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Foreign Affairs, Defence and Trade References Committee  
Department of the Senate  
Parliament House  
Online submission

10 December 2014

Dear Committee,

**Re: Inquiry into the potential use by the Australian Defence Force of unmanned air, maritime and land platforms**

Thank you for the opportunity to make a submission to this inquiry. My comments are confined to the international law issues arising from the use of unmanned platforms in military operations potentially involving the application of lethal armed force. (My submission is three pages and 97 pages of annexed United Nations documents follow.)

In paragraph 6(s) of resolution 68/178 (adopted 18 December 2013), the United Nations General Assembly urged states, while countering terrorism:

To ensure that any measures taken or means employed to counter terrorism, including the use of remotely piloted aircraft, comply with their obligations under international law, including the Charter of the United Nations, human rights law and international humanitarian law, in particular the principles of distinction and proportionality;

Any use of unmanned platforms by the Australian Defence Force must comply with Australia's international obligations in these respects, namely:

***International Law on the Use of Force***

- (a) Australia must only use military force in the territory (land, maritime or airspace) of a foreign state: (i) by the consent of that state's government; (ii) with Security Council authorisation under Chapter VII of the UN Charter; or (iii) in self-defence against an armed attack under Article 51 of the UN Charter;
- (b) Any exercise of self-defence must be: (i) a necessary and proportionate response, (ii) to an 'armed attack' that has actually occurred, (iii) that is committed by a state, or a non-state actor effectively controlled by a state and which perpetrates hostile acts of the scale, effects and gravity of an 'armed attack', and (iv) be promptly reported to the UN Security Council;

- (c) If Australia claims a right of self-defence wider than that set out above, it should clearly and prospectively indicate the scope of such right. In particular, Australia should indicate whether it claims: (i) a right of pre-emptive self-defence against an imminent armed attack that has not yet occurred; or (ii) a right of self-defence against attacks by non-state armed groups which are not controlled by a state, and the circumstances in which force may be used in the territory of a foreign state in which such group is located; (iii) that an 'armed attack' may be cumulatively constituted by a chain of less intense hostile acts (the so-called 'pinprick' or 'accumulation of events' theory of an armed attack);
- (d) Australia should be transparent about the circumstances in which members of terrorist organisations or other non-state groups may be regarded as perpetrating an 'armed attack' permitting Australia to respond in self-defence;

### ***International Humanitarian Law***

- (e) In armed conflicts Australian unmanned platforms may only target: (i) combatants in international conflicts; (ii) members of non-state armed groups performing a continuous combat function in non-international armed conflicts; (iii) civilians taking a direct part in hostilities in either type of armed conflict; and (iv) military objectives in either type of armed conflict;
- (f) Australia should prospectively clarify how it classifies conflicts involving autonomous non-state armed groups in foreign territory, namely whether such conflicts are regarded as international or non-international;
- (g) Australia should also be transparent about how it believes that international humanitarian law defines the geographical and temporal scope of armed conflicts involving autonomous non-state armed groups, in particular whether such conflicts may spread across multiple state territories;
- (h) Only military personnel may operate unmanned platforms engaged in hostilities;
- (i) Targeting operations must comply with all the usual constraints under international humanitarian law, namely the principles of distinction (including the obligation to take all feasible precautions to verify the target) and proportionality (not to cause excessive civilian casualties in relation to the military advantage anticipated), and the limits on means and methods of warfare (including, for instance, the prohibition on perfidy and rules on prohibited or restricted weapons);

### ***International Human Rights Law***

- (j) Australia should recognise that its international human rights law obligations apply extraterritorially in so far as Australia's use of unmanned platforms affects the right to life abroad;
- (k) In armed conflict, whether there is an arbitrary deprivation of life in a particular case is governed by the special law, namely international humanitarian law;
- (l) Outside armed conflict, the taking of life by use of an unmanned platform is only lawful in the narrow circumstances where a person presents an immediate

risk to the lives of others and there are no other means (such as arrest or incapacitation) of averting such threat;

- (m) Any taking of life by use of an unmanned platform must be independently investigated. Paragraph 2 of UN Human Rights Council resolution 25/22 (adopted 28 March 2014) calls upon states: 'to ensure transparency in their records on the use of remotely piloted aircraft or armed drones and to conduct prompt, independent and impartial investigations whenever there are indications of a violation to international law caused by their use'. Reparations or remedies must be provided in cases where the right to life has been violated.

## Conclusion

I draw the Committee's attention to these UN legal reports on unmanned platforms, annexed to my submission, which expand on the points made in my submission:

- **'Study on Targeted Killings'**, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, UN Doc A/HRC/14/24/Add.6 (28 May 2010);
- **'Armed drones and the right to life'**, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/68/382 (13 September 2014);
- **'Civilian impact of remotely piloted aircraft'**, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, UN Doc A/HRC/25/59 (11 March 2014);
- **'Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations'**, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, UN Doc A/68/389 (18 September 2013);
- **UN Human Rights Council resolution 25/22**: Ensuring use of remotely piloted aircraft or armed drones in counterterrorism and military operations in accordance with international law, including international human rights and humanitarian law (adopted 28 March 2014).

In particular, I recommend to the Committee the 'Conclusions and recommendations' set out on pages 27-29 of the 'Study on Targeted Killings' by Professor Philip Alston, then Special Rapporteur on extrajudicial, summary or arbitrary executions. For convenience, these are extracted on the next page.

Please be in touch if I can be of any further assistance.

Yours sincerely



## ANNEXES

### **Pages 27-29 of ‘Study on Targeted Killings’, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, UN Doc A/HRC/14/24/Add.6 (28 May 2010);**

#### **IV. Conclusions and recommendations**

##### **General**

93. States should publicly identify the rules of international law they consider to provide a basis for any targeted killings they undertake. They should specify the bases for decisions to kill rather than capture. They should specify the procedural safeguards in place to ensure in advance of targeted killings that they comply with international law, and the measures taken after any such killing to ensure that its legal and factual analysis was accurate and, if not, the remedial measures they would take. If a State commits a targeted killing in the territory of another State, the second State should publicly indicate whether it gave consent, and on what basis.

- States should make public the number of civilians collaterally killed in a targeted killing operation, and the measures in place to prevent such casualties.
- The High Commissioner for Human Rights should convene a meeting of States, including representatives of key military powers, the ICRC and human rights and IHL experts to arrive at a broadly accepted definition of “direct participation in hostilities.”

##### **Specific requirements under human rights law, applicable in and outside armed conflict, include:**

- States should disclose the measures taken to control and limit the circumstances in which law enforcement officers may resort to lethal force. These include:
  - Permissible objectives (which may not include retaliation or punishment but must be strictly to prevent the imminent loss of life);
  - the non-lethal tactics for capture or incapacitation that must be attempted if feasible;
  - the efforts that must be made to minimize lethal force, including specifying the level of force that must be used at each stage;
  - the legal framework should take into account the possibility that a threat may be so imminent that a warning and the graduated use of force are too risky or futile (e.g., the suspect is about to use a weapon or blow himself up). At the same time, it must put in place safeguards to ensure that the evidence of imminence is reliable, based on a high degree of certainty, and does not circumvent the requirements of necessity and proportionality.
- Disclosure of the measures in place to provide prompt, thorough, effective, independent and public investigations of alleged violations of law.
  - The appropriate measures have been endorsed in the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions. These should guide States whenever they carry out law enforcement operations, including during armed conflicts and occupations. The State’s duty to investigate and prosecute human rights abuses also applies in the context of armed conflict and occupation.

**Specific requirements under IHL, applicable in armed conflict, include:**

- Disclosure of 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 a prima facie case for the unlawfulness of a killing.
- Ensure that State armed forces and agents use all reasonably available sources (including technological ones such as intelligence and surveillance) to obtain reliable information to verify that the target is lawful. These measures, which should be publicly disclosed to the extent consistent with genuine security needs, include:
  - State armed forces should have a command and control system that collects, analyzes and disseminates information necessary for armed forces or operators to make legal and accurate targeting decisions.
  - Targeted killings should never be based solely on “suspicious” conduct or unverified – or unverifiable – information. Intelligence gathering and sharing arrangements must include procedures for reliably vetting targets, and adequately verifying information.
  - State forces should ensure adequate intelligence on the effects of weapons to be used, the presence of civilians in the targeted area, and whether civilians have the ability to protect themselves from attack. It bears emphasis that State forces violate the IHL requirements of proportionality and precaution if they do not do everything feasible to determine who else is, or will be, in the vicinity of a target – and thus how many other lives will be lost or people injured – before conducting a targeted killing.
  - In the context of drone attacks and airstrikes, commanders on the ground and remote pilots may have access to different information (e.g. based on human intelligence, or visuals from satellites); it is incumbent on pilots, whether remote or not, to ensure that a commander’s assessment of the legality of a proposed strike is borne out by visual confirmation that the target is in fact lawful, and that the requirements of necessity, proportionality and discrimination are met. If the facts on the ground change in substantive respects, those responsible must do everything feasible to abort or suspend the attack.
- Ensure that compliance with the IHL proportionality principle is assessed for each attack individually, and not for an overall military operation.
- Ensure that even after a targeting operation is under way, if it appears that the target is not lawful, or that the collateral loss of life or property damage is in excess of the original determination, targeting forces have the ability and discretion to cancel or postpone an attack.
- Ensure procedures are in place to verify that no targeted killing is taken in revenge, or primarily to cause terror or to intimidate, or to gain political advantage.
- Especially in heavily populated urban areas, if it appears that a targeted killing will risk harm to civilians, State forces must provide effective advance warning, as specifically as possible, to the population.
  - Warning does not, however, discharge the obligation to distinguish between lawful targets and civilians.
  - Although the use of civilians as “shields” is prohibited, one side’s unlawful use of civilian shields does not affect the other side’s obligation to ensure that attacks do not kill civilians in excess of the military advantage of killing the targeted fighter.



# General Assembly

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## Human Rights Council

### Fourteenth session

Agenda item 3

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

## **Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston\***

**Addendum**

**Study on targeted killings\*\***

### *Summary*

In recent years, a few States have adopted policies that permit the use of targeted killings, including in the territories of other States. Such policies are often justified as a necessary and legitimate response to “terrorism” and “asymmetric warfare”, but have had the very problematic effect of blurring and expanding the boundaries of the applicable legal frameworks. This report describes the new targeted killing policies and addresses the main legal issues that have arisen.

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\* Late submission.

\*\* Owing to time constraints, the present report is circulated as received, in the language of submission only.

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## I. Introduction

1. A targeted killing is the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator. In recent years, a few States have adopted policies, either openly or implicitly, of using targeted killings, including in the territories of other States.

2. Such policies have been justified both as a legitimate response to “terrorist” threats and as a necessary response to the challenges of “asymmetric warfare.” In the legitimate struggle against terrorism, too many criminal acts have been re-characterized so as to justify addressing them within the framework of the law of armed conflict. New technologies, and especially unarmed combat aerial vehicles or “drones”, have been added into this mix, by making it easier to kill targets, with fewer risks to the targeting State.

3. The result of this mix has been a highly problematic blurring and expansion of the boundaries of the applicable legal frameworks – human rights law, the laws of war, and the law applicable to the use of inter-state force. Even where the laws of war are clearly applicable, there has been a tendency to expand who may permissibly be targeted and under what conditions. Moreover, the States concerned have often failed to specify the legal justification for their policies, to disclose the safeguards in place to ensure that targeted killings are in fact legal and accurate, or to provide accountability mechanisms for violations. Most troublingly, they have refused to disclose who has been killed, for what reason, and with what collateral consequences. The result has been the displacement of clear legal standards with a vaguely defined licence to kill, and the creation of a major accountability vacuum.

4. In terms of the legal framework, many of these practices violate straightforward applicable legal rules. To the extent that customary law is invoked to justify a particular interpretation of an international norm, the starting point must be the policies and practice of the vast majority of States and not those of the handful which have conveniently sought to create their own personalized normative frameworks. It should be added that many of the justifications for targeted killings offered by one or other of the relevant States in particular current contexts would in all likelihood not gain their endorsement if they were to be asserted by other States in the future.

5. This report describes the publicly available information about new targeted killing policies and addresses the main legal issues that have arisen. It identifies areas in which legal frameworks have been clearly violated or expanded beyond their permissible limits; where legal issues are unclear, it suggests approaches which would enable the international community to return to a normative framework that is consistent with its deep commitment to protection of the right to life, and the minimization of exceptions to that constitutive principle.

6. The Special Rapporteur is grateful to Hina Shamsi of the Project on Extrajudicial Executions at the Center for Human Rights and Global Justice, New York University School of Law, for her superb assistance in the preparation of this report. He is also grateful to Sarah Knuckey for her comments, and Nishant Kumar and Anna De Courcy Wheeler for research assistance.



## II. Background

### A. Definition of “targeted killing”

7. Despite the frequency with which it is invoked, “targeted killing” is not a term defined under international law. Nor does it fit neatly into any particular legal framework. It came into common usage in 2000, after Israel made public a policy of “targeted killings” of alleged terrorists in the Occupied Palestinian Territories.<sup>1</sup> The term has also been used in other situations, such as:

- The April 2002 killing, allegedly by Russian armed forces, of “rebel warlord” Omar Ibn al Khattab in Chechnya.<sup>2</sup>
- The November 2002 killing of alleged al Qaeda leader Ali Qaed Senyan al-Harithi and five other men in Yemen, reportedly by a CIA-operated Predator drone using a Hellfire missile.<sup>3</sup>
- Killings in 2005 – 2008 by both Sri Lankan government forces and the opposition LTTE group of individuals identified by each side as collaborating with the other.<sup>4</sup>
- The January 2010 killing, in an operation allegedly carried out by 18 Israeli Mossad intelligence agents, of Mahmoud al-Mahboubh, a Hamas leader, at a Dubai hotel.<sup>5</sup> According to Dubai officials, al-Mahboubh was suffocated with a pillow; officials released videotapes of those responsible, whom they alleged to be Mossad agents.<sup>6</sup>

8. Targeted killings thus take place in a variety of contexts and may be committed by governments and their agents in times of peace as well as armed conflict, or by organized armed groups in armed conflict.<sup>7</sup> 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.<sup>8</sup>

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<sup>1</sup> Infra, section II.B. Orna Ben-Naftali & Keren Michaeli, We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings, 36 Cornell Int’l L.J. 233, 234 (2003). Although this report uses the common terms “terrorism” and “terrorist”, I agree with the Special Rapporteur on the promotion and protection of human rights while countering terrorism that the continuing lack of a “universal, comprehensive and precise” definition of these terms hampers the protection of human rights, E/CN.4/2006/98, para. 50, and in particular, the right to life. The work of the Ad Hoc Committee established under GA Res. 51/210 to work on a draft convention on international terrorism is critical and urgent.

<sup>2</sup> BBC, Russia ‘Kills’ Chechen Warlord, 25 April 2002.

<sup>3</sup> Jane Mayer, The Predator War, The New Yorker, 26 Oct. 2009; Greg Miller, C.I.A. Said to Use Outsiders to Put Bombs on Drones, LA Times, 13 Feb. 2009.

<sup>4</sup> A/HRC/8/3/Add.3, para. 12.

<sup>5</sup> Targeted Killing in Dubai: A Mossad Operation Gone Awry?, Der Spiegel, 23 Feb. 2010; Ilene Prusher, Was Mossad Behind Dubai Assassination? Israel Foreign Minister Isn’t Saying, Christian Science Monitor, 17 Feb. 2010.

<sup>6</sup> Targeted Killing in Dubai: A Mossad Operation Gone Awry?, Der Spiegel, 23 Feb. 2010. Other examples of Israeli targeted killings include: Crimes of War Project, Case Study: The Israeli Strike Against Hamas Leader Salah Shehadeh. available at: <http://www.crimesofwar.org/print/onnews/Shehadeh-print.html>.

<sup>7</sup> This report focuses only on killings by States and their agents because, as yet, no non-state actors have sought to justify specific “targeted killings.”

<sup>8</sup> See, fns. 2-6; B’Tselem, Statistics: Fatalities, available at <http://www.btselem.org/English/Statistics/Casualties.asp>; Simon Saradzhyan, Russia’s System to Combat Terrorism and Its Application in Chechnya, in R.W. Orttung and A. Makarychev, National

9. The common element in all these contexts is that lethal force is intentionally and deliberately used, with a degree of pre-meditation, against an individual or individuals specifically identified in advance by the perpetrator.<sup>9</sup> In a targeted killing, the specific goal of the operation is to use lethal force. This distinguishes targeted killings from unintentional, accidental, or reckless killings, or killings made without conscious choice. It also distinguishes them from law enforcement operations, e.g., against a suspected suicide bomber. Under such circumstances, it may be legal for law enforcement personnel to shoot to kill based on the imminence of the threat, but the goal of the operation, from its inception, should not be to kill.

10. Although in most circumstances targeted killings violate the right to life, in the exceptional circumstance of armed conflict, they may be legal.<sup>10</sup> This is in contrast to other terms with which “targeted killing” has sometimes been interchangeably used, such as “extrajudicial execution”, “summary execution”, and “assassination”, all of which are, by definition, illegal.<sup>11</sup>

## B. New targeted killing policies

11. The phenomenon of targeted killing has been present throughout history.<sup>12</sup> In modern times, targeted killings by States have been very restricted or, to the extent that they are not, any *de facto* policy has been unofficial and usually denied, and both the justification and the killings themselves have been cloaked in secrecy.<sup>13</sup> When responsibility for illegal targeted killings could be credibly assigned, such killings have been condemned by the international community – including by other States alleged to practice them.<sup>14</sup>

12. More recently, however, a few States have either openly adopted policies that permit targeted killings, or have formally adopted such a policy while refusing to acknowledge its existence.

### Israel

13. In the 1990s, Israel categorically refused to admit to targeted killings, stating, when accused, that “the [Israeli Defense Force] wholeheartedly rejects this accusation. There is no policy and there never will be a policy or a reality of willful killing of suspects . . . the

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Counter-terrorism Strategies (2006) at 185; BBC, Chechens ‘Confirm’ Warlord’s Death, 29 April 2002.

<sup>9</sup> Nils Melzer, Targeted Killing in International Law (2008) at 4-5.

<sup>10</sup> *Infra*, section II.A.

<sup>11</sup> Michael N. Schmitt, State Sponsored Assassination in International and Domestic Law, 17 Yale J. Int’l L. 609, 611-12 (1992); W. Hays Parks, Memorandum of Law: Executive Order 12333 and Assassination, 1989 Army Lawyer 4, 7-8 (1989).

<sup>12</sup> Melzer, *supra* note 9 at 1.

<sup>13</sup> According to Amnesty International, between 1976 and 1992, an elite unit of the British army killed 37 reported members of the Irish Republican Army in Northern Ireland; the United Kingdom has consistently denied conducting targeted killings. Amnesty International, Political Killings in Northern Ireland (1994) at 4.

<sup>14</sup> E.g., Press Release of the Council of the European Union, 7373/04 of March 2004 available at: <http://www.consilium.europa.eu/App/NewsRoom/loadBook.aspx?target=2004&infotarget=&max=15&bid=78&lang=EN&id=1850>; Record of Security Meeting (S/PV.4945) 19 April 2004 (condemnation of Israeli killing of Hamas leader by Russia, Pakistan, United Kingdom, Germany and Spain); Brian Whittaker & Oliver Burkeman, Killing Probes the Frontiers of Robotics and Legality, Guardian, 6 Nov. 2002 (Swedish Foreign Minister on US targeting of al-Harithi).

principle of the sanctity of life is a fundamental principle of the I.D.F.”<sup>15</sup> In November 2000, however, the Israeli Government confirmed the existence of a policy pursuant to which it justified targeted killings in self-defence and under international humanitarian law (IHL) because the Palestinian Authority was failing to prevent, investigate and prosecute terrorism and, especially, suicide attacks directed at Israel.<sup>16</sup> This was reinforced by the issuance, in 2002, of a legal opinion (only part was published) by the Israeli Defense Force Judge Advocate General on the conditions under which Israel considered targeted killings to be legal.<sup>17</sup>

14. The majority of Israeli targeted killings have reportedly taken place in “Area A”, a part of the West Bank under the control of the Palestinian Authority.<sup>18</sup> The targets have included members of various groups, including Fatah, Hamas, and Islamic Jihad, who, Israeli authorities claimed, were involved in planning and carrying out attacks against Israeli civilians.<sup>19</sup> Means used for targeted killings include drones, snipers, missiles shooting from helicopters, killings at close range, and artillery.<sup>20</sup> One study by a human rights group found that between 2002 and May 2008 at least 387 Palestinians were killed as a result of targeted killing operations. Of these, 234 were the targets, while the remainder were collateral casualties.<sup>21</sup>

15. The legal underpinnings of these policies were subsequently adjudicated by the Israeli Supreme Court in December 2006.<sup>22</sup> The court did not as a general matter either prohibit or permit targeted killings by Israeli forces, holding instead that the lawfulness of each killing must be determined individually. It found without detailed discussion that the customary law of international armed conflict was the applicable law, and did not consider the application of either human rights law or the IHL of non-international armed conflict. It rejected the Government’s contention that terrorists were “unlawful combatants” subject to attack at all times. Instead, it held that the applicable law permitted the targeted killing of civilians for such time as they “directly participated in hostilities”<sup>23</sup> as long as four cumulative conditions were met:

- Targeting forces carried the burden of verifying the identity of the target as well as the factual basis for meeting the “direct participation” standard.
- Even if the target was legally and factually identified by the Government as legitimate, State forces could not kill the person if less harmful means were available.
- After each targeted killing, there must be a retroactive and independent investigation of the “identification of the target and the circumstances of the attack”; and

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<sup>15</sup> Na’ama Yashuvi, *Activity of the Undercover Units in the Occupied Territories*, B’Tselem (1992).

<sup>16</sup> E.g., Press Briefing by Colonel Daniel Reisner, IDF Legal Division, 15 Nov. 2000, available at [http://www.mfa.gov.il/MFA/MFAArchive/2000\\_2009/2000/11/Press%20Briefing%20by%20Colonel%20Daniel%20Reisner-%20Head%20of](http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2000/11/Press%20Briefing%20by%20Colonel%20Daniel%20Reisner-%20Head%20of).

<sup>17</sup> Gideon Alon & Amos Harel, *IDF Lawyers Set ‘Conditions’ for Assassination Policy*, Haaretz, 2 Feb. 2002.

<sup>18</sup> K.A. Cavanaugh, *Selective Justice: The Case of Israel and the Occupied Territories*, 26 *Fordham Int’l L. J.* 934, 960 (2003).

<sup>19</sup> Naftali & Michaeli, *supra* note 1 at 247-50.

<sup>20</sup> B’Tselem, *Statistics related to Israel-Palestinian conflict post-2000*, available at: <http://www.btselem.org/english/statistics/Casualties.asp>.

<sup>21</sup> *Id.*

<sup>22</sup> *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 Dec. 2006 (PCATI).*

<sup>23</sup> *Id.* at paras. 31-40.

- Any collateral harm to civilians must meet the IHL requirement of proportionality.<sup>24</sup>

16. Subsequently, it has been reported that Israeli forces have conducted targeted killings in violation of the Supreme Court's requirements.<sup>25</sup> The reports, denied by Israeli officials, were allegedly based on classified documents taken by an IDF soldier during her military service; the soldier has been charged with espionage.<sup>26</sup>

17. Israel has not disclosed the basis for its legal conclusions, and has not disclosed in detail the guidelines it uses to make its targeted killings decisions, the evidentiary or other intelligence requirements that would justify any killing, or the results of any after-action review of the conformity of the operation with the legal requirements.

### The USA

18. The United States has used drones and airstrikes for targeted killings in the armed conflicts in Afghanistan and Iraq, where the operations are conducted (to the extent publicly known) by the armed forces.<sup>27</sup> The US also reportedly adopted a secret policy of targeted killings soon after the attacks of 11 September 2001,<sup>28</sup> pursuant to which the Government has credibly been alleged to have engaged in targeted killings in the territory of other States.<sup>29</sup> The secret targeted killing program is reportedly conducted by the Central Intelligence Agency (CIA) using "Predator" or "Reaper" drones, although there have been reports of involvement by special operations forces, and of the assistance of civilian contractors with the implementation of the program.<sup>30</sup>

19. The first credibly reported CIA drone killing occurred on 3 November 2002, when a Predator drone fired a missile at a car in Yemen, killing Qaed Senyan al-Harithi, an al-Qaeda leader allegedly responsible for the *USS Cole* bombing.<sup>31</sup> Since then, there have reportedly been over 120 drone strikes, although it is not possible to verify this number.<sup>32</sup> The accuracy of drone strikes is heavily contested and also impossible for outsiders to verify. Reports of civilian casualties in Pakistan range from approximately 20 (according to anonymous US Government officials quoted in the media) to many hundreds.<sup>33</sup>

20. The CIA reportedly controls its fleet of drones from its headquarters in Langley, Virginia, in coordination with pilots near hidden airfields in Afghanistan and Pakistan who handle takeoffs and landings.<sup>34</sup> The CIA's fleet is reportedly flown by civilians, including both intelligence officers and private contractors (often retired military personnel).<sup>35</sup>

<sup>24</sup> Id. at paras. 39, 40 and 60.

<sup>25</sup> Uri Blau, *IDF Rejects Claims it Killed Palestinians in Defiance of Court*, Haaretz, 27 Nov. 2008.

<sup>26</sup> Ofra Edelman, *Ex-Soldier Charged with Espionage for Leaking Documents to Haaretz*, Haaretz, 9 April 2010.

<sup>27</sup> BBC, *US Drones Take Combat Role*, 5 Nov. 2002.

<sup>28</sup> Council of Europe, *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States*, report submitted by Mr. Dick Marty, Doc. 11302 Rev. (7 June 2007), paras. 58-64.

<sup>29</sup> Greg Miller, *Feinstein Comment on US Drones Likely to Embarrass Pakistan*, LA Times, 13 Feb. 2009.

<sup>30</sup> Jane Perlez, *Pakistan Rehearses Its Two-Step on Airstrikes*, NY Times, 15 April 15 2009; Mayer, *supra* note 3; James Risen & Mark Mazzetti, *CIA Said to Use Outsiders to Put Bombs on Drones*, NY Times, 21 Aug. 2009.

<sup>31</sup> Jane's, *Yemen Drone Strike: Just the Start?* 8 Nov. 2002, available at [http://www.janes.com/aerospace/military/news/jdw/jdw021108\\_1\\_n.shtml](http://www.janes.com/aerospace/military/news/jdw/jdw021108_1_n.shtml).

<sup>32</sup> New America Foundation, *Analysis of US Drone Strikes in Pakistan 2004-2010*, available at <http://counterterrorism.newamerica.net/drones#2010chart>.

<sup>33</sup> Id.; *US Drone Attacks in Pakistan 'Backfiring, Congress Told'*, LA Times, 3 May 2009.

<sup>34</sup> Mayer, *supra* note 3.

<sup>35</sup> Id.

According to media accounts, the head of the CIA's clandestine services, or his deputy, generally gives the final approval for a strike.<sup>36</sup> There is reportedly a list of targets approved by senior Government personnel, although the criteria for inclusion and all other aspects of the program are unknown.<sup>37</sup> The CIA is not required to identify its target by name; rather, targeting decisions may be based on surveillance and "pattern of life" assessments.<sup>38</sup>

21. The military also has a target list for Afghanistan. A Senate Foreign Relations Committee Report released on 10 August 2009 disclosed that the military's list included drug lords suspected of giving money to help finance the Taliban.<sup>39</sup> According to the report, "[t]he military places no restrictions on the use of force with these selected targets, which means they can be killed or captured on the battlefield . . . standards for getting on the list require two verifiable human sources and substantial additional evidence."<sup>40</sup>

22. The Legal Adviser to the Department of State recently outlined the Government's legal justifications for targeted killings. They were said to be based on its asserted right to self-defence, as well as on IHL, on the basis that the US is "in an armed conflict with Al Qaeda, as well as the Taliban and associated forces."<sup>41</sup> While this statement is an important starting point, it does not address some of the most central legal issues including: the scope of the armed conflict in which the US asserts it is engaged, the criteria for individuals who may be targeted and killed, the existence of any substantive or procedural safeguards to ensure the legality and accuracy of killings, and the existence of accountability mechanisms.

### **Russia**

23. Russia has described its military operations in Chechnya, launched in 1999, as a counter-terrorism operation. During the course of the conflict, Russia has reportedly deployed "seek and destroy" groups of army commandoes to "hunt down groups of insurgents"<sup>42</sup> and has justified reported targeted killings in Chechnya as necessitated by Russia's fight against terrorism.<sup>43</sup> This justification is especially problematic in so far as large parts of the population have been labeled as terrorists.<sup>44</sup> Although there are credible reports of targeted killings conducted outside of Chechnya, Russia has refused to acknowledge responsibility or otherwise justify the killing, and also refused to cooperate with any investigation or prosecution.<sup>45</sup>

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<sup>36</sup> Id.

<sup>37</sup> Id.

<sup>38</sup> Id.

<sup>39</sup> 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).

<sup>40</sup> Id. at 15-16.

<sup>41</sup> Harold Koh, Legal Adviser, Department of State, *The Obama Administration and International Law*, Keynote Address at the Annual Meeting of the American Soc'y of Int'l Law (25 Mar. 2010).

<sup>42</sup> Saradzhyan, *supra* note 8 at 183.

<sup>43</sup> E.g., BBC, *Chechen Rebel Basayev Dies*, 10 July 2006 (alleged killing by Russian special forces of Chechen rebel leader Shamil Basayev).

<sup>44</sup> E.g., Anna Le Huerou and Amandine Regamey, *Russia's War in Chechnya*, in Samy Cohen, *Democracies at War Against Terrorism* at 222 (2008).

<sup>45</sup> Andrew McGregor, *The Assassination Of Zelimkhan Yandarbiyev: Implications For The War On Terrorism* *Terrorism Monitor*, 2:14, 14 July 2004.

24. In summer 2006, the Russian Parliament passed a law permitting the Russian security services to kill alleged terrorists overseas, if authorized to do so by the President.<sup>46</sup> The law defines terrorism and terrorist activity extremely broadly, including “practices of influencing the decisions of government, local self-government or international organizations by terrorizing the population or through other forms of illegal violent action,” and also any “ideology of violence.”<sup>47</sup>

25. Under the law, there appears to be no restriction on the use of military force “to suppress international terrorist activity outside the Russian Federation.”<sup>48</sup> The law requires the President to seek the endorsement of the Federation Council to use regular armed forces outside Russia, but the President may deploy FSB security forces at his own discretion. According to press accounts, at the time of the law’s passage, “Russian legislators stressed that the law was designed to target terrorists hiding in failed States and that in other situations the security services would work with foreign intelligence services to pursue their goals.”<sup>49</sup> Legislators also “insisted that they were emulating Israeli and US actions in adopting a law allowing the use of military and special forces outside the country’s borders against external threats.”<sup>50</sup>

26. There is no publicly available information about any procedural safeguards to ensure Russian targeted killings are lawful, the criteria for those who may be targeted, or accountability mechanisms for review of targeting operations.

