

## **OTHER AREAS**

This Chapter of the Handbook collects the observations and recommendations of the Special Rapporteur on subjects not covered in the previous chapters. It addresses the responsibilities of foreign donors with regard to practices which systematically violate human rights by a State receiving international assistance; the duty to protect individuals against violence by non-state actors in situations where State authorities have reason to know such violence will occur; the role of “soft law” standards in guiding compliance with obligations under human rights law; and how the international community can better prevent genocide and widespread crimes against humanity.

<b>A. RESPONSIBILITIES OF FOREIGN DONORS</b> .....	2
<b>B. RESPONSIBILITY TO PROTECT</b> .....	5
<b>C. THE ROLE OF “SOFT LAW” STANDARDS</b> .....	8
<b>D. GENOCIDE AND CRIMES AGAINST HUMANITY</b> .....	17

## **A. RESPONSIBILITIES OF FOREIGN DONORS**

### ***Report on Mission to Guatemala (A/HRC/4/20/Add.2, 19 February 2007, Recommendations):***

Foreign donors are playing a complex, and in some ways problematic, role: rather than funding projects that the State cannot afford, they are funding projects that the State has simply opted not to be able to afford. Insofar as these projects benefit those with the least power over the legislative agenda, such foreign assistance is commendable. Moreover, foreign assistance makes up a relatively small proportion of the Government's budget, and its withdrawal would not necessarily stimulate more responsible fiscal policies. Nevertheless, the donor community should carefully consider whether its assistance is doing as much as possible to push the State to assume its own responsibilities.

### ***Report on Mission to the Central African Republic (A/HRC/11/2/Add.3, 27 May 2009, ¶¶ 60-61, 73-78, Recommendations):***

60. Recent proposals to reform the justice system as part of the Central African Republic's security sector reform programme are promising. Proposals to address staffing and equipment supply deficiencies, to improve courthouse infrastructure, and to revise training programmes are appropriate. Donors and the international community should support these reform efforts, which are essential to address impunity.

61. However, while the lack of resources is one significant cause of impunity, even when the capacity to investigate and prosecute does exist, there is little effort made to respond to killings by the security forces....

[...]

73. As long as a single individual is permitted to control what amounts to a private army, there will always be a danger that large-scale abuses will recommence as quickly as they were brought to an end. Moreover, the pattern in which each new president remakes this critical component of the security sector in his own image will continue, meaning that every transition will threaten to undo all previous efforts at reform. Nevertheless, it must be candidly acknowledged that the GP will not be permanently eliminated until incoming presidents feel that they can rely on the existing FACA and do not need to form ad hoc units to ensure their regime's survival. This suggests that an element of sequencing is pragmatically reasonable. As the FACA is reformed, the elimination of the GP will be facilitated. There is not, however, anything inevitable about this progression. An end to the use of the GP for any purpose other than the President's close protection must be treated as a key aim of security sector reform, and donors should link the issues.

74. The limited efficacy of formal legal proscription in making permanent the elimination of an institution that emerges and re-emerges in conjunction with regime transitions must also be acknowledged. Again, there is no perfect solution, but a starting point would be for civil society groups to prioritize this issue and promote a non-partisan understanding that new presidents must accept the existing security forces rather than "supplementing" them - and that the security forces

must support whomever is president. Entrenching a new societal norm will not be easy, but the country's history provides ample evidence of why such a norm is necessary.

75. Second, a regular chain-of-command should be established and enforced. Every operation should be conducted pursuant to a written order signed by the legally designated commander. Personal ties must not be permitted to subvert this chain-of-command. Soldiers who refuse the lawful orders of their commanders, who order military activities outside the proper chain-of-command, or who follow such irregularly issued orders should be disciplined. The importance of this was brought home during meetings with the GP. According to senior GP officials, the GP command had not signed the orders for all of Lt. Ngaïkossé's missions, and thus was not responsible for any unauthorized missions. The GP had apparently taken no measures to investigate or control these irregular missions by Lt. Ngaïkossé.

