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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](#).

* 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.

I. Introduction

1. The present report is submitted to the General Assembly by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, pursuant to General Assembly resolution [66/171](#) and Human Rights Council resolutions [15/15](#), [19/19](#) and [22/8](#). It sets out the activities of the Special Rapporteur conducted between 10 January and 8 August 2013. 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.

II. Activities of the Special Rapporteur

2. From 31 January to 1 February 2013, the Special Rapporteur participated in an international conference on national and regional counter-terrorism strategies convened by the United Nations Counter-Terrorism Centre in Bogota.

3. On 22 February, the Special Rapporteur participated in a high-level policy seminar on targeted killing, unmanned aerial vehicles and European Union policy, held at the European University Institute in Florence, Italy.

4. On 25 February, the Special Rapporteur organized a workshop in Geneva for a high-level Iraqi delegation on conflict resolution and peacebuilding in the context of terrorist violence.

5. On 4 March, the Special Rapporteur participated in a panel discussion, organized by the Open Society Justice Initiative in Geneva, on issues arising from the Initiative's report, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*.

6. On 5 March, the Special Rapporteur presented his report on the framework principles for securing the accountability of public officials for gross or systematic human rights violations committed in the course of States-sanctioned counter-terrorism initiatives ([A/HRC/22/52](#)) to the Human Rights Council at its twenty-second session.

7. On 6 March, the Special Rapporteur participated in a briefing to the European Parliament in Brussels on the human rights implications of the targeted killing programme of the United States of America.

8. From 11 to 13 March, the Special Rapporteur travelled to Islamabad to gather information on the impact of drones on the civilian population for the present report. During his visit, he met officials from the ministries of foreign affairs, defence and human rights and other relevant entities, including a senior representative of the secretariat of the Federally Administered Tribal Areas and the Chair of the Senate Standing Committee on Defence and Defence Production.

9. From 8 to 12 April, the Special Rapporteur conducted a visit to Burkina Faso, at the invitation of the Government. He will present his report thereon to the Human Rights Council at its twenty-fifth session.

10. From 17 to 19 April, the Special Rapporteur participated in an expert meeting on drone strikes under international law conducted at Wilton Park, United Kingdom of Great Britain and Northern Ireland.

11. On 23 April, the Special Rapporteur participated in a side event of the twenty-second session of the Commission on Crime Prevention and Criminal Justice, held in Vienna, on victims of acts of terrorism, and addressed the Commission in plenary meeting on 24 April.

12. On 25 April, the Special Rapporteur participated in a joint hearing of the subcommittees on human rights and on security and defence of the European Parliament on the study *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare*, held in Brussels.

13. On 3 May, the Special Rapporteur travelled to Paris, where he met senior representatives of the Presidency and the ministries of foreign affairs and defence to discuss issues relevant to the present report.

14. On 14 May, the Special Rapporteur participated as a panellist in a debate entitled “Drone wars: counter-terrorism and human rights”, organized by the American Society of International Law and the New America Foundation.

15. From 1 to 7 June, the Special Rapporteur attended meetings in Washington, D.C., with senior lawyers at the United States Department of State, the Department of Defense, the Department of Justice, the Office of the Director of National Intelligence, the Central Intelligence Agency (CIA) and the President’s national security staff. He also met the Director of CIA, in addition to the Deputy National Security Advisor for Strategic Communications and Speechwriting and the Senior Director for Multilateral Affairs and Human Rights of the President’s national security staff.

16. On 13 and 14 June, the Special Rapporteur participated as a panellist in an international counter-terrorism focal points conference on addressing conditions conducive to the spread of terrorism and promoting regional cooperation, organized by the Counter-Terrorism Implementation Task Force in partnership with the Government of Switzerland.

17. On 21 June, the Special Rapporteur met the European Union Counter-Terrorism Coordinator at the European Commission and addressed the Counter-Terrorism Committee of the European Parliament in Brussels, at the invitation of the Irish Presidency. His address concerned the formulation of European Union policy on the use of remotely piloted aircraft in lethal counter-terrorism operations.

18. From 17 to 30 July, the Special Rapporteur conducted a visit to Chile, at the invitation of the Government. He will present his report thereon to the Human Rights Council at its twenty-fifth session.

