Chapter V
Unlawful Killings during Armed Conflict

A. Introduction

This chapter collects the observations and recommendations of the Special Rapporteurs in relation to violations of the right to life during international and non-international armed conflict.

The chapter focuses on the legal obligations of states and armed non-state actors to respect and protect the right to life during armed conflict, as required by both international human rights law and international humanitarian law (IHL). It includes the Special Rapporteurs' writing on the relationship between human rights and humanitarian law; the principles of distinction, proportionality and precautions in the use of force; the objective application of humanitarian law; and the issue of reciprocity. The chapter addresses legal and policy issues related to specific methods and means of warfare investigated by the Special Rapporteur, including mercy killings, targeted killings, cluster bombs, drones, suicide attacks, human shielding, and perfidy. This chapter also includes analysis of the importance of the fundamental principles of accountability and transparency for killings that take place during armed conflict, as well as the importance of providing reparations to victims.

Both Special Rapporteurs at various times discussed the legal framework concerning the inter-state use of force (*jus ad bello*) as well as the law of armed conflict specifically in relation to new weapons technologies—particularly armed drones and lethal autonomous weapons systems. These discussions are presented separately in Chapter 11.

B. Legal Framework

1. Applicability of humanitarian law and human rights law during armed conflict

During armed conflict, the legal frameworks of both humanitarian law and human rights law apply—the two fields of law are complementary and not mutually exclusive. Thus, the protections guaranteed by human rights law continue to apply during international or non-international armed conflict in full and at all times, unless specific rules of derogation are relevant or because of direct conflict with a specific rule of humanitarian law.

As was discussed above (in Chapter 2) the Special Rapporteurs occasionally had to defend the mandate against opportunistic arguments by some states that the mandate should not consider matters arising during armed conflict.

> ***Report to the Commission on Human Rights (E/CN.4/2005/7, 22 December 2004, ¶¶50-52)***
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> 50. [...] It is now well recognised that the protections offered by international human rights law and international humanitarian law are coextensive, and that both bodies of law apply simultaneously unless there is a conflict between them. In the case of a conflict, the *lex specialis* should be applied but only to the extent that the situation at hand involves a conflict between the principles applicable under the two international legal regimes. The International Court of Justice has explicitly rejected the argument that the International Covenant on Civil and Political Rights was directed only to the protection of human rights in peacetime:
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> > ... [t]he protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 [derogation in a time of national emergency]. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.[1]

1 ICJ, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 8 July 1996, [*Nuclear Weapons*

51. The Court repeated and approved of this passage in its 2004 Advisory Opinion.[2]

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

In September 2006, Special Rapporteur Alston was one of four UN human rights experts to visit Israel and Lebanon after the month-long conflict earlier that year. In their report to the Council, the experts made clear that certain fundamental human rights guarantees (including the protection of the right to life) could not be derogated from during times of emergency:

Report on Mission to Israel and Lebanon (A/HRC/2/7, 2 October 2006, ¶¶15-16) (joint report with the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Representative of the Secretary-General on the human rights of internally displaced persons, and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living)

15. Human rights law does not cease to apply in times of war, except in accordance with precise derogation provisions relating to times of emergency.[3] More specifically, the International Covenant on Civil and Political Rights (ICCPR) and other international human rights instruments allow for the possibility, in circumstances that threaten the life of the nation, to derogate from certain of its guarantees provided that the measures are strictly necessary and are lifted as soon as the public emergency or armed conflict ceases to exist.[4] Certain guarantees, in particular the prohibition of torture and cruel, inhuman or degrading treatment or the right to life, are non-derogable.[5] Lebanon has not declared an emergency in accordance with ICCPR article 4, but it did proclaim a national state of emergency on 12 July 2006. Israel remains in a state of public emergency proclaimed on 19 May 1948, four days after its Declaration of Establishment.[6] Upon ratifying the Covenant, it made a declaration regarding the existence of this state of emergency and noted a reservation to article 9 (liberty and security of person).[7] As regards economic, social and cultural rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR) does not explicitly allow for derogations in time of public emergency, but the guarantees of the Covenant may, in times of armed conflict, be limited in accordance with its articles 4 and 5 and because of the possible scarcity of available resources in the sense of article 2, paragraph 1.[8]

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

Advisory Opinion], para. 25.

2 ICJ, Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, [*Palestinian Wall Advisory Opinion*], para. 105.

3 *Nuclear Weapons Advisory Opinion, supra* note 1, para. 25; *Palestinian Wall Advisory Opinion, supra* note 2, para. 106; Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v. Uganda*), I.C.J. Reports 2005, [*Congo v Uganda*], para. 219 (finding substantive violations of human rights law during an armed conflict). Affirmations to the contrary by Israel are not persuasive. See Human Rights Committee, Concluding Observations on the Second Periodic Report of Israel, CCPR/C/ISR/2001/2, para. 11.

4 ICCPR, art. 4, para. 1; Human Rights Committee, General Comment No. 29 (2001), para. 3.

5 ICCPR, art. 4, para. 2.

6 CCPR/C/ISR/2001/2, *supra* note 3, para. 71.

7 Ibid., para. 12. The Human Rights Committee has expressed concern that the article 9 reservation is broader than is permissible under article 4 of ICCPR, and that Israeli policies related to the state of emergency appear to have unofficially derogated from additional provisions of ICCPR.

8 See Committee on Economic, Social and Cultural Rights, General Comment No. 14 on the right to the highest attainable standard of health (article 12), E/C.12/2000/4, (2000), paras. 28-29.

of both bodies of law. In respect of certain human rights, more specific rules of international humanitarian law may be relevant for the purposes of their interpretation.[9]

As was noted in Chapter 2, the disputes concerning whether questions of IHL fell within the mandate were largely precipitated by responses of the Government of the United States of America to allegations addressed by the Special Rapporteur concerning the conduct of their armed forces. In 2006, Special Rapporteur Alston responded in some detail to the arguments the Government of the United States of America put forward:

Allegation letter sent to the Government of the United States of America (30 November 2006), A/HRC/4/20/Add.1 pp.346-58

[...]

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",[10] a position your Government had advocated in its written pleadings to the Court.[11] Thus, even under the

9 See Human Rights Committee, General Comment No. 31 on the nature of the general legal obligation imposed on States parties to the Covenant (article 2), CCPR/C/21/Rev.1/Add.13, (2004).

10 *Nuclear Weapons Advisory Opinion, supra* note 1, para. 25.

11 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 (20 June 1995) available at: http://www.icjcij.org/icjwww/icases/iunan/iunan_ipleadings/iunan_ipleadings_199506_WriStats_18_USA.pdf..

lex specialis 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.[12]

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.[13] 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.[14] 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."[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.

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), 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".[16] Similarly, in Resolution 2002/36, the Commission "[e]xpresse[d] 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".[17] 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,[18]

12 *Palestinian Wall Advisory Opinion, supra* note 2, para. 106; *Congo v Uganda, supra* note 3, para. 216.
13 *Palestinian Wall Advisory Opinion, supra* note 2, para. 106.
14 *Congo v. Uganda, supra* note 3, paras. 216-20, 345(3).
15 CCPR/C/21/Rev.1/Add.13, *supra* note 9, para. 11.
16 Resolution 2005/34 on extrajudicial, summary, or arbitrary executions, preamble (19 April 2005). See also GA Res. 61/173.
17 Commission on Human Rights, Res. 2002/34, (22 April 2002), para. 13(a).
18 Official Records of the General Assembly, 60th sess., Supp. No. 10 (A/60/10), p. 66, para. 172 ("The view was

the Special Rapporteur on the topic,[19] and the Legal Office of the United Nations Secretariat.[20] 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.[21]

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 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"[22] 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".[23] 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."[24]
- 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".[25] 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".[26] Taking note of this resolution, the ECOSOC "approved … [t]he Commission's … request that the Special Rapporteur … continue to submit periodic reports

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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").

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

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

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

22 Commission on Human Rights, Res. 1992/S-1/1, The situation of human rights in the territory of the former Yugoslavia, (14 August 1992), para. 1.

23 Ibid., para. 9.

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

25 Commission on Human Rights, 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), (9 March 1994), para. 4.

26 Ibid. at para. 7.

… on the implementation of Commission resolution 1994/72".[27] 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".[28] 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".[29] 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".[30] ECOSOC, in special session, explicitly "endorsed resolution S-3/1 of 25 May 1994, adopted by the Commission on Human Rights".[31]
- 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".[32] 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".[33]

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.[34]

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.[35] 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

27 ECOSOC Res. 1994/262 (22 July 1994) (emphasis added).
28 Ibid (emphasis added).
29 Commission on Human Rights, Res. S-3/1, The Situation of human rights in Rwanda, (25 May 1994), para. 1.
30 Ibid.
31 ECOSOC Decision 1994/223 (6 June 1994).
32 Commission on Human Rights, Res. 1996/68, Human rights situation in southern Lebanon and West Bekaa, (23 April 1996), para. 3.
33 ECOSOC Decision 1996/274 (23 July 1996).
34 GA Res. 60/251 (3 April 2006).
35 Commission on Human Rights, Res. 1982/29, para. 2; ECOSOC Res. 1982/35, para. 2.

to be implemented, neither may any single government do so. This power is held by the Council and was previously held by the Commission, which reviewed and accepted the interpretations provided by successive mandate-holders. The cases below provide illustrative examples:

- In the very first report under the mandate in 1983, Mr. S. Amos Wako observed that summary and arbitrary executions frequently occur during armed conflicts and that, therefore, international humanitarian law formed an important element of the mandate's legal framework. With that in mind, he included a substantive section on "Killings in war, armed conflict, and states of emergency" under the heading "International legal standards".[36] 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."[37] The report was accepted in its entirety by the Commission.[38]
- 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.[39] The Geneva Conventions appear as item three of that fourteen point list. This report was accepted in its entirety by the Commission.[40] Moreover, the Commission explicitly "welcome[d] his recommendations with a view to eliminating extrajudicial, summary, or arbitrary executions".[41] These recommendations contained recommendations on extrajudicial executions during armed conflict.[42] 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".[43] 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

36 Report by the Special Rapporteur, Mr. S. Amos Wako, E/CN.4/1983/16, 31 January 1983, paras. 29-39.
37 Ibid. at pp. 8-9, paras. 33-34.
38 Commission on Human Rights, Res. 1983/36, (8 Mar. 1983), para. 3.
39 Report by the Special Rapporteur, Mr. S. Amos Wako, E/CN.4/1992/30, 31 January 1992, p. 176.
40 Commission on Human Rights, Res. 1992/72, (5 March 1992), para. 3.
41 Ibid.
42 E/CN.4/1992/30, *supra* note 39, paras. 649(f), 651(b).
43 Report by the Special Rapporteur, Mr. Bacre Waly Ndiaye, E/CN.4/1993/46, 23 December 1992, paras. 60-61.

protection of the civilian population against the dangers arising from military operations."[44] This report was accepted in its entirety by the Commission.[45]

- In the first report of Ms. Asma Jahangir as Special Rapporteur in 1999, she adopted the legal framework elaborated by Mr. Ndiaye.[46] This report was accepted in its entirety by the Commission in its Resolution 1999/35 on extrajudicial, summary, or arbitrary executions.[47]
- 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."[48] The Commission accepted this report in its Resolution 2005/34 on extrajudicial, summary, or arbitrary executions.[49] That resolution also explicitly "[a]cknowledg[ed]… that international human rights law and international humanitarian law are complementary and not mutually exclusive".[50] This endorsement of the complementarity of human rights and international humanitarian law by the Commission – the body that determined my mandate – is unequivocal.

I note with respect that the United States did not object to Mr. Wako's characterization of the legal framework when first published, nor did the United States ever object to the inclusion of international humanitarian law instruments in the legal framework supporting the mandate until 2003, two decades after international humanitarian law was first applied under the mandate.[51] 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

44 Ibid., para. 60. Mr. Ndiaye repeatedly stated this interpretation in his report to the Commission each subsequent year. See Report by the Special Rapporteur, Mr. Bacre Waly Ndiaye, E/CN.4/1994/7, 7 December 1993, para. 10(l); Report by the Special Rapporteur, Mr. Bacre Waly Ndiaye, E/CN.4/1995/61, 14 December 1994, paras. 7(d), 394-96; Report by the Special Rapporteur, Mr. Bacre Waly Ndiaye, E/CN.4/1996/4, 25 January 1996, paras. 10(f), 587-89; Report by the Special Rapporteur, Mr. Bacre Waly Ndiaye, E/CN.4/1997/60, 24 December 1996, paras. 38-41; Report of the Special Rapporteur, Mr. Bacre Waly Ndiaye, E/CN.4/1998/68, 23 December 1997, paras. 42-43, 126-127.

45 Commission on Human Rights, Res. 1993/71, para. 4 (10 March 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").

46 Report of the Special Rapporteur, Ms. Asma Jahangir, E/CN.4/1999/39, 6 January 1999, para. 7. Ms. Jahangir repeatedly stated this interpretation in each subsequent year. See Report of the Special Rapporteur, Ms. Asma Jahangir, E/CN.4/2000/3, 25 January 2000, paras. 6(f), 30, 103-105; Report of the Special Rapporteur, Ms. Asma Jahangir, E/CN.4/2001/9, 11 January 2001, paras. 7(b), 51-53; Report of the Special Rapporteur, Ms. Asma Jahangir, E/CN.4/2002/74, 9 January 2002, paras. 8(b), 66-71; Report of the Special Rapporteur, Ms. Asma Jahangir, E/CN.4/2003/3, 13 January 2003, paras. 8(b), 35-44; Report of the Special Rapporteur, Ms. Asma Jahangir, E/CN.4/2004/7, 22 December 2003, paras. 27-29.

47 Commission on Human Rights, Res. 1999/35, (26 April 1999), para. 8.

48 Report of the Special Rapporteur, Mr. Philip Alston, E/CN.4/2005/7, 22 December 2004, para. 45.

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

50 Ibid., Preamble.

51 Letter dated 14 April 2003 from the Chief of Section, Political and Specialised 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).

in the debate on the resolution, but none concerning this language.[52] In the vote on the resolution, your Government chose to abstain.[53]

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.[54] 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 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.

52 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. E/CN.4/2005/SR.56, p. 16, para. 88-89 (16 Feb. 2006).

53 Commission on Human Rights, Report of the Sixty-First Session, 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', *British Yearbook of International Law* 176 (1957) p. 201.

54 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).

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.[55] 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.[56]

A State which receives a communication from the Special Rapporteur requesting information may, of course, express its opinion as to whether the given situation falls within the mandate, but it also has a duty to provide the requested information so that the Special Rapporteur can himself make this determination and communicate it to the Council. Any failure to do so is directly contrary to the repeated requests by the Commission to States to "cooperate with and assist the Special Rapporteur so that her or his mandate may be carried out effectively".[57]

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."[58] 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.[59] The report of his mission is widely heralded for sounding the alarm bells to the world of the impending genocide in that country.[60]
- 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.[61] She sent sixteen allegations to Pakistan.[62]

55 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.

56 Report of the Special Rapporteur, Philip Alston, E/CN.4/2006/53, 8 March 2006, para. 42.

57 See, e.g., Commission on Human Rights, Res. 2004/37, para. 14 (19 April 2004).

58 Report of the Special Rapporteur, Mr. S. Amos Wako, E/CN.4/1986/21, 7 February 1986, para. 150.

59 Report by the Special Rapporteur, Mr. Bacre W. Ndiaye, on his mission to Rwanda from 8 to 17 1993, E/CN.4/1994/7/Add.1, 11 August 1993.

60 See Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda (15 Dec. 1999).

61 Report of the Special Rapporteur, Ms. Asma Jahangir, Summary of cases transmitted to Government and replies received, E/CN.4/2000/3/Add.1, 2 February 2000, para. 225.

62 Ibid., para. 348.

- 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.[63]
- 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.[64]
- Israel/Occupied Palestinian Territories – international humanitarian law also applies to situations of occupation.[65] 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.[66] 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.[67]

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.

In his 2010 report to the Human Rights Council, Special Rapporteur Alston made clear the coextensive and complementary relationship between the two bodies of law.

Report to the Human Rights Council (A/HRC/14/24, 24 May 2010, ¶39)

39. Much of the mandate's work on killings in armed conflict has sought to clarify the relationship between human rights and humanitarian law, starting with the basis for the mandate's coverage and investigation of armed conflict killings. In 2004 (E/CN.4/2005/7, paras. 5-11 and 45) and 2007 (A/HRC/4/20, paras. 18 and 20-24) I showed that, from the very beginning of the mandate, Special Rapporteurs have reviewed the legality of killings under international humanitarian law, and that the mandate covers, without exception, violations of the right to life in international and non-international armed conflicts. These analyses, as well as reports on Afghanistan, Israel and Lebanon, and Sri Lanka, the coextensive protections of, and complementary relationship between, human rights and humanitarian law.[68]

63 Report of the Special Rapporteur, Ms. Asma Jahangir, Country situations, E/CN.4/1999/39/Add.1, 6 January 1999 para. 77; Report of the Special Rapporteur, Ms. Asma Jahangir, Summary of cases transmitted to Governments and replies received, E/CN.4/2001/9/Add.1, 17 January 2001, para. 178.

64 Report of the Special Rapporteur, Ms. Asma Jahangir, Mission to the Democratic Republic of the Congo, E/CN.4/2003/3/Add.3, 4 Nov. 2002.

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

66 Report of the Special Rapporteur, Philip Alston, Communications to and from governments, E/CN.4/2006/53/Add.1, 27 March 2006, pp. 125-136.

67 Report of the Special Rapporteur, Philip Alston, Summary of cases transmitted to Governments and replies received, E/CN.4/2005/7/Add.1, 17 March 2005, paras. 357-358.

68 E/CN.4/2005/7, *supra* note 48, paras. 48-53; Report of the Special Rapporteur, Philip Alston, A/HRC/4/20, 29 January 2007, para. 19; Joint Report of the Special Rapporteur, Philip Alston (with the Special Rapporteur

In his 2013 report to the General Assembly on the subject of armed drones, Special Rapporteur Heyns added detail on how human rights law is applied. The extraterritorial application of human rights law to uses of force in situations not amounting to non-international armed conflicts will be further discussed in Chapter 11.

Report to the General Assembly (A/68/182, 13 September 2013, ¶¶40-41)

Applicability of international human rights law in armed conflicts

40. It is now a well-established principle of international law that international human rights law continues to apply during armed conflict, as a complement to international humanitarian law.[ ] The right to life as provided under international human rights law therefore continues to apply in times of armed conflict, but the prohibition against arbitrariness is, according to the International Court of Justice, interpreted in terms of international humanitarian law.[69]

41. The applicability of human rights obligations during armed conflict is confirmed by the presence of provisions for derogation in many human rights instruments, permitting States parties to derogate in times of war or public emergency from some of their human rights obligations arising under those treaties.[70] Absent derogation, human rights obligations as a general rule continue to apply in times of armed conflict. This applies even more so to the right to life, which is non-derogable under most treaties.[71]

2. Basic humanitarian law principles protecting the right to life: distinction, proportionality and precautions

In his 2013 report to the General Assembly, Special Rapporteur Heyns discussed the requirements of distinction and proportionality under IHL. Although the extracts refer specifically to drone strikes (which are examined in Chapter 11), the general principles he enumerated also apply to all methods of warfare.

Report to the General Assembly (A/68/382, 13 September 2013, ¶¶67-72, 74-76)

(e) Requirement of distinction

67. Once it has been established that an armed conflict exists, and thus that the rules of international humanitarian law apply in the specific case, the next question concerns who may be targeted. Civilians may not be made the object of an attack unless, and only for such time as, they take a direct part in hostilities.[72] Furthermore, where there is doubt as to whether a person is a civilian or is taking a direct part in hostilities, civilian status must be presumed.[73]

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on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Representative of the Secretary-General on the human rights of internally displaced persons, and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living) on Mission to Israel and Lebanon, A/HRC/2/7, 2 October 2006 paras. 15-16; Report of the Special Rapporteur, Philip Alston, Mission to Sri Lanka, E/CN.4/2006/53/Add.5, 27 March 2006, paras. 24-33; and Report of the Special Rapporteur, Philip Alston, Mission to Afghanistan, A/HRC/11/2/Add.4, 6 May 2009.