### C. New technology

27. Drones were originally developed to gather intelligence and conduct surveillance and reconnaissance. More than 40 countries now have such technology. Some, including Israel, Russia, Turkey, China, India, Iran, the United Kingdom and France either have or are seeking drones that also have the capability to shoot laser-guided missiles ranging in weight from 35 pounds to more than 100 pounds. The appeal of armed drones is clear: especially in hostile terrain, they permit targeted killings at little to no risk to the State personnel carrying them out, and they can be operated remotely from the home State. It is also conceivable that non-state armed groups could obtain this technology.<sup>51</sup>

## III. Legal issues

### 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 inter-state use of force.<sup>52</sup> The basic legal rules applicable to targeted killings in each of these contexts are laid out briefly below.

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<sup>46</sup> Federal Law No. 35-FZ on Counteracting Terrorism (2006) available at: <http://www.legislationline.org/topics/country/7/topic/5..>

<sup>47</sup> Id. art. 3.

<sup>48</sup> Id. art. 6.

<sup>49</sup> Peter Finn, In Russia, A Secretive Force Widens, *Washington Post*, 12 Dec. 2006.

<sup>50</sup> Steven Eke, Russia Law on Killing Extremists Abroad, *BBC*, 27 Nov. 2006.

<sup>51</sup> Dan Efron, Hizbullah’s Worrisome Weapon, *Newsweek*, 11 Sept. 2006 (reporting that Iran has provided weaponized drones to Hezbollah).

<sup>52</sup> A/61/311, paras. 33-45 (detailed discussion of “arbitrary” deprivation of life under human rights law).

### **In the context of armed conflict**

29. **The legal framework:** Both IHL and human rights law apply in the context of armed conflict; whether a particular killing is legal is determined by the applicable *lex specialis*.<sup>53</sup> To the extent that IHL does not provide a rule, or the rule is unclear and its meaning cannot be ascertained from the guidance offered by IHL principles, it is appropriate to draw guidance from human rights law.<sup>54</sup>

30. **Under the rules of IHL:** Targeted killing is only lawful when the target is a “combatant” or “fighter”<sup>55</sup> or, in the case of a civilian, only for such time as the person “directly participates in hostilities.”<sup>56</sup> In addition, the killing must be militarily necessary, the use of force must be proportionate so that any anticipated military advantage is considered in light of the expected harm to civilians in the vicinity,<sup>57</sup> and everything feasible must be done to prevent mistakes and minimize harm to civilians.<sup>58</sup> These standards apply regardless of whether the armed conflict is between States (an international armed conflict) or between a State and a non-state armed group (non-international armed conflict), including alleged terrorists. Reprisal or punitive attacks on civilians are prohibited.<sup>59</sup>

### **Outside the context of armed conflict**

31. **The legal framework:** The legality of a killing outside the context of armed conflict is governed by human rights standards, especially those concerning the use of lethal force. Although these standards are sometimes referred to as the “law enforcement” model, they do not in fact apply only to police forces or in times of peace. The “law enforcement officials” who may use lethal force include all government officials who exercise police

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<sup>53</sup> Human rights law and IHL apply coextensively and simultaneously unless there is a conflict between them. E/CN.4/2005/7, paras. 46-53; A/HRC/4/20, paras. 18-19; A/HRC/11/2/Add.5, paras. 71-73, 83; A/HRC/4/20/Add.1, pp. 342-58; E/CN.4/2006/53/Add.1, pp. 264-65; A/HRC/4/20/Add.1, pp. 358-61. In situations that do not involve the conduct of hostilities – e.g., law enforcement operations during non-international armed conflict – the *lex generalis* of human rights law would apply.

<sup>54</sup> ICJ, Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ rep. 226, para 25 (Nuclear Weapons); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] I.C.J. Rep. (Wall Opinion) para. 106; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), [2005] I.C.J. Rep., para. 216 (Armed Activities).

<sup>55</sup> International Institute of Humanitarian Law, The Manual on the Law of Non-International Armed Conflict, March 2006.

<sup>56</sup> Geneva Conventions Common Article 3, AP I, art. 52(1) and (2); AP I, art. 50(1); International Humanitarian Law Research Initiative, HPCR Manual and Commentary on International Law Applicable to Air and Missile Warfare, Harvard University Program on Humanitarian Policy and Conflict Research, 15 May 2009, available at <http://www.ihlresearch.org/amw/manual> (HPCR Commentary), section C.12.(a).

<sup>57</sup> Proportionality requires an assessment whether an attack that is expected to cause incidental loss of civilian life or injury to civilians would be excessive in relation to the anticipated concrete and direct military advantage. AP I, arts. 51(5)(b) and 57; Henckaerts & Oswald-Beck, Customary International Humanitarian Law Rules, ICRC (2005) (ICRC Rules) Rule 14.

<sup>58</sup> Precaution requires that, before every attack, armed forces must do everything feasible to: i) verify the target is legitimate, (ii) determine what the collateral damage would be and assess necessity and proportionality, and (iii) minimize the collateral loss of lives and/or property. AP I, art. 57; ICRC Rules 15-21. “Everything feasible” means precautions that are “practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.” Melzer, *supra* note 9 at 365.

<sup>59</sup> AP I, art. 51 (2); HPCR Commentary section C.18.

powers, including a State's military and security forces, operating in contexts where violence exists, but falls short of the threshold for armed conflict.<sup>60</sup>

32. **Under human rights law:** A State killing is legal only if it is required to protect life (making lethal force *proportionate*) and there is no other means, such as capture or non-lethal incapacitation, of preventing that threat to life (making lethal force *necessary*).<sup>61</sup> The proportionality requirement limits the permissible level of force based on the threat posed by the suspect to others.<sup>62</sup> The necessity requirement imposes an obligation to minimize the level of force used, regardless of the amount that would be proportionate, through, for example, the use of warnings, restraint and capture.<sup>63</sup>

33. This means that under human rights law, a targeted killing in the sense of an intentional, premeditated and deliberate killing by law enforcement officials cannot be legal because, unlike in armed conflict, it is never permissible for killing to be the *sole objective* of an operation. Thus, for example, a "shoot-to-kill" policy violates human rights law.<sup>64</sup> This is not to imply, as some erroneously do, that law enforcement is incapable of meeting the threats posed by terrorists and, in particular, suicide bombers. Such an argument is predicated on a misconception of human rights law, which does not require States to choose between letting people be killed and letting their law enforcement officials use lethal force to prevent such killings. In fact, under human rights law, States' duty to respect and to ensure the right to life<sup>65</sup> entails an obligation to exercise "due diligence" to protect the lives of individuals from attacks by criminals, including terrorists.<sup>66</sup> Lethal force under human rights law is legal if it is strictly and directly necessary to save life.

#### The use of inter-state force

34. **The legal framework:** Targeted killings conducted in the territory of other States raise sovereignty concerns.<sup>67</sup> Under Article 2(4) of the UN Charter, States are forbidden from using force in the territory of another State.<sup>68</sup> When a State conducts a targeted killing in the territory of another State with which it is not in armed conflict, whether the first State violates the sovereignty of the second is determined by the law applicable to the use of inter-state force, while the question of whether the specific killing of the particular individual(s) is legal is governed by IHL and/or human rights law.

35. **Under the law of inter-state force:** A targeted killing conducted by one State in the territory of a second State does not violate the second State's sovereignty if either (a) the second State consents, or (b) the first, targeting, State has a right under international law to

<sup>60</sup> Code of Conduct for Law Enforcement Officials, GA Res. 34/169 of 17 December 1979 (Code of Conduct), art. 1, commentary (a) and (b); Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth U.N. Congress on Prevention of Crime and Treatment of Offenders, Havana, Cuba, Aug. 27-Sept. 7, 1990, (Basic Principles), preamble, note.

<sup>61</sup> A/61/311, paras. 33-45; Human Rights Committee, General Comment No. 6, HRI/GEN/1/Rev.6 (1982), para. 3; Inter-American Commission of Human Rights, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. (2002).

<sup>62</sup> A/61/311, paras. 42-44.

<sup>63</sup> A/61/311, para. 41.

<sup>64</sup> E/CN.4/2006/53, paras. 44-54.

<sup>65</sup> ICCPR, Art. (2)(1).

<sup>66</sup> E/CN.4/2005/7, paras. 71-74.

<sup>67</sup> Sec. Co. Res. 611 of 25 April 1988 (condemning as an act of illegal aggression Israel's killing in Tunisia of Khalil al-Wazir for violating Tunisian territory); Robert Pear, US Assails P.L.O. Aide's Killing As 'Act of Political Assassination', NY Times, 18 April 1988 (condemned by US State Department as "political assassination").

<sup>68</sup> UN Charter, art. 51.



use force in self-defence under Article 51 of the UN Charter,<sup>69</sup> because (i) the second State is responsible for an armed attack against the first State, or (ii) the second State is unwilling or unable to stop armed attacks against the first State launched from its territory. International law permits the use of lethal force in self-defence in response to an “armed attack” as long as that force is necessary and proportionate.<sup>70</sup>

36. While the basic rules are not controversial, the question of which framework applies, and the interpretation of aspects of the rules, have been the subject of significant debate. Both issues are addressed in greater detail below.

## **B. Sovereignty issues and States’ invocation of the right to self-defence**

### **Consent**

37. The proposition that a State may consent to the use of force on its territory by another State is not legally controversial.<sup>71</sup> But while consent may permit the use of force, it does not absolve either of the concerned States from their obligations to abide by human rights law and IHL with respect to the use of lethal force against a specific person. The consenting State’s responsibility to protect those on its territory from arbitrary deprivation of the right to life applies at all times.<sup>72</sup> A consenting State may only lawfully authorize a killing by the targeting State to the extent that the killing is carried out in accordance with applicable IHL or human rights law.

38. To meet its legal obligations, therefore, the consenting State should, at a minimum, require the targeting State to demonstrate verifiably that the person against whom lethal force is to be used can be lawfully targeted and that the targeting State will comply with the applicable law.<sup>73</sup> After any targeted killing, the consenting State should ensure that it was legal. In case of doubt, the consenting State must investigate the killing and, upon a finding of wrongdoing, seek prosecution of the offenders and compensation for the victims.

### **The right to self-defence**

39. In the absence of consent, or in addition to it, States may invoke the right to self-defence as justification for the extraterritorial use of force involving targeted killings.<sup>74</sup> As noted above, international law permits the use of lethal force in self-defence in response to an “armed attack” as long as that force is necessary and proportionate.<sup>75</sup> Controversy has arisen, however, in three main areas: whether the self-defence justification applies to the

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<sup>69</sup> UN Charter, art. 2(4).

<sup>70</sup> ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicar. vs. US)* [1986] ICJ Rep., para. 194 (Military and Paramilitary Activities); O. Schachter, *The Right of States to Use Armed Force*, 82 Mich. L. Rev. 1620, 1633-34 (1984). In the context of self-defence, force is proportionate only if it is used defensively and if it is confined to the objective.

<sup>71</sup> *Military and Paramilitary Activities*, para. 246. Pakistan and Yemen may have consented to targeted drone killings by the US in their territory. Eric Schmitt and Mark Mazzetti, *In a First, US Provides Pakistan with Drone Data*, NY Times, 13 May 2009; Joby Warrick and Peter Finn, *CIA director says secret attacks in Pakistan have hobbled al-Qaeda*, Wash. Post., Mar. 18, 2010.

<sup>72</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, art. 6 (ICCPR); UN General Assembly, *Resolution on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, A/Res/51/191, 10 Mar. 2005, para. 1.

<sup>73</sup> E/CN.4/2005/7, at para. 41.

<sup>74</sup> *E.g.*, PCATI, *supra* note 22, para. 10; Koh, *supra* note 41; Abraham D. Sofaer, *Terrorism, The Law, and the National Defense*, 126 Military Law Review 89, 103 (1989).

<sup>75</sup> U.N. Charter art. 51; Schachter, *supra* note 70 at 1633-34.

use of force against non-state actors and what constitutes an armed attack by such actors; the extent to which self-defence alone is a justification for targeted killings; and, the extent to which States have a right to “anticipatory” or “pre-emptive” self-defence.

### **Self-defence and non-state actors**

40. It has been a matter of debate whether Article 51 permits States to use force against non-state actors. The argument that it does not finds support in judgments of the International Court of Justice (ICJ) holding that States cannot invoke Article 51 against armed attacks by non-state actors that are not imputable to another State.<sup>76</sup> On the other hand, some States, including the US, argue that Article 51 does not displace the customary international law right to act in self-defence, including against non-state actors, and that State practice supports that position.<sup>77</sup> Commentators find support for that argument in Security Council Resolutions 1368 and 1373 issued in the wake of the September 11 attacks,<sup>78</sup> as well as NATO’s invocation of the North Atlantic Treaty’s Article 5 collective self-defence provision.<sup>79</sup> But even if it were to be accepted that Article 51 has not displaced customary law, the reality is that it will only be in very rare circumstances that a non-state actor whose activities do not engage the responsibility of any State will be able to conduct the kind of armed attack that would give rise to the right to use extraterritorial force. In such exceptional circumstances, the UN Charter would require that Security Council approval should be sought.

41. A more difficult question concerns the extent to which persistent but discrete attacks, including by a non-state actor, would constitute an “armed attack” under Article 51. In a series of decisions, the ICJ has established a high threshold for the kinds of attacks that would justify the extraterritorial use of force in self-defence.<sup>80</sup> In its view, sporadic, low-intensity attacks do not rise to the level of armed attack that would permit the right to use extraterritorial force in self-defence, and the legality of a defensive response must be judged in light of each armed attack, rather than by considering occasional, although perhaps successive, armed attacks in the aggregate. While this approach has been criticized,<sup>81</sup> few commentators have supported an approach that would accommodate the invocation of the right to self-defence in response to most of the types of attack that have been at issue in relation to the extraterritorial targeted killings discussed here. Any such approach would diminish hugely the value of the foundational prohibition contained in Article 51.

### **The relationship between self-defence and IHL and human rights law**

42. The second area of controversy arises particularly in the context of the use of force by the US against alleged terrorists in other countries, especially Pakistan. Some US scholars and commentators advocate a “robust” form of self-defence in which, once the doctrine is invoked, no other legal frameworks or limiting principles – such as IHL – would

<sup>76</sup> *Wall Opinion; Armed Activities*, para. 216.

<sup>77</sup> Sofaer, *supra* note 74 at 107.

<sup>78</sup> Sec. Co. Res. 1368 (2001) 12 Sept. 2001; Sec. Co. Res. 1372 (2001) 28 Sept. 2001.

<sup>79</sup> Press Release, North Atlantic Council, 12 Sept. 2001, *available at* <http://www.nato.int/docu/pr/2001/p01-124e.htm>.

<sup>80</sup> *Military and Paramilitary Activities* 1986 I.C.J. 14; ICJ, *Oil Platforms (Iran v. US)*, 2003 I.C.J. 161, 6 Nov. 2003; *Armed Activities*, 2005 I.C.J. 116, 19 Dec. 2005; *Wall Opinion*, 2004 I.C.J. 136.

<sup>81</sup> *Armed Activities* (separate opinion of Judge Simma), paras. 8 and 15; Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 *Yale J. Int’l Law* 82 (2010); Christine Gray, *International Law and the Use of Force* (2004) 133.

apply to targeted killings.<sup>82</sup> Under this view, once it is justified to use force in self-defence, IHL and human rights law would not be applicable to that use of force. This approach reflects an unlawful and disturbing tendency in recent times to permit violations of IHL based on whether the broader cause in which the right to use force is invoked is “just,”<sup>83</sup> and impermissibly conflates *jus ad bellum* and *jus in bello*.<sup>84</sup> Proponents of a “robust” right to self-defence cite to the ICJ’s Nuclear Weapons Advisory Opinion, in which the court found that “the threat or use of nuclear weapons would generally” violate IHL, but held that it could not conclude that such threat or use “would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.”<sup>85</sup> While this aspect of the opinion has been criticized as being vague and confusing,<sup>86</sup> it seeks to address only the most extreme situation involving a State’s very survival. Invoking such an extreme exception to permit the violation of IHL on self-defence grounds in the type of situations under consideration here would be tantamount to abandoning IHL.

43. The “robust” self-defence approach also ignores the very real differences between the law of inter-state force and the law applicable to the conduct of hostilities. Whether the use of force is legal is a question that usually arises at the start of an armed conflict, while the law applicable to the conduct of that armed conflict applies throughout it.<sup>87</sup> The limitations on each are distinct. Proportionality under self-defence requires States to use force only defensively and to the extent necessary to meet defensive objectives,<sup>88</sup> whereas the test for proportionality under IHL requires States to balance the incidental harm or death of civilians caused by an operation to the military advantage that would result. Necessity in under self-defence requires a State to assess whether it has means to defend itself other than through armed force, while necessity in IHL requires it to evaluate whether an operation will achieve the goals of the military operation and is consistent with the other rules of IHL. Finally, the “robust” self-defence approach fails to take into account the existence of two levels of responsibility in the event that a targeted killing for which self-defence is invoked is found to be unlawful. Violation of the limitations on the right to self-defence results in State and individual criminal responsibility for aggression. There is also liability for the unlawful killing itself – if it violates IHL, it may be a war crime. The Articles on State Responsibility make abundantly clear that States may not invoke self-defence as justification for their violations of IHL.<sup>89</sup>

<sup>82</sup> E.g., Kenneth Anderson, Targeted Killing in US Counterterrorism Strategy and Law, available at [http://www.brookings.edu/papers/2009/0511\\_counterterrorism\\_anderson.aspx](http://www.brookings.edu/papers/2009/0511_counterterrorism_anderson.aspx); Kenneth Anderson, Predators over Pakistan, *The Weekly Standard*, 8 March 2010; Parks, *supra* note 11. Recently, the State Department Legal Adviser appeared to acknowledge that self-defence is an additional, not alternative, source of authority. Koh, *supra* note 41.

<sup>83</sup> IACHR, *Tablada*, Report No. 55/97, Argentina, Doc. 38, 1997, paras. 173-74.

<sup>84</sup> Robert Kolb, *Origin of the Twin Terms Jus ad Bellum and Jus in Bello*, 320 *Int’l Rev. Red Cross* 554 (1997); Judith Gardam, *Proportionality and Force in International Law*, 87 *American Journal of International Law* 391 (1993).

<sup>85</sup> *Nuclear Weapons*, para 25.

<sup>86</sup> E.g., *Dissenting Opinion of Judge Higgins, Dissenting Opinion of Judge Koroma; Dapo Akande, Nuclear Weapons, Unclear Law? Deciphering the Nuclear Weapons Advisory Opinion of the International Court*, 68 *Brit. Yearbook of Int’l Law* 209 (1997); Christopher Greenwood, *The Advisory Opinion on Nuclear Weapons and the Contribution of the International Court to International Humanitarian Law*, *Int’l Rev. Red Cross*, No. 316, p. 65 (1997); Jasmine Moussa, *Can Jus Ad Bellum Override Jus in Bello? Reaffirming the Separation of the Two Bodies of Law*, *Int’l Rev. Red Cross*, No. 872, p. 963 (2008).

<sup>87</sup> Christopher Greenwood, *The Relationship Between Jus ad Bellum and Jus in Bello*, 9 *Review of International Studies* 221, 222-23 (1983).

<sup>88</sup> *Nuclear Weapons, Dissenting Opinion of Judge Higgins*, para. 5.

<sup>89</sup> ILC, *Articles on State Responsibility* at 166-67.

44. In sum, even if the use of inter-state force is offered as justification for a targeted killing, it does not dispose of the further question of whether the killing of the particular targeted individual or individuals is lawful. The legality of a specific killing depends on whether it meets the requirements of IHL and human rights law (in the context of armed conflict) or human rights law alone (in all other contexts).

#### **Anticipatory and pre-emptive self-defence**

45. The third key area of controversy is the extent to which States seek to invoke the right to self-defence not just in response to an armed attack, but in anticipatory self-defence, or alternatively, as a pre-emptive measure in response to a threat that is persistent and may take place in the future, but is not likely to take place imminently.<sup>90</sup> Under a restrictive view of Article 51, the right to self-defence may only be invoked after an attack has taken place.<sup>91</sup> In contrast, under a more permissive view that more accurately reflects State practice and the weight of scholarship, self-defence also includes the right to use force against a real and imminent threat when “the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment of deliberation.”<sup>92</sup> A third view, invoked exceptionally by the US Bush administration, but which apparently may still reflect US policy, would permit “pre-emptive self-defence”, the use of force even when a threat is not imminent and “uncertainty remains as to the time and place of the enemy’s attack.”<sup>93</sup> This view is deeply contested and lacks support under international law.<sup>94</sup>

### **C. The existence and scope of armed conflict**

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.

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<sup>90</sup> US National Security Strategy 2002 (2006 rev’n) at 6; W. Taft and A. Buchwald, Pre-emption, Iraq and International Law, 97 AJIL 557 (2003).

<sup>91</sup> Yoram Dinstein, War, Aggression and Self-Defence, Cambridge (2001) at 167 (describing the restrictive approach).

<sup>92</sup> R.Y. Jennings, The Caroline and McLeod Cases, 32 Am. J. Int’l L. 82, 92 (1938); Thomas M. Franck, Recourse to Force: State Action Against Threats and Armed Attacks (2002) 107; Thomas M. Franck, What Happens Now? The United Nations After Iraq, 97 Am. J. Int’l L. 607, 619 (2003); Christian J. Tams, The Use of Force Against Terrorists, 20 Eur. J. Int’l Law, 359, 378-83 (2009).

<sup>93</sup> US National Security Strategy 2002 (2006 rev’n) at 15.

<sup>94</sup> Lord Goldsmith, ‘Iraq: Resolution 1441’, Memo to the Prime Minister, Mar. 7, 2002, available at <http://image.guardian.co.uk/sys-files/Guardian/documents/2005/04/28/legal.pdf>; Franck, What Happens Now? at 619 (2003).

47. On the other hand, both the US and Israel have invoked the existence of an armed conflict against alleged terrorists (“non-state armed groups”).<sup>95</sup> The appeal is obvious: the IHL applicable in armed conflict arguably has more permissive rules for killing than does human rights law or a State’s domestic law, and generally provides immunity to State armed forces.<sup>96</sup> Because the law of armed conflict has fewer due process safeguards, States also see a benefit to avoiding compliance with the more onerous requirements for capture, arrest, detention or extradition of an alleged terrorist in another State. IHL is not, in fact, more permissive than human rights law because of the strict IHL requirement that lethal force be necessary. But labeling a situation as an armed conflict might also serve to expand executive power both as a matter of domestic law and in terms of public support.

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

49. The IHL applicable to non-international armed conflict is not as well-developed as that applicable to international armed conflict. Since 11 September 2001, this fact has often been cited either to criticize IHL in general or as a justification for innovative interpretations which go well beyond generally accepted approaches. It is true that 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.<sup>97</sup> The IHL of

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<sup>95</sup> Koh, *supra* note 41; PCATI *supra* note 22.

<sup>96</sup> Adjutant General’s Office, General Orders No. 100, Instructions for the Government of Armies of the US in the Field (Lieber Code), 24 April 1863, art 14; Nuclear Weapons, para. 78.

<sup>97</sup> Geneva Conventions I to IV, Common Art. 2(1); ICRC, Commentary on the Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field 32 (Jean S. Pictet ed., 1952);

international armed conflict applies also to “all cases of total or partial occupation of the territory of a High Contracting Party” to the Geneva Conventions.<sup>98</sup> Following these criteria, an international armed conflict cannot exist between a State and a non-state group.<sup>99</sup>

52. The tests for the existence of a *non-international* armed conflict are not as categorical as those for international armed conflict. This recognizes the fact that there may be various types of non-international armed conflicts. The applicable test may also depend on whether a State is party to Additional Protocol II to the Geneva Conventions.<sup>100</sup> Under treaty and customary international law, the elements which would point to the existence of a non-international armed conflict against a non-state armed group are:

(i) The non-state armed group must be identifiable as such, based on criteria that are objective and verifiable. This is necessary for IHL to apply meaningfully, and so that States may comply with their obligation to distinguish between lawful targets and civilians.<sup>101</sup> The criteria include:<sup>102</sup>

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

(ii) There must be a minimal threshold of intensity and duration. The threshold of violence is higher than required for the existence of an international armed conflict. To meet the minimum threshold, violence must be:<sup>103</sup>

- “Beyond the level of intensity of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” (AP II).
- “[P]rotracted armed violence” among non-state armed groups or between a non-state armed group and a State;<sup>104</sup>

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*Prosecutor v. Tadic*, [Appeal on Jurisdiction] Case No. IT-94-I-AR72 (2 Oct. 1995), 35 I.L.M. 32, 54, para. 70 (1996)

<sup>98</sup> Geneva Conventions I to IV, Common Art. 2(2); AP I, art. 1(4).

<sup>99</sup> Thus, it was legally incorrect for the US Bush Administration to claim that its right to conduct targeted killings anywhere in the world was part of its “war on terror”, which it classified as an “international armed conflict” against al Qaeda. Communication of the US regarding the Killing of Harithi al-Yemeni, 4 May 2006, A/HRC/4/20/Add.1, p. 344.

<sup>100</sup> AP II, Art. 1(1).

<sup>101</sup> Lindsay Moir, *The Law of Internal Armed Conflict*, 2002.

<sup>102</sup> ICRC Commentary *supra* note 97, 49-50 (Common Article 3); ICTY, *Delalic Judgment*, 16 Nov. 1998, para. 184; ICTR, *Musema*, Judgment, 27 Jan. 2000, para. 248; IACHR, *Tablada*, Report No. 55/97, Argentina, Doc. 38, 1997, para. 152.

<sup>103</sup> The tests listed are independent of one another and for each threshold a different set of IHL rules might apply, but such distinctions are not crucial to the present analysis.

- If an isolated incident, the incident itself should be of a high degree of intensity, with a high level of organization on the part of the non-state armed group;<sup>105</sup>

(iii) The territorial confines can be:

- Restricted to the territory of a State and between the State's own armed forces and the non-state group (AP II); or
- A transnational conflict, i.e., one that crosses State borders (GC Art. 3).<sup>106</sup>  
This does not mean, however, that there is no territorial nexus requirement.

53. Taken cumulatively, these factors make it problematic for the US to show that – outside the context of the armed conflicts in Afghanistan or Iraq – it is in a transnational non-international armed conflict against “al Qaeda, the Taliban, and other associated forces”<sup>107</sup> without further explanation of how those entities constitute a “party” under the IHL of non-international armed conflict, and whether and how any violence by any such group rises to the level necessary for an armed conflict to exist.

54. The focus, instead, appears to be on the “transnational” nature of the terrorist threat. Al-Qaeda and entities with various degrees of “association” with it are indeed known to have operated in numerous countries around the world including in Saudi Arabia, Indonesia, Pakistan, Germany, the United Kingdom and Spain, among others, where they have conducted terrorist attacks. Yet none of these States, with the possible exception of Pakistan, recognize themselves as being part of an armed conflict against al-Qaeda or its “associates” in their territory. Indeed, in each of those States, even when there have been terrorist attacks by al-Qaeda or other groups claiming affiliation with it, the duration and intensity of such attacks has not risen to the level of an armed conflict. Thus, while it is true that non-international armed conflict can exist across State borders, and indeed often does, that is only one of a number of cumulative factors that must be considered for the objective existence of an armed conflict.

55. With respect to the existence of a non-state group as a “party”, al-Qaeda and other alleged “associated” groups are often only loosely linked, if at all. Sometimes they appear to be not even groups, but a few individuals who take “inspiration” from al Qaeda. The idea that, instead, they are part of continuing hostilities that spread to new territories as new alliances form or are claimed may be superficially appealing but such “associates” cannot constitute a “party” as required by IHL – although they can be criminals, if their conduct violates US law, or the law of the State in which they are located.

56. To ignore these minimum requirements, as well as the object and purpose of IHL, would be to undermine IHL safeguards against the use of violence against groups that are not the equivalent of an organized armed group capable of being a party to a conflict – whether because it lacks organization, the ability to engage in armed attacks, or because it does not have a connection or belligerent nexus to actual hostilities. It is also salutary to recognize that whatever rules the US seeks to invoke or apply to al Qaeda and any “affiliates” could be invoked by other States to apply to other non-state armed groups. To expand the notion of non-international armed conflict to groups that are essentially drug

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<sup>104</sup> *Tadic*, *supra* note 97, para. 70

<sup>105</sup> IACHR, *Juan Carlos Abella v. Argentina*, Report No. 55/97, OEA/Ser.L./V./II.95, doc. 7 rev. 271 para. 151 (1997).

<sup>106</sup> Common Article 3 is universally applicable and not limited to internal conflicts. *Nuclear Weapons*, paras. 79-82.

<sup>107</sup> Koh, *supra* note 41; *Hamdan v. Rumsfeld*, 548 US 547 (2006).

cartels, criminal gangs or other groups that should be dealt with under the law enforcement framework would be to do deep damage to the IHL and human rights frameworks.

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

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

58. In international armed conflict, combatants may be targeted at any time and any place (subject to the other requirements of IHL).<sup>108</sup> 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.”<sup>109</sup> Instead – as in international armed conflict – States are permitted to directly attack only civilians who “directly participate in hostilities” (DPH).<sup>110</sup> Because there is no commonly accepted definition of DPH, it has been left open to States’ own interpretation – which States have preferred not to make public – to determine what constitutes DPH.

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

60. It is not easy to arrive at a definition of direct participation that protects civilians and at the same time does not “reward” an enemy that may fail to distinguish between civilians and lawful military targets, that may deliberately hide among civilian populations and put them at risk, or that may force civilians to engage in hostilities.<sup>111</sup> The key, however, is to recognize that regardless of the enemy’s tactics, in order to protect the vast majority of civilians, direct participation may only include conduct close to that of a fighter, or conduct that directly supports combat. More attenuated acts, such as providing financial support, advocacy, or other non-combat aid, does not constitute direct participation.

