

USE OF FORCE IN COUNTER-TERRORISM OPERATIONS

This Chapter of the Handbook collects the observations and recommendations of the UN Special Rapporteur on the use of force in counter-terrorism operations in the context of extra-judicial executions. This section focuses on the impact of armed conflict on civilians killed during targeted killings of terrorists. The Special Rapporteur also looks at the arbitrary executions or targeted assassinations of individuals alleged to have committed crimes or to be linked to terrorism, and the extent to which such practices undermine international human rights law. This section also analyzes the accountability requirement and the lack of transparency regarding the legal framework and targeting choices of some states.

A. TARGETED KILLINGS OF “TERRORISTS”	2
B. ACCOUNTABILITY AND TRANSPARENCY IN COUNTER-TERRORISM OPERATIONS	21

A. TARGETED KILLINGS OF “TERRORISTS”

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (E/CN.4/2005/7, 22 December 2004, ¶¶ 41-43, 84):

Violations of the right to life in armed conflict and internal strife

41. Recent years have seen a growing number of civilians and persons *hors de combat* killed in situations of armed conflict and internal strife. One result has been a general lessening of respect for established and clearly binding international norms. This is manifested in part by the proliferation of proposals that seek to justify illegal executions. Thus, it is increasingly common to read arguments along the lines that “targeting and eliminating known terrorists is more efficient and costs fewer lives than waging conventional war”.¹ While there are a great many empirical arguments that might be made in order to show that such strategies will be counterproductive, the point is that such proposals directly undermine the essential foundations of human rights law. 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 had been exhausted. While it is portrayed as a limited “exception” to international norms, it actually creates the potential for an endless expansion of the relevant category to include any enemies of the State, social misfits, political opponents, or others. And it makes a mockery of whatever accountability mechanisms may have otherwise constrained or exposed such illegal action under either humanitarian or human rights law.

42. There are several responses which need to be made to recent developments, and the Commission can contribute significantly to this effort through its work. The first is to reject unequivocally the killing of all innocent civilians and non-combatants by no matter whom and in no matter what circumstances. This includes those struggling against foreign occupation, for whom an exception is sometimes claimed. But, as the High-level Panel on Threats, Challenges and Change concluded at the end of a detailed analysis of the issue, “the central point is that there is nothing in the fact of occupation that justifies the targeting and killing of civilians”.²

43. The second response is to underscore the fact that efforts to eradicate terrorism must be undertaken within a framework clearly governed by human rights law as well as international humanitarian law, and that executions occurring in the context of armed conflict that violate that framework fall squarely within the remit of the Special Rapporteur. These issues have assumed particular salience in the past couple of years because they have been contested by some Governments. The most important responses in this regard have come from the Government of the United States in relation to two sets

¹ A variant of this argument is that the United Nations itself should approve targeted killings of “dangerous dictators”. Anne-Marie Slaughter, “Mercy killings: why the United Nations should issue death warrants against dangerous dictators”, *Foreign Policy*, 1 May 2003.

² *A More Secure World*, op. cit., para. 160.

of allegations. The first concerned the alleged killing of six men by a “U.S.-controlled Predator drone aircraft” when they were travelling in a car in Yemen. At least one of those killed was said to have been a suspected senior figure of Al-Qaida. While there was no armed conflict in Yemen at the time, the United States pointed out that since Al-Qaida was waging war unlawfully against it, the situation constituted an armed conflict and thus “international humanitarian law is the applicable law”. In its view, “allegations stemming from any military operations conducted during the course” of such an armed conflict “do not fall within the mandate of the Special Rapporteur”, or of the Commission itself (E/CN.4/2003/G/80, annex).

[...]

Recommendations

84. Proposals seeking to justify or rationalize the arbitrary execution or targeted assassination of individuals alleged to have committed crimes or to be linked to terrorism involve a fundamental undermining of international human rights law and should be condemned without reservation.

Report on Mission to Kenya (A/HRC/11/2/Add.6, 26 May 2009, ¶¶9-10, 12, 85-89):

The Special Rapporteur visited Kenya from 16 to 25 February 2009. During his mission he focused on the types and causes of unlawful killings and investigated whether those responsible for such killings were held to account. He looked into the practices of security forces and death squads in dealing with suspected criminals.

9. The Government has a clear obligation to protect citizens from Mungiki and other criminal violence, while respecting human rights, including the right to life. Suspects should be arrested, charged, tried and punished accordingly. In a context of violent criminality, police will inevitably be required to use force on occasion, and sometimes lethal force in order to protect life. The police, including the Police Commissioner, assured me that there have been no unlawful police killings. However, as I detail below, the evidence is compelling that the police respond - frequently - with unlawful force: murdering, rather than arresting suspects. Further, investigations by police are so deficient and compromised that claims by the police that all killings are lawful are inherently unreliable and unsustainable.

10. During my mission, I received compelling evidence that death squads - including one called *Kwekwe* - exist within the police force in Kenya, and that these squads were set-up to eliminate the Mungiki and other high-profile suspected criminals, upon the orders of senior police officials. Detailed evidence was provided by civil society investigations,³ witnesses to the squad’s activities, survivors of attempted killings, family members of deceased or disappeared victims, and victim autopsy reports indicating shots at close

³ E.g., KNCHR, *The Cry of Blood: Report on Extra-Judicial Killings and Disappearances* (September 2008).

range and back entry wounds. A further key component of this evidence is the now public testimony of a police whistleblower, who recorded his statement in July 2008, before he was murdered while in hiding in October 2008. His account provides, in precise and often excruciating, detail the composition and operations of the death squad in which he was a part, and the circumstances of the murder of 67 persons between February 2007 and July 2008. Together, this evidence implicates the Commissioner of Police, and senior police officials from the Criminal Investigation Division, Special Crime Unit, and the Criminal Intelligence Unit. From this large amount of testimony, it is possible to set-out in detail the operations of the death squads:

- The suspected Mungiki or other criminal suspects appear to nearly always be known and individually targeted by police in advance. The police carrying out the operations (those driving the vehicles and committing the murders) are generally ordered by senior police to pick up a specified individual at a particular location (often his home, workplace, or a road on which he is believed to be traveling).⁴
- While most suspects are individually targeted, police will generally also detain others who may be accompanying the target at the time of arrest.
- Very often, the initial detention is witnessed by family members, co-workers, or bystanders.⁵ In one well-known case, a man was actually photographed by a member of the press while being arrested.⁶
- Some suspects are murdered at the location of arrest. They are generally ordered by the police to lie down on the ground and are then shot. Police then attempt to set the crime scene to look like a “shoot out” occurred between criminals and police - weapons will be placed next to the bodies of the suspect, and fired into the air to give the appearance of an exchange of fire. Such victims are often taken to the mortuary by the police.⁷

[...]

12. Lethal force is also commonly used in legitimate law enforcement operations in which the police could have readily made an arrest. Some of these killings would be prevented through the provision of unambiguous guidelines on when police may use lethal force. The use of force by police is regulated by the Constitution of Kenya, the Police Act, and the Force Standing Orders.⁸ In addition to being unclear and contradictory, these laws do not meet the requirements of international law which requires the use of force to be both necessary and proportionate, and permits intentional lethal force only where it is required to protect life.⁹ The Constitution of Kenya, for example, states that there is no violation of the right to life if, *inter alia*, the death occurred as a result of reasonably justifiable force used to protect a person from violence,

⁴ E.g. Appendix II: Case 6, Case 7, Case 8, Case 9.

⁵ Appendix II: Case 4, Case 7, Case 8, Case 11, Case 13.

⁶ Appendix II: Case 3.

⁷ Appendix II: Case 3.

⁸ Constitution of Kenya, s 71; Police Act, s 28; Criminal Procedure Code, s 21; Police Force Standing Orders, Appendix 51A.

⁹ See: A/61/311, pages 12-16.

to defend property, to effect a lawful arrest, to prevent an escape, to suppress a riot, or to prevent the commission of a criminal offence.

[...]

Recommendations

Killings by police

85. The President should publicly acknowledge his commitment to ending unlawful killings by the police. To this end:

- (a) The Police Commissioner should be replaced immediately;
- (b) Unambiguous public orders should be issued that under no circumstances will unlawful killings by the security forces be tolerated.

86. Police death squad killings should be prevented, investigated, and punished:

- (a) The Minister for Internal Security should order the disbandment of all death squads, and report to Parliament on the measures he has taken to ensure that the squads no longer operate;

- (b) The Government should establish an independent inquiry into the operation of police death squads. To secure the inquiry's integrity and independence, Kenya should invite foreign police investigators (such as the FBI, or Scotland Yard) to assist. The inquiry's work should begin by investigating the detailed allegations contained in reports of the KNCHR, and in the testimony of the police whistleblower. It should report its findings to Parliament, and be empowered to provide evidence and names for criminal prosecution to the Government;

- (c) All individuals under investigation for their involvement in police death squads should be removed from active duty during that period.

87. A review of the use of force provisions in the Constitution of Kenya, the Police Act, and the Standing Force Orders should be undertaken to bring them into line with Kenya's obligations under international law.

88. Across-the-board vetting of the current police is necessary. This needs to be part of a comprehensive reform of the police, including the creation of a Police Service Commission, as recommended by the Waki Commission.

89. The Government should ensure that its expressed commitment to centralize the records of police killings at police headquarters in Nairobi is implemented. All police stations should be required to report such cases to headquarters within 24 hours. The complete statistics of police killings should be made public by the police headquarters on a monthly basis, and the past records of police killings should be made publicly accessible.

Report on Mission to Brazil (A/HRC/11/2/Add.2, 23 March 2009, ¶¶ 7, 16, 18-22, 26-29, 34-37):

The Special Rapporteur visited Brazil from the 4 to 14 November 2007. He reported on the rampant rate of extrajudicial executions in certain parts of the country and the problems of executions by on-duty police and off-duty police operating in death squads.

Background: High Crime and Homicide Rates

7. Policing in Brazil takes place within a context of significant organized crime, gang control of entire communities, drug and weapons trafficking, and high levels of violent street crime.¹⁰ Gangs and traffickers have become so powerful that in large cities such as Rio de Janeiro, São Paulo and Recife, they exercise control over favelas, threatening and extorting residents and businesses, imposing their own “laws”, and requiring residents to protect them from police. Gangs engage in lethal violence against enemy factions, making everyday security for favela residents volatile. In some areas of Rio de Janeiro, gang control is so absolute, and legitimate state presence so absent, that police can only enter under threat of armed confrontation with traffickers. In São Paulo, one gang, First Command of the Capital (*Primeiro Comando da Capital*, PCC) was able to bring the state to a standstill in May 2006, organizing prison riots, attacks and murders across the state. The May 2006 violence caused widespread fear across Brazil, and drew international attention to the country’s need for more effective crime control.

[...]

“War” on crime and large-scale police operations in Rio de Janeiro

16. Senior state Government officials and law enforcement authorities in Rio de Janeiro discuss policing as a “war” against gangs and drug traffickers. During 2007 and early 2008, police mounted a number of large-scale operations involving hundreds of men supported by armoured vehicles and attack helicopters, to “invade” and take back favelas controlled by gangs.¹¹ One of these operations, the police invasion of the Complexo do Alemão area of Rio de Janeiro on 27 June 2007, illustrates why such an approach might be tempting in theory but in practice is murderous and self-defeating.

[...]

18. In an attempt to take back the Complexo from gang control, on 27 June 2007, the state Government mounted a large-scale invasion of the area, involving 1,280 Civil and Military Police and 170 National Public Security Force (FNSP)¹² members. The invasion

¹⁰ For example, rates of robberies per 100,000 have also been rising steadily in Rio de Janeiro since 1991, (under 600 per 100,000 in 1991, to over 1,200 per 100,000 in 2006).

¹¹ The state of Rio de Janeiro reported to me that 4 large-scale operations were mounted in 2007 (numbers of police involved in each operation were: 120; 230; 460; 1,280). In total, 6 police were wounded in the 4 operations, and 2 killed. A total of 36 residents were killed, 78 wounded, and 36 traffickers arrested.

¹² The *Força Nacional de Segurança Pública* (FNSP) was created by presidential decree 5.289 on 29 November 2004. The National Secretariat for Public Security, which is part of the federal Ministry of

began in the morning, led by members of the Special Police Operations Battalion¹³ in armoured vehicles. Other Civil and Military Police followed, while police attempted to remove barriers – concrete pipes, abandoned cars, etc. - that had been placed at key entrances to the neighbourhood. The area is composed of 17 favelas spread across steep hills, and police attempted to take the higher ground, eventually occupying approximately 60% of the area. But police moved slowly through the area over the course of the day - the Secretary for Public Security told me that in the first four hours they were only able to move forward 400 metres due to barriers and confrontation.

Residents with whom I spoke described hearing gun shots and observing the gradual approach of police to their own streets. Many told me that they were unable to leave their homes all day for fear of being caught in the shooting. Meanwhile, the FNSP forces had assumed positions on the edges of the favela to act as a “suffocation” force, responsible for preventing gang members from escaping the favela and for preventing gangs from neighboring areas entering and joining the fight. At the time of my visit, the FNSP continued to maintain checkpoints on the perimeter, but the only law enforcement presence within the community consisted of a few small outposts of members of the Military Police.

19. I questioned the Rio de Janeiro Secretary of Public Security and senior members of the Civil and Military Police as to the purpose of this huge confrontation. I was informed that the Complexo was one of 19 centres of criminality in Rio de Janeiro, a place from which drugs.

20. In evaluating the operation in Complexo do Alemão, two questions stand out. First, what were the crime prevention benefits of the operation - did the operation in fact seize weapons and drugs, arrest gang leaders, and open the community to state services? Second, did the operation harm the community’s residents? These questions are especially important because most state Government officials with whom I spoke in Rio de Janeiro considered the operation a success, and a model for future police action.¹⁴

Justice, is responsible for coordinating the force, which is composed of police from around the country, and which can only be deployed in a state at the express request of that state’s governor.

¹³ The *Batalhão de Operações Policiais Especiais* (BOPE) are an elite battalion of the Military Police.

¹⁴ In fact, after my visit, I was informed of a number of other large-scale police operations involving deaths. On 30 January 2008, an operation was mounted in Jacarezinho and Mangueira neighborhoods, and involved approximately 200 police, two helicopters and two armoured cars. Six people were killed, six arrested, and a small amount of drugs and weapons were seized. On April 3 2008, an operation took place in the Coréia and Vila Aliança favelas. Two hundred police were used, supported by armored vehicles and one helicopter. Eleven civilians were killed, including three killed from shots fired from the helicopter. Seven suspected criminals were arrested. Another large scale operation took place on 15 April 2008, by 180 police in the Vila Cruzeiro and other favelas in the Complexo da Penha area. Nine civilians were killed, and 7 bystanders wounded by stray bullets. Fourteen men were arrested. After this operation, military police commander Colonel Marcus Jardim was reported in the press as comparing the dead men to insects: “The [police are] the best remedy against dengue. Not a single fly resists ... it’s the best social bug spray” (“Ação do Bope deixa 9 mortos e 7 feridos”, *O Estado do S. Paulo*, 16 April 2008). Security Secretary of Rio de Janeiro, Mr José Beltrame was reported as stating that the two April operations were a success (“Operação na Vila Cruzeiro termina com nove mortos, seis feridos e 14 presos”, *O Globo*, 15 April 2008).

21. In fact, from a crime control perspective, the operation was a failure. Police confiscated 2 machine guns, 6 handguns, 3 rifles, 1 sub-machine gun, 2,000 cartridges, 300 kilograms of drugs, and unspecified amount of explosives. Thus there were more people killed than guns confiscated. And the day after the operation, there was only a *de minimis* police presence inside the favela. The gang was still there and still in control. It is not surprising that a one-day long, large, slow sweep through a neighborhood long neglected by the state failed to result in significant arrests or seizures, much less in the end of gang control. Large operations over large areas are difficult to keep secret in advance and are immediately exposed as they enter a community. This gives criminals great opportunity to escape, along with their weapons and drugs. The combined effects of poor intelligence - which was inevitable given the absence of a police presence in the area - and enormous advance warning to the members of criminal organizations are obvious in the paucity of arrests and the failure to seize large quantities of firearms or drugs.¹⁵

22. Nineteen were killed and at least 9 wounded during the 8 hour operation. All 19 deaths were recorded as “resistance” deaths.¹⁶ But there is compelling evidence that at least some of those killed were extrajudicially executed. I received credible accounts from residents and family members of victims that victims were shot in the back whilst walking away from police, or dragged out of homes unarmed and executed, or disarmed and then shot in the head.

Residents and families also testified that police invaded their homes, threatened them, damaged and stole property, and were physically abusive. Some of those subsequently independently investigating allegations of police abuse - including members of the Brazilian Bar Association¹⁷ as well as victims’ families - reported receiving death threats and warnings to cease their investigations.¹⁸

¹⁵ The state of Rio de Janeiro reported that the total drug and weapons confiscated for all 4 large-scale operations in 2007 were: 107 weapons (including antiaircraft machine guns, pistols); 43 explosive devices; 20,016 ammunition cartridges; 2,730 kg of cannabis; 441 kg of cocaine. And more broadly, despite the aggressive state-wide policies and a dramatic rise in the numbers of people killed in 2007 by police in Rio de Janeiro (25.1% more than in 2006), there was a 5.7% reduction in drug seizures, a 16.9% reduction in arms confiscations by police, and a 13.2% reduction in arrests from 2006 to 2007. (Rio de Janeiro, Public Security Institute (Instituto de Segurança Pública), 19 March 2008. The numbers reported by the State of Rio de Janeiro are: drug seizures (10,793 in 2006; 10,176 in 2007); arms confiscations (13,312 in 2006; 11,062 in 2007); arrests (16,543 in 2006; 14,355 in 2007).)

¹⁶ The numbers of killings by police registered as “*autos de resistência*” in Rio de Janeiro has risen sharply since 1997: 1997 (300), 1998 (397), 1999 (289), 2000 (427), 2001 (592), 2002 (900), 2003 (1195), 2004 (983), 2005 (1098), 2006 (1063), 2007 (1,330).

¹⁷ See Ordem dos Advogados do Brasil, Seção do Rio de Janeiro, Comissão de Direitos Humanos e Acesso à Justiça, *Notitia Criminis*, Exmo. Sr. Dr. Sub-Procurador Geral de Direitos Humanos do Ministério Público do Estado do Rio de Janeiro.

¹⁸ Since my visit, I have also learned that prominent human rights activist and lawyer João Tancredo (who has been working on behalf of some of the families of Complexo do Alemão victims) survived an assassination attempt on 19 January 2008. The bullet-proof car he was traveling in was shot at four times when he returning home from a meeting with the parents of victims of alleged police violence in the Furquim Mendes favela.

[...]

26. The degree to which the killing of “criminals” is tolerated and even publicly encouraged by high level Government officials goes a long way to explaining why the numbers of killings by police are so high, and why they are so inadequately investigated. Current Secretary for Public Security José Mariano Beltrame commented that, while police did their best to avoid casualties, one could not “make an omelet without breaking some eggs”.¹⁹ Such public statements, and the military-style methods used in mega-operations, have led favela residents to become increasingly cynical about the police. The view that police operations are planned for the very purpose of killing poor, black, young men is surprisingly mainstream. The official rhetoric of “war”, the acquisition of military hardware, and violent police symbols only make these views more broadly acceptable.²⁰

Policing gang controlled areas: lessons learned from the Complexo do Alemão operation

27. The large operations of 2007 were ineffective in most respects. They endangered the residents of the communities in which the operations took place, failed to contribute to dismantling criminal organizations, and had a very limited effect on the quantity of drugs, weapons, and other contraband in the city or state at large. Given the striking failure of the “war” approach, the primary motivation for such policies seems to be the state Government’s wish to appear “tough on crime”. Some senior police officers, parliamentarians, and civil society advocates are highly critical of this “war” approach to policing. But they have largely been silenced by apparently strong middle class approval

¹⁹ Bia Barbosa, “OEA recebe denúncia contra megaoperação no Complexo do Alemão”, Carta Mayor, 25 July 2007. These views have considerable public support, because many people have little faith in the normal work of the police and other components of the criminal justice system. Fifty percent of Brazilians state that they do not even report crimes to the police because it would be a “waste of time”. (See William C Prillaman, “Crime, Democracy, and Development in Latin America”, Centre for Strategic and International Studies, Policy Papers on the Americas, Volume XIV, Study 6 (June 2003), p. 9. A Brazilian Judges’ Association surveys show that citizens lack faith in the judiciary and consider it corrupt, slow, and mysterious. (AMB, Pesquisa qualitativa “Imagem do Poder Judiciário”, Brasília, 2004, p. 61.) In a context of soaring crime rates, widespread citizen fear and insecurity, lack of faith in the police, and lack of trust in the judicial system, it is perhaps not surprising that many Brazilians support “tough” law and order approaches and the extrajudicial execution of suspected criminals: a 2002 Rio de Janeiro survey found that 47% supported the killing of murderers and thieves by police. See William C. Prillaman, “Crime, Democracy, and Development in Latin America”, Centre for Strategic and International Studies, Policy Papers on the Americas, Volume XIV, Study 6 (June 2003), p. 14.