69 See *Nuclear Weapons Advisory Opinion supra* note 1, paras. 24-25; *Palestinian Wall Advisory Opinion, supra* note 2, para. 106.

70 See, for example, International Covenant on Civil and Political Rights, art. 4; European Convention on Human Rights, art. 15; American Convention on Human Rights, art. 27.

71 The European Convention on Human Rights permits derogations from the right to life, but only within the limits of lawful acts of war.

72 Additional Protocol II to the Geneva Conventions (1977), art. 13 (2) and (3); Additional Protocol I to the Geneva Convention (1977), art. 51.

73 Additional Protocol II, *supra* note 72, art. 13 (2) and (3); Additional Protocol I, *supra* note 72, art. 50 (1).

68. In its Interpretive Guidance on Direct Participation in Hostilities, ICRC has taken the view that civilians protected from direct attack in a non-international armed conflict are all those who are neither members of a State's armed forces nor members of organised armed groups. The latter are then defined as "individuals whose continuous function it is to take a direct part in hostilities ('continuous combat function')".[74] Thus, a drone strike carried out against an individual with a continuous combat function in an organised armed group with which the attacking State is engaged in a non-international armed conflict will be consistent with the principle of distinction in international humanitarian law, provided that the other rules of international humanitarian law are also observed. It can never be sufficient to claim that someone targeted is a member of the opposing party; he or she must at least be a member of the armed forces of that group.

69. In addition to targeting on the basis of continuous combat function, individual civilians will lose their protection from direct attack based on conduct when, and only for such time as, they engage in specific acts of direct participation. According to ICRC, there is a three-stage test for determining when a civilian is directly participating in hostilities and thus may be targeted:[75] the actions of the civilian must reach a certain threshold of harm; there must be direct causation; and there must be a belligerent nexus to the conflict.[76]

70. The ICRC test may rightly be criticised because of its lack of an authoritative basis in treaty law, but it has the advantage that the question of who is a legitimate target is answered by reference to the performance of activity that directly causes harm to belligerents and/or civilians. This provides some objective basis for determining who may be targeted. It is noteworthy that the ICRC approach to the concepts of "members of organised armed groups" and "direct participation in hostilities" has been followed in recent State practice concerning drone attacks.[77]

71. International humanitarian law provides that all feasible precautions must be taken in determining whether a person has lost protection from attack as described above.[78] This obligation requires parties to the conflict to use all information that is reasonably available in making the determination about whether a person is a lawful target. To the extent that drones enable more precise targeting and have a greater capacity for extended surveillance than other methods of force projection, such as other aeroplanes, there is also a greater concomitant responsibility to take precautions.

72. References are sometimes made to signature strikes, whereby people may be targeted based on their location or appearance.[79] This is not a concept known to international humanitarian law and could lead to confusion. The legality of such strikes depends on what the signatures are. In some cases, people may be targeted without their identities being known, based on insignia or conduct. The legal test remains whether there is sufficient evidence that a person is targetable under international humanitarian law, as described above, by virtue of having a continuous combat function or directly participating in hostilities,[80] and if there is doubt States must refrain from

74 Nils Melzer (ICRC), Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (Geneva, ICRC, 2009), p. 27.

75 Ibid.

76 Ibid., p. 46.

77 See *Drohneneinsatz vom 4. Oktober 2010 in Mir Ali/Pakistan*, Verfügung des Generalbundesanwalts vom 20. Juni 2013 [Order of the German Federal Prosecutor of 20 June 2013] 3 BJs 7/12-4 available at: www.generalbundesanwalt.de/docs/drohneneinsatz_vom_04oktober2010_mir_ali_pakistan.pdf (in German).

78 ICRC, Interpretive Guidance, *supra* note 74, p. 74.

79 Kevin Jon Heller, "'One hell of a killing machine': signature strikes and international law", *Journal of International Criminal Justice*, 11:1 (2012), pp. 8-20.

80 Ibid. The author distinguishes between "legally adequate" and "legally inadequate" signatures.

targeting.[81] Insofar as the term "signature strikes" refers to targeting without sufficient information to make the necessary determination, it is clearly unlawful.

[...]

74. The public statements of States that they conduct threat assessments of individuals before targeting them in armed conflict should be welcomed and implementation of these statements should be urged, because this offers a higher level of protection than is required by international humanitarian law in respect of legitimate targets.[82] The proviso is that the situation must be correctly classified as an armed conflict; if the requirements posed for a non-international armed conflict are not met, a threat assessment is not enough, and the more rigorous conditions of self-defence under international human rights law must be met.

(f) Requirement of proportionality

75. Drones come from the sky, but leave the heavy footprint of war on the communities that they target.[83] The claims that drones are more precise in targeting cannot be accepted uncritically, not least because terms such as "terrorist" or "militant" are sometimes used to describe people who are in truth protected civilians. The principle of proportionality protects those civilians who are not directly targeted but nevertheless may bear the brunt of the force used. According to this principle, it is prohibited to carry out an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.[84] By implication, where it is not excessive, such losses are regarded as incidental ("collateral") damage and are not prohibited, provided that international humanitarian law rules have been respected. The risk to civilians may be exacerbated where drone strikes are carried out far away from areas of actual combat operations, especially in densely populated areas, and unsuspecting civilians may suddenly find themselves in the line of fire.

76. Avoiding collateral damage requires taking all feasible precautions to prevent or minimise incidental loss of civilian lives and information-gathering relating to possible civilian casualties and military gains.[85]

IHL's core principles protecting the right to life of civilians and limiting the force that may be employed during an attack—including the principles of distinction, proportionality and precautions—are further elaborated in several of the Special Rapporteurs' country reports.

81 Additional Protocol I, *supra* note 72, art. 50 (1). See also ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Commentary on Additional Protocol II, para. 4789 and ICRC, Interpretive Guidance, *supra* note 74, recommendation VIII.

82 See www.theguardian.com/world/2013/may/23/obama-drones-guantanamo-speech-text.

83 International Human Rights and Conflict Resolution Clinic at Stanford Law School and Global Justice Clinic at New York University School of Law, "Living under drones: death, injury, and trauma to civilians from US drone practices in Pakistan" (2012), available from http://livingunderdrones.org/wp-content/uploads/2012/10/Stanford-NYU-LIVING-UNDERDRONES.pdf.

84 Additional Protocol I, *supra* note 72, art. 51 (5) (b).

85 Ibid., art. 57.

Report on Mission to Israel and Lebanon (A/HRC/2/7, 2 October 2006, ¶¶24-30) (joint report with the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Representative of the Secretary-General on the human rights of internally displaced persons, and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living)

24. Of the [international customary rules] rules applicable to attackers, the most relevant relate to the principle of distinction, the principle of proportionality, and the obligation to take precautionary measures. These obligations are cumulative: an attack must comply with all of the rules in order to be lawful.

25. First, under the principle of distinction, the parties to a conflict must at all times distinguish between civilians and combatants,[86] 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.[87] The only circumstance in which civilians may be targeted is for such time as they take a direct part in hostilities.[88] Thus, attacks on civilian objects[89] are unlawful unless at the time of the attack they were used for military purposes and their destruction offered a definite military advantage.

26. Indiscriminate attacks are similarly prohibited.[90] They are those which (i) are not directed at a specific military objective; (ii) employ a method or means of combat which cannot be directed at a specific military objective; or (iii) employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.[91] Attacks by bombardment, including with rockets, which treat as a single military objective a number of clearly separated and distinct military objectives located in an urban area or rural village are prohibited.[92] The prohibition of indiscriminate attacks must not only determine the strategy adopted for a particular military operation but also limit the use of certain weapons in situations where the civilian population will be affected.

27. Second, under the principle of proportionality, attacks on legitimate military objectives which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, are prohibited.[93]

28. Third, an attacker must take all feasible precautions to avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects.[94] A number of specific precautionary measures are prescribed by humanitarian law in relation to the planning

86 Jean-Marie Henckaerts and Louise Doswald-Beck (eds.) [ICRC], *Customary International Humanitarian Law*, (Cambridge University Press, 2005) [ICRC Study of Customary Law], pp. 3-8 (Rule 1), 25-36 (Rules 7-10). This study was prepared upon recommendation of the twenty-sixth International Conference of the Red Cross and Red Crescent (December 1995) and is based on an extensive analysis of State practice (e.g. military manuals) and documents expressing *opinion juris*.
87 Ibid., pp. 25-32 (Rules 7-8).
88 Ibid., pp. 19-24 (Rule 6).
89 Ibid., pp. 32-34 (Rule 9).
90 Ibid., p. 37 (Rule 11).
91 Ibid., pp. 40-43 (Rule 12).
92 Ibid., pp. 43-45 (Rule 13).
93 Ibid., p. 48 (Rule 14).
94 Ibid., p. 51 (Rule 15).

and conduct of attacks.[95] In addition, an attacker is required to give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit.[96]

29. International humanitarian law also imposes obligations on defenders. The use of human shields is prohibited.[97] Violation of this rule may be understood to require the defender's specific intent to use civilians to immunise otherwise legitimate military objectives from lawful attack.[98] In addition to this prohibition, the defender also has affirmative obligations to protect civilians by keeping them away from military targets.[99]

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

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

With respect to the proportionality requirement, the "expected" resulting "incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof" must not be "excessive in relation to the concrete and direct military advantage anticipated" (ICRC Study, Rule 14). With respect to the required precautions in carrying out an attack, the general rule is that "constant care" and "[a]ll feasible precautions" must be taken "to avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects" (ICRC Study, Rule 15). This general rule is supplemented by a number of more specific rules. These include rules requiring that a party to the conflict make the "choice of means and methods of warfare" such as to minimise such harm to civilians (ICRC Study, Rule 17), do "everything feasible to assess" whether the proportionality requirement will be satisfied (ICRC Study, Rule 18), and "give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit" (ICRC Study, Rule 20). Furthermore, even as an operation is underway, there is an obligation to do "everything feasible to cancel or suspend an attack if it becomes apparent" that the target is not a military objective or that the proportionality requirement would not be satisfied (ICRC Study, Rule 19). On the issue of verifying that the target is a legitimate military objective, the rule is that each "party to the conflict must do everything feasible to verify that targets are military objectives" (ICRC study, Rule 16).

In order for the duty to take adequate precautions to be meaningful, and indeed for the other protections to exist in reality, they must correspond and interact with the duty to investigate. The full extent of the duty to investigate during armed conflict (and particularly during the conduct of hostilities) is discussed further below in Chapter 9. The revised Minnesota Protocol underlines the importance of assessing targeting as part of a post-operation assessment.

95 Ibid., pp. 51-67 (Rules 15-21).
96 Ibid., pp. 62-65 (Rule 20).
97 Ibid., pp. 337-340 (Rule 97).
98 Ibid., p 340 (Rule 97).
99 Ibid., pp. 68-76 (Rules 22-24).

Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (2017, ¶20, 21)

20. [...] Certain situations, such as armed conflict, may pose practical challenges for the application of some aspects of the Protocol's guidance.[100] This is particularly the case with regard to the obligation on a State, as opposed to another actor, to investigate deaths linked to armed conflict when they occur on territory the State does not control. Where context-specific constraints prevent compliance with any part of the guidance in this Protocol, the constraints and reasons for non-compliance should be recorded and publicly explained.

21. Where, during the conduct of hostilities, it appears that casualties have resulted from an attack, a post-operation assessment should be conducted to establish the facts, including the accuracy of the targeting.[101] Where there are reasonable grounds to suspect that a war crime was committed, the State must conduct a full investigation and prosecute those who are responsible.[102] Where any death is suspected or alleged to have resulted from a violation of IHL that would not amount to a war crime, and where an investigation ("official inquiry") into the death is not specifically required under IHL, at a minimum further inquiry is necessary. In any event, where evidence of unlawful conduct is identified, a full investigation should be conducted.

3. Criteria for the applicability of international humanitarian law

International humanitarian law applies whenever an international or non-international armed conflict exists. The existence of an armed conflict is determined according to objective criteria, and not according to the subjective views or pronouncements of States or other actors. In his 2010 study of targeted killings, Special Rapporteur Alston analysed the criteria for the existence of an armed conflict, the threshold tests for various forms of armed conflict, and the importance of their objective application.

Study on Targeted Killings (A/HRC/14/24/Add.6, 28 May 2010, ¶¶46-52, 56)

46. Whether an armed conflict exists is a question that must be answered with reference to objective criteria, which depend on the facts on the ground, and not only on the subjective declarations either of States (which can often be influenced by political considerations rather than legal ones) or, if applicable, of non-state actors, including alleged terrorists (which may also have political reasons for seeking recognition as a belligerent party). Traditionally, States have refused to acknowledge the existence of an armed conflict with non-state groups. The reasons include not wanting to accord such groups recognition as "belligerents" or "warriors", and instead being able to insist that they remain common criminals subject to domestic law. States also do not want to appear "weak" by acknowledging that they are unable to stop large scale violence, and/or that rebels or insurgent groups have control over State territory. In recent times, for example, the United Kingdom (with respect to Northern Ireland) and Russia (with respect to Chechnya) have refused to acknowledge the existence of internal armed conflicts.

100 See The Public Commission to Examine the Maritime Incident of 31 May 2010, Second Report: Turkel Commission, "Israel's mechanisms for examining and investigating complaints and claims of violations of the laws of armed conflict according to international law", February 2013 [hereafter, Turkel II], paras. 48–50, pp. 102–03.

101 See ibid.

102 For a discussion of the duty to investigate violations of international humanitarian law (IHL) see ICRC Study of Customary Law, *supra* note 86, Rule 158 (Prosecution of War Crimes): "States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory… They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects." See also, e.g., Report of the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Ben Emmerson, A/68/389, 18 September 2013, para. 42.

47. On the other hand, both the US and Israel have invoked the existence of an armed conflict against alleged terrorists ("non-state armed groups"). The appeal is obvious: the IHL applicable in armed conflict arguably has more permissive rules for killing than does human rights law or a State's domestic law, and generally provides immunity to State armed forces. Because the law of armed conflict has fewer due process safeguards, States also see a benefit to avoiding compliance with the more onerous requirements for capture, arrest, detention or extradition of an alleged terrorist in another State. IHL is not, in fact, more permissive than human rights law because of the strict IHL requirement that lethal force be necessary. But labelling a situation as an armed conflict might also serve to expand executive power both as a matter of domestic law and in terms of public support.

48. Although the appeal of an armed conflict paradigm to address terrorism is obvious, so too is the significant potential for abuse. Internal unrest as a result of insurgency or other violence by non-state armed groups, and even terrorism, are common in many parts of the world. If States unilaterally extend the law of armed conflict to situations that are essentially matters of law enforcement that must, under international law, be dealt with under the framework of human rights, they are not only effectively declaring war against a particular group, but eviscerating key and necessary distinctions between international law frameworks that restricts States' ability to kill arbitrarily.

49. The IHL applicable to non-international armed conflict is not as well-developed as that applicable to international armed conflict. Since 11 September 2001, this fact has often been cited either to criticise IHL in general or as a justification for innovative interpretations which go well beyond generally accepted approaches. It is true that non international armed conflict rules would benefit from development, but the rules as they currently exist offer more than sufficient guidance to the existence and scope of an armed conflict. The key is for States to approach them with good faith intent to apply the rules as they exist and have been interpreted by international bodies, rather than to seek ever expanding flexibility.

50. There are essentially four possibilities under international law for the existence of an armed conflict:

i. The conflict is an international armed conflict.
ii. The conflict is a non-international armed conflict meeting the threshold of Common Article 3 to the Geneva Conventions.
iii. The conflict is a non-international armed conflict meeting the threshold of both Common Article 3 to the Geneva Conventions and Additional Protocol II to the Geneva Conventions
iv. The level of violence does not rise to the level of an armed conflict, but is instead isolated and sporadic and human rights law determines the legality of the use of lethal force.

51. The test for the existence of an *international* armed conflict is clear under IHL: "Any difference arising between two States and leading to the intervention of armed forces" qualifies as armed conflict, regardless of its intensity, duration or scale.[103] The IHL of international armed conflict applies also to "all cases of total or partial occupation of the territory of a High Contracting Party"

103 Geneva Conventions I to IV, Common Art. 2(1); *ICRC Commentary on the First Geneva Convention of 1949* (Jean S. Pictet ed., 1952); International Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Duško Tadić*, Case No. IT-94-I-AR72, decision on defence appeal on jurisdiction of 2 October 1995, para. 70.

to the Geneva Conventions.[104] Following these criteria, an international armed conflict cannot exist between a State and a non-state group.[105]

52. The tests for the existence of a *non-international* armed conflict are not as categorical as those for international armed conflict. This recognises the fact that there may be various types of non-international armed conflicts. The applicable test may also depend on whether a State is party to Additional Protocol II to the Geneva Conventions.[106] Under treaty and customary international law, the elements which would point to the existence of a non-international armed conflict against a non-state armed group are:

(i) The non-state armed group must be identifiable as such, based on criteria that are objective and verifiable. This is necessary for IHL to apply meaningfully, and so that States may comply with their obligation to distinguish between lawful targets and civilians.[107] The criteria include:[108]

- Minimal level of organization of the group such that armed forces are able to identify an adversary (GC Art. 3; AP II).
- Capability of the group to apply the Geneva Conventions (i.e., adequate command structure, and separation of military and political command) (GC Art. 3; AP II).
- Engagement of the group in collective, armed, anti-government action (GC Art. 3).
- For a conflict involving a State, the State uses its regular military forces against the group (GC Art. 3).
- Admission of the conflict against the group to the agenda of the UN Security Council or the General Assembly (GC Art. 3).

(ii) There must be a minimal threshold of intensity and duration. The threshold of violence is higher than required for the existence of an international armed conflict. To meet the minimum threshold, violence must be:[109]

- "Beyond the level of intensity of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature" (AP II).
- "[P]rotracted armed violence" among non-state armed groups or between a non-state armed group and a State;[110]
- If an isolated incident, the incident itself should be of a high degree of intensity, with a high level of organization on the part of the non-state armed group;[111]

(iii) The territorial confines can be:

- Restricted to the territory of a State and between the State's own armed forces and the non-state group (AP II); or

104 Geneva Conventions I to IV, Common Art. 2(2); art. 1(4).

105 Thus, it was legally incorrect for the US Bush Administration to claim that its right to conduct targeted killings anywhere in the world was part of its "war on terror", which it classified as an "international armed conflict" against al Qaeda. Communication of the US regarding the Killing of Harithi al-Yemeni, 4 May 2006, Report of the Special Rapporteur, Philip Alston, Communications to and from governments, A/HRC/4/20/Add.1, 12 March 2007, p. 344.

106 Additional Protocol II, *supra* note 72, Art. 1(1).

107 Lindsay Moir, *The Law of Internal Armed Conflict*, 2002.

108 *ICRC Commentary on the First Geneva Convention of 1949, supra* note 103, 49-50 (Common Article 3); ICTY, Delalic Judgment, 16 Nov. 1998, para. 184; ICTR, *Prosecutor v. Musema*, case No. ICTR-96-13-A, Judgment, 2 7 January 2000, para. 248; IACHR, *Juan Carlos Abella v. Argentina*, Case 11.137, Report No. 55/97 [sometimes known as the Tablada case] 18 November 1997, para. 152.

109 The tests listed are independent of one another and for each threshold a different set of IHL rules might apply, but such distinctions are not crucial to the present analysis.

110 *Prosecutor v. Tadić, supra* note 103, para. 70

111 IACHR, *Juan Carlos Abella v. Argentina*, Report No. 55/97, OEA/Ser.L./V./II.95, doc. 7 rev. 271 (1997) para. 151.

- A transnational conflict, i.e., one that crosses State borders (GC Art. 3).[112] This does not mean, however, that there is no territorial nexus requirement.

56. To ignore these minimum requirements, as well as the object and purpose of IHL, would be to undermine IHL safeguards against the use of violence against groups that are not the equivalent of an organised armed group capable of being a party to a conflict – whether because it lacks organization, the ability to engage in armed attacks, or because it does not have a connection or belligerent nexus to actual hostilities. … To expand the notion of non-international armed conflict to groups that are essentially drug cartels, criminal gangs or other groups that should be dealt with under the law enforcement framework would be to do deep damage to the IHL and human rights frameworks.

