination of an institution that emerges and re-emerges in conjunction with regime transitions must also be acknowledged. Again, there is no perfect solution, but a starting point would be for civil society groups to prioritize this issue and promote a non-partisan understanding that new presidents must accept the existing security forces rather than "supplementing" them - and that the security forces must support whomever is president. Entrenching a new societal norm will not be easy, but the country's history provides ample evidence of why such a norm is necessary.

75. Second, a regular chain-of-command should be established and enforced. Every operation should be conducted pursuant to a written order signed by the legally designated commander. Personal ties must not be permitted to subvert this chain-of-command. Soldiers who refuse the lawful orders of their commanders, who order military activities outside the proper chain-of-command, or who follow such irregularly issued orders should be disciplined. The importance of this was brought home during meetings with the GP. According to senior GP officials, the GP command had not signed the orders for all of Lt. Ngaïkossé's missions, and thus was not responsible for any unauthorized missions. The GP had apparently taken no measures to investigate or control these irregular missions by Lt. Ngaïkossé.

76. Soldiers should also be instructed that they have an obligation to disobey manifestly illegal orders and be sufficiently well-educated in international law to recognize these orders. In this respect, recent steps to establish an international humanitarian law unit in the military are encouraging. It should be kept in mind that training must be regularly reinforced, and that it will not achieve its objectives without an effective military justice system to punish violations.

77. Third, the principle that the security sector is accountable to the State and its people rather than to any single individual or regime should be entrenched. As a reflection of this principle and in furtherance of its implementation, the security forces should consult closely with local populations in need of protection in the north-west to guide operations responding to banditry. For a territorial army to provide protection requires a close relationship with the people, in addition to more general reforms in operational performance and respect for human rights.

78. These lessons suggest that donors should continue to provide assistance to increase the effectiveness of the security sector and that this assistance should be accompanied by efforts to provide strong human rights training, ensure effective monitoring of the military and police, and promote respect for human rights.

***Press Statement on Mission to Colombia (8-18 June 2009)***

The key question is who was responsible for these premeditated killings? On the one hand, I have found no evidence to suggest that these killings were carried out as a matter of official Government policy, or that they were directed by, or carried out with the knowledge of, the President or successive Defence Ministers. On the other hand, the explanation favoured by many in Government – that the killings were carried out on a small scale by a few bad apples – is equally unsustainable. The sheer number of cases, their geographic spread, and the diversity of military units implicated, indicate that these killings were carried out in a more or less systematic fashion by significant elements within the military.

Starting in 2007, the Government has taken important steps to stop and respond to these killings. They include: disciplinary sanctions, increased cooperation with the ICRC and the UN, the installation of Operational Legal Advisors to advise on specific military operations, increased oversight of payments to informers, the appointment of the Suarez Temporary Special Commission, the appointment of Delegated Inspectors to army divisions, requiring deaths in combat to be investigated first by judicial police, modifying award criteria, and creating a specialized unit in the Prosecutor's Office (Fiscalia).

These encouraging steps demonstrate a good faith effort by the Government to address past killings and prevent future ones. But there remains a worrying gap between the policies and the practice. The number of successful prosecutions remains very low, although improved results are hoped for in the coming year. Three problems stand out. The first is that the Fiscalia, and especially its Human Rights Unit, lack the requisite staff, resources and training. A substantial increase in resources is essential. The second is that in some areas military judges ignore the rulings of the Constitutional Court and do all in their power to thwart the transfer of clear human rights cases to the ordinary justice system. The transfer of information is delayed or obstructed,

wherever possible jurisdictional clashes are set up, and delaying tactics are standard. Delays, often of months or years, result and the value of testimony and evidence is jeopardized.

The good news is that there has been a significant reduction in recorded allegations of extrajudicial executions by the military over the last 6-9 months. If this trend is confirmed, it will represent a welcome reversal of course, but the problem of impunity for past killings must still be addressed.

***Press statement on Mission to the Democratic Republic of the Congo ( 5-15 October 2009):***

Security sector reform is complex and time-consuming. An all but neglected issue is the future of the Republican Guard. This is a ticking time bomb. Unless the RG is fully integrated into the FARDC, it has the potential to become an uncontrollable and explosive obstacle in the way of free elections and democratic governance.

## **K. RECRUITMENT INTO THE MILITARY**

### ***Report on Mission to Central African Republic (A/HRC/11/2/Add.3, 27 May 2009, ¶ 14, Recommendations):***

14. Recruitment into the FACA since the early 1980s has not been based on consistent criteria over time. Rather, soldiers have all too often been recruited through personal relationships, or recruited for their ethnicity and loyalty to the current leader. The result of this today is that the army is not an integrated whole with regularized command and control lines, but includes various informal factions, including members of the Yacoma ethnic group recruited under former President André Kolingba, and the *ex-libérateurs* brought in by President Bozizé.

[...]

The FACA should be reformed so that it is seen to be an apolitical institution working on behalf of the people rather than of any single individual or regime.

Relevant reforms would include:

- (a) Recruitment and promotion processes should be regularized and based on merit and the development of a force representative of the society as a whole;
- (b) A regular chain-of-command should be established and enforced;
- (c) No military operation should be carried out except pursuant to a written order signed by the legally designated commander. Reports of irregular operations should be investigated, and those involved disciplined and prosecuted;
- (d) The FACA and other security forces should consult closely with local populations in the north in need of protection to reduce fears that the military will engage in abuses and to guide operations responding to banditry and cross-border raids;
- (e) The FACA should be transformed into a truly country-wide force with soldiers based in key centers throughout the country.

### ***Press statement on Mission to the Democratic Republic of the Congo ( 5-15 October 2009):***

In many areas, it is the FARDC themselves who pose the greatest direct risk to security. The lack of vetting, training, and planning of the integration of former armed group members, especially the ex-Congrès National pour la Défense du Peuple (CNDP) into the FARDC in the Kivus has, not surprisingly, escalated the abuses committed by the army against civilians, and failed to break down parallel ex-CNDP command structures within the army. The process of developing a professional military has not yet begun in earnest. Training has often been perfunctory at best, even for many commanders. The precise number of soldiers is unknown, and the composition of military units is unclear. Soldiers' uniforms rarely identify their name or brigade. Ongoing

efforts by EUSEC to carry out a much needed census of the army are indispensable to professionalizing the armed forces.

In addition to these large-scale killings by FARDC units, there have been many cases of opportunistic murder by soldiers. Regular failures by the Government to provide soldiers 3 their rations and pay, together with embezzlement by commanders, forces soldiers to literally prey on the population. I received extensive testimony of such cases, including many killings during attempts to steal food and other basic items, or deaths in the context of the FARDC forcing civilians to carry items for them. It is clear that abuses by the FARDC are dramatically reduced in areas where they are paid and fed.

As in the Kivus, a range of interlocutors have identified the FARDC as the most serious growing security threat in Orientale. For much of this year, the Republican Guard has been deployed in Orientale. However, in the last few months, a new integrated FARDC brigade – including ex-CNDP members – has been deployed to Orientale from North Kivu to replace the Republican Guard. Predictably, the new brigade has brought with it the harassment, looting, rape, and killing committed by the same forces in the Kivus. Most abuses are committed with impunity – members of the population have no idea that it is possible to complain about FARDC abuses, let alone who they should complain to. A military prosecutor was sent to Dungen for the first time only last week. At least 15 killings have been committed by the FARDC in Haut-Uélé in the last two and a half months. Most of these killings were in the context of FARDC looting and robbery attempts. In one case, two women were killed when they resisted a gang rape by soldiers. As the Republican Guard leave Orientale, and further integrated brigade soldiers continue to arrive, increased abuses should be anticipated. In turn, village self-defence groups are likely to be reinvigorated and to consider taking up arms against the FARDC if it continues to abuse the population with impunity. Orientale is at a critical juncture and all the warning signs are there for a repetition of the patterns of violence that have plagued the Kivus.

[...]

2. Permitting key members of the military who are alleged to have committed war crimes, crimes against humanity and other serious offences to serve in the armed forces sends an immensely powerful message to the rest of the military. The message is that impunity rules and that brutality and power prevail over law. The slogan that peace will come first and justice later fundamentally misunderstands the dynamic involved. Peace will not come, nor will justice, until the Government and the international community take seriously the notion that those accused of heinous crimes must be indicted immediately. Giving individuals like Bosco Ntaganda, Innocent Zimulinda, Sultani Makenga, Bernard Byamungu and Salumu Mulenda a get out of jail free card, even if ostensibly “just for a few years”, only serves to mock human rights. No amount of sophisticated strategic rationalization should be permitted to obscure that fact.

***Report on Mission to the Democratic Republic of the Congo (A/HRC/14/24/Add.3, ¶¶ 24-29):***

24. Individual killings have generally occurred in the context of looting or sexual violence, or for other purely subjective reasons. Soldiers have, for example, retaliated when civilians resisted attempts by soldiers to steal their food, motorcycles or other goods. I received numerous

testimonies of soldiers opening fire on crowds of civilians who had refused to hand over food. In other cases soldiers have shot at their commanders or civilians when rations or pay were delayed. I also received testimony of soldiers forcing civilians to carry rations and other goods for them over long distances, because the soldiers do not have other methods of transport. Civilians have been ordered to do this under threat of death. Looting by the FARDC in villages they have taken over from the FDLR has also been common. Such problems are due both to the central Government's failure to provide funds and to the rampant embezzlement of pay by commanders, combined with often poorly trained and ill-disciplined soldiers.

25. Victims or witnesses have difficulty in attributing responsibility for abuses because soldiers' uniforms do not identify their name and unit number. The rapid and unvetted integration of former rebels into the FARDC in early 2009 compounded these problems. The failure to appropriately support soldiers in the field led soldiers to prey on the local population, and resulted in the range of predictable parasitic abuses against civilians that were well-documented by humanitarian organizations through 2009. Available evidence, including that provided to me by military commanders, strongly suggests that these types of abuses are reduced where soldiers are provided adequate pay and rations.

[...]

26. In addition to these opportunistic killings, I obtained credible evidence that FARDC soldiers carried out large-scale targeted massacres of civilians in the Kivus. These killings appear to have been primarily carried out by units composed of ex-CNDP members integrated into the FARDC in the early stages of Kimia II, and led by CNDP commanders with sometimes extensive records of prior abuses. The massacres have often taken place against civilians located near suspected rebel group locations, or against civilians presumed to have supported the FDLR.

27. For example, I received reliable evidence of a massacre on 27 April 2009 in which the FARDC attacked a makeshift refugee camp in Shalio. Some 50 Rwandan Hutu refugees, presumed to be aligned with the FDLR, were immediately killed – either shot, cut, or beaten to death. Another group of 50 were taken by the FARDC, most of whom were subsequently also killed; a group of some 40 women were raped and beaten; a further group taken from Shalio remains unaccounted for. The commander responsible for the attacks appears to have been Lt. Col. Innocent Zimurinda, an ex-CNDP leader known for his Tutsi extremism.<sup>239</sup>

28. Since my visit, further evidence has emerged of other similar FARDC killings, including killings near Shalio, in Bunyarwanda and Marok; two other massacres in August 2009 in Mashango and Ndoruma; and frequent killings through 2009 on the Nyabiondo- Pinga axis.<sup>240</sup> Information provided to me indicates that many of these killings were also committed by ex-CNDP members, and that they likely took place to punish civilians perceived to be rebel

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<sup>239</sup> Zimurinda (also Zimulinda) was formerly an officer in the UPC militia (Ituri), the commander of the second battalion of the Mixed Bravo Brigade, an officer in the CNDP, and is now a commander in the FARDC. He has been accused of being responsible for CNDP killings in Kiwanja (2008), and for killings of civilians while in the Bravo Brigade in 2007.

<sup>240</sup> See Human Rights Watch, *"You Will Be Punished": Attacks on Civilians in Eastern Congo* (December 2009).

“collaborators”, to destroy non-Tutsi populations, and possibly to gain access to mineral resources.

29. One of the most significant causes of these large-scale killings by the FARDC were the failures to appropriately plan the integration of the CNDP into the regular armed forces, and to vet during that process, especially at senior command levels. This resulted in a context ripe for grave abuses, especially against non-Tutsi civilians. It should come as no surprise that members of the CNDP terrorized civilians when integrated into the FARDC given that: (a) the CNDP has long been known to abuse civilians; (b) most CNDP members had little formal military training, and were provided no serious training or discipline upon integration; (c) mass rapid integration and poor record-keeping resulted in confused command structures in the FARDC; (d) the ex-CNDP were deployed to fight in areas inhabited by the rebels they had previously fought, or inhabited by civilians perceived to support those rebels or simply of a rival ethnicity; and (e) the units were led by commanders with extensive records of serious human rights abuses.

#### **L. INTERNATIONAL HUMANITARIAN LAW TRAINING FOR MILITARY OFFICIALS**

***Report on Mission to Central African Republic (A/HRC/11/2/Add.3, 27 May 2009, ¶ 13, Recommendations):***

13. Government officials acknowledged that soldiers are poorly trained, lack discipline, and are unprofessional. Foreign military advisers<sup>241</sup> described them as lacking effective command and control structures. This is particularly the case with the GP. Military officials stated that while the GP are structurally part of the FACA, they are not under the command of its Chief of Staff. As detailed below, some units of the GP seem to undertake military operations outside of any formal command structure. The GP were repeatedly singled out as being the least disciplined. They would consume alcohol while on duty, refuse to take care of their military equipment, and many were unable to properly handle their weapons. Human rights and humanitarian law training has, until recently, also been poor. A foreign adviser noted that during a recent humanitarian law training session it became evident that troops were ignorant of the content of the core legal principles.