76. Soldiers should also be instructed that they have an obligation to disobey manifestly illegal orders and be sufficiently well-educated in international law to recognize these orders. In this respect, recent steps to establish an international humanitarian law unit in the military are encouraging. It should be kept in mind that training must be regularly reinforced, and that it will not achieve its objectives without an effective military justice system to punish violations.

77. Third, the principle that the security sector is accountable to the State and its people rather than to any single individual or regime should be entrenched. As a reflection of this principle and in furtherance of its implementation, the security forces should consult closely with local populations in need of protection in the north-west to guide operations responding to banditry. For a territorial army to provide protection requires a close relationship with the people, in addition to more general reforms in operational performance and respect for human rights. 78. These lessons suggest that donors should continue to provide assistance to increase the effectiveness of the security sector and that this assistance should be accompanied by efforts to provide strong human rights training, ensure effective monitoring of the military and police, and promote respect for human rights.

[...]

[Recommendations]

(a) Donors should link assistance for reforms that increase the effectiveness and reliability of the military to steps taken to reduce the size and role of the Presidential Guard;

***Report on Mission to Nigeria (E/CN.4/2006/53/Add.4, 7 January 2006, ¶ 108):***

108. *Development assistance*

Support for these recommendations must also come from the international community. Rule of law programmes have been too narrowly defined,<sup>1</sup> and the taming of high-level corruption, as vital as it is, seems to represent the total picture for some agencies.

***Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009, ¶ 88):***

88. Measures should be taken to address the corruption that obstructs justice at all levels of the criminal justice system:

(a) An independent anti-corruption agency should be established by the Government, with international support, and endowed with the necessary powers and resources to prosecute important cases at all levels of government and the judiciary;

(b) Insofar as international aid money provides the resources on which much corruption thrives, the international community has a responsibility to assist the Government with anti-corruption efforts through a range of mechanisms, including the use of high-level appointment review boards.

***Report on Mission to Sri Lanka (E/CN.4/2006/53/Add.5, 27 March 2006, ¶¶ 44, 88-89):***

44. A range of candidates was identified as possible providers of a new human rights monitoring role. Foremost among these was the United Nations, which has both an established expertise in human rights monitoring and a lack of political involvement in the peace process. Other candidates were the Sri Lanka Donor Co-Chairs, some unspecified but non-Nordic country, and a “high-level panel” of human rights experts. There was a general consensus that, even were its resources greatly increased, the Sri Lanka Human Rights Commission would not be an appropriate body to investigate political killings countrywide.<sup>2</sup> Few of my interlocutors felt that effective monitoring could be conducted without the participation of the LTTE.

[...]

88. Concerned Member States, particularly the Donor Co-Chairs and contributing countries to SLMM, should provide political, human and financial resources for expanded human rights monitoring by SLMM or another international mechanism.

89. The Governments of all United Nations Member States in which there is a significant Tamil diaspora should enter into serious dialogue with those communities in light of the findings in this report. The diaspora has a responsibility to use its considerable political and financial influence and funding to promote and to insist upon respect for human rights.

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<sup>1</sup> Stephen Golub, “Less Law and Reform, More Politics and Enforcement: A Civil Society Approach to Integrating Rights and Development”, in Philip Alston and Mary Robinson (eds.), *Human Rights and Development: Towards Mutual Reinforcement* (2005) 297.

<sup>2</sup> Following the 2003 peace talks in Hakone, it was envisioned that, with international support, the HRC would play the lead monitoring role. However, the HRC itself has stated “its belief that no national or regional human rights entity will be able to effectively monitor and implement human rights standards in the north and the east. No organization or individual enjoys that kind of universal authority and legitimacy.” Human Rights Commission of Sri Lanka, *The Human Rights Situation in the Eastern Province (Dec. 2003)*, p. 33.