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

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<sup>108</sup> AP I, art. 48; AP I, art. 51(2) (defining lawful targets); HPCR Commentary section A.1.(y)(1). The term “combatant” is not defined in IHL, but may be extrapolated from Geneva Convention III, art. 4(A); Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 *Am. J. Int’l L.* 48 (2009).

<sup>109</sup> Marco Sassoli & Laura M Olson, *The Relationship Between International Humanitarian Law and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts*, 90 *Int’l Rev. Red Cross*, 599, 611 (Sept. 2008); Marco Sassoli, *Transnational Armed Groups and International Humanitarian Law*, HPCR Paper Series, Winter 2006.

<sup>110</sup> AP I, art. 51(3); AP I, art. 50(1) (defining civilian). AP I, arts. 13(3) and 51(3); Geneva Conventions III and IV, art. 3; AP II, arts. 4 and 13(3).

<sup>111</sup> For this reason I have criticized non-state armed groups for using civilians as human shields and locating their military operations in areas heavily populated by civilians. A/HRC/11/2/Add.4, paras. 9, 23, 24.



ground, such as for the proverbial “farmer by day, fighter by night”, that has remained unclear and subject to uncertainty.

62. In 2009, the ICRC issued its Interpretive Guidance on DPH, which provides a useful starting point for discussion. In non-international armed conflict, according to the ICRC Guidance, civilians who participate directly in hostilities and are members of an armed group who have a “continuous combat function” may be targeted at all times and in all places.<sup>112</sup> With respect to the temporal duration of DPH for all other civilians, the ICRC Guidance takes the view that direct participation for civilians is limited to each single act: the earliest point of direct participation would be the concrete preparatory measures for that specific act (e.g., loading bombs onto a plane), and participation terminates when the activity ends.<sup>113</sup>

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

64. These criteria generally exclude conduct that is clearly indirect, including general support for the war effort through preparation or capacity building (such as the production of weapons and military equipment).<sup>114</sup> They also exclude conduct that is protected by other human rights standards, including political support for a belligerent party or an organized armed group. Importantly, the ICRC’s Guidance makes clear that the lawfulness of an act under domestic or international law is not at issue, rather, the sole concern of the direct participation inquiry is whether the conduct “constitute[s] an integral part of armed confrontations occurring between belligerents.”<sup>115</sup> Thus, although illegal activities, e.g., terrorism, may cause harm, if they do not meet the criteria for direct participation *in hostilities*,<sup>116</sup> then States’ response must conform to the lethal force standards applicable to self-defence and law enforcement.<sup>117</sup> In general, the ICRC’s approach is correct, and comports both with human rights law and IHL.

65. Nevertheless, the ICRC’s Guidance raises concern from a human rights perspective because of the “continuous combat function” (CCF) category of armed group members who may be targeted anywhere, at any time.<sup>118</sup> 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

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<sup>112</sup> ICRC Guidance at 66.

<sup>113</sup> ICRC Guidance at 66-68

<sup>114</sup> HPCR Commentary section C.28(2), n. 278; Nils Melzer, Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities, 42 NYU J. Int’l L. and Politics, 829, 858 (2010).

<sup>115</sup> Id. at 859.

<sup>116</sup> Hague Regulations IV, art. 22; AP I, arts. 35(1) and 51 (discussing hostilities).

<sup>117</sup> Melzer, *supra* note 114 at 861.

<sup>118</sup> ICRC Guidance at 66.

questionable given the specific treaty language that limits direct participation to “for such time” as opposed to “all the time.”

66. Creation of the CCF category also raises the risk of erroneous targeting of someone who, for example, may have disengaged from their function. If States are to accept this category, the onus will be on them to show that the evidentiary basis is strong. In addition, States must adhere to the careful distinction the ICRC draws between continuous combatants who may always be subject to direct attack and civilians who (i) engage in sporadic or episodic direct participation (and may only be attacked during their participation), or (ii) have a general war support function (“recruiters, trainers, financiers and propagandists”) or form the political wing of an organized armed group (neither of which is a basis for attack).<sup>119</sup>

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

68. The failure of States to disclose their criteria for DPH is deeply problematic because it gives no transparency or clarity about what conduct could subject a civilian to killing. It also leaves open the likelihood that States will unilaterally expand their concept of direct participation beyond permissible boundaries. Thus, although the US has not made public its definition of DPH, it is clear that it is more expansive than that set out by the ICRC; in Afghanistan, the US has said that drug traffickers on the “battlefield” who have links to the insurgency may be targeted and killed.<sup>120</sup> This is not consistent with the traditionally understood concepts under IHL – drug trafficking is understood as criminal conduct, not an activity that would subject someone to a targeted killing. And generating profits that might be used to fund hostile actions does not constitute DPH.

69. Given the ICRC’s promulgation of its Guidance, and the hesitant or uncertain response of some States to date, in order for the issues to be addressed comprehensively, it would be very timely for there to be a convening of State representatives, including particularly those from key military powers, together with the ICRC and experts in human rights and IHL. Such a convening would perhaps be most useful if held under the auspices of a neutral body, such as the High Commissioner for Human Rights. The group could discuss and revise (if necessary) the ICRC’s Guidance after a careful review of best practices.

## **E. Who may conduct a targeted killing**

70. Reported targeted killings by the CIA have given rise to a debate over whether it is a violation of IHL for such killings to be committed by State agents who are not members of its armed forces. Some commentators have argued that CIA personnel who conduct targeted drone killings are committing war crimes because they, unlike the military, are “unlawful combatants”, and unable to participate in hostilities. This argument is not supported by IHL. As a threshold matter, the argument assumes that targeted killings by the CIA are committed in the context of armed conflict, which may not be the case. Outside of armed conflict, killings by the CIA would constitute extrajudicial executions assuming that

<sup>119</sup> ICRC Guidance at 31-36.

<sup>120</sup> Afghanistan’s Narco War supra note 39 at 16 (2009).

they do not comply with human rights law. If so, they must be investigated and prosecuted both by the US and the State in which the wrongful killing occurred. The following discussion assumes, without accepting, that CIA killings are being conducted in the context of armed conflict.

71. Under IHL, civilians, including intelligence agents, are not prohibited from participating in hostilities. Rather, the consequence of participation is two-fold. First, because they are “directly participating in hostilities” by conducting targeted killings, intelligence personnel may themselves be targeted and killed. Second, intelligence personnel do not have immunity from prosecution under domestic law for their conduct. They are thus unlike State armed forces which would generally be immune from prosecution for the same conduct (assuming they complied with IHL requirements). Thus, CIA personnel could be prosecuted for murder under the domestic law of any country in which they conduct targeted drone killings, and could also be prosecuted for violations of applicable US law.

72. It is important to note that if a targeted killing violates IHL (by, for example, targeting civilians who were not “directly participating in hostilities”), then regardless of who conducts it – intelligence personnel or State armed forces – the author, as well as those who authorized it, can be prosecuted for war crimes.

73. Additionally, unlike a State’s armed forces, its intelligence agents do not generally operate within a framework which places appropriate emphasis upon ensuring compliance with IHL, rendering violations more likely and causing a higher risk of prosecution both for war crimes and for violations of the laws of the State in which any killing occurs. To the extent a State uses intelligence agents for targeted killing to shield its operations from IHL and human rights law transparency and accountability requirements, it could also incur State responsibility for violating those requirements.<sup>121</sup>

## **F. The use of less-than-lethal measures**

74. As discussed above, the intentional use of lethal force in the context of law enforcement is only permitted in defence of life. Thus, outside the context of armed conflict, law enforcement officials are required to be trained in, to plan for, and to take, less-than-lethal measures – including restraint, capture, and the graduated use of force – and it is only if these measures are not possible that a law enforcement killing will be legal.<sup>122</sup> States should ensure public disclosure of the measures taken to “strictly control and limit the circumstances” in which law enforcement officers may resort to lethal force, including the level of force used at each stage.<sup>123</sup> The legal framework must take into account the possibility that the threat is so imminent that graduated use of force is not possible, and ensure appropriate safeguards are in place so that the assessment of imminence is reliably made.<sup>124</sup>

75. Although IHL does not expressly regulate the kind and degree of force that may be used against legitimate targets, it does envisage the use of less-than-lethal measures: in

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<sup>121</sup> In response to Freedom of Information Act litigation seeking the legal basis for alleged CIA targeted killings, the CIA has said that it cannot even confirm or deny the existence of any records because that information is classified and protected from disclosure. See Letter from CIA Information and Privacy Coordinator, 9 March 2010, available at <http://www.aclu.org/national-security/predator-drone-foia-cia-letter-refusing-confirm-or-deny-existence-records>.

<sup>122</sup> A/61/311, paras. 33-45; E/CN.4/2006/53, paras. 44-54.

<sup>123</sup> Human Rights Committee, *Suarez de Guerrero v. Colombia*, 1982, para. 13.

<sup>124</sup> A/61/311, paras. 49-51.

armed conflict, the “right of belligerents to adopt means of injuring the enemy is not unlimited”<sup>125</sup> and States must not inflict “harm greater than that unavoidable to achieve legitimate military objectives.”<sup>126</sup> The limiting principles are not controversial – States may only exercise force that is militarily necessary and consistent with the principle of humanity.<sup>127</sup> As the ICRC Guidance recognizes “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.”<sup>128</sup>

76. The position taken by the ICRC in its Guidance has been the subject of controversy. The Guidance states that, “the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.”<sup>129</sup> Some critics interpret this statement as requiring the use of a law enforcement paradigm in the context of armed conflict.<sup>130</sup> However, as the Guidance makes clear, it states only the uncontroversial IHL requirement that the kind and amount of force used in a military operation be limited to what is “actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.”<sup>131</sup> Especially in the context of targeted killings of civilians who directly participate in hostilities, and given that IHL does not create an unrestrained right to kill,<sup>132</sup> the better approach is for State forces to minimize the use of lethal force to the extent feasible in the circumstances.

77. Less-than-lethal measures are especially appropriate when a State has control over the area in which a military operation is taking place,<sup>133</sup> when “armed forces operate against selected individuals in situations comparable to peacetime policing,”<sup>134</sup> and in the context of non-international armed conflict, in which rules are less clear.<sup>135</sup> In these situations, States should use graduated force and, where possible, capture rather than kill. Thus, rather than using drone strikes, US forces should, wherever and whenever possible, conduct arrests, or use less-than-lethal force to restrain. As the ICRC’s Guidance intended to make clear, “the international lawfulness of a particular operation involving the use of force may not always depend exclusively on IHL but, depending on the circumstances, may potentially be influenced by other applicable legal frameworks, such as human rights law and the *jus ad bellum*.”<sup>136</sup>

78. In addition, precautionary measures that States should take in armed conflict to reduce casualties include:

<sup>125</sup> Convention (IV) respecting the Laws and Customs of War on Land, adopted on 18 Oct. 1907, entered into force, 26 Jan. 1910 (Hague IV Regulation); AP I, art. 35(1)

<sup>126</sup> Nuclear Weapons, para. 78.

<sup>127</sup> AP I, art. 1(2); Hague IV Regulations, preamble; Geneva Convention III, art. 142; Geneva Convention IV, art. 158.

<sup>128</sup> ICRC Guidance at 82.

<sup>129</sup> ICRC Guidance at 17 and 77.

<sup>130</sup> W. Hays Parks, Part IX of the ICRC’s “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect, 42 NYU J. Int’l L. and Politics 767 (2010).

<sup>131</sup> ICRC Guidance at 77.

<sup>132</sup> Hague IV Regulations, art. 22.

<sup>133</sup> Univ. Ctr. For Int’l Humanitarian Law, Report on the Expert Meeting on the Right to Life in Armed Conflict and Situations of Occupation, 1-2 Sept. 2005; at 36; Sassoli & Olson, *supra* note 109, at 614.

<sup>134</sup> ICRC Guidance at 80-81.

<sup>135</sup> Sassoli & Olson, *supra* note 109, at 611.

<sup>136</sup> 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, 897 (2010).

- Provide effective advance warning to the civilian population, through leaflets, broadcast warnings, etc. in the areas in which targeted killings may take place.<sup>137</sup> The warnings must be as specific as possible.<sup>138</sup>
- Any such warning does not, however, discharge the obligation to distinguish between lawful targets and civilians. “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.”<sup>139</sup>
- The use of civilians as “shields” is strictly prohibited.<sup>140</sup> But one side’s unlawful use of civilian shields does not affect the other side’s obligation to ensure that attacks do not kill civilians in excess of the military advantage of killing the targeted fighter.<sup>141</sup>

## G. The use of drones for targeted killing

79. The use of drones for targeted killings has generated significant controversy. Some have suggested that drones as such are prohibited weapons under IHL because they cause, or have the effect of causing, necessarily indiscriminate killings of civilians, such as those in the vicinity of a targeted person.<sup>142</sup> It is true that IHL places limits on the weapons States may use, and weapons that are, for example, inherently indiscriminate (such as biological weapons) are prohibited.<sup>143</sup> However, a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles. The critical legal question is the same for each weapon: whether its specific use complies with IHL.

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

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

82. Drones may provide the ability to conduct aerial surveillance and to gather “pattern of life” information that would allow their human operators to distinguish between peaceful civilians and those engaged in direct hostilities. Indeed, advanced surveillance capability

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<sup>137</sup> 1907 Hague Regulations, art. 26; AP I, art. 57.

<sup>138</sup> Thus, I, together with three other Special Rapporteurs, previously criticized Israel for overly broad warnings. A/HRC/2/7, ¶ 41.

<sup>139</sup> A/HRC/2/7, para. 41.

<sup>140</sup> AP I, art. 51(7); AP I, art. 50(3); HPCR Commentary section G.45; A/HRC/2/7; A/HRC/11/2/Add.4.

<sup>141</sup> AP I, art. 58; A/HRC/2/7, paras. 30, 68-70 (Israel and Lebanon); A/HRC/11/2/Add.4, paras. 9, 23-24 (Afghanistan).

<sup>142</sup> Murray Wardrop, Unmanned Drones Could be Banned, Says Senior Judge, *The Telegraph*, 6 July 2009.

<sup>143</sup> The general prohibition under IHL is against weapons that violate the principle of distinction or cause unnecessary suffering. See HPCR Commentary, section C.

enhances the ability of a State's forces to undertake precautions in attack.<sup>144</sup> But these optimal conditions may not exist in every case. More importantly, a drone operation team sitting thousands of miles away from the environment in which a potential target is located may well be at an even greater human intelligence gathering disadvantage than ground forces, who themselves are often unable to collect reliable intelligence.

83. It was clear during my mission to Afghanistan how hard it is even for forces on the ground to obtain accurate information. Testimony from witnesses and victims' family members, showed that international forces were often too uninformed of local practices, or too credulous in interpreting information, to be able to arrive at a reliable understanding of a situation.<sup>145</sup> International forces all too often based manned airstrikes and raids that resulted in killings on faulty intelligence. Multiple other examples show that the legality of a targeted killing operation is heavily dependent upon the reliability of the intelligence on which it is based.<sup>146</sup> States must, therefore, ensure that they have in place the procedural safeguards necessary to ensure that intelligence on which targeting decisions are made is accurate and verifiable.

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

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

86. Outside its own territory (or in territory over which it lacked control) and where the situation on the ground did not rise to the level of armed conflict in which IHL would apply, a State could theoretically seek to justify the use of drones by invoking the right to anticipatory self-defence against a non-state actor.<sup>147</sup> It could also theoretically claim that human rights law's requirement of first employing less-than-lethal means would not be possible if the State has no means of capturing or causing the other State to capture the target. As a practical matter, there are very few situations outside the context of active hostilities in which the test for anticipatory self-defence – necessity that is "instant, overwhelming, and leaving no choice of means, and no moment of deliberation"<sup>148</sup> – would be met. This hypothetical presents the same danger as the "ticking-time bomb" scenario does in the context of the use of torture and coercion during interrogations: a thought experiment that posits a rare emergency exception to an absolute prohibition can effectively institutionalize that exception. Applying such a scenario to targeted killings threatens to eviscerate the human rights law prohibition against the arbitrary deprivation of life. In addition, drone killing of anyone other than the target (family members or others in the vicinity, for example) would be an arbitrary deprivation of life under human rights law and could result in State responsibility and individual criminal liability.

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<sup>144</sup> Michael N. Schmitt, Precision Attack and International Humanitarian Law, 87 Int'l Rev. Red Cross 445 (Sept. 2005).

<sup>145</sup> A/HRC/11/2/Add.4, paras. 14-18, 70.

<sup>146</sup> See, e.g., Israel Ministry of Foreign Affairs Website, "Findings of the inquiry into the death of Salah Shehadeh"  
<http://www.mfa.gov.il/MFA/Government/Communiques/2002/Findings%20of%20the%20inquiry%20into%20the%20death%20of%20Salah%20Sh>.

<sup>147</sup> *Infra* III.B.

<sup>148</sup> See R.Y. Jennings, *The Caroline and McLeod Cases*, 32 Am. J. Int'l L. 82, 92 (1938).

## H. The requirements of transparency and accountability

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 killings to provide transparency about their policies violates the international legal framework that limits the unlawful use of lethal force against individuals.<sup>149</sup>

88. Transparency is required by both IHL<sup>150</sup> and human rights law.<sup>151</sup> A lack of disclosure gives States a virtual and impermissible license to kill.

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

- Ensure that forces and agents have access to reliable information to support the targeting decision.<sup>152</sup> These include an appropriate command and control structure,<sup>153</sup> as well as safeguards against faulty or unverifiable evidence.<sup>154</sup>
- Ensure adequate intelligence on “the effects of the weapons that are to be used ... the number of civilians that are likely to be present in the target area at the particular time; and whether they have any possibility to take cover before the attack takes place.”<sup>155</sup>
- The proportionality of an attack must be assessed for each individual strike.<sup>156</sup>
- Ensure that when an error is apparent, those conducting a targeted killing are able to abort or suspend the attack.<sup>157</sup>

90. In order to ensure that accountability is meaningful, States must specifically disclose the measures in place to investigate alleged unlawful targeted killings and either to identify

<sup>149</sup> Human Rights Committee, General Comment No. 6 (1982), Doc. CCPR/C/21/Rev.1; *Neira Alegria Case*, Judgment of 19 January 1995, Inter-Am.Ct.H.R. (Ser. C) No. 20 (1995); *McCann and others v. UK*, ECHR, Judgment of 27 September 1995, Series A, No. 324, 140; *Kaya v. Turkey*, Judgment of 19 February 1998, 1998-I R.J.D. 297, 140; *Husband of Maria Fanny Suarez de Guerrero v. Colombia*, Communication No. R.11/45 (5 February 1979), UN Doc. Supp. No. 40 (A/37/40) at 137 (1982); E/CN.4/2006/53, para. 35. States party to the ICCPR can be held responsible for violations of the rights under the Covenant when the violations are perpetrated by authorized agents of the State, including on foreign territory. *Lopez v. Uruguay*, Communication No. 52/1979, CCPR/C/OP/1 at 88 (1984), paras. 12.1-12.3; *Wall Opinoin*, paras. 108-111 (ICCPR “is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”).

<sup>150</sup> Geneva Conventions, art. 1; AP I, arts. 11, 85 (grave breaches), 87(3); Geneva Conventions I-IV, articles 50/51/130/147;

<sup>151</sup> Economic and Social Council Resolution 1989/65 of 24 May 1989.

<sup>152</sup> HPCR Commentary section G.32(a).

<sup>153</sup> *Id.*

<sup>154</sup> HPCR Commentary section G.32(a)-(c) and 39.

<sup>155</sup> HPCR Commentary section g.32(c).

<sup>156</sup> *Sandoz*, AP Commentary, AP 1, art. 57, section 2207.

<sup>157</sup> Helpful in this regard: UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004), para. 5.32.9.

and prosecute perpetrators, or to extradite them to another State that has made out a prima facie case for the unlawfulness of a targeted killing.<sup>158</sup>

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

92. Transparency and accountability in the context of armed conflict or other situations that raise security concerns may not be easy. States may have tactical or security reasons not to disclose criteria for selecting specific targets (e.g. public release of intelligence source information could cause harm to the source). But without disclosure of the legal rationale as well as the bases for the selection of specific targets (consistent with genuine security needs), States are operating in an accountability vacuum. It is not possible for the international community to verify the legality of a killing, to confirm the authenticity or otherwise of intelligence relied upon, or to ensure that unlawful targeted killings do not result in impunity. The fact that there is no one-size-fits-all formula for such disclosure does not absolve States of the need to adopt explicit policies.

## IV. Conclusions and recommendations

### General

93. **States should publicly identify the rules of international law they consider to provide a basis for any targeted killings they undertake. They should specify the bases for decisions to kill rather than capture. They should specify the procedural safeguards in place to ensure in advance of targeted killings that they comply with international law, and the measures taken after any such killing to ensure that its legal and factual analysis was accurate and, if not, the remedial measures they would take. If a State commits a targeted killing in the territory of another State, the second State should publicly indicate whether it gave consent, and on what basis.**

- **States should make public the number of civilians collaterally killed in a targeted killing operation, and the measures in place to prevent such casualties.**
- **The High Commissioner for Human Rights should convene a meeting of States, including representatives of key military powers, the ICRC and human rights and IHL experts to arrive at a broadly accepted definition of “direct participation in hostilities.”**

**Specific requirements under human rights law, applicable in and outside armed conflict, include:**

- **States should disclose the measures taken to control and limit the circumstances in which law enforcement officers may resort to lethal force. These include:**
  - **Permissible objectives (which may not include retaliation or punishment but must be strictly to prevent the imminent loss of life);**

<sup>158</sup> Geneva Conventions (I-IV), arts. 49/50/129/146; Geneva Convention (IV), arts. 3 and 4. AP I, art 75.



- the non-lethal tactics for capture or incapacitation that must be attempted if feasible;
  - the efforts that must be made to minimize lethal force, including specifying the level of force that must be used at each stage;
  - the legal framework should take into account the possibility that a threat may be so imminent that a warning and the graduated use of force are too risky or futile (e.g., the suspect is about to use a weapon or blow himself up). At the same time, it must put in place safeguards to ensure that the evidence of imminence is reliable, based on a high degree of certainty, and does not circumvent the requirements of necessity and proportionality.
- Disclosure of the measures in place to provide prompt, thorough, effective, independent and public investigations of alleged violations of law.
    - The appropriate measures have been endorsed in the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions. These should guide States whenever they carry out law enforcement operations, including during armed conflicts and occupations. The State's duty to investigate and prosecute human rights abuses also applies in the context of armed conflict and occupation.

Specific requirements under IHL, applicable in armed conflict, include:

- Disclosure of 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 a prima facie case for the unlawfulness of a killing.
- Ensure that State armed forces and agents use all reasonably available sources (including technological ones such as intelligence and surveillance) to obtain reliable information to verify that the target is lawful. These measures, which should be publicly disclosed to the extent consistent with genuine security needs, include:
  - State armed forces should have a command and control system that collects, analyzes and disseminates information necessary for armed forces or operators to make legal and accurate targeting decisions.
  - Targeted killings should never be based solely on "suspicious" conduct or unverified – or unverifiable – information. Intelligence gathering and sharing arrangements must include procedures for reliably vetting targets, and adequately verifying information.
  - State forces should ensure adequate intelligence on the effects of weapons to be used, the presence of civilians in the targeted area, and whether civilians have the ability to protect themselves from attack. It bears emphasis that State forces violate the IHL requirements of proportionality and precaution if they do not do everything feasible to determine who else is, or will be, in the vicinity of a target – and thus how many other lives will be lost or people injured – before conducting a targeted killing.
  - In the context of drone attacks and airstrikes, commanders on the ground and remote pilots may have access to different information (e.g. based on human intelligence, or visuals from satellites); it is incumbent

on pilots, whether remote or not, to ensure that a commander's assessment of the legality of a proposed strike is borne out by visual confirmation that the target is in fact lawful, and that the requirements of necessity, proportionality and discrimination are met. If the facts on the ground change in substantive respects, those responsible must do everything feasible to abort or suspend the attack.

- Ensure that compliance with the IHL proportionality principle is assessed for each attack individually, and not for an overall military operation.
  - Ensure that even after a targeting operation is under way, if it appears that the target is not lawful, or that the collateral loss of life or property damage is in excess of the original determination, targeting forces have the ability and discretion to cancel or postpone an attack.
  - Ensure procedures are in place to verify that no targeted killing is taken in revenge, or primarily to cause terror or to intimidate, or to gain political advantage.
  - Especially in heavily populated urban areas, if it appears that a targeted killing will risk harm to civilians, State forces must provide effective advance warning, as specifically as possible, to the population.
    - Warning does not, however, discharge the obligation to distinguish between lawful targets and civilians.
    - Although the use of civilians as “shields” is prohibited, one side's unlawful use of civilian shields does not affect the other side's obligation to ensure that attacks do not kill civilians in excess of the military advantage of killing the targeted fighter.
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Item 69 (b) of the provisional agenda\*

**Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms**

**Extrajudicial, summary or arbitrary executions**

**Note by the Secretary-General**

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, submitted in accordance with Assembly resolution [67/168](#).

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\* [A/68/150](#).



## **Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions**

### *Summary*

In the present report, the Special Rapporteur focuses on the use of lethal force through armed drones from the perspective of protection of the right to life.

Although drones are not illegal weapons, they can make it easier for States to deploy deadly and targeted force on the territories of other States. As such, they risk undermining the protection of life in the immediate and longer terms. If the right to life is to be secured, it is imperative that the limitations posed by international law on the use of force are not weakened by broad justifications of drone strikes.

The Special Rapporteur examines the ways in which the constitutive regimes of international law, including international human rights law, international humanitarian law and the law on the inter-State use of force, regulate the use of armed drones. He reiterates that these legal regimes constitute an interconnected and holistic system and emphasizes the distinctive role of each in protecting the right to life. He cautions against wide and permissive interpretations of their rules and standards and underlines the centrality of transparency and accountability obligations.

## **B. Visits**

10. The Special Rapporteur visited Mexico from 22 April to 2 May 2013, at the invitation of the Government. His report on that country visit will be submitted to the Human Rights Council in 2014.

11. Since his previous report to the General Assembly, the Special Rapporteur has sent requests for visits to the Governments of Egypt, the Gambia, Iraq, Madagascar, Mali, Papua New Guinea and Yemen. He welcomes the acceptance of his visit requests by the Governments of Mali and Papua New Guinea. Regrettably, the Government of the Gambia has not agreed to a visit. The Special Rapporteur encourages States to accept his pending requests for visits.

## **III. Armed drones and the right to life<sup>1</sup>**

### **A. Introduction: an opportunity to take stock**

12. New methods of employing lethal force are continuously developed. On the horizon, for example, developments in nanotechnology and biotechnology<sup>2</sup> and in autonomy and robotic systems (see [A/HRC/23/47](#)) present eventualities that the international community must address in coordinated ways. Drones, assumed for the purposes of the present report to be armed drones, have moved from the horizon into the realm of the known. The appeal of drones is clear. Among other things, they provide the strategic advantage of greatly reducing the time between the identification of a potential target that could be a great distance away and the deployment of deadly force against that target. Drones, it can safely be said, are here to stay.

13. There is broad agreement that drones themselves are not illegal weapons. This is not the case, for example, with lethal autonomous robots. There is, however, a notable lack of consensus on how to apply the rules of international law that regulate the use of force to drones, the fact that drones are now an established technology notwithstanding. It is the aim of the Special Rapporteur in the present report to contribute to clarifying the application of those rules and to reiterate their authority, from the perspective of protection of the right to life.

14. Drones can be expected to become more sophisticated and available in more compact form, and also to become less expensive and therefore more accessible. They are likely to form part of the arsenals of an increasing number of States that may be able to deploy such force across international borders in relatively non-intrusive and sometimes non-attributable ways, on the battlefield and to pursue targets far removed from what would traditionally be seen as zones of armed conflict. Some States may also wish to use armed drones in domestic law enforcement contexts, such as for border patrols, operations against organized crime and crowd control in

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<sup>1</sup> Dapo Akande, Co-Director of the Oxford Institute for Ethics, Law and Armed Conflict and the Oxford Martin Programme on Human Rights for Future Generations, provided assistance by hosting an expert meeting and preparing a discussion paper to inform the present report and is thanked along with all participants in the meeting. Research assistance provided by Thompson Chengeta, Lawrence Hill-Cawthorne and Tess Borden is also gratefully acknowledged. Sarah Knuckey provided valuable advice at various points.

<sup>2</sup> See Frank Simonis and Steven Schilthuizen, "Nanotechnology: innovation opportunities for tomorrow's defence" (TNO Science and Industry, 2006).

demonstrations. Armed drones may fall into the hands of non-State actors and may also be hacked by enemies or other entities. In sum, the number of States with the capacity to use drones is likely to increase significantly in the near future, underscoring the need for greater consensus on the terms of their use.

15. The ready availability of drones may lead to States, where they perceive their interests to be threatened, increasingly engaging in low-intensity but drawn-out applications of force that know few geographical or temporal boundaries. This would run counter to the notion that war — and the transnational use of force in general — must be of limited duration and scope, and that there should be a time of healing and recovery following conflict.

16. Peace should be the norm, yet such scenarios risk making its derogation the rule by privileging force over long-term peaceful alternatives. The expansive use of armed drones by the first States to acquire them, if not challenged, can do structural damage to the cornerstones of international security and set precedents that undermine the protection of life across the globe in the longer term. There is also uncertainty about the extent to which States are newly acquiring the technology and, because their engagement in the current debates is limited, about what their approach will be in the future.

17. On the one hand, it is often said that drones contribute towards more accurate targeting and can reduce civilian casualties. On the other, drones make it not only physically easier to dispatch long-distance and targeted armed force, but the proliferation of drones may lower social barriers in society against the deployment of lethal force and result in attempts to weaken the relevant legal standards.

18. Given that drones greatly reduce or eliminate the number of casualties on the side using them, the domestic constraints — political and otherwise — may be less restrictive than with the deployment of other types of armed force. This effect is enhanced by the relative ease with which the details about drone targeting can be withheld from the public eye and the potentially restraining influence of public concern. Such dynamics call for a heightened level of vigilance by the international community concerning the use of drones.

19. A decade or so ago, the use of armed drones was relatively novel and untested; their human impact and further technological development were hard to predict, and a full discussion of the proper application of the international legal framework had yet to emerge. A vast body of academic and advocacy literature has now developed, and civil society watchdogs are tracking the issue and pursuing transparency. Armed drones have been debated in various forums of the United Nations, intergovernmental bodies and national Governments and courts.<sup>3</sup> Recent initiatives that help to shape the international response and consensus, for example by the European Parliament and an independent advisory committee of the Government of the Netherlands, deserve attention and support.<sup>4</sup>

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<sup>3</sup> United Kingdom, High Court of Justice, *The Queen on The Application of Noor Khan v. The Secretary of State for Foreign and Commonwealth Affairs*, case No. CO/2599/2012, judgement of 21 December 2012.