²⁰ In 2002, police acquired a military-style armoured vehicle, known colloquially as the *caveirão*, or “big skull”, so named because the BOPE’s emblem - a skull impaled on a sword, backed by two pistols - is displayed on the side of the vehicle. It can carry 12 armed officers, and has a modified turret and rows of firing positions along each side of the vehicle. By 2006, Rio had 10 of the vehicles. The vehicle is equipped with loudspeakers, and I received testimony from favela residents and civil society that police used the loudspeakers to threaten residents. The *caveirão* causes significant fear in the community. Given the intensity of criminal violence in Rio de Janeiro, armoured vehicles may be useful policing tools in the short-term since police should not be required to work at undue risk to their own lives. Armoured vehicles - when used properly - can improve police safety. However, their use should be restricted to circumstances in which it is indispensable in order to protect the lives of police. To reduce abuse their use should be monitored, and each deployment carefully recorded with audio and visual equipment installed on the inside and outside of the vehicle.

of confrontation tactics. Fortunately, more effective and less militaristic policing in Rio de Janeiro is possible.

28. An acceptable policing strategy cannot ignore or discount the need to protect individuals living within the communities controlled by criminal organizations. A clear lesson from the Complexo operation is that police operations to remove a criminal organization from a particular area must be followed by a sustained police presence. If the police withdraw, many of the very same gang members will return, as operations are unlikely to arrest the entirety of the local criminal organization. Even if the operation did arrest all or most of the gang members within that community, failure to maintain a police presence will permit members of the gang from other areas, or members of other gangs, to move in. If control returns to the gangs, the operation is likely to have left residents in great danger. One of the key reasons that people are killed by criminal organizations is that they are believed to be collaborating with the police or rival gangs. In many communities in Brazil, being labeled a “snitch” is tantamount to being sentenced to death. When one gang controls a community over time, its residents at least know the rules and how to act to survive. But when control changes hands, the residents face an impossible challenge: they must conduct themselves in a manner that will not be perceived as resistant to the current group’s control (which will likely result in death today), but they must also conduct themselves in a manner that will not be perceived as collaborating with that group when control subsequently swings to another group (which would likely result in death tomorrow). The police should not gratuitously inflict this further punishment on the residents already so unfortunate as to have their communities be controlled by criminal organizations.

29. By attempting to re-establish government control over a large area almost instantaneously, large-scale operations are not only too ambitious but contain the seeds of their own failure. Police dashing through a community are unable to develop a sufficient understanding of the local criminal structures as to be able to reliably identify and arrest the organization’s members. This is certainly the case when the level of government presence and thus of reliable intelligence was previously very low, as in the Complexo. This ignorance engenders fear and frustration and is likely to lead some policemen and units to commit acts of indiscriminate violence.

[...]

Militias and para-policing

34. As reported to me by police investigators, public prosecutors, civil society, and residents of militia-controlled areas, militias are groups composed of police, ex-police, firefighters, prison guards, and private citizens, who attempt to “take over” geographical areas, and engage in extra-state “policing”. Like gangs, their motivations for such control are often economic - militias extort shop owners, and control the supply of gas, cable and transport services. Militias also seek to justify their control by contending that they are “protecting” residents from violent gangs and traffickers. However, for residents, rule under a militia is often just as violent and insecure as rule under a gang. Militias

extrajudicially execute suspected traffickers while forcing them out of the area, execute other suspected criminals, intimidate residents, and threaten and kill those who speak out against the militia or are perceived to have allegiances to other groups vying for control.

35. Militias operate throughout Brazil but have become a particular problem in Rio de Janeiro over the last 3 years, where it is estimated that approximately 92 of the 500 Rio de Janeiro city favelas are now controlled by such groups. In particular, I received detailed information on the militia activities in the Kelson's community, a neighborhood of 6,000. My sources included long-term residents, local NGOs, Civil Police responsible for investigating the Kelson's militia, and the head of the Military Police battalion from which 4 police militia members had been arrested. For many years prior to 2006, the area was dominated by the drug traffickers from the Red Command gang (*Comando Vermelho*). In November 2006, a militia involving men from the 14th, 16th and 22nd Military Police battalions invaded Kelson's using police vehicles and equipment, and expelled the gang. The militia "policed" the area 24 hours a day, and extorted local businesses, restricted the ability of independent local shops to sell gasoline (only militia-run shops could do so), and required bus owners to pay the militia 600 Reais per week.

36. Jorge da Silva Siqueira Neto, who residents and police informed me had been installed as President of the Kelson's Residents' Association with militia cooperation, subsequently fell out with the militia and was expelled from the area. He then made public denunciations against the militia, which were covered by the press on 29 August 2007. The next day, police arrested certain police who Jorge had accused of belonging to the militia. They were released from administrative detention within several days. On 1 September 2007, with the militia's control undermined, the gang attempted to retake control of the area, but was kept out by police after heavy fighting. Jorge was kidnapped and murdered on 7 September 2007. Civil Police investigating the militia informed me that 6 members of the Military Police had been arrested for militia involvement, and a further 13 arrest warrants had been issued for non-police militia members. They stated that their investigations were ongoing but near completion. The head of the Military Police battalion told me that they were re-establishing control of the area, that police corruption and militia involvement by police in his battalion had already been investigated, and that the guilty officers had been arrested. However, I received credible accounts from residents and NGOs working in Kelson's that on 8 October 2007, some members of the Military Police received payments from the Red Command gang, allowing them to re-enter the community and that, at the time of my mission, the gang continued to operate in Kelson's.

37. Each time the control of the community changes hands, residents' lives are endangered. Those residents aligned with the group that was previously in control live in fear of retaliation from the new group, or are forced to leave.²¹ The constant shifting of control makes it nearly impossible for residents to act in a way that will keep them safe in the present as well as when control changes hands in the future.

²¹ I was informed that since the militia first took control, approximately 35 families (200-250 people) have been forced to abandon their homes and leave the area.

Follow up to country recommendations (Sri Lanka) (A/HRC/8/3/Add.3, 14 May 2008, ¶ 12, 15-30, 48-54, 65-66):

The Special Rapporteur visited Sri Lanka from 28 November to 6 December 2005. In May 2008, he reported on the progress of the implementation of the recommendations he had made following his trip. The Special Rapporteur discussed the widespread extrajudicial killings of civilians caught in the conflict between the government and the LTTE. For instance, civilians have been killed due to purported links to the LTTE.

12. The Government of Sri Lanka and the LTTE, however, appear to believe that the only effective insurgency and counterinsurgency tactics are ones that involve extrajudicial executions and other human rights violations. This view has led them to commit widespread abuses. The Government and the LTTE have both engaged in the targeted killing of individuals suspected of collaborating with the other party. The Government and the LTTE have engaged in shelling (and the Government also in aerial bombardment) that has killed a substantial number of civilians in circumstances that sometimes suggest a failure to respect rules on proportionality and precautions in attack. The LTTE has also stepped up its indiscriminate attacks on civilians for the apparent purpose of terrorizing the population.

[...]

Overview

15. In his report, the Special Rapporteur observed that extrajudicial executions were proving fundamental to the erosion of the ceasefire. He recommended that the Government take a number of immediate steps to comply with its existing human rights obligations, that the LTTE take concrete steps to demonstrate that it was serious about its professed commitment to human rights, and that all parties to the conflict comply with their legal obligations under common article 3 of the Geneva Conventions of 12 August 1949 and customary international humanitarian law. In particular, the Special Rapporteur noted, humanitarian law requires respect in the conduct of hostilities for the distinction between civilians and combatants and prohibits the killing of anyone not taking an active part in hostilities.

16. Since that time, the Government and the LTTE have engaged in a new round of hostilities characterized by exceptional brutality and disregard for international human rights and humanitarian law. According to one source, “A conservative estimate for total civilian deaths would be at least 1,500.”²² The number of deaths of combatants has been far higher. A Government official has estimated that between 2006 and 2007, 1,233 Government personnel and 4,800 LTTE cadres were killed.²³

²² International Crisis Group, *Sri Lanka’s Return to War: Limiting the Damage* (20 February 2008), page 9.

²³ Cited in *ibid.*, page 5.

17. Without effective independent human rights monitoring in many areas, it is difficult to distinguish lawful from unlawful killings and track precisely the number of violations of human rights or humanitarian law, but evidence from numerous sources makes it clear that extrajudicial executions are widespread throughout the country. There is, however, significant regional variation in both the level and pattern of abuse.

Government-controlled areas of Jaffna

18. In the Government-controlled areas of Jaffna, Government security forces, supported by the Eelam People's Democratic Party (EPDP), regularly kill civilians suspected of serving as LTTE informants. It appears that persons are suspected of acting as informants based on their record of past collaboration with the LTTE. Such collaboration can range from having attended an LTTE rally to having received its military training. According to some sources, Government forces will attempt to identify such people at checkpoints and during cordon-and-search operations, confiscate their identity cards, and require them to report to a military base. The individuals are then interrogated. If the soldiers conclude that they are LTTE collaborators, they are at risk of being killed. If the soldiers conclude that they are not, they are likely to be threatened with death unless they provide names of actual LTTE collaborators. Given Jaffna's history of LTTE control, nearly everyone has had some - voluntary or involuntary - association with the LTTE, and who survives and who is killed appears to have little relationship to what they have done. The LTTE also commits extrajudicial executions against suspected informants; however, in the Government-controlled areas of Jaffna, the number killed by the LTTE is much lower than the number killed by the Government.

19. There are no exact statistics on the number of extrajudicial executions in Jaffna. In part, this is because enforced disappearances are common, and while many of the disappeared are ultimately executed, many others are not. An informed estimate is that from January 2006 through November 2007, the security forces committed a total of 700 extrajudicial executions in Jaffna.²⁴ The EPDP has also been implicated in a large number of these cases.

20. There is also a high-rate of extrajudicial execution in other Government-controlled areas in the north, including Vavuniya and Mannar. One study documented 27 civilians

²⁴ This estimate derives from the overlapping statistics of a variety of sources and is given in University Teachers of Human Rights (Jaffna), *Slow Strangulation of Jaffna: Trashing General Larry Wijeratne's Legacy and Enthroning Barbarism* (December 2007). A study by the Law and Society Trust and four national non-governmental organizations documented that, from January 2007 through August 2007, 178 civilians were killed and 271 civilians were disappeared in the district of Jaffna. Civil Monitoring Commission, Free Media Movement, Law and Society Trust, *Second Submission to the Presidential Commission of Inquiry and Public on Human Rights Violations in Sri Lanka: January - August 2007* (31 October 2007). Two other organizations involved in producing the report "did not wish to be named". The information on which the report was based was gathered through "direct reporting of incidents by witnesses or family members to organizations with a district presence (ie, offices or individuals)" and "Tamil, Sinhala and English media monitoring". The report notes that "this is not, nor is it intended to be, an exhaustive document and is the result of work done in a difficult, hostile and dangerous environment, with concerns for the physical safety of human rights defenders involved."

killed (along with 30 disappeared) in Mannar between January 2007 and August 2007. In Vavuniya, over the same period, it documented 130 civilians killed and 14 disappeared.

The Wann

21. The Wann comprises the districts of Kilinochchi and Mullaitivu along with some of Mannar and Vavuniya. This area is under LTTE control but is subject to continual Government bombardment and incursions.

22. Presumably there are cases of LTTE killings within this area, whether by its fighters or pursuant to the orders of its judiciary, but the Special Rapporteur is not aware of any reliable statistics on these killings. The NorthEast Secretariat on Human Rights (NESOHR), which is based in the LTTE's administrative centre of Kilinochchi, ignores violations committed by the LTTE.

23. A number of people have been killed in aerial bombardment by the Government. NESOHR records such attacks as having killed 38 civilians during 2007 and 12 in the first two months of 2008.²⁵ Whether all of these individuals were civilians has been contested by the Government. In the absence of independent human rights monitoring, it is impossible to be certain.

The East

24. The East comprises the districts of Ampara, Batticaloa, and Trincomalee. At the time of the Special Rapporteur's visit, all major cities in this area were controlled by the Government, but significant swathes of the countryside were controlled by the LTTE. However, between mid-2006 and mid-2007 the Government succeeded in eliminating nearly all LTTE presence in the East. A large number of civilians also died in the course of military confrontations during this campaign. Estimates place the number of such civilian deaths as between 300 and 500.²⁶

25. Today, Government security forces, supported by the (factionalized) Tamileela Makkal Viduthalai Pulikal (TMVP), regularly kill civilians due to their purported links to the LTTE. There are similarities to the situation in Jaffna, but there are also differences: Many areas were under LTTE control until quite recently, and the TMVP paramilitary group only split from the LTTE in 2004.

26. According to one study, from January 2007 through August 2007, 261 civilians were extrajudicially executed and 74 were disappeared.²⁷

²⁵ North East Secretariat on Human Rights (NESOHR), *Annual Report on Human Rights - 2007* (5 January 2008); NESOHR, *Monthly Report - January 2008* (7 February 2008); NESOHR, *Monthly Report - February 2008* (5 March 2008).

²⁶ See International Crisis Group, *Sri Lanka's Return to War: Limiting the Damage* (20 February 2008), page 9.

²⁷ Civil Monitoring Commission, Free Media Movement, Law and Society Trust, *Second Submission to the Presidential Commission of Inquiry and Public on Human Rights Violations in Sri Lanka: January - August 2007* (31 October 2007).

27. A particularly common scenario appears to be that someone who is believed to have previously supported the LTTE is killed for failing to provide requested assistance to the TMVP. There is also an electoral dimension to this violence as the TMVP attempts to displace other political parties as the representative of Tamils in the East.

The South

28. The area is under Government control. Indeed, the state of Tamil Eelam which the LTTE aims to establish does not include the South, so this area is not actively contested.

29. Probably for this reason, individuals are selectively killed in the South with less frequency than in the North and East. According to one study, from January 2007 through August 2007, 24 civilians were extrajudicially executed and 78 were disappeared in the southern districts of Anuradhapura, Colombo, and Polonnaruwa.²⁸

30. However, the LTTE has resorted to indiscriminate attacks on civilians apparently designed to terrorize the population. In an extremely worrying trend, such attacks became common in the first months of 2008. In February 2008 alone, there were at least six attacks against civilian objectives using bombs or claymore mines that were most likely committed by the LTTE. More than 70 civilians have died in such attacks so far this year.

[...]

The Government's reliance on paramilitary groups

48. The Government has relied extensively on paramilitary groups to maintain control in the East and, to a lesser extent, in Jaffna. There is evidence that these groups conduct operations with the Government forces and are responsible for extrajudicial executions.

49. In March 2004 the LTTE commander of the Eastern Province, Vinayamurthy Muralitharan, who is better known by his alias, "Karuna", split with the LTTE leadership in the Northern Province, initially taking with him perhaps one fourth of the LTTE's cadres. At the time of the Special Rapporteur's visit, the relationship between the Government and the Karuna group remained unclear. The Special Rapporteur observed that many of the people he spoke with in the Army and the Police Special Task Force (STF) noted that the split had been beneficial for the Government. However, the Special Rapporteur found "no clear evidence of official collusion" but only "strong circumstantial evidence of (at least) informal cooperation between Government forces and members of the Karuna group".²⁹ Noting that facilitating the Karuna group's actions would show a dangerous indifference to the many civilians in the East who have been killed as a consequence of the low-intensity conflict, he recommended that the Government should publicly reiterate its renunciation of any form of collaboration with

²⁸ Civil Monitoring Commission, Free Media Movement, Law and Society Trust, *Second Submission to the Presidential Commission of Inquiry and Public on Human Rights Violations in Sri Lanka: January - August 2007* (31 October 2007).

²⁹ E/CN.4/2006/53/Add.5, para. 16.

the Karuna group, and should demonstrably take action to discipline military officers who breach this rule.

50. The situation has changed dramatically since the Special Rapporteur's visit took place. In March 2007, the Government claimed to have succeeded in retaking all LTTE-controlled areas in the East. Shortly thereafter, the Karuna group - which has rechristened itself as a political party, the TMVP - broke into factions headed by Karuna and Pillaiyan (the commonly used alias of Sivanesathurai Chanthirakanthan). While Karuna has since been detained in the United Kingdom, accounts indicate that there continue to be multiple factions with distinct chains of military command. There are also strong indications that these factions no longer constitute truly independent armed groups but instead receive direction and assistance from the security forces.

51. In Jaffna, another paramilitary group, the EPDP, also works closely with Government security forces and is dependent on their protection and support. The EPDP dates from an earlier era than the TMVP factions. When the conflict began, there were other Tamil militant groups fighting alongside the LTTE. However, during the 1980s the LTTE repeatedly attacked these groups, killing many of their members. Some of the groups subsequently cooperated with the Indian Peace Keeping Force (1987-1990) or the Government in fighting the LTTE, and many of them also entered into electoral politics. The CFA required the Government to disarm these groups. The Special Rapporteur noted that compliance had not been perfect - for example, a government official had confirmed that armed EPDP cadres continued to operate in the islands off the Jaffna peninsula - but he found that there was little evidence that most members of these groups do other than non-military, political work. As a general observation, this remains true, but there is substantial evidence that today the EPDP is committing extrajudicial executions in support of the Government security forces in Jaffna.

52. The Government has completely failed to comply with the recommendation made by the Special Rapporteur that it renounce all collaboration with the Karuna group. Instead, the Government has intensified its collaboration with a range of paramilitary groups. The Government should recognize that, regardless of the formal relationship between its security forces and these paramilitary groups, it cannot avoid international legal responsibility for their actions.³⁰ Military commanders and other Government officials should also recognize that acting through a paramilitary group will not suffice to prevent them from having individual criminal responsibility for extrajudicial executions and other abuses.

Policing and police accountability

53. During his visit, the Special Rapporteur found that the police failed to respect or ensure the right to life. He noted that the underlying cause was that the police had become a counterinsurgency force. Police officers were accustomed to conducting themselves according to the broad powers provided them under emergency regulations rather than to those provided by the code of criminal procedure. Indeed, most police

³⁰ E/CN.4/2005/7, para. 69.

officers had never received significant training in criminal detection and investigation. The police force also lacked the language skills to effectively police in the Northeast, given that the force was only 1.2 per cent Tamil and 1.5 per cent Muslim with few Sinhala officers speaking Tamil proficiently.

54. The Special Rapporteur observed that these deficiencies in the police force had resulted in failures to respect and ensure the right to life. There were a number of credible reports of police summarily executing suspects, and the widespread use of police torture had resulted in additional deaths. The Government had also failed to effectively investigate most political killings. This was due partly to the police force's general lack of investigative ability and partly to its reluctance to pursue cases that might implicate the ceasefire.

[...]

Recommendations directed at the Liberation Tigers of Tamil Eelam

65. The Special Rapporteur recommended that the LTTE should stop committing extrajudicial executions, including of non-LTTE-affiliated Tamil civilians. The Special Rapporteur had found that the LTTE classified its political opponents within the Tamil community as "traitors" and used to killings to enforce obedience. He found that many people - most notably, Tamil and Muslim civilians - faced a credible threat of death for exercising freedoms of expression, movement, association, and participation in public affairs. The LTTE has not changed its approach to dissenters within the Tamil community, and these killings continue.

66. As a first step toward accepting accountability, the Special Rapporteur also recommended that the LTTE denounce and condemn any killing attributed to it for which it denied responsibility. The Special Rapporteur noted that mere denials were neither adequate nor convincing. In a report to the General Assembly, the Special Rapporteur pointed to the LTTE's response to allegations that it had attacked a bus full of civilians as representing some progress in implementing this recommendation.³¹ The LTTE had issued a statement that, "LTTE condemns this attack on the civilian bus. Directly targeting civilians, as the Kebutigollawe claymore attack has, cannot be justified under any circumstances."³² He noted that while the statement did not clarify the responsibility of any party, it did demonstrate an important evolution in the acceptance by LTTE of its moral responsibility to denounce attacks on civilians. (When the Special Rapporteur spoke with Mr. Thamichelvan, then chief of the LTTE political wing, during his visit, he had categorically refused to denounce particular attacks as incompatible with the role of LTTE as a people's movement.) However, since that time, the LTTE has ceased to denounce and condemn killings that have been attributed to it. The LTTE has, for example, failed to denounce and condemn the attacks on buses that have killed scores of civilians this year. The Special Rapporteur also recommended that the LTTE should refrain from providing arms, training and encouragement to civilian proxies and self-defence organizations. Reportedly, the LTTE continues to train and deploy a civilian "people's force".