## **B. RESPONSIBILITY TO PROTECT**

### ***Press Statement on Mission to the Democratic Republic of the Congo, 15 October 2009:***

In the past year, over 1,200 civilians have been brutally killed by the LRA. Many of these killings have been revenge massacres following Government military operations. Both Operation Rudia I (a September 2008 joint FARDC-MONUC operation) and Operation Lightening Thunder (a December 2008 joint FARDC-Uganda-Sudan People's Liberation Army operation, with US logistical support) were immediately followed by retaliation killings by the LRA. In Dungu and in Doruma, I spoke with adults and children abducted by the LRA, children forced to serve as soldiers and trained to kill, and family members who watched their relatives bashed to death with machetes and sticks in coordinated LRA attacks. Given the longstanding pattern of LRA retaliation killings in Uganda and Sudan, these massacres were predictable, and far more should have been done by the Government and by MONUC to prioritize civilian protection in planning the military operations. This is required by both international humanitarian and human rights law.

### ***Report on Mission to Israel and Lebanon (A/HRC/2/7, 2 October 2006, ¶¶ 28-29):***

28. Third, an attacker must take all feasible precautions to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.<sup>3</sup> A number of specific precautionary measures are prescribed by humanitarian law in relation to the planning and conduct of attacks.<sup>4</sup> In addition, an attacker is required to give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit.<sup>5</sup>

29. International humanitarian law also imposes obligations on defenders. The use of human shields is prohibited.<sup>6</sup> Violation of this rule may be understood to require the defender's specific intent to use civilians to immunize otherwise legitimate military objectives from lawful attack.<sup>7</sup> In addition to this prohibition, the defender also has affirmative obligations to protect civilians by keeping them away from military targets.<sup>8</sup>

### ***Report on Mission to Sri Lanka (E/CN.4/2006/53/Add.5, 27 March 2006, ¶¶ 60-61):***

60. The State's failure to convict anyone for the Bindunuwewa massacre is an example of this impunity: on 25 October 2000, 27 Tamil men were beaten, cut, and trampled to death by a mob while they were in custody and "protected" by roughly 60 police officers, but not a single private person or public official has been convicted. I had previously corresponded with the Government concerning this case<sup>9</sup> and, during my visit, I met with the mothers of Bindunuwewa victims, a survivor, and an attorney for the families.

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<sup>3</sup> International Committee of the Red Cross, *Customary International Humanitarian Law*, Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), Cambridge University Press, 2005 (hereafter "ICRC Study"), p. 51 (Rule 15).

<sup>4</sup> *Ibid.*, pp. 51-67 (Rules 15-21).

<sup>5</sup> *Ibid.*, pp. 62-65 (Rule 20).

<sup>6</sup> *Ibid.*, pp. 337-340 (Rule 97).

<sup>7</sup> *Ibid.*, p. 340 (Rule 97).

<sup>8</sup> *Ibid.*, pp. 68-76 (Rules 22-24).

<sup>9</sup> Letter of 10 August 2005, in E/CN.4/2006/53/Add. 1.

61. That there was both State and individual criminal responsibility is undeniable, and supported by multiple government reports.<sup>10</sup> However, not a single person has been convicted of any crime related to the events at Bindunuwewa.<sup>11</sup> I was offered various explanations for this failure of justice: an inadequate police investigation led to insufficient evidence for conviction; judicial bias or corruption produced acquittals; the complexity of the case forced the prosecution to rely on novel legal theories. I do not have the information available to form a judgement, but the bottom line remains that this is a deeply unsatisfactory outcome and one which is all too consistent with fears of impunity for those who kill Tamils.<sup>12</sup>

***Press Statement on Mission to Albania, 23 February 2010:***

Commentators attribute the revival of the blood feud to various causes, including the post-communist era breakdown of the state, failings in the criminal justice system, unresolved property disputes, and educational failings.

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<sup>10</sup> On 8 March 2001, the government established a Commission of Inquiry into the killings. The Commission faulted the local police commanders (identified by their rank and name) for failing to protect the detainees from the attack in spite of prior knowledge of a planned demonstration by local villagers in front of the detention centre, and for their failure to take any disciplinary action against their subordinates for failing to protect inmates under their control. A report of the National Human Rights Commission found no evidence to suggest the incident had been “an unpremeditated eruption of mob violence caused by the provocation of the inmates. It is more consistent with a premeditated and planned attack”. (Human Rights Commission of Sri Lanka, *Interim Report on the Incident at the Bindunuwewa Rehabilitation Centre, Bandarawela - 24 & 25 October 2000*, 1 Nov. 2000, p. 16.) The Commission also found that the sixty or so police officers had “been guilty of a grave dereliction of duty in not taking any effective action to prevent the acts of violence ...”. *Ibid.*, p. 12.