<sup>4</sup> Nils Melzer, *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare*, European Parliament, Directorate General for External Policies, Policy Department Study (Brussels, 2013) and Advisory Committee on Issues of Public International Law, “Main conclusions of advice on armed drones” (The Hague, 2013).

20. Looking backwards and forwards, and keeping in mind the advent of new weapons systems waiting in the wings, the current moment provides an opportunity to take stock. It is a chance to reflect on the outlines of the debate as it currently stands, to restate the law in some places, to identify the main disagreements and to address some of the contentious issues. This opportunity may be further facilitated by the fact that available information suggests that the present number of drone strikes may at the moment have declined.<sup>5</sup>

21. The Special Rapporteur emphasizes that the various components of international law developed over the ages create a finely balanced system to address immediate security concerns, in addition to the need to protect the right to life in the short and long terms. International security and the protection of the right to life depend on the principle that the use of force is a matter of last resort.

22. The most immediate protection for the right to life is provided by the international human rights law framework. This is the default legal regime from which deviations are permissible only when, and for as long as, those who justify the more permissive use of force under international humanitarian law can show that the requisite conditions have been fulfilled.

23. An outer layer of protection for the right to life is the prohibition on the resort to force by one State against another, again subject to a narrowly construed set of exceptions. The protection of State sovereignty and of territorial integrity, which on occasion presents a barrier to the protection of human rights, here can constitute an important component of the protection of people against deadly force, especially with the advent of armed drones.

24. A central point made by the Special Rapporteur is that a holistic approach is needed in order to protect the right to life. For a particular drone strike to be lawful under international law it must satisfy the legal requirements under all applicable international legal regimes. Although a particular drone strike may satisfy the requirements for the use of inter-State force, it may nevertheless be inconsistent with applicable rules of international humanitarian law and international human rights law, or vice versa, and thus unlawful under international law. The right to life can be adequately secured only if all the distinct requirements posed by the various constitutive parts of international law are met.

25. The present report is in parallel to that submitted to the General Assembly by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, which pertains to the topic of drones from the perspective of his mandate (A/68/389). While the two reports are separate and independent, they cover, to some extent, the same ground.

## **B. Mandate of the Special Rapporteur**

26. The mandate of the Special Rapporteur on extrajudicial, summary or arbitrary executions focuses on violations of the right to life contrary to international law. The mandate extends to the protection of the right to life and violations of this right in all circumstances, during peace and armed conflict.

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<sup>5</sup> Scott Shane, "Debate aside, number of drone strikes drops sharply", *New York Times*, 21 May 2013. This could be due in part to pressures on Governments by the public.

27. The Human Rights Council, in its resolution 17/5, in which it set out the scope of the mandate, made reference to the Geneva Conventions of 12 August 1949, noting that they, alongside human rights law, provided an important framework of accountability in relation to extrajudicial, summary or arbitrary executions. The Council stated that the mandate was aimed against such executions in all their forms (paras. 1 and 3) and that it had a key role to play in respect of, among other things, war crimes (para. 2), requesting the mandate holder to continue to examine situations of extrajudicial, summary or arbitrary executions in all circumstances and for whatever reason (para. 7 (a)). An important part of the mandate has been to cover issues of armed conflict and, for more than a decade now, drones.<sup>6</sup>

28. The mandate is guided, among others, by the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, paragraph 1 of which provides that exceptional circumstances, including a state of war or threat of war, may not be invoked as a justification of extrajudicial, summary or arbitrary executions and that the prohibition is to prevail over decrees issued by governmental authority.

### C. Protecting people: the right to life

29. The right to life is widely regarded as the supreme right.<sup>7</sup> While its exact scope can be contested, there is no serious challenge to the foundational status of this right.

30. The right against the arbitrary deprivation of life has been described as a rule of customary international law, in addition to a general principle of international law and a rule of *jus cogens*.<sup>8</sup> It is included in the Universal Declaration of Human Rights (art. 3), which is widely regarded as setting out rules of general international law. The right to life is recognized in the constitutional and other legal provisions of States and through a wide range of national and international actions and practices, and unlawful killing is universally criminalized. Some violations of the right to life are considered to be war crimes or crimes against humanity.<sup>9</sup>

31. A further layer of protection is added to the right to life by various human rights treaties and the monitoring mechanisms that they have created to tackle violations by States parties. The International Covenant on Civil and Political Rights calls it an inherent right (art. 6 (1)), which suggests that it exists independently from its recognition in the Covenant,<sup>10</sup> strengthening the points made in the previous paragraph. The Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (art. 2) and the American

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<sup>6</sup> See E/CN.4/2003/3/Add.3, para. 27, and the seminal 2010 exposition by Philip Alston on targeted killings (A/HRC/14/24/Add.6). See also the report of the current Special Rapporteur on the follow-up to recommendations on the United States of America made by his predecessor (A/HRC/20/22/Add.3), paras. 76-84.

<sup>7</sup> Human Rights Committee, general comment No. 6 (1982), on the right to life.

<sup>8</sup> Human Rights Committee, general comment No. 24 (1994), on issues relating to reservations made upon ratification or accession to the International Covenant on Civil and Political Rights, para. 10.

<sup>9</sup> See, generally, International Tribunal for the Former Yugoslavia, *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, case No. IT-95-13/1-A.

<sup>10</sup> Sarah Joseph, *The International Covenant on Civil and Political Rights* (Oxford, United Kingdom, Oxford University Press, 2004), p. 154.



Convention on Human Rights (art. 4), in addition to the African Charter on Human and Peoples' Rights (art. 4), similarly recognize the importance of the right to life.

## 1. International human rights law

### (a) General

32. As a general rule, human rights treaties state that any deprivation of life must be non-arbitrary.<sup>11</sup> The use of force is, in any event, a matter of last resort under international human rights law. Principle 9 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that intentional lethal use of firearms may be made only when strictly unavoidable in order to protect life.<sup>12</sup>

33. Any force must be necessary and proportionate, and intentional force can be used only where strictly necessary to protect against an imminent threat to life. A previous mandate holder noted that the police might shoot to kill only when it was clear that an individual was about to kill someone (making lethal force proportionate) and there was no other available means of detaining the suspect (making lethal force necessary) (A/HRC/14/24, para. 35). Other avenues should be explored first, and only when they are shown to be inadequate should there be resort to force.<sup>13</sup>

34. In *McCann and others v. United Kingdom of Great Britain and Northern Ireland*, the European Court of Human Rights held that the killing of members of the Provisional Irish Republican Army by State agents was a violation of their right to life because they could have been arrested upon their arrival in Gibraltar, where the operation was conducted.<sup>14</sup>

35. Under the above international human rights law standards, the intentional, premeditated killing of an individual would generally be unlawful. Where intentional killing is the only way to protect against an imminent threat to life, it may be used. This could be the case, for example, during some hostage situations or in response to a truly imminent threat.

36. While the standards of human rights law remain the same even in situations approaching armed conflict, they have to be applied in ways that are realistic in the context.<sup>15</sup>

37. The view that mere past involvement in planning attacks is sufficient to render an individual targetable even where there is no evidence of a specific and immediate attack distorts the requirements established in international human rights law.<sup>16</sup>

38. States cannot consent to the violation of their obligations under international humanitarian law or international human rights law. A State that consents to the

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<sup>11</sup> The European Convention gives an exhaustive list of permissible grounds on which lethal force may be based in article 2.

<sup>12</sup> See also principle 10.

<sup>13</sup> Code of Conduct for Law Enforcement Officials, art. 3.

<sup>14</sup> European Court of Human Rights, application No. 18984/91, judgement of 27 September 1995, paras. 203-214; Human Rights Committee, *Maria Fanny Suárez de Guerrero v. Colombia*, communication No. R.11/45, views adopted on 31 March 1982, para. 13.2.

<sup>15</sup> Melzer, *Human Rights Implications of the Usage of Drones*, p. 33.

<sup>16</sup> United States, Department of Justice, White Paper, "Lawfulness of a lethal operation directed against a U.S. citizen who is a senior operational leader of Al-Qa'ida or an associated Force" (5 February 2003). Available from [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf).

activities of another State on its territory remains bound by its own human rights obligations, including to ensure respect for human rights and thus to prevent violations of the right to life, to the extent that it is able to do so.<sup>17</sup>

39. In addition to the right to life issues raised above, the use of drones can also raise questions about possible discrimination in their use, for example if distinct standards are applied to citizens and non-citizens.

**(b) 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.<sup>18</sup> 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.<sup>19</sup>

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.<sup>20</sup> 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.<sup>21</sup>

**(c) Applicability of human rights norms to extraterritorial actions by States**

42. The use of drones by one State in another State's territory raises the question whether States can be held accountable for their actions outside their own territories.

43. Reference was made earlier to the status of the right to life as a general principle of international law and a customary norm. This means that, irrespective of the applicability of treaty provisions recognizing the right to life, States are bound to ensure the realization of the right to life when they use force, whether inside or outside their borders.

44. In addition, States are bound by those treaties to which they are a party and are subject to monitoring by their respective supervisory mechanisms. The applicability of such treaties is normally limited to individuals under the jurisdiction

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<sup>17</sup> Draft Articles on responsibility of States for internationally wrongful acts, art. 23, *Yearbook of the International Law Commission 2001*, vol. II, Part Two (United Nations publication, Sales No. E.04.V.17 (Part 2)), as corrected.

<sup>18</sup> See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, paras. 24-25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, para. 106.

<sup>19</sup> *Ibid.*

<sup>20</sup> 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.

<sup>21</sup> The European Convention on Human Rights permits derogations from the right to life, but only within the limits of lawful acts of war.

of a State party.<sup>22</sup> Jurisdiction has a territorial and a personal dimension. All persons finding themselves within the territory of a State are presumed to be within its territorial jurisdiction.<sup>23</sup>

45. That human rights treaty obligations can apply in principle to the conduct of a State outside its territory has been confirmed by, among others, the International Court of Justice,<sup>24</sup> the Human Rights Committee,<sup>25</sup> the Inter-American Commission on Human Rights<sup>26</sup> and the European Court of Human Rights.<sup>27</sup>

46. States exercise territorial jurisdiction beyond their own borders where they exercise effective control over other territory, while personal jurisdiction is established where the State has physical power, authority or control over individuals.<sup>28</sup>

47. Drones enable a State to perform targeted killing without exercising effective control over territory and without having the individual in custody, however. Accordingly, it must be asked whether such targeting can result in violations of the right to life under the applicable treaties.

48. There is limited case law on this matter. In *Alejandro*, the Inter-American Commission on Human Rights concluded that the shooting down of two private aeroplanes registered in the United States of America by Cuban military aircraft in international airspace violated the right to life of the passengers.<sup>29</sup> At the same time, in *Banković*, the European Court of Human Rights held that persons killed during aerial bombings by the North Atlantic Treaty Organization of a radio station in Serbia did not fall within the jurisdiction of the participating States for the purposes of establishing whether they had violated the right to life.<sup>30</sup> The broad sweep of this decision has, however, increasingly been narrowed in subsequent cases in the same system,<sup>31</sup> and it is not clear that the position can be sustained.

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<sup>22</sup> In the International Covenant on Civil and Political Rights, the obligation of States is further limited to “all individuals within its territory” (art. 2 (1)). However, since *López Burgos v. Uruguay* (communication No. 52/1979, views adopted on 29 July 1981, the Human Rights Committee has held that States parties can also be held accountable for violations outside their territory.

<sup>23</sup> This presumption may be rebutted where the State is unable to exercise its authority over its territory.

<sup>24</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para. 109.

<sup>25</sup> General comment No. 31 (2004), on the nature of the general legal obligation imposed on States parties, para. 10.

<sup>26</sup> *Coard and others v. United States*, case 10.951, Report No. 109/99, 29 September 1999, para. 37.

<sup>27</sup> *Al-Skeini and others v. the United Kingdom*, application No. 55721/07, Grand Chamber judgement of 7 July 2011, paras 106-186; *Loizidou v. Turkey*, application No. 15318/89, judgement of 18 December 1996; *Ilaşcu v. Moldova and Russia*, application No. 48787/99, judgement of 8 July 2004, para. 392; *Al-Jedda v. the United Kingdom*, application No. 27021/08, Grand Chamber judgement of 7 July 2011.

<sup>28</sup> European Court of Human Rights, *Al-Skeini and others v. the United Kingdom*, *Loizidou v. Turkey* and *Ilaşcu v. Moldova and Russia*; International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168; Inter-American Commission on Human Rights, *Coard and others v. United States*; Human Rights Commission, *Burgos v. Uruguay*.

<sup>29</sup> *Armando Alejandro Jr., Carlos Costa, Mario de la Pena y Pablo Morales v. Republic of Cuba*, case 11.589, Report No. 86/99, 29 September 1999, paras. 23-25.

<sup>30</sup> *Banković and others v. Belgium and 16 Other Contracting States*, application No. 52207/99, Grand Chamber decision (admissibility) of 12 December 2001, para. 82.

<sup>31</sup> *Al-Skeini and others v. the United Kingdom*, paras. 106-186.

49. It has been argued that the deliberate killing of selected individuals through extraterritorial drone strikes is likely to bring the affected persons within the jurisdiction of the operating State.<sup>32</sup> Pursuing this line of reasoning, where a State targets individuals abroad with lethal force, it can be argued that it intends to exercise ultimate control over the individuals concerned, resulting in those actions being governed by the State's human rights treaty law obligations.<sup>33</sup>

50. That a State has human rights obligations with regard to conduct outside its territory does not automatically mean that those obligations are the same as those that arise within its territory. In principle, while control of territory means that a State has obligations, guaranteed by international law, not only to respect but also to ensure and to fulfil the human rights of those on the territory, the exercise of authority with regard to an individual by State agents in the absence of territorial control at a minimum triggers the State's obligation to respect the rights of those individuals.<sup>34</sup>

51. It has been held that human rights treaties cannot be interpreted so as to allow a State party to perpetrate violations of the treaty on the territory of another State, which it could not perpetrate on its own territory.<sup>35</sup> The same must apply to the right to life as a part of general international law and custom. The conclusion appears to be that any positive action by a State, on its own territory or that of another State, must be carried out in compliance with its human rights obligations under all applicable rules of international law.

## 2. International humanitarian law

### (a) General

52. Drone strikes currently do not occur in the context of international armed conflict between States. Drones, where used in the context of armed conflict, are rather used where the respective parties are States and non-State armed groups, which potentially makes their use situations of non-international (or non-inter-State) armed conflict. Consequently, the Special Rapporteur focuses herein on the latter.

53. If a drone strike occurs in a situation where a non-international armed conflict exists, the protection afforded to the right to life is commonly interpreted in accordance with the rules of international humanitarian law. It is important to emphasize, however, that not all applications of violence by States against non-State actors meet the threshold requirements to be regarded as an armed conflict. Accordingly, if there is no armed conflict, there can be no non-international armed conflict, and international humanitarian law does not apply to such use of force.

54. It is worth noting the view held by some that, where a State uses force on the territory of another State against a non-State actor without the consent of the latter

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<sup>32</sup> See Nils Meltzer, *Targeted Killing in International Law* (Oxford, United Kingdom, Oxford University Press, 2008).

<sup>33</sup> Cordula Droegge, "Elective affinities? Human rights and humanitarian law", *International Review of the Red Cross*, vol. 90, No. 871 (September 2008), p. 516; Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford, United Kingdom, Oxford University Press, 2010), pp. 227-231; Marko Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford, United Kingdom, Oxford University Press, 2011), pp. 209-221.

<sup>34</sup> Milanovic, *Extraterritorial Application of Human Rights Treaties*, pp. 209-221.

<sup>35</sup> European Court of Human Rights, *Issa and others v. Turkey*, application No. 31821/96, judgement of 16 November 2004, para. 71.

State, the law relating to international armed conflicts will also be applicable because the use of force is also against the territorial State.<sup>36</sup>

**(b) 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 organized armed groups or between such groups within a State.<sup>37</sup> 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.<sup>38</sup>

56. An armed group will be considered to constitute a party to a non-international armed conflict only if it is sufficiently organized. 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.<sup>39</sup>

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.<sup>40</sup> The armed violence should not be sporadic or isolated but protracted.<sup>41</sup> The requirement of protracted violence, however, refers more to the intensity of the armed violence than its duration.<sup>42</sup> Just as the condition of organization, the intensity of the armed violence is an issue that is determined on a case-by-case basis.<sup>43</sup>

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.

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<sup>36</sup> Dapo Akande, "Classification of conflicts: relevant legal concepts", in Elizabeth Wilmshurst, ed., *International Law and the Classification of Conflicts* (Oxford, United Kingdom, Oxford University Press, 2012), p. 70.

<sup>37</sup> International Tribunal for the Former Yugoslavia, *Prosecutor v. Duško Tadić*, decision on the defence motion for interlocutory appeal on jurisdiction, case No. ICTY-94-1, 2 October 1995, para. 70.

<sup>38</sup> *Ibid.*, case No. IT-94-1-T, trial judgment of 7 May 1997, para. 562.

<sup>39</sup> International Tribunal for the Former Yugoslavia, *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.

<sup>40</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1 (2); International Criminal Tribunal for Rwanda, *Prosecutor v. Musema*, case No. ICTR-96-13-A, judgement of 27 January 2000, para. 248.

<sup>41</sup> *Prosecutor v. Musema*, *ibid.*

<sup>42</sup> International Tribunal for the Former Yugoslavia, *Prosecutor v. Haradinaj and others*, case No. IT-04-84-T, Trial Chamber judgement of 3 April 2008, para. 49; *Prosecutor v. Limaj*, para. 90.

<sup>43</sup> *Prosecutor v. Musema*, para. 249.

**(c) Various organized armed groups**

59. Expanded use of armed drones has been justified by arguments that force may be used not only against an organized armed group in a situation that meets the above requirements but also against its co-belligerents (or affiliates or associates).<sup>44</sup>

60. Co-belligerency is a concept that applies to international armed conflicts and entails a sovereign State becoming a party to a conflict, either through formal or informal processes.<sup>45</sup> A treaty of alliance may be concluded as a formal process, while an informal process could involve providing assistance to or establishing a common cause with belligerent forces.<sup>46</sup>

61. The idea that the concept of co-belligerency can be transposed into non-international armed conflicts has been met with resistance because it ignores the significant differences between the various forms of armed conflict and opens the door for an expansion of targeting without clear limits.<sup>47</sup>

62. The established legal position is that, where the individuals targeted are not part of the same command and control structures as the organized armed group or are not part of a single military hierarchical structure, they ought not to be regarded as part of the same group, even if there are close ties between the groups.<sup>48</sup>

63. Violence by various organized armed groups against the same State can amount to separate non-international armed conflicts, but only where the intensity of violence between each group and the State individually crosses the intensity threshold. Isolated drone strikes alone are unlikely to meet this threshold of violence intensity.<sup>49</sup>

**(d) Question of a “transnational” non-international armed conflict**

64. When a State uses force against non-State actors in a number of foreign States, some commentators have proposed that the entirety of the violence between the State and the non-State actors should be understood to constitute a single, transnational non-international armed conflict, occurring across multiple territories where fighters can potentially be targeted. It has been argued that this could be the case if — and only if — those targeted have a nexus to the same organized armed group.<sup>50</sup> Yet one of the risks posed by a facile acceptance of the possibility of a transnational armed conflict is subjecting unsuspecting communities to the risk of disproportionate collateral damage.

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<sup>44</sup> See [www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address](http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address). See also Curtis A. Bradley and Jack L. Goldsmith, “Congressional authorization and the war on terrorism”, *Harvard Law Review*, vol. 118, No. 7 (2005), pp. 2112-2113.

<sup>45</sup> L. Oppenheim, *International Law: A Treatise*, H. Lauterprecht, ed., 5th ed. (London, Longmans, 1935), pp. 203 and 206.

<sup>46</sup> *Ibid.*

<sup>47</sup> “The [United States] administration’s failure to define what specific organizational features or conduct would lead a group to be classified as an associated force raises concerns that this results in an aggressive and indefinitely expansive scope of targeting authority.” See [www.hrw.org/news/2013/04/11/joint-letter-president-obama-us-drone-strikes-and-targeted-killings](http://www.hrw.org/news/2013/04/11/joint-letter-president-obama-us-drone-strikes-and-targeted-killings).

<sup>48</sup> *Prosecutor v. Haradinaj*, p. 144.

<sup>49</sup> Noam Lubell and Nathan Derejko, “A global battlefield? Drones and the geographical scope of armed conflict”, *Journal of International Criminal Justice*, vol. 11, No. 1 (2013), p. 78.

<sup>50</sup> *Ibid.*, p. 84.

65. It is to be questioned whether the various terrorist groups that call themselves Al-Qaida or associate themselves with Al-Qaida today possess the kind of integrated command structure that would justify considering them a single party involved in a global non-international armed conflict.<sup>51</sup>

66. The view of the International Committee of the Red Cross (ICRC) is that, based on the facts, this type of non-international armed conflict is not and has not been taking place. Instead, a case-by-case approach to legally analysing and classifying the various situations of violence that have occurred in efforts to combat terrorism should be applied. Some situations may be classified as an international armed conflict, others a non-international armed conflict, while various acts of terrorism taking place in the world may be outside any armed conflict.<sup>52</sup>

**(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.<sup>53</sup> 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.<sup>54</sup>

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 organized armed groups. The latter are then defined as "individuals whose continuous function it is to take a direct part in hostilities ('continuous combat function')".<sup>55</sup> Thus, a drone strike carried out against an individual with a continuous combat function in an organized 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:<sup>56</sup> the actions of the civilian

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<sup>51</sup> See Claus Kreß, "Some reflections on the international legal framework governing transnational armed conflicts", *Journal of Conflict and Security Law*, vol. 15, No. 2 (2010), p. 261.

<sup>52</sup> ICRC, "International humanitarian law and the challenges of contemporary armed conflicts", document 31IC/11/5.1.2 (2011), pp. 10-11.

<sup>53</sup> Additional Protocol II, art. 13 (2) and (3) and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Production of Victims of International Armed Conflict (Protocol I), art. 51.

<sup>54</sup> Additional Protocol II, art. 13 (2) and (3); Additional Protocol I, art. 50 (1).

<sup>55</sup> Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva, ICRC, 2009), p. 27.

<sup>56</sup> *Ibid.*

must reach a certain threshold of harm; there must be direct causation; and there must be a belligerent nexus to the conflict.<sup>57</sup>

70. The ICRC test may rightly be criticized 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 organized armed groups” and “direct participation in hostilities” has been followed in recent State practice concerning drone attacks.<sup>58</sup>

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.<sup>59</sup> 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.<sup>60</sup> 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,<sup>61</sup> and if there is doubt States must refrain from targeting.<sup>62</sup> Insofar as the term “signature strikes” refers to targeting without sufficient information to make the necessary determination, it is clearly unlawful.

73. Where one drone attack is followed up by another in order to target those who are wounded and hors de combat or medical personnel, it constitutes a war crime in armed conflict and a violation of the right to life, whether or not in armed conflict. Strikes on others confirmed to be civilians who are directly participating in hostilities or having a continuous combat function at the time of the follow-up strike could be lawful if the other international humanitarian law rules are respected.

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

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<sup>57</sup> Ibid., p. 46.

<sup>58</sup> See decision of the German Federal Prosecutor of 20 June 2013. Available from [www.generalbundesanwalt.de/docs/drohneneinsatz\\_vom\\_04oktober2010\\_mir\\_ali\\_pakistan.pdf](http://www.generalbundesanwalt.de/docs/drohneneinsatz_vom_04oktober2010_mir_ali_pakistan.pdf) (in German).

<sup>59</sup> ICRC, *Interpretive Guidance*, p. 74.

<sup>60</sup> Kevin Jon Heller, “‘One hell of a killing machine’: signature strikes and international law”, *Journal of International Criminal Justice*, vol. 11, No. 1 (2012), pp. 8-20.

<sup>61</sup> Ibid. The author distinguishes between “legally adequate” and “legally inadequate” signatures.

<sup>62</sup> Additional Protocol I, 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 *Interpretive Guidance*, recommendation VIII.



legitimate targets.<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup> 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 minimize incidental loss of civilian lives and information-gathering relating to possible civilian casualties and military gains.<sup>66</sup>

**(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.<sup>67</sup>

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<sup>63</sup> See [www.theguardian.com/world/2013/may/23/obama-drones-guantanamo-speech-text](http://www.theguardian.com/world/2013/may/23/obama-drones-guantanamo-speech-text).

<sup>64</sup> 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-UNDER-DRONES.pdf>.

<sup>65</sup> Additional Protocol I, art. 51 (5) (b).

<sup>66</sup> Additional Protocol I, art. 57.

<sup>67</sup> ICRC, *Interpretive Guidance*, p. 82.

78. The articulation of this principle has been controversial.<sup>68</sup> It has been criticized for its alleged misrepresentation of the current *lex lata*,<sup>69</sup> 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.<sup>70</sup> 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, which may even be controlled by the State party or its allies.<sup>71</sup> The ICRC approach has been applied in some recent State practice on drone attacks<sup>72</sup> 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.<sup>73</sup>

#### **D. Protecting sovereignty and people: restrictions on the use of force in foreign territory**

80. In addition to the rules of international humanitarian law and international human rights law that must be strictly observed in any drone strike, the use by one State of drones to target individuals located in another State will be lawful only where it complies with the rules on the use of inter-State force. While international humanitarian law and international human rights law are aimed at protecting the individuals concerned, the law on the use of inter-State force serves primarily to protect the legal rights of States, including the right and interest of the State to have the lives of its citizens and inhabitants protected from aggressive acts. It can thus indirectly serve to protect life by containing the geographical spread of conflict.

81. Article 2 (4) of the Charter of the United Nations and customary international law prohibit the threat or use of inter-State force, subject to limited exceptions. A State may consent to the use of force on its territory by another State. The Charter also allows action taken in self-defence.<sup>74</sup>

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<sup>68</sup> 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 and 191.

<sup>69</sup> 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 and 39-43.

<sup>70</sup> 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 and 835.

<sup>71</sup> Ryan Goodman, "The power to kill or capture enemy combatants", *European Journal of International Law*, vol. 24 (2013) (forthcoming).

<sup>72</sup> Decision of the German Federal Prosecutor of 20 June 2013.

<sup>73</sup> 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.

<sup>74</sup> The Security Council can also authorize the use of force. Humanitarian intervention without Council approval is a controversial ground for the use of inter-State force.

## 1. Consent

82. Only the State's highest government authorities have the power to give consent to use force. It is not sufficient to obtain consent from regional authorities or from particular agencies or departments of the Government.<sup>75</sup> Where there is a difference of view between the highest authorities in the Government and lower-level officials, the view of the higher-level officials should be taken as determinative.

83. While there is no requirement that consent be made public, it must nevertheless be clear between the States concerned that consent is being given to a use of force, and the parameters of that consent should also be made clear. Consent must be given in advance.<sup>76</sup> Moreover, consent must be freely given and clearly established. It must be actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked. Consent may be vitiated by error, fraud, corruption or coercion.<sup>77</sup>

84. Once consent to the use of force is withdrawn, the State conducting the targeting operations is bound by international law to refrain from conducting any further operations from that moment.<sup>78</sup> States cannot consent to violations of international human rights law or international humanitarian law on their territory.

## 2. Self-defence

85. The use of drones on the territory of other States has also been justified on the basis of self-defence (including where consent was not given or is unclear). International law poses stringent requirements on the use of force in self-defence. Under Article 51 of the Charter and customary international law, a State may invoke self-defence to justify its use of force to target individuals in another State's territory when an armed attack occurs or (see below) is imminent. The International Court of Justice has confirmed that, for an attack to constitute an armed attack and thus enable the State's right to use force in self-defence, the scale and effects of the attack must reach a certain threshold of gravity.<sup>79</sup>

86. In addition, the State claiming to be acting in self-defence must satisfy the dual requirements of necessity and proportionality, grounded in customary international law. These requirements, as defined in the context of the use of inter-State force, are closely linked to the aim of a lawful act of self-defence. Thus, necessity and proportionality mean that self-defence must not be retaliatory or punitive; the aim should be to halt and repel an attack.<sup>80</sup> Action taken lawfully in self-defence, such as the use of drones to target individuals in another State's territory, must serve the purpose of halting and repelling an armed attack and must be both necessary and proportionate to that end.

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<sup>75</sup> See International Law Commission, Draft articles on responsibility of States for internationally wrongful acts, commentary to article 20.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid., para. 6.

<sup>78</sup> See *Armed Activities on the Territory of the Congo*.

<sup>79</sup> *Nicaragua v. United States of America, Judgment, I.C.J. Reports 1986*, p. 14, para. 191, *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, p. 161, paras. 51 and 62.

<sup>80</sup> See Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 25/2625, annex).

87. Article 51 recognizes the right to self-defence where an armed attack occurs, but also refers to self-defence as an inherent right of States. This has given rise to arguments that the right to self-defence under customary law is not displaced by the Charter. The argument that an anticipatory attack against an imminent threat is also permissible rests on this basis (see [A/59/565](#) and Corr.1, paras. 188-192). Under the proper interpretation of Article 51, however, this may be done only in response to an existing threat. It may not be done pre-emptively to prevent a threat from arising in the future. The necessity of the self-defence, in the well-known phrase, must be instant, overwhelming and leaving no choice of means, no moment of deliberation.<sup>81</sup> The body of opinion and State practice that reject the concept of anticipatory self-defence altogether should be noted, and serve at least as a confirmation of the limited scope of the exception.<sup>82</sup>

88. Before 11 September 2001, the claim that force could be used in self-defence in response to an armed attack by a non-State group whose acts were not attributable to a State was not supported — or rather, not entertained — by most commentators. The International Court of Justice also did not follow this view of the law in *Nicaragua*.<sup>83</sup> State practice since 11 September, however, suggests that international law may now permit such a notion.<sup>84</sup>

89. There is an emerging view that the level of violence necessary to justify a resort to self-defence ought to be set higher when it is in response to an attack by non-State actors than to an attack by another State.<sup>85</sup> This specific intensity requirement for the definition of an armed attack must be met vis-à-vis each host State on whose territory action in self-defence is taken.<sup>86</sup>

90. The right to self-defence persists only for so long as it is necessary to halt or repel an armed attack and must be proportionate to that aim. In determining what is necessary to bring an attack to an end and what is a legitimate objective for self-defence, however, States are not entitled to continue to act in self-defence until the absolute destruction of the enemy is achieved, such that the enemy poses no long-term threats.