³¹ A/61/311, note 18.

³² The Liberation Tigers of Tamil Eelam Peace Secretariat, press release of 15 June 2006.

Report of Communications to/from governments (A/HRC/11/2/Add.1, 29 May 2009, pp. 244-246):

Israel: Killing of Muhamad Shahad, Issa Marzuk, Imad Kamil and Ahmed al-Balbul in Bethlehem and of 120 civilians between 25 February and 4 March 2008, in the Gaza Strip

Violation alleged: Violations of the right to life during armed conflict; Deaths due to excessive use of force by law enforcement officials

Subject(s) of appeal: 4 males and over 120 persons

Character of reply: Receipt acknowledged

The Special Rapporteur looks forward to receiving a substantive response concerning the deaths of Muhamad Shahade, Issa Marzuk, Imad Kamil, and Ahmed al-Balbul and the deaths of over 120 Palestinian civilians in the Gaza strip between 25 February and 4 March 2008. The Special Rapporteur would note, however, that the Government has already taken longer than the customary 90 days to respond.

Allegation letter dated 3 April 2008

In this connection, I would like to bring to your Government's attention information I have received concerning a number of Palestinian civilians killed during recent military operations in the Occupied Palestinian Territories.

According to the information received:

Between 25 February and 4 March 2008 over 120 Palestinian civilians, including 29 children and 6 women were killed as a result of Israeli military operations in the Gaza strip.

On 12 March 2008 Israeli security forces conducted an operation in Bethlehem resulting in the death of 4 Palestinians: Muhamad Shahade, Issa Marzuk, Imad Kamil, members of the Islamic Jihad and Ahmed al-Balbul, a member of the Al-Aqsa Martyrs Brigade. It is alleged that Muhamad Shahade feared that Israeli forces would not try to arrest him but would rather seek to kill him. While I do not wish to prejudge the accuracy of these reports, I would like to refer Your Excellency's Government to the fundamental legal rules applicable to all armed conflicts under international humanitarian law and human rights law.

In particular, I would like to refer to the customary rules of international humanitarian law governing the conduct of hostilities, including inter alia the prohibition on directing attacks against the civilian population and the need to respect the principles of proportionality and precautions in attack. Civilians are all persons who are not members of the armed forces of a party to the conflict. Civilians are protected against attack unless and for such time as they take a direct part in hostilities. (Rules 1, 5 and 6 of the

Customary Rules of International Humanitarian Law identified in the study of the International Committee of the Red Cross (“Customary Rules”).)

The principle of proportionality prohibits any attack which can be expected to cause incidental loss of civilian life or injury to the civilians which would be excessive in relation to the concrete and direct military advantage expected (Rule 14 of the Customary Rules). Compliance with this rule should be assessed for each attack taken individually and not for an overall military operation. I would note that this approach is also reflected in the Judgment of the Israeli Supreme Court of 14 December 2006 (The Public Committee against Torture in Israel et al. v. The Government of Israel et al.; HCJ 769/02) which observed that “when the damage to innocent civilians is not proportionate to the benefit of the attacking army, the attack is disproportionate and forbidden.”

The obligation to take all necessary precautions to spare the civilian population or in any case to limit to the maximum extent any incidental civilian loss of life, includes taking all appropriate measures to examine that the target of the attack is indeed a military objective, a choice of means and methods of warfare which will seek to avoid civilian loss of life or limit incidental civilian loss of life and a careful assessment of the conformity of the attack with the principle of proportionality. (Rules 15, 16, 17 and 18 of the Customary Rules).

I would also like to refer Your Excellency’s Government to its obligations under human rights law. These are in particular applicable in areas which are under its jurisdiction, including territories subject to belligerent occupation. Article 6 of the International Covenant on Civil and Political Rights, to which Israel is a party, provides that no one shall be arbitrarily deprived of his or her life. In its General Comment on Article 6, the Human Rights Committee has observed “that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities. A civilian taking a direct part in hostilities may be the object an attack, for such time, only if no less harmful means, such as arrest, can be used. This has been the interpretation adopted by the Israeli Supreme Court (The Public Committee against Torture in Israel et al. v. The Government of Israel et al). In the latter case the High Court stated that “a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed [...]. Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed.” Examining the right to life in the context of an anti-terrorist operation the European Court for Human Rights reached a similar conclusion, in the *McCann v. United Kingdom* case of 1995.

I also take this opportunity to remind your Excellency’s Government of it’s obligation to conduct a thorough investigations of all alleged violations of the right to life. (E/CN.4/2006/53, paras. 33-43, 60.) In this regard I would again observe that the

approach adopted by the Israeli Supreme in *The Public Committee against Torture in Israel et al. v. The Government of Israel et al*, confirmed that cases of attacks on civilians suspected of taking an active part in hostilities, at the time of the attack, must be the object of thorough investigations regarding the precision of the identification of the target and the circumstances of the attack.

B. ACCOUNTABILITY AND TRANSPARENCY IN COUNTER-TERRORISM OPERATIONS

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.³³ 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.³⁴ On several occasions I have asked the Government to explain the legal basis on which a particular individual was targeted.³⁵ 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.³⁶ 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.³⁷ Under the Government's reinterpretation of the law and the

³³ 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.

³⁴ 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.

³⁵ 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).

³⁶ A/HRC/4/20/29; A/HRC/4/20/Add.1, pp. 342-58.

³⁷ 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

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.

Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009, ¶¶ 10-18, 70):

The Special Rapporteur visited Afghanistan from 4 to 15 May, 2008. He reported on the practices of the Afghan and international forces in capturing individuals suspected of links to the Taliban. These practices have unnecessarily endangered the lives of the targeted individuals' relatives.

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.³⁸ 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

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.

³⁸ 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.

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.³⁹

11. Raids must be conducted in accordance with the stringent safeguards required by international human rights and humanitarian law.⁴⁰ 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.⁴¹

12. Raids for which no Government or military command appears ready to acknowledge responsibility are especially problematic. In January 2008, two brothers were killed in a raid in Kandahar City led by international personnel. Well-informed Government officials confirmed that the victims had no connection to the Taliban. Despite clear indications of international involvement no international military commander would admit that his soldiers were involved.

13. I also examined raids in Kandahar and Nangarhar provinces involving international and Afghan forces. The identity of the international forces has yet to be confirmed. In Nangarhar the Afghan forces were probably the Shaheen Unit working with armed international personnel and in Kandahar the Afghans were working with international forces out of the Ghecko military base. The Minister of Defense, the head of NDS and

³⁹ 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.

⁴⁰ 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.)

⁴¹ 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.

ANA commanders confirmed that these force did not fall under their command. It is virtually certain that some or all of these units are led by personnel belonging to international intelligence services. The result is that, in the name of restoring the rule of law, heavily-armed internationals and their Afghan counterparts are wandering around conducting raids that too often result in killings and being held accountable by no one.

Intelligence gathering and false tips

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.⁴² 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.⁴³

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.⁴⁴ Numerous Government officials also claimed that civilian casualties

⁴² 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.)

⁴³ 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.”

⁴⁴ 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

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.⁴⁵ 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.⁴⁶

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.⁴⁷ 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.⁴⁸ 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.⁴⁹ The current approach renders civilians vulnerable to attack and pushes personal and tribal rivals into opportunistic participation in the armed conflict.

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.

⁴⁵ 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.

⁴⁶ Similarly, several elders from Nuristan province stated that communities closely observe who receives development assistance from the Provincial Reconstruction Teams (PRTs) and that those who do not receive assistance may come to fear that they are thought to be AGEs and thus flee the area rather than wait to be attacked.

⁴⁷ 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.

⁴⁸ 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.

⁴⁹ ICRC Study, Rule 16.

[...]

70. Air strikes, raids and other attacks should never be based solely on conduct considered “suspicious” or on unverified “tips”. Rather, the Government and IMF should review intelligence sharing arrangements, develop procedures for more reliably vetting targets, and ensure that attacks are only conducted based on adequately verified information.

Report on Mission to the Philippines (A/HRC/8/3/Add.2, 16 April 2008, ¶¶ 1, 19-21):

The Special Rapporteur visited the Philippines from 12 to 21 February 2007. He reported on the civilian casualties that result from the government’s counterinsurgency operations against insurgent and terrorist groups.

1. Since 2001 the number of politically motivated killings in the Philippines has been high and the death toll has mounted steadily. These killings have eliminated civil society leaders, including human rights defenders, trade unionists, and land reform advocates, as well as many others on the left of the political spectrum. Of particular concern is the fact that those killed appear to have been carefully selected and intentionally targeted. The aim has been to intimidate a much larger number of civil society actors, many of whom have, as a result, been placed on notice that the same fate awaits them if they continue their activism. One of the consequences is that the democratic rights that the people of the Philippines fought so hard to assert are under serious threat.

[...]

8. In western Mindanao and the islands stretching toward Borneo, the Government faces a number of insurgent and terrorist groups. Those with a political agenda seek autonomy or secession for the historically Muslim areas. In 1996, the Government reached a peace agreement with the Moro National Liberation Front (MNLF) and, while hostilities have restarted with some factions of the MNLF, they remain at a relatively low level, and the parties continue to talk.⁶ The ceasefire between the Government and the Moro Islamic Liberation Front (MILF) has largely held, and the parties are now actively engaged in peace negotiations.⁷ The Government also confronts the Abu Sayyaf Group (ASG), which has been implicated in several major bomb attacks on civilian targets. These groups have many fighters — 700 (MNLF), 11,770 (MILF), and 400 (ASG), respectively — but their distance from the capital and relatively modest aims have limited the extent to which they are considered security threats.⁵⁰

⁵⁰ On November 24, soldiers from the Alpha Company of the 21st Infantry Battalion of the Army had conducted a meeting in the barangay. At the meeting, soldiers explained their program on the insurgency. During the meeting, they conducted a census, gathering the names and nicknames of all who attended. The soldiers asked what the problems in the community were. People answered regarding a health center and the need to fix the roads. The soldiers asked how they could fix the roads when the NPA destroys the machinery. One resident responded that this had happened once, but now they were not around, so why not fix the roads? The soldiers also spoke about how the CPP/NPA/NDF members were deceptive. Nelson’s father stood up and asked why they didn’t arrest them if they were so deceptive. A soldier responded,

[...]

10. The global context of the “war on terror” has affected the Government’s approach to these security threats. On the one hand, it has shown its willingness to compromise with the MILF in exchange for cooperation against the ASG and foreign terrorists.⁵¹ On the other hand, Government officials have begun referring to the CPP/NPA/NDF as the “Communist Terrorist Movement” (CTM), legitimizing a turn from negotiation to counterinsurgency.

Case Studies

Counterinsurgency Strategy in the Cagayan Valley Region (with a focus on Cagayan province)⁵²

19. In the Cagayan Valley Region, the AFP’s approach to counterinsurgency starts by sending a detachment to a barangay or sometimes to a somewhat larger area.⁵³ What happens next varies across municipalities and barangays. In some, the soldiers hold a barangay-wide meeting revealing the treachery of the CPP/NPA/NDF, alleging that various mass organizations are fronts of the CPP/NPA/NDF, and vilifying them. At these meetings, the soldiers collect the names and occupations of the residents and attempt to glean an understanding of the power structure of the community and the political alignments of its members. In others, the soldiers conduct a house-to-house census.

20. The information gathered through the meeting or census is used either to identify NPA fighters and members of leftist civil society organizations or as a starting point for conducting individual interviews to elicit that information. These interviews generally take place at persons’ homes. (In contrast to the interrogations in Nueva Ecija, below, these do not systematically involve torture.) Attempts are generally made to get the persons identified to “surrender”. Some of these are suspected of being NPA fighters; others belong to civil society organizations or so called sectoral fronts (of the CPP). The vilification and intimidation of persons who do not “surrender” too often escalates into extrajudicial executions; however, these do not appear fundamental to the strategy.

“How can we arrest them when they are legal organizations?” (I clarified that this was just a question and answer session; there was no PowerPoint presentation.)

⁵¹ In a joint communiqué signed 6 May 2002, the Government and the MILF “agreed to the isolation and interdiction of all criminal syndicates and kidnap-for-ransom groups, including so called ‘lost commands’ operating in Mindanao” and arranged various practical measures to this end, including the formation of “an Ad Hoc Joint Action Group against criminal elements in order to pursue and apprehend such criminal elements”.

⁵² I interviewed witnesses to four incidents that took place in the Cagayan Valley Region; I also reviewed case files concerning two additional incidents. The facts concerning the case of Nelson Asucena are summarized in Appendix A, paras. 1-16.

⁵³ A barangay is the smallest governmental unit. (There are over 40,000 barangays in the Philippines.) Informally, a barangay is typically divided into smaller units called either sitios or puroks. A typical barangay will have three to eight sitios.

21. The other use that is made of the information gathered is to recruit or assign residents to a Citizens Armed Forces Geographical Unit (CAFGU) that, it is hoped, will “hold” the barangay once it has been “cleared”.⁵⁴ A CAFGU is a paramilitary organization that works closely with the AFP and is subordinate to its command-and-control structure.⁵⁵ CAFGU members accompany AFP units on operations and also serve, in effect, as armed informants, permitting the military to pull-back and focus on other barangays.

Counterinsurgency Strategy in the Central Luzon Region (with a focus on Nueva Ecija province)⁵⁶

22. In parts of Central Luzon, the leaders of leftist organizations are systematically hunted down. Those who may know their whereabouts may be interrogated and tortured. A campaign of vilification designed to instill fear into the community follows, and the individual is often killed as a result. Such attacks and the attendant fear can lead to the disintegration of organized civil society. One person I met called the result “the peace of the dead”.

23. This practice reflects more than the mere “excesses” of a particular commander. Rather, it is a deliberate strategy in keeping with the overall trajectory of counterinsurgency thinking at the national level. While the prosecution of responsible individuals is essential, such efforts in relation to one or a handful of people will make little overall difference. It is, instead, essential to identify and decisively reject at an institutional level those innovations in counterinsurgency strategy that have resulted in such a high level of political killings. Moreover, it is essential to prevent the replication of this strategy in other regions.

24. There is considerable local variation in counterinsurgency strategy within Central Luzon, and this account draws especially on testimony concerning the province of Nueva Ecija:

(a) The military establishes a detachment of roughly 10 soldiers in a barangay hall or other public building.

⁵⁴ According to the briefings I received from the Government, the guiding counterinsurgency strategy for the AFP against the NPA is to “clear”, “hold”, and “support” areas affected by the insurgency.

⁵⁵ CAFGUs are also referred to as CAFGU Active Auxiliary (CAA) companies. The Philippines has experimented with a number of forms of militia and paramilitary organization, including, in addition to CAA, Special CAFGU Active Auxiliaries (SCAA), Civilian Volunteer Organizations (CVO), Civilian Home Defense Forces (CHDF), and Barrio Self-Defense Units (BSDU). Officials describe these as “force multipliers” for the AFP. The Barangay Defense Systems (BDS) that have recently been deployed in Bulacan, Nueva Ecija, and perhaps some other areas, appear to be unique, however, in their involvement of most or all of the population.

⁵⁶ I interviewed witnesses to 13 incidents that took place in Central Luzon, including 6 incidents involving extrajudicial execution (of 7 victims), 3 incidents involving disappearances (of 2 victims), one frustrated killing, and three other incidents. I also reviewed case files concerning an additional 21 incidents of extrajudicial execution. The facts concerning one case, that of James Ayunga, are summarized in Appendix A, paras. 17-26.

(b) These soldiers move about, showing that they are part of the community, playing sports, hearing grievances, and undertaking small development projects.

(c) After a short period, they take a door-to-door census. One explanation of the census is that it is used to determine medical and other basic needs to guide development projects. The better explanation appears to be that the census is for identifying members of civil society organizations and current and former NPA fighters. The private setting encourages some to provide information on others in the community.

(d) The census results allow the detachment to draft a provisional order of battle of civil society leaders and former or suspected NPA fighters. Soldiers make the fact that this has been drafted known to the community.

(e) The soldiers call those on the order of battle to the site of their detachment to be interrogated for information on civil society leaders, NPA fighters, etc. If they do not cooperate, they are tortured.⁵⁷ Any names provided are added to the order of battle, and the process repeated. Over a relatively brief time the military develops a fairly detailed understanding of the local structure of leftist civil society.

(f) A “Know Your Enemies” seminar is held and “communist terrorist movement” front organizations are listed.⁵⁸ (Sometimes such meetings also precede the census.) Members of what soldiers call the “speakers bureau” tell those assembled about CPP lies, its true aims, and its use of fronts. The purpose of this meeting would appear to be to encourage “surrender” and to lay the groundwork for making killings of civil society members appear justified and legitimate.

(g) Individuals identified as leaders of civil society organizations or NPA fighters are encouraged to “surrender”. In some areas of Central Luzon, such as Tarlac, as well as in the Bohol and Southern Tagalog regions, posters or leaflets vilifying them personally as communist terrorists will be distributed if they resist surrendering. Then their houses are placed under surveillance.⁵⁹ If the person flees, his or her house may be burned to the ground. This serves as a signal that refusing to “surrender” is a grave and irreversible choice.

(h) Then such individuals begin to get killed. The connection between organization membership and death is made unambiguous for community members. While I do not

⁵⁷ I received testimony that such forms of torture as forcing people to drink to excess, covering their face with plastic, and punching them in the stomach had been inflicted during these interrogations.

⁵⁸ There is a well-known PowerPoint presentation entitled “Knowing the Enemy” that was developed to show to soldiers and includes an explanation of the CPP/NPA/NDF’s overall military and political strategies, a list of purported CPP fronts groups, and a proposal for changes in the AFP’s counterinsurgency strategies. I have viewed this PowerPoint presentation. While PowerPoint is also sometimes used in community meetings, my understanding is that the version shown is a pared down version with a somewhat different focus.

⁵⁹ Sometimes such surveillance simply involves motorcycles passing through the neighborhood. In other instances, a small detachment of two or three soldiers will establish itself for some days in a makeshift hut or an abandoned house in the immediate vicinity of the surveillance target.

fully understand the community-level dynamics, it would appear that one or two such killings will greatly encourage “surrenders”.

(i) Finally, a Barangay Defense System (BDS) is established. Every household in the community is made to contribute members.⁶⁰ A BDS is a post that serves as a checkpoint of sorts. At least in Nueva Ecija, each sitio of a barangay has had its own BDS. When strangers or anyone who does not live in the sitio comes in, their name and reason to visit is recorded in a log. The contents of this log are regularly communicated to the barangay captain and the military. I received conflicting reports on whether the BDS are armed. My tentative conclusion would be that the AFP has no general practice of providing the BDS arms, but some BDS arm themselves, and sometimes AFP soldiers may help them to do so.

(j) Once the BDS is established, the military detachment moves on to another barangay. The BDS is expected to “hold” the barangay “cleared” by the military. (It is not that the BDS is expected to literally, physically defend the barangay but that it will provide sufficiently solid intelligence as to make the military’s constant presence unnecessary.)