<sup>11</sup> Following autopsies on the victims’ bodies the police arrested 56 suspects among both villagers and police officers. While the remains of 17 of the victims were identified at the mortuary by family members, the families of the remaining 10 victims refused to identify their loved ones among the badly mangled remains. In the course of my visit, I met the mothers of four of the latter group. In the immediate aftermath of the massacre they provided blood samples in order to match their DNA with that of the unidentified victims, as requested by the authorities. According to the authorities, the samples were sent to a DNA laboratory in New Delhi. According to the information presented to me the authorities have still not disclosed to these mothers the results of the DNA matching. This is an issue which the Government should clarify immediately. Prosecutors charged 41 persons with various crimes, including murder. Of those, 23 were released on the grounds that there was no case to answer. The remaining 18 were tried and 13 of them acquitted for lack of evidence. On 1 July 2003, the Colombo High Court found the remaining five individuals guilty and sentenced them to death. The Supreme Court subsequently quashed the conviction of one of the five, a police sub-inspector from Bandarawela, on grounds of “lack of evidence”. On 27 May 2005, the Supreme Court acquitted the remaining four accused, again citing lack of evidence. The two commanding officers identified in the Commission of Inquiry report have neither been disciplined nor criminally prosecuted.

<sup>12</sup> For most Sri Lankans, the legal ins-and-outs of any particular case are, understandably, less notable than the broader patterns of justice they perceive. In this regard the impunity in *Bindunawewa* stands in stark contrast in the public mind to the speedy and effective investigation following the November 2004 assassination of Sarath Ambepitiya, a High Court judge. Within seven months the investigation and trial were completed and convictions obtained. Success in the latter case holds two important lessons. Firstly, the efficiency of the process meant that although some of the witnesses were reportedly threatened, none of them withdrew, changed testimony, or was injured, unlike the situation in a great many other criminal cases. Secondly, sophisticated forensic evidence, including DNA evidence, was reportedly crucial in securing the conviction. The *Ambepitiya* case demonstrated that the Sri Lankan police, prosecution and judiciary are capable of delivering justice to the victims of extrajudicial killings. But in the public mind it seemed also to show that the speed and efficacy of justice depend on the identity of the victim rather than the difficulty of investigating the crime. There is an urgent need to dispel this perception with reforms that ensure timely and effective justice for all.

*The criminal justice system:* The blood feud phenomenon re-emerged at the end of the communist era and increased significantly with the 1997 breakdown in law and order. The absence of effective official responses to criminality encouraged the citizenry to revert to traditional mechanisms to obtain justice. But suggestions that the criminal justice system is still so inefficient and corrupt as to necessitate continuing resort to blood feuds to achieve justice appear misplaced. While the justice system does suffer from serious weaknesses and considerable corruption, there is no evidence that a perceived law and order vacuum explains a continuing attachment to the practice of blood feuds. While some cases, particularly older ones, remain unresolved, and some accused killers have gone into hiding or fled the country and not been extradited, in most of the cases I examined, the killer had either surrendered or been quickly arrested, and was prosecuted and sentenced. Moreover, the reduction in recent years in the overall homicide rate has also brought with it a reduction in blood feuds, thus attesting to the impact of more effective policing, among other factors.

A much more salient problem is that many families involved in blood feuds do not see the state's criminal justice system as being *capable* of addressing their concerns, which center around the loss of blood and honour caused by the initial killing. Sentencing a killer to prison fails to go to the essence of their conception of justice, which requires restoration of the lost blood, either through a revenge killing or a voluntary formal reconciliation between the families. The actions of the state vis-à-vis the perpetrator are thus irrelevant in the families' evaluation of whether there has been a "just" response to the original killing.

On the other hand, the role of the state in relation to the family in isolation varies. For many such families, it is limited at best. Some believe that, in practical terms, there is little the state *could* do to protect them. Others think the state *should* do little because matters of honour and respect must be resolved privately, rather than by the police. Moreover, many isolated families never receive a specific threat to which police could respond – they just believe that the lack of *besa* means they could be targeted at any time.