Special Rapporteur Alston also examined the objective application of international humanitarian law in his report on his 2009 mission to Colombia, where the existence of an armed conflict had been controversial.

Report on Mission to Colombia (A/HRC/14/24/Add.2, 31 March 2010, ¶¶6-9)

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

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

8. As a matter of law, application of IHL is not discretionary; it applies when the defining objective elements of a [in this case] non-international armed conflict are met. Common article 3 of the Geneva Conventions, therefore, would apply when internal hostilities in Colombia reach a minimum level of intensity and duration and when the opposing armed group is organised and itself has the capacity to engage in military operations. Protocol II to the Geneva Conventions, which Colombia ratified in 1996, supplements common article 3; it applies when opposing forces are under a responsible command, exercise enough control over territory to mount sustained and coordinated military actions and are able to implement Protocol II. This will often mean that IHL will apply in the context of military operations against the FARC or ELN.

9. Whether or not IHL applies in the context of actions against other armed non-State actors will also depend on whether the objective criteria are met. Generally, operations against such groups [such as criminal gangs, and drug traffickers] should be undertaken by the police, in accordance with human rights law.

Special Rapporteur Heyns returned in his 2013 report to the General Assembly to the subject of the criteria for establishing the existence of a (non-international) armed conflict:

112 Common Article 3 is universally applicable and not limited to internal conflicts. *Nuclear Weapons Advisory Opinion, supra* note 1, paras. 79-82.

> ***Report to the General Assembly (A/68/382, 13 September 2013, ¶¶55-58)***
>
> ***Criteria for the existence of a non-international armed conflict***
>
> 55. For violence to amount to a non-international armed conflict, the threshold requirements are that it must be protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.[113] Two cumulative criteria must thus be satisfied for a particular situation to be classified as a non-international armed conflict to which international humanitarian law would apply: the intensity of the conflict and the organization of the parties to the conflict.[114]
>
> 56. An armed group will be considered to constitute a party to a non-international armed conflict only if it is sufficiently organised. International jurisprudence has determined the relevant indicative criteria, which include the existence of a command structure, of headquarters and of a group's ability to plan and carry out military operations.[115]
>
> 57. For a conflict to qualify as a non-international armed conflict, armed violence must also reach a certain threshold of intensity that is higher than that of internal disturbances and tensions.[116] The armed violence should not be sporadic or isolated but protracted.[117] The requirement of protracted violence, however, refers more to the intensity of the armed violence than its duration.[118] Just as the condition of organization, the intensity of the armed violence is an issue that is determined on a case-by-case basis.[119]
>
> 58. In the context of drones, these requirements mean that international humanitarian law will not apply where the threshold levels of violence or organization are not present, leaving international human rights law principles to govern the situation alone.

4. Targeted killings and "Capture rather than kill"

Whether states have a legal obligation to capture rather than kill combatants or civilians directly participating in hostilities is a contentious issue and one that has received significant attention from the mandate. The principal context in which the question of capture versus kill arises is so-called "targeted killings," which the Special Rapporteurs have had occasion to address many times.

In 2010, Special Rapporteur Alston reported specifically on the issue of targeted killings to the Human Rights Council. According to that report, the applicable legal standards depend on the context in which the targeted killing takes place: (1) during armed conflict; (2) outside armed conflict; or (3) in relation to the interstate use of force. The second context—outside armed conflict—encompasses law enforcement operations and is addressed in more detail in Chapter 3.

113 *Prosecutor v. Tadić, supra* note 103, para. 70.
114 ICTY, *Prosecutor v. Duško Tadić*, case No. IT-94-1-T, trial judgment of 7 May 1997, para. 562.
115 ICTY, *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, case No. IT-03-66-T, judgement of 30 November 2005, paras. 94-134; International Criminal Court, *Prosecutor v. Thomas Lubanga Dyilo*, case No. ICC-01/04-01/06-2842, judgement of 14 March 2012, paras. 536-538.
116 Additional Protocol II, *supra* note 72, art. 1 (2); *Prosecutor v. Musema, supra* note 108, para. 248.
117 *Prosecutor v. Musema, supra* note 108, para. 248.
118 ICTY, *Prosecutor v. Haradinaj and others*, case No. IT-04-84-T, Trial Chamber judgement of 3 April 2008, para. 49; *Prosecutor v. Limaj and others, supra* note 115, para. 90.
119 *Prosecutor v. Musema, supra* note 108, para. 249.

Study on Targeted Killings (A/HRC/14/24/Add.6, 28 May 2010, ¶¶28-30, 34-36)

A. The applicable legal frameworks and basic rules

28. Whether or not a specific targeted killing is legal depends on the context in which it is conducted: whether in armed conflict, outside armed conflict, or in relation to the interstate use of force.[120] The basic legal rules applicable to targeted killings in each of these contexts are laid out briefly below.

In the context of armed conflict

29. *The legal framework:* Both IHL and human rights law apply in the context of armed conflict; whether a particular killing is legal is determined by the applicable *lex specialis*.[121] To the extent that IHL does not provide a rule, or the rule is unclear and its meaning cannot be ascertained from the guidance offered by IHL principles, it is appropriate to draw guidance from human rights law.[122]

30. *Under the rules of IHL:* Targeted killing is only lawful when the target is a "combatant" or "fighter"[123] or, in the case of a civilian, only for such time as the person "directly participates in hostilities."[124] In addition, the killing must be militarily necessary, the use of force must be proportionate so that any anticipated military advantage is considered in light of the expected harm to civilians in the vicinity,[125] and everything feasible must be done to prevent mistakes and minimise harm to civilians.[126] These standards apply regardless of whether the armed conflict is between States (an international armed conflict) or between a State and a non-state armed group (non-international armed conflict), including alleged terrorists. Reprisal or punitive attacks on civilians are prohibited.[127]

[...]

120 Report of the Special Rapporteur, Philip Alston, A/61/311, 5 September 2006, paras. 33-45 (detailed discussion of "arbitrary" deprivation of life under human rights law).

121 Human rights law and IHL apply coextensively and simultaneously unless there is a conflict between them. E/CN.4/2005/7, *supra* note 48, paras. 46-53; A/HRC/4/20, *supra* note 68, paras. 18-19; Report of the Special Rapporteur, Philip Alston, Mission to the United States of America, A/HRC/11/2/Add.5, 28 May 2009, paras. 71-73, 83; A/HRC/4/20/Add.1, *supra* note 105, pp. 342-58 and pp. 358-61; E/CN.4/2006/53/Add.1, *supra* note 66, pp. 264-65. In situations that do not involve the conduct of hostilities – e.g., law enforcement operations during non-international armed conflict – the *lex generalis* of human rights law would apply.

122 *Nuclear Weapons Advisory Opinion, supra* note 1, para 25; *Palestinian Wall Advisory Opinion, supra* note 2, para. 106; *Congo v Uganda, supra* note 3, para. 216 (Armed Activities).

123 International Institute of Humanitarian Law, The Manual on the Law of Non-International Armed Conflict, March 2006.

124 Geneva Conventions Common Article 3, AP I, art. 52(1) and (2); AP I, art. 50(1); International Humanitarian Law Research Initiative, HPCR Manual and Commentary on International Law Applicable to Air and Missile Warfare, Harvard University Program on Humanitarian Policy and Conflict Research, 15 May 2009, available at http://www.ihlresearch.org/amw/manual (HPCR Commentary), section C.12.(a).

125 Proportionality requires an assessment whether an attack that is expected to cause incidental loss of civilian life or injury to civilians would be excessive in relation to the anticipated concrete and direct military advantage. AP I, arts. 51(5)(b) and 57; ICRC Study of Customary Law, *supra* note 86, Rule 14.

126 Precaution requires that, before every attack, armed forces must do everything feasible to: i) verify the target is legitimate, (ii) determine what the collateral damage would be and assess necessity and proportionality, and (iii) minimise the collateral loss of lives and/or property. AP I, art. 57; ICRC Study of Customary Law, *supra* note 86, Rules 15-21. "Everything feasible" means precautions that are "practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations." See Nils Melzer, *Targeted Killing in International Law* (Oxford: OUP, 2008) p. 365.

127 AP I, art. 51 (2); HPCR Commentary *supra* note 124 § C.18.

The use of inter-state force

34. *The legal framework:* Targeted killings conducted in the territory of other States raise sovereignty concerns.[128] Under Article 2(4) of the UN Charter, States are forbidden from using force in the territory of another State.[129] When a State conducts a targeted killing in the territory of another State with which it is not in armed conflict, whether the first State violates the sovereignty of the second is determined by the law applicable to the use of inter-state force, while the question of whether the specific killing of the particular individual(s) is legal is governed by IHL and/or human rights law.

35. *Under the law of inter-state force:* A targeted killing conducted by one State in the territory of a second State does not violate the second State's sovereignty if either (a) the second State consents, or (b) the first, targeting, State has a right under international law to use force in self-defence under Article 51 of the UN Charter,[130] because (i) the second State is responsible for an armed attack against the first State, or (ii) the second State is unwilling or unable to stop armed attacks against the first State launched from its territory. International law permits the use of lethal force in self-defence in response to an "armed attack" as long as that force is necessary and proportionate.[131]

36. While the basic rules are not controversial, the question of which framework applies, and the interpretation of aspects of the rules, have been the subject of significant debate.

Targeted killings and the issue of "capture rather than kill" drew significant attention in 2011 following the United States' operation in Pakistan, which resulted in the killing of Osama bin Laden. This issue was addressed by Special Rapporteur Heyns in his 2011 report to the General Assembly:

Report to the General Assembly (A/66/330, 30 August 2011, ¶¶65-69, 69-72, 74-75, 77, 80-85)

65. The issue of the use of lethal force and arrest also comes to the fore in the context of the increased use of targeted killing, as it manifests itself in practices such as drone strikes and raids (including, for example, the killing of Osama Bin Laden in Pakistan by forces of the United States of America).[132] In respect of the latter case, at least some of the information available suggests that the objective was to kill, not to capture, Bin Laden.[133]

128 UNSC Res. 611 of 25 April 1988 (condemning as an act of illegal aggression Israel's killing in Tunisia of Khalil al-Wazir for violating Tunisian territory); Robert Pear, 'US Assails P.L.O. Aide's Killing As 'Act of Political Assassination,' *New York Times*, 18 April 1988 (condemned by US State Department as "political assassination").

129 UN Charter, art. 51.

130 UN Charter, art. 2(4).

131 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* Judgment of 27 June 1986 [*ICJ Nicaragua Decision*], para. 194; O. Schachter, 'The Right of States to Use Armed Force, 82 *Michigan Law Review* (1984) pp. 1633-34. In the context of self-defence, force is proportionate only if it used defensively and if it is confined to the objective.

132 See The Situation in Afghanistan and its implications for international peace and security. Report of the Secretary General, A/65/873-S/2011/381, 23 June 2011, para. 22; The Situation in Afghanistan and its implications for international peace and security. Report of the Secretary General, A/65/783-S/2011/120, 9 March 2011, para. 35; Mary Ellen O'Connell, "Unlawful killing with combat drones: a case study of Pakistan", Notre Dame Law School Legal Studies Research Paper No. 09-43 (2004-2009), p. 21. See also the comments of the Legal Advisor to the United States Department of State, Harold Koh, "The lawfulness of the U.S. operation against Osama bin Laden", available at: http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-usoperation-against-osama-bin-laden/.

133 See, for example, the comments by United States Attorney General, Eric Holder: "The reality is, we will be reading Miranda rights to a corpse" quoted in "If bin Laden is found, he'll be killed, Holder says", *Washington Post*, (16 March 2010), available at: http://www.washingtonpost.com/wp-dyn/content/article/2010/03/16/AR2010031603753.html.

66. In the context of the mandate, targeted killing has been defined as the intentional and deliberate use of lethal force, "with a degree of pre-meditation, against an individual or individuals specifically identified in advance by the perpetrator".[134]

67. Without commenting on the full range of issues surrounding the legality of such operations, including those related to matters such as sovereignty, the present report addresses the question as to what extent a decision that is taken in advance that rules out the possibility of offering or accepting an opportunity to surrender render such operations unlawful.

68. Much will turn on the applicable system of law. If the targeting occurs in the context of law enforcement, international human rights law applies exclusively. If it takes place during armed conflict, international human rights law remains applicable; however, international humanitarian law finds application as *lex specialis*.[135]

69. While both systems of law allow the use of lethal force by State agents under certain circumstances, the approaches followed are very different. In the case of international human rights law, the use of deadly force is regarded as exceptional, and is legal only in the limited set of circumstances applicable to law enforcement situations described in the rest of the report. International humanitarian law is generally more permissive with regard to the use of lethal force; however, for such force to be used lawfully, various rules have to be complied with, as will be discussed below.

[...]

71. In the case of international armed conflict, it is often stated that enemy soldiers "may be killed at any time and any place", and as a general rule no attempt to arrest has to be made and no opportunity to surrender need be given. However, as will be argued below, the use of lethal force during armed conflict remains subject to constraints such as military necessity. In non-international armed conflict, members of opposing forces may also be targeted as long as they directly participate in hostilities, but again this is subject to military necessity. When a combatant, or a direct participant in hostilities is placed hors de combat, or surrenders to the enemy, the enemy may not kill or injure such a person.[136]

72. A State may, under no circumstances, follow an approach in terms of which an offer to surrender will not be accepted. Orders that "no quarter be given" constitute war crimes.[137]

[...]

74. In international armed conflict, the use of lethal force is generally based not on suspected individual guilt, but on the enemy's status or active membership of a larger collective, namely, a dangerous opponent. Individual guilt normally does not enter into the picture. Targeted killing, however, when conducted as part of such armed hostilities, does not conform to this paradigm. The target is identified on an individual basis, which is tied to his or her individual conduct or perceived guilt, which makes some comparison with the law enforcement paradigm difficult to avoid.

134 See Report of the Special Rapporteur, Philip Alston, Study on Targeted Killings, A/HRC/14/24/Add.6, 28 May 2010, para. 9.

135 *Nuclear Weapons Advisory Opinion, supra* note 1, para. 25.

136 Additional Protocol I, *supra* note 72, art. 40; Additional Protocol II, *supra* note 72, art. 4(1).

137 Article 8(2)(b)(xii) and article 8(2)(e)(x) of the Rome Statute of the International Criminal Court. Customary International Humanitarian Law rules 46 to 48 provide that it is also a crime under customary law.

75. To determine whether an opportunity to surrender has to be offered to someone in the position of a Bin Laden, or an attempt be made to arrest him, one of the key questions is therefore a factual one, namely, whether there is an armed conflict in the country in question, in this case in Pakistan, or where there is not an armed conflict in the country as a whole, whether there is one in the region involved. It is clear that there are ongoing non-international armed conflicts in Afghanistan and Iraq, as in both instances the United States forces and their allies are engaged in hostilities with the consent of the host Government, the opposing forces constitute organised armed groups who are identifiable as such, and the requisite threshold of violence has been met.

[...]

77. Even if it is accepted that there is an armed conflict in the particular country, or parts thereof, it still does not follow that there is an armed conflict in the particular region where the operations take place. As has been emphasised, the existence of armed conflict merely triggers the application of international humanitarian law. The use of lethal force during an armed conflict situation will only be lawful if such force is used in strict conformity with international humanitarian law.

[...]

80. The situation in each country has to be assessed on a case-by-case basis, in order to determine whether there is an armed conflict or not. The idea of a global "war on terror", if taken literally, would imply that international humanitarian rules can be used to justify targeted killings in any country in the world, at any time, which would mean the entire globe is a theatre of war; a war without borders. This would undermine the very basis of the restraints on the use of force that international law seeks to maintain. Any claim that a particular targeted killing in Pakistan was lawful cannot be transferred to serve as an argument that similar actions in other countries or regions is lawful.

81. Other differences also need to be kept in mind. In a situation that occurs in the mayhem of the battlefield, providing an opportunity for arrest normally does not enter into the picture. The question can, however, legitimately be asked whether the same applies where a specific opponent is in relative isolation, who has been under surveillance for years, far from the battlefield, and overwhelming force is available. States must not inflict "harm greater than that unavoidable to achieve legitimate military objectives".[138] States may only exercise force that is militarily necessary and consistent with the principle of humanity.[139]

82. The view of the International Committee of the Red Cross, as expressed in its Guidance, is that "it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force".[140] Indeed, the principles of military necessity and humanity dictate that a person may not be killed where less harmful means are available, such as arrest.[141]

83. In situations of uncertainty, the onus of proof becomes important. States are required to provide the legal basis for targeted killings.[142] Those who wish to stretch established categories and rules of international law beyond their established meaning have to justify this.

138 *Nuclear Weapons Advisory Opinion, supra* note 1, para. 78.

139 Additional Protocol I, *supra* note 72, Article 1(2); preamble to the Hague IV Regulations concerning the Laws and Customs of War on Land; article 142 of the Third Geneva Convention; and article 158 of the Fourth Geneva Convention. See also A/HRC/14/24/Add.6, *supra* note 134, para. 77.

140 ICRC, Interpretive Guidance , *supra* note 74, p. 82.

141 Israel High Court of Justice, *The Public Committee against Torture et al. v. The Government of Israel*, et al., HCJ 769/02, Judgment of 14 December 2006, para. 40.

142 See A/HRC/14/24/Add.6, *supra* note 134, para. 87.

84. International humanitarian law requires a State to investigate, and if appropriate, prosecute individuals for violations.[143] Similarly, human rights law guarantees the right to a remedy.[144] Transparency is a necessary component of the obligation incumbent upon States to investigate alleged violations of both international humanitarian law and international human rights law. The starting point for States to comply with their obligations to ensure transparency and accountability is to disclose the safeguards in place when conducting such operations which ensure that violations are not committed. These safeguards must include the possibility to abort any targeted mission should the continuation of the operation place legal obligations in jeopardy; for example, if the target is hors de combat or surrenders.

85. To a significant extent, the eventual assessment of situations of this kind will have to turn on the scope of the potential violations of the right to life. Even one (especially high profile) case could set a dangerous precedent, also for other States to follow, but the more continuous and systematic a practice of questionable targeted killing becomes, the more questions will be raised.

Follow-up report on Mission to the United States of America (A/HRC/20/22/Add.3, 30 March 2012, ¶¶76-79)

D. Targeted killings: lack of transparency regarding legal framework and targeting choices

76. As mentioned in the 2009 report[145] and evidenced by a number of studies,[146] the Government has continuously engaged in targeted killings on the territory of other States. Such attacks have been reported particularly in Afghanistan, Iraq, Pakistan, Somalia and Yemen where the United States has conducted raids and airstrikes as well as deployed unmanned aerial vehicles to target particular individuals. The previous mandate holder was disturbed by the lack of transparency regarding the legal framework and targeting choices. He called on the Government to clarify the rules of international law it considers to cover targeted killings. To date, the Government has not provided an official and satisfactory response, but has referred to a statement made by the Department of State Legal Adviser.[147]

77. The legal framework governing targeted killings had already been addressed by the mandate,[148] and a report presented to the General Assembly in 2011[149] considered the extent to which an advance decision, ruling out the possibility of offering or accepting an opportunity to surrender, renders such operations unlawful; it makes reference also to the killing of Osama bin Laden.[150] Human rights law dictates that every effort must be made to arrest a suspect, in accordance with

143 ICRC Study of Customary Law, *supra* note 86, rule 158.

144 Naomi Roht-Arriaza, "State responsibility to investigate and prosecute grave human rights violations in international law", *California Law Review*, 78 (1990), p. 463.

145 See A/HRC/11/2/Add.5, *supra* note 121, para. 71; and A/HRC/14/24/Add.6, *supra* note 134, paras. 18-22.

146 See for example, Peter Bergen and Katherine Tiedemann, *The Year of the Drone – An Analysis of U.S. Drone Strikes in Pakistan, 2004-2010*, New America Foundation, 24 February 2010; "The Hidden War," feature, Foreign Policy, 21 December 2010; Amnesty International, *'As if Hell Fell on Me': The Human Rights Crisis in Northwest Pakistan,* June 2010, pp. 87-90; Human Rights Commission in Pakistan, *State of Human Rights in 2010*, April 2011, pp. 75-76.