19. On 8 August, the Special Rapporteur met senior officials of the Ministry of Defence of the United Kingdom in London to discuss issues relevant to the present report. He was given a detailed legal and technical briefing on the use by the United Kingdom of remotely piloted aircraft.

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.¹ 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.² 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.³

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

¹ 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.

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

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

⁴ 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.⁵ 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”.⁶

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.⁷ 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

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

⁶ 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.

⁷ 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.⁸

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.⁹ 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.¹⁰

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.

⁸ 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.

⁹ See www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120626/text/120626w0002.htm#120626119000810.

¹⁰ 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.¹¹ 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),¹² 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.¹³ 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

¹¹ 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.

¹² 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).

¹³ 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.).¹⁴ 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.

¹⁴ 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”.¹⁵ 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.¹⁶ 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”.¹⁷ 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”.¹⁸ 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

¹⁵ 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.

¹⁶ 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.

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

¹⁸ *Ibid.*

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

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.²⁰ 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

¹⁹ Available from www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13642&LangID=E.

²⁰ 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.²¹ 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.²²

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.²³ 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.²⁴

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

²² See www.intelligence.senate.gov/130207/transcript.pdf.

²³ 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.

²⁴ *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.²⁵ 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).²⁶ National law may dictate which entity has authority to consent to the use of force, but international law otherwise presumes that, when a

²⁵ 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.

²⁶ 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.²⁷

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.²⁸

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

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

²⁸ See 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.²⁹ This may extend to situations in which a non-State armed group is being harboured by the host State.³⁰ 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.³¹ 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.³²

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.³³ The principle of anticipatory self-defence is usually traced back to the *Caroline* formula, under which a State may act defensively when the

²⁹ 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.

³⁰ 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).

³¹ 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).

³² 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).

³³ 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”.³⁴ 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.³⁵ 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.³⁶ 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.³⁷

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.³⁸ 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).³⁹ 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).

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

³⁵ 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).

³⁶ 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.

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

³⁸ 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”.

³⁹ 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.⁴⁰ 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.⁴¹ 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](#)).⁴²

64. ICRC has noted the absence of a clear international consensus on the issue.⁴³ 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.⁴⁴ 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

⁴⁰ 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.

⁴¹ 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.

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

⁴³ ICRC, "The use of armed drones must comply with laws".

⁴⁴ *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”.⁴⁵

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.⁴⁶ 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*.⁴⁷

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).⁴⁸ 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.⁴⁹ 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

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

⁴⁶ 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).

⁴⁷ *Ibid.*

⁴⁸ 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.

⁴⁹ 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.⁵⁰

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.⁵¹ 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.⁵² 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.⁵³ Indeed, the President has indicated that the United States conflict with Al-Qaida may be approaching an end.⁵⁴ 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.⁵⁵ 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.⁵⁶ 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

⁵⁰ 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.

⁵¹ 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).

⁵² Schmitt, “The Interpretive Guidance on the Notion of Direct Participation in Hostilities”.

⁵³ See Koh, “How to end the forever war?”, and Johnson, “The conflict against Al-Qaida and its affiliates”.

⁵⁴ 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”.

⁵⁵ ICRC, *Interpretive Guidance*.

⁵⁶ *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.⁵⁷

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.⁵⁸ 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.⁵⁹ 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.⁶⁰ 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.⁶¹ 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

⁵⁷ *Ibid.*

⁵⁸ Schmitt, “The Interpretive Guidance on the Notion of Direct Participation in Hostilities”.

⁵⁹ Michael N. Schmitt, “Deconstructing direct participation in hostilities: the constitutive elements”, *New York University Journal of International Law and Politics*, vol. 42 (2010).

⁶⁰ *Ibid.*

⁶¹ *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.⁶² 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.⁶³

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.⁶⁴ 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.⁶⁵ 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”⁶⁶ of information between the forward air controller on the ground

⁶² Melzer, *Human Rights Implications of the Usage of Drones*, pp. 23-24.

⁶³ 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.

⁶⁴ The United Kingdom neither uses the term “signature strikes” nor comments on its use by others.

⁶⁵ 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”.

⁶⁶ 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,⁶⁷ 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”.⁶⁸ 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”.⁶⁹ 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

⁶⁷ Israel Defense Forces, “The operation in Gaza”.

⁶⁸ 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”.

⁶⁹ 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.