There are, however, cases in which the state could play a more active protection role for the isolated family. Offers to monitor are sometimes made, but it is not clear how seriously they are followed up. Internal relocation has occurred, but a more systematic program could be developed. Threats could be tracked more effectively and prosecuted far more often than has been the case to date.

## C. THE ROLE OF “SOFT LAW” STANDARDS

*Interim Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/61/311, 5 September 2006, ¶¶ 30-54):*

30. Most international human rights norms are, by their very nature, stated in broad and somewhat open-ended terms. It thus falls to various interpretative institutions established at the national and international levels to undertake the process of elaborating upon the content and requirements of the relevant standards so that they are capable of providing practical guidance in specific contexts. An important function of the Special Rapporteur is to assist this process. The present analysis thus seeks to shed some light on key issues.

### *A. The evolving human rights regime and the role of “soft law” standards*

31. The international legal regime applicable to extrajudicial executions is ultimately grounded in norms of customary international law, the Universal Declaration of Human Rights and the provisions of widely ratified international treaties. While the direct applicability of the last will vary from country to country according to its record of ratification, it remains the case that there is a significant influence exerted by non-universally ratified treaty norms and by “soft law” standards in the shaping and interpretation of the basic regime. This is not to suggest that all relevant norms, whether formally accepted or not by a given country, are nevertheless applicable to it. This is patently not the case, but it is important to acknowledge that the formation and evolution of international human rights norms are not black and white or unidimensional processes. Just as the Standard Minimum Rules for the Treatment of Prisoners exerted considerable and systematic influence before they became an accepted part of customary international law, so too do various bodies of principles that have been adopted by United Nations bodies such as the Economic and Social Council and the General Assembly exert a significant influence over the interpretative context which operates today in relation to situations involving extrajudicial executions. In other words, the jump from the status of a declaratory but non-binding declaration or statement of principles or guidelines to that of a customary norm is a gradual and often imperceptible process. It is this process which gives salience to the key aids to interpretation which are regularly invoked by United Nations human rights bodies and other institutional arrangements entrusted with the interpretation and application of human rights standards.

32. In order to illustrate these processes the following sections of this report provide two case studies. One concerns the use of lethal force by law enforcement officials, illustrating how non-binding principles can assist in determining the content of binding rules. The second concerns the concept of due diligence and notes its evolution from a principle enunciated by human rights courts to one which is now firmly entrenched in treaty law.

### *B. Case study: the use of lethal force by law enforcement officials*

33. One issue frequently underscored in communications that I have sent to Governments is that of the lethal use of force by law enforcement officials. My report on Nigeria provides a compelling example of what happens when the rules governing such situations are inconsistent

with the fundamental principles reflected in the basic international norms, as elaborated upon in standards originally adopted on a non-binding basis.<sup>13</sup> Nigeria's standing "rules for guidance in use of firearms by the police" (Police Order No. 237) authorize the use of firearms if a police officer cannot "by any other means" arrest or rearrest any person who is suspected (or has already been convicted) of an offence punishable by death or at least seven years' imprisonment. The rules which elaborate upon this provision are even more permissive. They note that any person who seeks to escape from lawful custody commits a felony warranting a seven-year sentence. As a result shooting to kill someone charged with stealing goods of negligible value would be justified if the person were alleged to be escaping from custody. The only qualification contained in the rules is that "firearms should only be used if there are no other means of effecting his arrest, and the circumstances are such that his subsequent arrest is unlikely".

34. These rules attempt to codify the principle of necessity, but completely ignore the principle of proportionality which, as we shall see below, constitute the twin pillars of international law in this area. Rather than permitting the intentional lethal use of force only "in order to protect life", these rules permit deliberate killing even to prevent the possible repetition of minor thefts. The consequences in relation to armed robbery — a capital offence in Nigeria — have been devastating. According to official statistics, 2,402 armed robbers have been killed by the police since 2000. (In 2004, one "armed robber" was killed for every six reported armed robberies.) While many of these were executions that would not have satisfied even the principle of necessity, it is the inadequacy of the rules on proportionality that makes the pretext of a fleeing armed robber available. Another example from Nigeria illuminates the human consequences of failing to properly incorporate international standards on necessity into domestic rules on the use of lethal force. In "operation fire-for-fire", a 2002 campaign against crime, the Inspector-General of Police pre-authorized police officers to fire in "very difficult situations". The result, revealed in police statistics, was that in the first 100 days, 225 suspected criminals were killed, along with 41 innocent bystanders.