25. While denying the use of executions or torture, a former military commander confirmed most aspects of this account. He also provided a rationale for this strategy and an alternative explanation of the executions that have followed the deployment of AFP detachments. On his account, when the CPP/NPA/NDF moves into a barangay, it organizes sectoral front organizations (i.e., civil society organizations), and the chair and vice-chair of each sectoral front together comprise the local CPP central committee. In

⁶⁰ According to a civil society organization that I consulted, at the time of my visit, BDS had been established in four of Nueva Ecija’s municipalities: San Jose City (in 20 of its barangays: Sto. Tomas, Cannawan, Abar 1st, Abar 2nd, Sto. Nino 1st, St. Nino 2nd, Sto. Nino 3rd, Sibut, Palestina, Pinili, Villa Joson, Villa Marina, Culaylay, San Agustin, Kaliwanagan, Kita-Kita, Tayabo, Malasin, Manicla, and Villa Floresta), Lupao Town (in 23 of its barangays: San Isidro, Balbalungao, Parista, Cordero, Namulandayam, Bagong Flores, San Pedro, San Roque, Agupalo Este, Agupalo Weste, Mapangpang, Alalay Chico, Alalay Grande, Talugtog, Maasin, Tienzo Cabangasan, Alo-o, Calsib, Pinggan, Ubboy, Poblacion West, San Antonio South, and San Antonio North), Guimba Town (in 41 of its barangays: Culong, Triala, Cabarusa, Bunol, Sinalatan, Naglabrahan, Consuelo, Naturanok, Tampac 1, Tampac 2, Tampac 3, Sta. Cruz, Caballero, Mancsac, San Bernardino, San Roque, Bantog, Banitan, Balingog East, Balingog West, Bacayao, Pasong Inchik, Manggang Marikit, Bagong Baryo, Galvan, San Agustin, Yuson, Pacac, Narvacan I, Narvacan II, Lennec, Macamias Cavite, Camiing, Ayos Lomboy, Sta. Ana, Nacababillag, San Marcelino, San Andres I, San Andres II, Balbalino, Sto. Cristo, and Cawayan Bugtong), and Cuyapo Town (in 14 of its barangays: St. Clara, San Antonio, Cacapasan, Rizal, Nagmisahan, Tagtagumbao, Malineg, Sta. Cruz, Bambanaba, Bantog, Piglisan, San Jose, Paitan Norte, and Paitan Sur). In addition, the civil society organization reported that BDS were starting to be setup in Carranglan Town (as of February 2007). A rough statistical analysis provides further evidence of the relationship between extrajudicial executions and the kind of counterinsurgency operation that culminates in a BDS. Of the 30 extrajudicial executions that Karapatan recorded as having taken place in Nueva Ecija (as of November 2006), 10 took place in one of the 98 barangays that has a BDS (not counting any established in Carranglan). In the 751 barangays that do not have a BDS, 20 extrajudicial executions have taken place (including 1 in Carranglan). In other words, an execution was 4 times more likely to have occurred in a barangay in which a BDS was ultimately established than in other barangays. (However, of those 20 executions that took place in barangays without a BDS, 9 occurred in the municipality of Pantabangan, suggesting either that other problematic counterinsurgency methods are being used or that the process leading up to the establishment of a BDS has not been completed.)

addition to administering the CPP's work in the barangay, that committee and, in particular its chair, serves as an intelligence service for the NPA, providing it with information on persons who cause problems for the residents (e.g., usurers) and on AFP informants. This intelligence is used by the NPA — or, less often, by a barangay militia organized by the NPA — to intimidate or execute the identified individuals. This account of the CPP/NPA/NDF's approach to establishing its control at the barangay level was largely confirmed by NDF representatives.⁶¹

26. One important aspect of this counterinsurgency strategy should be noted. Specific barangays are targeted because they have active civil society organizations, not because such organizations are thought to be proxies for NPA presence. On all accounts, an NPA group will move around quite a few barangays and may or may not even be present when the AFP comes.

The evidence I received suggests that the entrance of the AFP into a barangay is generally sufficient to keep the NPA away.⁶² The civil society organizations are the targets, because the AFP considers them the political infrastructure of the revolution and the NPA's intelligence network. Attacking them is designed to blind the NPA and undermine the CPP's political progress.

27. The former commander's explanation of the killings that have accompanied the AFP's presence in a barangay was that residents whose relatives were killed by the NPA take advantage of the new situation to retaliate against members of the local CPP

⁶¹ NDF representatives with whom I spoke said that the CPP/NPA/NDF had established a political infrastructure in approximately 10,000 barangays, 800 municipalities, and more than 70 provinces. When the CPP/NPA/NDF members enter a barangay, they attempt to establish "mass organizations" of peasants, women, workers, etc. These mass organizations belong to the NDF. (Thus, for example, a barangay's peasant organization would form what might loosely be characterized as a local chapter of the National Association of Peasants (PKM), an NDF member organization.) They said that in each barangay the CPP/NPA/NDF also attempts to establish a "barrio organizing committee" which will be replaced with a "barrio revolutionary committee" once there are no longer Government informers in the barangay and the CPP/NPA/NDF has consolidated its control. In keeping with this difference in the security situation, organizing committees are secretly elected by representatives of the mass organizations; whereas, revolutionary committees are openly elected by the barangay's whole population. A committee will typically have 15 members, approximately one-third of whom will belong to the CPP or NPA, one-third to the "basic" mass organizations (of peasants, workers, etc.), and one-third to other organizations (of teachers, professionals, etc.). NDF representatives described these political structures that are established at the barangay level as "embryos of the People's Democratic Government". They said that in these barangays Government organs, such as the Barangay Council, are rendered non-functional, although if some Government officials are willing to participate in the "new government", they can be accommodated. (The intended structure of the CPP/NPA/NDF's barangay-level political organs can be found in "Guide for Establishing the People's Democratic Government", Chapter II.)

NDF representatives also provided some information on the role such political organs play in providing the NPA intelligence and in countering Government intelligence gathering efforts. They said that the mass organizations can generally identify Government informers and other "unreliable" individuals and that they report these to the barangay's organizing or revolutionary committee. The committee, in turn, provides information about suspected Government informers as well as AFP troop movements to the NPA. (See Part V for information on how suspected informers are dealt with.)

⁶² This generalization derives from the testimony of witnesses corroborated by AFP incident data. (See the case studies on Nelson Asucena and James Ayunga in Appendix A, paras. 1-26.)

committee who are suspected of having fingered their relatives. This private retaliation explanation is facially plausible; however, it does not align with accounts provided by any witness. It would appear that, at least in the areas from which I interviewed numerous individuals, retaliation against other residents is carried out simply by informing on them to the AFP.

[...]

Killings by the New People's Army

31. Discussions with NDF representatives and review of published CPP/NPA/NDF documents did, however, reveal several practices that are inconsistent with international human rights and humanitarian law. First, the CPP/NPA/NDF considers "intelligence personnel" of the AFP, PNP, and paramilitary groups to be legitimate targets for military attack. Some such persons no doubt are combatants or civilians directly participating in hostilities; however, the CPP/NPA/NDF defines the category so broadly as to encompass even casual Government informers, such as peasants who answer when asked by AFP soldiers to identify local CPP members or someone who calls the police when faced with NPA extortion.⁶³ Killing such individuals violates international law.

[...]

⁶³ NDF representatives called my attention to a formal declaration it had made (*Declaration o Undertaking*):

The NDFP regards as legitimate targets of military attacks the units, personnel and facilities belonging to the following:

- a. The Armed Forces of the Philippines
- b. The Philippine National Police
- c. The paramilitary forces; and
- d. The intelligence personnel of the foregoing.

Civil servants of the GRP are not subject to military attack, unless in specific cases they belong to any of the four abovestated categories.

The interpretation given the concept of "intelligence personnel" is quite broad, including ordinary civilians who provide information to Government forces. NDF representatives stated that if there is certainty that someone is a Government informant, then he or she is considered a legitimate military target. If there is doubt as to whether someone is a Government informant, a process of escalating responses is followed: He or she will be approached and given a warning, then he or she will be asked to leave the area, and finally a judicial process will be commenced before a people's court, perhaps ultimately resulting in arrest and punishment. Generally, however, they said that such people simply leave the area.

When I inquired regarding the alleged killings of persons for being Government officials and for refusing to pay revolutionary taxes, the importance of how "intelligence personnel" is interpreted was further demonstrated. NDF representatives asserted that insofar as Government officials may have been killed, this would have been due to the role that particular Government officials had played in providing Government forces with intelligence information. Similarly, NDF representatives stated that they were unaware of any case in which tax evasion as such had resulted in the NPA killing someone. They explained that tax collection generally involves a negotiation to settle on a mutually agreeable amount. If that negotiation breaks down and the firm or individual refuses to pay taxes, then the NPA might take such actions as the confiscation or destruction of assets. They stated that when some has been killed in connection with tax collection efforts, this has been because he or she tipped off the AFP or PNP with a view to getting CPP or NPA members arrested to avoid making payment.

Killings Related to the Conflicts in Western Mindanao

36. I received fewer allegations of extrajudicial executions in Maguindanao and other areas of western Mindanao. It is possible that there are fewer such abuses. The Government and MILF are engaged in an active peace process and have even cooperated in operations against terrorists. However, the allegations that I did receive, together with the enormous population displacements that have been caused by ongoing fighting, tentatively suggest that the relative absence of reported human rights abuses in this area may not reflect the true situation. Consideration should be given to establishing within the framework of the Government–MILF peace process a mechanism for monitoring and publicly reporting on the human rights situation.⁶⁴

[...]

Davao: Vigilantism or Death Squad?

39. It is a commonplace that a death squad known as the “Davao Death Squad” (DDS) operates in Davao City. However, it has become a polite euphemism to refer vaguely to “vigilante groups” when accounting for the shocking predictability with which criminals, gang members, and street children are extrajudicially executed. One fact points very strongly to the officially-sanctioned character of these killings: No one involved covers his face. The men who warn mothers that their children will be the next to die unless they make themselves scarce turn up on doorsteps undisguised. The men who gun down or, and this is becoming more common, knife children in the streets almost never cover their faces. In fact, for these killers to wear “bonnets” is so nearly unheard of that the witnesses I interviewed did not think to mention the fact until I asked.⁶⁵ None of those with whom I spoke had witnessed such persons covering their faces, and one knowledgeable advocate informed me that they do so in no more than two cases out of one hundred.

[...]

43. How does the death squad operate? The inquiries I made do not provide a complete picture, but they do indicate two starting points for investigation and reform. First, it would appear that the “assets” who identify targeted individuals for the death squad are often suspected criminals who are recruited after being arrested, with an early release as inducement.⁶⁶ Second, it would appear that barangay officials are sometimes involved in selecting targets for the death squad, a practice perhaps originating in the role barangay

⁶⁴ In the first week of January 2007, members of the Kalinga Medical Society received text messages reading, “Pakisabi kay Dr Claver na mag-ingat dahil hindi siya titigilan, at may plano pang gamitin ang mga bata. Hindi ko na uulitin ang pag-contact sa inyo dahil baka mahalata ako”. (Warn Dr. Claver to take care because they will keep going after him. They even are thinking of using the children. I will not contact you anymore because they might get suspicious.)

⁶⁵ In the Philippines, what is often referred to elsewhere as a “ski mask” is called a “bonnet”.

⁶⁶ One person with whom I spoke said that the police asked her son to become an asset after he was arrested. Others had friends or acquaintances who had acted as assets. They appear to invariably be gang members or petty criminals, who are in a position to report the locations of other gang members and criminals. Generally assets appear to provide information to their handlers using cell phone text messages.

officials have played in naming suspected drug dealers for inclusion in PNP watch lists.⁶⁷ Insofar as prison officials and barangay councils help the death squad function, they can be reformed.⁶⁸ The intelligence gathering role played by barangay officials can be limited, and the processing of inmates can be more tightly restricted. To shut the death squad down will, however, ultimately require following the evidence upward to the handlers who task “assets” to provide the location of persons on watch lists and who direct hit men to kill them. If it were not for the fact that the local office of the CHRP denies the existence of a death squad, it should be capable of conducting an effective investigation. There are many witnesses who would provide information anonymously or who would testify were they to receive a credible protection arrangement.⁶⁹

Communications to/from Governments (A/HRC/4/20/Add.1, 12 March 2007, pp. 239-241):

Pakistan: Targeted Killings in the Federally Administered Tribal Areas

Violation alleged: Deaths due to attacks or killings by security forces; death threats and fear of imminent extrajudicial execution

Subject(s) of appeal: 31 persons (killed) ; 1 male, journalist (threats to life)

Character of reply: No response

Observations of the Special Rapporteur

The Special Rapporteur regrets that the Government of Pakistan has failed to cooperate with the mandate he has been given by the General Assembly and the Commission on Human Rights.

⁶⁷ In accord with DILG Memorandum Circular No. 98-227 (2 December 1998), some barangays have established Barangay Anti-Drug Abuse Councils (BADACs) for this purpose. According to PNP officials with whom I spoke, the watch lists these groups provide are validated by PNP intelligence officers and the Philippine Drug Enforcement Agency and are then used in buy-bust and other anti-drug operations.

⁶⁸ The mayor told me unequivocally that he would welcome investigators to come to his jails, talk with the inmates, and ensure that nothing remiss takes place. The CHRP should fully exercise its pre-existing right to do so (Constitution of the Republic of the Philippines (1987), art. XIII, section 18(4)), and civil society organizations should consider whether to take the mayor up on his offer.

⁶⁹ I spoke with a number of witnesses about why they and others have been so reticent. One recounted that the police came and asked various neighbors whether they had seen the killing. Although the killing had happened in public in the morning and many had seen the perpetrators and their actions, everyone told the police that they had not. The reason was that someone in the neighborhood had described the killer in a previous incident; that night some had come and killed her. In another incident involving a child of the same witness, the police did not even ask for witnesses to come forward. They just gathered up the bullets and left. Another witness with whom I spoke said that the family of one victim did not pursue the case at all, because they knew that the perpetrator was connected to powerful people. He said that even in other cases that he was aware of, no one would testify, both from fear and because the media always reports that the victim was a criminal, and who wants to witness for a criminal? A well-informed individual told me that in Davao City the witnesses that do come forward are nearly invariably from a victim’s family; no one else is willing to take the risk.

Letter of allegation dated 7 March 2006 sent with the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

We would like to bring to your Excellency's attention information we have received regarding three incidents of air strikes by United States unmanned aircraft against targets in Pakistan, each of them resulting in the death of several civilians. We have written to the Government of the United States of America in this matter as well.

On 5 November 2005, an unmanned aircraft operated by the US Central Intelligence Agency (CIA) fired a missile at a house in North Waziristan, Pakistan (no further details of the location reported). The CIA had received information that al-Qaeda operative Hamza Rabia, a citizen of Egypt alleged to have been involved in an attempt on the life of President Pervez Musharraf in December 2003, was staying there with his wife and children. While an overall eight persons, including his wife and children, were reportedly killed in the attack, Hamza Rabia managed to escape with an injured leg.

On 1 December 2005, an unmanned drone operated by the CIA fired a missile at a house in the village Haisori, near the town of Mir Ali, North Waziristan, about 30 kms from the Afghani border, killing five persons. It would appear that the dead are Hamza Rabia, two other foreign men, and the 17-year-old son and an eight-year-old nephew of the owner of the house. While officials of your Excellency's Government stated that the blast resulting in the deaths was caused by explosives handled or stored in the house, reports indicate that residents of the area saw an unmanned aircraft fire a missile at the house and recovered fragments of the missile. In the early morning hours of 13 January 2006 a remote-piloted Predator aircraft of the United States security services launched a strike with "Hellfire" missiles on the village of Damadola in the Bajaur Agency, North Western Pakistan, close to the border with Afghanistan. Reports indicate that US Predator drones were circling the area of Damadola village during the three days preceding the missile strike. The attack is reported to have killed 18 persons, including women and children. The target of the strike reportedly was Ayman al-Zawahri, who is commonly referred to as the "number two" of al-Qaeda. He was reportedly expected at a dinner in Damadola on the evening of 12 January 2006. However, he appears not to have been in the village at the time of the attack. Your Government is reported to have stated that 5 senior al-Qaeda figures were among those killed, including a chemical and explosives expert, Midhat Mursi al-Sayed alias Abu Abu Khabab, Abu Obaidah al-Misri, allegedly al-Qaeda chief of operations for Afghanistan's eastern Kunar province, and Ayman al-Zawahiri's son-in-law Abdur Rehman al-Maghribi. However, the reports we have received indicate that the bodies of the five "Arab fighters" killed in the strike were pulled out of the rubble and taken away from the scene soon after the strike, so that only the bodies of 13 Pakistani victims could be identified. It is our understanding that the US Central Intelligence Agency (CIA) is authorized to operate such Predator operations under presidential authority signed after the September 11, 2001 terrorist attacks. As to your Government's position, the Special Rapporteur on extrajudicial, summary or arbitrary executions noted in his letter to you of 1 September 2005, concerning the death on 8 May 2005 of Mr. Haitham al-Yemeni, that his understanding is that your Government's Information

Minister, Sheik Rashid Ahmed, reportedly denied at the time that any such incident had ever happened near the Pakistan-Afghanistan border. In a similar vein, your reply to the mentioned letter, dated 17 October 2005, states that “a car blew up with an explosion ... resulting in the killing of a local and an unidentified foreigner” without further elaborating on the causes of that explosion. With regard to the incident in Haisori of 1 December 2005, as noted above your Government’s position reportedly was that the deaths were caused by the explosion of explosives stored in the house. With regard to the incident in Damadola on 13 January 2006, however, media reports suggest that your Excellency’s Government attributes the deaths to a missile fired by a US aircraft. Your Government’s Prime Minister, Mr. Shaukat Aziz, is reported to have publicly stated that such attacks are not acceptable to Pakistan.

In connection with these conflicting reports, we would also express our concern at information received regarding Mr. Hayatullah Khan, a reporter for the Urdu-language daily "Ausaf" and photographer for the European Press Photo Agency, who reportedly found and reported evidence that the deaths in Haisori village on 1 December 2005 were caused by a US air strike, thus contradicting your Government’s official version of the events. He was abducted by armed men on 5 December 2005, in Mir Ali, North Waziristan, and has since then remained unaccounted for. An official at the Governor's House in Peshawar, however, is reported to have recently told journalists who were protesting in favor of Hayatullah Khan’s release: “The more noise you make, the more you prolong Hayatullah's captivity”. We urge your Excellency’s Government to clarify the whereabouts of Mr. Khan and to ensure that his rights to life, physical integrity, personal freedom and freedom of expression are respected.

We wish to remind you that while Governments have a responsibility to protect their own citizens and those of other States against the excesses of non-State actors or other entities, the UN GA Resolution 59/191, in its paragraph 1 stresses that “States must ensure that any measure to combat terrorism complies with their obligation under international law, in particular international human right, refugee and humanitarian law”. In this respect, we wish to stress our 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 the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions to the 61st Commission on Human Rights, E/CN.4/2005/7, at par. 41). Without in any way wishing to pre-judge the accuracy of the information received, we would be grateful for a reply to the following questions.

1. Are the above reports accurate? In particular, does your Excellency’s Government accept that there were three air strikes by unmanned CIA drones on targets in Pakistan on 5 November 2005, 1 December 2005, and 13 January 2006, as described above?
2. On what basis was it decided to kill, rather than capture, Ayman al-Zawahri? On what basis was it decided to kill, rather than capture, Hamza Rabia?

3. What rules of international law does your Excellency's Government consider to govern these incidents? If your Excellency's Government considers the incidents to have been governed by humanitarian law, please clarify which treaty instruments or customary norms are considered to apply.

4. What procedural safeguards, if any, were employed to ensure that these killings complied with international law?

5. Did the Government of Pakistan agree to the killing of Hamza Rabia and Ayman al-Zawahri? More in general, does the Government of Pakistan agree to the United States carrying out air strikes against targets in Pakistan in order to kill terrorism suspects?

6. In case your Excellency's Government did not consent to these air strikes, what steps were taken to investigate the incidents and hold those responsible accountable?

7. Does your Excellency's Government intend to provide compensation to the families of the persons killed in these air strikes? If so, what steps have been taken in this direction?

United States of America: Targeted Killing of Haitham al-Yemeni

Violation alleged: Death due to attacks or killings by security forces

Subject(s) of appeal: 1 male (foreign national)

Character of reply: Allegations rejected but without adequate substantiation

Observations of the Special Rapporteur

The Special Rapporteur appreciates the detailed legal arguments provided by the Government of the United States of America. However, the arguments it provides for not clarifying the facts surrounding the death of Haitham al-Yemeni are not persuasive, as discussed in the SR's communication dated 30 November 2006 (below).

Allegation letter sent on 26 August 2005, reproduced from E/CN.4/2006/53/Add.1, 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?

Response of the Government of the United States of America dated 4 May 2006

This letter responds to your correspondence of August 26, 2005 requesting information regarding Haitham al-Yemeni, an alleged Al Qaida senior figure, who was allegedly killed on the Pakistan-Afghanistan border on or around May 10, 2005 by a missile fired by an unmanned aerial drone. The United States has no comment on the specific allegations regarding the May 2005 incident concerning Mr. al-Yemeni. The United States recalls its response of April 14, 2003 to a similar request for observations regarding an alleged aerial drone incident (E/CN.4/2003/G/80). 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. The conduct of a government in legitimate military operations, whether against Al Qaida operatives or any other legitimate military target, would be governed by the law of armed conflict. Nevertheless, as a matter of courtesy, we provide the following information:

Immediately following the attacks of September 11, 2001 against the United States, most of the world, including the United Nations Security Council and NATO, condemned these attacks as a "threat to international peace and security," recognized the inherent right of individual and collective self-defense, and expressed determination to combat by all means threats to international peace and security caused by terrorist acts. NATO's North Atlantic Council determined on October 2, 2001, that the September 11th attack was directed from abroad by the world-wide terrorist network of Al Qaida and "shall therefore be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack on one or more of the Allies of Europe or North America shall be considered an attack against them all."