[...]

The Government’s proposed reforms to increase the resources and capability of the security forces should continue to be supported by the international community and be pursued in a manner that develops their capacity to both respect and protect human rights.

The general instructions given by the President to end killings and other abuses against the civilian population should be specifically reflected in internal regulations, orders, training and other practices so as to prevent abuses from recurring in the future.

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<sup>241</sup> French, South African and regional *Mission de Consolidation de la Paix* (MICOPAX) personnel engage in training and other assistance for the CAR forces. This contribution was generally perceived to be positive.

Training in human rights and humanitarian law should be provided to all members of the security forces and regularly reinforced. The President and senior commanders should further support respect for these bodies of law by issuing clear instructions:

- (a) Soldiers should be instructed that they must obey international human rights and humanitarian law and that they have the obligation to disobey manifestly illegal orders and will otherwise be prosecuted;
- (b) Commanders should be instructed that they are criminally responsible when they knew or had reason to know that their subordinates were going to commit crimes and did not take all reasonable and necessary measures to prevent and punish those crimes.

The FACA should be reformed so that it is seen to be an apolitical institution working on behalf of the people rather than of any single individual or regime. Relevant reforms would include:

- (a) Recruitment and promotion processes should be regularized and based on merit and the development of a force representative of the society as a whole;
- (b) A regular chain-of-command should be established and enforced;
- (c) No military operation should be carried out except pursuant to a written order signed by the legally designated commander. Reports of irregular operations should be investigated, and those involved disciplined and prosecuted;
- (d) The FACA and other security forces should consult closely with local populations in the north in need of protection to reduce fears that the military will engage in abuses and to guide operations responding to banditry and cross-border raids;
- (e) The FACA should be transformed into a truly country-wide force with soldiers based in key centres throughout the country.

A process should be embarked upon to permanently abolish the institution of a Presidential Guard - whatever it might be formally named - that plays any role other than providing close protection for the President:

- (a) Donors should link assistance for reforms that increase the effectiveness and reliability of the military to steps taken to reduce the size and role of the Presidential Guard;
- (b) Civil society groups should promote a popular non-partisan understanding that new presidents must accept the existing security forces rather than supplementing them with presidential guards, militias or mercenaries, and that the security forces must support whoever is president.

***Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009, ¶ 82):***

82. Ending unlawful killings by the police should be a priority. To that end, there should be a concerted effort to reform the police:

(a) Human rights training, while important, will not be sufficient to prevent abuses that are driven by the links between police officers and particular tribes, commanders, and politicians. These links must be broken in order to establish a national police force that serves and protects the entire community;

(b) Continued efforts to reconstruct the police force as a truly national and professional force are vital. The “focused district development” training should be strongly supported;

(c) All efforts to supplement the police by establishing or legitimizing local militias should be abandoned.

## M. RESPONSIBILITY OF STATES IN JOINT-MILITARY OPERATIONS

*Report on Mission to the Democratic Republic of the Congo (A/HRC/14/24/Add.3, 1 June 2010, ¶¶ 31-35):*

31. MONUC serves a crucial role in the DRC. I met with MONUC officials across the country, and was impressed with the level of their dedication to the mission, and the skill with which they carried out their functions. In the Kivus especially, MONUC's presence has provided important protection to civilians over the years. However, its involvement in Kimia II raised serious human rights questions.

32. As described above, MONUC provided substantial support to the Congolese army in Kimia II, and also has a significant role in the Amani Leo Operation, launched in January 2010. The seriousness and extent of abuses committed by the Congolese army in the context of Kimia II brings into question whether MONUC carried out its mission in accordance with its mandate, and whether it met its international legal obligations.

33. MONUC's mandate for 2009 was set out in Security Council Resolution 1856, which authorized its deployment and set out its priorities. Its mandate included coordinating with the FARDC and supporting its operations in the Kivus. However, and as legal advice from the UN Office of Legal Affairs (OLA) has clarified,<sup>242</sup> MONUC could not participate in or support operations by Congolese units where there were "substantial grounds for believing there to be a real risk of [those units] violating international humanitarian law, human rights law or refugee law".<sup>243</sup> The OLA advice also clarified that if the FARDC did violate international law, MONUC would need to take a range of measures, including, if the violations were "widespread or serious", to end its "participation in the operation as a whole".<sup>244</sup> The advice stated that, if the FARDC violated international law, MONUC would need to immediately "intercede with the FARDC ... to dissuad[e] the units concerned from continuing in such violations". If the violations continued, MONUC would need to "reassess its relations" with the relevant units. In some cases, MONUC would need to take other actions, including the use of force, to stop violations by the FARDC.

34. Some interlocutors questioned the appropriateness of the initial decision to involve MONUC in FARDC operations given the immediate history of FDLR retaliation attacks; known abuses by the FARDC and its lack of discipline and inadequate pay and rations; the poorly planned CNDP

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<sup>242</sup> The UN Office of Legal Affairs advice was prepared on a confidential basis, but its contents have been widely leaked and the text is publicly available: Jeffrey Gettleman, "UN Told Not To Join Congo Army in Operation", *New York Times* (9 December 2009); "U.N. Correspondence on Peacekeeping in the Democratic Republic of the Congo", *New York Times* (providing full copies of (a) April 2009 Letter from Peter Taksøe-Jenson, Assistant-Secretary-General for Legal Affairs to Alain Le Roy, Under-Secretary-General for Peacekeeping Operations on "Operation Kimia II"; and (b) October 2009 Letter from Patricia O'Brien, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, to Alain Le Roy, Under-Secretary General for Peacekeeping Operations"), available at: <http://documents.nytimes.com/united-nations-correspondence-on-peacekeeping-in-the-democraticrepublic-of-the-congo#p=1>.

<sup>243</sup> "April 2009 Letter from Peter Taksøe-Jenson", para. 7; Security Council Resolution 1856, para. 3(g).

<sup>244</sup> "April 2009 Letter from Peter Taksøe-Jenson", para. 10.

integration; and resource constraints on MONUC troops. In any event, once involved in Kimia II, MONUC's ability to fulfill its mandate and legal obligations was certainly compromised by its failure to design and implement from the outset a comprehensive civilian protection strategy, incorporating a strong conditionality policy based on monitoring and investigating allegations against FARDC units.

### *Conditionality*

35. FARDC units were supported by MONUC despite credible reports of widespread human rights violations. I was told by MONUC military officials that, when it received such reports, they were usually raised with the FARDC command. This is entirely appropriate, but it can only be a first step in a graduated response. A clear and credible conditionality policy was necessary to ensure that MONUC was not implicated in FARDC abuses. At the time of this report, MONUC had not yet published a formal policy setting out how and when it would condition support for FARDC units or the operation as such. I understand that the drafting of such a policy only began in September 2009.

### ***Press statement on Mission to the Democratic Republic of the Congo ( 5-15 October 2009):***

The international law definition of extrajudicial execution is far broader than that under DRC law. It encompasses any killing by Government forces as well as killings by any other groups or individuals which the Government fails to investigate, prosecute and punish when it is in a position to do so.

[...]

In the past year, over 1,200 civilians have been brutally killed by the LRA. Many of these killings have been revenge massacres following Government military operations. Both Operation Rudia I (a September 2008 joint FARDC-MONUC operation) and Operation Lightning Thunder (a December 2008 joint FARDC-Uganda-Sudan People's Liberation Army operation, with US logistical support) were immediately followed by retaliation killings by the LRA. In Dungu and in Doruma, I spoke with adults and children abducted by the LRA, children forced to serve as soldiers and trained to kill, and family members who watched their relatives bashed to death with machetes and sticks in coordinated LRA attacks. Given the longstanding pattern of LRA retaliation killings in Uganda and Sudan, these massacres were predictable, and far more should have been done by the Government and by MONUC to prioritize civilian protection in planning the military operations. This is required by both international humanitarian and human rights law.

### ***2009 General Assembly Report (A/64/187, 29 July 2009, ¶¶ 55-57):***

55. Recognition of the various roles that States have played in vigilante killings has important implications for considering States' international legal obligations. States are obliged both to respect and to ensure the right to life.<sup>245</sup> This means that they are required to refrain from

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<sup>245</sup> International Covenant on Civil and Political Rights, articles 2 and 6.1.

violating the right to life and also that they must adopt the necessary legislative, judicial, administrative, educative and other measures to guarantee that the right to life is respected within their territory or areas under their control.<sup>246</sup> In other words, just as States are prohibited from using otherwise private actors to carry out vigilante killings, they are required to protect people from violent vigilantism carried out by privately formed groups.

56. With respect to the relationship between vigilantism and the obligation to respect the right to life, some types or cases of vigilante killings appear to have such a level of State involvement on the facts that the killings could reasonably be judged as attributable to the State. The conduct of private individuals is attributable to a State where, for example, those actors are acting on the instructions of, or under the direction or control of, the State.<sup>247</sup> Whether any particular vigilante killing is attributable to the State needs to be determined on a case-by-case basis. An example that would likely satisfy the attribution test would be where State officials fund the formation of a vigilante group and instructs it to kill certain named individuals or to patrol a certain area and kill suspected criminals. Where attribution exists on the facts, the State is internationally responsible for the killing itself. The provision of compensation or rewards for such killings would likely satisfy the criteria for attribution.

57. Outside of such cases of direct liability, the State can also be internationally responsible for failing to meet its due diligence obligations to ensure that rights are respected.<sup>248</sup> The State's obligations to protect victims from vigilante violence and to investigate and prosecute perpetrators are especially relevant. All too often, the actions of officials encourage or permit vigilante killings in such a way that they entail a failure to meet the State's due diligence obligations. A State's obligation to "ensure" the right to life is not breached simply because a vigilante kills a suspected criminal. Generally, isolated killings of individuals will constitute a crime in violation of the State's domestic laws, but not give rise to any international governmental responsibility. However, a State will violate its obligation to "ensure" the right to life when it fails to take appropriate measures to prevent, punish, investigate or redress the harm caused by vigilantes.<sup>249</sup> The police, for example, fail in their duty to prevent when they refuse to respond to calls of ongoing mob justice, or to take victims for medical treatment.<sup>250</sup> States also fail in their obligations when they permit the perpetrators of vigilante killings to escape

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<sup>246</sup> Human Rights Committee, General Comment No. 31, "Nature of the legal obligation on States parties to the Covenant", 2004 (CCPR/C/21/Rev.1/Add.13); Commission on Human Rights resolution 2004/37, paras. 6-7.

<sup>247</sup> See the International Law Commission's articles on responsibility of States for internationally wrongful acts (2001), art. 8 (and commentary set out therein); see also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports, 1986, paras. 109-115; compare *Prosecutor v. Duško Tadić*, International Tribunal for the Former Yugoslavia, Case IT-94-1-A, ILM, vol. 38 (1999), No. 6, November 1999, para. 117.

<sup>248</sup> E/CN.4/2005/7, para. 73; *Velasquez Rodriguez v. Honduras*, Annual Report of the Inter-American Court of Human Rights, OAS/Ser.L/V/III/19, doc. 13 (1988), 28 ILM (1989) 291.

<sup>249</sup> Human Rights Committee, General Comment No. 31, "Nature of the legal obligation on States parties to the Covenant", 2004 (CCPR/C/21/Rev.1/Add.13); Commission on Human Rights, Resolution 2004/37, para. 9.

<sup>250</sup> Examples of such police failure are discussed in: Amanda Dissel and Kindiza Ngubeni, *A Lonely Way to Die: An Examination of Deaths in Police Custody*, July 1999, Center for the Study of Violence and Reconciliation; David Bruce and Joe Komane, "Taxis, cops, and vigilantes: police attitudes towards street justice", *Crime and Conflict*, No. 17, Spring 1999, p. 39.

prosecution, as so often happens.<sup>251</sup> Where vigilante killings are known to be a significant phenomenon, the State should take specific and focused action to investigate and stop them. The State may need to create a specialized law enforcement task force to dismantle vigilante groups and arrest and prosecute perpetrators,<sup>252</sup> or investigations by a State's national human rights institution may be appropriate (as is currently occurring in the Philippines). The international community can usefully assist States in such efforts through the provision of technical advice and resources.

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<sup>251</sup> For example, in one study of 82 cases, "Police inquests had not closed even one case": Maria- Victoria Benevides and Rosa-Maria Fischer Ferreira, "Popular responses and urban violence: lynching in Brazil", in *Vigilantism and the State in Modern Latin America: Essays on Extralegal Violence* (1991), Martha K. Huggins (ed.), p. 38.

<sup>252</sup> See for example Makubetse Sekhonyane and Antoinette Louw, *Violent Justice: Vigilantism and the State's Response*, Monograph 72 (March 2002), chap. 3 (noting that the targeted prosecution of Mapogo members in South Africa had "decreased the group's activities").

## N. COMMUNICATIONS WITH ARMED NON-STATE ACTORS

### *Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009, ¶¶ 38-43):*

38. There have been limited efforts to respond to the Taliban's perpetration of extrajudicial executions and other human rights abuses. Tribal elders, in particular, emphasized the importance of finding ways to influence the Taliban's conduct. While there was a general consensus that doing so would be difficult, a number of possible approaches were proposed.