147 See United States Department of State, Speech by Harold, Hongju Koh, Legal Adviser, to the Annual Meeting of the American Society of International Law, 25 March 2010, in which he evokes a number of legal bases to justify targeted killing, including the assertion that the Government is engaged in an "armed conflict" against al-Qaeda, the Taliban and associated forces, who the Government considers as legitimate targets under international humanitarian law. He also evokes the right to self-defence. Available from http://www.state.gov/s/l/releases/remarks/139119.htm.

148 A/HRC/14/24/Add.6, *supra* note 134, paras. 18-22.

149 Report of the Special Rapporteur, Christof Heyns, A/66/330, 30 August 2011, paras. 65-85.

150 See press statement by two Special Rapporteurs on Osama bin Laden, 6 May 2011, available from http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10987&LangID=E.

the principles of necessity and proportionality on the use of force. In cases where international humanitarian law may apply, the situation in each country should be assessed on a case-by-case basis in order to determine the existence or not of armed conflict.

78. With regard to targeted killings in the context of an armed conflict, the Special Rapporteur notes with appreciation that an updated directive on "population-centric counterinsurgency principles" was adopted in August 2010. However, no information has been made available on substantial changes to procedures applied on the ground to ensure that strikes targeting Taliban fighters were based on reliable information, and did not cause unnecessary suffering and damage to the civilian population. The Special Rapporteur is unable to comment on the content and criteria established in the July 2009 Tactical Directive on the disciplined use of force, the Standard Operating Procedures on the escalation of force and the two Tactical Directives on night raids that were issued in January and December 2010, respectively.[151]

79. The Special Rapporteur again requests the Government to clarify the rules that it considers to cover targeted killings, as mere reference to a statement made by a senior State official is insufficient. The Special Rapporteur reiterates his predecessor's recommendation that the Government specify the bases for decisions to kill rather than capture "human targets" and whether the State in which the killing takes place has given consent. It should also specify procedural safeguards in place to ensure in advance that targeted killings comply with international law, as well as the measures taken after such killing to ensure that its legal and factual analysis is accurate.

Report to the General Assembly (A/68/382, 13 September 2013, ¶¶77-79)

(g) Question of whether international humanitarian law requires a capture rather than kill approach

77. Recent debates have asked whether international humanitarian law requires that a party to an armed conflict under certain circumstances consider the capture of an otherwise lawful target (i.e. a combatant in the traditional sense or a civilian directly participating in hostilities) rather than targeting with force. In its Interpretive Guidance, ICRC states that it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force.[152]

78. The articulation of this principle has been controversial.[153] It has been criticised for its alleged misrepresentation of the current *lex lata*,[154] in particular on the basis that it suggests that the principle of military necessity sits above every rule of international humanitarian law in a limiting manner, rather than simply as a consideration that has already been factored into the rules.[155] In other words, so the argument goes, States have already decided that it is necessary and proportionate to target combatants on the basis of their status alone.

79. It is too early to determine in which direction the controversy around this concept will be resolved. The issue will likely remain relevant in the context of modern anti-terrorism measures where individuals or small groups may be isolated in territory far away from the conflict zone,

151 UNAMA and AIHRC, *Afghanistan, Annual Report* 2010, p. 22.
152 ICRC, Interpretive Guidance, *supra* note 74, p. 82.
153 See Dapo Akande, "Clearing the fog of war? The ICRC's Interpretive Guidance on Direct Participation in Hostilities", *International and Comparative Law Quarterly*, vol. 59, No. 1 (January 2010), pp. 180, 191.
154 See Michael N. Schmitt, "The Interpretive Guidance on the Notion of Direct Participation in Hostilities: a critical analysis", *Harvard National Security Journal*, vol. 1 (2010), pp. 5, 39-43.
155 Michael N. Schmitt, "Military necessity and humanity in international humanitarian law: preserving the delicate balance", *Virginia Journal of International Law*, vol. 50, No. 4 (2010), pp. 795, 835.

which may even be controlled by the State party or its allies.[156] The ICRC approach has been applied in some recent State practice on drone attacks[157] and at least one other State that uses drones has stated that, as a matter of policy, it will not use lethal force when it is feasible to capture a terror suspect.[158]

5. Humanitarian law obligations and reciprocity

During country missions, the Special Rapporteurs encountered statements or actions by parties to a conflict that indicated that the parties believed they could lower or ignore their IHL obligations because the other side itself failed to observe IHL. Such views are contrary to the requirements of IHL. IHL obligations do not depend on any notion of "reciprocity." IHL applies during the entire period of an armed conflict, and irrespective of whether other parties to the conflict observe their own IHL obligations.

Report on Mission to Israel and Lebanon (A/HRC/2/7, 2 October 2006, ¶¶30, 68-70) (joint report with the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Representative of the Secretary-General on the human rights of internally displaced persons, and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living)

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

[...]

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

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

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

156 Ryan Goodman, "The power to kill or capture enemy combatants", *European Journal of International Law*, vol. 24 (2013)

157 *Drohneneinsatz vom 4. Oktober 2010, supra* note 77.

158 United States, Office of the President, "Fact sheet: U.S. policy standards and procedures for the use of force in counterterrorism operations outside the United States and areas of active hostilities", 23 May 2013.

Urgent appeal sent to the Government of Sri Lanka (30 April 2009)

There are credible reports that the Liberation Tigers of Tamil Eelam (LTTE) have been holding civilians as human shields in the No Fire Zone, and that LTTE cadres have shot at civilians trying to leave the area. This conduct by the LTTE would constitute a most serious violation of its obligations under customary humanitarian law. I would, however, draw your Government's attention to the principle whereby a violation of the obligation to take precautionary measures vis-à-vis the civilian population or their use as human shields by one side to a conflict does not change the obligations incumbent on the other party to the conflict to evaluate what constitutes an excessive attack in relation to concrete and direct military advantage (see A/HRC/10/22, para. 17).

C. Application: Means and Methods of Armed Conflict

A significant element of the mandate's work has been to study the means and methods of armed conflict as they impact the right to life. Reports have also variously addressed: targeted killings; the use of human shields; the use of cluster bombs and rockets; and issues raised by the development of autonomous weapons.

1. Targeting decisions

Only combatants or "civilians directly participating in hostilities" may be intentionally lethally targeted in armed conflict. While the general principles defining who may be targeted in an armed conflict are clear, their application has at times been controversial. In particular, individual cases or policies of "targeted killings" and "mercy killings" during the Special Rapporteur's mandate necessitated detailed legal and policy analysis, and clarification of the relevant international law.

In his 2006 report on Israel and Lebanon, Special Rapporteur Alston analysed Israel's targeting decisions, the targeting of military and dual-use targets, and whether these decisions complied with the principle of distinction.

Report on Mission to Israel and Lebanon (A/HRC/2/7, 2 October 2006, ¶¶35, 37-40, 42-51) (joint report with the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Representative of the Secretary-General on the human rights of internally displaced persons, and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living)

35. Both for principled and pragmatic reasons, Israel set certain limits on the conduct of its hostilities with Hezbollah.[159] The mission was informed by IDF representatives that Israel followed its practice of drawing up lists of potential targets, with each individual target, as well as the type of weapon to be used, being reviewed by an IDF expert in humanitarian law.

[...]

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

- A refusal to consistently distinguish Hezbollah fighters from civilians, including civilian members of Hezbollah;

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

- An approach to vetting targets that appears to have treated entire categories of dual-use objects as legitimate military objectives …

2. Attacks on Hezbollah and the principle of distinction

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

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

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

[...]

42. As regards the destruction of high-rise buildings in the south-eastern suburbs (*Dahiye*) of Beirut, Israeli bombing destroyed about 150 apartment buildings and damaged approximately the same number. Because the buildings, which would normally have housed between 30,000 and 60,000 persons, had been nearly entirely evacuated before they were struck, the loss of life was limited. Because the mission was not able to obtain from the Lebanese authorities disaggregated data about the geographical distribution within Lebanon of the overall 1,191 deaths, a more precise statement is not possible at this stage. It also remains, moreover, unclear how many of those killed were Hezbollah fighters.

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

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

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

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

[...]

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

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

50. In characterizing objects, in particular objects that serve primarily civilian purposes, as legitimate military objectives (see para. 38 above), Israel relies heavily on the "list of categories of military objectives" included in the ICRC Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War (1956). The list is relevant, but it cannot be seen as the end point of an analysis. The current legal rule, adopted in Additional Protocol I and recognised as customary, not only requires that the targeted objects, due to "their nature, location, purpose or use make an effective contribution to military action", but also demands that their "partial or total destruction, capture or neutralization, in the circumstances ruling at the time, [offer] a

definite military advantage".[160] The law in force thus imposes a test that requires an object-specific and context-specific assessment of each target rather than a test based on an object's generic classification.

51. The distinction between a categorical and a context-specific approach is crucial to evaluating Israel's targeting practice during this conflict. For example, a road connecting southern Lebanon to the rest of the country could be considered to contribute to Hezbollah's military action and a bridge along such a road may thus be a legitimate military objective.[161] But no such justification is plausible for most other areas, including targets in areas inhabited by populations with no links to Hezbollah. The mission notes that such attacks on the transportation infrastructure have a particularly debilitating effect on the safe transportation of IDPs, the provision of humanitarian assistance and access to medical care.

In his report on his 2008 mission to Afghanistan, Special Rapporteur Alston examined American and NATO use of airstrikes and raids, particularly focusing on whether the intelligence underlying strikes was adequate to distinguish civilians.

Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009, ¶¶5-6, 10-18)

5. In 2008, 64% of civilian casualties (552 people) caused by pro-Government forces were due to air strikes and close air support for troops in contact with Taliban fighters. These deaths have galvanised widespread outrage against international military action. Civilian casualties may result from attacks on those mistakenly believed to be combatants, or because of collateral damage…

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

[...]

2. Raids

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.[162] The most common method, employed without any prior warning or

160 ICRC Study of Customary Law, *supra* note 86, Rule 8; Additional Protocol I, *supra* note 72, art. 52 (2). Israel agrees that this definition is "generally accepted". Israel Ministry of Foreign Affairs, Jerusalem, "Responding to Hezbollah attacks from Lebanon: Issues of proportionality, Legal Background", 25 July 2006.

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

162 During raids, the international forces are often accompanied by ANA units, and, in many cases, ANP forces will

request to enter, is to blow off a housing compound's door with explosives. The other method is to land on a roof in a helicopter and then climb down into the house on ladders. Night raids are always dangerous for civilians. Many Afghans keep guns for personal protection from criminals, and to assure their self-protection within their own homes and compounds. Given that it is common for people to sleep with guns due to fear of intruders and local attackers, there is a high likelihood that they will fire on anyone, including troops, breaking down the compound's door at night. The results can be devastating.[ ]

11. Raids must be conducted in accordance with the stringent safeguards required by international human rights and humanitarian law.[163] 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.[164]

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 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.

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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 as operational dimension. NDS officials informed me that they are authorised to conduct arrest operations and do so, especially in the areas of counterterrorism, organised crime, and counter-espionage. I did not gather information on the conduct of these raids.

163 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. 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 of Customary Law, *supra* note 86, 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 of Customary Law, *supra* note 86, 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 of Customary Law, *supra* note 86, 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).

164 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.

3. 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.[165] This seem to happen because the IMF [international military forces] 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.[166]

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.[167] Numerous Government officials also claimed that civilian casualties had often been caused by international forces acting on false tips. One governor stated that there were people in his province who make a business of acting as intermediaries who would give false tips to the international forces in return for payment from individuals holding grudges. A number of security officials raised the issue in more general terms.[168] 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.

165 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 of Customary Law, *supra* note 86, Rule 7). In addition to certain objects (*see* ICRC Study of Customary Law, *supra* note 86, Rule 8), legitimate military objectives may include combatants and civilians taking a direct part in hostilities (ICRC Study of Customary Law, *supra* note 86, 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 of Customary Law, *supra* note 86, 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.)

166 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 labour) 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-defence 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."

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

168 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.

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.[169] 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. The merits of corroborating intelligence with as many sources as possible were not disputed by international military commanders, although one characterised 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.[170] The current approach renders civilians vulnerable to attack and pushes personal and tribal rivals into opportunistic participation in the armed conflict.

Study on Targeted Killings (A/HRC/14/24/Add.6, 28 May 2010, ¶¶7-8, 11, 28, 57-68)

7. Despite the frequency with which it is invoked, "targeted killing" is not a term defined under international law. Nor does it fit neatly into any particular legal framework. It came into common usage in 2000, after Israel made public a policy of "targeted killings" of alleged terrorists in the Occupied Palestinian Territories.[171] The term has also been used in other situations, such as:

- The April 2002 killing, allegedly by Russian armed forces, of "rebel warlord" Omar Ibn al Khattab in Chechnya.[172]
- The November 2002 killing of alleged al Qaeda leader Ali Qaed Senyan al-Harithi and five other men in Yemen, reportedly by a CIA-operated Predator drone using a Hellfire missile.[173]
- Killings in 2005 – 2008 by both Sri Lankan government forces and the opposition LTTE group of individuals identified by each side as collaborating with the other.[174]
- The January 2010 killing, in an operation allegedly carried out by 18 Israeli Mossad intelligence agents, of Mahmoud al-Mahbouh, a Hamas leader, at a Dubai hotel.[175]
- According to Dubai officials, al-Mahbouh was suffocated with a pillow; officials released videotapes of those responsible, whom they alleged to be Mossad agents.[176]

169 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.

170 ICRC Study of Customary Law, *supra* note 86, Rule 16.

171 Orna Ben-Naftali & Keren Michaeli, 'We Must Not Make a Scarecrow of the Law: Legal Analysis of the Israeli Policy of Targeted Killings', 36 Cornell Int'l L.J. 233, 234 (2003). although this report uses the common terms "terrorism" and "terrorist", I agree with the Special Rapporteur on the promotion and protection of human rights while countering terrorism that the continuing lack of a "universal, comprehensive and precise" definition of these terms hampers the protection of human rights, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, E/CN.4/2006/98, 28 December 2005, para. 50, and in particular, the right to life. The work of the Ad Hoc Committee established under GA Res. 51/210 to work on a draft convention on international terrorism is critical and urgent.

172 'Russia 'Kills' Chechen Warlord,' *BBC News*, 25 April 2002.

173 Jane Mayer, 'The Predator War,' *The New Yorker*, 26 October 2009; Greg Miller, 'C.I.A. Said to Use Outsiders to Put Bombs on Drones', *Los Angeles Times*, 13 Feb. 2009.

174 Report of the Special Rapporteur, Philip Alston, A/HRC/8/3/Add.3, 14 May 2007, para. 12.

175 'Targeted Killing in Dubai: A Mossad Operation Gone Awry?', *Der Spiegel*, 23 Feb. 2010; Ilene Prusher, 'Was Mossad Behind Dubai Assassination? Israel Foreign Minister Isn't Saying,' *Christian Science Monitor*, 17 Feb. 2010.

176 'Targeted Killing in Dubai' *supra* note 175. Other examples of Israeli targeted killings include: Crimes of War

8. Targeted killings thus take place in a variety of contexts and may be committed by governments and their agents in times of peace as well as armed conflict, or by organised armed groups in armed conflict.[177] The means and methods of killing vary, and include sniper fire, shooting at close range, missiles from helicopters, gunships, drones, the use of car bombs, and poison.[178]

[...]

11. The phenomenon of targeted killing has been present throughout history.[179] In modern times, targeted killings by States have been very restricted or, to the extent that they are not, any de facto policy has been unofficial and usually denied, and both the justification and the killings themselves have been cloaked in secrecy.[180] When responsibility for illegal targeted killings could be credibly assigned, such killings have been condemned by the international community – including by other States alleged to practice them.[181]

[...]

28. Whether or not a specific targeted killing is legal depends on the context in which it is conducted: whether in armed conflict, outside armed conflict, or in relation to the interstate use of force.[182]

[...]

D. Who may lawfully be targeted, when, and on what basis

57. The greatest source of the lack of clarity with respected to targeted killings in the context of armed conflict is who qualifies as a lawful target, and where and when the person may be targeted.

58. In international armed conflict, combatants may be targeted at any time and any place (subject to the other requirements of IHL).[183] Under the IHL applicable to non-international armed conflict, the rules are less clear. In non-international armed conflict, there is no such thing as a "combatant."[184] Instead – as in international armed conflict – States are permitted to directly attack

Project, Case Study: The Israeli Strike Against Hamas Leader Salah Shehadeh. available at: http://www.crimesofwar.org/print/onnews/Shehadeh-print.html.

177 This report focuses only on killings by States and their agents because, as yet, no non-state actors have sought to justify specific "targeted killings."

178 See B'Tselem, Statistics: Fatalities, available at: http://www.btselem.org/English/Statistics/Casualties.asp; Simon Saradzhyan, Russia's System to Combat Terrorism and Its Application in Chechnya, in R.W. Orttung and A. Makarychev, *National Counter-terrorism Strategies* (2006), p.185; 'Chechens 'Confirm' Warlord's Death,' BBC News, 29 April 2002.

179 Melzer, *supra* note 126, p. 9.

180 According to Amnesty International, between 1976 and 1992, an elite unit of the British army killed 37 reported members of the Irish Republican Army in Northern Ireland; the United Kingdom has consistently denied conducting targeted killings. Amnesty International, *Political Killings in Northern Ireland* (1994) p. 4.

181 E.g., Press Release of the Council of the European Union, 7373/04 of March 2004 available at: http://www.consilium.europa.eu/App/NewsRoom/loadBook.aspx?target=2004&infotarget=&max=15&bid=78&lang=EN&id=1850; Record of Security Meeting (S/PV.4945) 19 April 2004 (condemnation of Israeli killing of Hamas leader by Russia, Pakistan, United Kingdom, Germany and Spain); Brian Whittaker & Oliver Burkeman, Killing Probes the Frontiers of Robotics and Legality, Guardian, 6 Nov. 2002 (Swedish Foreign Minister on US targeting of al-Harithi).

182 A/61/311, *supra* note 120, paras. 33-45 (detailed discussion of "arbitrary" deprivation of life under human rights law).

183 Additional Protocol I, *supra* note 72, art. 48, 51(2) (defining lawful targets); HPCR Commentary, *supra* note 124, § A.1.(y)(1). The term "combatant" is not defined in IHL, but may be extrapolated from Geneva Convention III, art. 4(A); Ryan Goodman, The Detention of Civilians in Armed Conflict, 103 Am. J. Int'l L. 48 (2009).

184 Marco Sassoli & Laura M Olson, The Relationship Between International Humanitarian Law and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts, 90 Int'l Rev. Red Cross, 599, 611 (Sept. 2008); Marco Sassoli, Transnational Armed Groups and International

only civilians who "directly participate in hostilities" (DPH).[185] Because there is no commonly accepted definition of DPH, it has been left open to States' own interpretation – which States have preferred not to make public – to determine what constitutes DPH.

59. There are three key controversies over DPH. First, there is dispute over the kind of conduct that constitutes "direct participation" and makes an individual subject to attack. Second, there is disagreement over the extent to which "membership" in an organised armed group may be used as a factor in determining whether a person is directly participating in hostilities. Third, there is controversy over how long direct participation lasts.

60. It is not easy to arrive at a definition of direct participation that protects civilians and at the same time does not "reward" an enemy that may fail to distinguish between civilians and lawful military targets, that may deliberately hide among civilian populations and put them at risk, or that may force civilians to engage in hostilities.[186] The key, however, is to recognise that regardless of the enemy's tactics, in order to protect the vast majority of civilians, direct participation may only include conduct close to that of a fighter, or conduct that directly supports combat. More attenuated acts, such as providing financial support, advocacy, or other non-combat aid, does not constitute direct participation.

61. Some types of conduct have long been understood to constitute direct participation, such as civilians who shoot at State forces or commit acts of violence in the context of hostilities that would cause death or injury to civilians. Other conduct has traditionally been excluded from direct participation, even if it supports the general war effort; such conduct includes political advocacy, supplying food or shelter, or economic support and propaganda (all also protected under other human rights standards). Even if these activities ultimately impact hostilities, they are not considered "direct participation." But there is a middle ground, such as for the proverbial "farmer by day, fighter by night", that has remained unclear and subject to uncertainty.