Foreign Ministers of the States Parties to the 1947 Inter-American Treaty of Reciprocal Assistance ("the Rio Treaty"), likewise resolved on September 21, 2001, that "these attacks against the United States are attacks against all American states and that in accordance with all the relevant provisions of the ... [Rio Treaty]... and the principle of continental solidarity, all States Parties to the Rio Treaty shall provide effective reciprocal assistance to address such attacks and the threat of any similar attacks against any American state, and to maintain the peace and security of the continent."

Consistent with this widely held international view, President Bush stated in Military Order No. 1 of November 13, 2001 that "international terrorists, including members of Al Qaida, have carried out attacks on the United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces."

The United States believes that it is in a continuing state of international armed conflict with Al Qaida. Members of Al Qaida have attacked our embassies, our military vessels and military bases, our capital city, and our financial center. They have trained, equipped, and supported armed forces and have planned and executed attacks around the world against the United States on a scale that has required a military response. Al Qaida attacks have deliberately targeted civilians and protected sites and objects. For example, the Al Qaida network headed by Abu Musad al-Zargawi helped establish a poison and explosive training center camp located in northeastern Iraq, in cooperation with the radical organization Ansar al-Islam. Other attacks attributed to Al Qaida and Al Qaida-linked groups include the attempted bombing on December 22, 2001, of a commercial transatlantic flight from Paris to Miami by convicted shoe bomber Richard Reid; on January 23, 2002, the kidnapping of U.S. reporter Daniel Pearl from Karachi, Pakistan, who was later killed; on March 17, 2002, a grenade attack on a Protestant church in Islamabad killing five people, including two U.S. citizens; on June 14, 2002, a car bomb attack on the U.S. Consulate in Karachi, Pakistan, killing 12 Pakistanis and damaging the consulate; on October 2, 2002, a bomb explosion in the Philippines, resulting in the death of a U.S. serviceman; on October 12, 2002, a car bomb outside a nightclub in Bali, Indonesia, killing nearly 200 international tourists, including seven U.S. citizens, and injuring about 300; on October 28, 2002, the fatal shooting of a USAID employee in Amman, Jordan; on February 28, 2003, attacks by a gunman on police posts outside the U.S. consulate in Karachi, killing four local police; on May 12, 2003, suicide bombings in Saudi Arabia attacking three residential compounds of foreign workers killing 34, including 10 U.S. citizens, and injuring 139 others; in 2004, at least 11 attacks, killing more than 60 people, including 6 U.S. citizens, and wounding more than 225; and on July 7, 2005, the coordinated suicide bombings of London's public transportation system, killing over 50 and injuring about 700, including U.S. citizens. Moreover, no one needs reminding of the attacks on United States persons and property prior to 9/11 linked to Al Qaida, including the embassy. Despite coalition successes in Afghanistan and around the world, the conflict is far from over.

The Al Qaida network today is a multinational enterprise with operations in numerous countries. Some captured Al Qaida operatives have escaped from detention to plan and to mount further terrorist attacks against the United States and coalition partners. The continuing military operations undertaken against the United States and its nationals by the Al Qaida organization both before and after September 11 necessitate a military response by the armed forces of the United States. To conclude otherwise is to permit an armed group to wage war unlawfully against a sovereign state while precluding that state from defending itself. The law of armed conflict (also known as international humanitarian law) is the applicable law in armed conflict and governs the use of force against legitimate military targets. Accordingly, the law to be applied in the context of an armed conflict to determine whether an individual was arbitrarily deprived of his or her life is the law and customs of war. Under that body of law, enemy combatants may be attacked unless they have surrendered or are otherwise rendered hors de combat. Al Qaida terrorists who continue to plot attacks against the United States may be lawful subjects of armed attack in appropriate circumstances. In addition, the mandate of the

Special Rapporteur for extrajudicial, summary, or arbitrary executions does not include the competence to review alleged violations of the law of armed conflict. See Commission on Human Rights resolution 1982/29. The United States disagrees with the assertion contained in the Special Rapporteur's August 26, 2005 communication and report to the 61st Commission on Human Rights (E/CN.4/2005/7) that issues arising under the law of armed conflict are within the Special Rapporteur's mandate. This assertion by the Special Rapporteur rests on a series of inapplicable facts, the first of which is that "All major relevant resolutions in recent years have referred explicitly to that body of law" (E/CN.4/2005/7, para. 45). While recent Commission on Human Rights and UN General Assembly resolutions have made mention of international humanitarian law in the context of suggestions or admonitions to governments, this does not somehow impart upon the Special Rapporteur a mandate to consider issues arising under the law of armed conflict.

As support for his assertion, the Special Rapporteur also notes, "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.' (E/CN.4/2005/7, para. 45; emphasis added). The emphasis here is relevant because the General Assembly was urging Governments to take action, not modifying or extending the Special Rapporteur's mandate. This resolution did not, in fact, deal with the mandate of the Special Rapporteur other than to urge the Special Rapporteur to operate within his mandate. For example, operative paragraph 13 of the Resolution "[u]rges the Special Rapporteur to continue, within his mandate, to bring to the attention of the United Nations High Commissioner for Human Rights ... situations of extrajudicial, summary or arbitrary executions that are of particularly serious concern or in which early action might prevent further deterioration." (59/197; emphasis added.) The Special Rapporteur's final support for his assertion that he has a mandate to consider issues arising under international humanitarian law is that "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" (E/CN.4/2005/7, para. 45). The United States notes 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.

For the foregoing reasons, the Commission and Special Rapporteur lack competence to address issues of this nature arising under the law of armed conflict. The United States remains fully committed to the work of the Special Rapporteur on Extrajudicial, Summary, and Arbitrary Executions.

Allegation letter dated 30 November 2006

This communication is in response to your correspondence of 4 May 2006, which replied to my earlier communication of 26 August 2005 requesting information regarding the alleged killing of Haitham al-Yemeni on the Pakistan-Afghanistan border on or around 10 May 2005 by a missile fired by an unmanned aerial drone operated by the US Central

Intelligence Agency. Your 4 May 2006 correspondence took the position that your government is in a continuing state of international armed conflict with Al Qaida, stated that “Al Qaeda terrorists who continue to plot attacks against the United States may be lawful subjects of armed attacks in appropriate circumstances”, and implied that Haitham al-Yemeni was targeted on that basis. While I greatly appreciate your Government’s willingness to engage in a dialogue on this issue, I regret that your correspondence of 4 May 2006 provides a partial response to only the first of the four questions posed in my communication, namely, that you consider international humanitarian law applicable to the incident in question. 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. International human rights law and international humanitarian law are complementary, not mutually exclusive

Your position is that, as a general matter, international humanitarian law operates to the exclusion of international human rights law in times of armed conflict. I respectfully submit that the relationship between the two bodies of law in times of armed conflict is significantly more complex than this characterization would suggest. In its *Nuclear Weapons Advisory Opinion*, the International Court of Justice concluded 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”,⁷⁰ a position your Government had advocated in its written pleadings to the Court.⁷¹ Thus, even under the *lex specialis*

⁷⁰ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996*, p. 240, para. 25.

⁷¹ The US Government’s written submission to the International Court of Justice in the Nuclear Weapons Advisory Opinion was premised on the *lex specialis* principle, arguing that a full examination of the principle of ‘arbitrary deprivation of life’ under human rights law must include examination of international humanitarian law during armed conflict.. *Legality of the Threat or Use of Nuclear Weapons, Written Statement of the Government of the United States of America (June 20, 1995)* online at <http://www.icjciij>.

principle, and even if my mandate were specifically limited to human rights law (which, as I will explain below, it is not), I would be not only permitted but required to examine international humanitarian law as a necessary prerequisite to interpreting human rights law.

The Court has since consistently added another important layer to this analysis, as exemplified in its most recent case (*Congo v. Uganda*):

[T]he protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.⁷²

The Court stated this principle of complementarity and the *lex specialis* principle in the same paragraph, with the clear implication that the complementarity principle continues to operate alongside the *lex specialis* principle.⁷³ In *Congo v. Uganda* it reiterated the complementarity principle and then found separate violations of international humanitarian law and human rights law, thus demonstrating conclusively that international humanitarian law does not wholly replace human rights law during an armed conflict.⁷⁴ This is consistent with the conclusion of the Human Rights Committee that “[w]hile, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.”⁷⁵ **15** Thus, under current international law, human rights law is applied alongside international humanitarian law during armed conflict, and the interpretation of human rights law requires examination of international humanitarian law. In contrast, it is noteworthy that in support of its assertion of the exclusivity of international humanitarian law the United States’ Government offers no authority to support its position. It also clearly and directly contradicts earlier positions taken by the United States.

org/icjwww/icasess/iunan/iunan_ipleadings/iunan_ipleadings_199506_WriStats_18_USA.pdf. For this reason, your Government argued that *Id.* at p. 44-45 (“Rather than attempt to identify all the possible circumstances under which the taking of life might be justified, the drafters [of the ICCPR] agreed to a simple prohibition on the ‘arbitrary’ deprivation of life. In any event, we know of no significant opposition to the proposition that the deprivation of life as a ‘lawful act of war’ would not be violative of the protected right to life. The European Convention, which also guarantees the right to life, specifically recognizes the right of States to deprive persons of their lives through lawful acts of war”).

⁷² *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.

⁷³ *The Wall Advisory Opinion, supra* note 12, at para. 106.

⁷⁴ *Congo v. Uganda, supra* note 12, at paras. 216-20, 345(3).

⁷⁵ 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), UN Doc. CCPR/C/21/Rev.1/Add.13, para. 11 (26 May 2004).

The Commission on Human Rights, the body specifically charged with oversight of my mandate (until its replacement by the Human Rights Council earlier this year),⁷⁶ has also clearly endorsed the complementarity of human rights law and international humanitarian law. In Resolution 2005/34 on extrajudicial, summary, or arbitrary executions, the Commission explicitly “[a]cknowledg[ed]... that international human rights law and international humanitarian law are complementary and not mutually exclusive”.⁷⁷ Similarly, in Resolution 2002/36, the Commission “[e]xpress[ed] grave concern over the continued occurrence of violations of the right to life highlighted in the report of the Special Rapporteur as deserving special attention [including] violations of the right to life during armed conflict”.⁷⁸ It would be inexplicable for the Commission to explicitly endorse this aspect of the report if it considered human rights law inapplicable during armed conflict or believed such violations were beyond the mandate. Finally, the International Law Commission has recently addressed the applicability of human rights law during armed conflict in its work on the effect of armed conflict on treaties. In that context, the applicability of human rights law in armed conflict was separately endorsed by governments,⁷⁹ the Special Rapporteur on the topic,⁸⁰ and the Legal Office of the United Nations Secretariat.⁸¹ It should be noted in particular that the applicability of human rights law during armed conflict received the direct support and approval of the US Government.⁸² The Commission on Human Rights could and did consider international humanitarian law within its terms of reference. Your assertion that the Commission on Human Rights lacked the competence to address issues arising under the law of armed conflict is deeply concerning, both because of a complete lack of support for the proposition and because of the radical consequences that would flow from removing many of the worst situations in the world today from the purview of the Council. In the decades since the Commission was established as a subsidiary body of the Economic and Social Council (“ECOSOC”), the Commission has consistently included international humanitarian law within its terms of reference, and this approach has been endorsed by ECOSOC. The resolutions discussed below provide illustrative examples:

In Resolution 1992/S-1/1, on the situation of human rights in the territory of the former

⁷⁶ See *infra* Part III.

⁷⁷ Resolution 2005/34 on extrajudicial, summary, or arbitrary executions, preamble (19 April 2005).

⁷⁸ Comm. Hum. Rts., Res. 2002/34, para. 13(a) (22 April 2002).

⁷⁹ Official Records of the General Assembly, 60th sess., Supp. No. 10 (A/60/10), p. 66, para. 172 (“The view was expressed [by governments] that the category of treaties in subparagraph (d) [human rights treaties] was one in which there probably was a good basis for continuity [during armed conflict], subject to the admonition of the International Court of Justice, in the Nuclear Weapons Advisory Opinion, that such rights were to be applied in accordance with the law of armed conflict”).

⁸⁰ Second report on the effects of armed conflicts on treaties by Mr. Ian Brownlie, Special Rapporteur, Int’l Law. Comm., 58th sess., UN Doc. A/CN.4/570, paras. 30, 41, Draft Art. 7(2)(d) (16 June 2006).

⁸¹ The effect of armed conflict on treaties: an examination of practice and doctrine: Memorandum by the Secretariat, Int’l Law Comm., 57th sess., UN Doc. A/CN.4/550, para. 32 (“[I]t is well-established that non-derogable provisions of human rights treaties apply during armed conflict”).

⁸² UNGA, Sixth Cmt., summary record of the 20th mtg., 3 Nov. 2005, statement of the United States, UN Doc. A/C.6/60/SR.20, p. 6, para. 33 (29 Nov. 2005) (accepting that “certain human rights and environmental principles did not cease to apply in time of armed conflict”).

Yugoslavia, adopted by the Commission at its first special session in 1992, the Commission “call[ed] upon all parties ... to ensure full respect for ... humanitarian law”⁸³ and “[r]emind[ed] all parties that they are bound to comply with their obligations under international humanitarian law, and in particular the third Geneva Convention relating to the treatment of prisoners of war and the fourth Geneva Convention relating to the protection of civilian persons in time of war, of 12 August 1949, and the Additional Protocols thereto of 1977”.⁸⁴ Significantly, in Decision 1992/305, ECOSOC explicitly “endorsed resolution 1992/S-1/1 of 14 August 1992, adopted by the Commission on Human Rights at its first special session.”⁸⁵

- In Resolution 1994/72, on the situation of human rights in the territory of the former Yugoslavia, the Commission “[c]ondemn[ed] categorically all violations of human rights and international humanitarian law by all sides”.⁸⁶ It then applied international humanitarian law to the situation and “denounce[d] continued deliberate and unlawful attacks and uses of military force against civilians and other protected persons ... non-combatants, ...[and] ... relief operations”.⁸⁷ 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*”.⁸⁸ It also approved “[t]he Commission’s request to the Secretary-General to take steps to assist in obtaining the active cooperation of all United Nations bodies *to implement Commission resolution 1994/72*”.⁸⁹ Again, rather than denounce the Commission for exceeding its mandate in Resolution 1994/72, ECOSOC provided continued funds for the Special Rapporteur to implement that resolution, and called upon all UN bodies to cooperate in its implementation.

- In Resolution S-3/1 of 25 May 1994 on the Situation of human rights in Rwanda, the Commission “[c]ondemn[ed] in the strongest terms all breaches of international humanitarian law ... in Rwanda, and call[ed] upon all the parties involved to cease immediately these breaches”.⁹⁰ 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”.⁹¹ ECOSOC, in special session,

⁸³ Comm. Hum. Rts., Res 1992/S-1/1, The situation of human rights in the territory of the former Yugoslavia, para.1 (14 August 1992).

⁸⁴ *Id.* at para. 9.

⁸⁵ ECOSOC Decision 1992/305 (18 Aug. 1992).

⁸⁶ Comm. Hum. Rts., Res. 1994/72, Situation of human rights in the territory of the former Yugoslavia: violation of human rights in Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro), para. 4 (9 Mar. 1994).

⁸⁷ *Id.* at para. 7.

⁸⁸ ECOSOC Res. 1994/262 (22 July 1994) (emphasis added).

⁸⁹ *Id.* (emphasis added).

⁹⁰ Comm. Hum. Rts., Res. S-3/1, The Situation of human rights in Rwanda, para. 1 (25 May 1994).

⁹¹ *Id.*

explicitly “endorsed resolution S-3/1 of 25 May 1994, adopted by the Commission on Human Rights”.⁹²

- In Resolution 1996/68, the Commission “call[ed] upon the Government of Israel, the occupying Power of territories in southern Lebanon and West Bekaa, to comply with the Geneva Conventions of 1949, in particular the Geneva Convention relative to the Protection of Civilian Persons in Time of War”.⁹³ ECOSOC then “approve[d] the Commission’s requests to the Secretary-General ... [t]o bring the resolution to the attention of the Government of Israel and to invite it to provide information concerning the extent of its implementation thereof”.⁹⁴

As these examples make clear, during the life of the Commission, ECOSOC clearly and repeatedly accepted that international humanitarian law formed part of its terms of reference. Similarly, in establishing the Council in replacement of the Commission, the General Assembly in no way undertook to narrow its competence.⁹⁵ The mandate of the Special Rapporteur for extrajudicial, summary, or arbitrary executions includes examination of alleged violations of international humanitarian law. 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.⁹⁶ 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

⁹² ECOSOC Decision 1994/223 (6 June 1994).

⁹³ Comm. Hum. Rts., Res. 1996/68, Human rights situation in southern Lebanon and West Bekaa, para. 3 (23 April 1996).

⁹⁴ ECOSOC Decision 1996/274 (23 July 1996).

⁹⁵ GA Res. 60/251 (3 April 2006).

⁹⁶ Comm. Hum. Rts. Res. 1982/29, para. 2; ECOSOC Res. 1982/35, para. 2.

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”.⁹⁷ 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.”⁹⁸ The report was accepted in its entirety by the Commission.⁹⁹

• 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*.¹⁰⁰ The Geneva Conventions appear as item three of that fourteen point list. This report was accepted in its entirety by the Commission.¹⁰¹ Moreover, the Commission explicitly “welcome[d] his recommendations with a view to eliminating extrajudicial, summary, or arbitrary executions”.¹⁰² These recommendations contained recommendations on extrajudicial executions during armed conflict.¹⁰³ 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”.¹⁰⁴ 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

⁹⁷ 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).

⁹⁸ *Id.* at pp. 8-9, paras. 33-34.

⁹⁹ Comm. Hum. Rts., Res. 1983/36, para. 3 (8 Mar. 1983).

¹⁰⁰ Report by Mr. S. Amos Wako, Comm. Hum. Rts., 48th sess., UN Doc. E/CN.4/1992/30, p. 176 (31 Jan. 1992).

¹⁰¹ Comm. Hum. Rts., Res. 1992/72, para. 3 (5 March 1992).

¹⁰² *Id.*

¹⁰³ Report by Mr. S. Amos Wako, *supra* note 40, at p. 173, para. 649(f), p. 174, para. 651(b).

¹⁰⁴ 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).

against the dangers arising from military operations.”¹⁰⁵ This report was accepted in its entirety by the Commission.¹⁰⁶

- In the first report of Ms. Asma Jahangir as Special Rapporteur in 1999, she adopted the legal framework elaborated by Mr. Ndiaye.¹⁰⁷ This report was accepted in its entirety by the Commission in its Resolution 1999/35 on extrajudicial, summary, or arbitrary executions.¹⁰⁸

- 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.”¹⁰⁹ The Commission accepted this report in its Resolution 2005/34 on extrajudicial, summary, or arbitrary executions.¹¹⁰ That resolution also explicitly “[a]cknowledg[ed]... that international human rights law and international humanitarian law are complementary and not mutually exclusive”.¹¹¹ 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

¹⁰⁵ *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)

¹⁰⁶ 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”).

¹⁰⁷ 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).

¹⁰⁸ Comm. Hum. Rts., Res. 1999/35, para. 8 (26 April 1999).

¹⁰⁹ Report of Mr. Philip Alston, Comm. Hum. Rts., 61st sess., UN Doc. E/CN.4/2005/7, p. 16, para. 45 (22 Dec. 2004).

¹¹⁰ Resolution 2005/34 on extrajudicial, summary, or arbitrary executions, para. 12 (19 April 2005).

¹¹¹ *Id.* at *Preamble*.

first applied under the mandate.¹¹² 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.¹¹³ In the vote on the resolution, your Government chose to abstain.¹¹⁴

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.¹¹⁵ After twenty-three years of silence on the topic while an unbroken line of Special Rapporteurs 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

¹¹² 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).

¹¹³ 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).

¹¹⁴ 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).

¹¹⁵ 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 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).

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.¹¹⁶ 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 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.¹¹⁷

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

¹¹⁶ 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.