39. Some suggested that Islamic scholars could take actions that would constrain the Taliban's freedom to resort to tactics violative of Islamic and international law. While the Taliban's own clerical network is unlikely to be influenced, my interlocutors felt that scholars could exercise a more indirect influence. One measure suggested was for especially respected clerics to release *fatwas* condemning the Taliban's resort to abusive tactics.<sup>253</sup> Another was for Islamic scholars to familiarize tribal elders with the precepts of Islamic law governing the conduct of hostilities. This would better equip them to persuade local commanders to desist from abusive tactics, to reduce broader support for such tactics, and to discourage young men from engaging in these methods of warfare.

40. Views varied on the relevance of a strategy "naming and shaming" in relation to the Taliban. One interlocutor suggested that since the Taliban has denied responsibility for particular suicide attacks causing heavy civilian casualties, there might be a reputational concern with the public. It would follow that credibly documenting and publicizing violations could affect conduct. Another interlocutor argued that this analysis disregarded the structure of Taliban decision-making on military action and public relations. Although some senior Taliban might disavow particular attacks to minimize political fallout, commanders on the ground lacked external or internal incentives to modify their behavior to avoid adverse media reports. This reasoning would suggest that incentives for compliance are strong enough to induce *post hoc* damage control but too weak to encourage actual reforms. There is evidence, however, that reputational concerns have led to some efforts to ensure actual compliance rather than merely feign it after the fact. The Taliban's leadership has promulgated directives prohibiting particular abusive tactics - such as beheadings<sup>254</sup> - and these have been at least partially respected by fighters on the ground. In my view, more extensive credible naming and shaming efforts are appropriate.

41. Many interlocutors, especially elders, were frustrated by what they perceived as inadequate efforts by governments and inter-governmental organizations to respond to Taliban abuses. Many argued that Pakistan should do more to rein in those Taliban residing in its territory. It was also repeatedly suggested that the United Nations and the Organization of the Islamic Conference (OIC) should do more to condemn Taliban abuses and put pressure on states in a

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<sup>253</sup> Some interlocutors expressed frustration that clerics from Al-Azhar University (in Egypt) in particular had not more forcibly called attention to the incompatibility of some Taliban tactics with Islamic law. They opined that, even if the Taliban's leadership might disregard Al-Azhar's authority, the respect accorded the views of the Grand Imam and other clerics there by the wider society in which the Taliban operates in Afghanistan and Pakistan would nevertheless constrain the Taliban's freedom of action.

<sup>254</sup> In February 2008, Mullah Mohammad Omar issued a directive ordering the Taliban not to behead people, and this was seen to have some impact on conduct on the ground.

position to affect the Taliban's conduct. While some expectations seemed unrealistic, the palpable disillusionment with efforts to date should provide a wake-up call.

42. Others argued that there was a need for international actors to engage directly with the Taliban to understand the rationales for its abusive tactics and to apply targeted pressure for change. Prominent elders in the South told me directly that the problem with visits by international envoys was that they only spoke to one side. An international military commander expressed surprise that I was not speaking with Taliban representatives. In general, when I conduct country visits and fact-finding missions, I speak with armed opposition groups, but I did not speak with any formal representatives of the Taliban or other armed groups during my visit.<sup>255</sup> In retrospect, this was a mistake. Taking account of information provided by such sources would permit a more nuanced understanding of Taliban and other AGE strategies. While some of the and deceitful, there is no reason to assume that the Taliban could never be persuaded to modify its conduct in ways that would improve its respect for human rights. And purely humanitarian contacts have had a positive impact in the past.<sup>256</sup>

43. One senior official succinctly summarized Government concerns. While the Government itself can engage with any and all domestic groups, he felt that international engagement with the Taliban would reduce the Government from being a sovereign to being a mere faction in a civil war. It is true that this concern might apply to political negotiations to resolve the conflict. Does human rights engagement to ameliorate the conflict's effects on civilians warrant the same concern? First, while such contacts could indeed be pursued in ways that might somehow "legitimize" these groups, contact in order to request its views on particular incidents, criticize its conduct, and urge better human rights and IHL compliance does not "legitimize" that group. Second, in many other countries Governments have permitted human rights actors to engage with armed opposition groups. The bottom line is that the international community does have human rights expectations to which it holds the Taliban and other armed groups. It criticizes them for conducting suicide attacks, assassinating teachers, and other acts incompatible with those fundamental human rights expectations. These expectations operate to protect people, rather than going to issues of legitimacy. The international community must do all it can to promote human rights compliance by all actors. I thus recommend that, in the future, human rights proponents should develop contacts with the Taliban and other armed groups.

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<sup>255</sup> Initially, I assumed that security concerns, largely of the armed groups' own making, would make doing so impossible. I was also aware that various actors had reservations about the political implications of doing so. Ultimately, I felt I had no option but to abide by these reservations despite the fact that realistic opportunities were presented to me.

<sup>256</sup> In 2003 and 2004, Afghanistan was close to eliminating polio when Taliban fighters and others concluded that the polio vaccine was actually designed to cause infertility and limit the growth of the Muslim population worldwide. For this reason, they began executing nurses and doctors and forcing those transporting vaccines to drink them. In 2007, persons close to the Taliban leadership in Quetta were contacted to explain the vaccination program's purpose. In September 2007, a letter was produced by a Taliban leader in Quetta which permitted the WHO, UNICEF, and the Ministry of Health to vaccinate hundreds of thousands of children.

## O. PRIVATE CONTRACTOR ISSUES

### *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (E/CN.4/2005/7, 22 December 2004, 70):*

(In his report, the Special Rapporteur speaks of the various kinds of non-state actors included within his mandate)

70. A second group, which is becoming far more numerous and very much a part of the landscape in many of the situations brought to the attention of the Special Rapporteur, is private contractors or consultants who, although not government officials in any way, are nonetheless exercising functions which would otherwise have been carried out by the State. This might include prison management, law enforcement, interrogation, etc. In dealing with such cases the Human Rights Committee has made clear, in relation to torture for example, that States parties to the International Covenant on Civil and Political Rights should report on the provisions of their criminal law not only in relation to acts committed by public officials or persons acting on behalf of the State, but also by private persons.<sup>257</sup> In final Views adopted in 2003 the Committee concluded that “the contracting out to the private commercial sector of core State activities which involve the use of force and the detention of persons does not absolve a State party of its obligations under the Covenant”.<sup>258</sup> While there may be some debate over what constitutes a “core State activity”, it is clear that actions carried out by contractors and consultants which attract the attention of the Special Rapporteur may well engage the responsibility of the State concerned.

### *Report on Mission to the United States of America (A/HRC/11/2/Add.5, 28 May 2009, ¶¶ 46, 56-60, 70, 80, Appx. III):*

46. There have been numerous and credible accounts of private security and other contractors (PCs) engaging in a pattern of indiscriminate or otherwise questionable use of force against civilians.<sup>259</sup> At least in Iraq, that use of force has resulted in a significant number of casualties, conservatively estimated to be in the hundreds, perhaps thousands. Yet the failures of reporting and transparency by PCs employed by various Government military and civilian agencies are even more dramatic than those for the military. For example, in Iraq, the DOD established reconstruction Operating Councils (ROCs), administered by a private security contractor, to provide coordination between the military and security contractors. While in theory DOD contractors report casualties and use of force in serious incident reports (SIRs) to the ROCs, doing so has not been compulsory for all contractors.<sup>260</sup> The most comprehensive study to date found that few firms ever report shooting incidents, that such incidents are often misreported, and that SIRs that are filed are almost uniformly cursory and uninformative.<sup>261</sup>

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<sup>257</sup> General comment No. 20 (1992) on art. 7, para. 13.

<sup>258</sup> *Cabal and Pasini Bertran v. Australia*, case No. 1020/2001, decision of 7 August 2003 (CCPR/C/78/D/1020/2001), para. 7.2.

<sup>259</sup> Upwards of 200,000 contractors to the Government are currently working in Iraq and Afghanistan in support of U.S. military and civilian agency missions.

<sup>260</sup> Steve Fainaru and Alec Klein, *In Iraq, a Private Realm of Intelligence Gathering*, Washington Post, July 1 2007.

<sup>261</sup> Human Rights First, *Private Security Contractors at War: Ending the Culture of Impunity*

[...]

56. For far too long, there has been a zone of *de facto* impunity for killings by private contractors (PCs) and civilian intelligence agents operating in Iraq, Afghanistan, and elsewhere. There is some debate whether federal court jurisdiction extends to PCs of Government agencies other than DOD, a debate that Congress should resolve expeditiously by clarifying that it does.<sup>262</sup> But the principal accountability problem today is not the inadequacy of the applicable legal framework. Rather, U.S. prosecutors have failed to use the laws on the books to investigate and prosecute PCs and civilian agents for wrongful deaths, including, in some cases, deaths credibly alleged to have resulted from torture and abuse. Prosecutors have also failed, even years after alleged wrongful deaths, to disclose the status of their investigations or the bases for decisions not to prosecute. One well-informed source succinctly described the situation: “The DOJ has been AWOL in response to these incidents.” This must change.

57. The Department of Justice (DOJ) is responsible for prosecuting PCs and civilian Government employees, as well as former military personnel who commit war crimes. DOJ has failed miserably. Its efforts are coordinated by two bodies. The first is a task force based at the U.S. Attorney’s Office for the Eastern District of Virginia, which handles detainee abuse cases. This task force has admitted that 24 cases of alleged detainee abuse were referred to it and that it has declined to prosecute 22 of these cases.<sup>263</sup> It is unclear why more cases have not been referred (or if they have, how many more), or how many of the 24 referred cases involved the detainee deaths credibly alleged to have occurred at the hands of PCs or the CIA.

58. The second entity, the Domestic Security Section (DSS) of DOJ’s Criminal Division, coordinates the prosecution of other cases involving PCs, such as unlawful shootings committed while protecting convoys. Its track record has been somewhat better, although too often it appears investigations and prosecutions follow only the most notorious public cases, such as the shootings in Nissor Square.

59. DSS representatives acknowledged the lack of convictions to me, but refused to provide even ballpark statistics on the allegations received or the status of investigations.<sup>264</sup> They emphasized that conducting investigations in a war zone is extremely difficult and that they ultimately rely

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(2008).

<sup>262</sup> See Appendix C (describing legal framework applicable to prosecution of private contractors, civilian Government employees, and former military personnel).

<sup>263</sup> Letter from Brian A. Benczkowski, Principal Deputy Assistant Attorney General, to Senator Richard J. Durbin (7 February 2008).

<sup>264</sup> In testimony to Congress in April 2008, a Department of Justice official stated that, as of that date, there had been 25 allegations of private contractor wrongdoing under the Military Extraterritorial Judicial Act (MEJA), of which 12 resulted in federal criminal charges and one in state criminal charges, with others still pending and others being declined. Four of the seven successful prosecutions were for sexual abuse charges. Statement of Sigal P. Mandelker, Deputy Assistant Attorney General, Before the Senate Committee on Foreign Relations (9 April 2008), *available at* <http://foreign.senate.gov/testimony/2008/MandelkerTestimony080409a.pdf>. It is not clear how many of the cases under investigation relate to killings of Iraqi or Afghan civilians. In its response to this Report, the Department of State informed me that, as of December 2008, the Department of Justice had brought charges in 25 MEJA cases and that in one of those cases, in May 2009, a jury convicting Steven Green, a former soldier, of MEJA charges arising out of his murder and rape of Iraqi civilians in 2006.

on the military either to conduct the investigation or to provide the FBI with logistical and security support. While there are significant challenges to conducting investigations in the context of armed conflict, DSS representatives' responses suggested serious thought had not been given to how such investigations can be conducted. Investigations into PCs's conduct can be conducted successfully, and one interlocutor who has done so suggested that these cases are actually relatively easy to investigate because they tend to take place in daylight in front of numerous witnesses who can go to safe locations to be interviewed.

60. The lamentable bottom line is that DOJ has brought a scant few cases against PCs for civilian casualties, achieved a conviction only in one case involving a CIA contractor, and brought no cases against CIA employees. Government officials with whom I met acknowledged this lack of accountability, and it now seems clear that this vacuum is neither legally nor ethically defensible. Indeed, many PCs themselves accept the need for legal regulation and accountability.<sup>265</sup> Unfortunately, accountability for CIA officials appears more remote because of a lack of political will.

[...]

70. The lack of systematic compensation for civilian casualties caused by private contractors is acute. While some have offered compensation on their own account, this does not appear to be an approach that could be systematized. One interlocutor suggested the best approach would be for the Government to provide reparations for casualties caused by its contractors and then deduct the amount of this compensation from payments made under the contract.

[...]

(80. To ensure comprehensive criminal jurisdiction over offenses in armed conflict:)

- Congress should adopt legislation that comprehensively provides criminal jurisdiction over all private contractors and civilian employees, including those working for intelligence agencies.
- An office dedicated to investigation and prosecution of crimes by private contractors, civilian Government employees, and former military personnel should be established within the DOJ. The office should receive the resources and investigative support necessary to handle these cases. The DOJ should make public statistical information on the status of these cases, disaggregated by the kind, year, and country of alleged offence.

[...]

### Legal Framework Applicable to Prosecutions of Private Contractors and Civilian Employees

1. Congress has adopted a series of statutes expanding and clarifying jurisdiction over offences committed by contractors and civilian Government employees operating in areas of armed conflict and in peacetime. To date, however, these legislative initiatives have been largely reactive to specific incidents such as the abuses at Abu Ghraib and the shooting incident at

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<sup>265</sup> It is also encouraging that the United States has participated in efforts to clarify the relevant international standards as part of the Swiss Initiative on Private Military and Security Companies.

