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**CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONS  
OF DISAPPEARANCES AND SUMMARY EXECUTIONS**

**Extrajudicial, summary or arbitrary executions**

**Report of the Special Rapporteur, Philip Alston\***

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\* The present report is submitted late so as to reflect the most recent information.

## Summary

This report is submitted pursuant to Commission resolution 2005/34, and should be read in conjunction with its various addenda. They provide the following: a detailed analysis of communications sent to Governments which describe alleged cases of extrajudicial executions; reports on country missions to Nigeria and Sri Lanka during 2005; a report on the principle of transparency in relation to the death penalty; and several reports aimed at following up on earlier country missions to the Sudan, Brazil, Honduras and Jamaica.

The report notes that the establishment of the Human Rights Council represents a singular opportunity to develop a more credible human rights system. Accordingly, the report highlights opportunities to make the special procedures system more effective. Prominent among these is the need to ensure that the system of country visits undertaken by special procedure mandate-holders is able to function effectively. The report calls upon the Human Rights Council to establish a procedure whereby specific cases of persistent or especially problematic non-cooperation with mandate-holders are automatically flagged and taken up by the Council. It is neither fair nor a credit to the system that some of the countries with the most serious human rights problems are also those that are the least likely to be visited.

Attention is also given to the principle of transparency, which is closely related to efforts to ensure the right to life. Transparency allows considerable light to be shed on the causes of extrajudicial executions and helps in the development of potential remedial measures. The right to political participation, itself a principal driver of reform, cannot be fully realized without the information provided by transparent governmental processes. This report addresses several key areas in which transparency is often lacking: commissions of inquiry for investigating extrajudicial executions, the administration of the death penalty, and violations committed during armed conflict. In light of the legal and empirical analysis of governance processes in these areas, the report makes recommendations for measures that would increase transparency and reduce extrajudicial executions:

- States employing the death penalty should, on at least an annual basis, disclose detailed information on persons at every stage of the capital punishment process: the number of persons sentenced to death; the number of executions actually carried out; the number of death sentences reversed or commuted on appeal; the number of instances in which clemency has been granted; and each of the above broken down according to the offence for which the condemned person was convicted;
- Persons sentenced to death, their families and their lawyers should be provided with timely and reliable information on the procedures and timing of appeals, clemency petitions and executions;
- States must comply with human rights law obligations during armed conflict. These include the obligation to investigate alleged violations of the right to life promptly, thoroughly and effectively through independent and impartial bodies, and the obligation to punish those individuals responsible for violations in a manner commensurate with the gravity of their crimes.

Various events in 2005 demonstrated that “shoot-to-kill” policies pose a very real risk to the right to life. This report attempts to analyse these policies in a manner that acknowledges the challenges to be met but also respects long-established human rights principles. Various threats, including widespread looting, armed robbery, drug dealing and, most importantly, the phenomenon of suicide bombers, challenge the adequacy of traditional law enforcement measures. However, it is important to affirm that the use of lethal force by law enforcement officers must be regulated within the framework of human rights law and its standard of strict necessity. The rhetoric of shoot-to-kill should never be used. It risks conveying the message that clear legal standards have been replaced with a vaguely defined licence to kill.

The report systematically applies the human rights framework to the threats posed in such situations and concludes that when States adopt policies permitting the use of lethal force without prior warnings, a prior graduated use of force or clear signs of an imminent threat, they must provide alternative safeguards to ensure the right to life. The reliance on intelligence information in such contexts means that States must develop legal frameworks to properly incorporate intelligence information and analysis into both the operational planning and post-incident accountability phases of State responsibility, and instruct officers that there is no legal basis for shooting to kill for any reason other than near certainty that to do otherwise will lead to loss of life.

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## Introduction

1. There is much to be said for following the “same recipe” each year in reporting to an intergovernmental body such as the Commission on Human Rights. Predictability and respect for precedent make reports easier to read and the content seems less likely to convey any novel or unexpected messages. But there are also downsides. Repetition of the same material in each annual report is a persuasive reason not to look too closely at a report which seems all too familiar. And a tendency to accord equal importance to both routine procedural matters and to important substantive issues makes it difficult to work out what is significant and what is not. Linked to this is often a reluctance to clearly identify the key issues on which the relevant debates within the Commission should focus, or to spell out the matters on which action is explicitly recommended.
2. This report departs from the traditional formula. Since it is being submitted to the final session of the Commission, some reflection on the strengths and weaknesses of the procedures used in carrying out the mandate entrusted to the Special Rapporteur is especially apposite. And because much of the effort of the new Human Rights Council which is to succeed the Commission will initially be devoted to identifying improved procedures, it is important to draw attention to some of the more important considerations that should be taken into account.
3. The present report thus seeks to achieve three objectives: to outline the key measures taken in 2005 in relation to the goal of eliminating extrajudicial executions;<sup>1</sup> to identify ways in which the relevant procedures might be developed more effectively to achieve the goals set by the Commission; and to shed light on some of the central issues that arise at the national level in dealing with extrajudicial executions. In particular, the report focuses on the notion of transparency as a key component of the concept of accountability which underpins the international human rights system.
4. The report is submitted pursuant to Commission resolution 2005/34.
5. The report takes account of information received and communications sent in the period 1 December 2004 to 30 September 2005. It should be noted, however, that the addendum to the present report - which contains the details of the communications sent and the replies received - follows a different chronology, the details of which are explained below.<sup>2</sup>
6. An overview of the Special Rapporteur’s terms of reference, a list of the specific types of violations of the right to life upon which the Special Rapporteur takes action, and a description of the legal framework and methods of work used in implementing this mandate can be found in his report E/CN.4/2005/7, paragraphs 5-12.
7. The Special Rapporteur is grateful to the staff of the Office of the High Commissioner for Human Rights for their assistance in the conduct of his work, and to Mr. William Abresch of New York University School of Law, who has provided expert assistance and advice.

## I. ACTIVITIES

### A. Communications

8. An indispensable aspect of the Special Rapporteur's mandate involves engaging in a productive and meaningful dialogue with Governments in response to credible allegations of violations relating to extrajudicial executions. This is done in part through the sending of communications that might request the taking of urgent action of some kind or the preparation of a detailed and systematic response to the allegations. In order to ensure that such exchanges are frank, productive and focused, the Special Rapporteur has sought to use straightforward language, to spell out his concerns clearly, and to identify the steps which he believes would appropriately be taken. Pro forma exchanges with Governments are not helpful and he has sought to avoid them.

9. This report covers communications<sup>3</sup> sent and replies received over the past year.<sup>4</sup> The details of the Special Rapporteur's concerns and the information provided in response by Governments are reflected in considerable detail in addendum 1 to this report. That addendum is an integral, and for some purposes even the most important, part of the report on work done under this mandate. The Special Rapporteur has thus sought to make the information more accessible and better ordered than in previous years and has included his own observations in response to each set of exchanges with a Government.