¹¹⁷ 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).

his mandate may be carried out effectively”.¹¹⁸ 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.”¹¹⁹ 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.¹²⁰ The report of his mission is widely heralded for sounding the alarm bells to the world of the impending genocide in that country.¹²¹
- 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.¹²² She sent sixteen allegations to Pakistan.¹²³
- 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 2000.¹²⁴
- 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 2002.¹²⁵

¹¹⁸ See, e.g., Comm. Hum. Rts., Res. 2004/37, para. 14 (19 April 2004).

¹¹⁹ 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).

¹²⁰ 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).

¹²¹ 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).

¹²² *Id.* at p. 41, para. 225.

¹²³ *Id.* at p. 63, para. 348.

¹²⁴ 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).

¹²⁵ 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).

• Israel/Occupied Palestinian Territories – international humanitarian law also applies to situations of occupation.¹²⁶ 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.¹²⁷ 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.¹²⁸

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.

Conclusion and Request for Further Information

In light of these considerations, I respectfully request a reply to the four questions posed in my correspondence of 26 August 2005 with respect to the alleged killing of Haitham al-Yemeni on the Pakistan-Afghanistan border on or around 10 May 2005 by a missile fired by an un-manned aerial drone operated by the US Central Intelligence Agency. To reiterate, these questions are:

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?

¹²⁶ Geneva Conventions of 1949, Common Article 2; Hague Regulations of 1907, Arts. 42-56; Fourth Geneva Convention, Arts. 27-34 and 47-78.

¹²⁷ 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).

¹²⁸ 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).

I make these observations and requests for information in the hope that they will prove helpful to your Government and other governments in ensuring compliance with international law prohibiting extrajudicial, summary, or arbitrary executions, and I look forward to further constructive dialogue with your Government on this issue in the future.

United States of America: Targeted Killings in Pakistan

Violation alleged: Deaths due to attacks or killings by security forces

Subject(s) of appeal: 31 persons (foreign nationals)

Character of reply: No response

Observations of the Special Rapporteur

The Special Rapporteur regrets that the Government of the United States of America has failed to cooperate with the mandate he has been given by the General Assembly and the Commission on Human Rights.

Letter of allegation dated 7 March 2006 sent with Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism We would like to bring to your Excellency's attention information we have received regarding three incidents of air strikes by United States unmanned aircraft against targets in Pakistan, each of them resulting in the death of several civilians. We have written to the Government of Pakistan in this matter as well.

On 5 November 2005, an unmanned aircraft operated by the US Central Intelligence Agency (CIA) fired a missile at a house in North Waziristan, Pakistan (no further details of the location reported). The CIA had received information that al-Qaeda operative Hamza Rabia, a citizen of Egypt alleged to have been involved in an attempt on the life of President Pervez Musharraf in December 2003, was staying there with his wife and children. While an overall eight persons, including his wife and children, were reportedly killed in the attack, Hamza Rabia managed to escape with an injured leg.

On 1 December 2005, an unmanned drone operated by the CIA fired a missile at a house in the village Haisori, near the town of Mir Ali, North Waziristan, about 30 kms from the Afghani border, killing five persons. It would appear that the dead are Hamza Rabia, two other foreign men, and the 17-year-old son and an eight-year-old nephew of the owner of the house.

While Pakistani authorities stated that the blast that resulted in the deaths was caused by explosives handled or stored in the house, reports indicate that residents of the area saw an unmanned aircraft fire a missile at the house and recovered fragments of the missile. In the early morning hours of 13 January 2006 a remote-piloted Predator aircraft of the United States security services launched a strike with "Hellfire" missiles on the village of Damadola in the Bajaur Agency, North Western Pakistan, close to the border with

Afghanistan. Reports indicate that US Predator drones were circling the area of Damadola village during the three days preceding the missile strike. The attack is reported to have killed 18 persons, including women and children. The target of the strike reportedly was Ayman al-Zawahri, who is commonly referred to as the “number two” of al-Qaeda. He was reportedly expected at a dinner in Damadola on the evening of 12 January 2006. However, he appears not to have been in the village at the time of the attack. The Pakistani Federal authorities are reported to have stated that 5 senior al-Qaeda figures were among those killed, including a chemical and explosives expert, Midhat Mursi al-Sayed alias Abu Abu Khabab, Abu Obaidah al-Misri, allegedly al-Qaeda chief of operations for Afghanistan’s eastern Kunar province, and Ayman al-Zawahiri’s son-in-law Abdur Rehman al-M aghribi. However, the reports we have received indicate that the bodies of the five “Arab fighters” killed in the strike were pulled out of the rubble and taken away from the scene soon after the strike, so that only the bodies of 13 Pakistani victims could be identified.

It is our understanding that the US Central Intelligence Agency (CIA) is authorized to operate such Predator operations under presidential authority signed after the September 11, 2001 terrorist attacks. The Government of Pakistan is reported to have lodged a diplomatic protest over the incident on 14 January 2006. Pakistan’s Prime Minister, Mr. Shaukat Aziz, reportedly stated publicly that such attacks are not acceptable to Pakistan.

In drawing the attention of your Excellency’s Government to this information and seeking clarification thereof, we are fully aware of the stance taken by your Government in correspondence with the predecessor to the Special Rapporteur on extrajudicial, summary or arbitrary executions with respect to the mandate’s competence regarding killings that are said to have occurred within the context of an armed conflict (we refer to your Government’s letters dated 22 April 2003 and 8 April 2004). As explained in the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions to the 61st Commission on Human Rights, as well as in a letter to your Excellency’s Government of 26 August 2005, 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). As to the mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, it should be pointed out that reference to “fundamental freedoms” in the title of the mandate established by paragraph 14 of Commission on Human Rights resolution 2005/80 is to be understood in the light of operative paragraph 1 of the same resolution which explicitly refers to, inter alia, international humanitarian law.

In the light of these considerations, we would express the concern (stated by the Special Rapporteur on extrajudicial, summary or arbitrary executions in his Report to the 61st Commission on Human Rights and in his letter of 26 August 2005 concerning the killing of Haitham al-Yemeni, which unfortunately has remained without a reply from your Government), 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). Moreover, as these incidents dramatically illustrate, such “targeted killings” may (and all too often do) result in the death of numerous bystanders, while missing the target.

We 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, we wish to remind you that UN GA Resolution 59/191 of 10 March 2005, in its paragraph 1, stresses that “States must ensure that any measure to combat terrorism complies with their obligation under international law, in particular international human right, refugee and humanitarian law”, the latter to the extent it is indeed applicable.

Without in any way wishing to pre-judge the accuracy of the information received, we would be grateful for a reply to the following questions. (These questions repeat the unanswered questions in letter of the Special Rapporteur on extrajudicial, summary or arbitrary executions of 26 August 2005):

1. Are the reports according to which the target of the missile strike against Damadola was Ayman al-Zawahri accurate? On what basis was it decided to kill, rather than capture, Ayman al- Zawahri (considering also the reported presence of US military aircraft in the area during the three days preceding the attack)? On what basis was it decided to kill, rather than capture, Hamza Rabia?
2. Did the Government of Pakistan agree to the killing of Ayman al-Zawahri? Did the Government of Pakistan agree to the killing of Hamza Rabia?
3. What rules of international law does your Excellency’s Government consider to govern these incidents? If your Excellency's Government considers the incidents to have been governed by humanitarian law, please clarify which treaty instruments or customary norms are considered to apply.
4. What procedural safeguards, if any, were employed to ensure that these killings complied with international law?
5. Does your Excellency’s Government intend to provide compensation to the families of the civilians killed in these air strikes? If so, what steps have been taken in this direction?

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions to the General Assembly (A/62/265, 16 August 2007, ¶¶ 27-32, 37-44):

Confronting problematic innovations in counter-terrorism tactics

27. The past few years have seen innovations in Governments' counter-terrorism tactics, some of which are clearly problematic in human rights terms. In some instances, Governments have contended that these tactics — and the terrorist methods they counter — are not covered by the existing legal framework of human rights and humanitarian law. The roles and responsibilities entrusted to the special procedures system have proven valuable in responding to these arguments. Independent experts have been well positioned to analyse the ways in which existing law can be adapted in accordance with widely accepted principles to address new situations. And they have been able to do so in ways that are objective and informed both by rigorous legal analysis and by extensive experience.

28. The practice of so-called “targeted killings” provides an example. The Special Rapporteur has addressed allegations concerning such killings to both Israel and the United States, as well as to countries on whose territories such killings have taken place.¹²⁹ The largest challenge has been the lack of cooperation these countries have shown: Israel has not addressed the substance of allegations, and the United States has insisted that the whole issue falls outside the mandate. The Special Rapporteur has used thematic sections of his reports to clarify the manner in which human rights and humanitarian law norms apply to this tactic. The Special Rapporteur's report to the Commission on Human Rights in 2005 discussed due process safeguards and noted that “[e]mpowering 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 ... it makes a mockery of whatever accountability mechanisms may have otherwise constrained or exposed such illegal action under either humanitarian or human rights law”.¹³⁰

29. The Special Rapporteur has engaged in a robust and constructive dialogue with the United States regarding its contention that targeted killings are part of armed conflict and that the mandate does not apply to armed conflicts. The Special Rapporteur rejected this contention and called the Council's attention to the extent to which excluding such conduct from the mandate would risk its very purpose.¹³¹ The Commission had endorsed this view, stating that “international human rights law and international humanitarian law are complementary”¹³² and expressing “grave concern over the continued occurrence of violations relating to the right to life highlighted in the report of the Special Rapporteur as deserving special attention [including] violations of the right to life during armed conflict”.¹³³

30. The Special Rapporteur has also addressed the adoption of “shoot-to-kill policies” by law enforcement agencies in response to the threat of suicide bombers. While recognizing

¹²⁹ A/HRC/4/20/Add.1, annex, pp. 244-246 and 342-361; E/CN.4/2006/53/Add.1, annex, pp. 129-136, 183-184 and 264-265; E/CN.4/2005/7/Add.1, paras. 357-361.

¹³⁰ E/CN.4/2005/7, para. 41.

¹³¹ A/HRC/4/20, paras. 18-28; see also A/HRC/4/20/Add.1, annex, pp. 342-358.

¹³² *Official Records of the Economic and Social Council, 2005, Supplement No. 3* and corrigenda (E/2005/23 and corrigenda), chap. II, sect. A, resolution 2005/34, preamble.

¹³³ *Ibid.*, 2002, *Supplement No. 3* (E/2002/23), chap. II, sect. A, resolution 2002/36, para. 13 (a).

that unconventional threats may demand unconventional responses, the Special Rapporteur emphasized that existing human rights law already provides a framework for reconciling State obligations to respect the rights of suspects and to protect the lives of the population at large. The Special Rapporteur clarified how the general rules regulating the use of lethal force by law enforcement officials apply to the unusual case of a suspected suicide bomber.¹³⁴

31. The Special Rapporteur noted that, on the one hand, there are circumstances in which the immediate use of lethal force without a prior warning may be justified but explained that, as a matter of law, a State cannot “strip the use of lethal force of its usual safeguards ... without providing any alternative safeguards”.¹³⁵ He explained the form that such alternative safeguards might take. He also defended the key role of public accountability in ensuring that the right to life is protected, and he noted that a State using such a policy would need to “accept the implications of shooting based on intelligence information on the requirement that States publicly investigate deaths and prosecute perpetrators where appropriate. Investigations and trials may require the disclosure of some intelligence information. To withhold such information would be to replace public accountability with unverifiable assertions of legality by the Government, inverting the very idea of due process”.¹³⁶ This general legal analysis has informed his correspondence with the United Kingdom on the case of Jean Charles de Menezes, illustrating again the manner in which the mandate’s working methods allow for the fruitful interaction of general analysis and its concrete application.¹³⁷

32. The Special Rapporteur’s engagement on these issues has demonstrated that what sometimes seems like a weakness of the special procedures system — the idea of a dialogue of a single expert with all of the countries of the world — can also be one of its strengths. Through continual engagement with a large number of countries facing a vast variety of complex situations, special procedures mandate holders are unlikely to be susceptible to claims that any particular event or situation is so exceptional as to fall outside the existing legal framework. Their legal expertise, together with their broad human rights experience that is further developed within their mandates, mean that they can at once apply the law to novel situations and recognize that old practices do not become new merely through the application of new names. Their independent status also insulates them from political pressures that might tend to excuse unlawful practices against unpopular groups of people and thus undermine the universality of fundamental norms. In playing this role, a number of mandate holders have addressed a range of practices — including diplomatic assurances in cases of refoulement, terrorist profiling, terrorist group listing and proscription and the use of secret prisons — thereby ensuring that international human rights instruments continue to offer effective protection of individual rights, even as the challenges facing States continue to evolve.¹³⁸

¹³⁴ E/CN.4/2006/53, paras. 44-54.

¹³⁵ *Ibid.*, para. 49.

¹³⁶ *Ibid.*, para. 54.

¹³⁷ E/CN.4/2006/53/Add.1, annex, pp. 258-261.

¹³⁸ A/60/316, paras. 29-52 (Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment); A/HRC/4/26, paras. 32-62 (Special Rapporteur on the promotion and protection of human

[...]

Holding armed groups and other non-State actors to account for human rights abuses

37. When extrajudicial executions occur during an armed conflict, determining whether the State has international legal responsibility can be legally complex. The question what to do if an armed opposition group is responsible can be even more complex. The mandate's approach to such extrajudicial executions has developed considerably over the past 25 years, demonstrating how the Special Rapporteur is at once constrained by the prevailing normative framework and pushed by the needs of victims to explore its possibilities.

38. Paramilitary groups tied to Governments were referred to from the first years of the mandate.¹³⁹ The Special Rapporteur explained in his review of the first decade of activities of the mandate in 1992 that, while the inclusion of paramilitary groups had been “questioned on occasion by a few Governments, which consider that the mandate should be limited to ‘those cases in which there was actual involvement of a government official’”, the practice of focusing on such groups remained valid.¹⁴⁰ In the same year, the Working Group on Enforced or Involuntary Disappearances drew the Commission's attention to the use of what it termed “civil defence units” in internal armed conflicts, noted that they had often been implicated in human rights abuses and suggested “minimum conditions for their operations”.¹⁴¹

39. These interpretations of the mandates' scope were endorsed by the Commission. It adopted resolutions requesting the special procedures to “pay due attention” to the human rights implications of “civil defence forces”.¹⁴² The Special Rapporteur subsequently dealt with such groups in a broad range of countries and brought that experience to bear in crafting recommendations to prevent the involvement of such groups in extrajudicial executions. For example, in correspondence with the Government of Sri Lanka regarding extrajudicial executions by “home guards”, the Special Rapporteur responded in part by “stress[ing] the need for strict control of any such auxiliary force by the security forces” but then, drawing on his by then extensive experience, went on to state that, “In view of the experience of other countries, where paramilitary groups are responsible for numerous and grave human rights violations, the Government may wish to consider as a preferable solution strengthening the regular security forces in areas with armed conflict, rather than creating a paramilitary body.”¹⁴³

rights while countering terrorism); A/61/267, paras. 9-41 (idem); E/CN.4/2006/7, paras. 53-59 (Working Group on Arbitrary Detention).

¹³⁹ E/CN.4/1983/16, paras. 111 and 186; E/CN.4/1984/29, paras. 91 and 132.

¹⁴⁰ E/CN.4/1992/30, chap. IV, paras. 611-613.

¹⁴¹ E/CN.4/1992/18, paras. 378-381.

¹⁴² Official Records of the Economic and Social Council, 1992, Supplement No. 2 (E/1992/22), chap. II, sect. A, resolution 1992/57, para. 3.

¹⁴³ E/CN.4/1995/61, para. 293.

40. It took much longer for the mandate to find a suitable means for responding to extrajudicial executions by rebels and other armed opposition groups. This was an issue of finding appropriate working methods more than an issue of substantive law. In 1992, the Special Rapporteur reported that he had received allegations concerning human rights abuses committed by a substantial number of armed groups, including the National Liberation Army and Revolutionary Armed Forces of Colombia in Colombia, the Eritrean People's Liberation Front and the Ethiopian People's Revolutionary Front in Ethiopia, the Unidad Revolucionaria Nacional Guatemateca in Guatemala, Shining Path and Tupac Amarú in Peru, and the Liberation Tigers of Tamil Eelam and Muslim Home Guards in Sri Lanka, but he concluded that: Within the United Nations human rights system, it is generally considered that addressing appeals to such entities or providing them with the opportunity to respond to allegations accusing them of human rights violations would be inappropriate, given their legal status. Consequently, existing working methods offer little opportunity for responding effectively to allegations concerning opposition groups.¹⁴⁴

41. While the legal issues and diplomatic sensibilities were real, the consequences of unconditionally refusing to address appeals to armed groups were problematic. From the perspective of a victim's family, an extrajudicial execution is no less devastating for having been committed by rebels rather than by government forces, and addressing complaints to the Government will generally prove futile if the abuses were committed by an armed group. Moreover, Governments accused of extrajudicial executions were understandably unhappy if comparable acts perpetrated by armed groups within their countries were simply ignored in the human rights context.

42. Recognizing these consequences, as well as the Commission's abiding interest in victims, the Special Rapporteur began to address a range of non-State actors involved in complex situations. Some of these had widely recognized international legal personality: the Palestinian Authority (first addressed in the 1996 report)¹⁴⁵ and United Nations peacekeeping missions (first addressed in 2006).¹⁴⁶ However, the Special Rapporteur has also addressed other non-State actors, such as the "Turkish Cypriot community" (in 1997 and 1998),¹⁴⁷ the "Taliban movement in Afghanistan" (1998),¹⁴⁸ and the Liberation Tigers of Tamil Eelam (2006 and 2007).⁴⁰ The Special Rapporteur observed that addressing complaints to armed opposition groups "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')." ¹⁴⁹ He explained that the Commission and its special procedures had a right to

¹⁴⁴ E/CN.4/1992/30, para. 627; see also para. 614.

¹⁴⁵ E/CN.4/1996/4, paras. 537-539.

¹⁴⁶ An allegation letter was sent to the United Nations Stabilization Mission in Haiti (E/CN.4/2006/53/Add.1, annex, pp. 322-333). The much earlier engagement with the United Nations Commissioner and Council for Namibia might also be cited in this context, although it was of a quite different character (E/CN.4/1983/16, paras. 180-188 and annexes VII-VIII).

¹⁴⁷ E/CN.4/1997/60/Add.1, para. 575; E/CN.4/1998/68/Add.1, paras. 446-449.

¹⁴⁸ E/CN.4/1998/68/Add.1, paras. 446-449.

¹⁴⁹ E/CN.4/2006/53/Add.1, annex, pp. 319-321; A/HRC/4/20/Add.1, annex, pp. 384-386.

hold armed groups to account, a *droit de regard*, whatever the international legal status of a particular group might be.

43. The Special Rapporteur developed this theme in the context of a report on a country visit in which he observed:

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 ... [A] non-State actor ... 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.

...The international community does have human rights expectations to which it will hold [an armed group], but it has long been reluctant to press these demands directly if doing so would be to “treat it like a State”.

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.¹⁵⁰

44. The Special Rapporteur’s efforts to hold armed groups accountable for their abuses on this realistic basis have been welcomed by the Council.

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/HRC/4/20, 29 January 2007, ¶¶ 18-28):

The mandate of the Special Rapporteur in armed conflicts

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.¹⁵¹ 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.¹⁵² 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.

The alleged exclusivity of the two bodies of law

¹⁵⁰ E/CN.4/2006/53/Add.5, paras. 25-27.

¹⁵¹ E/CN.4/2005/7, paras. 41-54.

¹⁵² See, e.g., Communication of 4 May 2006 from the United States.

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”.¹⁵³ 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 ...”.¹⁵⁴ In *Congo v. Uganda*, for example, it found separate violations of international humanitarian law and human rights law, thus conclusively underscoring the fact that the former does not wholly replace the latter during an armed conflict.¹⁵⁵ 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”.¹⁵⁶ 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”.¹⁵⁷

Humanitarian law in the Commission’s mandate

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,¹⁵⁸ 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”¹⁵⁹ and “[r]emind[ed] all parties that they are bound to comply with their obligations under international humanitarian law ...”.¹⁶⁰ This resolution was subsequently endorsed by the Economic and Social Council.¹⁶¹

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”.¹⁶² It then applied international humanitarian law to the situation and “denounce[d]

¹⁵³ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996, para. 25.

¹⁵⁴ 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.

¹⁵⁵ *Id.*, at paras. 216-20, 345(3).