Nisoor Square. The result is legislation that closes particular jurisdictional gaps but leaves others. Nevertheless, these statutes together should permit the justice system to punish all or virtually all killings prohibited by human rights or humanitarian law.

2. The USA Patriot Act of 2001 expanded the scope of “special maritime and territorial jurisdiction” over crimes committed overseas to include offenses committed “by or against a national of the United States” on U.S. bases, facilities and diplomatic missions.<sup>266</sup> This expanded jurisdiction applies to about 30 criminal statutes and is most likely to be of use in cases involving deaths in custody.<sup>267</sup> Indeed, the only private security contractor ever successfully prosecuted in the civilian justice system was convicted under this statute after beating a detainee to death during an interrogation in Afghanistan.

3. When the Military Extraterritorial Jurisdiction Act (MEJA) was enacted in 2000, it covered Department of Defense employees, former military personnel, contractors, and sub-contractors accompanying the military outside the United States.<sup>268</sup> After it came to light that contractors to other Government agencies were implicated in the torture and abuse of prisoners at Abu Ghraib, Congress amended MEJA in 2004 to cover any federal employee or Government contractor whose “employment relates to supporting the mission of the Department of Defense overseas” (except contractors who are nationals or residents of the country in which the missions takes place).<sup>269</sup> The intent was to cover the range of civilian employees and contractors operating in Afghanistan and Iraq, but there is some debate whether a court would agree that all such persons are “supporting the mission of the Department of Defense.” I was briefed by a number of Congressional staffers on ongoing efforts to adopt new legislation that would definitively clarify MEJA in this regard.<sup>270</sup> This is most encouraging. There was, however, also talk of including a so-called “intelligence carve-out” that would provide impunity for contractors and employees working for U.S. intelligence agencies. This would be wholly inappropriate and Congress should adopt legislation that comprehensively provides criminal jurisdiction over contractors and civilian employees.

4. The War Crimes Act was adopted in 1996 and amended in 1997 and 2006.<sup>271</sup> In contrast to MEJA and the Patriot Act, which define the scope of federal jurisdiction but do not codify new criminal offences, the War Crimes Act provides jurisdiction over a number of violations of international humanitarian law, including, *inter alia*, the “willful killing” of “protected persons” within the meaning of the Geneva Conventions (in international armed conflicts) and “murder” (in a non-international armed conflict).<sup>272</sup> In accordance with the United States’ humanitarian

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<sup>266</sup> 18 U.S.C. § 7(9), as amended by PL 107-56 § 804.

<sup>267</sup> The jurisdiction provision would not, however, apply if a foreign security contractor to the U.S.. Government were to kill a foreign national.

<sup>268</sup> PL 106-523.

<sup>269</sup> 18 U.S.C. § 3267, as amended by PL 108-375, § 1088.

<sup>270</sup> The “Security Contractor Accountability Act of 2007” was passed by the House (HR 2740), and its companion bill (S 2147) is subject to ongoing discussions in the Senate.

<sup>271</sup> The War Crimes Act was originally adopted in Public Law 104-192 (enacted 21 August 1996) and was significantly amended in Public Law 105-118 (enacted 26 November 1997) and Public Law 109-366 (enacted 17 October 2006).

<sup>272</sup> Note that jurisdiction is also provided over several other offences that involve killing. The provision most relevant killings in the current conflicts in Afghanistan and Iraq is, however, that of “murder”. This is defined as: “The act of a person who intentionally kills, or conspires or attempts to kill, or kills whether intentionally or

law obligations, the War Crimes Act originally made all violations of the Common Article 3 of the Geneva Conventions a war crime under U.S. domestic law. The 2006 amendments to the War Crimes Act - made as part of the Military Commissions Act of 2006 - however, exempted certain violations of Common Article 3 from prosecution as war crimes, including “humiliating and degrading treatment,” and sentencing or execution by courts that fail to provide “all the judicial guarantees . . . recognized as indispensable by civilized peoples.” Such provisions narrow the United States’ obligations under international humanitarian law and, together with the MCA’s provisions that violate fair trial principles, should be repealed.

5. Finally, pursuant to a 2006 amendment, the Uniform Code of Military Justice (UCMJ) also provides jurisdiction over “persons serving with or accompanying an armed force in the field” whether “[i]n time of declared war or a contingency operation.”<sup>273</sup> This first conviction of a private security contractor under this provision occurred in June 2008 in response to one contractor stabbing another in Iraq.

6. There may be incidents over which both the military justice system and the civilian justice system have jurisdiction. With respect to killings by contractors or civilian Government officials in the context of armed conflicts, the military justice system may have jurisdiction under the UCMJ, and the civilian justice system may also have jurisdiction under a variety of statutes. With respect to unlawful killings by soldiers, both the UCMJ and the War Crimes Act could apply.

7. The current arrangement in cases implicating contractors or civilian Government employees is that the DOJ will generally prosecute the case in the federal courts, and the military justice system will only act if the DOJ declines to do so.<sup>274</sup> While the DOJ’s performance in these cases has thus far been abysmal, as I discuss in the body of this report, this is the right arrangement in principle.<sup>275</sup>

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unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause.” This definition is qualified by another provision, which declares that the “intent specified . . . precludes the applicability of [the murder provision] to an offense under [Common Article 3] with respect to- (A) collateral damage; or (B) death, damage, or injury incident to a lawful attack.” (18 U.S.C. § 2441(d)(3).)

<sup>273</sup> UCMJ, Art. 2(a)(10) was amended with Public Law 109-364 (enacted 17 October 2006) to expand its scope from declared wars to “contingency operations”. Military operations in Afghanistan and Iraq are characterized in U.S. law as “contingency operations.”

<sup>274</sup> In March 2008, the Secretary of Defense issued a memorandum to implement the 2006 amendment extending the UCMJ to cover private security contractors. *UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations* (10 March 2008). The memorandum provides that DOD will notify DOJ of cases so that the latter can “determine whether it intends to exercise jurisdiction”. If DOJ decides to pursue the case, DOD will withhold from commanders the authority to initiate court-martial charges. If DOJ decides not to pursue the case, DOD will notify the relevant geographic combatant commander that he may initiate action under the UCMJ and notifies DOJ that this authorization has been made.

<sup>275</sup> The general framework for DOD - DOJ cooperation is the Memorandum of Understanding Between Departments of Justice and Defense Relating to the Investigation and Prosecution of Crimes (August 1984) contained in Manual for Courts-Martial 2008, appendix 3. This requires the DOD to notify the DOJ of certain cases. The issue of the propriety of military jurisdiction over civilians raises complex questions that I do not address here.

## P. INTELLIGENCE AGENCIES

***Report on Mission to the United States of America (A/HRC/11/2/Add.5, 28 May 2009, ¶¶ 47, 56-60, 80, Appx. III):***

47. There are credible reports of at least five custodial deaths caused by torture or other coercion in which the Central Intelligence Agency (CIA) has been implicated.<sup>276</sup> Although the role of the CIA in these wrongful deaths has reportedly been investigated (and in one instance, a CIA contractor prosecuted), no investigation has ever been released and alleged CIA involvement has never been publicly confirmed or denied. The CIA Inspector General told me that the number of cases involving possibly unlawful killings referred by the CIA to the DOJ is classified.

[...]

56. For far too long, there has been a zone of *de facto* impunity for killings by private contractors (PCs) and civilian intelligence agents operating in Iraq, Afghanistan, and elsewhere. There is some debate whether federal court jurisdiction extends to PCs of Government agencies other than DOD, a debate that Congress should resolve expeditiously by clarifying that it does.<sup>277</sup> But the principal accountability problem today is not the inadequacy of the applicable legal framework. Rather, U.S. prosecutors have failed to use the laws on the books to investigate and prosecute PCs and civilian agents for wrongful deaths, including, in some cases, deaths credibly alleged to have resulted from torture and abuse. Prosecutors have also failed, even years after alleged wrongful deaths, to disclose the status of their investigations or the bases for decisions not to prosecute. One well-informed source succinctly described the situation: “The DOJ has been AWOL in response to these incidents.” This must change.

57. The Department of Justice (DOJ) is responsible for prosecuting PCs and civilian Government employees, as well as former military personnel who commit war crimes. DOJ has failed miserably. Its efforts are coordinated by two bodies. The first is a task force based at the U.S. Attorney’s Office for the Eastern District of Virginia, which handles detainee abuse cases. This task force has admitted that 24 cases of alleged detainee abuse were referred to it and that it has declined to prosecute 22 of these cases.<sup>278</sup> It is unclear why more cases have not been referred (or if they have, how many more), or how many of the 24 referred cases involved the detainee deaths credibly alleged to have occurred at the hands of PCs or the CIA.

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<sup>276</sup> Mainstream media accounts and reports from civil society organizations indicate CIA involvement in the deaths of the following five people: an un-named detainee killed in November 2002 at a CIA site code-named the “Salt Pit,” reportedly located to the north of Kabul, Afghanistan; Abdul Wali, killed in U.S. custody in Asadabad, Afghanistan, on June 21, 2003; Manadel al-Jamadi, killed in U.S. custody in Abu Ghraib, Iraq, on November 4, 2003; Major General Abed Hamed Mowhoush, killed at U.S. Forward Operating Base Tiger, Iraq, on November 26, 2003; Lt. Col. Abdul Jameel, killed at a U.S. forward operating base in Iraq on January 9, 2004.

<sup>277</sup> See Appendix C of Report (describing legal framework applicable to prosecution of private contractors, civilian Government employees, and former military personnel).

<sup>278</sup> Letter from Brian A. Benczkowski, Principal Deputy Assistant Attorney General, to Senator Richard J. Durbin (7 February 2008).

58. The second entity, the Domestic Security Section (DSS) of DOJ's Criminal Division, coordinates the prosecution of other cases involving PCs, such as unlawful shootings committed while protecting convoys. Its track record has been somewhat better, although too often it appears investigations and prosecutions follow only the most notorious public cases, such as the shootings in Nissor Square.

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<sup>282</sup> The jurisdiction provision would not, however, apply if a foreign security contractor to the U.S.. Government were to kill a foreign national.

<sup>283</sup> PL 106-523.

<sup>284</sup> 18 U.S.C. § 3267, as amended by PL 108-375, § 1088.

<sup>285</sup> The “Security Contractor Accountability Act of 2007” was passed by the House (HR 2740), and its companion bill (S 2147) is subject to ongoing discussions in the Senate.

4. The War Crimes Act was adopted in 1996 and amended in 1997 and 2006.<sup>286</sup> In contrast to MEJA and the Patriot Act, which define the scope of federal jurisdiction but do not codify new criminal offences, the War Crimes Act provides jurisdiction over a number of violations of international humanitarian law, including, *inter alia*, the “willful killing” of “protected persons” within the meaning of the Geneva Conventions (in international armed conflicts) and “murder” (in a non-international armed conflict).<sup>287</sup> In accordance with the United States’ humanitarian law obligations, the War Crimes Act originally made all violations of the Common Article 3 of the Geneva Conventions a war crime under U.S. domestic law. The 2006 amendments to the War Crimes Act - made as part of the Military Commissions Act of 2006 - however, exempted certain violations of Common Article 3 from prosecution as war crimes, including “humiliating and degrading treatment,” and sentencing or execution by courts that fail to provide “all the judicial guarantees . . . recognized as indispensable by civilized peoples.” Such provisions narrow the United States’ obligations under international humanitarian law and, together with the MCA’s provisions that violate fair trial principles, should be repealed.

5. Finally, pursuant to a 2006 amendment, the Uniform Code of Military Justice (UCMJ) also provides jurisdiction over “persons serving with or accompanying an armed force in the field” whether “[i]n time of declared war or a contingency operation.”<sup>288</sup> This first conviction of a private security contractor under this provision occurred in June 2008 in response to one contractor stabbing another in Iraq.

6. There may be incidents over which both the military justice system and the civilian justice system have jurisdiction. With respect to killings by contractors or civilian Government officials in the context of armed conflicts, the military justice system may have jurisdiction under the UCMJ, and the civilian justice system may also have jurisdiction under a variety of statutes. With respect to unlawful killings by soldiers, both the UCMJ and the War Crimes Act could apply.

7. The current arrangement in cases implicating contractors or civilian Government employees is that the DOJ will generally prosecute the case in the federal courts, and the military justice system will only act if the DOJ declines to do so.<sup>289</sup> While the DOJ’s performance in these cases

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<sup>286</sup> The War Crimes Act was originally adopted in Public Law 104-192 (enacted 21 August 1996) and was significantly amended in Public Law 105-118 (enacted 26 November 1997) and Public Law 109-366 (enacted 17 October 2006).

<sup>287</sup> Note that jurisdiction is also provided over several other offences that involve killing. The provision most relevant killings in the current conflicts in Afghanistan and Iraq is, however, that of “murder”. This is defined as: “The act of a person who intentionally kills, or conspires or attempts to kill, or kills whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause.”

This definition is qualified by another provision, which declares that the “intent specified . . . precludes the applicability of [the murder provision] to an offense under [Common Article 3] with respect to- (A) collateral damage; or (B) death, damage, or injury incident to a lawful attack.” (18 U.S.C. § 2441(d)(3).)

<sup>288</sup> UCMJ, Art. 2(a)(10) was amended with Public Law 109-364 (enacted 17 October 2006) to expand its scope from declared wars to “contingency operations”. Military operations in Afghanistan and Iraq are characterized in U.S. law as “contingency operations.”