91. It has been argued that self-defence against an armed group on the territory of another State is permissible only if the host State is unable or unwilling to act against that group.<sup>87</sup> This follows from the requirement that action taken in self-defence must be necessary. The test of unwillingness or inability can therefore not refer to an independent justification for the use of force on foreign soil, but at best constitute part and parcel of a claim to self-defence. Moreover, in determining

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<sup>81</sup> Letter from Mr. Webster to Lord Ashburton, 6 August 1842, in R. Y. Jennings, “The *Caroline* and *McLeod* cases”, *American Journal of International Law*, vol. 32, No. 1 (January 1938).

<sup>82</sup> Christine Gray, *International Law and the Use of Force* (Oxford, United Kingdom, Oxford University Press, 2008), pp. 160-161.

<sup>83</sup> *Nicaragua v. United States; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para. 139.

<sup>84</sup> See Security Council resolutions 1368 (2001) and 1373 (2001).

<sup>85</sup> The Chatham House Principles of International Law on the Use of Force by States in Self-Defence (2005), principle 6; and Leiden Policy Recommendations on Counter-terrorism and International Law, Grotius Centre for International Legal Studies (2010), para. 38.

<sup>86</sup> Kreß, “Some reflections on the international legal framework governing transnational armed conflicts”, p. 251.

<sup>87</sup> Daniel Bethlehem, “Self-defence against an actual or imminent armed attack by non-State actors”, *American Journal of International Law*, vol. 106, No. 4 (2012), pp. 770 and 776.

whether a State is unable or unwilling to take action, the State acting in self-defence might be required to request such action before the commencement of acts taken in self-defence, to establish that it is necessary.

92. Importantly, the imminence requirement in international human rights law that stipulates that life may be taken only to protect life is not to be conflated with the requirement of imminence in the law governing the use of force on foreign territory under Article 51 of the Charter. The former is a condition required for all uses of lethal force to be lawful under international human rights law. The latter applies under the doctrine of anticipatory self-defence and would allow the use of self-defence where an attack is imminent.<sup>88</sup>

93. Article 51 makes it clear that measures adopted by States in exercise of self-defence must be reported to the Security Council.<sup>89</sup> This can be seen as posing an obligation of transparency and justification to the international community, placing the issue formally on the agenda of the Council and recognizing its role. All States Members of the United Nations have an obligation under its founding treaty to submit such reports. While failure to report will not render unlawful an otherwise lawful action taken in self-defence, the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence.<sup>90</sup> According to Article 51, the right to exercise self-defence shall continue until the Council has taken measures necessary to maintain international peace and security.

94. In addition to its transparency function, it could be argued that the rationale for this reporting requirement is to contribute towards the protection of the legal rights of sovereignty by the international community, given that the State using force is required to offer its justification for that use of force. By extension, it may be concluded that a State must report afresh when the material facts have changed, for example, where self-defence is used as a basis for the use of force on the territory of a new State, or new parties are added to the conflict.

## **E. Accountability and transparency**

### **1. International human rights law**

95. The modern concept of human rights is based on the fundamental principle that those responsible for violations must be held to account. A failure to investigate and, where applicable, punish those responsible for violations of the right to life in itself constitutes a violation of that right.<sup>91</sup>

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<sup>88</sup> Contrast United States, Department of Justice, White Paper, “Lawfulness of a lethal operation directed against a U.S. citizen”.

<sup>89</sup> *Nicaragua v. United States*, para. 235; *Armed Activities in the Territory of the Congo*, para. 145.

<sup>90</sup> *Nicaragua v. United States*, para. 200.

<sup>91</sup> European Court of Human Rights, *Kaya v. Turkey*, application No. 22729/93, judgement of 19 February 1998, paras. 86-92; Human Rights Committee, general comment No. 31 (2004), para. 15; *McCann and others v. United Kingdom*, para. 169.

96. Legal and political accountability are dependent on public access to the relevant information.<sup>92</sup> Only on the basis of such information can effective oversight and enforcement take place. The first step towards securing human rights in this context is transparency about the use of drones.

97. A lack of appropriate transparency and accountability concerning the deployment of drones undermines the rule of law and may threaten international security.<sup>93</sup> Accountability for violations of international human rights law (or international humanitarian law) is not a matter of choice or policy; it is a duty under domestic and international law.<sup>94</sup>

98. The various components of transparency<sup>95</sup> require that the criteria for targeting and the authority that approves killings be known and that drone operations be placed in institutions that are able to disclose to the public the methods and findings of their intelligence, criteria used in selection of targets and precautions incorporated in such criteria.

99. One of the criticisms levelled against the current drone programmes has been the absence of an official record regarding the persons killed. States must also give guarantees of non-repetition and give effect to the right to reparations of victims of drone strikes.

100. Drone victims, just as any other human rights victims, and society at large have a right to have access to information relating to allegations of human rights violations and their investigation.<sup>96</sup> The Human Rights Council has emphasized the need under international human rights law for transparency, highlighting victims' right to know the truth about the perpetrators, their accomplices and their motives there.<sup>97</sup> Likewise, during an armed conflict, relatives of persons killed or missing have the right to know the fate of their relatives.<sup>98</sup>

## 2. International humanitarian law

101. A parallel obligation to investigate and, where appropriate, punish those responsible in respect of cases of alleged war crimes exists under international

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<sup>92</sup> Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, para. 16.

<sup>93</sup> Melzer, *Human Rights Implications of the Usage of Drones*, p. 4.

<sup>94</sup> Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka (12 April 2011). Available from [www.un.org/News/dh/infocus/Sri\\_Lanka/POE\\_Report\\_Full.pdf](http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf).

<sup>95</sup> See Philip Alston, "The CIA and targeted killings beyond borders", *Harvard National Security Journal*, vol. 2, No. 2 (2011), p. 287.

<sup>96</sup> See Inter-American Court of Human Rights, "*Mapiripán Massacre*" v. Colombia, judgement of 15 September 2005, para. 238.

<sup>97</sup> Human Rights Council resolution 9/11, preamble and para. 1; International Convention for the Protection of All Persons from Enforced Disappearance, art. 24 (2); Commission on Human Rights resolution 2005/66.

<sup>98</sup> Additional Protocol I, art. 32 and ICRC, Commentary on article 32 of Additional Protocol I, para. 1197; Additional Protocol I, art. 33 and ICRC, Commentary on article 33 of Additional Protocol I, para. 1222; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), art. 138.

humanitarian law.<sup>99</sup> Whenever there are reasons to query whether violations of international humanitarian law may have occurred in armed conflict as a result of a drone strike, such as the incorrect designation of persons as targetable or disproportionate civilian harm, accountability demands at least a preliminary investigation.<sup>100</sup> Civilian casualties must be determined and should be disclosed.

## IV. Conclusions

102. The legal framework for maintaining international peace and the protection of human rights is a coherent and well-established system, reflecting norms that have been developed over the centuries and have withstood the test of time. Even though drones are not illegal weapons, they can easily be abused. The central norms of international law need not, and should not, be abandoned to meet the new challenges posed by terrorism. On the contrary, that drones make targeted killing so much easier should serve as a prompt to ensure a diligent application of these standards, especially in view of the likely expansion in the number of States with access to this technology in the future.

103. The use of drones by States to exercise essentially a global policing function to counter potential threats presents a danger to the protection of life, because the tools of domestic policing (such as capture) are not available, and the more permissive targeting framework of the laws of war is often used instead.

## V. Recommendations

### A. General

**104. The established international legal framework for the use of force (international human rights law, international humanitarian law and inter-State force) should be regarded as setting forth an adequate framework for the use of armed drones.**

**105. It is a matter of concern that there is uncertainty about which States are developing and acquiring armed drones. States should be transparent, and be called upon to be transparent by the international community and by domestic actors in this regard.**

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<sup>99</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), art. 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), art. 50; Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention), art. 129; Fourth Geneva Convention, art. 146; Additional Protocol I, art. 85; Security Council resolution 827 (1993) establishing the International Criminal Tribunal for the Former Yugoslavia and Statute of the Tribunal, art. 2; Security Council resolution 955 (1994) establishing the International Criminal Tribunal for Rwanda and Statute of the Tribunal, art. 4; Rome Statute of the International Criminal Court, art. 8 (2) (a).

<sup>100</sup> 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), p. 256.

## **B. To the United Nations**

106. Even where self-defence is exercised in accordance with the Charter of the United Nations, Security Council endorsement is desirable. The role of the Council in ensuring multilateral supervision of the use of armed drones should be strengthened.

107. The Security Council should seek transparency from States on the reasons for self-defence when invoked, if this is neither provided nor clear.

## **C. To States using armed drones**

108. States must be transparent about the development, acquisition and use of armed drones. They must publicly disclose the legal basis for the use of drones, operational responsibility, criteria for targeting, impact (including civilian casualties), and information about alleged violations, investigations and prosecutions.

109. States must bring their practices and policies in line with international standards, including their standing orders and rules of engagement as well as their targeting norms. This includes adhering to the rule, in the context of international humanitarian law, that if there is doubt whether a person is a civilian, the person must be considered a civilian.

110. States must ensure meaningful oversight of the use of drones and, where appropriate, investigation and accountability as well as reparations for their misuse.

111. States must recognize the extraterritorial applicability of human rights treaties, in addition to the global applicability of the right to life on the basis of customary law and the general principles of international law, including during armed conflict.

112. Drone operators must not be placed within a chain of command that requires them to report within institutions that are unable to disclose their operations.

113. States that invoke the right to self-defence to use inter-State force should submit a report to the Security Council pursuant to Article 51 of the Charter in respect of each State on whose territory they use force. If a conflict is extended to the territory of a new State, a new report should then be submitted.

114. Whether or not they recognize this as a legal obligation, States should capture rather than kill during armed conflict where feasible.

## **D. To States on whose territory armed drones are used**

115. States must continue to honour their own human rights obligations and recognize that they cannot consent to the violation of human rights or international humanitarian law by foreign States. They must recognize that the duty to protect the right to life of their subjects rests primarily with them. States must investigate allegations of violations of the right to life through drone killings and provide redress where applicable.



116. Where States consent to the use of force, they should do so openly and clearly.

**E. To other actors**

117. Intergovernmental organizations, States and others, especially those with an interest in using armed drones or against whose territory and constituents they are used, should engage in individual and collective consensus-seeking processes to determine the correct interpretation and application of the established international standards for the use of drones that are equally applicable to all States.

118. Civil society should continue and, where possible, expand its assessment and monitoring of the use of drones.

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## Human Rights Council

Twenty-fifth session

Agenda item 3

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

### **Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson\***

#### *Summary*

This is the third annual report submitted to the Human Rights Council by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson.

In chapter II of the report, the Special Rapporteur lists his key activities undertaken from 10 January to 16 December 2013. In chapter III, the Special Rapporteur examines the use of remotely piloted aircraft, or drones, in extraterritorial lethal counter-terrorism operations, including in the context of asymmetrical armed conflict, and allegations that the increasing use of remotely piloted aircraft, or drones, has caused a disproportionate number of civilian casualties, and makes recommendations to States. The present report constitutes the continuation of the Special Rapporteur's interim report on the use of drones to the General Assembly (A/68/389).

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\* Late submission.

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### III. Civilian impact of remotely piloted aircraft

#### A. Introduction

21. In January 2013, the Special Rapporteur began an inquiry into the use of remotely piloted aircraft, or drones, in extraterritorial lethal counter-terrorism operations, including in the context of asymmetrical armed conflict. The principal aims of the inquiry were: (a) to evaluate allegations that such operations have resulted in disproportionate levels of civilian casualties; (b) make recommendations concerning the duty of States to conduct independent and impartial investigations and to make public the results; and (c) identify the disputed issues of international law relevant to such operations, and to make recommendations aimed at promoting international consensus.

22. On 25 October, the Special Rapporteur presented an interim report to the General Assembly (A/68/389, hereinafter “the interim report”) which sets out a framework for examining the factual and legal issues relevant to his inquiry, by reference to the principles laid down in the United Nations Global Counter-Terrorism Strategy.<sup>3</sup> The present report should be read in conjunction with the interim report and the report to the General Assembly by the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/68/382).

23. On 18 December, following the presentation of the Special Rapporteur’s interim report, the General Assembly adopted by consensus resolution 68/178 on the protection of human rights and fundamental freedoms while countering terrorism. In paragraph 6 (s) of the resolution, States are urged to ensure that any measures taken or means employed to counter terrorism, including the use of remotely piloted aircraft, comply with their obligations under international law, including the Charter of the United Nations, human rights law and international humanitarian law, in particular the principles of distinction and proportionality.

24. In furtherance of that objective, the present report summarizes developments since the presentation of the Special Rapporteur’s interim report to the General Assembly, including recent trends in civilian casualty rates resulting from the use of remotely piloted aircraft and other significant developments (sect. B below); it presents the conclusions of the Special Rapporteur’s review of 37 strikes in which civilian casualties were reportedly sustained (sect. C below);<sup>4</sup> and, in it, the Special Rapporteur makes recommendations to the Council aimed at clarifying and promoting compliance with the relevant principles of international law, including international humanitarian and human rights law. The sample strike analysis in section C below is intended to provide a clear opportunity for the relevant States to fulfil their international legal obligations of transparency and accountability (as described in the interim report) by making public the results of their own inquiries into the sample strikes identified. In order to provide an up-to-date source of information on his continuing inquiries, the Special Rapporteur has set up a dedicated website, which reflects and supplements the content of his reports on remotely piloted aircraft to the General Assembly and the Council: [unsrct-drones.com](http://unsrct-drones.com). The Special Rapporteur will continue to seek additional information from States on the legal justifications for the use of deadly force in counter-terrorism operations, as well as the justification for individual attacks. Subject to the consent of the State concerned, the responses received will be posted on the official web page of the mandate.

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<sup>3</sup> See General Assembly resolution 60/288, annex, sect. IV, para. 2.

<sup>4</sup> The Special Rapporteur uses the legal standards set out in the interim report as the benchmark for the inclusion of each strike in the present report: see paras. 32–36 below.

## **B. Recent developments**

### **1. Civilian casualty rates**

#### **Afghanistan**

25. In the interim report the Special Rapporteur noted the assessment by the United Nations Mission in Afghanistan (UNAMA) that, up to the end of 2012, confirmed drone strikes appeared to have inflicted significantly lower levels of civilian casualties than aerial attacks carried out by other air platforms (para. 30).<sup>5</sup> This is no longer the case. Figures for 2013 indicate that drone strikes accounted for almost 40 per cent of the total number of civilian fatalities inflicted as the result of aerial attacks by pro-Government forces. In its 2013 report, *Afghanistan Annual Report on Protection of Civilians in Armed Conflict*,<sup>6</sup> UNAMA records 59 civilian casualties during 2013 as the result of 19 confirmed drone strikes (comprising 45 fatalities and 14 non-fatal injuries).<sup>7</sup> As compared with 2012, this represents a threefold increase in the number of recorded civilian casualties from the use of drones by the International Security Assistance Force (ISAF). It also represents a significant increase in the number of civilian casualties from drone strikes as a percentage of the overall number of civilian casualties from aerial operations (including attacks by manned fixed and rotary blade aircraft).<sup>8</sup>

#### **Pakistan**

26. In his interim report, the Special Rapporteur noted that there had been a marked drop in reported civilian casualties from attacks by remotely piloted aircraft in the Federally Administered Tribal Areas of Pakistan during 2012 (both in absolute terms and as a percentage of overall fatalities), a trend that appeared to have continued during the first half of 2013 (para. 33). He welcomed, in that context, the August 2013 statement of the Secretary of State of the United States to the effect that there was a clearly defined timeline for ending drone strikes in Pakistan (para. 54).<sup>9</sup> Figures to the end of 2013 confirm that there has been a significant de-escalation in the number of recorded drone strikes in Pakistan. The total number of reported strikes for the year was 27, down from a peak of 128 in 2010. For the first time in nine years, there were no reports of civilian casualties during 2013. At the time of writing, there have been no reported drone strikes during 2014, the longest period without drone strikes since President Obama took office. The cessation in strikes coincides with peace initiatives being pursued between the Government of Pakistan and the Tehrik-i-Taliban Pakistan.

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<sup>5</sup> According to UNAMA, figures for 2012 showed that 16 civilians had been killed and 5 injured owing to confirmed remotely piloted aircraft strikes during the course of the year.

<sup>6</sup> Kabul, 2014, p. 8. Available from [http://unama.unmissions.org/Portals/UNAMA/human%20rights/Feb\\_8\\_2014\\_PoC-report\\_2013-Full-report-ENG.pdf](http://unama.unmissions.org/Portals/UNAMA/human%20rights/Feb_8_2014_PoC-report_2013-Full-report-ENG.pdf).

<sup>7</sup> In the UNAMA report, it is pointed out, in footnote 195, that “the number of civilian casualties from drone strikes may be higher as UNAMA is not always able to confirm which type of platform was used during an aerial operation (fixed-wing, rotary or remotely-controlled) that resulted in civilian casualties”.

<sup>8</sup> UNAMA documented 182 civilian casualties (118 deaths and 64 injured) during 2013, from a total 54 aerial operations conducted by international military forces. Putting these figures in context, aerial operations as a whole caused 19 per cent of civilian deaths attributed to pro-Government forces, and 2 per cent of all civilian casualties. Of the civilians killed in aerial operations in Afghanistan, 45 per cent were women and children.

<sup>9</sup> See “John Kerry says Pakistan drone strikes could end as bilateral talks resume”, *The Guardian*, 1 August 2013. Available from [www.theguardian.com/world/2013/aug/01/john-kerry-us-pakistan-talks-drones](http://www.theguardian.com/world/2013/aug/01/john-kerry-us-pakistan-talks-drones).

## Yemen

27. By contrast, the frequency of reported drone strikes in Yemen has increased since the Special Rapporteur's interim report, resulting in a significant number of reported civilian casualties in the final weeks of 2013 (see paras. 59 and 60 below). Recent estimates provided by Human Rights Watch allege that, since 2009, the United States has conducted at least 86 lethal counter-terrorism operations, using remotely piloted aircraft and other means, killing up to 500 people.<sup>10</sup> The majority of those killed is believed to have been individuals with a "continuous combat function" in Yemeni internal armed conflicts, and therefore to have been legitimate military targets under the principles of international humanitarian law. However, media monitoring organizations allege that between 24 and 71 civilians have been killed in confirmed drone strikes between 2009 and 2013.<sup>11</sup>

## 2. Other significant developments

### Yemen

28. During the universal periodic review of Yemen in January 2014, the Government delegation informed the Working Group on the Universal Periodic Review that the National Dialogue Conference in Yemen had demanded the cessation of the use of armed drones (see A/HRC/26/8). The Working Group was also informed of a non-binding resolution passed by the Yemeni House of Representatives on 14 December 2013 calling for a ban on the use of armed drones in Yemen, and insisting that measures to fight terrorism should not harm civilians and should be based on human rights standards (ibid.).<sup>12</sup>

29. The Government of Yemen has informed the Special Rapporteur that the United States routinely seeks prior consent, on a case-by-case basis, for lethal remotely piloted aircraft operations on its territory through recognized channels, and that where consent is withheld, a strike will not go ahead. However, according to a recent report by Human Rights Watch, President Hadi told that organization during a meeting on 28 January 2014 that specific drone strikes were not pre-approved, but instead such strikes were "generally permitted" pursuant to an agreement concluded between the United States and former President Abdullah Saleh, which remains binding.<sup>13</sup> The Special Rapporteur invites the Government of Yemen to clarify its position in that regard. Finally, the Special Rapporteur thanks the Government of Yemen for agreeing in principle to receive a country visit from his mandate. Initially the visit was postponed at the Government's request pending the conclusion of the National Dialogue Conference in 2013. Since that time, logistical and other concerns have prevented the planned visit from taking place. The Special Rapporteur takes this opportunity to affirm his commitment to visiting Yemen as soon as possible.

### Israel

30. The Special Rapporteur attended a meeting with representatives of Israel on 26 January 2014 in London. The meeting was convened at the request of Israel in the context of the Special Rapporteur's inquiries into targeted killing through the use of drones in counter-terrorism operations. The Government was represented by the Ambassador of

<sup>10</sup> Human Rights Watch, *A wedding that became a funeral: US Drone Attack on Marriage Procession in Yemen* (2014). Available from [www.hrw.org/sites/default/files/reports/yemen0214\\_ForUpload\\_0.pdf](http://www.hrw.org/sites/default/files/reports/yemen0214_ForUpload_0.pdf).

<sup>11</sup> See, e.g., The Bureau of Investigative Journalism, "Drone strikes in Yemen". Available from [www.thebureauinvestigates.com/category/projects/drones/drones-yemen/](http://www.thebureauinvestigates.com/category/projects/drones/drones-yemen/) (accessed on 7 March 2014).

<sup>12</sup> See also Hakim Almasmari, "Drone Strikes Must End, Yemen's Parliament Says", CNN.com, 15 December 2013. Available from [www.cnn.com/2013/12/15/world/meast/yemen-drones](http://www.cnn.com/2013/12/15/world/meast/yemen-drones).

<sup>13</sup> Human Rights Watch, *A Wedding That Became a Funeral*, p. 6.

Israel to the United Kingdom and the Deputy Attorney-General for International Affairs. During the course of an extended and informative exchange, the Special Rapporteur was briefed on, among other matters, the efforts made by the Israeli Air Force to avoid inflicting civilian loss of life, and was shown video recordings of operational measures taken for that purpose. The Government stressed the efforts taken by its forces in all aerial operations to give advanced warnings of attacks whenever possible. Referring to the Special Rapporteur's interim report (paras. 75 and 76), the Government emphasized that a standard of zero anticipated civilian casualties goes beyond the mandatory requirements of international humanitarian law and would remain unattainable whilst legitimate military targets, particularly in Gaza, used civilian institutions as a base for military operations. The Special Rapporteur has identified a number of examples of strikes in which there are credible allegations that civilians were killed or injured as the result of Israeli drone strikes in Gaza. These are set out in chapter III, section C, below. During the course of the meeting, the Special Rapporteur requested certain additional information from the Government. That information had not been received at the time of writing of the present report.

### **European Union**

31. On 25 February 2014, the European Parliament passed a resolution, by 534 votes to 49, calling for the adoption of a common position for the European Union on the use of armed drones. In the resolution, the European Parliament:

(a) Concluded that “drone strikes outside a declared war by a State on the territory of another State without the consent of the latter or of the Security Council constitute a violation of international law and of the territorial integrity and sovereignty of that country”; expressed its “grave concern over the use of armed drones outside the international legal framework”; and urged the European Union “to develop an appropriate policy response at both European and global level which upholds human rights and international humanitarian law”;

(b) Called upon the High Representative for Foreign Affairs and Security Policy, the member States and the Council of the European Union to “oppose and ban the practice of extrajudicial targeted killings”; to “ensure that member States, in conformity with their legal obligations, do not perpetrate unlawful targeted killings or facilitate such killings by other States”; and to “include armed drones in relevant European and international disarmament and arms control regimes”;

(c) Urged the Council to adopt an European Union common position on the use of armed drones;

(d) Called upon the European Union “to promote greater transparency and accountability on the part of third countries in the use of armed drones with regard to the legal basis for their use and to operational responsibility, to allow for judicial review of drone strikes and to ensure that victims of unlawful strikes have effective access to remedies”.

### **C. Sample strike analysis**

32. In his interim report to the General Assembly, the Special Rapporteur made specific recommendations aimed at strengthening compliance with the applicable legal standards on accountability and transparency (paras. 41–50, 78 and 80). Having regard to the duty of States to protect civilians in armed conflict, the Special Rapporteur concluded that, in any case in which there have been, or appear to have been, civilian casualties that were not anticipated when the attack was planned, the State responsible is under an obligation to

conduct a prompt, independent and impartial fact-finding inquiry and to provide a detailed public explanation of the results (para. 78). This obligation is triggered whenever there is a plausible indication from any apparently reliable source that unintended civilian casualties may have been sustained, including where the facts are unclear or the information is partial or circumstantial (whether the attack was initiated by remotely piloted aircraft or other means, and whether it occurred within or outside an area of active hostilities) (paras. 41–50, 78 and 80).<sup>14</sup> In a modest extension of the approach adopted in the Turkel Commission report,<sup>15</sup> the Special Rapporteur concluded that the international human rights law principle of transparency applies not only to those cases in which a full criminal investigation is launched, but also to preliminary fact-finding inquiries. Subject to redactions on grounds of legitimate national security, he recommended that a full explanation should be made public in each case, and that this obligation ought to be viewed as an inherent part of a State's legal duties of accountability under international humanitarian law and international human rights law.<sup>16</sup>

33. The Special Rapporteur has adopted and applied this standard to a sample of individual strikes in which remotely piloted aircraft are alleged to have been implicated in the infliction of civilian casualties. Having considered the available sources, the Special Rapporteur has identified 30 strikes (out of a total of 37 strikes initially brought to his attention) in which there is a plausible indication that civilians were killed or sustained life-threatening injuries, or in which civilian lives were put at immediate risk. With the assistance of a team of researchers he has sifted the available evidence to determine whether there is a plausible and credible allegation of civilian casualties, from apparently reliable sources, such as to trigger the duties of investigation and transparency.

34. The list below is intended to be illustrative rather than exhaustive. The criteria adopted for including a strike in the list are: (a) that there is an allegation emanating from an apparently reliable source, or from multiple independent sources, that civilians have been killed, seriously injured or had their lives put at immediate risk in an operation in which remotely piloted aircraft are alleged to have been involved; (b) that, in the absence of any official public explanation from the State(s) responsible, the number and/or proportion of civilians harmed arguably raises a reasonable suspicion that the action taken may have been unlawful; and (c) that there is sufficient information to identify the location, the date and approximate time of the incident. In those cases where it has not been possible to identify the victim(s) and inquire into their backgrounds, the Special Rapporteur has required other credible indications that the victims were, or included, civilians.

35. It is important to emphasize that the mere existence of credible allegations that civilians were killed or injured in these incidents does not necessarily establish any violation of international humanitarian law or international human rights law. Still less does it provide clear evidence of the commission of a war crime. Indeed, most of the relevant evidence which could confirm or dispel such a suspicion remains in the exclusive possession of the alleged perpetrator States. However, in each of the cases identified, the Special Rapporteur has evaluated the available sources, looking for indicia of reliability,

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<sup>14</sup> Similarly, the European Parliament resolution on the use of armed drones of 25 February 2014 states that, in the event of allegations of civilian deaths as a result of drone strikes, States are under the obligation to conduct prompt, independent investigations and, if the allegations are proved correct, to proceed to public attribution of responsibility, punishment of those responsible and provision of access to redress, including payment of compensation to the families of victims.

<sup>15</sup> See the Public Commission to Examine the Maritime Incident of 31 May 2010, *Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict according to International Law: Second report — the Turkel Commission* (2013). Available from [www.turkel-committee.gov.il/files/newDoc3/The%20Turkel%20Report%20for%20website.pdf](http://www.turkel-committee.gov.il/files/newDoc3/The%20Turkel%20Report%20for%20website.pdf).

<sup>16</sup> *Ibid.* and A/68/389, para. 45.



and has judged the information and evidence he has seen to be sufficient to cross the threshold identified in his interim report as imposing a duty on the relevant States to provide a public explanation of the circumstances and the justification for the use of deadly force.

36. In the opinion of the Special Rapporteur, the States responsible are under a present and continuing obligation to make public, in as much detail as possible, and subject only to such redactions as are strictly necessary to meet legitimate national security concerns, the results of any fact-finding investigations that have been conducted into the incidents identified in the present section of the report. If no fact-finding investigation has so far taken place, the Special Rapporteur considers that the States concerned are under an obligation to indicate this publicly, and provide an explanation.

37. By way of illustration, the Special Rapporteur draws attention to the one instance in which the United States has previously made public significant parts of an investigation report into a strike in which civilian casualties were sustained in Afghanistan. On 21 February 2010, precision-guided munitions were discharged from a United States military helicopter aimed at three pick-up trucks travelling near Khotal Chowzar, a mountain pass that connects Daikundi with Oruzgan. The attack occurred 12 km from the village of Khod in the Shahidi Hassas district. Remotely piloted aircraft under the control of the United States were involved in assessing and determining the target of the operation. Up to 23 civilians were reportedly killed and 12 civilians were injured. The victims included eight men, one woman and three children under the age of 14. The findings of an investigation conducted by ISAF were partially declassified. The investigation concluded that the Predator drone crew involved had provided misleading situational information, that there was evidence of inaccurate and unprofessional reporting, and a propensity to “kinetic activity” (the discharge of precision-guided munitions). It recommended administrative and disciplinary sanctions.<sup>17</sup> The publication of the investigation report is a model of accountability and transparency and sets a benchmark to be followed in other cases. In the opinion of the Special Rapporteur, the States implicated in the incidents set out below are under a duty to release the substance of all investigation reports in a level of detail comparable to that adopted in the case in question.

38. The Special Rapporteur therefore calls on relevant States to respond to the allegations set out below. He has written separately to them inviting their comments. Any responses that are received will, subject to the consent of the State concerned, be posted on the official web page of the mandate.

### **Afghanistan**

39. On 25 March 2011, precision-guided munitions were discharged at two vehicles travelling in the Now Zad district of Helmand province. Both vehicles were destroyed; six people were killed and two injured. Remotely piloted aircraft under the control of ISAF (United Kingdom) were involved in the operation. The United Kingdom has confirmed that, in addition to killing two men believed to be combatants (who were the targets of the attack), the operation resulted in the deaths of four non-combatants and the infliction of serious injuries on two further non-combatants. Contemporaneous reports suggest that the two identified targets were travelling in the first vehicle, and that the dead included two women and two children who were travelling in the following vehicle. The incident was investigated by the Joint Incident Assessment Team at ISAF, which concluded that the operation had been directed at two pick-up trucks believed to be carrying explosives and

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<sup>17</sup> Memorandum for Commander, United States Forces – Afghanistan, 13 April 2010, executive summary for AR-15-6 investigation, 21 February 2010, air-to-ground engagement in the vicinity of Shahidi Hassas, Oruzgan.

found that the actions of the crew had been in accordance with the applicable rules of engagement.<sup>18</sup> The Special Rapporteur calls on the United Kingdom to declassify and publish the results of the investigation report (and of any other report relating to the infliction of civilian casualties through the use of remotely piloted aircraft by the United Kingdom in Afghanistan).