62. In 2009, the ICRC issued its Interpretive Guidance on DPH, which provides a useful starting point for discussion. In non-international armed conflict, according to the ICRC Guidance, civilians who participate directly in hostilities and are members of an armed group who have a "continuous combat function" may be targeted at all times and in all places.[187] With respect to the temporal duration of DPH for all other civilians, the ICRC Guidance takes the view that direct participation for civilians is limited to each single act: the earliest point of direct participation would be the concrete preparatory measures for that specific act (e.g., loading bombs onto a plane), and participation terminates when the activity ends.[188]

63. Under the ICRC's Guidance, each specific act by the civilian must meet three cumulative requirements to constitute DPH:

(i) There must be a "threshold of harm" that is objectively likely to result from the act, either by adversely impacting the military operations or capacity of the opposing party, or by causing the loss of life or property of protected civilian persons or objects; and
(ii) The act must cause the expected harm directly, in one step, for example, as an integral part of a specific and coordinated combat operation (as opposed to harm caused in unspecified future operations); and

Humanitarian Law, HPCR Paper Series, Winter 2006.

185 Additional Protocol I, *supra* note 72, art. 51(3)and 50(1) (defining civilian)and, arts. 13(3) and 51(3); Geneva Conventions III and IV, *supra* note 72, art. 3; AP II, *supra* note 72, arts. 4 and 13(3).

186 For this reason I have criticised non-state armed groups for using civilians as human shields and locating their military operations in areas heavily populated by civilians. A/HRC/11/2/Add.4, *supra* note 68, paras. 9, 23, 24.

187 ICRC, Interpretive Guidance *supra* note 74, p. 66.

188 Ibid., pp. 66-68

(iii) The act must have a "belligerent nexus" – i.e., it must be specifically designed to support the military operations of one party to the detriment of another.

64. These criteria generally exclude conduct that is clearly indirect, including general support for the war effort through preparation or capacity building (such as the production of weapons and military equipment).[189] They also exclude conduct that is protected by other human rights standards, including political support for a belligerent party or an organised armed group. Importantly, the ICRC's Guidance makes clear that the lawfulness of an act under domestic or international law is not at issue, rather, the sole concern of the direct participation inquiry is whether the conduct "constitute[s] an integral part of armed confrontations occurring between belligerents."[190] Thus, although illegal activities, e.g., terrorism, may cause harm, if they do not meet the criteria for direct participation in hostilities,[191] then States' response must conform to the lethal force standards applicable to self-defence and law enforcement.[192] In general, the ICRC's approach is correct, and comports both with human rights law and IHL.

65. Nevertheless, the ICRC's Guidance raises concern from a human rights perspective because of the "continuous combat function" (CCF) category of armed group members who may be targeted anywhere, at any time.[193] In its general approach to DPH, the ICRC is correct to focus on function (the kind of act) rather than status (combatant vs. unprivileged belligerent), but the creation of CCF category is, de facto, a status determination that is questionable given the specific treaty language that limits direct participation to "for such time" as opposed to "all the time."

66. Creation of the CCF category also raises the risk of erroneous targeting of someone who, for example, may have disengaged from their function. If States are to accept this category, the onus will be on them to show that the evidentiary basis is strong. In addition, States must adhere to the careful distinction the ICRC draws between continuous combatants who may always be subject to direct attack and civilians who (i) engage in sporadic or episodic direct participation (and may only be attacked during their participation), or (ii) have a general war support function ("recruiters, trainers, financiers and propagandists") or form the political wing of an organised armed group (neither of which is a basis for attack).[194]

67. Especially given the ICRC's membership approach to CCF, it is imperative that the other constituent parts of the Guidance (threshold of harm, causation and belligerent nexus) not be diluted. It is also critical that DPH not include combat service support functions (selling food, providing supplies). While this may, in the view of some, create inequity between State forces and non-state actors, that inequity is built into IHL in order to protect civilians.

68. The failure of States to disclose their criteria for DPH is deeply problematic because it gives no transparency or clarity about what conduct could subject a civilian to killing. It also leaves open the likelihood that States will unilaterally expand their concept of direct participation beyond permissible boundaries. Thus, although the US has not made public its definition of DPH, it is clear that it is more expansive than that set out by the ICRC; in Afghanistan, the US has said that drug traffickers on the "battlefield" who have links to the insurgency may be targeted and killed.[195]

189 HPCR Commentary *supra* note 124, § C.28(2), n. 278; Nils Melzer, 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities,' 42 *NYU J. Int'l L. and Politics*, 829, 858 (2010).

190 Ibid., p. 859.

191 Hague Regulations IV, art. 22; AP I, arts. 35(1) and 51 (discussing hostilities).

192 Melzer, *supra* note 189, p. 861.

193 ICRC, Interpretive Guidance, *supra* note 74, p. 66.

194 Ibid., pp. 31-36.

195 US Senate Foreign Relations Committee, Afghanistan's Narco War: Breaking the Link Between Drug Traffickers and Insurgents: Report to the Senate Committee on Foreign Relations., S. Rep. No. 111-29, at 16 (2009).

This is not consistent with the traditionally understood concepts under IHL – drug trafficking is understood as criminal conduct, not an activity that would subject someone to a targeted killing. And generating profits that might be used to fund hostile actions does not constitute DPH.

The killing of persons *hors de combat* (such as detained or wounded individuals), including so-called "mercy killings," are absolutely prohibited by IHL:

Report on Mission to Israel and Lebanon (A/HRC/2/7, 2 October 2006, ¶47) (joint report with the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Representative of the Secretary-General on the human rights of internally displaced persons, and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living)

47. [There were] reports of 12 destroyed and 38 severely damaged health facilities, notably in Bent Jbeil, Marjayoun and Nabatieh. Ambulances and medical convoys were, according to ICRC, also hit during the conflict. In the absence of concrete evidence to the contrary, it must be assumed that the health facilities and ambulances attacked were not legitimate targets. In this context it is important to stress that killing persons placed *hors de combat* is prohibited at any time and in any place whatsoever.[196]

Report to the Human Rights Council (A/HRC/4/20, 29 January 2007, ¶¶29-38)

29. The expression "mercy killings" has recently been used to characterise certain killings by the military in the context of armed conflicts. One example concerns the court martial of Capt. Rogelio Maynulet for the shooting of an Iraqi man in Baghdad in May 2004. A "mercy killing" argument was central to the defence.[197] Although originally charged with murder for shooting twice at point-blank range,[198] Maynulet was ultimately convicted of assault with intent to commit voluntary manslaughter and sentenced to dismissal from the army and no confinement.[199] Another example, also from Iraq, is the invocation of a mercy killing defence for two soldiers who mistakenly opened fire on what appears to have been a group of non-combatant teenagers. Realizing their mistake, medics hurried to treat the injured, when, according to reports,

> "[a] dispute broke out among a handful of soldiers standing over one severely wounded young man who was moaning in pain. An unwounded Iraqi claiming to be a relative of the victim pleaded in broken English for soldiers to help him. But to the horror of bystanders, Alban, 29, a boyish-faced sergeant who joined the Army in 1997, retrieved an M-231 assault rifle and fired into the wounded man's body. Seconds later, another soldier, Staff Sgt. Johnny Horne, Jr., 30, of Winston-Salem, NC, grabbed an M-16 rifle and also shot the victim".[200]

196 Common article 3 to the Geneva Convention (preventing "violence to life and person, in particular murder of all kinds" of those placed *hors de combat* by sickness, wounds, detention, or any other cause"). Common article 3 is considered by the International Court of Justice to "constitute a minimum yardstick … which, in the Court's opinion, reflects what the Court in 1949 called 'elementary conditions of humanity'" see *ICJ Nicaragua Decision, supra* note 31, para. 218. See also ICRC Study of Customary Law, *supra* note 87, p. 312. ("The prohibition on killing civilians and persons *hors de combat* is set forth in numerous military manuals. It is also contained in the legislation of a large number of States. This prohibition has been upheld extensively in national and international case-law. Furthermore, it is supported by official statements and other practice.")

197 "Charges Reduced in Iraq Killing", *Los Angeles Times*, Dec. 8, 2004; "U.S. Officer Calls Killing an Act of Mercy", *New York Times*, 9 September, 2004.

198 Ibid.

199 "Army Officer Convicted in Iraqi's Death Is Freed", *New York Times*, April 2, 2005.

200 "'Mercy killing' of Iraqi revives GI conduct debate", *Los Angeles Times*, Nov. 5, 2004.

30. On this basis United States officials characterised the shooting as a "mercy killing", citing statements by Alban and Horne that they had shot the wounded Iraqi "to put him out of his misery".[201] Subsequently, other soldiers present at the scene expressed surprise that the victims were not rushed to hospital.[202] In January 2005, Alban was convicted of murder and conspiracy to commit murder after a one-day court martial in Baghdad. He was sentenced to one year's confinement, demotion to private and a bad-conduct discharge.[203]

31. A third example concerns a recommendation that Specialist Juston R. Graber be court-martialled for killing an Iraqi in a raid on a potential insurgent stronghold north-west of Baghdad. Informed reports suggest that the "mercy killing" defence would also be raised in this case, as Graber allegedly shot the Iraqi in the head as the man lay dying.[204]

32. Despite the extent to which military officials, commentators, and even military judges seem willing to entertain a "mercy killing" defence, it is clear that such a characterization is entirely unacceptable under the applicable rules of international humanitarian law. In international armed conflicts, article 12 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention) is clear that the wounded or sick "shall be respected and protected in all circumstances … Any attempts upon their lives, or violence to their persons, shall be strictly prohibited; in particular, they shall not be murdered …".[205] The ICRC Commentary on this provision, based on the *travaux préparatoires*, considers such "derelictions of duty … [to be] the gravest a belligerent can commit in regard to the wounded and sick in his power".[206] It notes that "the heinous crimes in question were already prohibited in the 1929 text, which established the principle of respect and protection in all circumstances – a principle which is general and absolute in character".[207]

33. Although the Geneva Conventions of 1949 limited most protection of the wounded and sick to a narrow class of "protected persons", the First Additional Protocol to the Geneva Conventions expanded the scope of protection to cover all persons affected by international armed conflict. Article 75 of Additional Protocol I extends protection to those persons who do not qualify for the status of "protected persons" under the 1949 Conventions; this article includes protection against "violence to … life, health, or physical or mental well-being … in particular, murder".[208] Similarly, article 8 (a) of Protocol I expands the definition of "wounded and sick" to include civilians as well as soldiers.[209] Such persons would also benefit from the protection of common article 3 to the

201 Ibid.
202 Ibid.
203 "U.S. soldier convicted in 'mercy killing'", *Desert News* (Salt Lake City), Jan. 15, 2005.
204 "Army Officer Calls for Death In Slaying Case", *New York Times*, September 3, 2006.
205 Geneva Convention I, 1949, Art. 12. Article 12 of Geneva Convention II contains an equivalent prohibition concerning wounded or shipwrecked at sea.
206 ICRC, *Commentary to the First Geneva Convention of 1949*, *supra* note 103, p. 138.
207 Ibid.
208 Additional Protocol I, *supra* note 72, Art. 75(2)(a)(i). The Commentary to this provision states explicitly that "cases in which the status of prisoner of war or of protected person were denied to certain individuals, the protection of Article 75 must be applied to them as a minimum". *Commentary to the First Additional Protocol to the Geneva Conventions*, p. 866, para. 3014. For a similar situation with respect to another provision of the Geneva Conventions (Fourth Geneva Convention, Art. 4), See *Congo v. Uganda, I.C.J. Reports 2005, Judgment of 19 Dec. 2005*, Separate Opinion of Judge Simma, para. 26 ("The gap thus left by Geneva Convention Article 4 has in the meantime been – deliberately – closed by Article 75 of Protocol I Additional to the Geneva Conventions of 1949.").
209 Additional Protocol I, *supra* note 72, Art. 8(a). As the ICRC Commentary makes clear, the Protocol therefore "does not retain the distinction made between these two categories by the Conventions as regards the wounded and sick. On this basis a wounded soldier and a wounded civilian are entitled to identical protection." *Commentary to the First Additional Protocol to the Geneva Conventions*, p. 117, para. 304. *See also* Additional Protocol I, *supra* note 72, Article 10.

Geneva Conventions, as discussed below, which constitute "a minimum yardstick" applicable to all armed conflicts.[210]

34. In non-international armed conflicts, common article 3 to the Geneva Conventions requires that "members of armed forces … placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely … . To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds".[211] Additional Protocol II further states that "[a]ll the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict, shall be respected and protected"[212] and "all possible measures shall be taken … to search for and collect the wounded … [and] protect them against … ill-treatment".[213]

35. The prohibition of murder of persons *hors de combat* and the obligation to protect the wounded from adverse treatment are norms of customary international law applicable in both international and non-international armed conflicts.[214]

36. Although such "mercy killings" are sometimes presented as a "necessary evil" of war, such an analysis contradicts the foundations of the applicable law. Once enemy combatants have been rendered *hors de combat* by injury, they are no longer a threat to the opposing combatants, and there is simply no reason why it would be "necessary" to kill them.[215]

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

38. It warrants underlining the fact that international humanitarian law does not allow – under any circumstances – the taking of the life of another as a purported act of "mercy". The obligation to treat injured soldiers "humanely" and the obligation to "respect and protect" the wounded are incompatible with the idea of "mercy killings". Rather, the obligation of parties to a conflict, in the presence of injured persons, is (i) to "take all possible measures to search for, collect and evacuate the wounded, sick and shipwrecked without adverse distinction"[216] and (ii) to seek the appropriate medical care to the fullest extent practicable and with the least possible delay.[217] Individual parties to the conflict, who lack medical training, may not take the medical care of the wounded into their own hands by deciding to end the life of an injured person on the battlefield. Such killings are an unequivocal violation of international humanitarian law.

210 *ICJ Nicaragua Decision, supra* note 131, para. 218.
211 Geneva Conventions of 1949, Common Article 3.
212 Additional Protocol II, *supra* note 72, Art. 7(1).
213 Ibid., Art. 8.
214 ICRC Study of Customary Law, *supra* note 86, pp. 306-308 (Rule 87 – civilians and persons *hors de combat* must be treated humanely), pp. 311-314 (Rule 89 – prohibition of murder of persons *hors de combat*), pp. 403-405 (Rule 111 – protection of wounded, sick, and shipwrecked).
215 See, e.g., *ICRC Commentary on the First Geneva Convention of 1949, supra* note 103, p. 136 ("It is only the soldier who is himself seeking to kill who may be killed. The abandonment of all aggressiveness should put an end to aggression.").
216 First Geneva Convention, art. 15; Second Geneva Convention, Art. 18; Fourth Geneva Convention, Art. 16(2); Additional Protocol I, *supra* note 72, Art. 10; Geneva Conventions, Common Art. 3; Additional Protocol II, *supra* note 72, Art. 8, ICRC Study of Customary Law, *supra* note 86, pp. 396-399 (Rule 109).
217 First Geneva Convention, *supra* note 72, Arts. 12(2), 15(1); Second Geneva Convention, *supra* note 72, Arts. 12(2), 18; Fourth Geneva Convention, *supra* note 72, Art. 16(1); Geneva Conventions, Common Art. 3; Additional Protocol II, *supra* note 72, Arts. 7-8; ICRC Study of Customary Law, *supra* note 86, pp. 400-403.

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

6. In addition to the obligations imposed by human rights law, the conflicts in both the north-west and north-east were non-international armed conflicts to which international humanitarian law applied. All parties to these conflicts, including rebel groups, are bound by this body of law.[218] International humanitarian law requires the parties to distinguish between civilians and combatants at all times,[219] prohibits killing civilians except when they are directly participating in hostilities, and prohibits killing anyone, civilian or combatant, who has been detained or otherwise placed *hors de combat*.[220]

In their reports on country visits to Israel (2006) and to Ukraine (2015), the Special Rapporteurs highlighted failures to adhere to precautionary measures during attack:

Report on Mission to Israel and Lebanon (A/HRC/2/7, 2 October 2006, ¶¶35-36, 38-41, 66) (joint report with the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Representative of the Secretary-General on the human rights of internally displaced persons, and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living)

1. Precautionary measures and principled limits to the conduct of hostilities

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

36. Israel made extensive use of leaflets dropped from the air and of telephone calls to warn civilians of impending attacks, an obligation which applies unless circumstances do not permit.[221] While the mission found some aspects of the warnings to be highly problematic … they certainly saved many lives, both in south Beirut and south of the Litani river.

[...]

2. Attacks on Hezbollah and the principle of distinction

38. One well-informed analysis of Israel's targeting policies concluded that they were premised upon the permissibility of targeting the whole of Hezbollah's infrastructure:

> "Targets belonging to the Hezbollah infrastructure which support the terrorist-operative apparatus in the Shi'ite neighbourhoods of south Beirut (e.g., Dahiya) and other locations in Lebanon [are]: headquarters, offices, buildings serving Hezbollah's various branches, leaders' residences and the bunkers they are hiding in, as well as the organization's 'information' infrastructure (Al-Manar TV) and offices of the organization's social and financial infrastructure."[222]

218 Common article 3 of the four Geneva Conventions of 1949; Protocol II *supra* note 72,; and customary rules applicable to non-international armed conflicts.

219 Article 13 (2) of Additional Protocol II *supra* note 72; ICRC Study of Customary Law, *supra* note 86, Rule 1.

220 Common article 3 of the four Geneva Conventions of 1949, article 4 of Protocol II, *supra* note 72, and Rule 89 of the ICRC Study of Customary Law, *supra* note 86.

221 Ibid., pp. 62-65 (Rule 20).

222 IDF, Intelligence and Terrorism Information Centre at the Centre for Special Studies (CSS), "The IDF-Hezbollah confrontation (Updated on the morning of Thursday, July 20)," 20 July 2006.

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

40. While Hezbollah was in conflict with Israel, it does not follow that every member of Hezbollah could be justifiably targeted. Individuals do not become legitimate military objectives unless they are combatants or civilians directly participating in hostilities. Many members and supporters of Hezbollah do not meet either criterion. Similarly, not every building owned by or associated with Hezbollah constituted a legitimate military objective. Hezbollah is, in addition to being an organization using violence, a political movement and social services enterprise, particularly in the Dahiye and the areas of southern Lebanon with a Shiite majority population. It runs medical facilities, schools, groceries, an orphanage, a garbage service and a reconstruction programme for homes damaged during Israel's invasion. It is the country's second-largest employer,[223] holds 14 seats in parliament and, since 2005, is part of the Government.

41. [...] The 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.

[...]

66. [...] The principle of precaution requires each party to the conflict to give effective advance warning of attacks which may affect the civilian population, and give it enough time and the opportunity to evacuate safely, unless circumstances do not permit.[224]

Report on Mission to Ukraine (A/HRC/32/39/Add.1, 2 October 2016, ¶¶62-66)

B. Right to life in areas controlled by the Government of Ukraine

62. The "anti-terrorism operation" is being undertaken across the two regions of Donetsk and Luhansk; however, the "contact line" demarcating the boundary between territory controlled by the Government of Ukraine and territory not under its control runs through the middle of these two regions. During his visit, the Special Rapporteur was able to cross the "contact line", and so here presents his findings on the protection of the right to life on both sides.

1. Indiscriminate shelling

63. The Special Rapporteur is concerned by some of the weaponry used by forces on the Government side in the course of hostilities. Some of the weapons used are inherently insufficiently precise to be used within a highly urban and civilian-populated conflict zone. In other cases, weapons with a known level of precision are being used contrary to or without regard to proper standard operating procedures for targeting.

64. Moreover, he was not convinced during his engagement with relevant authorities that proper investigations had been conducted when allegations of civilian casualties were brought to their attention. The answer from some of the military authorities to questions about when an investigation into allegations of excessive civilian casualties would be triggered, was that such a situation would never arise, because there was an order by the Minister of Defence that this should not happen.

223 Robin Wright, "Inside the Mind of Hezbollah", *Washington Post*, 16 July 2006.

224 ICRC Study of Customary Law, *supra* note 86. The duty to warn as part of the duty to protect life may also be derived from ICCPR article 6.