<sup>289</sup> In March 2008, the Secretary of Defense issued a memorandum to implement the 2006 amendment extending the UCMJ to cover private security contractors. *UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor*

has thus far been abysmal, as I discuss in the body of this report, this is the right arrangement in principle.<sup>290</sup>

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*Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations* (10 March 2008). The memorandum provides that DOD will notify DOJ of cases so that the latter can “determine whether it intends to exercise jurisdiction”. If DOJ decides to pursue the case, DOD will withhold from commanders the authority to initiate court-martial charges. If DOJ decides not to pursue the case, DOD will notify the relevant geographic combatant commander that he may initiate action under the UCMJ and notifies DOJ that this authorization has been made.

<sup>290</sup> The general framework for DOD - DOJ cooperation is the Memorandum of Understanding Between Departments of Justice and Defense Relating to the Investigation and Prosecution of Crimes (August 1984) contained in Manual for Courts-Martial 2008, appendix 3. This requires the DOD to notify the DOJ of certain cases. The issue of the propriety of military jurisdiction over civilians raises complex questions that I do not address here.

## Q. TARGETED KILLINGS

### 1. Targeted killing of “terrorists”

*Report on Targeted Killings (A/HRC/14/24/Add.6, 28 May 2010, ¶¶ 7, 8, 11, 28-30, 34-36, 46-73, 79-86):*

7. Despite the frequency with which it is invoked, “targeted killing” is not a term defined under international law. Nor does it fit neatly into any particular legal framework. It came into common usage in 2000, after Israel made public a policy of “targeted killings” of alleged terrorists in the Occupied Palestinian Territories.<sup>291</sup> The term has also been used in other situations, such as:

- The April 2002 killing, allegedly by Russian armed forces, of “rebel warlord” Omar Ibn al Khattab in Chechnya.<sup>292</sup>
- The November 2002 killing of alleged al Qaeda leader Ali Qaed Senyan al-Harithi and five other men in Yemen, reportedly by a CIA-operated Predator drone using a Hellfire missile.<sup>293</sup>
- Killings in 2005 – 2008 by both Sri Lankan government forces and the opposition LTTE group of individuals identified by each side as collaborating with the other.<sup>294</sup>
- The January 2010 killing, in an operation allegedly carried out by 18 Israeli Mossad intelligence agents, of Mahmoud al-Mahboubh, a Hamas leader, at a Dubai hotel.<sup>295</sup>

According to Dubai officials, al-Mahboubh was suffocated with a pillow; officials released videotapes of those responsible, whom they alleged to be Mossad agents.<sup>296</sup>

8. Targeted killings thus take place in a variety of contexts and may be committed by governments and their agents in times of peace as well as armed conflict, or by organized armed groups in armed conflict.<sup>297</sup> The means and methods of killing vary, and include sniper fire,

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<sup>291</sup> *Infra*, section II.B. Orna Ben-Naftali & Keren Michaeli, We Must Not Make a Scarecrow of the Law: Legal Analysis of the Israeli Policy of Targeted Killings, 36 *Cornell Int'l L.J.* 233, 234 (2003). although this report uses the common terms “terrorism” and “terrorist”, I agree with the Special Rapporteur on the promotion and protection of human rights while countering terrorism that the continuing lack of a “universal, comprehensive and precise” definition of these terms hampers the protection of human rights, E/CN.4/2006/98, para. 50, and in particular, the right to life. The work of the Ad Hoc Committee established under GA Res. 51/210 to work on a draft convention on international terrorism is critical and urgent.

<sup>292</sup> BBC, Russia ‘Kills’ Chechen Warlord, 25 April 2002.

<sup>293</sup> Jane Mayer, The Predator War, *The New Yorker*, 26 Oct. 2009; Greg Miller, C.I.A. Said to Use Outsiders to Put Bombs on Drones, *LA Times*, 13 Feb. 2009.

<sup>294</sup> A/HRC/8/3/Add.3, para. 12.

<sup>295</sup> Targeted Killing in Dubai: A Mossad Operation Gone Awry?, *Der Spiegel*, 23 Feb. 2010; Ilene Prusher, Was Mossad Behind Dubai Assassination? Israel Foreign Minister Isn't Saying, *Christian Science Monitor*, 17 Feb. 2010.

<sup>296</sup> Targeted Killing in Dubai: A Mossad Operation Gone Awry?, *Der Spiegel*, 23 Feb. 2010. Other examples of Israeli targeted killings include: Crimes of War Project, Case Study: The Israeli Strike Against Hamas Leader Salah Shehadeh. available at: <http://www.crimesofwar.org/print/onnews/Shehadeh-print.html>.

<sup>297</sup> This report focuses only on killings by States and their agents because, as yet, no non-state actors have sought to justify specific “targeted killings.”

shooting at close range, missiles from helicopters, gunships, drones, the use of car bombs, and poison.<sup>298</sup>

[...]

11. The phenomenon of targeted killing has been present throughout history.<sup>299</sup> In modern times, targeted killings by States have been very restricted or, to the extent that they are not, any de facto policy has been unofficial and usually denied, and both the justification and the killings themselves have been cloaked in secrecy.<sup>300</sup> When responsibility for illegal targeted killings could be credibly assigned, such killings have been condemned by the international community – including by other States alleged to practice them.<sup>301</sup>

[...]

28. Whether or not a specific targeted killing is legal depends on the context in which it is conducted: whether in armed conflict, outside armed conflict, or in relation to the interstate use of force.<sup>302</sup> The basic legal rules applicable to targeted killings in each of these contexts are laid out briefly below.

In the context of armed conflict

29. The legal framework: Both IHL and human rights law apply in the context of armed conflict; whether a particular killing is legal is determined by the applicable *lex specialis*.<sup>303</sup> To the extent that IHL does not provide a rule, or the rule is unclear and its meaning cannot be ascertained from the guidance offered by IHL principles, it is appropriate to draw guidance from human rights law.<sup>304</sup>

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<sup>298</sup> See, fns. 2-6; B'Tselem, Statistics: Fatalities, available at <http://www.btselem.org/English/Statistics/Casualties.asp>; Simon Saradzhyan, Russia's System to Combat Terrorism and Its Application in Chechnya, in R.W. Ortung and A. Makarychev, National

<sup>299</sup> Nils Melzer, Targeted Killing in International Law (2008) at 9.

<sup>300</sup> According to Amnesty International, between 1976 and 1992, an elite unit of the British army killed 37 reported members of the Irish Republican Army in Northern Ireland; the United Kingdom has consistently denied conducting targeted killings. Amnesty International, Political Killings in Northern Ireland (1994) at 4.

<sup>301</sup> E.g., Press Release of the Council of the European Union, 7373/04 of March 2004 available at: <http://www.consilium.europa.eu/App/NewsRoom/loadBook.aspx?target=2004&infotarget=&max=15&bid=78&lang=EN&id=1850>; Record of Security Meeting (S/PV.4945) 19 April 2004 (condemnation of Israeli killing of Hamas leader by Russia, Pakistan, United Kingdom, Germany and Spain); Brian Whittaker & Oliver Burkeman, Killing Probes the Frontiers of Robotics and Legality, *Guardian*, 6 Nov. 2002 (Swedish Foreign Minister on US targeting of al-Harithi).

<sup>302</sup> A/61/311, paras. 33-45 (detailed discussion of "arbitrary" deprivation of life under human rights law).

<sup>303</sup> Human rights law and IHL apply coextensively and simultaneously unless there is a conflict between them. E/CN.4/2005/7, paras. 46-53; A/HRC/4/20, paras. 18-19; A/HRC/11/2/Add.5, paras. 71-73, 83; A/HRC/4/20/Add.1, pp. 342-58; E/CN.4/2006/53/Add.1, pp. 264-65; A/HRC/4/20/Add.1, pp. 358-61. In situations that do not involve the conduct of hostilities – e.g., law enforcement operations during non-international armed conflict – the *lex generalis* of human rights law would apply.

<sup>304</sup> ICJ, Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ rep. 226, para 25 (Nuclear Weapons); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] I.C.J. Rep. (Wall Opinion) para. 106; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), [2005] I.C.J.Rep., para. 216 (Armed Activities).

30. Under the rules of IHL: Targeted killing is only lawful when the target is a “combatant” or “fighter”<sup>305</sup> or, in the case of a civilian, only for such time as the person “directly participates in hostilities.”<sup>306</sup> In addition, the killing must be militarily necessary, the use of force must be proportionate so that any anticipated military advantage is considered in light of the expected harm to civilians in the vicinity,<sup>307</sup> and everything feasible must be done to prevent mistakes and minimize harm to civilians.<sup>308</sup> These standards apply regardless of whether the armed conflict is between States (an international armed conflict) or between a State and a non-state armed group (non-international armed conflict), including alleged terrorists. Reprisal or punitive attacks on civilians are prohibited.<sup>309</sup>

[...]

#### The use of inter-state force

34. The legal framework: Targeted killings conducted in the territory of other States raise sovereignty concerns.<sup>310</sup> Under Article 2(4) of the UN Charter, States are forbidden from using force in the territory of another State.<sup>311</sup> When a State conducts a targeted killing in the territory of another State with which it is not in armed conflict, whether the first State violates the sovereignty of the second is determined by the law applicable to the use of inter-state force, while the question of whether the specific killing of the particular individual(s) is legal is governed by IHL and/or human rights law.

35. Under the law of inter-state force: A targeted killing conducted by one State in the territory of a second State does not violate the second State’s sovereignty if either (a) the second State consents, or (b) the first, targeting, State has a right under international law to use force in self-defence under Article 51 of the UN Charter,<sup>312</sup> because (i) the second State is responsible for an armed attack against the first State, or (ii) the second State is unwilling or unable to stop armed

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<sup>305</sup> International Institute of Humanitarian Law, *The Manual on the Law of Non-International Armed Conflict*, March 2006.

<sup>306</sup> Geneva Conventions Common Article 3, AP I, art. 52(1) and (2); AP I, art. 50(1); International Humanitarian Law Research Initiative, *HPCR Manual and Commentary on International Law Applicable to Air and Missile Warfare*, Harvard University Program on Humanitarian Policy and Conflict Research, 15 May 2009, available at <http://www.ihlresearch.org/amw/manual> (HPCR Commentary), section C.12.(a).

<sup>307</sup> Proportionality requires an assessment whether an attack that is expected to cause incidental loss of civilian life or injury to civilians would be excessive in relation to the anticipated concrete and direct military advantage. AP I, arts. 51(5)(b) and 57; Henckaerts & Oswald-Beck, *Customary International Humanitarian Law Rules*, ICRC (2005) (ICRC Rules) Rule 14.

<sup>308</sup> Precaution requires that, before every attack, armed forces must do everything feasible to: i) verify the target is legitimate, (ii) determine what the collateral damage would be and assess necessity and proportionality, and (iii) minimize the collateral loss of lives and/or property. AP I, art. 57; ICRC Rules 15-21. “Everything feasible” means precautions that are “practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.” Melzer, *supra* note 9 at 365.

<sup>309</sup> AP I, art. 51 (2); HPCR Commentary section C.18.

<sup>310</sup> Sec. Co. Res. 611 of 25 April 1988 (condemning as an act of illegal aggression Israel’s killing in Tunisia of Khalil al-Wazir for violating Tunisian territory); Robert Pear, *US Assails P.L.O. Aide’s Killing As ‘Act of Political Assassination*, NY Times, 18 April 1988 (condemned by US State Department as “political assassination”).

<sup>311</sup> UN Charter, art. 51.

<sup>312</sup> UN Charter, art. 2(4).

attacks against the first State launched from its territory. International law permits the use of lethal force in self-defence in response to an “armed attack” as long as that force is necessary and proportionate.<sup>313</sup>

36. While the basic rules are not controversial, the question of which framework applies, and the interpretation of aspects of the rules, have been the subject of significant debate. Both issues are addressed in greater detail below.

[...]

46. Whether an armed conflict exists is a question that must be answered with reference to objective criteria, which depend on the facts on the ground, and not only on the subjective declarations either of States (which can often be influenced by political considerations rather than legal ones) or, if applicable, of non-state actors, including alleged terrorists (which may also have political reasons for seeking recognition as a belligerent party). Traditionally, States have refused to acknowledge the existence of an armed conflict with non-state groups. The reasons include not wanting to accord such groups recognition as “belligerents” or “warriors”, and instead being able to insist that they remain common criminals subject to domestic law. States also do not want to appear “weak” by acknowledging that they are unable to stop large scale violence, and/or that rebels or insurgent groups have control over State territory. In recent times, for example, the United Kingdom (with respect to Northern Ireland) and Russia (with respect to Chechnya) have refused to acknowledge the existence of internal armed conflicts.

47. On the other hand, both the US and Israel have invoked the existence of an armed conflict against alleged terrorists (“non-state armed groups”).<sup>314</sup> The appeal is obvious: the IHL applicable in armed conflict arguably has more permissive rules for killing than does human rights law or a State’s domestic law, and generally provides immunity to State armed forces.<sup>315</sup> Because the law of armed conflict has fewer due process safeguards, States also see a benefit to avoiding compliance with the more onerous requirements for capture, arrest, detention or extradition of an alleged terrorist in another State. IHL is not, in fact, more permissive than human rights law because of the strict IHL requirement that lethal force be necessary. But labeling a situation as an armed conflict might also serve to expand executive power both as a matter of domestic law and in terms of public support.