10. The responses received have been classified according to the following five categories designed to assist the Commission in its task of evaluating the effectiveness of the mandate:

(a) "Largely satisfactory response" denotes a reply that is responsive to the allegations and that substantially clarifies the facts. It does not, however, imply that the action taken necessarily complies with international human rights law;

(b) "Cooperative but incomplete response" denotes a reply that provides some clarification of the allegations but that contains limited factual substantiation or that fails to address some issues;

(c) "Allegations rejected but without adequate substantiation" denotes a reply denying the allegations but which is not supported by documentation or analysis that can be considered satisfactory under the circumstances;

(d) "Receipt acknowledged" denotes a reply acknowledging that the communication was received but without providing any substantive information;

(e) "No response".

11. The very brief statistical details of the communications sent during the period under review indicate that 117 communications were sent to 55 countries and 3 other actors (including 57 urgent appeals and 60 letters of allegations) concerning a total of more than 800 individuals. A breakdown of the subjects of those appeals shows that they

involved 373 males, 76 females, more than 350 persons of whose sex was unknown, 56 minors, 75 members of religious, ethnic or indigenous minorities, 29 human rights defenders, 6 journalists, more than 200 persons exercising their right to freedom of opinion and expression, 18 persons killed in the name of passion or of honour, 2 persons killed for various discriminatory reasons, including their sexual orientation, and 9 migrants.

12. Overall, the proportion of Government replies received to communications sent during the period under review remains low at an average of 46 per cent (however, if Government replies received under the period under review but relating to communications sent during the previous period are included, the proportion of communications to which replies were received rises to 57 per cent). This means that roughly half of all communications sent drew no response from the Government concerned within a reasonable time period. As indicated in the Special Rapporteur's previous report this response rate must be considered problematic, particularly in the case of a long-established procedure that addresses an issue as grave as the alleged violations of the right to life.

## **B. Visits**

### **1. The need to ensure a response to requests for visits: a challenge for the Council**

13. Much of the focus in the recent discussions surrounding the creation of the Human Rights Council has been upon the obligation of all States, and especially those seeking election to the Commission or the Council, to cooperate with the special procedures. The importance of this obligation has long been a constant refrain of the Commission in its various resolutions<sup>5</sup> and some of the Governments which have refused to cooperate have drawn considerable criticism as a result. The most important aspect of this obligation concerns the provision of positive responses to a request for a visit by a Special Rapporteur or other mandate-holder.

14. It was in recognition of the importance of this component of fulfilling the Charter of the United Nations-based obligation to cooperate in promoting universal respect for human rights (Arts. 55 and 56), that the Commission established the practice of "standing invitations", whereby an open invitation is extended by a Government to all thematic special procedures. In addition to the 53 Governments that have registered a commitment of this type, many others have systematically responded affirmatively to specific requests.

15. Nonetheless, the almost universally acknowledged loss of credibility by the Commission on Human Rights in recent years had much to do with its failure to take up cases in which particular Governments failed to invite or permit appropriate access to special procedures. Thus one of the major challenges confronting the Council will be to devise a procedure for recording the number of requests addressed to each Government, noting cases involving outright refusals or the use of delaying tactics, and taking appropriate action once a certain threshold of seriousness is reached in each instance. Any such procedure is unlikely to work if it remains ad hoc and dependent upon one or more Governments taking the initiative. Instead, the Council should mandate a procedure whereby specific cases of persistent or especially problematic non-cooperation are automatically flagged and taken up by the Council.

16. It is clear that not every Government is obligated to immediately accept every request for a visit. There might, for example, be cases in which too many requests have been made or where the proposed timing is genuinely problematic. But in general, if the Council is to build a credible system of special procedures, it has to operate on a general assumption that visits will be facilitated and that it will take appropriate action in cases of clear non-cooperation.

## **2. Requests for visits made in 2005 and responses received**

17. During the course of 2005 a number of visits were requested. The details of those, as well as of some prior but still outstanding requests, are as follows:<sup>6</sup>

(a) China: an invitation was requested on 24 March 2005. While no written reply was received, the Special Rapporteur met with the permanent representative of China in Geneva on 24 June 2005 and was assured that the request was being considered in Beijing. No further reply has been received;

(b) India: in October 2000 the then Special Rapporteur requested an invitation, which was not forthcoming. A follow-up request, on 1 December 2005, drew an immediate response from the Permanent Mission indicating that they “are conveying your request to the authorities in India for their consideration, and will revert to you upon hearing from them”;

(c) Indonesia: a request was made, especially in relation to the province of Aceh, on 27 September 2004. No reply has been received;

(d) Islamic Republic of Iran: a request was made on 14 January 2004, noting that a standing invitation had been extended by the Government. The following day a reply was received, indicating that a visit would be acceptable in principle but would have to be considered in the context of missions sought by other special procedures. A follow-up letter was sent on 11 February 2005 to the Permanent Mission. On 4 April 2005 a meeting took place at the Special Rapporteur’s request with the permanent representative, at which specific dates for a visit were discussed. These dates and the terms of reference of the visit were confirmed in a letter of 18 April 2005. A follow-up letter was sent on 9 August 2005. A further meeting was sought with the permanent representative, which took place on 14 October 2005. A follow-up letter, again specifying possible dates as requested, was sent on 17 October 2005. No reply has been received;

(e) Nepal: a visit was requested on 27 September 2004. The Permanent Mission replied that it had forwarded the request “to Kathmandu with positive recommendation”. No reply has been received;

(f) Pakistan: in October 2000 the then Special Rapporteur requested an invitation, which was not forthcoming. A follow-up request, on 1 December 2005, has not yet drawn a reply;

(g) Peru: a letter of 30 November 2005 welcomed Peru’s standing invitation and requested a visit in 2006. In January 2006 the Permanent Mission conveyed an affirmative response to the request;



(h) Russian Federation: in 2003 the then Special Rapporteur requested an invitation, which was not forthcoming. A follow-up request, sent on 17 September 2004, drew a negative response. A further request, drafted in different terms, was sent on 14 June 2005. On 28 June the Permanent Mission replied that “the Russian Federation is willing to continue the constructive cooperation with the Special Rapporteur and, in this regard, is ready to consider positively his request to undertake a visit to Russia. However, taking into account a tight schedule of planned visits for the nearest future, the issue of when such [a] mission is to be performed could be discussed at a later stage”;

(i) Saudi Arabia: A request was made on 11 May 2005. The Permanent Mission replied on 27 July 2005 that “in light of consultations, meetings and discussions that are currently being held in the United Nations forums relating to the reform of the Commission on Human Rights, and in view of the prior commitments of some of the officials responsible for matters within your Excellency’s mandate during the time-frame specified, the Kingdom’s Government is regrettably unable to extend an invitation to the Special Rapporteur during the first semester of 2006”. A follow-up letter to the Government indicated that the reform discussions “should not be taken as providing an impediment to the visit going ahead as soon as possible”, and renewed the request. No further reply has been received;