65. While the Special Rapporteur understands the difficulties of conducting investigations in territory outside the control of the Government's armed forces, such difficulties should not be understood, as suggested in many of the meetings he had, as a reason to reject any possibility of verifying civilian casualties caused by shelling or of assessing alleged violations of international humanitarian law. The conflict is being closely monitored by several international organizations, which publicly report the occurrence of civilian casualties on both sides of the "contact line". Combined with the military records of Ukraine on the use of artillery, and the possibility of contacting the families of casualties, morgues, hospitals or other sources for verification, it is possible for the Government to assess the damage caused by its use of artillery. Damage assessments conducted this way may not always establish evidence solid enough to allow accountability for violations of international humanitarian law, but credible estimations of civilian casualties would enable the armed forces to evaluate and strengthen precautionary measures taken to mitigate the impact of shelling on civilians.

66. Such basic analysis of the impact of the use of force during armed conflict is a vital first step in a process of accountability for violations of the right to life during armed conflict. At a minimum, all serious violations of international humanitarian law during armed conflict must be investigated and, where necessary, those identified as potential perpetrators must be prosecuted. As has been held by the European Court of Human rights, in particular with respect to indiscriminate shelling, the human rights protection of the right to life continues to imply that there should be some form of effective judicial investigation when individuals have been killed as a result of the use of force in the context of armed conflict.[225]

2. Weapons: cluster munitions and rockets

International humanitarian law places limits on both the use and type of weapons that may be deployed in armed conflict. In a number of contexts, the Special Rapporteurs have examined the use of particular weapons and technologies, the international law governing their use, and the implications for the right to life. The extracts below include the Special Rapporteurs' writing on weapons and technologies whose use or development have been particularly contentious: cluster munitions and rockets. Drones and autonomous weapons are examined separately in Chapter 11.

The manner in which cluster munitions are used may violate the principles of proportionality and discrimination. Special Rapporteur Alston addressed this in a joint mission to Israel and Lebanon following the 12 July to 14 August 2006 conflict.

Report on Mission to Israel and Lebanon (A/HRC/2/7, 2 October 2006, ¶¶52, 55-57, 87, 103, 107) (joint report with the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Representative of the Secretary-General on the human rights of internally displaced persons, and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living)

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

[...]

225 See European Court of Human Rights, *Isayeva v. Russia*, application No. 57950/00, judgment of 24 February 2005, para. 209.

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

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

57. Moreover, one government official acknowledged that cluster bombs were used in part to prevent Hezbollah fighters from returning to the villages after the ceasefire. As these sites were often located in civilian built-up or agricultural areas, the long-term effect on the civilian population should have been obvious. This rationale would be consistent with reports from UNMACC and other sources that the majority of the cluster munitions were delivered in the final 72 hours of the conflict, when a ceasefire was imminent. While some Government of Israel interlocutors denied the allegation, others spoke of a gradual crescendo in the use of cluster bombs during the last 10 days of the conflict.

[...]

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

[...]

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

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

[...]

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

Similarly, Hezbollah's use of rockets against Israel during the conflict appeared to violate IHL:

Report on Mission to Israel and Lebanon (A/HRC/2/7, 2 October 2006, ¶¶72-75) (joint report with the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Representative of the Secretary-General on the human rights of internally displaced persons, and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living)

72. The vast majority of rockets fired by Hezbollah [into Israel] were 122-mm "Katyushas", some of them with a larger warhead and modified to increase the range up to 50 km. But a variety of other weapons were also used, including 220-mm mobile rockets modified to carry thousands of small ball bearings, which spray out over a radius of up to 300 m when the rocket strikes and thus maximise harm to persons.[226]

73. The Katyushas and 220-mm mobile rockets have an accuracy of 300-400 m when used at maximum range. As a consequence, when they hit civilian targets such as hospitals or villages which are more than 1 km away from a military target, it is reasonable to assume that they have either targeted the object in question or that their use is indiscriminate.

74. Thus, for example, some 20 rocket strikes reportedly hit the immediate vicinity of the Nahariya Hospital (located 6 km from the Lebanese border). They included one direct hit on 28 July which caused major damage to an ophthalmology ward. In the absence of a plausible military target within 1 km of the hospital, this would seem to suggest illegal targeting of a civilian building.

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

In his end of visit statement on the mission to the Ukraine in 2015, Special Rapporteur Heyns referred to the use of cluster munitions and landmines in the conflict in eastern Donbas:

226 The 220mm mobile rocket used by Hezbollah against Israeli settlements is of Syrian manufacture or origin with a maximum range of 70 km. These rockets, as well as according to some reports the improved range Katyushas, had been modified to carry thousands of small ball bearings, which spray out over a radius of up to 300 meters when the rocket strikes. Harm to persons is thus maximised. The 220mm mobile rocket would appear to be responsible for the most deadly single incident, the death of 8 workers at a railway repair shop in Haifa on 16 July 2006. A 220m rocket attack (or the similar 302mm rocket with ball bearings) on an IDF encampment near Kfar Giladi, a kibbutz in north-eastern Israel, is also responsible for the death of all 12 IDF soldiers killed on Israeli territory.

Ukraine end of visit statement: Lives lost in an accountability vacuum (Kyiv, Ukraine, 18 September 2015)

IV. The right to life in eastern Donbas

A. General observations on the conduct of hostilities

As noted above, I welcome the fact that it seems that there have only been very limited violations of the ceasefire on either side of the "contact line" since 31 August. I hope that this ceasefire continues to hold and that it provides a space for more thorough-going de-escalation of the conflict.

Over the past 18 months, however, the conflict has exacted a heavy human price. Last week the HRMMU [the UN Human Rights Monitoring Mission in Ukraine] released their latest report on the human rights situation in Ukraine, estimating that a total of nearly 8,000 have now been killed and more than 17,000 injured in the course of hostilities.

The majority of these deaths have been caused by shelling, which it would appear on both sides has been taken place indiscriminately or with inadequate precautionary steps taken to protect civilians.

I am also concerned by allegations that the conflict is being waged in part using inherently indiscriminate weapons such as cluster munitions and landmines, including anti-personnel mines. Ukraine is party to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, which establishes an absolute prohibition to use anti-personnel mines "under any circumstances". I also note with concern that Ukraine failed to fulfil its commitment to destruct all its stockpiled anti-personnel mines before 1 June 2010. According to its official reports, Ukraine still retains over 5 million anti-personnel mines.

I am also concerned by the threat that unexploded ordnance (UXO) and other explosive remnants of war pose against civilian lives, particularly children. The HRMMU has already verified numerous civilian casualties as a result of UXO left in the battleground both in Government-controlled areas and in territories controlled by the armed groups. I would like to remind the Government of its obligations under the fifth Protocol to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, on Explosive Remnants of War. According to the Protocol, which Ukraine ratified in 2005, state parties have to mark and clear, remove or destroy, as soon as feasible, all explosive remnant of war in territories under their control. In case explosive ordnance used by Ukraine remains in territory outside of its control, the Government has the obligation to provide assistance and information to facilitate the marking, clearance, removal or destruction of the ordnance by a third party. Throughout the hostilities, Ukrainian armed forces have the obligation to record and retain information on the use of explosive ordnance, in order to facilitate its clearance without delay after the cessation of hostilities.

[...]

VII. Preliminary Recommendations

[...]

4. The Government of Ukraine should take steps to ratify the 2008 Convention on Cluster Munitions. In their public statements on the use of such weapons by the opposing armed groups, the Government has added weight to the idea of an emerging norm against the use of cluster munitions under any circumstances. All parties to the conflict should immediately desist from the use of such weapons, which are inherently indiscriminate.

Special Rapporteur Heyns' subsequent report on the Ukraine mission further detailed the use of these weapons by both government forces and armed rebel groups:

Report on Mission to Ukraine (A/HRC/32/39/Add.1, 2 October 2016, ¶¶55-61)

55. [...] On 3 March 2016, the United Nations Human Rights Monitoring Mission in Ukraine released its latest report on the human rights situation in Ukraine, estimating that at least 9,167 people had been killed and more than 21,044 injured in the course of hostilities.[227] More than 1,000 persons remained missing, underlining the importance of identification and communication regarding the deceased in the context of armed conflict.[228] The Special Rapporteur applauds the work that the International Committee of the Red Cross and others are undertaking to provide training and technical assistance to all sides with respect to searching for, recovering and identifying mortal remains.

56. The majority of these deaths have been caused by shelling, which it would appear has taken place indiscriminately on both sides or without the taking of adequate precautionary steps to protect civilians.

57. The Special Rapporteur is also concerned by allegations that the conflict is being waged in part with inherently indiscriminate weapons, such as cluster munitions and landmines, including anti-personnel mines. Researchers have documented widespread use of cluster munitions by both government forces and armed groups in dozens of urban and rural locations, with some locations hit multiple times. The weapons used were ground-fired 300 mm Smerch (Tornado) and 220 mm Uragan (Hurricane) cluster munition rockets, which deliver 9N210 or 9N235 antipersonnel fragmentation submunitions. For example, there is evidence of cluster munitions having been used by government troops in attacks against Donetsk City (October 2014), Makiivka (August 2014), Stakhanov (January 2015), Komsomolske (December 2014 and February 2015) and Luhansk (January and February 2015). Conversely, there is evidence of their use by armed groups in attacks against Artemivsk, Hrodivka and Kramatorsk (all in February 2015).[229]

58. While not taking responsibility for the use of cluster munitions by their own side, high-level officials on both sides of the conflict have condemned their use against civilians by the other party as barbaric savagery.[230] During a 24 October 2014 Security Council debate on the situation in Ukraine, 11 States expressed concern at the reported use of cluster munitions and called for an investigation (see S/PV.7287). While authorities in both Ukraine and the Russian Federation have condemned the use of cluster munitions in populated areas, neither Ukraine nor the Russian Federation has joined the 2008 Convention on Cluster Munitions. However, swift public condemnation of their use demonstrates the growing strength of the emerging customary norm against the use of cluster munitions by any actor under any circumstance, as it constitutes the use of an inherently indiscriminate weapon.

59. Ukraine is party to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, which establishes an absolute prohibition on the use of anti-personnel mines "under any circumstances". The Special Rapporteur notes with concern that Ukraine failed to fulfil its commitment to destroy all its stockpiled anti-personnel mines before 1 June 2010. According to its official reports, Ukraine still retains more than

227 See OHCHR, report on the human rights situation in Ukraine, 16 November 2015 to February 2016, para. 6.
228 International Committee of the Red Cross, "Ukraine: best practices in dead body recovery discussed in Lugansk" (23 January 2016), available from www.icrc.org/en/document/ukraine-crisis-best-practices-dead-body-recovery-discussed-lugansk.
229 Human Rights Watch, "Technical briefing note: cluster munition use in Ukraine" (June 2015).
230 Ibid., p. 12.

5 million anti-personnel mines. The Special Rapporteur observed signs indicating the continued use of landmines on 12 September 2015, when he attempted to visit the facilities of the Mariupol Airport Base. The entrance to the base and surrounding perimeter had hazard signs warning of the presence of landmines.

60. The Special Rapporteur is concerned by the threat that unexploded ordnance and other explosive remnants of war pose against civilian lives, particularly children. The United Nations Human Rights Monitoring Mission in Ukraine verified numerous civilian casualties as a result of unexploded ordnance left in the battleground, both in Government-controlled areas and in territories controlled by the armed groups. The Special Rapporteur reminds the Government of its obligations under the Protocol on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol V). According to the Protocol, which Ukraine ratified in 2005, State parties have to mark and clear, remove or destroy, as soon as feasible, all explosive remnants of war in territories under their control. In the event that explosive ordnance used by Ukraine remains in territory outside of its control, the Government has the obligation to provide assistance and information to facilitate the marking, clearance, removal or destruction of the ordnance by a third party. Throughout the hostilities, Ukrainian armed forces have the obligation to record and retain information on the use of explosive ordnance, in order to facilitate its clearance without delay after the cessation of hostilities.

61. More generally, the Special Rapporteur is worried by the extent to which reporting on the conflict is being instrumentalised by all parties using mechanisms that ought to be exercising an accountability function with respect to their own forces. Instead of responding to, investigating or prosecuting cases of indiscriminate shelling by their own military forces, each side is dedicating its time to documenting in laudable detail the violations of the other side with a view to continuing their confrontation in national or international courtrooms.

3. Perfidy, suicide attacks, and human shielding

In his 2006 report on Israel and Lebanon, Special Rapporteur Alston analysed the laws relating to perfidy, suicide attacks, and human shielding, and the relationships between the three methods of fighting.

Report on Mission to Israel and Lebanon (A/HRC/2/7, 2 October 2006, ¶¶29-30, 58) (joint report with the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Representative of the Secretary-General on the human rights of internally displaced persons, and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living)

29. International humanitarian law also imposes obligations on defenders. The use of human shields is prohibited.[231] Violation of this rule may be understood to require the defender's specific intent to use civilians to immunise otherwise legitimate military objectives from lawful attack.[232] In addition to this prohibition, the defender also has affirmative obligations to protect civilians by keeping them away from military targets.[233]

30. A violation of the obligation to take precautionary measures vis-à-vis the civilian population or their use as human shields by one side to a conflict does not change the obligations incumbent on

231 ICRC Study of Customary Law, *supra* note 86, pp. 337-340 (Rule 97).
232 Ibid., p. 340 (Rule 97).
233 Ibid., pp. 68-76 (Rules 22-24).

the other party to the conflict to weigh what constitutes an excessive attack in relation to concrete and direct military advantage.

[...]

58. It is clear that Hezbollah made at least some use of houses and other civilian sites to hide or conceal military activities. Although systematic evidence was not presented to the mission in this regard, the Government of Israel has provided it with video material unmistakably showing rockets being launched from civilian residential buildings in South Lebanon. This conduct was a violation of international humanitarian law obligations. The question of whether Hezbollah used human shields is more complicated, and the mission did not receive clear evidence on that issue. Under international law, the term "human shield" is appropriate when there is "an intentional collocation of military objectives and civilians or persons *hors de combat* with the specific intent of trying to prevent the targeting of those military objectives".[234] This relatively precise definition of the term should be maintained, especially in light of the distinction between war crimes and other violations of humanitarian law.[235]

Special Rapporteur Alston also addressed these issues in his report on Afghanistan.

Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009, ¶¶7-9, 19-24,71)

7. IHL also requires each party to the conflict to take certain steps to limit the risk to civilians of attacks by the opposing party.[236] These requirements are routinely disregarded by the Taliban. While there are cases in which Taliban fighters have warned civilians to leave an area prior to an attack, I received multiple witness accounts of the Taliban intentionally using civilians as "human shields" to deter attacks on their forces. In some instances, the Taliban have launched rocket-propelled attacks at IMF bases, convoys or other military targets from civilian compounds and villages, thereby making it difficult for international forces to respond militarily – via return fire or air strike – without causing civilian casualties or damaging civilian objects. Human shielding is also employed when the Taliban are in direct military engagement with international ground forces, and fire upon soldiers from homes or compounds. In this situation, the presence of civilians within the compound – generally a family or group of families – has been used by the insurgents to deter return fire from international or ANA ground forces located nearby.[237]

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

234 Ibid. , p. 340.

235 Ibid., pp. 568-603 (Rule 156).

236 Customary international humanitarian law prohibits "the use of human shields" (ICRC Study of Customary Law, *supra* note 86, Rule 97) meaning the "intentional collocation of military objectives and civilians or persons *hors de combat* with the specific intent of trying to prevent the targeting of those military objectives" (ICRC Study of Customary Law, *supra* note 86, Rule 97, discussion p. 340).

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

less likely to lead to civilian casualties, but in other circumstances endangerment will occur and various binding IHL obligations will be violated.

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

[...]

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

20. Taliban suicide attacks are often employed in a disproportionate or indiscriminate manner, and large numbers of civilians are injured or killed as a result. Because they are carried out through a suicide body-borne or vehicle-borne IED ("incendiary explosive device") by insurgents who feign civilian status, Afghan and international forces are hard pressed to distinguish potential suicide bombers from civilians, leading to the accidental killing of civilians.

21. Suicide bombing, as a method of attack during an armed conflict, is not prohibited *per se*.[238] But a suicide attack violates IHL when it targets civilians, may be expected to result in disproportionate civilian casualties, or is carried out in a perfidious manner.

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

23. Many Taliban attacks also involve perfidy, a prohibited method of warfare.[239] The Taliban regularly violate the prohibition against perfidy by feigning a civilian or other protected status for the purpose of carrying out suicide attacks. The Taliban's perfidious acts render everyday activities for Afghan civilians highly dangerous. In addition to the deaths caused directly, perfidy affects the behaviour of international and Afghan troops vis-à-vis Afghan civilians. In this way, violations by one side make it more difficult for the other side to comply with its legal obligations. Thus, in many situations the IMF will have no reliable way of assessing whether an unknown person approaching is a civilian, or a Taliban member intending to attack. This heightens the caution with which IMF soldiers approach ordinary Afghans, and necessitates the IMF taking precautions to protect themselves.

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

239 Perfidy is a deception that is designed to lead one party in the conflict to believe that they must accord protected status to the enemy. AP 1; ICC. And see J Ashley Roach, "Ruses and Perfidy Deception During Armed Conflict", 23 *U. Tol. L. Rev.* 395 (1991-1992).

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

[...]

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

a) To stop threatening and assassinating civilians in all circumstances, including for their alleged failure to cooperate with the Taliban or for their decision to cooperate with the Government;
b) To cease using civilians as "human shields" to deter attacks by international and Afghan military forces;
c) To stop targeting civilians in suicide attacks, and cease engaging in perfidy (unlawful deception) during such attacks, including by disguising themselves as civilians, soldiers or police.

D. Factors Contributing to Unlawful Killings by Armed Forces

In reports on different country missions, the Special Rapporteurs addressed the underlying causes of or factors contributing to unlawful killings, with a view to understanding their dynamics and formulating constructive reforms to reduce killings.

The country mission reports extracted below contain examples of these factors, how they may interact with and affect each other, and the Special Rapporteurs' analysis of common forms of killings by the armed forces:

Report on Mission to Central African Republic (A/HRC/11/2/Add.3, 27 May 2009, ¶¶13-14)

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

14. Recruitment into the FACA since the early 1980s has not been based on consistent criteria over time. Rather, soldiers have all too often been recruited through personal relationships, or recruited for their ethnicity and loyalty to the current leader. The result of this today is that the army is not an integrated whole with regularised command and control lines, but includes various informal

factions, including members of the Yacoma ethnic group recruited under former President André Kolingba, and the *ex-libérateurs* brought in by President Bozizé.

[...]

[Recommendations]

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

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

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

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

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

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

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

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

Report on Mission to Colombia (A/HRC/14/24/Add.2, 31 March 2010, ¶¶3, 10-29)

II. Background

3. The conflict in Colombia has lasted for almost 50 years, the longest endured by any country in modern times. State forces have fought against left-wing guerrilla groups, primarily the *Fuerzas Armadas Revolucionarias de Colombia* (FARC) and the *Ejército de Liberación Nacional* (ELN). By the mid-1980s, the conflict had grown to include rightwing paramilitaries aligned with the State against the guerrillas. [...]

[...]

IV. "*Falsos positivos*" and killings by security forces

10. The phenomenon of so-called "false positives" (*falsos positivos*) – unlawful killings of civilians, staged by the security forces to look like lawful killings in combat of guerrillas or criminals – are well known to Colombians. While there are examples of such cases going back to the 1980s, the evidence indicates that they began occurring with a disturbing frequency across Colombia from 2004.

11. The factual dynamics of these cases are well-documented, and it is necessary here only to outline the general patterns common throughout the country's departments. In some cases, civilian victims are lured under false pretences – usually with the promise of a job – by a paid "recruiter" (a civilian, demobilised armed group member or former soldier) to a remote location. Once there, victims are killed by members of the military, often within a matter of hours or days of when they were last seen by family members. In other cases, the security forces remove victims from their homes or pick them up on patrol or at a roadblock. Victims may also be identified to military members as guerrillas or criminals by "informers", often in exchange for a monetary reward. Once these victims are killed, the military, with varying degrees of sophistication, then sets up the scene to make it appear like a lawful combat killing. This can involve: placing weapons in the hands of victims; firing weapons from victims' hands; changing their clothes to combat fatigues or other clothing associated with guerrillas; and putting combat boots on victims' feet. The victims are reported by the military and in the press as guerrillas or criminals killed in combat. Victims are often buried without first being identified (*nombre desconocido*) and some are buried in communal graves. Meanwhile, victims' families search desperately – sometimes for many months – for their loved ones. When family members discover what happened and take steps to seek justice, such as reporting a case to officials or discussing the case with the press, they often face intimidation and threats. Some have been killed.