35. The principles of international human rights law applicable in such contexts draw significantly upon the Code of Conduct for Law Enforcement Officials<sup>14</sup> and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.<sup>15</sup> Each of these instruments has played a central role in defining the limits to the use of force by law enforcement officials.<sup>16</sup> They are of special interest for two reasons. First, they were developed through intensive dialogue between law enforcement experts and human rights experts. Second, the process of their development and adoption involved a very large number of States and provides an indication of the near universal consensus on their content.<sup>17</sup> Of course, neither the consensus between law enforcement and human rights experts nor the consensus among States about the desirability of compliance with the Code of Conduct and the Basic Principles is definitive in

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<sup>13</sup> See E/CN.4/2006/53/Add.4, paras. 18 and 43-47.

<sup>14</sup> General Assembly resolution 34/169 of 17 December 1979.

<sup>15</sup> Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990.

<sup>16</sup> The phrase "law enforcement officials" includes all government officials exercising "police powers", sometimes including "military authorities" and "security forces" as well as police officers. (Code of Conduct, art. 1, commentary (a) and (b); Basic Principles, preamble, note).

<sup>17</sup> Nigel S. Rodley, *The Treatment of Prisoners Under International Law* (2nd ed.) (Oxford University Press, 1999), pp. 355-368, provides an overview of the development of the *Code of Conduct and Basic Principles*.

terms of their formal legal status, and some of the provisions are clearly guidelines rather than legal dictates. However, some provisions of the Code of Conduct and the Basic Principles are rigorous applications of legal rules that States have otherwise assumed under customary or conventional international law. Among these are the instruments' core provisions on the use of force. Thus, the substance of article 3 of the Code of Conduct and principle 9 of the Basic Principles reflects binding international law.

36. Human rights standards on the use of force derive from the understanding that the irreversibility of death justifies stringent safeguards for the right to life, especially in relation to due process. A judicial procedure, respectful of due process and arriving at a final judgement, is generally the *sine qua non* without which a decision by the State and its agents to kill someone will constitute an "arbitrary deprivation of life" and, thus, violate the right to life.<sup>18</sup>

37. Arbitrariness is not, however, simply the opposite of due process. The human rights obligations of States include protecting the right to life of private individuals against the actions of other private individuals.<sup>19</sup> That is, States must not only refrain from killing but must also exercise due diligence in preventing murder. Clearly there are instances in which the decision not to kill someone suspected of, or engaged in, the commission of a violent crime would itself result in the deaths of others. The typical situation would be one in which a suspect is threatening someone with a gun, apparently with the intention of shooting him, and in which the officer could expect to be shot if he attempted to arrest the gunman and bring him before a court. No reasonable interpretation of the State's obligation to respect the right to life would definitively rule out a police officer's decision to use lethal force in such a situation. As a result, due process remains the ideal against which "second best" safeguards for such situations must be measured. Necessity and proportionality are among the most fundamental of these second best safeguards.

38. The safeguards of necessity and proportionality are included in article 3 of the Code of Conduct and its commentary. Article 3 states: "Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty." The commentary appended to this provision explains that:

"...

"(b) ... In no case should this provision be interpreted to authorize the use of force which is disproportionate to the legitimate objective to be achieved.

"(c) The use of firearms is considered an extreme measure. In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender. ..."

39. Similarly, the Basic Principles' most general statement on the use of lethal force, principle 9, provides that:

"Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person

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<sup>18</sup> See International Covenant on Civil and Political Rights (ICCPR), art. 6 (1).

<sup>19</sup> See E/CN.4/2005/7, paras. 65-76.

presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.”