(j) Thailand: a request made on 8 November 2004 led to the correspondence reported in detail in the Special Rapporteur’s previous report. On 31 January and 8 March 2005 the Government provided written information on the establishment and the report of an independent fact-finding commission. In separate letters dated 30 August 2005 and 10 November 2005 the Special Rapporteur notified the Government of his continuing interest in undertaking a visit. No reply has been received;

(k) Togo: a request for a visit sent on 11 May 2005 was accepted on 26 October 2005;

(l) Uzbekistan: on 19 May 2005 the Special Rapporteur requested a visit, including to Andijan. In a press statement on 20 May 2005 he indicated his grave concern about reported killings and proposed that an independent commission of inquiry into the incident be established. On the same day the Permanent Mission replied that “the request is under consideration” but also expressed its “concern over prejudgment and preconception of the Special Rapporteur about the facts without visiting the places of events in Andijan and without proper study of substance of issues”. The Mission suggested that the Special Rapporteur’s statement was “politically biased and clearly indicates an excess of power and mandate by the Special Rapporteur”. There has been no further response. The Special Rapporteur wishes to draw the particular attention of the Commission to the problems experienced in relation to his repeated requests to the Islamic Republic of Iran, despite the existence of a standing invitation. The situation is considerably exacerbated by a series of credible reports indicating that the execution of juveniles (persons under the age of 18 when they committed the crime in question) has become commonplace during 2005. This is especially troubling given that it amounts to a clear breach of Iran’s obligations under the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights. This is a situation which warrants a clear response by the Commission.

### **3. Visits undertaken in 2005**

18. During the course of 2005, the Special Rapporteur undertook two visits:

(a) Nigeria: The Special Rapporteur visited from 27 June to 8 July 2005. His report (E/CN.4/2006/53/Add.4) identifies problems in the administration of the death penalty and the problems of policing. With respect to the death penalty, there are widespread procedural irregularities; an unacceptable average twenty-year stay on death row; and the imposition of death by stoning for adultery or sodomy in 12 States. The Nigerian police force is seriously under-resourced while confronted with a high violent crime rate; abuses, including excessive use of force and executions are common. Police rely on pretexts, including “armed robbery” and “attempted escape”, to justify extrajudicial executions. Resorting to these pretexts is facilitated by the domestic legal framework, which provides close to *carte blanche* to the police to shoot and kill at will. It is encouraging that, in August 2005, President Obasanjo acknowledged that extrajudicial executions are widespread and made a clear commitment to rooting out and punishing those responsible. To that end, the report identifies measures required to improve the situation;

(b) Sri Lanka: the Special Rapporteur visited from 28 November to 6 December 2005. He found that killings were symptomatic of the widespread use of police torture, of the failure to rein in abuses committed or tolerated by the military, and of the systematic efforts by various armed groups, and particularly the Liberation Tigers of Tamil Eelam (LTTE), to kill Tamils who refuse to support the LTTE and to provoke military retaliation. This visit proved timely, inasmuch as the ceasefire agreement of February 2002 between the Government and the LTTE came under unprecedented stress in December 2005. Until then, the ceasefire between the parties’ armed forces had been largely respected, with only few exceptions. In contrast, the ceasefire in relation to civilians had been repeatedly broken by a series of so-called “political killings”. The Special Rapporteur deplores the recent attacks on Government personnel and reiterates that peace is necessary to fully ensure the right to life in Sri Lanka. He also wishes to emphasize, however, that “political killings” were not halted by the ceasefire and appear set to continue regardless of how the conflict develops. The report (E/CN.4/2006/53/Add.5) identifies measures to improve the situation.

### **4. Follow-up procedure for country visits**

19. In conformity with the emphasis placed by the Commission, in its resolution 2004/37, on the importance of following up on reports and recommendations, and in light of its request to him “to follow up on communications and country visits” and its request to the States that have been visited “to examine carefully the recommendations made” and “to report to the Special Rapporteur on the actions taken on those recommendations”, the Special Rapporteur intends to pursue an appropriate follow-up procedure of the type already being implemented by other comparable special procedures. As indicated in his previous report to the Commission (E/CN.4/2005/7, para. 30), for the purposes of following up on his predecessor’s recommendations the Special Rapporteur sought information from appropriate sources, including intergovernmental organizations, non-governmental organizations and civil society groups. In September 2005 he addressed the four Governments concerned and sought information on the

efforts they had made to consider and implement the recommendations of the respective reports, as well as on the constraints relating thereto. Letters were sent to Honduras on 1 September 2005, Jamaica on 19 September 2005, Sudan on 21 September 2005, and Brazil on 30 September 2005. These letters included summaries of the information received with respect to each country from the other sources mentioned above. Initially, the Special Rapporteur requested Governments to submit their observations by 1 November 2005. Upon request, he extended this deadline to 15 December 2005, and in one case to 10 January 2006. Regrettably, none of the four Governments submitted any observations. The relevant addendum is thus based entirely on the information received from other sources.

## **II. OVERVIEW OF SELECTED ISSUES OF CONCERN AND THE ROLE OF TRANSPARENCY**

20. The engines that generate the information for this report consist of the country missions undertaken each year, the extensive number of communications received, and the detailed analytical reports provided by civil society groups and experts. The resulting mission reports and the compilation of communications sent to Governments speak largely for themselves, but they are also case-specific and are thus not, in themselves, an adequate vehicle for exploring some of the most important normative issues that arise in the effort to put an end to extrajudicial executions.

21. This part of the report thus seeks to track evolving understandings of the normative content of specific rights and of the ways in which they apply in specific contexts, and to highlight the interrelationships between the key right to life norm and other parts of the human rights framework. Much lip service is paid to the interdependence and interrelatedness of all of the various rights but all too often that does not prevent them from being treated in isolation from one another. As a result, insufficient regard is paid to the linkages and to the potentially reinforcing and synergetic relationships among them. In the Special Rapporteur's first report he emphasized the umbrella role played by the concept of accountability within the overall framework of human rights. In the present report the focus is on the notion of transparency, which can be considered a vital dimension of accountability.<sup>7</sup> Following a brief note on the normative importance of transparency the report focuses on three specific contexts in which it is of particular importance to the issues arising under this mandate. They are: in relation to commissions of inquiry set up to investigate large-scale or especially serious violations; in relation to the death penalty; and in situations of armed conflict and occupation.

22. In addition, consideration is also given to a growing problem of so-called "shoot-to-kill" policies, either in response to the threat of terrorism or to signal that Governments intend to crack down on a troubling problem such as looting, drug use or armed robbery.