¹⁵⁶ 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.

¹⁵⁷ CHR Res. 2005/34 and GA Res. 61/173.

¹⁵⁸ 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).

¹⁵⁹ CHR Res. 1992/S-1/1, para. 1.

¹⁶⁰ *Id.* at para. 9.

¹⁶¹ ECOSOC Decision 1992/305.

¹⁶² CHR Res. 1994/72, para. 4.

continued deliberate and unlawful attacks and uses of military force against civilians and other protected persons ... non-combatants, ... [and] ... relief operations”.¹⁶³

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”.¹⁶⁴ 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”.¹⁶⁵

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.¹⁶⁶

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.¹⁶⁷ 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,¹⁶⁸ 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.¹⁶⁹ 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 ‘wilful killings’ are to be

¹⁶³ *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.

¹⁶⁴ CHR Res. S-3/1, para. 1.

¹⁶⁵ *Id.* This resolution was explicitly endorsed by ECOSOC Decision 1994/223.

¹⁶⁶ GA Res. 60/251 (2006).

¹⁶⁷ CHR Res. 1982/29, para. 2; ECOSOC Res. 1982/35, para. 2.

¹⁶⁸ See communication sent to the United States on 30 Nov. 2006.

¹⁶⁹ E/CN.4/1983/16, paras. 29-39.

considered ‘grave breaches’ of the Geneva Conventions, that is, war crimes subject to universality of jurisdiction.”¹⁷⁰ His report was endorsed by the Commission.¹⁷¹

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”.¹⁷² 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 ...”,¹⁷³ some of which had focused explicitly on extrajudicial executions during armed conflict.¹⁷⁴

Determining compliance

27. The position put forward by the United States would give every State the power unilaterally, and without external scrutiny, to determine whether or not a specific incident is covered by the mandate of the Special Rapporteur. The implication is that the Special Rapporteur should automatically accept a State’s own determination that a particular individual was an “enemy combatant” attacked in “appropriate circumstances”. On this basis, a Government can target and kill any individual who it deems to be an enemy combatant, and it would not be accountable in that regard to the international community, let alone to the Council.

28. In effect, this position would place all actions taken in the so-called “global war on terror” in a public accountability void, in which no international monitoring body would exercise public oversight.¹⁷⁵ Creating such a vacuum would set back the development of the international human rights regime by several decades. In order to avoid such an unacceptable outcome, the Special Rapporteur would need to receive a detailed explanation of such incidents, so that he may determine independently whether they fall within the scope of the mandate provided by the Council.

Report on Mission to Lebanon and Israel (A/HRC/2/7, 2 October 2006, ¶¶ 25, 34, 41, 46):

The Special Rapporteur visited Lebanon from 7 to 10 September and Israel from 10 to 14 September 2006. He reported on the civilian casualties that resulted from the armed conflict between both countries from 12 July to 14 August 2006. The conflict highlights the principles of distinction, proportionality and the prohibition of indiscriminate attacks.

International Humanitarian Law

¹⁷⁰ *Id.* at paras. 33-34.

¹⁷¹ CHR Res. 1983/36, para. 3.

¹⁷² E/CN.4/1992/30, p. 176.

¹⁷³ CHR Res. 1992/72, para. 3.

¹⁷⁴ E/CN.4/1992/30, para. 649(f) and para. 651(b).

¹⁷⁵ The International Committee on the Red Cross (ICRC), although exercising valuable humanitarian oversight in such matters, does not act in a manner which satisfies the need for public accountability.

25. First, under the principle of distinction, the parties to a conflict must at all times distinguish between civilians and combatants,¹⁷⁶ 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.¹⁷⁷ The only circumstance in which civilians may be targeted is for such time as they take a direct part in hostilities.¹⁷⁸ Thus, attacks on civilian objects²⁶ are unlawful unless at the time of the attack they were used for military purposes and their destruction offered a definite military advantage.

[...]

The protection of the civilian population during the conflict

Lebanon

34. In the conduct of the hostilities, Israel is accused of having violated the principle of distinction between military and civilian targets, the principle of proportionality, and the prohibition of indiscriminate attacks. Hezbollah is accused of having used the civilian population of Beirut's southern and eastern suburbs (*Dahiye*) and of towns and villages in southern Lebanon as "human shields". These alleged violations need to be discussed because of their impact on human life, housing, health and internal displacement covered by the mandates of the four independent experts.

[...]

Attacks on Hezbollah and the principle of distinction

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".¹⁷⁹ 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.

[...]

¹⁷⁶ Ibid., pp. 3-8 (Rule 1), 25-36 (Rules 7-10).

¹⁷⁷ Ibid., pp. 25-32 (Rules 7-8).

¹⁷⁸ Ibid., pp. 19-24 (Rule 6).

¹⁷⁹ 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>.

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.¹⁸⁰

Communications to/from Governments (E/CN.4/2006/53/Add.1, 27 March 2006, pp 129-136):

Israel: Targeted Killings in the West Bank

Violation alleged: Death due to attacks or killings by security forces

Subject(s) of appeal: 25 males

Character of reply: No response (recent communication)

Observations of the Special Rapporteur

The Special Rapporteur looks forward to receiving a response concerning these allegations.

Allegation letter sent on 28 November 2005

Since assuming this mandate, I have received numerous reports concerning the killing of suspected terrorists by the Israeli Defense Force (IDF). In the annex to this letter you will find summaries of the information regarding ten such incidents, between 10 June 2004 and 25 January 2005. These summaries are based on affidavits signed by eye witnesses of the killings, as well as, in some cases, medical records of the deceased. The eye witnesses

¹⁸⁰ 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.

and the organization presenting the affidavits to me allege that in all cases fire was opened by the Israeli forces without any warning and without any threat against them by the persons fired at. The description of the incidents and of the injuries suffered by the victims strongly suggests that the lethal outcome of the use of force was intended in all cases. In some of the cases, your Excellency's Government appears to claim that there was in fact an armed confrontation, while in others the source's version appears to be undisputed in this respect. The members of the Israeli special forces carrying out the killings were dressed in civilian clothes and traveling on civilian vehicles, while military vehicles mostly appeared on the scene once the killing had been completed. The victims of the killings described in the annex include both persons sought by the Israeli security forces because of a suspicion that they were engaged in terrorist acts and persons who would not appear to have been under such suspicion. Nonetheless, most of the persons falling in the latter group appear to have been killed intentionally, and not as unintended casualties.

The concern raised by the summarised reports (as well as in numerous other recent reports of analogous incidents) is heightened by information according to which your Excellency's Government, in the persons of the Prime Minister and the IDF Chief of Staff, recently (on 8 November 2005) confirmed its intention to continue carrying out such killings. In drawing the attention of your Excellency's Government to this information and seeking clarification thereof, I am aware of the stance taken by your Government in proceedings in domestic and international fora with regard to targeted killings. I would therefore take your Government's statement to the Human Rights Committee of 25 July 2003 on this matter (CCPR/C/SR.2118, at para. 40) as basis for my queries.

1. As a preliminary matter, please state whether the attached summaries are accurate. If not so, please refer to the results of any investigation disproving their accuracy.
2. Your Excellency's Government insisted before the Human Rights Committee that the legal basis for such operations was to be found in the laws on armed conflict. It also stated that "Israel operate[s] only against legitimate targets, using legitimate methods of warfare while abiding by the rule of proportionality in accordance with international law." Please describe which rules of international humanitarian law, i.e. which treaties or rules of customary law, are taken as guidance to define legitimate targets and legitimate methods of warfare (inter alia concerning the identification of Israeli combatants as such), as well as to assess the proportionality of attacks. Please explain on what basis the applicability of human rights law, in particular Article 6 of the ICCPR, is ruled out.
3. Your Excellency's Government stated that "[e]ven persons known to be terrorists were legitimate targets only if there was reliable evidence linking them directly to a hostile act. ... [Israel's] security forces were instructed by the Attorney-General, however, to attack unlawful combatants only when there was an urgent military necessity and when no less harmful alternative was available to avert the danger posed by the terrorists." Please describe the decision-making process and the procedural safeguards in place to ensure that the principles stated by your Government as a policy find application in each

individual case. Your Excellency's Government stated that "[i]t would, of course, be preferable to arrest such persons [known to be terrorists], but in areas like the Gaza Strip, over which Israel had no control, his Government did not have that option." Please elaborate on why, in the cases summarized in the annex, arresting the suspected terrorists was not an option, considering that in several of the incidents your Government did in fact arrest several persons after killing others (e.g. on 8 August 2004 in Palestine Street, Jericho).

4. Your Excellency's Government stated that "under the rule of proportionality, which formed part of the laws of armed conflict and was integral to Israel's accepted values, [the security forces] were instructed to carry out such attacks only if they did not cause disproportionate harm to civilians. Consequently, at all stages of intelligence-gathering, operational planning and attacks on unlawful combatants, they always did their utmost to avoid injuring innocent persons." In at least one incident (not among those summarised in the annex), an inquiry of your Government found "shortcomings in the information available, and the evaluation of that information, concerning the presence of innocent civilians". (I refer to the 2 August 2002 communication of the IDF spokesperson regarding the findings of the inquiry into the death of Salah Shehadeh). These findings of an inquiry by the IDF and the Israeli Security Agency (ISA) refer to an incident on 22 July 2002 in which 16 persons, including nine children, were killed in addition to the targeted terrorism suspect when an IDF plane dropped a one ton bomb on a house in a densely populated area of Gaza. Please explain whether the findings of the inquiry were followed by any disciplinary or criminal proceedings, and, if not so, the reasons therefore. Please explain whether IDF inquiries were initiated into any other targeted killing cases with the aim to assess the proportionality of the force used, and what the outcome was. Without prejudging your Government's replies to my queries, 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). In expressing this concern, I am cognizant of the fact that in the course of the last five years hundreds of Israeli civilians have been killed in attacks carried out by terrorists using the Gaza strip and the West Bank as basis. I wish to stress that I fully acknowledge the responsibility of your Excellency's Government to protect its citizens against such attacks. Efforts to eradicate terrorism must, however, be undertaken within a framework clearly governed by international human rights law as well as by international humanitarian law.

Annex

1) 10 June 2004, 'Ein Nina, Jenin Governorate

Mr. Ma'moun Yousef Abu-al-Hasan was a militant of the Al-Aqsa Martyrs Brigades and a fugitive wanted by the Israeli Defence Force (IDF). On 10 June 2004, at around 1:30 a.m. he entered the house of his father, Mr. Husein Yousef Abu-al-Hasan, located in 'Ein-Nina of Jenin City. At 2 a.m. members of the IDF, who apparently had laid siege to the location, knocked at the door of the home and demanded that it be opened. Ma'moun Abu-al-Hasan shouted that he was coming to open the door, but instead attempted to

escape from the back door of the house and managed to climb over a wall into the garden of the neighbouring house. There, however, he was spotted by IDF soldiers, who without warning opened fire and hit him with four bullets in the back of the head, top of the back and the feet (according to the medical report issued by Jenin Governmental Hospital). Ma'moun Abu-al-Hasan was not armed. The IDF acknowledged responsibility for the killing of Ma'moun Abu-al- Hasan.

2) 14 June 2004, Balata Refugee Camp

On 14 June 2004, at 9:40 p.m., Mr. 'Awad Abu-Zeid was driving a taxi on the main street in the north part of Balata Refugee Camp in the Nablus Governorate, opposite Jacob's Well, with Messrs. Khalil 'Araysha and Muhammad Safwat as passengers. An IDF Apache helicopter fired two rockets at the car, one of them hitting the target. Mr. 'Araysha and 'Awad died on the spot, their bodies incinerated and Mr. 'Araysha's leg and hand amputated. Mr. Safwat sustained minor injuries and burns. Reportedly Mr. 'Araysha had recently become a leader of the al-Aqsa Martyrs Brigades. Mr. Abu- Zeid reportedly was his right hand man and often drove him in his taxi. The IDF acknowledged responsibility for the attack.

3) 25 July 2005, Toulkarem

On 25 July 2004, at 7:00 pm, a white Volkswagen bus carrying a yellow (Israeli) registration plate entered a Southern neighbourhood of Toulkarem, where a group of young Palestinian men, some of them wanted by the IDF, was standing opposite of the Abu Nidal Restaurant for Popular Foods. When the van was at a distance of five metres from the young men it stopped and five men got out of the car. They were wearing civilian clothing and carrying machine guns. The five men immediately opened heavy fire towards six of the Palestinian men, aiming at the heads and abdomen and killing them on the spot. The six victims were:

1. Mr. Hani Yousef Muhammad 'Weida, a militant of the al-Aqsa Martyrs Brigades wanted by the IDF. He was armed at the time of the incident.
2. Mr. 'Abd-al-Rahman Hasan Mustafa Shadid, a militant of the al-Aqsa Martyrs Brigades wanted by the IDF. He was armed at the time of the incident.
3. Mr. Mahdi Rateb Na'im Tanbouz, a militant of the al-Aqsa Martyrs Brigades wanted by the IDF. He was armed at the time of the incident.
4. Mr. Said Jamal Nasser. It is not clear whether he was a militant of the al-Aqsa Martyrs Brigades as well, but he was not a fugitive (he used to sleep at home) and did not carry weapons.
5. Mr. Muhammad 'Adnan Shantir, a bystander who was not a member of any militant group and not wanted by the IDF.
6. Mr. Ahmad Nabil Barouq , a bystander who was not a member of any militant group and not wanted by the IDF.

The shooting also injured some passers-by, including Messrs. Muhammad 'Adnan Fathi Samaha, Khalil Zidan, and Ibrahim al-Jayyousi. Immediately after the shooting IDF support units arrived to the scene and stayed for at least an hour. Muhammad 'Adnan Fathi Samaha was arrested after the shooting and questioned about the identity of the targeted men. Thereafter he received medical treatment in an Israeli hospital. The IDF acknowledged carrying out the operation, claiming that all the six men killed were militants of the al-Aqsa Martyrs Brigades.

4) 8 August 2004, Palestine Street, Jericho

On 8 August 2004, at about 9:30 pm, a number of young men from Ramallah living in Jericho had gathered in front of the Sara Net Café located on Palestine Street behind the Jericho football stadium. Several of the young men were wanted by the IDF, among them Mr. 'Amer 'Aydiyya , an activist of the al-Aqsa Martyres Brigades from the Al-Am'ari Refugee Camp, south of Ramallah, his brother Mr. Jaber 'Aydiyya, Mr. Hatem Abu-Halima from Ramallah, and Mr. Hamza Muhammad 'Abdallah al-Sheikh. At about 9:45 p.m., a white Volkswagen Caravelle stopped nearby. Without any notice or warning, the car's doors opened and a number of men in civilian dress got out of the car, aimed their automatic guns at the group of young men and without any warning fired at them (aiming at Mr. 'Amer 'Aydiyya) with live ammunition. Mr. 'Amer 'Aydiyya received several bullets in the chest and abdomen and died on the spot, while others were wounded, Mr. Hatem Abu-Halima and Mr. Jaber 'Aydiyya seriously. Immediately thereafter, Israeli soldiers came to the scene. They hand-cuffed those who had not been wounded, forced them to lie down on the ground, and subsequently led them inside the Net Café. Those wounded remained outside and received first-aid from the Israeli soldiers. After half an hour, the Israeli soldiers blindfolded the men, both those wounded and those unwounded, and took them in their cars to Benjamin Detention Camp in Bitouniya, northwest Ramallah. Mr. Hamza Muhammad 'Abdallah al-Sheikh was released after 13 days of detention. Mr. Jaber 'Aydiyya was transferred to Hadassa Hospital in East Jerusalem and then released (he continued his medical treatment at al-Sheikh Zayed Hospital in Ramallah).

5) 13 September 2004, Jenin, on the Jenin-Nablus road On 13 September 2004 at 5:15 p.m., Mr. Mahmoud Asa'd Abu-Khalifa (22 years), Mr. Yamen Feisal Ayyoub (18 years), and Mr. Amjad Husni Ayyoub (23 years), three activists of the al- Aqsa Martyrs Brigades wanted by the IDF, were travelling in a civilian Mazda car near the Jenin Municipality on Jenin-Nablus road when a powerful explosion completely burned and destroyed the car. The three passengers were killed, their bodies dismembered and body parts strewn all over the site of the incident. The Israeli army admitted its responsibility for the operation through the Yediot Ahranot website in Arabic (ArabNet), attributing the explosion to an air-to-ground rocket fired on the car from a helicopter. The families of the victims and other residents of Jenin doubt the veracity of this account. They point out that there was no helicopter in the sky above Jenin at the relevant time that day. These persons rather believe that a bomb had been planted on the car and was set off by a reconnaissance plane of the Israeli armed forces that was soaring in the sky above Jenin that day.

6) 15 September 2004, Jenin industrial area

On 15 September 2004, at around 12:30 pm, an IDF Special Squad entered the industrial area of Jenin in two cars which bore no signs identifying them as being in use of Israeli security forces. The two cars parked in front of a car repair shop owned by Messrs. Fawwaz Zakarna and Abu Al-Abed Saba'na. Mr. Fawwaz Zakarna, Mr. Fadi Fakhri Zakarna, an activist of the Islamic Jihad Movement wanted by the Israeli army, and other young men were standing in front of the car repair shop. Fadi Zakarna was carrying a weapon. Without prior notice or warning, approximately eight persons in civilian clothes, two of them wearing masks covering their faces, got out the two cars and opened fire on the young men standing in front of the car repair shop with guns known "M-16 short". Firing continued for five to seven minutes, mostly directed at the group of young men, but also in other directions. Fadi Fakhri Zakarna received 20 bullets in his head, chest and different parts of his body. Fawwaz Fakhri Zakarna, neither an activist nor wanted, was killed with seven bullets in the chest and right foot. Mr. Mu'ath Muhammad Qatit, known for trading in stolen cars, neither an activist nor wanted, was killed inside Mr. Fawwaz's shop by four bullets in the chest. Mr. Shuja' Nathmi, an activist in Al-Aqsa Martyrs Brigades wanted by the Israeli army, escaped from the place of the incident with two members of the special forces running after him and firing at him. Three members of the Special Squad dragged Mr. Ibrahim 'Ata Mahmoud (a/k/a) Ibrahim "al-Sirisi", who was neither an activist nor wanted by the IDF, into the car repair shop run by 'Arafat al-Sa'di, threw him on the ground, and opened fire on him from a distance of less than two metres. Three or four bullets hit his head and chest. After firing stopped, the IDF arrived at the scene to protect the members of the special forces, which departed from the area. The IDF left ten minutes later. According to an Israeli radio broadcast in Arabic, the Special Squad was fired at during the liquidation of a terrorist in Jenin and had to respond, resulting in the killing of three Palestinian young men.

7) 28 October 2004, Kufr-Saba neighborhood, Qalqiliya

Mr. Ibrahim Muhammad Fayed (a/k/a "Sheikh Ibrahim"), aged 48, was wanted by the Israeli security forces, who broke into his family's home several times in an attempt to find him. Israeli security forces had also on several occasions distributed statements to the citizenry warning against offering shelter to and otherwise assisting Sheikh Ibrahim. On 28 October 2004, at around 7.20 p.m., Sheikh Ibrahim was having coffee with a friend nearby his home in the Kufr-Saba quarter in Qalqiliya, when he was shot at from a white Ford car standing at about 70 metres distance. Apparently, the weapon used was a silenced pistol with a laser aiming device. The gun shots were fired without any warning and the bystanders realised that Sheikh Ibrahim had been shot by seeing him fall over backwards. Sheikh Ibrahim's friend, who was armed, returned the fire when he realised what was happening, and the white car left. Sheikh Ibrahim was immediately taken to the Emergency Hospital in Qalqiliya city, where he died of the wounds in the chest and the head at around 8 p.m. the same evening.

8) 1 November 2004, al-Yasmina Quarter in the Old City of Nablus, Nablus Governorate

On 1 November 2004, around 9 p.m., Mr. Majdi Mir'i and Mr. Fadi Sarwan were talking in front of Mr. Sarwan's home in the al-Yasmina Quarter in the Old City of Nablus. Mr.