48. Although the appeal of an armed conflict paradigm to address terrorism is obvious, so too is the significant potential for abuse. Internal unrest as a result of insurgency or other violence by non-state armed groups, and even terrorism, are common in many parts of the world. If States unilaterally extend the law of armed conflict to situations that are essentially matters of law enforcement that must, under international law, be dealt with under the framework of human rights, they are not only effectively declaring war against a particular group, but eviscerating key

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<sup>313</sup> ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicar. vs. US)* [1986] ICJ Rep., para. 194 (Military and Paramilitary Activities); O. Schachter, *The Right of States to Use Armed Force*, 82 Mich. L. Rev. 1620, 1633-34 (1984). In the context of self-defence, force is proportionate only if it used defensively and if it is confined to the objective.

<sup>314</sup> Koh, *supra* note 41; PCATI *supra* note 22.

<sup>315</sup> Adjutant General’s Office, *General Orders No. 100, Instructions for the Government of Armies of the US in the Field (Lieber Code)*, 24 April 1863, art 14; *Nuclear Weapons*, para. 78.

and necessary distinctions between international law frameworks that restricts States' ability to kill arbitrarily.

49. The IHL applicable to non-international armed conflict is not as well-developed as that applicable to international armed conflict. Since 11 September 2001, this fact has often been cited either to criticize IHL in general or as a justification for innovative interpretations which go well beyond generally accepted approaches. It is true that noninternational armed conflict rules would benefit from development, but the rules as they currently exist offer more than sufficient guidance to the existence and scope of an armed conflict. The key is for States to approach them with good faith intent to apply the rules as they exist and have been interpreted by international bodies, rather than to seek everexpanding flexibility.

50. There are essentially four possibilities under international law for the existence of an armed conflict:

- (i) The conflict is an international armed conflict.
- (ii) The conflict is a non-international armed conflict meeting the threshold of Common Article 3 to the Geneva Conventions.
- (iii) The conflict is a non-international armed conflict meeting the threshold of both Common Article 3 to the Geneva Conventions and Additional Protocol II to the Geneva Conventions
- (iv) The level of violence does not rise to the level of an armed conflict, but is instead isolated and sporadic and human rights law determines the legality of the use of lethal force.

51. The test for the existence of an international armed conflict is clear under IHL: "Any difference arising between two States and leading to the intervention of armed forces" qualifies as armed conflict, regardless of its intensity, duration or scale.<sup>316</sup> The IHL of international armed conflict applies also to "all cases of total or partial occupation of the territory of a High Contracting Party" to the Geneva Conventions.<sup>317</sup> Following these criteria, an international armed conflict cannot exist between a State and a non-state group.<sup>318</sup>

52. The tests for the existence of a non-international armed conflict are not as categorical as those for international armed conflict. This recognizes the fact that there may be various types of non-international armed conflicts. The applicable test may also depend on whether a State is party to Additional Protocol II to the Geneva Conventions.<sup>319</sup> Under treaty and customary international law, the elements which would point to the existence of a non-international armed conflict against a non-state armed group are:

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<sup>316</sup> Geneva Conventions I to IV, Common Art. 2(1); ICRC, Commentary on the Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field 32 (Jean S. Pictet ed., 1952); *Prosecutor v. Tadic*, [Appeal on Jurisdiction] Case No. IT-94-I-AR72 (2 Oct. 1995), 35 I.L.M. 32, 54, para. 70 (1996)

<sup>317</sup> Geneva Conventions I to IV, Common Art. 2(2); AP I, art. 1(4).

<sup>318</sup> Thus, it was legally incorrect for the US Bush Administration to claim that its right to conduct targeted killings anywhere in the world was part of its "war on terror", which it classified as an "international armed conflict" against al Qaeda. Communication of the US regarding the Killing of Harithi al-Yemeni, 4 May 2006, A/HRC/4/20/Add.1, p. 344.

<sup>319</sup> AP II, Art. 1(1).

(i) The non-state armed group must be identifiable as such, based on criteria that are objective and verifiable. This is necessary for IHL to apply meaningfully, and so that States may comply with their obligation to distinguish between lawful targets and civilians.<sup>320</sup> The criteria include:<sup>321</sup>

- Minimal level of organization of the group such that armed forces are able to identify an adversary (GC Art. 3; AP II).
- Capability of the group to apply the Geneva Conventions (i.e., adequate command structure, and separation of military and political command) (GC Art. 3; AP II).
- Engagement of the group in collective, armed, anti-government action (GC Art. 3).
- For a conflict involving a State, the State uses its regular military forces against the group (GC Art. 3).
- Admission of the conflict against the group to the agenda of the UN Security Council or the General Assembly (GC Art. 3).

(ii) There must be a minimal threshold of intensity and duration. The threshold of violence is higher than required for the existence of an international armed conflict.

To meet the minimum threshold, violence must be:<sup>322</sup>

- “Beyond the level of intensity of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature”

(AP II).

- “[P]rotracted armed violence” among non-state armed groups or between a non-state armed group and a State;<sup>323</sup>

- If an isolated incident, the incident itself should be of a high degree of intensity, with a high level of organization on the part of the non-state armed group;<sup>324</sup>

(iii) The territorial confines can be:

- Restricted to the territory of a State and between the State’s own armed forces and the non-state group (AP II); or
- A transnational conflict, i.e., one that crosses State borders (GC Art. 3).<sup>325</sup> This does not mean, however, that there is no territorial nexus requirement.

53. Taken cumulatively, these factors make it problematic for the US to show that – outside the context of the armed conflicts in Afghanistan or Iraq – it is in a transnational non-international armed conflict against “al Qaeda, the Taliban, and other associated forces”<sup>326</sup> without further explanation of how those entities constitute a “party” under the IHL of non-international armed conflict, and whether and how any violence by any such group rises to the level necessary for an armed conflict to exist.

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<sup>320</sup> Lindsay Moir, *The Law of Internal Armed Conflict*, 2002.

<sup>321</sup> ICRC Commentary *supra* note 97, 49-50 (Common Article 3); ICTY, *Delalic Judgment*, 16 Nov. 1998, para. 184; ICTR, *Musema*, Judgment, 27 Jan. 2000, para. 248; IACHR, *Tablada*, Report No. 55/97, Argentina, Doc. 38, 1997, para. 152.

<sup>322</sup> The tests listed are independent of one another and for each threshold a different set of IHL rules might apply, but such distinctions are not crucial to the present analysis.

<sup>323</sup> *Tadic*, *supra* note 97, para. 70

<sup>324</sup> IACHR, *Juan Carlos Abella v. Argentina*, Report No. 55/97, OEA/Ser.L./V./II.95, doc. 7 rev. 271 para. 151 (1997).

<sup>325</sup> Common Article 3 is universally applicable and not limited to internal conflicts. *Nuclear Weapons*, paras. 79-82.

<sup>326</sup> Koh, *supra* note 41; *Hamdan v. Rumsfeld*, 548 US 547 (2006).

54. The focus, instead, appears to be on the “transnational” nature of the terrorist threat. Al-Qaeda and entities with various degrees of “association” with it are indeed known to have operated in numerous countries around the world including in Saudi Arabia, Indonesia, Pakistan, Germany, the United Kingdom and Spain, among others, where they have conducted terrorist attacks. Yet none of these States, with the possible exception of Pakistan, recognize themselves as being part of an armed conflict against al-Qaeda or its “associates” in their territory. Indeed, in each of those States, even when there have been terrorist attacks by al-Qaeda or other groups claiming affiliation with it, the duration and intensity of such attacks has not risen to the level of an armed conflict. Thus, while it is true that non-international armed conflict can exist across State borders, and indeed often does, that is only one of a number of cumulative factors that must be considered for the objective existence of an armed conflict.

55. With respect to the existence of a non-state group as a “party”, al-Qaeda and other alleged “associated” groups are often only loosely linked, if at all. Sometimes they appear to be not even groups, but a few individuals who take “inspiration” from al-Qaeda. The idea that, instead, they are part of continuing hostilities that spread to new territories as new alliances form or are claimed may be superficially appealing but such “associates” cannot constitute a “party” as required by IHL – although they can be criminals, if their conduct violates US law, or the law of the State in which they are located.

56. To ignore these minimum requirements, as well as the object and purpose of IHL, would be to undermine IHL safeguards against the use of violence against groups that are not the equivalent of an organized armed group capable of being a party to a conflict – whether because it lacks organization, the ability to engage in armed attacks, or because it does not have a connection or belligerent nexus to actual hostilities. It is also salutary to recognize that whatever rules the US seeks to invoke or apply to al-Qaeda and any “affiliates” could be invoked by other States to apply to other non-state armed groups. To expand the notion of non-international armed conflict to groups that are essentially drug cartels, criminal gangs or other groups that should be dealt with under the law enforcement framework would be to do deep damage to the IHL and human rights frameworks.

#### D. Who may lawfully be targeted, when, and on what basis

57. The greatest source of the lack of clarity with respect to targeted killings in the context of armed conflict is who qualifies as a lawful target, and where and when the person may be targeted.

58. In international armed conflict, combatants may be targeted at any time and any place (subject to the other requirements of IHL).<sup>327</sup> Under the IHL applicable to noninternational armed conflict, the rules are less clear. In non-international armed conflict, there is no such thing as a “combatant.”<sup>328</sup> Instead – as in international armed conflict – States are permitted to directly

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<sup>327</sup> AP I, art. 48; AP I, art. 51(2) (defining lawful targets); HPCR Commentary section A.1.(y)(1). The term “combatant” is not defined in IHL, but may be extrapolated from Geneva Convention III, art. 4(A); Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 *Am. J. Int’l L.* 48 (2009).

<sup>328</sup> Marco Sassoli & Laura M Olson, *The Relationship Between International Humanitarian Law and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non- International Armed Conflicts*, 90

attack only civilians who “directly participate in hostilities” (DPH).<sup>329</sup> Because there is no commonly accepted definition of DPH, it has been left open to States’ own interpretation – which States have preferred not to make public – to determine what constitutes DPH.

59. There are three key controversies over DPH. First, there is dispute over the kind of conduct that constitutes “direct participation” and makes an individual subject to attack. Second, there is disagreement over the extent to which “membership” in an organized armed group may be used as a factor in determining whether a person is directly participating in hostilities. Third, there is controversy over how long direct participation lasts.

60. It is not easy to arrive at a definition of direct participation that protects civilians and at the same time does not “reward” an enemy that may fail to distinguish between civilians and lawful military targets, that may deliberately hide among civilian populations and put them at risk, or that may force civilians to engage in hostilities.<sup>330</sup> The key, however, is to recognize that regardless of the enemy’s tactics, in order to protect the vast majority of civilians, direct participation may only include conduct close to that of a fighter, or conduct that directly supports combat. More attenuated acts, such as providing financial support, advocacy, or other non-combat aid, does not constitute direct participation.

61. Some types of conduct have long been understood to constitute direct participation, such as civilians who shoot at State forces or commit acts of violence in the context of hostilities that would cause death or injury to civilians. Other conduct has traditionally been excluded from direct participation, even if it supports the general war effort; such conduct includes political advocacy, supplying food or shelter, or economic support and propaganda (all also protected under other human rights standards). Even if these activities ultimately impact hostilities, they are not considered “direct participation.” But there is a middle ground, such as for the proverbial “farmer by day, fighter by night”, that has remained unclear and subject to uncertainty.

62. In 2009, the ICRC issued its Interpretive Guidance on DPH, which provides a useful starting point for discussion. In non-international armed conflict, according to the ICRC Guidance, civilians who participate directly in hostilities and are members of an armed group who have a “continuous combat function” may be targeted at all times and in all places.<sup>331</sup> With respect to the temporal duration of DPH for all other civilians, the ICRC Guidance takes the view that direct participation for civilians is limited to each single act: the earliest point of direct participation would be the concrete preparatory measures for that specific act (e.g., loading bombs onto a plane), and participation terminates when the activity ends.<sup>332</sup>

63. Under the ICRC’s Guidance, each specific act by the civilian must meet three cumulative requirements to constitute DPH:

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Int’l Rev. Red Cross, 599, 611 (Sept. 2008); Marco Sassoli, *Transnational Armed Groups and International Humanitarian Law*, HPCR Paper Series, Winter 2006.

<sup>329</sup> AP I, art. 51(3); AP I, art. 50(1) (defining civilian). AP I, arts. 13(3) and 51(3); Geneva Conventions III and IV, art. 3; AP II, arts. 4 and 13(3).

<sup>330</sup> For this reason I have criticized non-state armed groups for using civilians as human shields and locating their military operations in areas heavily populated by civilians. A/HRC/11/2/Add.4, paras. 9, 23, 24.

<sup>331</sup> ICRC Guidance at 66.

<sup>332</sup> ICRC Guidance at 66-68

- (i) There must be a “threshold of harm” that is objectively likely to result from the act, either by adversely impacting the military operations or capacity of the opposing party, or by causing the loss of life or property of protected civilian persons or objects; and
- (ii) The act must cause the expected harm directly, in one step, for example, as an integral part of a specific and coordinated combat operation (as opposed to harm caused in unspecified future operations); and
- (iii) The act must have a “belligerent nexus” – i.e., it must be specifically designed to support the military operations of one party to the detriment of another.

64. These criteria generally exclude conduct that is clearly indirect, including general support for the war effort through preparation or capacity building (such as the production of weapons and military equipment).<sup>333</sup> 114 They also exclude conduct that is protected by other human rights standards, including political support for a belligerent party or an organized armed group. Importantly, the ICRC’s Guidance makes clear that the lawfulness of an act under domestic or international law is not at issue, rather, the sole concern of the direct participation inquiry is whether the conduct “constitute[s] an integral part of armed confrontations occurring between belligerents.”<sup>334</sup> 115 Thus, although illegal activities, e.g., terrorism, may cause harm, if they do not meet the criteria for direct participation in hostilities,<sup>335</sup> 116 then States’ response must conform to the lethal force standards applicable to self-defence and law enforcement.<sup>336</sup> 117 In general, the ICRC’s approach is correct, and comports both with human rights law and IHL.