### **A. The principle of transparency**

23. The principal of transparency is central to the elimination of extrajudicial executions in two respects. First, the right to political participation is a human right in itself as well as a critical attribute of notions of good governance. In this regard it has been noted that a right to

information or to appropriate transparency has now “been recognized as a prerequisite for the legitimate exercise of public authority”. It has thus become “a ‘constitutive principle’ of governance within the nation state”.<sup>8</sup> Other commentators have observed that “decisional transparency and access to information are important foundations for the effective exercise of participation rights and rights of review. They also promote accountability directly by exposing administrative decisions and relevant documents to public and peer scrutiny”.<sup>9</sup>

24. Second, transparency is crucial in relation to various techniques used to reduce the occurrence of extrajudicial executions and to inquire into their causes and potential remedial measures. The issues identified in the following parts of this report illustrate this dimension.

### **B. Transparency in investigating violations: commissions of inquiry**

25. One of the recommendations contained in the Special Rapporteur’s report to the Commission in 2005 was that national-level investigations of alleged violations of international law by the armed or security forces are indispensable. To be credible and acceptable, however, the results must be made public, including details of how and by whom the investigation was carried out, the findings, and any prosecutions subsequently undertaken.<sup>10</sup>

26. This recommendation is closely related to the question of impunity which has long been a major focus of the work of the Special Rapporteur on extrajudicial executions. The problem is typically manifested by a failure to investigate, a failure to report effectively and openly following investigations, or a failure to punish (commensurately) those responsible. An important role in this regard has been played by commissions of inquiry established at the national level. When such initiatives are launched, which is frequently the case following massacres, deaths in custody, police or military shootings, or other extrajudicial forms of execution, they are all too often designed mainly to blunt outrage rather than to establish the truth. Some such commissions are undertaken in good faith and result in published reports which contribute significantly to the promotion of respect for human rights. An excellent example is that established in 2005 by the Government of Nigeria to investigate the killing of the so-called Apo 6.<sup>11</sup> In other cases, however, the procedures, results and responses are much less satisfactory. Some commissions are close to being pro forma activities, in others they are undertaken in good faith but the results are never released, and in still others Governments do eventually release the reports but there is no follow-up of any type.

27. In principle, commissions of inquiry may be perfectly appropriate measures for achieving justice and accountability in response to human rights abuses involving extrajudicial executions. The challenge is to establish accepted standards against which the design of commissions of inquiry can be assessed. In view of the importance of this issue, as illustrated by the many occasions on which the Special Rapporteur has encountered problems linked to inquiries that have been set up, he plans to undertake a study on commissions of inquiry which will be presented to the Human Rights Council in the course of 2007. The study will focus on identifying the principal problems that have been experienced in the past in relation to the conduct of and follow-up to such inquiries and on recommending best practices which might be taken into account by Governments in the future.

### **C. Transparency in relation to the death penalty**

28. In his 2005 report to the Commission on Human Rights (E/CN.4/2005/7) the Special Rapporteur drew attention to the problem of a lack of transparency in relation to the death penalty. In particular, he observed that in a “considerable number of countries information concerning the death penalty is cloaked in secrecy. No statistics are available as to executions, or as to the numbers or identities of those detained on death row, and little if any information is provided to those who are to be executed or to their families”.<sup>12</sup> He observed that such secrecy is incompatible with human rights standards in various respects, and concluded that “countries that have maintained the death penalty are not prohibited by international law from making that choice, but they have a clear obligation to disclose the details of their application of the penalty”.<sup>13</sup> In an addendum to the present report the Special Rapporteur analyses in detail the legal basis of the obligation to be transparent in such matters. Consideration is also given to a range of case studies that illustrate the major problems that exist in this area.

29. Transparency is among the fundamental due process safeguards that prevent the arbitrary deprivation of life. As the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR) state, everyone has the right for criminal charges against him or her to be adjudicated in view of the public. The report looks in detail at article 14, paragraph 1, of the ICCPR, which narrowly limits the scope for secrecy at trial, and provides a powerful transparency requirement thereafter. Secrecy throughout the post-conviction process is also limited by State obligations to ensure due process rights and to respect the right to freedom from cruel, inhuman or degrading treatment or punishment.

30. Two key conclusions result from this analysis. First, the public is unable to make an informed evaluation as to the death penalty in the absence of key pieces of information. In particular, any meaningful public debate must take place in the light of detailed disclosure by the State of information relating to: the number of persons sentenced to death; the number of executions actually carried out; the number of death sentences reversed or commuted on appeal; the number of instances in which clemency has been granted; and each of the above broken down according to the offence for which the condemned person was convicted. Notwithstanding the critical role of this information in any informed decision-making process, many States choose secrecy over transparency, but still claim that capital punishment is retained in part because it attracts widespread public support.

31. Second, condemned persons, their families, and their lawyers should be provided with timely and reliable information on the procedures and timing of appeals, clemency petitions, and executions. Experience demonstrates that to do otherwise is highly likely to lead to violations of due process rights and to inhuman and degrading treatment.

32. The case studies demonstrate that non-compliance with these transparency obligations is of considerable practical relevance. Although the death penalty is not prohibited by international law, its use is potentially inconsistent with respect for the right to life when its administration is cloaked in secrecy.

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

33. It is of continuing concern that States often fail to comply with their obligation to effectively investigate, prosecute, and punish violations of the right to life in situations of armed conflict and occupation. This failure has taken a number of forms. Policies on investigating deaths have permitted unjustifiable exceptions and have often failed to provide for impartiality and independence. During armed conflicts, even grave crimes such as murder are often leniently punished when committed by members of the armed forces. Trends in the investigation, prosecution, and punishment of commanding officers have been even less encouraging. Impunity for individuals has not been the only failure. In some cases, a strategic reluctance to engage in “body counts” may have impeded full consideration of how the impact of armed conflict on civilian populations can be minimized. Efforts at monitoring the consequences of choices of weapons and tactics on the incidental loss of civilian life generally remain ad hoc, leaving compliance with requirements of proportionality and precautionary measures under-examined.<sup>14</sup>

34. These practices threaten to roll back 50 years of progress in subjecting armed conflict to the rule of law. The Geneva Conventions of 12 August 1949 first established the legal obligation of States to investigate alleged unlawful killings and to prosecute their perpetrators. Elaborating the general obligation to “respect and to ensure respect” for humanitarian law,<sup>15</sup> the Geneva Conventions mandated the penal repression of violations. In particular, when a State receives allegations that someone has committed or ordered a grave breach - such as the “wilful killing” of a protected civilian<sup>16</sup> - the State is then legally obligated to search for him and either try him before its own courts or extradite him to another State that has made out a prima facie case.<sup>17</sup> Should he be found guilty, the State must impose an “effective penal sanction[]”.<sup>18</sup> However, gaps remained in this accountability regime. In international armed conflicts, some individuals were excluded from protection by their nationality.<sup>19</sup> In non-international armed conflicts, no mechanism for penal repression was provided.<sup>20</sup> The scope of legal protection has, however, steadily improved. Since the Geneva Conventions were adopted in 1949, States have both filled its gaps and supplemented its protections with new instruments of human rights law, such as the ICCPR, which was adopted in 1966. Thus, with respect to non-international conflicts, the additional protection offered by human rights law was acknowledged in the Preamble to the Second Additional Protocol adopted in 1977.<sup>21</sup> Today, human rights law and humanitarian law together require accountability in all circumstances.