Majdi Mir'i had been wanted by the Israeli security forces for two years and had escaped an assassination attempt on 15 September 2004. Mr. Fadi Sarwan had received a call on his cellular from an Israeli officer calling himself "Ghazal" a week before the present incident, telling him that he would soon be assassinated. At ten to fifteen metres from them another group of several young men was standing, among them Mr. Amjad Ghafri and Mr. Karim Ghazi 'Abd-al-Rahman Abu-'Isa. Three persons arrived on the scene, two of them in male civilian dress, the third dressed like a woman. Once they were close to the two groups of men, these three persons took off some of the clothes they were wearing, revealing that they were in fact three men armed with guns. Without any previous questions or warning, they opened fire on Mr. Mir'i and Mr. Sarwan, as well as on the other group of men. Mr. Sarwan first fell to the ground. The men continued to shoot at him also when he was lying on the ground. Mr. Mir'i tried to escape, but interrupted his flight and lifted his hands after a few metres when IDF soldiers cut his way. He was approached by one of the men in civilian clothes who shot at him from a close range, and continued to fire at him also after he had fallen to the ground. Mr. Sarwan and Mr. Mir'i died on the spot of the wounds suffered. Karim Abu-'Isa was injured, while Amjad Ghafri was arrested.

9) 7 November 2004, Jenin-Nablus Road outside Jenin

On 7 November 2004 around 5:45 p.m., the following four men wanted by the Israeli security forces were killed:

1. Mr. Amin Jamal Muhammad Husein, an activist with the al-Aqsa Martyrs Brigades.
2. Mr. Fadi Khader Tawfiq Ighbariyya, an activist with Saraya al-Quds of the Islamic Jihad.
3. Mr. Muhammad Khaled Ahmad Masharqa, an activist with the al-Aqsa Martyrs Brigades.
4. Mr. Mahmoud Fahmi Salah-al-Din, an activist with al-Aqsa Martyrs Brigades. The four Palestinian men were driving in a black jeep. They had filled the car at the 'Abd-al-'Afou Gas Station located on the Jenin-Nablus Road to the south towards Jenin City. As the jeep was about to take the road again, a grey Volkswagen, which had appeared at high speed, came to stop immediately in front of it, at a distance not exceeding a metre and a half. Without prior notice or warning, the persons in that bus opened heavy fire towards the jeep from a distance not exceeding one metre from the front side. Then five men in blue jeans, shouting in Hebrew, got out of the Volkswagen bus and continued to fire at the jeep. The fire continued for around one minute and was directed at the upper part of the Palestinian men's bodies. All four men sustained wounds in their heads and died on the spot. Subsequent examination of the jeep revealed that hundreds of bullets had been fired at the jeep. The special forces soldiers gathered the weapons of the four Palestinian men in the jeep, which they had not been able to use due to the unexpected and sudden nature of the attack. Ten minutes after the attack, IDF support units arrived in eight to ten military jeeps and provided protection for the departure of the special forces in the Volkswagen bus. After the departure of the Israeli forces, the four Palestinian men were carried in Red Crescent Society ambulances to the Jenin Governmental Hospital, where their death was confirmed.

10) 26 January 2005, Qalqiliya

On 26 January 2005, around 3 p.m., Messrs. Maher Harb and Muhammad Khamis, two men wanted by the Israeli security forces because of their affiliation with the al- Aqsa Martyrs Brigades, and Mr. Yihiya Nazzal were slowly driving in a private car through the central part of the Kufr Saba Quarter in Qalqiliya. Their car was surrounded by three members of Israeli security forces in civilian clothes. These three men started firing into the car with M-16 guns while shouting, in both Hebrew and Arabic, “Stop the car and bring the weapons”. One member of the security forces shot Mr. Harb in the neck from a distance of approximately two meters, possibly killing him immediately. Although the car slowed down as a result of the driver losing control, the three special forces soldiers continued to shoot at the passengers of the car. Eventually, the car crashed into a tree. The soldier on the right side of the car opened one of the car doors and fired two bullets at the driver and the person sitting next to him (Mr. Khamis). The third soldier shot Mr. Nazzal in the leg from a distance of about a metre and a half. Then the soldiers pulled out the driver, the man in the passenger seat, and the third man who was sitting in the back of the car, and dragged them for a distance of 12 metres inside a shop. The soldiers were then attacked by persons throwing stones at them, but kept the attackers at bay by firing their weapons (apparently without any casualties). After few minutes, several Israeli patrol cars arrived at the scene. Mr. Harb, Mr. Khamis and Mr. Nazzal were put into patrol cars and driven to an Israeli Liaison Office on the eastern side of Qalqiliya. There, a doctor examined them and established that Mr. Harb was dead. Mr. Muhammad Khamis had sustained serious injuries, and Mr. Yihiya Nazzal medium injuries. Mr. Khamis and Mr. Nazzal were taken by ambulance to the Belinson Hospital in Israel. Mr. Nazzal was transferred to the Emergency Hospital in Qalqiliya after five days.

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (E/CN.4/2006/53, 8 March 2006, ¶¶ 33-43):

Transparency in armed conflict: accountability for violations of the right to life in armed conflict and occupation

33. It is of continuing concern that States often fail to comply with their obligation to effectively investigate, prosecute, and punish violations of the right to life in situations of armed conflict and occupation. This failure has taken a number of forms. Policies on investigating deaths have permitted unjustifiable exceptions and have often failed to provide for impartiality and independence. During armed conflicts, even grave crimes such as murder are often leniently punished when committed by members of the armed forces. Trends in the investigation, prosecution, and punishment of commanding officers have been even less encouraging. Impunity for individuals has not been the only failure. In some cases, a strategic reluctance to engage in “body counts” may have impeded full consideration of how the impact of armed conflict on civilian populations can be minimized. Efforts at monitoring the consequences of choices of weapons and tactics on the incidental loss of civilian life generally remain ad hoc, leaving compliance with requirements of proportionality and precautionary measures under-examined.¹⁸¹

¹⁸¹ See e.g. Marco Sassòli, “Targeting: the scope and utility of the concept of military objectives for the protection of civilians in contemporary armed conflicts”, in D. Wippman and M. Evangelista (eds.), *New Wars, New Laws? Applying the Laws of War in 21st Century*

34. These practices threaten to roll back 50 years of progress in subjecting armed conflict to the rule of law. The Geneva Conventions of 12 August 1949 first established the legal obligation of States to investigate alleged unlawful killings and to prosecute their perpetrators. Elaborating the general obligation to “respect and to ensure respect” for humanitarian law,¹⁸² the Geneva Conventions mandated the penal repression of violations. In particular, when a State receives allegations that someone has committed or ordered a grave breach - such as the “willful killing” of a protected civilian¹⁸³ - the State is then legally obligated to search for him and either try him before its own courts or extradite him to another State that has made out a prima facie case.¹⁸⁴ Should he be found guilty, the State must impose an “effective penal sanction[]”.¹⁸⁵ However, gaps remained in this accountability regime. In international armed conflicts, some individuals were excluded from protection by their nationality.¹⁸⁶ In non-international armed conflicts, no mechanism for penal repression was provided.¹⁸⁷ The scope of legal protection has, however, steadily improved. Since the Geneva Conventions were adopted in 1949, States have both filled its gaps and supplemented its protections with new instruments of human rights law, such as the ICCPR, which was adopted in 1966. Thus, with respect to non-international conflicts, the additional protection offered by human rights law was acknowledged in the Preamble to the Second Additional Protocol adopted in 1977.¹⁸⁸

Conflicts (2005) 181 at 204-205.

¹⁸² Common article 1 to the Geneva Conventions of 12 August 1949; see also Protocol I, article 87, paragraph 3.

¹⁸³ This is not the only grave breach that may intentionally or unintentionally result in loss of life. See Geneva Conventions I-IV, articles 50/51/130/147; Protocol I, articles 11, 85. Under the Geneva Conventions of 1949, “torture or inhuman treatment, including biological experiments” and “wilfully causing great suffering or serious injury to body or health” might well lead to a death that is not itself wilful. Less directly, the same is true of “compelling a prisoner of war [or person protected in Geneva (IV)] to serve in the forces of the hostile Power” or “wilfully depriving a prisoner of war [or person protected in Geneva (IV)] of the rights of fair and regular trial prescribed in this Convention”. Grave breaches related to medical procedures are extended in article 11, paragraph 4 of Protocol I. In addition, article 85, paragraph 3 of Protocol I classifies a number of acts as grave breaches “when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health”.

(a) Making the civilian population or individual civilians the object of attack;
(b) Launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in article 57, paragraph 2 (a) (iii);
(c) Launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in article 57, paragraph 2 (a) (iii);
(d) Making non-defended localities and demilitarized zones the object of attack;
(e) Making a person the object of attack in the knowledge that he is “hors de combat”.

¹⁸⁴ Article 49/50/129/146 of the Geneva Conventions (I-IV).

¹⁸⁵ Article 49/50/129/146 of the Geneva Conventions (I-IV).

¹⁸⁶ See Geneva Convention (IV), article 4. Note that the broader substantive reach of the prohibition of wilful killing. Common article 3 to the Geneva Conventions; Protocol I, article 75. These provisions reflect customary international law.

¹⁸⁷ Common article 3 to the Geneva Conventions. Protocol II does not include any accountability mechanisms either.

¹⁸⁸ For an analysis of the simultaneous and complementary relationship of human rights and

Today, human rights law and humanitarian law together require accountability in all circumstances.

35. 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”.¹⁸⁹ This duty is entailed by the general obligation to ensure the right to life to each individual. The particular measures States may take to fulfil this duty have been elaborated in detail with respect to law enforcement operations. Most prominently, in 1989 the Economic and Social Council adopted the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.¹⁹⁰ These detailed principles should guide States whenever they carry out law enforcement operations, including during armed conflicts and occupations.¹⁹¹ However, in other situations arising out of armed conflict and occupation, the modalities of the duty to investigate alleged violations have received less attention.

36. Armed conflict and occupation do not discharge the State’s duty to investigate and prosecute human rights abuses. The right to life is non-derogable regardless of circumstance.¹⁹² This prohibits any practice of not investigating alleged violations during armed conflict or occupation. As the Human Rights Committee has held, “It is inherent in the protection of rights explicitly recognized as non-derogable ... that they must be secured by procedural guarantees ... The provisions of the [ICCPR] relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights.”¹⁹³ 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.

humanitarian law see E/CN.4/2005/7, paragraphs 41-54.

¹⁸⁹ 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). See also Commission on Human Rights resolution 2004/37, paragraph 5, in relation to the mandate of the Special Rapporteur: “Reiterates the obligation of all States to conduct exhaustive and impartial investigations into all suspected cases of extrajudicial, summary or arbitrary executions, to identify and bring to justice those responsible, while ensuring the right of every person to a fair and public hearing by a competent, independent and impartial tribunal established by law, to grant adequate compensation within a reasonable time to the victims or their families and to adopt all necessary measures, including legal and judicial measures, in order to bring an end to impunity and to prevent the recurrence of such executions, as stated in the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.”

¹⁹⁰ Economic and Social Council resolution 1989/65 of 24 May 1989.

¹⁹¹ See Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Principle 1 (“... Exceptional circumstances including a state of war or threat of war, internal political instability or any other public emergency may not be invoked as a justification of such executions. Such executions shall not be carried out under any circumstances including, but not limited to, situations of internal armed conflict, excessive or illegal use of force by a public official or other person acting in an official capacity or by a person acting at the instigation, or with the consent or acquiescence of such person, and situations in which deaths occur in custody.”).

¹⁹² ICCPR, article 4, paragraph 2.

¹⁹³ Human Rights Committee, general comment No. 29, “Derogations from provisions of the Covenant during a state of emergency” (2001), paragraph 15.

In addition to being fully responsible for the conduct of their agents, in relation to the acts of private actors States are also held to a standard of due diligence in armed conflicts as well as peace. 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 an autopsy may prove impossible. Regardless of the circumstances, however, investigations must always be conducted as effectively as possible and never be reduced to mere formality.¹⁹⁴ In this regard, there are several areas of special concern.

37. The State obligation to conduct independent and impartial investigations into possible violations does not lapse in situations of armed conflict and occupation.¹⁹⁵ While the modalities of this obligation in situations of armed conflict have not been fully settled, some points are clear:

- States must establish institutions capable of complying with human rights law obligations; there is no double standard for military justice. While human rights law does not dictate any particular institutional arrangement for the administration of justice, neither does it permit exceptions to its requirements. Investigations and prosecutions proceeding under military jurisdiction must - in each case and without exception - comply with the requirements of independence and impartiality;
- As an empirical matter, subjecting allegations of human rights abuse to military jurisdiction often leads to impunity.¹⁹⁶ In such situations, investigation and prosecution by bodies independent of the military is necessary;

¹⁹⁴ See Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, Judgment of July 29, 1988, paragraph 177: “The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government.”

¹⁹⁵ Human Rights Committee, general comment No. 31 (2004), paragraph 15 (“the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies ... A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant”); Human Rights Committee, general comment No. 29: Derogations from provisions of the Covenant During a State of Emergency (2001), paragraph 15 (“It is inherent in the protection of rights explicitly recognized as non-derogable ... that they must be secured by procedural guarantees ... The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights”).

¹⁹⁶ Former Special Rapporteurs on extrajudicial, summary or arbitrary executions have identified this relationship time and again. E/CN.4/1995/61, paragraph 93 (“Military tribunals, particularly when composed of military officers within the command structure of the security forces, very often lack the independence and impartiality required under international law. Military jurisdiction over human rights violations committed by members of the security forces very often results in impunity”). E/CN.4/1999/39, paragraph 67 (“In some cases situations of impunity are a direct product of laws or other regulations which explicitly exempt public officials or certain categories of State agents from accountability or prosecution ... The Special Rapporteur is also increasingly concerned about the practice of prosecuting members of security forces in military courts, which often fall short of international standards regarding the impartiality, independence, and competence of the judiciary”).

- While commanding officers have a duty to investigate and repress violations,¹⁹⁷ there is growing awareness that additional mechanisms of investigation are needed in order to ensure impartiality.¹⁹⁸

38. Military justice was a form of self-regulation that ensured discipline among a State's armed forces and that led, as a matter of reciprocity, to lawful conduct on the part of opposing forces. As international law has increasingly protected civilians, aspects of military justice have begun to appear anachronistic. Many States have responded by imposing restrictions on military jurisdiction under both domestic and international law. All States should study whether their systems of justice provide victims of armed conflict with the reality and the appearance of genuinely independent and impartial investigation.

39. The legal obligation to effectively punish violations is as vital to the rule of law in armed conflict as in peace. It is, thus, alarming when States punish crimes committed against civilians and enemy combatants in a lenient manner. The legal duty to punish those individuals responsible for violations of the right to life is not a formality. Punishment is required in order to ensure the right to life by vindicating the rights of the victims and preventing impunity for the perpetrators. Therefore, States must punish those individuals responsible for violations in a manner commensurate with the gravity of their crimes. International law does not specify a particular schedule of sentences, but there are many indications of whether a State is effectively penalizing unlawful killings, including:

- Are the crimes a State's soldiers commit against civilians and enemy combatants punished as harshly as the crimes they commit against members of their own armed forces?;
- Are crimes committed against foreign nationals punished as harshly as crimes committed against compatriots?;
- How do the punishments imposed compare with those imposed by other States and by international criminal courts and tribunals?

¹⁹⁷ Protocol I, article 87.

¹⁹⁸ The development of the United Kingdom's policy on investigations over the past few years is instructive. The June 2003 policy of having the Royal Military Police (RMP) investigate and then decide on prosecution was shortly replaced with the July 2003 policy under which, "If the Commanding Officer (CO) of the soldier was satisfied, on the basis of the information available to him, that the soldier had acted lawfully and within the rules of engagement, then there was no requirement to initiate an investigation by the military police." Initially, then, the United Kingdom moved from a greater to lesser level of independence in the investigative process. However, according to Lieutenant General Sir John Reith, Chief of Joint Operations, "Between January and April 2004 there was a further reconsideration of this policy. This was prompted by the fact that the environment had become less hostile and also by the considerable media and Parliamentary interest in incidents involving UK forces in which Iraqis had died. On 24 April, a new policy was adopted by MND (SE) [Multi-National Division - Southeast] which required all shooting incidents involving UK forces which result in a civilian being killed or injured to be investigated by SIB (RMP). Exceptionally the Brigade Commander may decide that an investigation is not necessary and in any such case the decision must be notified to the Commander MND (SE) in writing." *Al Skeini v. Secretary of State for Defence*, High Court of Justice, Queen's Bench Division, Divisional Court, [2004] EWHC 2911 (Admin), 14 December 2004, paragraphs 47-54. [The quote from Lt. Gen. Reith is from his written witness statement].

40. It is especially important to note that the stress and confusion of combat do not justify the rejection or avoidance of the applicable standards; the realities of armed conflict are fully accommodated by the substance of the applicable law and by the established defences to criminal culpability.¹⁹⁹ Soldiers must be trained and held to the standards of international law. Any double standard in punishment is inimical to the rule of law and may implicate the prohibition of discrimination in human rights law.

41. The obligation to investigate is part and parcel of the obligation to ensure the right to life and, thus, entails more than the determination of criminal responsibility. States are also responsible for undertaking the systematic supervision and periodic investigation necessary to ensure that their institutions, policies, and practices ensure the right to life as effectively as possible. Canada's experience in Somalia illustrates the complementary roles of criminal and non-criminal investigation. Canada prosecuted and punished several soldiers for their actions in Somalia, but it also established a Commission of Inquiry to determine the institutional defects that allowed those abuses to occur. By identifying pervasive problems in how rules of engagement were drafted, were disseminated through the chain of command, and were taught to soldiers on the ground, Canada improved its institutional capacity to better ensure the right to life in the future. States must constantly monitor and investigate whether they are effectively ensuring human rights law and adopt all necessary measures to prevent the recurrence of a violation.

42. Finally, it is important to acknowledge the unique characteristics of armed conflict. However, the question of what rules govern the use of lethal force is completely distinct from the question of investigating violations of these rules. While even intentional killing is often permitted in armed conflict, a State cannot determine whether a particular act was lawful without first investigating what occurred. Whether, for example, the deceased was taking part in hostilities is an inherently factual question, requiring factual investigation. Likewise, the Special Rapporteur cannot determine whether a particular incident falls within his mandate without first examining its facts. When he receives information alleging a 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.

43. In the years ahead a greater effort should be made to design indicators and criteria to facilitate an evaluation of decisions as to proportionality and to give a greater objective dimension to such judgement calls. In the course of conflict any such indicators would necessarily be applied by the military personnel involved and would not readily be subject to external scrutiny. Ex post facto monitoring, however, would be possible if belligerents undertook to keep records of their evaluations and to make them public after a certain period of time has elapsed following the end of a given conflict. Such record-keeping would also facilitate prosecution and defence in possible war crimes trials. In

¹⁹⁹ See generally Marco Sassòli, "Le génocide rwandais, la justice militaire suisse et le droit international", Volume 12, *Revue suisse de droit international et de droit européen* (2002) 151, at 175-176.

addition, subsequent disclosure would allow belligerents to counter false accusations and would counter the suggestions made by some critics that international humanitarian law is not respected in war. By so doing it would strengthen the potential willingness of those involved in such decision-making to respect the law.

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, by Asma Jahangir (E/CN.4/1999/39, 6 January 1999, ¶ 48):

Violations of the right to life and non-state actors

48. While the Special Rapporteur recognizes the difficulties that the concerned Governments face in fighting armed insurgent groups, she notes with concern that in some countries Governments have adopted counter-insurgency strategies, often involving excessive and indiscriminate use of force, aimed at targeting those suspected of being members, collaborators or sympathizers of those groups, leading to further violations of the right to life. In this context, the Special Rapporteur wishes to refer to paragraph 1 of general comment 6 of the Human Rights Committee on article 6 of the International Covenant on Civil and Political Rights, in which the Committee confirmed that there can be no derogation from the right to life, not “even in time of public emergency which threatens the life of the nation”. Governments engaged in action against armed groups must ensure that its own forces act in accordance with relevant international standards when carrying out their duties. Governments are also encouraged to devise strategies aimed at good governance through an efficient investigative process and to strengthen judicial capacity for long-term relief from rampant violence.

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, by Bacre Waly Ndiaye (E/CN.4/1997/60, 24 December 1996, ¶ 69):

Violations of the right to life and terrorism

69. The Special Rapporteur expresses his repugnance at terrorist acts and understands the difficulties that the concerned Governments face in controlling violence by terrorist groups. However, he has noted that, in some countries, the Government's reaction to terrorist groups has resulted in counter-insurgency strategies aimed at targeting those suspected of being members, collaborators or sympathizers of those groups. In this context, the Special Rapporteur wishes to emphasize once more that the right to life is absolute and must not be derogated from, even under the most difficult circumstances. Governments must respect the right to life of all persons, including members of armed groups, even when they demonstrate total disregard for the lives of others.