65. Nevertheless, the ICRC’s Guidance raises concern from a human rights perspective because of the “continuous combat function” (CCF) category of armed group members who may be targeted anywhere, at any time.<sup>337</sup> 118 In its general approach to DPH, the ICRC is correct to focus on function (the kind of act) rather than status (combatant vs. unprivileged belligerent), but the creation of CCF category is, de facto, a status determination that is questionable given the specific treaty language that limits direct participation to “for such time” as opposed to “all the time.”

66. Creation of the CCF category also raises the risk of erroneous targeting of someone who, for example, may have disengaged from their function. If States are to accept this category, the onus will be on them to show that the evidentiary basis is strong. In addition, States must adhere to the careful distinction the ICRC draws between continuous combatants who may always be subject to direct attack and civilians who (i) engage in sporadic or episodic direct participation (and may only be attacked during their participation), or (ii) have a general war support function (“recruiters, trainers, financiers and propagandists”) or form the political wing of an organized armed group (neither of which is a basis for attack).<sup>338</sup> 119

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<sup>333</sup> HPCR Commentary section C.28(2), n. 278; Nils Melzer, Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities, 42 NYU J. Int’l L. and Politics, 829, 858 (2010).

<sup>334</sup> Id. at 859.

<sup>335</sup> Hague Regulations IV, art. 22; AP I, arts. 35(1) and 51 (discussing hostilities).

<sup>336</sup> Melzer, supra note 114 at 861.

<sup>337</sup> ICRC Guidance at 66.

<sup>338</sup> ICRC Guidance at 31-36.

67. Especially given the ICRC's membership approach to CCF, it is imperative that the other constituent parts of the Guidance (threshold of harm, causation and belligerent nexus) not be diluted. It is also critical that DPH not include combat service support functions (selling food, providing supplies). While this may, in the view of some, create inequity between State forces and non-state actors, that inequity is built into IHL in order to protect civilians.

68. The failure of States to disclose their criteria for DPH is deeply problematic because it gives no transparency or clarity about what conduct could subject a civilian to killing. It also leaves open the likelihood that States will unilaterally expand their concept of direct participation beyond permissible boundaries. Thus, although the US has not made public its definition of DPH, it is clear that it is more expansive than that set out by the ICRC; in Afghanistan, the US has said that drug traffickers on the "battlefield" who have links to the insurgency may be targeted and killed.<sup>339</sup> 120 This is not consistent with the traditionally understood concepts under IHL – drug trafficking is understood as criminal conduct, not an activity that would subject someone to a targeted killing. And generating profits that might be used to fund hostile actions does not constitute DPH.

69. Given the ICRC's promulgation of its Guidance, and the hesitant or uncertain response of some States to date, in order for the issues to be addressed comprehensively, it would be very timely for there to be a convening of State representatives, including particularly those from key military powers, together with the ICRC and experts in human rights and IHL. Such a convening would perhaps be most useful if held under the auspices of a neutral body, such as the High Commissioner for Human Rights. The group could discuss and revise (if necessary) the ICRC's Guidance after a careful review of best practices.

70. Reported targeted killings by the CIA have given rise to a debate over whether it is a violation of IHL for such killings to be committed by State agents who are not members of its armed forces. Some commentators have argued that CIA personnel who conduct targeted drone killings are committing war crimes because they, unlike the military, are "unlawful combatants", and unable to participate in hostilities. This argument is not supported by IHL. As a threshold matter, the argument assumes that targeted killings by the CIA are committed in the context of armed conflict, which may not be the case. Outside of armed conflict, killings by the CIA would constitute extrajudicial executions assuming that they do not comply with human rights law. If so, they must be investigated and prosecuted both by the US and the State in which the wrongful killing occurred. The following discussion assumes, without accepting, that CIA killings are being conducted in the context of armed conflict.

71. Under IHL, civilians, including intelligence agents, are not prohibited from participating in hostilities. Rather, the consequence of participation is two-fold. First, because they are "directly participating in hostilities" by conducting targeted killings, intelligence personnel may themselves be targeted and killed. Second, intelligence personnel do not have immunity from prosecution under domestic law for their conduct. They are thus unlike State armed forces which would generally be immune from prosecution for the same conduct (assuming they complied with IHL requirements). Thus, CIA personnel could be prosecuted for murder under the

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<sup>339</sup> Afghanistan's Narco War *supra* note 39 at 16 (2009).

domestic law of any country in which they conduct targeted drone killings, and could also be prosecuted for violations of applicable US law.

72. It is important to note that if a targeted killing violates IHL (by, for example, targeting civilians who were not “directly participating in hostilities”), then regardless of who conducts it – intelligence personnel or State armed forces – the author, as well as those who authorized it, can be prosecuted for war crimes.

73. Additionally, unlike a State’s armed forces, its intelligence agents do not generally operate within a framework which places appropriate emphasis upon ensuring compliance with IHL, rendering violations more likely and causing a higher risk of prosecution both for war crimes and for violations of the laws of the State in which any killing occurs. To the extent a State uses intelligence agents for targeted killing to shield its operations from IHL and human rights law transparency and accountability requirements, it could also incur State responsibility for violating those requirements.<sup>340</sup> 121

[...]

79. The use of drones for targeted killings has generated significant controversy. Some have suggested that drones as such are prohibited weapons under IHL because they cause, or have the effect of causing, necessarily indiscriminate killings of civilians, such as those in the vicinity of a targeted person.<sup>341</sup> It is true that IHL places limits on the weapons States may use, and weapons that are, for example, inherently indiscriminate (such as biological weapons) are prohibited.<sup>342</sup> However, a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles. The critical legal question is the same for each weapon: whether its specific use complies with IHL.

80. The greater concern with drones is that because they make it easier to kill without risk to a State’s forces, policy makers and commanders will be tempted to interpret the legal limitations on who can be killed, and under what circumstances, too expansively. States must ensure that the criteria they apply to determine who can be targeted and killed – i.e., who is a lawful combatant, or what constitutes “direct participation in hostilities” that would subject civilians to direct attack – do not differ based on the choice of weapon.

81. Drones’ proponents argue that since drones have greater surveillance capability and afford greater precision than other weapons, they can better prevent collateral civilian casualties and injuries. This may well be true to an extent, but it presents an incomplete picture. The precision, accuracy and legality of a drone strike depend on the human intelligence upon which the targeting decision is based.

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<sup>340</sup> In response to Freedom of Information Act litigation seeking the legal basis for alleged CIA targeted killings, the CIA has said that it cannot even confirm or deny the existence of any records because that information is classified and protected from disclosure. See Letter from CIA Information and Privacy Coordinator, 9 March 2010, available at <http://www.aclu.org/national-security/predatordrone-foia-cia-letter-refusing-confirm-or-deny-existence-records>.

<sup>341</sup> Murray Wardrop, Unmanned Drones Could be Banned, Says Senior Judge, *The Telegraph*, 6 July 2009.

<sup>342</sup> The general prohibition under IHL is against weapons that violate the principle of distinction or cause unnecessary suffering. See HPCR Commentary, section C.

82. Drones may provide the ability to conduct aerial surveillance and to gather “pattern of life” information that would allow their human operators to distinguish between peaceful civilians and those engaged in direct hostilities. Indeed, advanced surveillance capability enhances the ability of a State’s forces to undertake precautions in attack.<sup>343</sup> But these optimal conditions may not exist in every case. More importantly, a drone operation team sitting thousands of miles away from the environment in which a potential target is located may well be at an even greater human intelligence gathering disadvantage than ground forces, who themselves are often unable to collect reliable intelligence.

83. It was clear during my mission to Afghanistan how hard it is even for forces on the ground to obtain accurate information. Testimony from witnesses and victims’ family members, showed that international forces were often too uninformed of local practices, or too credulous in interpreting information, to be able to arrive at a reliable understanding of a situation.<sup>344</sup> International forces all too often based manned airstrikes and raids that resulted in killings on faulty intelligence. Multiple other examples show that the legality of a targeted killing operation is heavily dependent upon the reliability of the intelligence on which it is based.<sup>345</sup> States must, therefore, ensure that they have in place the procedural safeguards necessary to ensure that intelligence on which targeting decisions are made is accurate and verifiable.

84. Furthermore, because operators are based thousands of miles away from the battlefield, and undertake operations entirely through computer screens and remote audiofeed, there is a risk of developing a “Playstation” mentality to killing. States must ensure that training programs for drone operators who have never been subjected to the risks and rigors of battle instill respect for IHL and adequate safeguards for compliance with it.

85. Outside the context of armed conflict, the use of drones for targeted killing is almost never likely to be legal. A targeted drone killing in a State’s own territory, over which the State has control, would be very unlikely to meet human rights law limitations on the use of lethal force.

86. Outside its own territory (or in territory over which it lacked control) and where the situation on the ground did not rise to the level of armed conflict in which IHL would apply, a State could theoretically seek to justify the use of drones by invoking the right to anticipatory self-defence against a non-state actor.<sup>346</sup> It could also theoretically claim that human rights law’s requirement of first employing less-than-lethal means would not be possible if the State has no means of capturing or causing the other State to capture the target. As a practical matter, there are very few situations outside the context of active hostilities in which the test for anticipatory self-defence – necessity that is “instant, overwhelming, and leaving no choice of means, and no moment of deliberation”<sup>347</sup> – would be met. This hypothetical presents the same danger as the “ticking-time bomb” scenario does in the context of the use of torture and coercion during interrogations: a

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<sup>343</sup> Michael N. Schmitt, Precision Attack and International Humanitarian Law, 87 Int’l Rev. Red Cross 445 (Sept. 2005).

<sup>344</sup> A/HRC/11/2/Add.4, paras. 14-18, 70.

<sup>345</sup> See, e.g., Israel Ministry of Foreign Affairs Website, “Findings of the inquiry into the death of Salah Shehadeh” <http://www.mfa.gov.il/MFA/Government/Communiques/2002/Findings%20of%20the%20inquiry%20into%20the%20death%20of%20Salah%20Sh>.

<sup>346</sup> *Infra* III.B in original report.

<sup>347</sup> See R.Y. Jennings, *The Caroline and McLeod Cases*, 32 Am. J. Int’l L. 82, 92 (1938).

thought experiment that posits a rare emergency exception to an absolute prohibition can effectively institutionalize that exception. Applying such a scenario to targeted killings threatens to eviscerate the human rights law prohibition against the arbitrary deprivation of life. In addition, drone killing of anyone other than the target (family members or others in the vicinity, for example) would be an arbitrary deprivation of life under human rights law and could result in State responsibility and individual criminal liability.

***Allegation letter sent on 26 August 2005,(reproduced from E/CN.4/2006/53/Add.1, 27 March 2006, pp. 264–265):***

Letter of allegation sent in relation to information received that Haitham al-Yemeni, an alleged al-Qaeda senior figure, was killed on the Pakistan-Afghanistan border on or around the 10 May 2005 by a missile fired by an un-manned aerial drone operated by the US Central Intelligence Agency. Mr. al-Yemeni had reportedly been under surveillance for more than a week by US intelligence and military personnel. Reports indicate that the Predator drone, operated from a secret base hundreds of kilometers from the target, located and fired on him in Toorikhel, Pakistan, an area where Pakistani forces had allegedly been looking for al-Qaeda leader, Osama Bin Laden. It is my understanding that the CIA is authorized to operate such Predator operations under presidential authority signed after the September 11, 2001 terrorist attacks.

According to the information received, although Mr. al-Yemeni was not listed by that name neither in the FBI's, nor in Pakistan's, "most wanted" list, the active surveillance of his activities would suggest that he was playing an important role inside the al-Qaeda organization. It has been suggested that those undertaking the surveillance were hoping that he would lead them to Osama bin Laden. However, after Abu Faraj al-Libbi, another suspected al-Qaeda leader, was arrested by Pakistani authorities a month before, it is reported that a decision was taken to kill Mr. al-Yemeni for fear that he would go into hiding and thus be lost track of. My understanding is that the CIA reportedly refused to comment on the situation. Similarly, Sheik Rashid Ahmed, Pakistan's Information Minister denied that any such incident had ever happened near the Pakistan-Afghanistan border.

In drawing the attention of your Excellency's Government to this information and seeking clarification thereof, I am fully aware of the stance taken by your Government in correspondence with my predecessor with respect to the mandate's competence regarding killings that are said to have occurred within the context of an armed conflict (I refer to your Government's letters dated 22 April 2003 and 8 April 2004). As I have explained in my Report to the 61st Commission on Human Rights, however, both the practice of the General Assembly and of the independent experts successively holding the mandate since its creation in 1982 make it clear that questions of humanitarian law fall squarely within the Special Rapporteur's mandate (See E/CN.4/2005/7, at par. 45).

In the light of these considerations, I would reiterate my concern that empowering Governments to identify and kill "known terrorists" places no verifiable obligation upon them to demonstrate in any way that those against whom lethal force is used are indeed terrorists, or to demonstrate that every other alternative has been exhausted. (See E/CN.4/2005/7, at par. 41). I would also recall that the Human Rights Committee has held that a State party can be held responsible for

violations of rights under the Covenant where the violations are perpetrated by authorized agents of the State on foreign territory, “whether with the acquiescence of the Government of [the foreign State] or in opposition to it”. (See *Lopez v. Uruguay*, communication No.52/1979, CCPR/C/OP/1 at 88 (1984), paras. 12.1-12.3.)