35. Human rights law imposes a duty on States to investigate alleged violations of the right to life “promptly, thoroughly and effectively through independent and impartial bodies”.<sup>22</sup> This duty is entailed by the general obligation to ensure the right to life to each individual. The particular measures States may take to fulfil this duty have been elaborated in detail with respect to law enforcement operations. Most prominently, in 1989 the Economic and Social Council adopted the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.<sup>23</sup> These detailed principles should guide States whenever they carry out law enforcement operations, including during armed conflicts and occupations.<sup>24</sup> However, in other situations arising out of armed conflict and occupation, the modalities of the duty to investigate alleged violations have received less attention.

36. Armed conflict and occupation do not discharge the State's duty to investigate and prosecute human rights abuses. The right to life is non-derogable regardless of circumstance.<sup>25</sup> This prohibits any practice of not investigating alleged violations during armed conflict or occupation. As the Human Rights Committee has held, "It is inherent in the protection of rights explicitly recognized as non-derogable ... that they must be secured by procedural guarantees ... The provisions of the [ICCPR] relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights."<sup>26</sup> 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. In addition to being fully responsible for the conduct of their agents, in relation to the acts of private actors States are also held to a standard of due diligence in armed conflicts as well as peace. On a case-by-case basis a State might utilize less effective measures of investigation in response to concrete constraints. For example, when hostile forces control the scene of a shooting, conducting an autopsy may prove impossible. Regardless of the circumstances, however, investigations must always be conducted as effectively as possible and never be reduced to mere formality.<sup>27</sup> In this regard, there are several areas of special concern.

37. The State obligation to conduct independent and impartial investigations into possible violations does not lapse in situations of armed conflict and occupation.<sup>28</sup> While the modalities of this obligation in situations of armed conflict have not been fully settled, some points are clear:

- States must establish institutions capable of complying with human rights law obligations; there is no double standard for military justice. While human rights law does not dictate any particular institutional arrangement for the administration of justice, neither does it permit exceptions to its requirements. Investigations and prosecutions proceeding under military jurisdiction must - in each case and without exception - comply with the requirements of independence and impartiality;
- As an empirical matter, subjecting allegations of human rights abuse to military jurisdiction often leads to impunity.<sup>29</sup> In such situations, investigation and prosecution by bodies independent of the military is necessary;
- While commanding officers have a duty to investigate and repress violations,<sup>30</sup> there is growing awareness that additional mechanisms of investigation are needed in order to ensure impartiality.<sup>31</sup>

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

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

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

40. It is especially important to note that the stress and confusion of combat do not justify the rejection or avoidance of the applicable standards; the realities of armed conflict are fully accommodated by the substance of the applicable law and by the established defences to criminal culpability.<sup>32</sup> Soldiers must be trained and held to the standards of international law. Any double standard in punishment is inimical to the rule of law and may implicate the prohibition of discrimination in human rights law.

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

42. Finally, it is important to acknowledge the unique characteristics of armed conflict. However, the question of what rules govern the use of lethal force is completely distinct from the question of investigating violations of these rules. While even intentional killing is often permitted in armed conflict, a State cannot determine whether a particular act was lawful without first investigating what occurred. Whether, for example, the deceased was taking part in



hostilities is an inherently factual question, requiring factual investigation. Likewise, the Special Rapporteur cannot determine whether a particular incident falls within his mandate without first examining its facts. When he receives information alleging a violation, he will often need to be informed by the State concerned of the evidentiary basis for its determination regarding any status or activity that may have justified the use of lethal force. Conclusory determinations that the deceased was a combatant or was taking part in hostilities when killed do not enable the Special Rapporteur to respond effectively to information and swiftly pursue the elimination of extrajudicial, summary or arbitrary executions.

43. In the years ahead a greater effort should be made to design indicators and criteria to facilitate an evaluation of decisions as to proportionality and to give a greater objective dimension to such judgement calls. In the course of conflict any such indicators would necessarily be applied by the military personnel involved and would not readily be subject to external scrutiny. Ex post facto monitoring, however, would be possible if belligerents undertook to keep records of their evaluations and to make them public after a certain period of time has elapsed following the end of a given conflict. Such record-keeping would also facilitate prosecution and defence in possible war crimes trials. In addition, subsequent disclosure would allow belligerents to counter false accusations and would counter the suggestions made by some critics that international humanitarian law is not respected in war. By so doing it would strengthen the potential willingness of those involved in such decision-making to respect the law.

#### **E. Shoot-to-kill policies**

44. In recent years there have been a number of high-profile pronouncements by officials, not infrequently at the most senior level of Government, that they have given orders for the police or the military to “shoot to kill”, to “shoot on sight”, or to use the “utmost force” in response to a particular challenge to law and order. Such statements have often been made in response to perceived terrorist threats but they have also come as a response to widespread looting, to a high incidence of armed robberies, or to an epidemic of drug abuse. All too often, the background context is one in which the official concerned has been subject to severe public criticism for failing to take adequate measures to protect the population. Rather than asking whether preventive measures taken in good time, or the use of accepted policing techniques, appropriately reinforced if necessary, might have been sufficient to deal with the situation, the temptation is to seek to escape blame by proclaiming a crackdown on crime, zero tolerance for any individuals suspected of terrorist ambitions, or a policy of unleashing the full fury of the State to root out drug dealers, etc.

45. But the rhetoric of shoot-to-kill and its equivalents poses a deep and enduring threat to human rights-based law enforcement approaches. Much like invocations of “targeted killing”, shoot-to-kill is used to imply a new approach and to suggest that it is futile to operate inside the law in the face of terrorism. However, human rights law already permits the use of lethal force when doing so is strictly necessary to save human life. The rhetoric of shoot-to-kill serves only to displace clear legal standards with a vaguely defined licence to kill, risking confusion among law enforcement officers, endangering innocent persons, and rationalizing mistakes, while avoiding the genuinely difficult challenges that are posed by the relevant threat.