40. On 23 September 2012, precision-guided munitions were reportedly discharged in the Marawara district of Kunar province, reportedly injuring a teenage girl who was working in a nearby agricultural field. Remotely piloted aircraft under the control of ISAF (United States) are alleged to have been involved in the operation. UNAMA has reported that the victim later died on the way to the Asadabad public health hospital.

41. On 20 October 2012, precision-guided munitions were reportedly discharged in the Baraki Barak district of Logar province. Remotely piloted aircraft under the control of ISAF (United States) are alleged to have been involved in the operation. Four children, aged between 11 and 13 years were reportedly killed whilst tending livestock. Three died immediately and the fourth is reported to have died en route to a hospital in Kabul. ISAF later issued a statement indicating that it was aware of possible civilian casualties resulting from the operation.<sup>19</sup>

42. On 12 November 2012, precision-guided munitions were reportedly discharged in the Shaqti Qala area of Baraki Barak district of Logar province. Remotely piloted aircraft under the control of ISAF (United States) are alleged to have been involved in the operation. Three children, all under the age of 16, were reportedly killed whilst working in a field. Reports concerning the affiliations and activities of the victims suggest that all three were civilians.

43. On 5 December 2012, precision-guided munitions were reportedly discharged in the Waygal district of Nuristan province. Remotely piloted aircraft under the control of ISAF (United States) are alleged to have been involved in the operation. At least three non-combatant civilians are alleged to have been killed (two adult male teachers and a child, all members of the same family). It has since been reported that two other children may have been killed in the attack. Inquiries concerning the affiliations and activities of the two adult victims suggest that they were civilians.

44. On 24 February 2013, precision-guided munitions reportedly struck the village of Meya Saheeb in the Hisarak district of Nangarhar province. Remotely piloted aircraft under the control of ISAF (United States) are alleged to have been involved in the operation. Five adult males were killed, and inquiries concerning their affiliations and activities suggest that at least three of them were civilians.

45. On 15 June 2013, precision-guided munitions were reportedly fired on a house in the Dara-i-Pech area of Nangham district in Kunar province. Remotely piloted aircraft under the control of ISAF (United States) are alleged to have been involved in the operation. Three civilians, including one woman, are reported to have been killed and at least six civilians, including one woman, are reported to have been injured. All the victims were members of the same family.

46. On 7 September 2013, precision-guided munitions were reportedly discharged at a vehicle in the Watapur district of Kunar province. Remotely piloted aircraft under the control of ISAF (United States) are alleged to have been involved in the operation. Six

<sup>18</sup> See

[www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120626/text/120626w0002.htm#120626119000810](http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120626/text/120626w0002.htm#120626119000810).

<sup>19</sup> See "NATO kills 4 children in Afgha East: Karzai", Reuters, 23 October 2012. Available from [www.reuters.com/article/2012/10/23/us-afghanistan-taliban-idUSBRE89M0N120121023](http://www.reuters.com/article/2012/10/23/us-afghanistan-taliban-idUSBRE89M0N120121023).

combatants and ten civilians were reportedly killed in the attack, and one civilian (a 4-year-old girl) was injured. The incident was investigated by UNAMA and is detailed in its 2013 annual report on civilian casualties.<sup>20</sup> According to the report, ISAF initially denied the possibility of civilian casualties. However, after being pressed by UNAMA to investigate further, ISAF officials confirmed that one woman and one child had been killed, and was unable to rule out the possibility of at least one further woman civilian having been killed.<sup>21</sup> ISAF informed UNAMA that approval of the strike was obtained from all required levels of ISAF and Afghan national security forces' chain of command. ISAF has not published the results of its investigations. The UNAMA report concludes (p. 47):

In the case of the 7 September UAV/RPA [unmanned aerial vehicle or remotely piloted aircraft] strike in Watapur, UNAMA raises concern about possible negligence of international military forces and a possible failure to take sufficient precautionary measures. The advanced surveillance technology, equipment and extensive intelligence networks used by international military forces, combined with operational policies oriented towards reducing harm, should provide a sufficiently robust framework to ensure the degree and kind of care that limits, if not eliminates, disproportionate collateral damage.

The apparent failure, however, of international forces to identify the presence of a group of women and children in a vehicle prior to engaging the vehicle with a UAV/RPA strike could suggest negligence. Of further concern was the apparent failure of international military forces to confirm the identity and/or status of the men accompanying the fighter targeted by international military forces.

### **Pakistan**

47. On 30 October 2006, precision-guided munitions were reportedly fired at a religious seminary in Chenagai in the Bajaur tribal region. Remotely piloted aircraft under the control of the United States are alleged to have been involved in the operation. Up to 80 people were reportedly killed instantly during the attack; two more victims reportedly died in hospital shortly afterwards as the result of injuries sustained. It is alleged that as many as 69 of the dead were children under 18 years of age, and that 16 of those killed were under the age of 13. Eyewitnesses allege that the majority of those killed had been pupils at the seminary and were non-combatant civilians. The identities of some of the deceased can be found at: [unsrct-drones.com/](http://unsrct-drones.com/).

48. On 23 June 2009, precision-guided munitions were reportedly discharged at a large funeral ceremony in Lattaka, South Waziristan, following the death of Khwaz Wali, a local Taliban leader, who had been killed earlier that day. Remotely piloted aircraft under the control of the United States are alleged to have been involved in the attack on the funeral. Eyewitnesses have confirmed that, whilst the mourners included active members of the Tehrik-i-Taliban, there were significant numbers of civilians present. Reports suggest that up to 83 people were killed. The estimated number of non-combatant fatalities varies between 18 and 50. However, credible reports indicate that 10 children and 4 tribal elders were reportedly among the dead. In addition, 27 people, including a number of children, were reportedly treated for injuries at a local hospital in Miranshah.

49. On 4 October 2010, precision-guided munitions reportedly struck a group of men who were gathered in a courtyard of a house on the outskirts of Mir Ali, North Waziristan, killing all of the intended targets. Two of the dead were identified as Bünyamin Erdogan, a German national, and Dashti Shabab, a dual Iranian-German national. According to a

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<sup>20</sup> UNAMA, *Afghanistan Annual Report*.

<sup>21</sup> *Ibid.*, p. 45.

German federal investigation, both men were engaged in paramilitary activity and had a “continuous combat function”<sup>22</sup> rendering them legitimate military targets. The identity of the other three fatalities is unconfirmed but they are reported to have been local Pashtun tribesmen. Remotely piloted aircraft under the control of the United States are alleged to have been involved in the operation. Three other men, including Emrah Erdogan, a German national, survived the attack. Two women, both of whom were pregnant, and a 5-year-old boy, also survived. Emrah Erdogan has since been charged with terrorism offences in Germany. The Special Rapporteur considers a number of those present at the time of the attack to have enjoyed protected civilian status. A detailed account of the strike, together with a forensic reconstruction provided to the Special Rapporteur’s inquiry by one of the eyewitnesses, is available at: [unsrct-drones.com/](http://unsrct-drones.com/). The Special Rapporteur notes that the targeted individuals reportedly had affiliations with non-State armed groups. He also notes the precision nature of the strike. Nonetheless, the Special Rapporteur considers that, since the lives of apparent non-combatant civilians were lost or put at serious risk, the strike satisfies the criteria identified in paragraph 34 above.

50. On 17 March 2011, precision-guided munitions were reportedly fired at a tribal council meeting (jirga) taking place in an open space adjacent to the Nomada bus depot in Datta Khel, North Waziristan. Remotely piloted aircraft under the control of the United States are alleged to have been involved in the operation. The meeting had reportedly been convened for the purpose of resolving disputed claims concerning the rights to a chromite mine. The local authorities had been notified in advance of the meeting, which had begun the previous day. According to custom, tribal elders (maliks) were seated in two circular formations. Witness reports and satellite imagery analysis suggest that at least two strikes were conducted in very short succession, targeting both groups of men. The most reliable estimates suggest that 43 people were killed in the attack and 14 injured. The overwhelming majority of those killed or injured were reportedly civilians, and included tribal elders and government officials. The confirmed identities of some of the dead, together with a forensic reconstruction of the attack, are available at: [unsrct-drones.com/](http://unsrct-drones.com/).

51. On 15 June 2011, precision-guided munitions were reportedly fired at a car travelling along the main road between Miranshah and Sirkot in North Waziristan. The strike occurred six miles east of Miranshah. Remotely piloted aircraft under the control of the United States are alleged to have been involved in the operation. Five of the dead were confirmed to be Akram Shah, Atiq-ur-Rehman, Irshad Khan, Sherzada and Umar Khan. They were reportedly travelling in a vehicle belonging to Akram Shah, who was employed as a driver by the Pakistani Water and Power Development Authority. Inquiries into the affiliations and activities of the victims suggest that all of them were civilians.

52. On 31 October 2011, precision-guided munitions reportedly struck a car and a house in the Norak area of North Waziristan, killing four people. Remotely piloted aircraft under the control of the United States are alleged to have been involved in the operation. Two of the dead were confirmed to be Tariq Aziz and Waheed Ullah, two teenagers who were travelling in the vehicle to collect other members of the local football team with whom they played. Inquiries into the affiliations and activities of the two boys strongly suggest that they were both civilians. The affiliations of the other two victims are unknown.

53. On 6 July 2012, precision-guided munitions were reportedly discharged in Zowi Sidgi village in North Waziristan. Remotely piloted aircraft under the control of the United States are alleged to have been involved in the operation. The first missiles reportedly struck a tent in which a group of labourers had gathered at the end of their working day, killing eight of the occupants. A second strike reportedly occurred shortly afterwards,

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<sup>22</sup> For the meaning of the phrase “continuous combat function”, see A/68/389, para. 69; and A/68/382, para. 68. See also para. 71 (f) below.

killing a number of first responders. A total of 18 people were reportedly killed in the strikes and a further 22 injured. Inquiries into the affiliations and activities of the victims suggest that all of those killed were civilians. In October 2013, Amnesty International reported the results of field research into this incident.<sup>23</sup>

54. On 24 October 2012, precision-guided munitions reportedly struck an area of agricultural land in Ghundi Khala village in North Waziristan. Remotely piloted aircraft under the control of the United States are alleged to have been involved in the operation. The sole victim, a 68-year-old woman named Manama Bibi, was killed instantly. Eyewitness reports from members of her family indicate that at the time of the attack the victim was picking vegetables, and was in an isolated position in the middle of a field, some distance away from the nearest road or building. Inquiries into her affiliations and activities suggest that she was a civilian. In October 2013, Amnesty International reported the results of field research into this incident.<sup>24</sup>

### Yemen

55. On 14 July 2011, munitions were reportedly launched at a police station in the town of Al-Wade'a in Abyan province. Aircraft under the control of either the United States or Yemen are alleged to have been involved in the operation. The evidence is currently equivocal as to whether the air platforms used were manned or unmanned. Reports suggest that the police station had been taken over by members of Al-Qaida, but that there were also significant numbers of civilians present at the location. Unconfirmed estimates put the total number of people killed at up to 50, of whom approximately 30 are alleged to have been civilians. The Special Rapporteur notes that the targeted individuals were reportedly engaged in military activities. Nonetheless, he considers that since the lives of apparent non-combatant civilians were lost in the attack it satisfies the criteria identified in paragraph 34 above.

56. On 14 October 2011, precision-guided munitions were launched at an outdoor location in Azzan in Shawba province. Remotely piloted aircraft under the control of the United States were involved in the operation. At least six, and possibly up to nine, people were killed in the attack, including Abdulrahman al-Awlaki, a 16-year-old United States citizen and a number of his cousins. Inquiries suggest that some, if not all, of those killed were civilians. On 22 May 2013, the United States Attorney General, in a letter to the Chairman of the United States Senate Judiciary Committee,<sup>25</sup> formally acknowledged that Abdulrahman al-Awlaki had been killed in a United States counter-terrorism operation, indicating that he had not been a specific target of the attack, but not otherwise explaining his death or specifying any other legitimate military target for the operation.

57. On 15 May 2012, munitions reportedly struck two buildings in the town of Ja'ar in Abyan province. Aircraft under the control of either the United States or Yemen are alleged to have been involved in the operation. The evidence is currently equivocal as to whether the air platforms used were manned or unmanned. The first strike reportedly hit and destroyed the houses of Nuweir al-Arshani and his neighbour Muhammed Salih Abdullah al-Amri. Nuweir al-Arshani is said to have been killed instantly and there were a number of other reported casualties as a result of the initial attack. Shortly afterwards, a second strike is alleged to have occurred, killing and injuring civilians who had gathered in the street nearby. Estimates suggest that at least 14 named civilians were killed in the attack,

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<sup>23</sup> Amnesty International, *"Will I Be Next?" US drone strikes in Pakistan* (2013), pp. 24 ff. Available from [www.amnesty.org/en/library/asset/ASA33/013/2013/en/041c08cb-fb54-47b3-b3fe-a72c9169e487/asa330132013en.pdf](http://www.amnesty.org/en/library/asset/ASA33/013/2013/en/041c08cb-fb54-47b3-b3fe-a72c9169e487/asa330132013en.pdf).

<sup>24</sup> *Ibid.*, pp. 18 ff.

<sup>25</sup> Available from [www.justice.gov/ag/AG-letter-5-22-13.pdf](http://www.justice.gov/ag/AG-letter-5-22-13.pdf).

including a pregnant woman who was hit by flying shrapnel, and that a further 20 civilians were injured.

58. On 29 August 2012, precision-guided munitions were reportedly targeted at and killed a group of five men gathered in open space behind a mosque in the village of Khashamir in Hadramout province. Remotely piloted aircraft under the control of the United States are alleged to have been involved in the operation. Three of the deceased were reportedly members of Al-Qaida in the Arabian Peninsula. The evidence, however, strongly suggests that the other two men were civilians. One of the men killed in the attack was Salem Ben Ahmed Ben Salim Ali Jaber, an imam of the al-Mutadharirin mosque and an outspoken opponent of Al-Qaida in the Arab Peninsula. The other was Walid Abhallah Abdelhamud Ben Ali Jaber, a relative of the imam and a local traffic policeman. Inquiries into the affiliations and activities of these two victims strongly suggest that both men were civilians. In October 2013, Human Rights Watch reported the results of field research into this incident.<sup>26</sup> The Special Rapporteur notes that the targeted individuals who were with Salem Ben Ahmed Ben Salim Ali Jaber and Walid Abhallah Abdelhamud Ben Ali Jaber were reportedly engaged in military activities, and he notes the precision nature of the attack. Nonetheless, he considers that, since two civilians were also killed in the attack, it merits investigation and satisfies the criteria identified in paragraph 34 above.

59. On 2 September 2012, precision-guided munitions were fired at a vehicle that was being used as a civilian shuttle bus in the vicinity of Rad'a in the Walad Rabi' district of Al-Bayda province. The attack reportedly occurred whilst the vehicle was stationary at the intersection of two roads leading to the villages of Sabool and Manasseh. Aircraft under the control of the United States are alleged to have been involved in the operation. The evidence is currently equivocal as to whether the air platforms used were manned or unmanned. Eleven civilians, including three children and a pregnant woman, were reported to have been killed instantly, and a twelfth is reported to have died as the result of his injuries shortly after the attack. Inquiries into the affiliations and activities of the victims suggest that all of those killed were civilians. In October 2013, Human Rights Watch reported the results of field research into this incident.<sup>27</sup>

60. On 12 December 2013, precision-guided munitions were reportedly fired at a convoy of vehicles making their way to a wedding celebration outside the city of Rad'a in Al-Bayda province. Remotely piloted aircraft under the control of the United States are alleged to have been involved in the operation. At least 12, and possibly as many as 15, individuals were reportedly killed, and at least 10 other individuals sustained non-fatal injuries, including the bride. Initial reports suggest that the majority of the victims may have been civilians, although there are indications that members of Al-Qaida in the Arabian Peninsula may have been the targets and were among the dead. The attacks were condemned in a joint statement issued on 26 December 2013 by the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.<sup>28</sup> In February 2014, Human Rights Watch published the results of field research into the attack, which raised serious questions as to whether the attack conformed to the criteria set down in a speech by the

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<sup>26</sup> Human Rights Watch, *"Between a Drone and Al-Qaeda": The Civilian Cost of US Targeted Killings in Yemen* (2013), pp. 61 ff. Available at <http://www.hrw.org/reports/2013/10/22/between-drone-and-al-qaeda-0>.

<sup>27</sup> *Ibid.*, pp. 53 ff.

<sup>28</sup> Press release, "UN experts condemn lethal drone airstrikes in Yemen. Available from [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14145&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14145&LangID=E).

President of the United States on 23 May 2013, most notably that a strike would not proceed unless there was a “near certainty” that no civilians would be killed or injured.<sup>29</sup>

### **Somalia**

61. The information that was provided to the Special Rapporteur concerning the use of remotely piloted aircraft in Somalia was sparse. This appears to be due, at least in part, to the security situation on the ground, which has severely limited access to certain parts of the country by the media and has imposed significant constraints on reliable independent reporting. The Special Rapporteur has examined information concerning a number of specific strikes, but has concluded that only one of the incidents examined met the criteria set out in paragraph 34 above. That is not to be taken to imply that the level of civilian deaths in Somalia as the result of the use of remotely piloted aircraft is lower or higher than elsewhere. It merely confirms that there was very little reliable independent evidence of civilian casualties in the limited number of strikes in Somalia that have been brought to the attention of the Special Rapporteur.

62. On 24 February 2012, precision-guided munitions hit a convoy of vehicles in an area in the Lower Shabelle region, approximately 60 km south of Mogadishu. Remotely piloted aircraft under the control of the United States are alleged to have been involved in the operation. Reports indicate between four and seven fatalities in the strike, including Mohamed Sakr, a dual Egyptian-British national whose British citizenship had been revoked in 2010 on suspicion of his involvement in terrorism associated with Al Shabaab. Sources conflict on the number and identity of the deceased. However, one witness has identified Maxamed Abdullahi, a local tribesman, camel-herdsman and mediator, as having been among the dead. Inquiries suggest that he was a civilian.

### **Gaza**

63. On 27 December 2008, precision-guided munitions reportedly struck an outdoor location on a street opposite the Gaza Technical College in Gaza City. Remotely piloted aircraft under the control of Israel are alleged to have been involved in the operation. Twelve people were confirmed to have been killed in the strike.<sup>30</sup> The confirmed identities of the deceased can be found at: [unsrct-drones.com/](http://unsrct-drones.com/). Reports concerning the affiliations and activities of the victims suggest that all but one were civilians. Nine of those killed were reportedly students at the college. Human Rights Watch and B’Tselem have published the results of field research into this incident.<sup>31</sup> The Special Rapporteur understands that the competent Israeli authorities investigated the incident, but concluded that there was no evidence warranting criminal charges. The details of the investigation, and the reason for its conclusion, have not been made public.

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<sup>29</sup> See Human Rights Watch, *A Wedding That Became a Funeral*, pp. 5–6. See also “The Future of our Fight against Terrorism” remarks of the President of the United States for delivery at the National Defense University; United States, “Fact sheet: U.S. policy standards and procedures for the use of force”; and A/68/389, para. 76.

<sup>30</sup> The Special Rapporteur has been informed of the identity of one additional casualty who reportedly died later in hospital of wounds sustained during the attack. This information has not been independently verified.

<sup>31</sup> Human Rights Watch, *Precisely Wrong: Gaza Civilians Killed by Israeli Drone-Launched Missiles* (2009), pp. 14 ff. Available from [www.hrw.org/reports/2009/06/30/precisely-wrong-0](http://www.hrw.org/reports/2009/06/30/precisely-wrong-0). B’Tselem, “Palestinians who did not take part in the hostilities and were killed by Israeli security forces (not including the objects of targeted killings) in the Occupied Territories”. Available from [www.btselem.org/statistics/fatalities/any/by-date-of-event/wb-gaza/palestinians-killed-during-the-course-of-a-targeted-killing-not-hisul](http://www.btselem.org/statistics/fatalities/any/by-date-of-event/wb-gaza/palestinians-killed-during-the-course-of-a-targeted-killing-not-hisul).

64. On 4 January 2009, precision-guided munitions reportedly struck a house in Gaza City killing two young people. Remotely piloted aircraft under the control of Israel are alleged to have been involved in the operation. The deceased were named as Mahmud Khaled 'Alayyan al-Masharawi (aged 12) and Ahmad Khader Diyab Subayh (aged 17). Reports concerning the affiliations and activities of the victims suggest that they were both civilians. In June 2009, Human Rights Watch published the results of field research into this incident.<sup>32</sup> The Special Rapporteur understands that the competent Israeli authorities investigated the allegations made by Human Rights Watch but concluded that there was no evidence warranting criminal charges. The details of this investigation, including the reasons for its conclusion, have not been made public.

65. On 4 January 2009, precision-guided munitions reportedly struck the Al-Habbash family house in the Al-Sha'f area of Gaza City killing two children and severely injuring three other young people. Remotely piloted aircraft under the control of Israel are alleged to have been involved in the operation. The deceased were named as Shaza al-'Abd Muhammad al-Habbash (aged 10) and Isra Qusai Muhammad al-Habbash (aged 12). Those sustaining non-fatal injuries were named as Jamila al-'Abd al-Habbash (aged 14), Mahmud 'Amr al-Habbash (aged 15) and Muhammad 'Amr al-Habbash (aged 16). Reports concerning the affiliations and activities of the victims suggest that they were all civilians. In June 2009, Human Rights Watch published the results of field research into this incident.<sup>33</sup> The Special Rapporteur understands that the competent Israeli authorities investigated the allegations made by Human Rights Watch but concluded that there was no evidence warranting criminal charges. The details of the investigation, including the reasons for its conclusion, have not been made public.

66. On 5 January 2009, precision-guided munitions reportedly struck the 'Allaw family house in the Al-Sha'f area of Gaza City, killing one child and injuring two others. Remotely piloted aircraft under the control of Israel are alleged to have been involved in the operation. The deceased was named as Mu'min Mahmoud Talal 'Allaw (aged 10). Those sustaining non-fatal injuries were named as Muhammad 'Allaw (aged 13) and Iman 'Allaw (aged 8). Reports concerning the affiliations and activities of the victims suggest that they were all civilians. In June 2009, Human Rights Watch published the results of field research into this incident.<sup>34</sup> The Special Rapporteur understands that the competent Israeli authorities investigated the allegations made by Human Rights Watch but concluded that there was no evidence warranting criminal charges. The details of the investigation, including the reasons for its conclusion, have not been made public.

67. On 9 January 2009, precision-guided munitions reportedly struck the Salha family house in the Beit Lahia Housing Project in Gaza, killing two women and six children. Remotely piloted aircraft under the control of Israel are alleged to have been involved in the operation. The deceased were named as Randa Salha (aged 34), Fatma Salha (aged 22), Rouala Salha (aged 1), Baha al-Din Salha (aged 4), Rana Salha (aged 12) and Diya al-Din Salha (aged 14). Reports concerning the affiliations and activities of the adult victims suggest that they were all civilians. In July 2009, Amnesty International published the results of field research into the incident.<sup>35</sup>

68. On 19 November 2012, precision-guided munitions reportedly struck an area of farmland adjacent to a house in Ahmad Yassin Street, north of Gaza City, killing three

<sup>32</sup> Human Rights Watch, *Precisely Wrong*, pp. 21 ff.

<sup>33</sup> *Ibid.*, pp. 22 ff.

<sup>34</sup> *Ibid.*, pp. 24 ff.

<sup>35</sup> Amnesty International, *Israel/Gaza: Operation Cast Lead: 22 Days of Death and Destruction* (London, 2009), pp. 11 and 12. Available from [www.amnesty.org/en/library/info/MDE15/015/2009/en](http://www.amnesty.org/en/library/info/MDE15/015/2009/en).



people. Remotely piloted aircraft under the control of Israel are alleged to have been involved in the operation. The deceased were a father, his 12-year-old daughter, and his 19-year-old son. All three were reportedly picking spearmint at the time of the attack. Investigations conducted by the Office of the United Nations High Commissioner for Human Rights indicate that all three victims were civilians; that no warnings were issued to residents prior to the attack; and that no militant activities were being carried out in the location (A/HRC/22/35/Add.1, para. 13).

69. On 21 November 2012, precision-guided munitions struck an olive farm east of Khan Younis, southern Gaza Strip, killing two people and injuring a third. Remotely piloted aircraft under the control of Israel are alleged to have been involved in the operation. The deceased were named as Ibrahim Abu Nasser (84 years old) and Amira Abu Nasser (his 14-year-old granddaughter). Mohamed Abu Nasser (aged 42) sustained non-fatal injuries in the attack. In February 2013, Human Rights Watch published the results of field research into this incident.<sup>36</sup> Investigations conducted by the Office of the United Nations High Commissioner of Human Rights indicate that all three victims were civilians; that they were working on the farm at the time of the attack; that no warnings were issued to residents prior to the attack; and that no militant activities were being carried out in the location (*ibid.*).

#### **D. Achieving a consensus on the applicable legal principles**

70. In his interim report to the General Assembly, the Special Rapporteur identified a number of legal issues on which there is currently no clear international consensus, or where current practices and interpretations appear to challenge established legal norms (paras. 51–76). Legal uncertainty in relation to the interpretation and application of the core principles of international law governing the use of deadly force in counter-terrorism operations leaves dangerous latitude for differences of practice by States. This runs counter to the obligation identified in paragraph 6 (s) of General Assembly resolution 68/178 (see para. 23 above); fails to provide adequate protection for the right to life; poses a threat to the international legal order; and runs the risk of undermining international peace and security.

71. There is thus an urgent and imperative need to reach a consensus between States on, *inter alia*, the following issues:

(a) Does the international law principle of self-defence entitle a State to engage in non-consensual lethal counter-terrorism operations on the territory of another State against a non-State armed group that poses a direct and immediate threat of attack, even when the armed group concerned has no operational connection to its host State? If so, under what conditions does such a right of self-defence arise? Does such a right arise where the territorial State is judged to be unable or unwilling to prevent the threat from materializing? If so, what are the criteria for determining “unwillingness” or “inability” to act?<sup>37</sup>

(b) Is the international law principle of self-defence confined to situations in which an armed attack has already taken place, or does it entitle a State to carry out pre-emptive military operations against a non-State armed group on the territory of another

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<sup>36</sup> Human Rights Watch, “Israel: Gaza Airstrikes Violated Laws of War”, 12 February 2012. Available at [www.hrw.org/news/2012/02/12/israel-gaza-airstrikes-violated-laws-war](http://www.hrw.org/news/2012/02/12/israel-gaza-airstrikes-violated-laws-war).

<sup>37</sup> For a discussion of the issues, see the Special Rapporteur’s interim report to the General Assembly, A/68/389, paras. 55 and 56; and the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/68/382, paras. 88–92.

State, without the territorial State's consent, where it judges that there is an imminent risk of attack to its own interests? If so, how is imminence to be defined?<sup>38</sup>

(c) Does the international humanitarian law test of intensity of hostilities (which is one of the criteria determining whether a non-international armed conflict exists) require an assessment of the severity and frequency of armed attacks occurring within defined geographical boundaries? In applying the intensity test to a non-State armed group operating transnationally, is it legitimate to aggregate armed attacks occurring in geographically diverse locations in order to determine whether, taken as a whole, they cross the intensity threshold so as to amount to a non-international armed conflict? If it is possible for a State to be engaged in a non-international armed conflict with a non-State armed group operating transnationally, does this imply that a non-international armed conflict can exist which has no finite territorial boundaries?<sup>39</sup>

(d) Does international humanitarian law permit the targeting of persons directly participating in hostilities who are located in a non-belligerent State and, if so, in what circumstances?<sup>40</sup>

(e) Do the pattern and frequency of the armed attacks currently being perpetrated by Al-Qaida, and the various affiliate organizations in different parts of the world that claim allegiance to Al-Qaida, satisfy (or continue to satisfy) the criteria of organization and intensity required under international humanitarian law to qualify as a state of armed conflict?<sup>41</sup>

(f) Assuming that a non-international armed conflict exists, does the test of "continuous combat function", as elaborated by the International Committee of the Red Cross for determining whether a person is a "member" of an armed group (such that that person may be targeted with lethal force at any time) reflect customary international law? If not, what is the correct test?<sup>42</sup>

(g) Does the guidance promulgated by the International Committee of the Red Cross for "direct participation in hostilities" reflect customary international law? In particular, does an individual who has participated in hostilities cease to be targetable during a pause in his or her active involvement? Does providing accommodation, food, financing, recruitment or logistical support amount to "direct participation in hostilities" for targeting purposes?<sup>43</sup>

(h) In the context of non-international armed conflict, when (and under what circumstances) does international humanitarian law impose an obligation to capture rather than kill a legitimate military target where this is feasible?<sup>44</sup>

72. The Special Rapporteur invites Member States to express their views on these questions prior to the twenty-seventh session of the Human Rights Council and (subject to

<sup>38</sup> See A/68/389, paras. 57 and 58; A/68/382, para. 92.

<sup>39</sup> See A/68/389, paras. 62–65; A/68/382, paras. 64–66.

<sup>40</sup> Ibid.

<sup>41</sup> See A/68/389, paras. 66–69; A/68/382, paras. 55–63. For a comprehensive and up-to-date assessment of the threat of armed attack by Al-Qaida and its various affiliate organizations, and the degree of operational coordination, organization and leadership among the various groups, see the fifteenth report of the Analytical Support and Sanctions Monitoring Team established pursuant to Security Council resolution 1526 (2004), transmitted with the letter dated 22 January 2014 from the Chair of the Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities addressed to the President of the Security Council (S/2014/41).

<sup>42</sup> A/68/389, para. 69; A/68/382, para. 68.

<sup>43</sup> A/68/389, paras. 70–72; A/68/382, paras. 69–71.

<sup>44</sup> A/68/382, paras. 77–79.

any requests for confidentiality) will publish the responses as they are received on the official web page of the mandate.

73. The Special Rapporteur recommends that the Council take effective steps, by means of an appropriate resolution aimed at:

- Urging all States to ensure that any measures taken to counter terrorism, including the use of remotely piloted aircraft, comply with their obligations under international law, including international humanitarian law and international human rights law, in particular the principles of precaution, distinction and proportionality;
- Urging all States to ensure that, in any case in which there is a plausible indication from any apparently reliable source that civilians have been killed or injured in a counter-terrorism operation, including through the use of remotely piloted aircraft, the relevant authorities conduct a prompt, independent and impartial fact-finding inquiry, and provide a detailed public explanation;
- Urging all States that use remotely piloted aircraft for lethal counter-terrorism operations, and all States on whose territory such operations occur, to clarify their position on the legal and factual issues raised in the present report and the Special Rapporteur's interim report to the General Assembly (A/68/389); to declassify, to the maximum extent possible, information relevant to lethal extraterritorial counter-terrorism operations; to make public the results of all fact-finding investigations into alleged civilian casualties resulting from such operations; and to release their own data on the level of civilian casualties inflicted through the use of remotely piloted aircraft, together with information on the evaluation methodology used.