12. That there have been such cases in Colombia is not in dispute. At issue is the number killed, the continuing nature of the phenomenon, the extent to which the State has sanctioned the killings, the motivations and causes, and whether the Government is taking sufficient steps in response.

A. State policy?

13. Some critics have accused the Government of having a "State policy" of killing civilians. Government officials have contended that many false allegations of *falsos positivos* have been made, and that many of the purported civilian victims were in fact guerrillas or criminals. When questioned, some senior Government officials told me that while there may have been "some errors", to the extent that, where unlawful killings were committed by the military, they were isolated cases and not part of a pattern or widespread practice.

14. Neither of these claims is accurate. I have seen no evidence to suggest that these killings were committed as part of an official policy or that they were ordered by senior Government officials.

However, I did receive detailed and credible reports of such killings from across the country, committed in numerous departments and by a large number of different military units. It is clear from my investigations that members of Colombia's security forces have committed a significant number of unlawful killings and that the *falsos positivos* pattern has been repeated around the country. There have been too many killings of a similar nature to characterise them as isolated incidents carried out by individual rogue soldiers or units, or "bad apples". The Soacha cases are only the most well-known set of such killings.[240] I interviewed many of the families of the numerous Soacha victims. But I also spoke with witnesses and family members of victims – who described the horrors of these killings – from the departments I visited (including Antioquia, Meta and Santander), and with those who travelled from departments around the country to explain the details of their cases to me (including from Arauca, Cali, Casanare, Cesar, Cordoba, Guaviare, Huila, Norte de Santander, Putumayo, Sucre and Vichada). In most of the cases I reviewed, I was provided with evidence that strongly supports the claims of the victims' families that the killings were unlawful. The forms of evidence received included ballistics and forensics reports, video and photographic evidence, eyewitness testimony and the testimony of soldiers and "recruiters" themselves.

15. It is not yet precisely clear how many killings have taken place. One civil society group has recorded at least 995 allegations of unlawful killings by the security forces from July 2002 to June 2007.[241] Another recorded 2,276 victims of extrajudicial executions and forced disappearances by State agents from July 1996 to June 2008 (1,486 between July 2002 and June 2008). The Ministry of Defence stated that there were 1,391 cases of homicides allegedly attributed to members of the National Security Forces, although I was not given statistics on the numbers of killings considered by the Ministry to have been unlawful. The Government informed me of 552 complaints, between 2000 and 2008, of homicides allegedly committed by members of the Armed Forces. The Government noted that there may also be additional complaints recorded by the Office of the Attorney-General (*Fiscalía*) or the Office of the Inspector General (*Procuraduría*). The *Fiscalía* reported to me that, in May 2009, its National Human Rights and International Humanitarian Law Unit was pursuing 1,708 homicides allegedly committed by State agents.15 The *Fiscalía* National Prosecution Unit was pursuing an additional 317 cases. The *Procuraduría* reported 639 preliminary enquiries since 2000.

B. Reduction in killings since late 2008?

16. From at least as early as 2007, the Government began to take a number of steps to confront the issue of these killings. After the publicity surrounding the Soacha killings, additional significant and specific steps were taken. Measures (analysed further below) have included: disciplinary sanctions, including the dismissal of 3 generals and 24 other soldiers; increased cooperation with the International Committee of the Red Cross and the United Nations with respect to monitoring; the installation of operational legal advisors in military units to advise on specific military operations; increased oversight of payments to informers; the creation of a temporary special commission to investigate operations (the "Suarez report"); appointment of delegated inspectors to army divisions; the introduction of the requirement that deaths in combat be investigated first by judicial police

240 During 2008, young men began disappearing from Soacha and Bogota. When some of the bodies of the missing were found in Santander and Norte de Santander, their families began publicly to allege forced disappearances and extrajudicial executions. Press reports initially reported 11 victims; over subsequent months, this increased to 23 victims. The men had been reported by the military as killed in combat, but the families strongly contested this, and evidence strongly suggested that the "combat" was fabricated. As of June 2009, there had been nine hearings for 54 accused soldiers. See MINGA, *Summary of Cases of Extrajudicial Killings in the Municipality of Soacha, Department of Cundinamarca, Colombia*, June 2009.

241 See Coordinación Colombia Europa Estados Unidos, *Informe de Ejecuciones Extrajudiciales en el Nororiente Colombiano – Presentado a: Relator Especial Sobre Ejecuciones Extrajudiciales en Colombia, Philip Alston*, June 2009.

(Directive No. 19); modifying award criteria (Directive No. 142) and military unit performance criteria (Directive No. 300-28); the creation of a specialised unit in the *Fiscalía* to deal with alleged extrajudicial executions; and the requirement that military criminal judges transfer cases to the civilian justice system.16 In 2009, the Ministry of Defence also issued Directive No. 208, which lays out 15 measures intended to implement the Ministry's human rights and humanitarian law policies throughout the Armed Forces and strengthen internal command, control, training and evaluation systems.

17. These steps appear to have led to a significant reduction in the allegations made of extrajudicial executions committed by the military since the Soacha scandal in late 2008. The Human Rights and International Humanitarian Law Observatory had received no allegations of unlawful killings in 2009 at the time of my visit in June 2009. The *Fiscalía* received denunciations of six cases of alleged unlawful killings by the security forces after the Soacha killings, each of which was still under investigation at the time of my visit. Nongovernmental organizations reported fewer than 10 new allegations. It is important to stress that it is still too early to confirm the extent or nature of a drop in allegations. Past experience in Colombia shows that many cases remain unreported for long periods of time due to witness fear, lack of knowledge about how to make complaints and navigate the justice system, and significant communication and geographic impediments to making complaints.

18. Furthermore, despite these good faith efforts by the Government to reduce killings, there are real gaps between the policies as they exist on paper and the practice on the ground, especially with respect to impunity for past killings. As explained below, the situation in the regions I visited is significantly less positive than the formal steps alone would indicate.

C. Causes of killings

19. Unlawful killings by the military are the result of a set of complex factors, which have both motivated individuals to commit killings, and fostered an environment in which such killings have been able to occur with general impunity.

1. Pressure to "show results"

20. Many expert and experienced interlocutors – including those in the military – confirmed to me that there was pressure in military units to "show results" and demonstrate that the military was continuing to gain ground against guerrillas and criminals. While senior Government officials disputed this and emphasised that killing civilians does not increase security, it is clear that within the military, success was often equated with enemy "kill counts" – the number of FARC members and others killed in combat.

21. As security in Colombia began to improve from 2002, and as guerrillas retreated from populated areas, some military units found it more difficult to engage in combat. In such areas, some units were motivated to falsify combat kills. In other areas, the guerrillas were perceived by soldiers to be particularly dangerous and soldiers were reluctant to engage them in combat. It was "easier" to murder civilians. In still other areas, there are links between the military and drug traffickers and other organised criminal groups. Local military units do not want to engage in combat with the illegal groups with which they are cooperating, so killing civilians falsely alleged to be part of these groups make military units appear to be taking action.[242]

242 A number of killings also appear to be efforts at "social cleansing" – killings of suspected criminals, drug users and other "undesirables". In such cases, victims are presented as killed in combat; the social cleansing motive overlaps with pressure to produce results.

22. Within this general culture, it has been very difficult for individual soldiers who wanted to speak out against abuses to do so. Some who spoke out have been forced to relocate for their own safety.

2. Rewards and incentives for killings

23. There is much public confusion about rewards and incentives for killings by military forces. It is difficult to obtain clear and accurate information, including from the Government. Some critics have argued that members of the military receive monetary rewards for killing guerrillas and other personal benefits (holidays, medals and promotions). Critics also attack the payment by the Government of money to informers who provide information leading to the killing or capturing of guerrillas.

(i) Rewards to civilians for information

24. The Government does provide rewards to those who provide information on guerrilla and criminal activity. The rewards policy is set out in Directive No. 29 (2005) (no longer in effect), Directive No. 02 (2008) and Directive No. 01 (2009), each of which is confidential, although copies of Directive No. 29 have been widely circulated.[243] Although these rewards have been heavily criticised in Colombia, monetary rewards to civilians for providing information leading to, for example, the capture of wanted criminals, are common in many countries and are not problematic *per se*. What should be at issue is whether there is sufficient oversight and transparency with respect to payments. It is of significant concern that the rewards may provide a ready source of money for members of the military to pay "recruiters" to assist with the commission of *falsos positivos*.

25. The Government informed me that the directives are all essentially similar, although the newer ones make the system of controls more explicit. According to information provided by the Government, rewards cannot be paid to public servants (such as soldiers) and can only be paid for information leading to clear operational results and following approval by a technical follow-up or central committee. The new directives set out controls and checks that would make it difficult for money to be paid to recruiters for *falsos positivos.*

26. However, other sources of payment in the form of "confidential expenses" (*gastos reservados*)[244] and commanders' discretionary funds are of serious concern. In fact, in its written comments to me, the Government conceded that there is more discretion for officers in distributing confidential expenses and that there "could be problems there".[245] One military commander told me that he has a US$ 2,000 monthly fund, a discretionary fund which he could use to, for example, pay small rewards to informers. Such funds, along with informal funds gained through criminal activity, are the more likely source of payments to recruiters (who are generally paid small amounts of a few hundred dollars or less).

(ii) Rewards to military for killings

27. Significantly, members of the military have also been provided various incentives to kill, including vacation time, medals and promotions. I asked the Government for information on the

243 Ministry of Defence, Permanent Ministerial Directive No. 29 (2005) provides for payment of rewards to those who provide "timely and truthful information … [that leads to, for example] the capture of overthrow in combat of leaders of Illegal Armed Groups"; provides up to 5,000 million pesos for information about top leaders. I could not obtain copies of the new Directive No. 1 (2009), which the Government told me was restricted.

244 According to the Government, confidential expenses are intended to finance intelligence activities, counter-intelligence, criminal investigations and the protection of witnesses and informants.

245 I asked for, but was not provided, information on the amounts, nature, or purpose of funds paid out to informants under the confidential expenses or other funds.

type and quantity of incentives provided to members of the security forces since 2002, but was not given that information. My investigations did reveal that some incentives are relatively informal and unregulated and differ from unit to unit. One soldier, for example, explained how a killing by his unit would be rewarded with 15 days' vacation. When important holidays approached, he stated, soldiers would attempt to "earn" vacation time. However, a commander from another unit said he would not reward his soldiers with time off, because he believed this could potentially distort their professional judgement.

28. The Government has taken some steps to address these possible distortions. It informed me that demobilizations and captures were now "worth more" than combat killings in evaluating the performance of a military unit. In addition, since Directive No. 142 (2008), demobilizations and captures have been incorporated as part of the criteria for the award of a bravery medal (*medalla Al Valor*) or a public order medal (*medalla de Orden Público*).

3. Accountability

29. Lack of sufficient accountability has been a key factor in the continuation of *falsos positivos*. Estimates of the current rate of impunity for alleged killings by the security forces are as high as 98.5 per cent. Soldiers simply knew that they could get away with murder.

Report on Mission to the Democratic Republic of the Congo (A/HRC/14/24/Add.3, 14 June 2010, ¶¶24-29)

1. Opportunistic killings

24. Individual killings have generally occurred in the context of looting or sexual violence, or for other purely subjective reasons. Soldiers have, for example, retaliated when civilians resisted attempts by soldiers to steal their food, motorcycles or other goods. I received numerous testimonies of soldiers opening fire on crowds of civilians who had refused to hand over food. In other cases soldiers have shot at their commanders or civilians when rations or pay were delayed. I also received testimony of soldiers forcing civilians to carry rations and other goods for them over long distances, because the soldiers do not have other methods of transport. Civilians have been ordered to do this under threat of death. Looting by the FARDC [state armed forces] in villages they have taken over from the FDLR [*Forces Démocratiques de Libération du Rwanda*, a rebel group] has also been common. Such problems are due both to the central Government's failure to provide funds and to the rampant embezzlement of pay by commanders, combined with often poorly trained and ill-disciplined soldiers.

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

2. Targeted massacres

26. In addition to these opportunistic killings, I obtained credible evidence that FARDC soldiers carried out large-scale targeted massacres of civilians in the Kivus. These killings appear to have been primarily carried out by units composed of ex-CNDP [Congrès National pour la Défense du Peuple, a rebel group largely integrated into the government armed forces]members integrated

into the FARDC in the early stages of Kimia II [military operation against the FDLR], and led by CNDP commanders with sometimes extensive records of prior abuses. The massacres have often taken place against civilians located near suspected rebel group locations, or against civilians presumed to have supported the FDLR.

27. For example, I received reliable evidence of a massacre on 27 April 2009 in which the FARDC attacked a makeshift refugee camp in Shalio. Some 50 Rwandan Hutu refugees, presumed to be aligned with the FDLR, were immediately killed – either shot, cut, or beaten to death. Another group of 50 were taken by the FARDC, most of whom were subsequently also killed; a group of some 40 women were raped and beaten; a further group taken from Shalio remains unaccounted for. The commander responsible for the attacks appears to have been Lt. Col. Innocent Zimurinda, an ex-CNDP leader known for his Tutsi extremism.[246]

28. Since my visit, further evidence has emerged of other similar FARDC killings, including killings near Shalio, in Bunyarwanda and Marok; two other massacres in August 2009 in Mashango and Ndoruma; and frequent killings through 2009 on the Nyabiondo-Pinga axis.[247] Information provided to me indicates that many of these killings were also committed by ex-CNDP members, and that they likely took place to punish civilians perceived to be rebel "collaborators", to destroy non-Tutsi populations, and possibly to gain access to mineral resources.

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

E. Addressing Violations by Non-State Armed Groups

In many of the countries visited by the Special Rapporteurs, non-state armed actors are responsible for violence and killings in the context of armed conflict with state armed forces.

Report to the Commission on Human Rights (E/CN.4/2005/7, 22 December 2004, ¶76)

76. [...] The traditional approach of international law is that only Governments can violate human rights and thus [...] armed groups are simply committing criminal acts. And indeed this may be an accurate characterization. In reality, however, that is often not the end of the matter and in some contexts it may be desirable to address the activities of such groups within some part of the human rights equation.[248] This could mean addressing complaints to them about executions and

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

247 See Human Rights Watch, *"You Will Be Punished": Attacks on Civilians in Eastern Congo* (December 2009).

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

calling for respect of the relevant norms.[249] This may be both appropriate and feasible where the group exercises significant control over territory and population and has an identifiable political structure (which is often not the case for classic "terrorist groups"). In cases in which such groups are willing to affirm their adherence to human rights principles and to eschew executions it may be appropriate to encourage the adoption of formal statements to that effect. And in reporting on violations committed by Governments it may be appropriate to provide details of the atrocities perpetrated by their opponents in order to provide the Commission with an accurate and complete picture of the situation. It goes without saying that any such approaches would in no way diminish the central human rights responsibilities of Governments, nor does it seek to give legitimacy to opposition groups. The condemnation of such groups and insisting that they respect international human rights law should not be taken as equating them with States. On the other hand, in an era when non-State actors are becoming ever more important in world affairs, the Commission risks handicapping itself significantly if it does not respond in a realistic but principled manner.

During his mission to Sri Lanka, Special Rapporteur Alston analysed the expectations of the international community and the legal obligations of the Liberation Tigers of Tamil Eelam (LTTE).

Report on Mission to Sri Lanka (E/CN.4/2006/53/Add.5, 27 March 2006, ¶¶25-27)

25. Human rights law affirms that both the Government and the LTTE must respect the rights of every person in Sri Lanka. Human rights norms operate on three levels – as the rights of individuals, as obligations assumed by States, and as legitimate expectations of the international community. The Government has assumed the binding legal obligation to respect and ensure the rights recognised in the International Covenant on Civil and Political Rights (ICCPR). As a non-State actor, the LTTE does not have legal obligations under ICCPR, but it remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights.[250]

26. I have previously noted that it is especially appropriate and feasible to call for an armed group to respect human rights norms when it "exercises significant control over territory and population and has an identifiable political structure".[251] This visit clarified both the complexity and the necessity of applying human rights norms to armed groups. The LTTE plays a dual role. On the one hand, it is an organization with effective control over a significant stretch of territory, engaged in civil planning and administration, maintaining its own form of police force and judiciary. On the other hand, it is an armed group that has been subject to proscription, travel bans, and financial sanctions in various Member States. The tension between these two roles is at the root of the international community's hesitation to address the LTTE and other armed groups in the terms of human rights law. The international community does have human rights expectations to which it will hold the LTTE, but it has long been reluctant to press these demands directly if doing so would be to "treat it like a State".

27. It is increasingly understood, however, that the human rights expectations of the international community operate to protect people, while not thereby affecting the legitimacy of the actors to whom they are addressed. The Security Council has long called upon various groups that Member States do not recognise as having the capacity to formally assume international obligations to

249 A similar result is achieved in relation to international humanitarian law through the application of common article 3 of the Geneva Conventions of 1949.

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

251 E/CN.4/2005/7, *supra* note 48, para. 76.

respect human rights. The LTTE and other armed groups must accept that insofar as they aspire to represent a people before the world, the international community will evaluate their conduct according to the Universal Declaration's "common standard of achievement".

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

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

In his 2009 report on Afghanistan, Special Rapporteur Alston discussed the many violations committed by the Taliban, as well as efforts to respond to them.

Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009, ¶¶38-43, 72)

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

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

40. Views varied on the relevance of a strategy "naming and shaming" in relation to the Taliban. One interlocutor suggested that since the Taliban has denied responsibility for particular suicide attacks causing heavy civilian casualties, there might be a reputational concern with the public. It would follow that credibly documenting and publicizing violations could affect conduct. Another interlocutor argued that this analysis disregarded the structure of Taliban decision-making on military action and public relations. Although some senior Taliban might disavow particular attacks to minimise political fallout, commanders on the ground lacked external or internal incentives to modify their behavior to avoid adverse media reports. This reasoning would suggest that incentives for compliance are strong enough to induce *post hoc* damage control but too weak to encourage actual reforms. There is evidence, however, that reputational concerns have led to some efforts to ensure actual compliance rather than merely feign it after the fact. The Taliban's leadership has promulgated directives prohibiting particular abusive tactics – such as beheadings[252] – and these have been at least partially respected by fighters on the ground. In my view, more extensive credible naming and shaming efforts are appropriate.

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

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

(OIC) should do more to condemn Taliban abuses and put pressure on states in a position to affect the Taliban's conduct. While some expectations seemed unrealistic, the palpable disillusionment with efforts to date should provide a wake-up call.

42. Others argued that there was a need for international actors to engage directly with the Taliban to understand the rationales for its abusive tactics and to apply targeted pressure for change. Prominent elders in the South told me directly that the problem with visits by international envoys was that they only spoke to one side. An international military commander expressed surprise that I was not speaking with Taliban representatives. In general, when I conduct country visits and fact-finding missions, I speak with armed opposition groups, but I did not speak with any formal representatives of the Taliban or other armed groups during my visit.[253] In retrospect, this was a mistake. Taking account of information provided by such sources would permit a more nuanced understanding of Taliban and other AGE strategies. While some of the explanations and justifications provided for engaging in abusive tactics would be self-serving and deceitful, there is no reason to assume that the Taliban could never be persuaded to modify its conduct in ways that would improve its respect for human rights. And purely humanitarian contacts have had a positive impact in the past.[254]

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

[...]

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

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

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

In 2010, Special Rapporteur Alston reported on an early warning system implemented to help protect civilians during Colombia's ongoing internal conflict with the FARC.

Report on Mission to Colombia (A/HRC/14/24/Add.2, 31 March 2010, ¶¶80-84)

80. The *Defensoría's* Early Warning System (*Sistema de Alertas Tempranas*, SAT) monitors, analyses and reports on risks to civilians and possible violations of international law. The reports describe the local dynamics of armed conflict, the sources of threats, the individuals and populations at risk, an evaluation of the risk and recommendations to reduce or eliminate threats.[255] SAT reports are full of detailed facts and sophisticated analysis.[ ] SAT is one of the best tools the Government has for preventing killings and other abuses in Colombia.