46. The use of shoot-to-kill tactics also imports, either consciously or otherwise, the language of international humanitarian law into situations which are essentially matters of law enforcement that international law requires be dealt with within the framework of human rights. The notion that the law of armed conflict is an appropriate frame of reference for a Government seeking to deal with law enforcement issues is one that must be soundly rejected. To do otherwise is tantamount to allowing Governments to declare war simultaneously on a given group and on human rights in general.

47. At its crudest, this rhetoric turns on erroneous conceptions about human rights law. There is no conflict between, for example, the human right not to be blown up by terrorists and the human right not to be arbitrarily shot by the police. Under human rights law, States must at once respect and ensure the right to life.<sup>33</sup> States have a legal duty to exercise “due diligence” in protecting the lives of individuals from attacks by criminals, including terrorists, armed robbers, looters, and drug dealers.<sup>34</sup> This may require the use of lethal force against a suspect, but only when doing so is proportionate and strictly unavoidable to prevent the loss of life.<sup>35</sup> No derogation is permitted from the right to life,<sup>36</sup> and none is needed.

48. Human rights law unconditionally prohibits the needless killing of suspected criminals, but it fully recognizes that lethal force is sometimes strictly necessary to save the lives of innocent people from lawless violence. A measure of the value human rights law places on the “inherent right to life” is provided by the prohibition of the death penalty for other than the “most serious crimes”.<sup>37</sup> For lethal force to be considered to be lawful it must be used in a situation in which it is necessary for self-defence or the defence of another’s life.<sup>38</sup> The State’s legal framework must thus “strictly control and limit the circumstances” in which law enforcement officers may resort to lethal force.<sup>39</sup> In addition to being pursuant to a legitimate objective, the force employed by law enforcement officers must be strictly unavoidable for its achievement. Non-lethal tactics for capture or prevention must always be attempted if feasible. In most circumstances, law enforcement officers must give suspects the opportunity to surrender,<sup>40</sup> and employ a graduated resort to force.<sup>41</sup> However, the use of lethal force may prove strictly unavoidable when such tactics would unduly risk death or serious harm to law enforcement officers or other persons. For States to grant law enforcement officers a vaguely defined licence to shoot to kill even when other means of preventing a suspected attack are available makes the daily lives of the innocent not safer, but far more hazardous. States facing terrorist or other threats alleged to require exceptional measures should instead clarify the implications of human rights law for law enforcement officers through training and written guidance.

49. At their most sophisticated, shoot-to-kill policies overlook the role human rights standards play in preventing tragic mistakes. The training documents published by the International Association of Chiefs of Police (IACP) are representative of shoot-to-kill thinking, and at critical points they advance doctrines that undermine the right to life. Human rights law normally requires that officers provide warnings, allow the opportunity for surrender, and employ a graduated use of force before resorting to lethal measures. These requirements serve in part to distinguish dangerous criminals, who can be stopped only with deadly force, from both the deterrable and the innocent. There are, however, exceptions to the requirements of warnings and a graduated response, because there are circumstances in which an immediate recourse to

lethal force is strictly necessary to prevent an even greater loss of life. In most such situations, this necessity is the result of a threat's imminence. This too serves as a safeguard. When a criminal is already in the process or visibly on the verge of using a weapon, there can be little doubt regarding the inevitability of violence if immediate recourse to lethal force is not taken. A suspected suicide bomber, however, poses somewhat different challenges. Warnings and non-lethal tactics are risky not because they might fail to prevent an already imminent act of violence but because they might, in fact, trigger an explosion either by alerting the bomber that this is his final opportunity or by directly setting off the explosive material. With these risks in mind, the IACP guidelines advise law enforcement officers, in some circumstances, to shoot to kill without warnings, without attempts at non-lethal tactics, and without an imminent threat. This strips the use of lethal force of its usual safeguards - without providing any alternative safeguards.

50. It is essential to account for the legal implications of the limited information officers will almost invariably have. The training documents refer constantly to "suspected suicide bombers", but they neglect to emphasize the high level of certainty required before lethal force is lawful. Unless intelligence is strong enough to permit interdiction before a suicide bombing operation begins, the burden will often fall on individual officers to evaluate whether a given person is a suicide bomber. The IACP's approach relies extensively on profiles of suicide bombers. Persons with freshly shaved beards, signs of drug use, tightly held backpacks, etc., are suggested as "among the most obvious signs" of possible suicide bombers. However, the scarcity of actual bombers relative to other people exhibiting these characteristics is such as to ensure that false alarms will predominate. No one has claimed that meeting a profile alone is sufficient to permit the use of lethal force, but insofar as law enforcement tactics often preclude warning suspected bombers, it is difficult to see how an officer is to either confirm or disconfirm his or her initial suspicions. Under human rights law, suspicion is not enough to justify a resort to lethal force. There is no legal basis for shooting to kill for any reason other than near certainty that to do otherwise will lead to loss of life.

51. States that employ shoot-to-kill policies for dealing with suicide bombers must develop legal frameworks to properly incorporate intelligence information and analysis into both the operational planning and post-incident accountability phases of State responsibility. If there is a solid factual basis for believing that a suspect is a suicide bomber capable of detonating his explosive if challenged, and if, to the extent possible, that information has been evaluated by persons with appropriate experience and expertise, the immediate use of lethal force may be justified. However, States employing shoot-to-kill procedures must ensure that only such solid information, combined with the adoption of appropriate procedural safeguards, will lead to the use of lethal force.

52. In addition to the legal arguments, it should also be noted that the consequences of mistakenly killing innocent persons on the basis of shoot-to-kill policies are potentially highly counter-productive. They include a loss of public confidence in the police, damage to community relations where a particular community has, in effect, been targeted, and an undermining of the willingness of members of the relevant community to cooperate with the security services in the future.

53. The multiple phases of State responsibility implicated necessitate broad terms of reference for post-incident investigations by States and a broad ambit for inquiries by the Special Rapporteur. The question of State responsibility under human rights law encompasses but goes beyond the question of whether the officer who fired shots thereby incurred criminal responsibility. This is well-illustrated by the case of *McCann and Others v. United Kingdom*.<sup>42</sup> Members of the United Kingdom's Special Air Service (SAS) shot and killed several members of the Irish Republican Army (IRA). They had been given the - erroneous - information that one of the IRA members possessed a push-button detonator for a car bomb. In light of that information, the European Court of Human Rights did not contest their decisions that it was "absolutely necessary" to kill them when they made motions consistent with reaching for a detonator.

54. However, the Court also held that the authorities controlling the operation had been careless in collecting and analysing intelligence and had, thus, violated the victims' right to life by communicating with certainty to the soldiers that there was such a car bomb and detonator. In order for the Special Rapporteur to respond effectively to the information he receives, States must cooperate in providing information on the earlier phases of State conduct - such as the legal and regulatory framework governing the use of lethal force, the training provided to law enforcement officers, the planning of operations, and the use of intelligence - as well as on the facts of the incident itself. States employing shoot-to-kill policies must accept the implications of shooting based on intelligence information on the requirement that States' publicly investigate deaths and prosecute perpetrators where appropriate. Investigations and trials may require the disclosure of some intelligence information. To withhold such information would be to replace public accountability with unverifiable assertions of legality by the Government, inverting the very idea of due process.