74. Further, the Special Rapporteur recommends that the Council convene an interactive panel discussion of experts at its twenty-seventh session to further deliberate on the issues raised in the present report; and mandate the Office of the United Nations High Commissioner for Human Rights to submit a summary of the deliberations of the panel discussion to the Council at its twenty-eighth session.

## **IV. Conclusions and recommendations**

75. **The Special Rapporteur:**

(a) **Calls upon the States identified in chapter III, section C, of the present report to disclose the results of any fact-finding inquiries into the alleged incidents listed therein, or to explain why no such inquiries have been made;**

(b) **Calls upon the States on whose territory those strikes reportedly took place to provide as much information as possible in connection with those strikes;**

(c) **Encourages all States to respond to his requests for clarification of their position in relation to the questions raised in paragraph 71 of the present report.**

(d) **Recommends that the Council adopt a resolution phrased in the terms outlined in paragraphs 73 and 74 of the present report.**

United Nations

A/68/389\*



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Item 69 (b) of the provisional agenda\*\*

**Promotion and protection of human rights: human rights  
questions, including alternative approaches for improving the  
effective enjoyment of human rights and fundamental freedoms**

**Promotion and protection of human rights and fundamental  
freedoms while countering terrorism**

**Note by the Secretary-General**

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, submitted in accordance with General Assembly resolution [66/171](#) and Human Rights Council resolution [15/15](#).

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\* Reissued for technical reasons on 18 October 2013.

\*\* [A/68/150](#).



## **Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism**

### *Summary*

The present report is the third annual report submitted to the General Assembly by the current Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

The key activities undertaken by the Special Rapporteur between 10 January and 8 August 2013 are listed in section II. Section III is an interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations. The Special Rapporteur intends to submit a final report on this subject to the Human Rights Council in 2014.

### **III. Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations**

#### **A. Introduction**

20. In January 2013, the Special Rapporteur launched an inquiry into the use of remotely piloted aircraft, or drones, in extraterritorial lethal counter-terrorism operations, including in the context of asymmetrical armed conflict. The central objective of the inquiry is to evaluate allegations that the increasing use of remotely piloted aircraft has caused disproportionate civilian casualties, and to make recommendations concerning the duty of States to conduct independent and impartial investigations. The present report is in parallel to that submitted to the General Assembly by the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/68/382). While the two reports are separate and independent, they cover, to some extent, the same ground.

21. With the assistance of a team of researchers, the Special Rapporteur has identified 33 sample remotely piloted aircraft strikes that appear to have resulted in civilian casualties. While the fact that civilians have been killed or injured does not necessarily point to a violation of international humanitarian law, it undoubtedly raises issues of accountability and transparency. Where possible, the Special Rapporteur's team has assembled direct evidence on individual strikes. This process has taken longer than originally envisaged. The Special Rapporteur is not yet able to report on the results because he is currently engaged in dialogue with relevant States in an effort to clarify the circumstances of the incidents.<sup>1</sup> He will present his findings on the individual strikes to the Human Rights Council once that process has been completed.

22. In the present report, the Special Rapporteur sets out a framework for examining the factual and legal issues by reference to the principles laid down in the United Nations Global Counter-Terrorism Strategy. In section IV of the plan of action for the Global Strategy, States reaffirm that States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law.<sup>2</sup> The proliferation of weaponized remotely piloted aircraft technology, taken together with the increasingly asymmetrical nature of modern conflicts, poses challenges for the framework of international law. This has led some to argue that the existing rules require "translation" to take account of changing circumstances.<sup>3</sup>

23. Section B provides an overview of the capabilities and deployment of weaponized remotely piloted aircraft and the levels of reported civilian casualties.<sup>4</sup>

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<sup>1</sup> Israel has to date not responded to the Special Rapporteur's inquiries, given its decision of 14 May 2012 to suspend its relationship with the Human Rights Council.

<sup>2</sup> General Assembly resolution 60/288, annex, sect. IV, para. 2.

<sup>3</sup> See, for example, Harold Koh, "How to end the forever war?", address to the Oxford Union, 7 May 2013.

<sup>4</sup> Differences of view about the forms of activity that amount to direct participation in hostilities under international humanitarian law will almost inevitably result in different assessments of civilian casualty levels. The Special Rapporteur adopts herein the interpretative guidance on direct participation in hostilities promulgated by the International Committee of the Red Cross (ICRC) in Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva, ICRC, 2009); see paras. 69-72.

In section C, which pertains to issues of accountability and transparency, the Special Rapporteur makes specific recommendations aimed at strengthening compliance with the applicable legal standards. In section D, he identifies a number of legal issues on which there is either no clear international consensus, or where current practices and interpretations appear to challenge established legal norms. He summarizes the principal areas of controversy and sets out the competing arguments. He is currently endeavouring to clarify the position of Member States on these questions and will report on the results of this consultation process to the Human Rights Council once they are available.

24. The Special Rapporteur does not use the expression “targeted killing” herein because its meaning and significance differ according to the legal regime applicable in specific factual circumstances. In a situation qualifying as an armed conflict, the adoption of a pre-identified list of individual military targets is not unlawful; if based upon reliable intelligence it is a paradigm application of the principle of distinction. Conversely, outside situations of armed conflict, international human rights law prohibits almost any counter-terrorism operation that has the infliction of deadly force as its sole or main purpose (A/HRC/14/24/Add.6, paras. 28 and 32-33). The threshold question therefore is not whether a killing is targeted, but whether it takes place within or outside a situation of armed conflict (see paras. 62-68 below).

## **B. Overview of deployment of remotely piloted aircraft and reported civilian casualty rates**

25. In conventional theatres of armed conflict, the primary function of remotely piloted aircraft is the provision of intelligence, surveillance, targeting and reconnaissance. Since 1999, remotely piloted aircraft have been used in a direct combat role for target acquisition, using laser markers to designate a target that is then attacked by precision-guided missiles discharged from conventional fixed-wing or rotary-blade aircraft. In February 2001, a missile was remotely test-fired for the first time from a Predator remotely piloted aircraft. The tactical military advantage of arming remotely piloted aircraft, rather than using them simply for the purposes of intelligence, surveillance, targeting and reconnaissance, is said to be speed of response from the moment of sighting a target to the swift delivery of deadly force by precision-guided missile.

26. The most common forms of weaponized remotely piloted aircraft are the medium altitude long endurance platforms. These include the Heron and Hermes systems developed by the Malat (Unmanned Aerial Vehicle) division of Israel Aerospace Industries and used by the Israeli military, and the Predator and Reaper systems developed by General Atomics Aeronautical Systems, Inc., and used by the United States and, in the case of the Reaper, the United Kingdom. These can be armed with a range of precision-guided munitions. The Reaper fleet of the United Kingdom, for example, currently employs two types of munition: the guided bomb unit (GBU)-12 laser guided bomb and the Hellfire air-to-ground missile (AGM)-114 precision-guided missile.

27. The Reaper has a range of 5,900 km, a maximum airspeed of 250 knots and a maximum unloaded flying altitude of 50,000 feet; an armed Reaper will typically fly at approximately 11,000 to 25,000 feet. The Reaper can fly for an average of between 16 and 18 hours and hand over surveillance to another remotely piloted

aircraft. It has a full-motion video sensor ball that includes three cameras, a synthetic aperture radar and laser technology for the purpose of target designation. A detailed video and computerized record of all sorties is maintained, providing a solid audit trail of operations. There are three networks for communication: a secure Internet-based chat function, a secure radio routed via satellite and a secure telephone system.

28. Modern remotely piloted aircraft can provide near-real-time video feeds around the clock. If used in strict compliance with the principles of humanitarian law, they can reduce the risk of civilian casualties by significantly improving overall situational awareness. The ability of drones to loiter and gather intelligence for long periods before a strike, coupled with the use of precision-guided munitions, is therefore a positive advantage from a humanitarian law perspective.<sup>5</sup> As the International Committee of the Red Cross (ICRC) has noted, “any weapon that makes it possible to carry out more precise attacks, and helps avoid or minimise incidental loss of civilian life, injury to civilians, or damage to civilian objects, should be given preference over weapons that do not”.<sup>6</sup>

### **Afghanistan**

29. In Afghanistan, the United States and the United Kingdom have relied increasingly on remotely piloted aircraft as the conflict has progressed. According to the United Nations Assistance Mission in Afghanistan (UNAMA), there was a steady recorded rise in the number of weapons released by remotely piloted aircraft from 2009 to 2012. Figures released by the United States Air Force in November 2012 confirm this. The number of remotely piloted aircraft weapon releases rose from 294 in 2011 to 447 during the first 11 months of 2012. According to data released by the United States Central Command in January 2013, remotely piloted aircraft by then accounted for 1 in 4 of all air weapon releases by the International Security Assistance Force (ISAF). Only Reapers operated by the United Kingdom have flown more than 46,000 hours in Afghanistan, averaging three sorties per day. As at the end of July 2013, 405 weapons had been discharged by remotely piloted aircraft operated by the United Kingdom in Afghanistan.

30. The first civilian casualties relating to remotely piloted aircraft were reported in February 2002. However, official estimates have not, until recently, disaggregated casualties by reference to the type of air platform used. At the end of 2012, UNAMA released disaggregated figures for the first time, showing that 16 civilians had been killed and 5 injured owing to confirmed remotely piloted aircraft strikes during the course of the year. In its latest published figures, covering the first six months of 2013, UNAMA documented 15 civilian deaths and 7 injuries in seven separate attacks by remotely piloted aircraft targeting anti-Government forces.<sup>7</sup> UNAMA acknowledges that the figures may be an underestimate, but assesses that, in recent years at least, confirmed remotely piloted aircraft strikes appear to have inflicted

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<sup>5</sup> See Michael N. Schmitt, “Precision attack and international humanitarian law”, *International Review of the Red Cross*, vol. 87, No. 859 (September 2005).

<sup>6</sup> ICRC, “The use of armed drones must comply with laws”, 10 May 2013, available from [www.icrc.org/eng/resources/documents/interview/2013/05-10-drone-weapons-ihl.htm](http://www.icrc.org/eng/resources/documents/interview/2013/05-10-drone-weapons-ihl.htm).

<sup>7</sup> See UNAMA, “Afghanistan: mid-year report 2013: protection of civilians in armed conflict” (Kabul, July 2013). Available from <http://unama.unmissions.org/LinkClick.aspx?fileticket=EZoxNuqDtps%3d&tabid=12254&language=en-US>.



lower levels of civilian casualties than aerial attacks carried out by other air platforms.<sup>8</sup>

31. The United Kingdom has reported only one civilian casualty incident, in which four civilians were killed and two civilians injured in a remotely piloted aircraft strike by the Royal Air Force in Afghanistan on 25 March 2011. The incident was investigated by the Joint Incident Assessment Team at ISAF, which concluded that the operation had been directed at two pick-up trucks believed to be carrying explosives and found that the actions of the crew had been in accordance with the applicable rules of engagement.<sup>9</sup> The United States has also partially declassified the findings of an investigation report concerning an incident on 21 February 2010 in which 23 civilians were reportedly killed as the result of an attack on a convoy in which a Predator crew was found to have provided misleading situational information. The report found evidence of inaccurate and unprofessional reporting by the Predator crew, together with a predisposition to engage in kinetic activity (the release of a missile). It recommended administrative and disciplinary sanctions.<sup>10</sup>

### **Pakistan**

32. During his visit to Pakistan in March 2013, the Special Rapporteur was provided with statistics from the Ministry of Foreign Affairs recording at least 330 remotely piloted aircraft strikes in the Federally Administered Tribal Areas of Pakistan since 2004. Government records showed that there had been at least 2,200 deaths caused by such strikes and that, in addition, at least 600 people had suffered serious injuries. Officials pointed out that efforts to identify the exact number of deceased (and therefore to establish the exact number of civilian deaths) were hampered by security concerns and by topographical and institutional obstacles to effective and prompt investigation on the ground by officials working on behalf of the Federally Administered Tribal Areas secretariat, as well as by the cultural tradition of Pashtun tribes in the Federally Administered Tribal Areas of burying their dead as soon as possible. Nonetheless, the Special Rapporteur was informed that the Government was able to confirm that at least 400 civilians had been killed as a result of remotely piloted aircraft strikes and a further 200 individuals were regarded as probable non-combatants. Officials indicated that, owing to underreporting and obstacles to effective investigation, those figures were likely to be an underestimate.

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<sup>8</sup> This assessment has recently been called into question by media reports citing research that reached the opposite conclusion (said to be based on classified United States data covering a 12-month period between mid-2010 and mid-2011). See [www.theguardian.com/world/2013/jul/02/us-drone-strikes-afghan-civilians](http://www.theguardian.com/world/2013/jul/02/us-drone-strikes-afghan-civilians).

<sup>9</sup> See [www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120626/text/120626w0002.htm#120626119000810](http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120626/text/120626w0002.htm#120626119000810).

<sup>10</sup> Memorandum for Commander, United States Forces — Afghanistan, 13 April 2010, executive summary for AR-15-6 investigation, 21 February 2010, air-to-ground engagement in the vicinity of Shahidi Hassas, Oruzgan.

33. There is significant variation in the civilian casualty rates recorded by the principal media monitoring organizations.<sup>11</sup> They coincide, however, in recording a marked drop in reported civilian casualties from remotely piloted aircraft strikes in the Federally Administered Tribal Areas during 2012 (both in absolute numbers and as a percentage of overall fatalities),<sup>12</sup> a trend that continued during the first half of 2013.

#### **Yemen**

34. The first remotely piloted aircraft strike reported in Yemen occurred on 3 November 2002 in an operation aimed at killing a suspect in the bombing of the *USS Cole* in February 2000. It was nine years before the next confirmed strike was conducted, on 5 May 2011, in a failed attempt to kill cleric Anwar al-Awlaki, who held dual United States and Yemeni nationality.<sup>13</sup> By the end of 2011, the United States was reported to have conducted 29 strikes in Yemen by means of remotely piloted aircraft, although the Special Rapporteur has not yet been able to confirm the figure. In 2012, United States remotely piloted aircraft and other air strikes intensified as the United States supported actions by Yemeni ground forces to dislodge militants from their positions in the south of the country. In mid-2013, the United States launched a series of remotely piloted aircraft strikes following reported terrorist threats to United States interests.

35. Many of the confirmed strikes in Yemen appear to have been directed at vehicles moving between conurbations, in an apparent effort to minimize civilian loss of life. In general, and with the notable exception of a cruise missile strike on a tented camp in Al Majalah in 2009, in which more than 40 civilians were reported to have been killed, the United States appears to have succeeded in avoiding the infliction of large-scale loss of civilian life in Yemen. Nonetheless, there have been a number of incidents in which civilians have reportedly been killed or injured. The highest estimates monitored by the media suggest that the total number of civilians to have been killed or injured as the result of confirmed remotely piloted aircraft strikes since 2011 is between 21 and 58 (of a total of between 268 and 393 fatalities). The most serious single incident to date was a remotely piloted aircraft attack on 2 September 2012 in which 12 civilians were reportedly killed in the vicinity of Rada'a.

#### **Libya**

36. The 2011 operation by the North Atlantic Treaty Organization (NATO) in Libya was carried out almost exclusively through the deployment of air power. In addition to conventional aircraft, the United States carried out armed attacks using

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<sup>11</sup> For the period from June 2004 to August 2013, the Bureau of Investigative Journalism estimates a minimum of 407 reported civilian casualties of 2,513 killed; Long War Journal reports 153 civilian casualties among 2,695 killed; and the New America Foundation estimates at least 258 civilians killed (along with 196 or more victims of unknown status) of a total of at least 2,054 killed by United States drones.

<sup>12</sup> For 2012, the Bureau of Investigative Journalism estimates 7 civilian deaths of a total of 238 fatalities (2.9 per cent); Long War Journal estimates 4 civilian deaths of a total of 300 fatalities (1.3 per cent); and the New America Foundation estimates 5 civilian deaths of a total of 222 fatalities (2.25 per cent).

<sup>13</sup> A number of United States air strikes involving non-remotely piloted aircraft platforms and missile attacks are reported to have been conducted in Yemen since December 2009.

Predator and Reaper remotely piloted aircraft between April and September 2011. The Royal Air Force of the United Kingdom also flew remotely piloted aircraft combat flights. Data later issued by NATO indicated that its aircraft conducted 17,939 armed sorties, firing 7,642 missiles. Armed remotely piloted aircraft conducted 250 of those sorties, of which 145 resulted in the discharge of a missile. NATO informed the International Commission of Inquiry on Libya that it had utilized a standard of zero expectation of death or injury to civilians in its campaign, and that no targets had been struck if there had been any reason to believe civilians would be killed or injured (A/HRC/19/68). The Commission reported that NATO had succeeded in conducting a highly precise campaign with demonstrable determination to avoid civilian casualties, but nonetheless found evidence of civilian loss of life and recommended investigations to determine the precise level of civilian casualties (ibid.).<sup>14</sup> The Ministry of Defence of the United Kingdom conducted its own investigations into all incidents involving reported civilian casualties that might have involved British assets. While the report itself remains classified, the Ministry has informed the Special Rapporteur that none of the reported incidents involved a remotely piloted aircraft operated by the United Kingdom.

### **Iraq**

37. The United States deployed a small number of unarmed Predators from the beginning of the conflict in Iraq. By 2004, it had an operational fleet of weaponized remotely piloted aircraft in use. According to *Jane's International Defence Review*, from July 2005 to June 2006, United States Predators had participated in more than 242 separate raids, engaged 132 troops in contact force-protection actions, fired 59 Hellfire missiles, surveyed 18,490 targets, escorted four convoys and flown 2,073 sorties for more than 33,833 flying hours. Figures for the period 2008-2011 indicate that, of a total of 17,009 armed remotely piloted aircraft sorties, missiles were discharged on 48 occasions. The Royal Air Force of the United Kingdom flew some of those remotely piloted aircraft sorties under a dual badging arrangement. The Special Rapporteur has not to date been able to obtain disaggregated figures for the number of civilian casualties caused by remotely piloted aircraft strikes in Iraq. United States officials have indicated, however, that the dominant use of remotely piloted aircraft during the Iraq conflict and the ensuing insurgency was for intelligence, surveillance, targeting and reconnaissance purposes.

### **Somalia**

38. The United States has engaged in extensive covert counter-terrorism operations in Somalia. The first reported strike by an armed remotely piloted aircraft occurred on 23 June 2011 and appears to have been aimed at a target alleged to be acting as a liaison between Al-Qaida in East Africa and Al-Shabaab. During the second half of 2011, there were unconfirmed media reports alleging that eight further drone strikes aimed at so-called "high-value targets" had been conducted in Somalia. Early in 2012, two confirmed strikes killed Bilal al-Berjawi and Mohammed Sakr, both of whom were alleged to have links with Al-Shabaab. There have been no reported United States drone strikes in Somalia since February 2012.

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<sup>14</sup> See also Human Rights Watch, *Unacknowledged Deaths: Civilian Casualties in NATO's Air Campaign in Libya* (14 May 2012); Amnesty International, "Libya: The forgotten victims of NATO strikes", available from <http://www.amnesty.org/en/library/info/MDE19/003/2012/en>.

## Gaza

39. Remotely piloted aircraft have been implicated in a significant number of lethal counter-terrorism operations by Israel. During Operation Cast Lead, from 27 December 2008 to 18 January 2009, remotely piloted aircraft were used by the Israel Defense Forces in conjunction with fixed-wing and rotary-blade aircraft. The availability of virtually real-time intelligence and the extensive use of precision-guided munitions notwithstanding, Israel has acknowledged that its military operation resulted in “many civilian deaths and injuries, and significant damage to public and private property in Gaza”.<sup>15</sup> Israel has not to date released disaggregated civilian casualty estimates in a form that would enable an analysis of the specific impact of remotely piloted aircraft (either as a direct weapons-delivery system or for the purposes of target acquisition). Human rights organizations, however, have identified a number of instances in which munitions apparently launched from remotely piloted aircraft hit civilians in circumstances where there was no readily identifiable military target in the vicinity.<sup>16</sup> Investigations carried out by the competent Israeli authorities concluded that there was no evidence warranting criminal charges in respect of the incidents.

40. The Office of the United Nations High Commissioner for Human Rights has similarly reported that in the run-up to, and during, Operation Pillar of Defence, from 14 to 21 November 2012, Israel used remotely piloted aircraft in Gaza, some of which reportedly caused civilian casualties ([A/HRC/22/35/Add.1](#)). In a recent report on investigations into alleged humanitarian law violations during this operation, the Israel Defense Forces noted that the operation “was primarily based on precision airstrikes”.<sup>17</sup> The report points out that such strikes “are relatively highly documented”. It acknowledges that “there is indeed a basis for the claim that as a result of [Israel Defense Forces] attacks, uninvolved civilians were killed or injured or civilian property was damaged, usually as unintended damage resulting from an attack against military targets, or alternatively from operational errors, where civilians were mistakenly identified as terrorist suspects”.<sup>18</sup> The investigation found evidence of what it termed “professional flaws” in some of the incidents examined up to April 2013, but did not consider that there was evidence warranting a criminal investigation.

## C. Accountability and transparency

41. The single greatest obstacle to an evaluation of the civilian impact of drone strikes is lack of transparency, which makes it extremely difficult to assess claims of precision targeting objectively (see [A/HRC/14/24/Add.6](#)). As the United Nations High Commissioner for Human Rights pointed out during an address to the Security

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<sup>15</sup> Israel Defense Forces, “The operation in Gaza — Factual and legal aspects”, July 2009, available from [www.mfa.gov.il/mfa/foreignpolicy/terrorism/palestinian/pages/operation\\_in\\_gaza-factual\\_and\\_legal\\_aspects.aspx](http://www.mfa.gov.il/mfa/foreignpolicy/terrorism/palestinian/pages/operation_in_gaza-factual_and_legal_aspects.aspx).

<sup>16</sup> Human Rights Watch, *Precisely Wrong: Gaza Civilians Killed by Israel Drone-Launched Missiles* (30 June 2009), available from [www.hrw.org/en/reports/2009/06/30/precisely-wrong-0](http://www.hrw.org/en/reports/2009/06/30/precisely-wrong-0).

<sup>17</sup> Israel Defense Forces, “The examination of alleged misconduct during operation ‘Pillar of Defence’ — An update”, 11 April 2013.

<sup>18</sup> *Ibid.*

Council on 18 August 2013, the current lack of transparency creates an accountability vacuum and affects the ability of victims to seek redress.<sup>19</sup>

42. In February 2013, the Public Commission to Examine the Maritime Incident of 31 May 2010 (Tukel Commission) published its careful and comprehensive review of Israeli mechanisms for examining and investigating complaints and claims of violations of the laws of armed conflict according to international law. The Commission recommended that principles derived from international human rights law should apply, with appropriate modifications, to the investigation of alleged violations of international humanitarian law. From an analysis of a broad range of sources, the Commission concluded that a preliminary inquiry (which it referred to as a “fact-finding assessment”) must take place in any case in which there have been, or appear to have been, civilian casualties that were not anticipated when the attack was planned.<sup>20</sup> According to the Commission, the requirement for such an inquiry does not depend on the existence of a prima facie suspicion of the commission of a war crime. A preliminary fact-finding investigation is required in any case where the information about possible civilian casualties is partial or circumstantial. The Commission rightly stressed that the information necessary to trigger such an inquiry could come from any plausible source, including a non-governmental organization.

43. Where an initial fact-finding investigation discloses reasonable grounds to suspect that a war crime may have been committed, a formal criminal investigation must be opened. The context in which civilian casualties have occurred will determine whether such a suspicion exists. Any criminal investigation must meet the core international human rights law standards of independence, impartiality, promptness, effectiveness and transparency, suitably adapted to the context. The requirement for independence and impartiality does not preclude an investigation conducted within the framework of a military justice system. As the Commission emphasized, however, those conducting the investigation must be independent of those under investigation, and certainly not subject to the same chain of command. The requirements of promptness and effectiveness must of course be applied in a manner that takes account of the circumstances of the conflict.

44. Significantly, the Commission considered that the principle of transparency should apply to investigations into alleged war crimes because it enhances public scrutiny and contributes to accountability. As the Commission rightly observed, transparency promotes the central objectives of humanitarian law, namely increasing compliance with the principles of distinction, proportionality and precaution, and deterring the commission of future violations.

45. Although the Commission’s recommendations on transparency were directed primarily to formal criminal investigations, the purposive considerations that it identified apply with equal force to preliminary fact-finding inquiries. Indeed, where there is found to be no basis for opening a criminal investigation into civilian deaths, the need for transparency is arguably heightened. Put simply, there is an onus on any State using lethal force to account for civilian casualties. In a modest extension of the approach adopted by the Commission, the Special Rapporteur

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<sup>19</sup> Available from [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13642&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13642&LangID=E).

<sup>20</sup> In the light of the stated position of the United Kingdom and United States (see paras. 75-76), the requirement for such a preliminary fact-finding investigation would appear to be triggered whenever there is evidence to suggest civilian loss of life.

considers that the principle of transparency should apply to the preliminary fact-finding inquiries required in any case where there are grounds to believe that civilians may have been killed or injured. Subject to redactions on grounds of national security, a full explanation should be made public in each case. In the view of the Special Rapporteur, this obligation ought to be viewed as an inherent part of the State's legal obligations of accountability under international humanitarian law and international human rights law.

### **United States**

46. In the United States, the involvement of CIA in lethal counter-terrorism operations in Pakistan and Yemen has created an almost insurmountable obstacle to transparency. This is because, just as all secret services, it operates on the basis of neither confirming nor denying its operations. Similarly, the conduct of covert targeting operations by United States special forces under the auspices of the Joint Special Operations Command is almost invariably classified.<sup>21</sup> In June 2012, the President of the United States, Barack Obama, declassified the fact that the United States was engaged in conducting covert anti-terrorism operations in Somalia and Yemen, although no information about individual operations was released at that time. Nevertheless, even the existence of the CIA programme in Pakistan remains technically classified. This stance has become increasingly difficult to justify, especially because remotely piloted aircraft operations in Pakistan have been publicly acknowledged by the President and the Secretary of State.

47. One consequence is that the United States has to date failed to reveal its own data on the level of civilian casualties inflicted through the use of remotely piloted aircraft in classified operations conducted in Pakistan and elsewhere, or any information on its methodology for evaluating this. The Special Rapporteur does not accept that considerations of national security justify withholding statistical and basic methodological data of this kind, and he notes that the Director of CIA has publicly called for information on civilian casualties to be released in the interests of transparency.<sup>22</sup>

48. In May 2013, the President signalled that the Administration intended to transfer control of lethal counter-terrorism operations conducted outside areas of active hostilities from CIA to the Department of Defense. This was said to be partly for the purpose of increasing transparency and accountability.<sup>23</sup> The Special Rapporteur understands that this process of migration is under way and that the Administration aims to have completed it by the end of 2014. The President also indicated that consideration would be given to new judicial or executive mechanisms to increase independent oversight.<sup>24</sup>

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<sup>21</sup> See Philip Alston, "The CIA and targeted killings beyond borders", *Harvard National Security Journal*, vol. 2, No. 2 (2011), p. 283.

<sup>22</sup> See [www.intelligence.senate.gov/130207/transcript.pdf](http://www.intelligence.senate.gov/130207/transcript.pdf).

<sup>23</sup> Prepared remarks by the President of the United States at the National Defense University on the Administration's counter-terrorism policy, 23 May 2013; see also "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.

<sup>24</sup> *Ibid.*

### **United Kingdom**

49. The Royal Air Force is accountable, through the Ministry of Defence, to Parliament. This allows for a degree of transparency, including as to civilian casualties, although the Ministry does not comment publicly on the use of remotely piloted aircraft in connection with special operations. The Ministry has informed the Special Rapporteur that, under operating procedures followed by the United Kingdom in Afghanistan, every remotely piloted aircraft weapons discharge is the subject of internal review involving the senior qualified weapons instructor. A mission report is prepared and is then reviewed by the most senior British officer at the Combined Air Operations Centre in Afghanistan and his or her legal adviser. This includes a review of video footage and communications reports. If there is any indication of civilian casualties, the incident is referred to the Joint Incident Assessment Team at ISAF, whose personnel are independent of the chain of command involved in any strike. Individuals are presumed to be civilian for this purpose unless it can be established that they were directly involved in immediate attempts or plans to threaten the lives of ISAF personnel.

### **Israel**

50. The current system for investigating alleged violations of humanitarian law in Israel is described in detail in the Turkel Commission report, in which the Commission recommended a number of significant changes to improve independence and accountability (see para. 42). Israel has not to date publicly acknowledged or explained the role played by remotely piloted aircraft in its counter-terrorism operations in Gaza. In 2006, however, the Israeli Supreme Court issued specific guidance on the circumstances in which it was lawful for the State to engage in preventative strikes against persons involved in the planning, dispatching or commission of terror attacks.<sup>25</sup> On the subject of accountability and transparency, the Court held that after such an attack there should be a thorough and independent investigation by a specially appointed commission concerning the identification of the target and the circumstances in which the attack was carried out, which would itself be subject to judicial review.

## **D. Principal areas of legal controversy**

### **1. International law governing the extraterritorial use of force**

#### *Consent*

51. A State's valid consent to the use of force by another State on its territory precludes any claim that its territorial sovereignty has been violated ([A/HRC/14/24/Add.6](#), paras. 37-38).<sup>26</sup> National law may dictate which entity has authority to consent to the use of force, but international law otherwise presumes that, when a

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<sup>25</sup> Israel High Court of Justice, *The Public Committee against Torture in Israel and LAW — Palestinian Society for the Protection of Human Rights and the Environment v. The Government of Israel and others*, HCJ 769/02, judgement of 14 December 2006, para. 2.

<sup>26</sup> Note that the consenting State's responsibility to protect those on its territory from arbitrary deprivation of the right to life applies at all times.

legitimate Government exercises effective control over the territory of the State, it possesses the exclusive authority to give or withhold consent.<sup>27</sup>

52. The Government of Yemen has informed the Special Rapporteur that the United States routinely seeks prior consent, on a case-by-case basis, for lethal remotely piloted aircraft operations on its territory through recognized channels. Where consent is withheld, a strike will not go ahead.