81. It is critically important that the Government provide SAT with more staff and resources. At the time of my visit, it had only 6 national analysts and 22 regional analysts, which is not enough to cover the country's geographical expanse or the complexity of its conflict dynamics. Direct access to local communities is integral to the accuracy and usefulness of the SAT monitoring and reporting function. Yet, because of its limited budget, SAT analysts are sometimes unable to travel to the areas they are responsible for covering. Analysts should be able to report on risks posed by the presence or movement of all armed actors, including State forces.

82. It is also crucial that the Government acts upon SAT reports, and that neither the SAT analysis nor the decision by the Inter-Agency Early Warning Committee (*Comité Interinstitucional de Alertas Tempranas*, CIAT) whether to issue an early warning are influenced by political pressures.

83. I was given information about several instances in which killings had occurred after the Government had failed to respond to the SAT warnings. One example is the Awa massacre discussed above.[256] Another death took place in March 2008, after SAT had issued a risk report for municipalities in Caqueta where the conflict against the FARC had intensified. The FARC threatened municipal officials to intimidate them into not supporting the Government's Domestic Security Policy. CIAT determined that no early warning should be issued and a week after the SAT report, the FARC killed a local official. Killings may occur despite early warnings and the Government's best prevention efforts, but the Government's failure to act after notice from one of its own agencies is a stark dereliction of its responsibilities.

84. I was told by some Government officials that political pressure may be a factor in the decision of CIAT not to issue an early warning. Military and civilian officials at the regional and departmental level may be concerned that a warning signals security failures and deters investment and development and press for a warning not to be issued or to be prematurely withdrawn. Given the importance of the SAT function, it is also foreseeable that other Government or civilian actors may try to influence its analysis or recommendations. To reduce such illegitimate pressures and to fulfil its obligation to prevent and protect, the Government must ensure that the independence of

255 SAT provides the reports to the Inter-Agency Early Warning Committee (*Comité Interinstitucional de Alertas Tempranas*, CIAT), led by the Minister of Interior and Justice and tasked with coordinating the Government's response to SAT warnings of possible rights violations. CIAT includes the vice president, the high counsellor for *Acción Social*, the defence minister and the DAS director, or their representatives. While SAT may participate in meetings, it does not have a vote. If CIAT decides an early warning should be issued, it alerts the governor of the affected department, other regional officials, the Armed Forces, the National Police and the *Acción Social* agency. The early warning triggers the duty of these officials to prevent human rights and humanitarian law violations (Law No. 1106 of 2006, art. 5). If an early warning is not issued, CIAT may informally notify departmental or municipal authorities of risks and provide recommendations for preventing harm and protecting civilians.

256 In local jurisdictions, *fiscales* may also have fewer resources and investigatory personnel, resulting in slower development and prosecution of cases, which may give rise to suspicion that the *fiscal* is not proceeding for more nefarious reasons.

CIAT and SAT is maintained. It should make SAT reports public (subject to security needs) after an appropriate period, such as three months after the decision of CIAT.

F. Accountability, Transparency, and Reparations

The Special Rapporteurs have frequently stressed the importance of transparency and accountability mechanisms relating to right to life violations during armed conflict. Whether in times of peace or war, states are obliged to investigate alleged violations of the right to life, to hold to account those responsible for abuses, and to provide reparations to victims.

Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009, ¶¶29-34, 73-78)

D. Transparency and accountability in international force operations

29. The international forces in Afghanistan should take seriously the principles of accountability and transparency, the importance of which they so frequently proclaim in other contexts.[257] I saw no evidence that the IMF commit widespread intentional killings in violation of human rights or IHL. But their response to alleged civilian casualties combines great seriousness of intent and adherence to the applicable law with surprisingly opaque and unsatisfactory outcomes.

30. First, when I asked relatives or witnesses which particular international force had carried out the killing, even those who had tried to follow up their cases at PRTs and other military bases were often unable to answer. Seeking clarification from the international forces is like entering a maze, one that I also experienced myself.[258]

31. Second, the situation is even worse when it comes to the accountability of individual soldiers. There is a dual system, involving both the ISAF and national commands, for incidents in which there are grounds to believe that unlawful force may have been used. An ISAF commander will convene a Mission Review Board in response to formal allegations, internal information that raises concerns, or even a newspaper report on an incident. The perspective of this inquiry is not legal, but addresses incidents that may undermine the mission. The board evaluates whether the force used was appropriate. Findings go to the ISAF commander and the command of the relevant national contingent. The responsibility for prosecuting any crime committed then belongs to the sending country. There is, however, no requirement that the outcomes of these national processes of investigation, discipline, and prosecution be reported back to ISAF. The result is that *no one*

257 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" (CCPR/C/21/Rev.1/Add.13, *supra* note 9, para. 15.) This duty is entailed by the general obligation to ensure the right to life of each individual. The right to life is non-derogable regardless of circumstance (ICCPR, art. 4 (2)); thus, armed conflict and occupation do not discharge the State's duty to investigate and prosecute human rights abuses. It is undeniable that during armed conflicts circumstances will sometimes impede investigation. Such circumstances will never discharge the obligation to investigate – this would eviscerate the non-derogable character of the right to life – but they may affect the modalities or particulars of the investigation. On a case-by-case basis a State might utilise less effective measures of investigation in response to concrete constraints. For example, when hostile forces control the scene of a shooting, conducting full forensic examinations may prove impossible. Regardless of the circumstances, however, investigations must always be conducted as effectively as possible and never be reduced to mere formality. (E/CN.4/2006/53, *supra* note 56, paras. 33-43.)

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

in Afghanistan systematically tracks the outcome of investigations and prosecutions.[259] This is a wholly unsatisfactory situation.

32. The international forces operating in Afghanistan have a responsibility to make sure that there is a coherent, unified system of accountability which Afghans and others can follow. However messy this system may be on the inside, composed as it is of multiple mandates and of disparate national military justice systems, it is essential that those pieces add up to a coherent whole.

33. Third, the international forces do not publicly provide information on civilian casualties. Clearly, it is often difficult to reliably ascertain a precise figure because it is not always possible to determine whether particular individuals were civilians or Taliban fighters. But instead of a wall of silence, statistics should be provided accompanied by appropriate caveats and explanations of any uncertainty. The absurdity of the current situation is captured in the response by NATO to the preliminary findings I issued at the conclusion of my mission to Afghanistan. NATO's spokesman stated that "the suggestion that international military forces have killed 200 civilians uses a figure that we reject and is far too high" but he then refused to provide any alternative estimate.[260] This I a wholly unsatisfactory situation.

34. Fourth, the international forces should also cooperate more fully with outside efforts to investigate alleged abuses. There is some cooperation in the investigations of incidents between the Government and the international forces. As one senior Government official explained to me, the Government will verify the facts on the grounds, and these findings will then be correlated with ISAF's information on how the operation was planned and conducted. These two sources of information result in a more complete understanding of whether and why civilians were killed. It is regrettable that the findings of these investigations are not made public. Moreover, while the international forces do respond to particular allegations of abuse provided to them by other actors (such as UNAMA and the AIHRC), they have the capacity to do so in a much more substantive manner. This should include the expedited declassification and more comprehensive sharing of

259 I met a witness in Jalalabad who lost family members in the 4 March 2007 incident in which soldiers responded to a suicide attack on their convoy by shooting at a number of people over the next 20 kilometers of road .... He was surprisingly open-minded about the responsible soldiers being tried by their sending country, but he was angry that he had not been provided with any information as to whether the soldiers involved had come before a court martial, whether they had been convicted or acquitted, and whether there were ongoing proceedings. Then I visited the regional commander, and he didn't know either. He explained that it was the previous unit that was responsible for that incident and they had taken all the relevant files with them when they rotated back to the United States. To his credit, he recognised that this was a problem. Another regional commander with whom I spoke suggested that it was not such a problem whether the status of investigations and prosecutions could be tracked because compensation was the main concern. As he acknowledged, the bottom line is that those wishing to know the final outcomes of any prosecutions must read the local newspapers in all of the troop-sending countries.

In fact, at the time of my visit, a Court of Inquiry into the 4 March incident was proceeding in the United States. Shortly after I returned from Afghanistan, the US military released a short statement on this incident, indicating that a US military commander had conducted a "thorough review of the report of a Court of Inquiry" and had determined that the soldiers had "acted appropriately and in accordance with the rules of engagement and tactics, techniques and procedures in place at the time in response to a complex attack". Unsurprisingly, this conclusory and unsubstantiated response to such a serious incident was met with dismay in Afghanistan. Afghans have a right to ask on what basis this conclusion was reached. But all of the documents produced by the Court of Inquiry have remained classified. The record of proceedings has not been released. The 12,000 page report of the Court of Inquiry including recommendations and factual findings has not been released. The US Government has even disregarded the existing regulation stating that the convening authority should ensure that an executive summary of the report be made public in order to provide information on the investigation's findings and recommendations. Aside from the question of whether the decision not to initiate courts-martial was justified, the manner in which the US military justice system operated in this case was entirely inconsistent with principles of public accountability and transparency. Regrettably, this is no aberration; it is the norm.

260 NATO Statement, 15 May 2008.

relevant information, including video footage (such as gun tapes) and mission story-boards (step-by-step descriptions of how an operation progressed).

[...]

[Recommendations]

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

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

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

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

a) Where the actions of soldiers are investigated or prosecuted within the troop-sending country, the progress of national processes of investigation, discipline and prosecution should be reported back to ISAF headquarters in Afghanistan;
b) The progress and outcomes of national processes of investigation or prosecution should be centrally tracked by ISAF;
c) This information should be made available to the various regional commands, to the Provincial Reconstruction Teams under their command, and provided to directly affected persons when requested.

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

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

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

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.[261] Senior Government officials have confirmed the existence of a program through

261 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

which drones are used to target particular individuals, but have also caused civilian casualties.[262] On several occasions I have asked the Government to explain the legal basis on which a particular individual was targeted.[263] 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.[264] 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.[265] Under the Government's reinterpretation of the law and the Council's and my mandate, the United States would function in a public accountability void – as could other States – to the detriment of the advances made by the international human rights and humanitarian law regimes over the past sixty years.

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

[...]

Recommendations

83. Enhancing transparency in targeted killings

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

Rev. (7 June 2007), paras. 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.

262 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.

263 A/HRC/4/20/Add.1, *supra* note 105, pp. 342-58 (one targeted killing in Pakistan) and pp. 358-61 (three targeted killings in Pakistan); *see also* E/CN.4/2006/53/Add.1, *supra* note 66, pp. 264-65).

264 A/HRC/4/20 *supra* note 68, para. 29; A/HRC/4/20/Add.1, *supra* note 105, pp. 342-58.

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

In his 2010 report to the Human Rights Council, Special Rapporteur Alston underlined that States are required by international law to provide reparations for violations for which they are responsible.

Report to the Human Rights Council (A/HRC/14/24, 20 May 2010, ¶¶84, 86)

84. Human rights law, humanitarian law and the international law on State responsibility require that individuals should have an effective remedy when their rights are violated, and that the State must provide reparations for its own violations.[266] States must ensure that victims' families are able to enforce their right to compensation, through judicial remedies where necessary. In many cases, reparations can mean the difference between the destitution of innocents and their families, and their ability to rebuild their lives and livelihoods.

[...]

86. During visits to countries experiencing armed conflict or other large-scale violence, I have found that States rarely complied with their reparations obligations,[267] although some States, such as the United States and the United Kingdom of Great Britain and Northern Ireland, have made commendable efforts.[268] Those efforts include monetary payments to the families of those killed even in lawful attacks. Such payments – unlike formal reparations – are offered without legal implication and as a gesture of condolence and respect. The Government of the United States also makes amends by providing livelihood assistance programmes to individuals (e.g. skills training to enable widows to make a living) or communities (e.g. to repair damage caused by military operations). Most countries with combat troops in Afghanistan now offer monetary payments for lawful civilian harm, but programme implementation suffers from flaws, including a lack of common funding among International Security Assistance Force (ISAF) partners, inconsistency due to an over-reliance on commander discretion and different troop-contributing country rules and practices, lack of access for civilians seeking payments, lack of a formal ISAF programme, and a lack of transparency. Some other States have also announced amends programmes in different contexts. In March 2010, Yemen promised payments to civilians killed in counter-terrorism operations. These examples illustrate an expanding practice which is not yet being systematically tracked or instituted by the international community.

In his 2010 report to the Council on targeted killings, Special Rapporteur Alston set out the legal basis of the state's international obligations with respect to accountability and transparency, and the measures and safeguards required in the context of targeted killings operations.

Study on Targeted Killings (A/HRC/14/24/Add.6, 28 May 2010, ¶¶87-92)

87. The failure of States to comply with their human rights law and IHL obligations to provide transparency and accountability for targeted killings is a matter of deep concern. To date, no State has disclosed the full legal basis for targeted killings, including its interpretation of the legal issues discussed above. Nor has any State disclosed the procedural and other safeguards in place to ensure that killings are lawful and justified, and the accountability mechanisms that ensure wrongful killings are investigated, prosecuted and punished. The refusal by States who conduct targeted

266 CCPR/C/21/Rev.1/Add.13, *supra* note 9, para. 16; J-M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law* (International Committee of the Red Cross, 2005), Rule 150; and *Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 10* (A/56/10), Draft articles on responsibility of States for internationally wrongful acts, para. 76.

267 E/CN.4/2006/53/Add.5, *supra* note 68, para. 75; A/HRC/8/3/Add.3, *supra* note 174 para. 63; and Report of the Special Rapporteur, Philip Alston, Mission to Kenya, A//HRC/11/2/Add.6, 26 May 2009, paras. 81-82.

268 A/HRC/11/2/Add.4, *supra* note 68, paras. 37 and A/HRC/11/2/Add.5, *supra* note 121, paras. 67-68.

killings to provide transparency about their policies violates the international legal framework that limits the unlawful use of lethal force against individuals.[269]

88. Transparency is required by both IHL[270] and human rights law.[271] A lack of disclosure gives States a virtual and impermissible license to kill.

89. Among the procedural safeguards States must take (and disclose) with respect to targeted killings in armed conflict are:

- Ensure that forces and agents have access to reliable information to support the targeting decision.[272] These include an appropriate command and control structure,[273] as well as safeguards against faulty or unverifiable evidence.[274]
- Ensure adequate intelligence on "the effects of the weapons that are to be used … the number of civilians that are likely to be present in the target area at the particular time; and whether they have any possibility to take cover before the attack takes place."[275]
- The proportionality of an attack must be assessed for each individual strike.[276]
- Ensure that when an error is apparent, those conducting a targeted killing are able to abort or suspend the attack.[277]

90. In order to ensure that accountability is meaningful, States must specifically disclose the measures in place to investigate alleged unlawful targeted killings and either to identify and prosecute perpetrators, or to extradite them to another State that has made out a prima facie case for the unlawfulness of a targeted killing.[278]

91. States have also refused to provide factual information about who has been targeted under their policies and with what outcome, including whether innocent civilians have been collaterally killed or injured. In some instances, targeted killings take place in easily accessible urban areas, and human rights monitors and civil society are able to document the outcome. In others, because of remoteness or security concerns, it has been impossible for independent observers and the international community to judge whether killings were lawful or not.

92. Transparency and accountability in the context of armed conflict or other situations that raise security concerns may not be easy. States may have tactical or security reasons not to disclose criteria for selecting specific targets (e.g. public release of intelligence source information could cause harm to the source). But without disclosure of the legal rationale as well as the bases for

269 Human Rights Committee, General Comment No. 6 (1982), CCPR/C/21/Rev.1; *Neira Alegria et al. v. Peru*, Judgment of 19 January 1995, Inter-Am.Ct.H.R. (Ser. C) No. 20 (1995); ECtHR, *McCann and others v. UK*, ECHR, Judgment of 27 September 1995, para. 140; *Kaya v. Turkey*, Judgment of 19 February 1998, para. 140; *Husband of Maria Fanny Suarez de Guerrero v. Colombia*, Communication No. R.11/45 (5 February 1979), Supp. No. 40 (A/37/40) (1982); E/CN.4/2006/53, *supra* note 56, para. 35. States party to the ICCPR can be held responsible for violations of the rights under the Covenant when the violations are perpetrated by authorised agents of the State, including on foreign territory, see *Lopez v. Uruguay*, Communication No. 52/1979, CCPR/C/OP/1 (1984), paras. 12.1-12.3; *Palestinian Wall Advisory Opinion, supra* note 2, paras. 108-111 (ICCPR "is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory").

270 Geneva Conventions, art. 1; AP I, arts. 11, 85 (grave breaches), 87(3); Geneva Conventions I-IV, articles 50, 51, 130, 147.

271 Economic and Social Council Resolution 1989/65 (24 May 1989).

272 HPCR Commentary *supra* note 124, § G.32(a).

273 Ibid.

274 Ibid., § G.32(a)-(c) and 39.

275 Ibid., § g.32(c).

276 Sandoz, AP Commentary, AP 1, art. 57, section 2207.

277 See for example UK Ministry of Defence, The Manual of the Law of Armed Conflict (2004), para. 5.32.9.

278 Geneva Conventions (I-IV), articles 49, 50, 129, 146; Geneva Convention (IV), articles 3 and 4. AP I, art 75.

the selection of specific targets (consistent with genuine security needs), States are operating in an accountability vacuum. It is not possible for the international community to verify the legality of a killing, to confirm the authenticity or otherwise of intelligence relied upon, or to ensure that unlawful targeted killings do not result in impunity. The fact that there is no one-size-fits-all formula for such disclosure does not absolve States of the need to adopt explicit policies.

In his end of visit statement on the 2015 Mission to Ukraine, Special Rapporteur Heyns emphasised that the duties of accountability and transparency exist even in territory which is outside the direct control of government forces. He highlighted the need for basic damage assessments, on both sides of the "contact line" across which fighting (including shelling) was taking place:

Ukraine end of visit statement: Lives lost in an accountability vacuum (Kyiv, Ukraine, 18 September 2015)

(i) Indiscriminate shelling

I am concerned that forces on the Government side are using weapons in the course of hostilities that are either inherently insufficiently precise to justify within the context of a highly urban and civilian-populated conflict zone, or that weapons with a known level of precision are being used outside or without regard to proper Standard Operating Procedures to guide targeting.

Moreover I have not been convinced during my engagement with the relevant authorities that there is a proper investigation conducted when allegations of civilian casualties are brought to their attention. The answer that I got from some of the military authorities to the question when an investigation into allegations of excessive civilian casualties would be triggered, was that such a situation will never arise, because there was an order by the Minister of Defence that this should not happen. Such a denial that a problem could exist makes a solution very difficult to achieve.

While I understand the difficulties of conducting investigations in territory outside the control of the Government's armed forces, such difficulties should not be understood, as suggested in many of the meetings I had, as a reason to reject any possibility to verify civilian casualties caused by shelling or to assess alleged violations of international humanitarian law. The conflict is currently being closely monitored by several international organizations, which publicly report the occurrence of civilian casualties on both sides of the "contact line". Combined with Ukraine's military records on the use of artillery, and the possibility to contact families of casualties, morgues, hospitals or other sources for verification, it would be possible for the Government to assess the damage caused by its use of artillery.

Damage assessments conducted this way may not always amount to evidence solid enough to allow accountability for possible violations of international humanitarian law. However, credible estimations of civilian casualties would enable the armed forces to evaluate and strengthen precautionary measures taken to mitigate the impact of shelling among civilians.

Report on Mission to Ukraine (A/HRC/32/39/Add.1, 4 May 2016, ¶¶52-53)

D. Accountability for violations

52. In many of his meetings with officials, the Special Rapporteur tried to explore the mechanisms of accountability that exist in current or proposed legislation and how they should function. As noted above, he left with the impression that in many instances the formal processes exist or will shortly exist. However, he remains concerned that, with the exception of the Office of the Ombudsperson and its national preventive mechanism, these processes are not being effectively used. Indeed, even the national preventive mechanism, which appears to be achieving its objective

as a preventive mechanism, cannot fully act as an accountability mechanism, since it can only make recommendations to the Office of the Prosecutor, which is not compelled to take up cases.

53. Several practising lawyers with whom the Special Rapporteur met identified the reluctance of the Office of the Prosecutor to take on certain cases, combined with the close relationship between the Prosecutor and the judicial authorities, as the principal impediments to pursuing allegations of ill-treatment on behalf of their clients.