Finally, I wish to stress that, while Governments have a responsibility to protect their citizens against the excesses of non-State actors or other entities, efforts to eradicate terrorism must be undertaken within a framework clearly governed by international human rights law as well as by international humanitarian law.

Without in any way wishing to pre-judge the accuracy of the information received, I would be grateful for a reply to the following questions:

1. What rules of international law does your Excellency’s Government consider to govern this incident? If your Excellency’s Government considers the incident to have been governed by humanitarian law, please clarify which treaty instruments or customary norms are considered to apply.
2. What procedural safeguards, if any, were employed to ensure that this killing complied with international law?
3. On what basis was it decided to kill, rather than capture, Haitham al-Yemeni?
4. Did the government of Pakistan consent to the killing of Haitham al-Yemeni?

***Report on Mission to the United States of America (A/HRC/11/2/Add.5, 28 May 2009, ¶¶ 71-73, 83):***

71. The Government has credibly been alleged to have engaged in targeted killings on the territory of other States.<sup>348</sup> Senior Government officials have confirmed the existence of a program through which drones are used to target particular individuals, but have also caused civilian casualties.<sup>349</sup> On several occasions I have asked the Government to explain the legal basis on which a particular individual was targeted.<sup>350</sup> While I have welcomed the Government’s willingness to engage in dialogue on targeted killings, it has been evasive about its grounds for targeting, and I am disturbed by the broader implications of its positions. Briefly, those positions are that: (a) the Government’s actions against al-Qaeda constitute a world-wide armed conflict to which international humanitarian law applies; (b) international humanitarian law operates to the

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<sup>348</sup> On 17 September 2001, the President signed a “presidential finding” pursuant to the authority of which the CIA developed the concept of “high-value targets” for whom “kill, capture or detain” orders could be issued in consultation with lawyers in DOJ, CIA, and the administration. Council of Europe, *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States*, report submitted by Mr. Dick Marty, Doc. 11302 Rev. (7 June 2007), paragraphs 58-64. I asked the Inspector General of the CIA about this program, but he refused to confirm or deny any aspect of this account.

<sup>349</sup> Eric Schmitt and Christopher Drew, *More Drone Attacks in Pakistan Planned*, The New York Times, April 7, 2009; Jane Perlez, *Pakistan Rehearses Its Two-Step on Airstrikes*, The New York Times, April 15, 2009.

<sup>350</sup> A/HRC/4/20/Add.1, pp. 342-58 (one targeted killing in Pakistan); see also E/CN.4/2006/53/Add.1, pp. 264-65); A/HRC/4/20/Add.1, pp. 358-61 (three targeted killings in Pakistan).

exclusion of human rights law; (c) international humanitarian law falls outside the mandate of the Special Rapporteur and of the Human Rights Council; and (d) States may determine for themselves whether an individual incident is governed by humanitarian law or human rights law.

72. I responded to these positions in detail both directly to the Government and in my 2007 report to the Council.<sup>351</sup> I have discussed the extent to which these positions constitute a radical departure from past practice, and the highly negative consequences that would flow from them.<sup>352</sup> Under the Government's reinterpretation of the law and the Council's and my mandate, the United States would function in a public accountability void - as could other States - to the detriment of the advances made by the international human rights and humanitarian law regimes over the past sixty years.

73. The new administration should reconsider these positions and move to ensure the necessary transparency and accountability. Withholding such information replaces public accountability with unverifiable Government assertions of legality, inverting the very idea of due process.

[...]

83. (Recommendations) Enhancing transparency in targeted killings:

- The Government should explicate the rules of international law it considers to cover targeted killings. It should specify the bases for decisions to kill rather than capture particular individuals, and whether the State in which the killing takes place has given consent. It should specify the procedural safeguards in place, if any, to ensure in advance of drone killings that they comply with international law, and the measures the Government takes after any such killing to ensure that its legal and factual analysis was accurate and, if not, the remedial measures it would take.
- The Government should make public the number of civilians collaterally killed as a result of drone attacks, and the measures in place to prevent such casualties.

## **2. Accountability and transparency in targeting operations**

***Report on Targeted Killings (A/HRC/14/24/Add.6, 28 May 2010, ¶¶ 87-92):***

87. The failure of States to comply with their human rights law and IHL obligations to provide transparency and accountability for targeted killings is a matter of deep concern. To date, no State has disclosed the full legal basis for targeted killings, including its interpretation of the legal issues discussed above. Nor has any State disclosed the procedural and other safeguards in place to ensure that killings are lawful and justified, and the accountability mechanisms that ensure wrongful killings are investigated, prosecuted and punished. The refusal by States who

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<sup>351</sup> A/HRC/4/20/29; A/HRC/4/20/Add.1, pp. 342-58.

<sup>352</sup> These consequences include: (a) many of the worst human rights and humanitarian law violations in the world today would be removed from the purview of the Special Rapporteur and the Human Rights Council; (b) a State could target and kill any individual, anywhere in the world, whom it deemed to be an "enemy combatant" and it would not be accountable to the international community; (c) a State could unilaterally decide that a particular incident complied with international law - as interpreted solely by the State - and would not therefore be covered by the mandate; (d) it is widely agreed that international human rights and humanitarian law are complementary, not mutually exclusive. *Ibid.*

conduct targeted killings to provide transparency about their policies violates the international legal framework that limits the unlawful use of lethal force against individuals.<sup>353</sup>

88. Transparency is required by both IHL<sup>354</sup> and human rights law.<sup>355</sup> A lack of disclosure gives States a virtual and impermissible license to kill.

89. Among the procedural safeguards States must take (and disclose) with respect to targeted killings in armed conflict are:

- Ensure that forces and agents have access to reliable information to support the targeting decision.<sup>356</sup> These include an appropriate command and control structure,<sup>357</sup> as well as safeguards against faulty or unverifiable evidence.<sup>358</sup>
- Ensure adequate intelligence on “the effects of the weapons that are to be used ... the number of civilians that are likely to be present in the target area at the particular time; and whether they have any possibility to take cover before the attack takes place.”<sup>359</sup>
- The proportionality of an attack must be assessed for each individual strike.<sup>360</sup>
- Ensure that when an error is apparent, those conducting a targeted killing are able to abort or suspend the attack.<sup>361</sup>

90. In order to ensure that accountability is meaningful, States must specifically disclose the measures in place to investigate alleged unlawful targeted killings and either to identify and prosecute perpetrators, or to extradite them to another State that has made out a prima facie case for the unlawfulness of a targeted killing.<sup>362</sup>

91. States have also refused to provide factual information about who has been targeted under their policies and with what outcome, including whether innocent civilians have been collaterally killed or injured. In some instances, targeted killings take place in easily accessible urban areas, and human rights monitors and civil society are able to document the outcome. In others, because of remoteness or security concerns, it has been impossible for independent observers and the international community to judge whether killings were lawful or not.

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<sup>353</sup> Human Rights Committee, General Comment No. 6 (1982), Doc. CCPR/C/21/Rev.1; *Neira Alegria Case*, Judgment of 19 January 1995, Inter-Am.Ct.H.R. (Ser. C) No. 20 (1995); *McCann and others v. UK*, ECHR, Judgment of 27 September 1995, Series A, No. 324, 140; *Kaya v. Turkey*, Judgment of 19 February 1998, 1998-I R.J.D. 297, 140; *Husband of Maria Fanny Suarez de Guerrero v. Colombia*, Communication No. R.11/45 (5 February 1979), UN Doc. Supp. No. 40 (A/37/40) at 137 (1982); E/CN.4/2006/53, para. 35. States party to the ICCPR can be held responsible for violations of the rights under the Covenant when the violations are perpetrated by authorized agents of the State, including on foreign territory. *Lopez v. Uruguay*, Communication No. 52/1979, CCPR/C/OP/1 at 88 (1984), paras. 12.1-12.3; *Wall Opinoin*, paras. 108-111 (ICCPR “is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”).

<sup>354</sup> Geneva Conventions, art. 1; AP I, arts. 11, 85 (grave breaches), 87(3); Geneva Conventions I-IV, articles 50/51/130/147;

<sup>355</sup> Economic and Social Council Resolution 1989/65 of 24 May 1989.

<sup>356</sup> HPCR Commentary section G.32(a).

<sup>357</sup> *Id.*

<sup>358</sup> HPCR Commentary section G.32(a)-(c) and 39.

<sup>359</sup> HPCR Commentary section g.32(c).

<sup>360</sup> Sandoz, AP Commentary, AP I, art. 57, section 2207.

<sup>361</sup> Helpful in this regard: UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004), para. 5.32.9.

<sup>362</sup> Geneva Conventions (I-IV), arts. 49/50/129/146; Geneva Convention (IV), arts. 3 and 4. AP I, art 75.

92. Transparency and accountability in the context of armed conflict or other situations that raise security concerns may not be easy. States may have tactical or security reasons not to disclose criteria for selecting specific targets (e.g. public release of intelligence source information could cause harm to the source). But without disclosure of the legal rationale as well as the bases for the selection of specific targets (consistent with genuine security needs), States are operating in an accountability vacuum. It is not possible for the international community to verify the legality of a killing, to confirm the authenticity or otherwise of intelligence relied upon, or to ensure that unlawful targeted killings do not result in impunity. The fact that there is no one-size-fits-all formula for such disclosure does not absolve States of the need to adopt explicit policies.

***Report on Mission to the United States of America (A/HRC/11/2/Add.5, 28 May, 2009, ¶¶ 71-73, 83):***

*The Special Rapporteur visited the United States from 16 -30 June 2008. He reported on the targeted killings framework and the lack of transparency and accountability following these operations.*

Targeted killings: lack of transparency regarding the legal framework and targeting choices

71. The Government has credibly been alleged to have engaged in targeted killings on the territory of other States.<sup>363</sup> Senior Government officials have confirmed the existence of a program through which drones are used to target particular individuals, but have also caused civilian casualties.<sup>364</sup> On several occasions I have asked the Government to explain the legal basis on which a particular individual was targeted.<sup>365</sup> While I have welcomed the Government's willingness to engage in dialogue on targeted killings, it has been evasive about its grounds for targeting, and I am disturbed by the broader implications of its positions. Briefly, those positions are that: (a) the Government's actions against al-Qaeda constitute a world-wide armed conflict to which international humanitarian law applies; (b) international humanitarian law operates to the exclusion of human rights law; (c) international humanitarian law falls outside the mandate of the Special Rapporteur and of the Human Rights Council; and (d) States may determine for themselves whether an individual incident is governed by humanitarian law or human rights law.

72. I responded to these positions in detail both directly to the Government and in my 2007 report to the Council.<sup>366</sup> I have discussed the extent to which these positions constitute a radical departure from past practice, and the highly negative consequences that would flow from

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<sup>363</sup> On 17 September 2001, the President signed a "presidential finding" pursuant to the authority of which the CIA developed the concept of "high-value targets" for whom "kill, capture or detain" orders could be issued in consultation with lawyers in DOJ, CIA, and the administration. Council of Europe, *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States*, report submitted by Mr. Dick Marty, Doc. 11302 Rev. (7 June 2007), paragraphs 58-64. I asked the Inspector General of the CIA about this program, but he refused to confirm or deny any aspect of this account.

<sup>364</sup> Eric Schmitt and Christopher Drew, *More Drone Attacks in Pakistan Planned*, The New York Times, April 7, 2009; Jane Perlez, *Pakistan Rehearses Its Two-Step on Airstrikes*, The New York Times, April 15, 2009.

<sup>365</sup> A/HRC/4/20/Add.1, pp. 342-58 (one targeted killing in Pakistan); see also E/CN.4/2006/53/Add.1, pp. 264-65); A/HRC/4/20/Add.1, pp. 358-61 (three targeted killings in Pakistan).

<sup>366</sup> A/HRC/4/20 29; A/HRC/4/20/Add.1, pp. 342-58.

them.<sup>367</sup> Under the Government's reinterpretation of the law and the Council's and my mandate, the United States would function in a public accountability void - as could other States - to the detriment of the advances made by the international human rights and humanitarian law regimes over the past sixty years.

73. The new administration should reconsider these positions and move to ensure the necessary transparency and accountability. Withholding such information replaces public accountability with unverifiable Government assertions of legality, inverting the very idea of due process.

[...]

### Recommendations

#### 83. Enhancing transparency in targeted killings

- The Government should explicate the rules of international law it considers to cover targeted killings. It should specify the bases for decisions to kill rather than capture particular individuals, and whether the State in which the killing takes place has given consent. It should specify the procedural safeguards in place, if any, to ensure in advance of drone killings that they comply with international law, and the measures the Government takes after any such killing to ensure that its legal and factual analysis was accurate and, if not, the remedial measures it would take.
- The Government should make public the number of civilians collaterally killed as a result of drone attacks, and the measures in place to prevent such casualties.

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<sup>367</sup> These consequences include: (a) many of the worst human rights and humanitarian law violations in the world today would be removed from the purview of the Special Rapporteur and the Human Rights Council; (b) a State could target and kill any individual, anywhere in the world, whom it deemed to be an "enemy combatant" and it would not be accountable to the international community; (c) a State could unilaterally decide that a particular incident complied with international law - as interpreted solely by the State - and would not therefore be covered by the mandate; (d) it is widely agreed that international human rights and humanitarian law are complementary, not mutually exclusive. Ibid.