### III. RECOMMENDATIONS

55. **The Human Rights Council should establish a procedure whereby specific cases of persistent or especially problematic non-cooperation with mandate-holders are automatically flagged and taken up by the Council.**

56. **Transparency is essential wherever the death penalty is applied. The public is unable to make an informed evaluation as to the death penalty in the absence of the relevant facts. The oversight required to safeguard the right to life depends on the detailed disclosure by the State, on at least an annual basis, of information relating to: the number of persons sentenced to death; the number of executions actually carried out; the number of death sentences reversed or commuted on appeal; the number of instances in which clemency has been granted; and each of the above broken down according to the offence for which the condemned person was convicted.**

57. **Persons sentenced to death, their families and their lawyers should be provided with timely and reliable information on the procedures and timing of appeals, clemency petitions and executions. Experience demonstrates that to do otherwise is highly likely to lead to violations of due process rights and to inhuman and degrading treatment.**

58. **The use of lethal force by law enforcement officers must be regulated within the framework of human rights law. The rhetoric of shoot-to-kill should never be used. It risks conveying the message that clear legal standards have been replaced with a vaguely defined licence to kill.**

59. **When States confronting the threat of suicide bombers adopt policies permitting the use of lethal force without prior warnings, a prior graduated use of force, or clear signs of an imminent threat, they must provide alternative safeguards to ensure the right to life. The reliance on intelligence information in such contexts means that States must develop legal frameworks to properly incorporate intelligence information and analysis into both the operational planning and post-incident accountability phases of State responsibility; and ensure that officers are aware that there is no legal basis for shooting to kill for any reason other than near certainty that to do otherwise will lead to loss of life.**

60. **The human rights obligation to investigate alleged violations of the right to life promptly, thoroughly and effectively through independent and impartial bodies does not cease to apply during armed conflict. Similarly, the obligation to punish those individuals responsible for violations in a manner commensurate with the gravity of their crimes applies during armed conflict. States must establish institutions capable of complying with these human rights law obligations; there is, in particular, no double standard for military justice.**

61. **National-level investigations of major incidents involving alleged violations of international human rights or humanitarian law by the armed or security forces are indispensable. A more detailed study needs to be undertaken in order to identify the principal problems that have been experienced in the past in relation to the conduct of, and follow-up to, such inquiries and to recommend best practices which might be taken into account by Governments in the future.**

62. **Problems of police accountability are ubiquitous and greatly exacerbate problems relating to extrajudicial executions. The challenge of setting up appropriate accountability mechanisms are complex and deserve more sustained analysis than they have so far received within the international human rights regime.**

#### Notes

<sup>1</sup> The term “extrajudicial executions” is used in this report to refer to executions other than those carried out by the State in conformity with the law. As explained in my previous report “[t]he terms of reference of this mandate are not best understood through efforts to define individually the terms ‘extrajudicial’, ‘summary’ or ‘arbitrary’, or to seek to categorize any given incident accordingly”. Rather, “the most productive focus is on the mandate itself, as it has evolved over the years through the various resolutions of the General Assembly and the Commission” (E/CN.4/2005/7, para. 6).

<sup>2</sup> See note 4 below.

<sup>3</sup> The focus on communications based exclusively on allegations and reports brought to the Special Rapporteur's attention means that there is very little and sometimes no information from countries where civil society is unable to function effectively. As a result this report is far from being comprehensive in terms of the occurrence of violations of the right to life worldwide.

<sup>4</sup> In order to comply with strict reporting deadlines, and to give Governments a minimum of two months to reply, the present report reflects communications sent between 1 December 2004 and 30 September 2005, and responses received from Governments between 1 December 2004 and 1 December 2005. A comprehensive account of communications sent to Governments up to 1 December 2005, along with replies received up to the end of January 2006, and the relevant observations of the Special Rapporteur, are reflected in addendum 1 to this report.

<sup>5</sup> See, e.g., Commission on Human Rights resolution 2005/34, paragraph 14: "*Strongly urges* all States to cooperate with and assist the Special Rapporteur so that his mandate may be carried out effectively, including, where appropriate, by issuing invitations to the Special Rapporteur when he so requests, in keeping with the usual terms of reference for missions by special rapporteurs of the Commission ...."

<sup>6</sup> Countries are listed in alphabetical order.

<sup>7</sup> Jonathan Koppell, "The legitimacy-accountability connection and transnational global governance", at <http://www.governance.qub.ac.uk/qub2005/KoppellPaperUpd.pdf>; and Alasdair Roberts, "A partial revolution: the diplomatic ethos and transparency in intergovernmental organizations", 64 *Public Administration Review* (2004) 410, available at [http://faculty.maxwell.syr.edu/asroberts/documents/journal/Roberts\\_PAR\\_Revolt\\_2004.pdf](http://faculty.maxwell.syr.edu/asroberts/documents/journal/Roberts_PAR_Revolt_2004.pdf).

<sup>8</sup> Sol Picciotto, "Democratizing globalism", quoted in Alasdair Roberts, "A partial revolution".

<sup>9</sup> Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, "The emergence of global administrative Law", 68 *Law and Contemporary Problems* (2005) 15.

<sup>10</sup> E/CN.4/2005/7, paragraph 86.

<sup>11</sup> See E/CN.4/2006/53/Add.4, paragraphs 8-14.

<sup>12</sup> E/CN.4/2005/7, paragraph 57.

<sup>13</sup> E/CN.4/2005/7, paragraph 59.

<sup>14</sup> See e.g. Marco Sassòli, "Targeting: the scope and utility of the concept of military objectives for the protection of civilians in contemporary armed conflicts", in D. Wippman and M. Evangelista (eds.), *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts* (2005) 181 at 204-205.

<sup>15</sup> Common article 1 to the Geneva Conventions of 12 August 1949; see also Protocol I, article 87, paragraph 3.

<sup>16</sup> This is not the only grave breach that may intentionally or unintentionally result in loss of life. See Geneva Conventions I-IV, articles 50/51/130/147; Protocol I, articles 11, 85. Under the Geneva Conventions of 1949, “torture or inhuman treatment, including biological experiments” and “wilfully causing great suffering or serious injury to body or health” might well lead to a death that is not itself wilful. Less directly, the same is true of “compelling a prisoner of war [or person protected in Geneva (IV)] to serve in the forces of the hostile Power” or “wilfully depriving a prisoner of war [or person protected in Geneva (IV)] of the rights of fair and regular trial prescribed in this Convention”. Grave breaches related to medical procedures are extended in article 11, paragraph 4 of Protocol I. In addition, article 85, paragraph 3 of Protocol I classifies a number of acts as grave breaches “when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health”.