53. As regards Pakistan, there is strong evidence to suggest that between June 2004 and June 2008 remotely piloted aircraft strikes in the Federally Administered Tribal Areas were conducted with the active consent and approval of senior members of the Pakistani military and intelligence service, and with at least the acquiescence and, in some instances, the active approval of senior government figures. On 12 April 2012, however, both houses of the parliament unanimously adopted guidelines for revised terms of engagement with the United States, NATO and ISAF and general foreign policy. In a resolution, the parliament, among other things, called for an immediate cessation of drone attacks inside the territorial borders of Pakistan; provided that neither the Government nor any of its component entities could lawfully enter into verbal agreements with any foreign Government or authority regarding national security; provided that any such agreements previously entered into should forthwith cease to have effect; and provided that any such agreements should, in the future, be subject to scrutiny by specified ministries and parliamentary bodies and then announced through a ministerial statement in the parliament.

54. The effect of the resolution was to clarify the process by which consent may lawfully be given in Pakistan for the deployment of another State's military assets on its territory or in its airspace. That procedure has not been invoked to authorize the use of remotely piloted aircraft in the Federally Administered Tribal Areas. Since the elections in Pakistan in May 2013, the Special Rapporteur has been informed by the new Administration that it adopts the same position as its predecessor, namely that drone strikes on its territory are counterproductive, contrary to international law, a violation of Pakistani sovereignty and territorial integrity, and should cease immediately. Under the constitutional arrangements in force in Pakistan, the democratically elected Government is the body responsible for Pakistani international relations and the sole entity able to express the will of the State in its international affairs. Suggestions of continued cooperation at the military or intelligence level do not affect the position in international law. The Special Rapporteur therefore considers that the continued use of remotely piloted aircraft in the Federally Administered Tribal Areas amounts to a violation of Pakistani sovereignty, unless justified under the international law principle of self-defence. He welcomes, in this context, the recent statement of the Secretary of State of the United States that there is now a clearly defined timeline for ending remotely piloted aircraft strikes in Pakistan.<sup>28</sup>

*Self-defence: the unable or unwilling test*

55. Self-defence is the central justification advanced by the Government of the United States for the extraterritorial use of deadly force in counter-terrorism operations. The International Court of Justice has held that in the absence of consent

<sup>27</sup> Ashley Deeks, "Consent to the use of force and international law supremacy", *Harvard International Law Journal*, vol. 54, No. 1 (2013).

<sup>28</sup> See [www.theguardian.com/world/2013/aug/01/john-kerry-us-pakistan-talks-drones](http://www.theguardian.com/world/2013/aug/01/john-kerry-us-pakistan-talks-drones).



the use of force in self-defence by one State against a non-State armed group located on the territory of another State can be justified only where the actions of the group concerned are imputable to the host State.<sup>29</sup> This may extend to situations in which a non-State armed group is being harboured by the host State.<sup>30</sup> In this analysis, however, absent such a connection, extraterritorial use of force against a non-State armed group in another State is an unlawful violation of sovereignty, and thus potentially an act of aggression, unless it takes place with the host State's consent or the prior authorization of the Security Council (*ibid.*, paras. 40-41).

56. On the other hand, the United States and some other countries take the view that, subject to particular conditions, the law of self-defence entitles States to engage in non-consensual military operations on the territory of another State against armed groups that pose a direct and immediate threat of attack, even where those groups have no operational connection with their host State.<sup>31</sup> They derive support for this approach from Security Council resolutions 1368 (2001) and 1373 (2001), which were adopted in the wake of the attacks of 11 September 2001. Borrowing from the law of neutrality applicable to international armed conflicts, the United States considers that if, after a reasonable opportunity, the host State has failed effectively to neutralize the threat that emanates from armed groups located within its borders, either because it is unwilling or unable to do so, then the State that is threatened with attack is entitled under the law of self-defence to cross the host State's borders and deploy armed force on its territory for the purpose of taking effective military action in self-defence against the armed group that presents the threat.<sup>32</sup>

#### *Imminence*

57. A further area in which there is currently no clear international consensus is the scope of the right to anticipatory self-defence. The language of Article 51 of the Charter of the United Nations speaks in terms of the right to use force in self-defence if an armed attack occurs against a Member of the United Nations. Most now accept that the use of force in self-defence is justified where an attack is imminent (*ibid.*, para. 45), but the precise threshold for determining imminence is the subject of dispute.<sup>33</sup> The principle of anticipatory self-defence is usually traced back to the *Caroline* formula, under which a State may act defensively when the

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<sup>29</sup> See International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, p. 136; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment*, I.C.J. Reports 2005, p. 168.

<sup>30</sup> See Daniel Bethlehem, "Self-defence against an actual or imminent armed attack by non-State actors", *American Journal of International Law*, vol. 106, No. 4 (2012).

<sup>31</sup> Prepared remarks by the President of the United States at the National Defense University and "Fact sheet: U.S. policy standards and procedures for the use of force"; Bethlehem, "Self-defence against an actual or imminent armed attack by non-State actors"; Abraham D. Sofaer, "The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the law, and the national defense", *Military Law Review*, vol. 126 (Fall 1989).

<sup>32</sup> See Ashley Deeks, "Unwilling or unable: toward a normative framework for extra-territorial self-defence", *Virginia Journal of International Law*, vol. 5, No. 3 (2012); O. Schachter, "The right of States to use armed force", *Michigan Law Review*, vol. 82 (1984).

<sup>33</sup> See Michael N. Schmitt, "Pre-emptive strategies in international law", *Michigan Journal of International Law*, vol. 24 (Winter 2003); Thomas M. Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge, United Kingdom, Cambridge University Press, 2002), p. 107.

necessity of self-defence is “instant, overwhelming, leaving no choice of means, and no moment for deliberation”.<sup>34</sup> This might be thought to imply that the right to use force would be confined to the period immediately before an attack.

58. The contrary argument is that in the context of asymmetrical conflict, where intelligence is unlikely to be sufficiently specific to enable a State to predict precisely when an attack is liable to occur, a strict temporal approach no longer makes sense.<sup>35</sup> Accordingly, while the United States appears to accept that resort to anticipatory self-defence is constrained by the principle of imminence, it interprets this standard as a flexible one that incorporates considerations of the relevant window of opportunity, the possibility of reducing collateral damage to civilians and the likelihood of heading off future disastrous attacks.<sup>36</sup> In this analysis, the principle of imminence does not involve a requirement to have clear evidence that a specific attack will be carried out in the immediate future.<sup>37</sup>

## 2. International human rights and humanitarian law

59. The overwhelming majority of remotely piloted aircraft strikes have been conducted within conventional theatres of armed conflict. The United States, however, has publicly asserted a right under international law to use lethal force in counter-terrorism operations conducted outside areas of active hostilities.<sup>38</sup> This gives rise to a number of issues on which there is either no clear international consensus, or United States policy appears to challenge established norms.

### *International human rights law*

60. International human rights law prohibits arbitrary killing. This prohibition is reflected in specific treaty obligations and forms part of customary international law (*ibid.*, para. 52).<sup>39</sup> Outside situations of armed conflict, the use of deadly force by the State is lawful only if strictly necessary and proportionate, if aimed at preventing an immediate threat to life and if there is no other means of preventing the threat from materializing. It follows that lethal remotely piloted aircraft attacks will rarely be lawful outside a situation of armed conflict, because only in the most exceptional of circumstances would it be permissible under international human rights law for killing to be the sole or primary objective of an operation (*ibid.*, para. 33).

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<sup>34</sup> R. Y. Jennings, “The *Caroline* and *McLeod* cases”, *American Journal of International Law*, vol. 32, No. 1 (January 1938).

<sup>35</sup> Bethlehem, “Self-defence against an actual or imminent armed attack by non-State actors”; Michael N. Schmitt, “Extraterritorial lethal targeting: deconstructing the logic of international law”, *Columbia Journal of Transnational Law*, vol. 52 (2013).

<sup>36</sup> John Brennan, “Strengthening our security by adhering to our values and laws”, Program on Law and Security, Harvard Law School, 16 September 2011; United States, Department of Justice, White Paper, “Lawfulness of a lethal operation directed against a U.S. citizen”, p. 7.

<sup>37</sup> Bethlehem, “Self-defence against an actual or imminent armed attack by non-State actors”.

<sup>38</sup> See the prepared remarks of the President of the United States at the National Defense University and “Fact sheet: U.S. policy standards and procedures for the use of force”; Bethlehem, “Self-defence against an actual or imminent armed attack by non-State actors”.

<sup>39</sup> See also Nils Melzer, *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare*, European Parliament, Directorate General for External Policies, Policy Department Study (Brussels, 2013).

61. It is now reasonably well settled that, in a situation of armed conflict (whether of an international or non-international character), the international human rights law prohibition on arbitrary killing continues to apply, but the test of whether a deprivation of life is arbitrary must be determined by the applicable targeting rules of international humanitarian law.<sup>40</sup> It is thus critical to determine whether an armed conflict has come into existence and, if so, to delineate its scope with reasonable precision.

*Geographical scope of non-international armed conflict*

62. The United States considers itself to be involved in a non-international armed conflict with Al-Qaida and associated forces that is transnational in character, a position that was endorsed by the United States Supreme Court in *Hamdan v. Rumsfeld*. Accordingly, the United States does not appear to recognize any express territorial limitation on the applicability of the targeting rules of international humanitarian law.

63. The classic formulation for deciding whether a state of non-international armed conflict has come into existence focuses on the intensity and protraction of the conflict and the degree of organization of the parties.<sup>41</sup> In one view, these criteria are premised upon an assumption of territorial limitation. Intensity, for example, is a relative criterion that has traditionally been measured by analysing the frequency and severity of armed attacks being conducted within a given area. Moreover, on a practical and operational level, it is necessary to define the geographical scope of the conflict in order to determine whether international humanitarian law principles of targeting apply to any particular operation. If it were otherwise, the law would permit attacks that result in proportionate civilian casualties in areas that are otherwise free of hostilities, a result that may be thought to undermine the very object and purpose of international humanitarian law. Among those subscribing to this analysis, most make allowance for a situation in which a non-international armed conflict spills across the border of a neighbouring State. Nonetheless, even in this analysis, the threshold rules for engaging international humanitarian law remain primarily territorial in character (see [A/HRC/14/24/Add.6](#)).<sup>42</sup>

64. ICRC has noted the absence of a clear international consensus on the issue.<sup>43</sup> Its view, however, is that the existence of a non-international armed conflict must be determined by reference to each situation of violence on a case-by-case basis, and that international humanitarian law does not permit the targeting of persons directly participating in hostilities who are located in non-belligerent States, given that, otherwise, the whole world is potentially a battlefield.<sup>44</sup> The same essentially territorial approach is reflected in recent advice to the Government, the House of Representatives and the Senate of the Netherlands by the Advisory Committee on

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<sup>40</sup> International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion*, *I.C.J. Reports 1996*, p. 226; *Legal Consequences of the Construction of a Wall*, para. 106; *Armed Activities on the Territory of the Congo*, para. 216.

<sup>41</sup> International Tribunal for the Former Yugoslavia, *Prosecutor v. Duško Tadić*, case No. IT-94-1-T, decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, para. 70.

<sup>42</sup> See also Mary Ellen O'Connell, "Combatants and the combat zone", *University of Richmond Law Review*, vol. 43, No. 3 (March 2009).

<sup>43</sup> ICRC, "The use of armed drones must comply with laws".

<sup>44</sup> *Ibid.*

Issues of Public International Law, which noted that in non-international armed conflicts, international humanitarian law “applies only to the territory of the State where a conflict is taking place”.<sup>45</sup>

65. Those who advocate the United States position, on the other hand, argue that the geography of conflict has evolved, and that where a State is engaged in non-international armed conflict with a non-State armed group operating transnationally there is no traditional battlefield.<sup>46</sup> They point to the absence of State practice or settled *opinio juris* to imply the existence of a legal rule confining non-international armed conflicts to a defined geographical area, arguing that the principle of territorial applicability described above is, in reality, *lex ferenda* rather than *lex lata*.<sup>47</sup>

#### *Organization*

66. To amount to a non-international armed conflict, one of the parties must be an organized armed group. Organization implies at least a common command structure, adequate communications, joint mission planning and execution, and cooperation in the acquisition and distribution of weaponry (*ibid.*, para. 52).<sup>48</sup> Some argue that the core Al-Qaida group responsible for armed attacks on the United States may no longer meet this criterion because its leadership and command structure appear to have been so degraded that it no longer constitutes, in itself, a sufficiently organized armed group.

67. Serious questions have also been raised concerning the definition of the term “associated forces” or “co-belligerents” adopted by the United States, a definition that is closely related to the United States analysis of the geographical scope of its non-international armed conflict with Al-Qaida in various parts of the world (*ibid.*, para. 55). The United States defines the term “associated force” as applying to an organized armed group that has entered the fight alongside Al-Qaida and is a co-belligerent with Al-Qaida in the sense that it engages in hostilities against the United States or its coalition partners.<sup>49</sup> There is, however, considerable doubt as to whether the various armed groups operating under the name of Al-Qaida in various parts of the world, or claiming or alleged to be affiliated with Al-Qaida, share an integrated command structure or mount joint military operations. The Special Rapporteur notes in this connection that recent statements by current and former members of the Administration of the United States, including the President, have emphasized the need for caution in determining whether armed groups that pledge allegiance to Al-Qaida, or share its aim of mounting armed attacks on United States

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<sup>45</sup> Advisory Committee on Issues of Public International Law, “Main conclusions of advice on armed drones” (The Hague, July 2013).

<sup>46</sup> 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).

<sup>47</sup> *Ibid.*

<sup>48</sup> See also International Tribunal for the Former Yugoslavia, *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, case No. IT-03-66-T, Trial Chamber judgement of 30 November 2005.

<sup>49</sup> Jeh Johnson, “National security law, lawyers and lawyering in the Obama administration”, Dean’s Lecture at Yale Law School, 22 February 2012; see also United States District Court for the District of Columbia, *Hamlily v. Obama* (2009).

interests, can properly be regarded as co-belligerents for the purposes of international humanitarian law.<sup>50</sup>

#### *Intensity of hostilities*

68. The second key criterion for the existence of a non-international armed conflict is intensity of hostilities. Some argue that, given the lapse of time since the devastating attacks on the United States in 2001, and the relative infrequency of organized armed attacks on the United States since then (outside what can be termed the “hot battlefields” of Iraq and Afghanistan), the intensity criterion is no longer met.<sup>51</sup> Even those who support the United States position recognize that groups engaging in infrequent armed attacks, however serious, do not cross the threshold of intensity required for the application of the law of armed conflict.<sup>52</sup> Recent statements by former United States officials have raised the possibility that the point may be approaching at which it is no longer possible to justify lethal extraterritorial counter-terrorism operations in terms of non-international armed conflict.<sup>53</sup> Indeed, the President has indicated that the United States conflict with Al-Qaida may be approaching an end.<sup>54</sup> These statements may imply that, as a result of military action against Al-Qaida and others, there will come a point in the foreseeable future at which the Administration no longer regards these disparate groupings in various parts of the world as representing an organized armed group engaged in sufficiently intense and coordinated hostilities against the United States to satisfy the threshold requirements in *Tadić*.

#### *Targeting rules*

69. For the purposes of international humanitarian law, organized armed groups are those that recruit their members primarily from the civilian population but develop a sufficient degree of military organization to conduct hostilities on behalf of a party to the conflict, albeit not always with the same means, intensity and level of sophistication as State armed forces.<sup>55</sup> ICRC takes the view that such individuals can be regarded as members of an armed group, such that they may be targeted for lethal operations at any time, only if they have assumed a continuous combat function within the group.<sup>56</sup> Continuous combat function implies lasting integration into an armed group. This encompasses individuals whose continuous function involves the preparation, execution or command of acts or operations amounting to direct participation in hostilities; individuals who have been recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf; and individuals who have directly participated in hostilities on repeated

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<sup>50</sup> Prepared remarks of the President of the United States at the National Defence University and “Fact sheet: U.S. policy standards and procedures for the use of force”; Koh, “How to end the forever war?”; Jeh Johnson, “The conflict against Al-Qaida and its affiliates: how will it end?”, address to the Oxford Union, 30 November 2012.

<sup>51</sup> See, among many others, Mary Ellen O’Connell, “The legal case against the war on terror”, *Case Western Reserve Journal of International Law*, vol. 36, Nos. 2-3 (2004).

<sup>52</sup> Schmitt, “The Interpretive Guidance on the Notion of Direct Participation in Hostilities”.

<sup>53</sup> See Koh, “How to end the forever war?”, and Johnson, “The conflict against Al-Qaida and its affiliates”.

<sup>54</sup> See the prepared remarks of the President of the United States at the National Defense University and “Fact sheet: U.S. policy standards and procedures for the use of force”.

<sup>55</sup> ICRC, *Interpretive Guidance*.

<sup>56</sup> *Ibid.*

occasions in support of an organized armed group in circumstances indicating that their conduct reflects a continuous combat role rather than a spontaneous or sporadic or temporary role assumed for the duration of a particular operation.

70. If the criterion of continuous combat function is not met, then an individual who is otherwise affiliated with an armed group is to be regarded as having protected civilian status and may be targeted with deadly force only if and for so long as he or she is directly participating in hostilities. According to ICRC, examples of direct participation include taking part in a direct act of violence; transmitting information for immediate use in an armed attack; transporting equipment in close proximity to an attack; and acting as a guard, intelligence agent or lookout. Conduct that does not cross the ICRC threshold for direct participation includes the commercial sale of equipment or supplies, publication of propaganda, recruitment, financing of terrorism, hiding weapons, helping fighters to escape capture and supplying fighters with food, lodging or logistical support.<sup>57</sup>

71. It is unclear whether or to what extent United States targeting rules incorporate these standards or observe them as a matter of policy (*ibid.*, para. 68). Lethal targeting directed at senior operational leaders of Al-Qaida and those who pose an imminent threat of violent attack would appear to satisfy the ICRC tests of continuous combat function and direct participation, respectively. There is, however, evidence to indicate that attacks have been launched against much lower-level operatives, including those who have harboured identified targets. The disclosure by States of the criteria that they adopt for direct participation in hostilities is critical to achieving transparency as to the forms of conduct that may expose a civilian to the threat of deadly force.

72. Some United States military lawyers argue that all members of an armed group, apart from medical and religious personnel, are legitimate targets at all times, and that the function of a particular individual within the group is irrelevant.<sup>58</sup> Those who advocate this position suggest that in asymmetrical armed conflict a requirement for solid intelligence demonstrating a continuous combat function, or distinguishing between roles played by adherents to an armed group, is unrealistic and impracticable.<sup>59</sup> They challenge the ICRC guidance on the ground that it would prevent attacks on targets acting as voluntary human shields and those who assemble and store improvised explosive devices.<sup>60</sup> There is also disagreement over the “for such time” criterion, with some arguing that if applied strictly it would create a near-insurmountable operational hurdle by requiring that an individual can be targeted only while actually engaged in an armed attack.<sup>61</sup> These differences of view have obvious implications for assessing both the legality of individual remotely piloted aircraft strikes and the level of “civilian” casualties.

#### *Targeting intelligence*

73. The accuracy of targeting intelligence is critical to the proper application of the principles of distinction, proportionality and precaution, in particular in

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<sup>57</sup> *Ibid.*

<sup>58</sup> Schmitt, “The Interpretive Guidance on the Notion of Direct Participation in Hostilities”.

<sup>59</sup> Michael N. Schmitt, “Deconstructing direct participation in hostilities: the constitutive elements”, *New York University Journal of International Law and Politics*, vol. 42 (2010).

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

asymmetrical conflict where non-State armed groups often intermingle with the civilian population, whose members provide varying degrees of voluntary or involuntary support that may or may not amount to direct participation in hostilities.<sup>62</sup> The United Kingdom has informed the Special Rapporteur that during its operations in Afghanistan targeting intelligence is “thoroughly scrubbed” to ensure accuracy before authorization to proceed is given. Similarly, in May 2013, the President of the United States indicated that it was United States policy to require near certainty that a terrorist was present.<sup>63</sup>

74. United States policy appears to recognize at least three categories of target for lethal counter-terrorism operations. The first is what is known as the “high-value target”. This classification implies that the identity, function and importance of the individual be established in advance. While it may be assumed that the list includes individuals identified by intelligence as senior leaders of Al-Qaida or an associated group, who would thus be deemed to have a continuous combat function, it is far from clear that the list is so confined. A second category consists of what are known as “signature strikes”, in which a group or individual is identified as a target on the basis of their activities. United States forces in Iraq pioneered what became known as “pattern of life” analysis using remotely piloted aircraft for intelligence, surveillance, targeting and reconnaissance purposes. This has since become a routine part of the armed conflict in Afghanistan, where it is also used for targeting purposes by the Royal Air Force of the United Kingdom.<sup>64</sup> In this context, the analysis is used to determine whether an individual or group falls within the criteria identified in military targeting directives. The United States has formally denied that the mere fact that an individual is a military-aged male located in the vicinity of an armed group is sufficient to justify a targeting decision.<sup>65</sup> There remains, however, considerable uncertainty as to the criteria used for the purpose of determining whether an individual’s habits of daily life are assessed as sufficient to identify him or her as a combatant. Inevitably, some of this information will be legitimately classified, but the Special Rapporteur considers that there is scope for further clarification. A third category is the use of remotely piloted aircraft for the purposes of contact force protection, which is governed by conventional rules of engagement adopted by the Department of Defense.

75. Within the United Kingdom, it is the responsibility of the Ministry of Defence to draw up a targeting directive and rules of engagement in any armed conflict. The targeting directive sets out legitimate targets (which may be individuals, groups or locations). It also includes a list of restricted and prohibited targets. Mission planning routinely involves an assessment of the collateral effects radius of any weapon deployed. For all remotely piloted aircraft sorties there is a customary “nine line exchange”<sup>66</sup> of information between the forward air controller on the ground

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<sup>62</sup> Melzer, *Human Rights Implications of the Usage of Drones*, pp. 23-24.

<sup>63</sup> See the prepared remarks of the President of the United States at the National Defense University and “Fact sheet: U.S. policy standards and procedures for the use of force”. It remains unclear whether the United States regards this as a legal requirement applicable in all situations of conflict, or merely adopts it as a matter of policy for operations conducted outside areas of active hostilities.

<sup>64</sup> The United Kingdom neither uses the term “signature strikes” nor comments on its use by others.

<sup>65</sup> See the prepared remarks of the President of the United States at the National Defense University and “Fact sheet: U.S. policy standards and procedures for the use of force”.

<sup>66</sup> The expression is a technical term used to refer to the lines of communication between a drone operator and those with whom he or she is in communication.

and the remotely piloted aircraft crew. This will record the assessment of any potential civilian casualties. While Israel has sometimes invoked the principle of proportionality to justify civilian casualties sustained in the course of lethal counter-terrorism operations in Gaza,<sup>67</sup> the United Kingdom has specifically informed the Special Rapporteur that in making targeting decisions involving the use of remotely piloted aircraft in Afghanistan it does not authorize strikes on the basis that the infliction of civilian casualties would be proportionate to a high-value military target. It is the policy of the Ministry of Defence that weapons should not be discharged from any aerial platform unless there is a zero expectation of civilian casualties, and that any individual or location should be presumed to be civilian in nature unless there is clear evidence to the contrary.

76. The President of the United States recently appeared to adopt the same standard for lethal counter-terrorism operations being conducted outside areas of active hostilities, indicating that, “before any strike is taken, there must be near-certainty that no civilians will be killed or injured”.<sup>68</sup> One United States military lawyer has since emphasized, however, that this is not a legal requirement, arguing that “the degree of requisite certainty would drop in the case of a very high value target because less certainty would be justified in light of the military advantage likely to accrue from the operation”.<sup>69</sup> Moreover, at the time of writing, it remains unclear whether the United States adopts the same standard for operations on the “hot” battlefield.

#### **IV. Conclusions and recommendations**

**77. If used in strict compliance with the principles of international humanitarian law, remotely piloted aircraft are capable of reducing the risk of civilian casualties in armed conflict by significantly improving the situational awareness of military commanders.**

**78. Having regard to the duty of States to protect civilians in armed conflict, the Special Rapporteur considers that, in any case in which civilians have been, or appear to have been, killed, the State responsible is under an obligation to conduct a prompt, independent and impartial fact-finding inquiry and to provide a detailed public explanation. This obligation is triggered whenever there is a plausible indication from any source that civilian casualties may have been sustained, including where the facts are unclear or the information is partial or circumstantial. The obligation arises whether the attack was initiated by remotely piloted aircraft or other means, and whether it occurred within or outside an area of active hostilities.**

**79. The Special Rapporteur identifies herein a number of legal questions on which there is currently no clear international consensus. He considers that there is an urgent and imperative need to seek agreement between States on these issues. To that end he is currently consulting Member States with a view**

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<sup>67</sup> Israel Defense Forces, “The operation in Gaza”.

<sup>68</sup> See the prepared remarks of the President of the United States at the National Defense University and “Fact sheet: U.S. policy standards and procedures for the use of force”.

<sup>69</sup> Schmitt, “The Interpretive Guidance on the Notion of Direct Participation in Hostilities”.



to clarifying their position on these questions. He urges all States to respond as comprehensively as possible.

80. In particular, the Special Rapporteur urges the United States to further clarify its position on the legal and factual issues raised herein; to declassify, to the maximum extent possible, information relevant to its lethal extraterritorial counter-terrorism operations; and to release its own data on the level of civilian casualties inflicted through the use of remotely piloted aircraft, together with information on the evaluation methodology used.

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# General Assembly

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## Human Rights Council

Twenty-fifth session

Agenda item 3

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

### Resolution adopted by the Human Rights Council

**25/22.**

**Ensuring use of remotely piloted aircraft or armed drones in counter-  
terrorism and military operations in accordance with international law,  
including international human rights and humanitarian law**

*The Human Rights Council,*

*Guided* by the purposes and principles of the Charter of the United Nations, in particular Article 2, paragraph 4 thereof,

*Reaffirming* the Universal Declaration of Human Rights, which recognizes the right to life, liberty and security of person, among other rights,

*Reaffirming also* the principles enshrined in the Vienna Declaration and Programme of Action,

*Reaffirming further* the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights,

*Recalling* General Assembly resolution 68/178 of 18 December 2013 and Human Rights Council resolution 19/19 of 23 March 2012 on the protection of human rights and fundamental freedoms while countering terrorism,

*Expressing deep concern* at the civilian casualties resulting from the use of remotely piloted aircraft or armed drones, as reflected in the reports of the Special Rapporteur on the protection of human rights and fundamental freedoms while countering terrorism to the General Assembly<sup>1</sup> and to the Human Rights Council,<sup>2</sup>

*Expressing concern* at the broader impact of remotely piloted aircraft or armed drones on individuals, children, families and communities, including the interruption of

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<sup>1</sup> A/68/389.

<sup>2</sup> A/HRC/25/59.

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education, the undermining of religious and cultural practices and the reluctance to assist the victims of drone strikes for fear of being caught in secondary strikes,

*Reaffirming* that the promotion and protection of human rights for all and the rule of law are essential to the fight against terrorism and to recognizing that effective counter-terrorism measures and the protection of human rights are not conflicting goals, but are complementary and mutually reinforcing,

*Reaffirming also* that all counter-terrorism measures should be implemented by States in accordance with their obligations under international law, including international human rights law, international humanitarian law and international refugee law, thereby taking into full consideration the human rights of all, including persons belonging to national or ethnic, religious and linguistic minorities, and in this regard must not be discriminatory on grounds such as race, colour, sex, language, religion or social origin,

*Takes note with appreciation* of the reports of the Special Rapporteur on the protection of human rights and fundamental freedoms while countering terrorism, presented to the Human Rights Council at its twenty-fifth session,<sup>2</sup> and of the Special Rapporteur on extrajudicial, summary or arbitrary executions, submitted to the General Assembly at its sixty-eighth session,<sup>3</sup>

*Welcoming* the statements made by the Secretary-General on 13 August 2013, and of the United Nations High Commissioner for Human Rights to the Security Council, on 19 August 2013, and to the Human Rights Council at its twenty-third session, on 27 May 2013, and at its twenty-fifth session, on 3 and 6 March 2014, on the use of remotely piloted aircraft,

*Commending* the role of civil society organizations in highlighting the humanitarian and human rights impact of the use of remotely piloted aircrafts or armed drones,

1. *Urges* all States to ensure that any measures employed to counter terrorism, including the use of remotely piloted aircraft or armed drones, comply with their obligations under international law, including the Charter of the United Nations, international human rights law and international humanitarian law, in particular the principles of precaution, distinction and proportionality;

2. *Calls upon* States to ensure transparency in their records on the use of remotely piloted aircraft or armed drones and to conduct prompt, independent and impartial investigations whenever there are indications of a violation to international law caused by their use;

3. *Invites* the United Nations High Commissioner for Human Rights and relevant special procedures of the Human Rights Council and the human rights treaty bodies to pay attention, within the framework of their mandates, to violations of international law as a result of the use of remotely piloted aircraft or armed drones;

4. *Decides* to organize an interactive panel discussion of experts at its twenty-seventh session on the issues raised in the report of the Special Rapporteur on the protection of human rights and fundamental freedoms while countering terrorism, from within existing resources, and invites the Office of the High Commissioner to liaise with States, relevant United Nations bodies and agencies, relevant special procedures, civil society and other stakeholders with a view to ensuring their participation in the panel discussion;

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<sup>3</sup> A/68/382.

5. *Requests* the Office of the High Commissioner to present a summary of the deliberations of the panel discussion at its twenty-eighth session.

*55th meeting  
28 March 2014*

[Adopted by a recorded vote of 27 to 6, with 14 abstentions. The voting was as follows:

*In favour:*

Algeria, Argentina, Botswana, Brazil, Chile, China, Congo, Costa Rica, Cuba, Gabon, Indonesia, Ireland, Kazakhstan, Kenya, Kuwait, Maldives, Mexico, Morocco, Pakistan, Peru, Philippines, Russian Federation, Saudi Arabia, Sierra Leone, South Africa, Venezuela (Bolivarian Republic of), Viet Nam

*Against:*

France, Japan, Republic of Korea, the former Yugoslav Republic of Macedonia, United Kingdom of Great Britain and Northern Ireland, United States of America

*Abstaining:*

Austria, Benin, Burkina Faso, Côte d'Ivoire, Czech Republic, Estonia, Ethiopia, Germany, India, Italy, Montenegro, Namibia, Romania, United Arab Emirates]

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