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

<sup>17</sup> Article 49/50/129/146 of the Geneva Conventions (I-IV).

<sup>18</sup> Article 49/50/129/146 of the Geneva Conventions (I-IV).

<sup>19</sup> See Geneva Convention (IV), article 4. Note that the broader substantive reach of the prohibition of wilful killing. Common article 3 to the Geneva Conventions; Protocol I, article 75. These provisions reflect customary international law.

<sup>20</sup> Common article 3 to the Geneva Conventions. Protocol II does not include any accountability mechanisms either.

<sup>21</sup> For an analysis of the simultaneous and complementary relationship of human rights and humanitarian law see E/CN.4/2005/7, paragraphs 41-54.

<sup>22</sup> Human Rights Committee, general comment No. 31, “Nature of the legal obligation on States Parties to the Covenant” (2004), (CCPR/C/21/Rev.1/Add.13, para. 15). See also Commission on Human Rights resolution 2004/37, paragraph 5, in relation to the mandate of the Special Rapporteur: “Reiterates the obligation of all States to conduct exhaustive and impartial investigations into all suspected cases of extrajudicial, summary or arbitrary executions, to identify and bring to justice those responsible, while ensuring the right of every person to a fair

and public hearing by a competent, independent and impartial tribunal established by law, to grant adequate compensation within a reasonable time to the victims or their families and to adopt all necessary measures, including legal and judicial measures, in order to bring an end to impunity and to prevent the recurrence of such executions, as stated in the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.”

<sup>23</sup> Economic and Social Council resolution 1989/65 of 24 May 1989.

<sup>24</sup> See Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Principle 1 (“... Exceptional circumstances including a state of war or threat of war, internal political instability or any other public emergency may not be invoked as a justification of such executions. Such executions shall not be carried out under any circumstances including, but not limited to, situations of internal armed conflict, excessive or illegal use of force by a public official or other person acting in an official capacity or by a person acting at the instigation, or with the consent or acquiescence of such person, and situations in which deaths occur in custody.”).

<sup>25</sup> ICCPR, article 4, paragraph 2.

<sup>26</sup> Human Rights Committee, general comment No. 29, “Derogations from provisions of the Covenant during a state of emergency” (2001), paragraph 15.

<sup>27</sup> See Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, Judgment of July 29, 1988, paragraph 177: “The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government.”

<sup>28</sup> Human Rights Committee, general comment No. 31 (2004), paragraph 15 (“the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies ... A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant”); Human Rights Committee, general comment No. 29: Derogations from provisions of the Covenant During a State of Emergency (2001), paragraph 15 (“It is inherent in the protection of rights explicitly recognized as non-derogable ... that they must be secured by procedural guarantees ... The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights”).

<sup>29</sup> Former Special Rapporteurs on extrajudicial, summary or arbitrary executions have identified this relationship time and again. E/CN.4/1995/61, paragraph 93 (“Military tribunals, particularly when composed of military officers within the command structure of the security forces, very often lack the independence and impartiality required under international law. Military jurisdiction over human rights violations committed by members of the security forces very often results in impunity”). E/CN.4/1999/39, paragraph 67 (“In some cases situations of impunity are



a direct product of laws or other regulations which explicitly exempt public officials or certain categories of State agents from accountability or prosecution ... The Special Rapporteur is also increasingly concerned about the practice of prosecuting members of security forces in military courts, which often fall short of international standards regarding the impartiality, independence, and competence of the judiciary”).

<sup>30</sup> Protocol I, article 87.

<sup>31</sup> The development of the United Kingdom’s policy on investigations over the past few years is instructive. The June 2003 policy of having the Royal Military Police (RMP) investigate and then decide on prosecution was shortly replaced with the July 2003 policy under which, “If the Commanding Officer (CO) of the soldier was satisfied, on the basis of the information available to him, that the soldier had acted lawfully and within the rules of engagement, then there was no requirement to initiate an investigation by the military police.” Initially, then, the United Kingdom moved from a greater to lesser level of independence in the investigative process. However, according to Lieutenant General Sir John Reith, Chief of Joint Operations, “Between January and April 2004 there was a further reconsideration of this policy. This was prompted by the fact that the environment had become less hostile and also by the considerable media and Parliamentary interest in incidents involving UK forces in which Iraqis had died. On 24 April, a new policy was adopted by MND (SE) [Multi-National Division - Southeast] which required all shooting incidents involving UK forces which result in a civilian being killed or injured to be investigated by SIB (RMP). Exceptionally the Brigade Commander may decide that an investigation is not necessary and in any such case the decision must be notified to the Commander MND (SE) in writing.” *Al Skeini v. Secretary of State for Defence*, High Court of Justice, Queen’s Bench Division, Divisional Court, [2004] EWHC 2911 (Admin), 14 December 2004, paragraphs 47-54. [The quote from Lt. Gen. Reith is from his written witness statement].

<sup>32</sup> See generally Marco Sassòli, “Le génocide rwandais, la justice militaire suisse et le droit international”, Volume 12, *Revue suisse de droit international et de droit européen* (2002) 151, at 175-176.

<sup>33</sup> ICCPR, article 2, paragraph 1.

<sup>34</sup> E/CN.4/2005/7, paragraphs 71-74. *Jiménez Vaca v. Colombia*, Human Rights Committee (25 March 2002), paragraph 7.3, (“[T]he Committee points out that article 6 of the Covenant implies an obligation on the part of the State party to protect the right to life of every person within its territory and under its jurisdiction.”).

<sup>35</sup> Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 9 (“In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life”).

<sup>36</sup> ICCPR, article 4, paragraph 2.

<sup>37</sup> *Baboeram v. Suriname*, Human Rights Committee (4 April 1985), paragraph 14, links the “most serious crimes” and use of lethal force standards.

<sup>38</sup> In *Baumgarten v. Germany* the Human Rights Committee (31 July 2003) found that shooting persons attempting to cross the border from the Former German Democratic Republic was a violation of the right to life. (“The Committee recalls that even when used as a last resort lethal force may only be used, under article 6 of the Covenant, to meet a proportionate threat.”)

<sup>39</sup> *Baboeram v. Suriname*, Human Rights Committee (4 April 1985), paragraph 14.

<sup>40</sup> *Suárez de Guerrero v. Colombia*, Human Rights Committee (31 March 1982), paragraph 13.2, (“the police action was apparently taken without warning to the victims and without giving them any opportunity to surrender to the police patrol or to offer any explanation of their presence or intentions”). Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 10 (“In the circumstances provided for under Principle 9, law enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident”).

<sup>41</sup> Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 4 (“Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result”).

<sup>42</sup> European Court of Human Rights, App. No. 18984/91 (27 September 1995).

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