40. To fully understand the legal basis for these provisions it is important to distinguish the proportionality criterion from the necessity criterion and to evaluate the contribution each safeguard makes to reconciling the obligations to respect and to ensure while adhering as closely as possible to the due process ideal.

41. While the proportionality requirement imposes an absolute ceiling on the permissible level of force based on the threat posed by the suspect to others, the necessity requirement imposes an obligation to minimize the level of force applied regardless of the level of force that would be proportionate. With respect to the use of firearms, the applicable standard of necessity is that the resort to this potentially lethal measure must be made “only when less extreme means are insufficient to achieve these objectives”. The question of a measure’s sufficiency can hardly be determined in advance. It is, rather, determined by the nature of the resistance put up by the suspect. In general, the way in which law enforcement officials should determine the necessary level of force is by starting at a low level and, in so far as that proves insufficient in the particular case, graduating, or escalating, the use of force.<sup>20</sup> Indeed, force should not normally be the first resort: so far as the circumstances permit, law enforcement officials should attempt to resolve situations through non-violent means, such as persuasion and negotiation.<sup>21</sup> As expressed in the Basic Principles, “They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result”.<sup>22</sup> If it should become necessary to use force, the level of that force should be escalated as gradually as possible. While the relevant provisions of the Basic Principles are not exhaustive, they are suggestive of the course such escalation might take. As a first step, officials should attempt to “restrain or apprehend the suspected offender” without using force that carries a high risk of death — perhaps by physically seizing the suspect.<sup>23</sup> If the use of firearms does prove necessary, law enforcement officials should “give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident”.<sup>24</sup> Like the escalation of force, one purpose of providing a warning is to avoid prejudging the level of resistance that will be shown. If the warning does not suffice, any use of firearms should be such as to “[m]inimize damage and

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<sup>20</sup> The issue of whether there are some situations in which an immediate recourse to lethal force may be strictly necessary in order to protect the lives of others arises in the context of so-called shoot-to-kill policies. See E/CN.4/2006/53, paras. 44-54; see also Center for Human Rights and Global Justice, *Irreversible Consequences: Racial Profiling and Lethal Force in the “War on Terror”* (New York: New York University School of Law, 2006) available at <<http://www.nyuhr.org/docs/CHRGJ%20Irreversible%20Consequences.pdf>>.

<sup>21</sup> See Basic Principles, principle 4; see also principle 20.

<sup>22</sup> *Ibid.*, principle 4.

<sup>23</sup> *Code of Conduct*, art. 3, commentary (c).

<sup>24</sup> *Basic Principles*, principle 10.

injury”.<sup>25</sup> The furthest extreme on this continuum of force is, of course, the intentional lethal use of force. This must be resorted to only when “strictly unavoidable”.<sup>26</sup>

42. Proportionality deals with the question of how much force might be permissible. More precisely, the criterion of proportionality between the force used and the legitimate objective for which it is used requires that the escalation of force be broken off when the consequences for the suspect of applying a higher level of force would “outweigh” the value of the objective.<sup>27</sup> Proportionality could be said to set the point up to which the lives and well-being of others may justify inflicting force against the suspect — and past which force would be unjustifiable and, in so far as it should result in death, a violation of the right to life. The general standard for proportionality is that the use of force must be “in proportion to the seriousness of the offence and the legitimate objectives to be achieved”.<sup>28</sup> From this general standard, other more precise standards may be derived for when particular levels of force may be used. The Basic Principles permit the intentional lethal use of force only “in order to protect life”.

43. With respect to the proportionality of other (potentially lethal) uses of firearms, principle 9 states:

“Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape. ...”<sup>29</sup>

44. This list of objectives proportionate to the use of firearms is distinguished from the objective “to protect life” only in that it includes the disruption of some conduct that is less certain, though still likely, to cost lives. The notion of proportionality at work here is fairly simple — taking someone’s life is permitted only to protect the lives of others from him or her — but gains a measure of complexity inasmuch as use of force rules must be applicable *ex ante*. The fundamental question is of proportionality between the objectively anticipatable likelihood that the use of force will result in death and the comparable anticipatable likelihood that failing to incapacitate the individual would result in the deaths of others. It must also be remembered that proportionality is a requirement additional to necessity. The principle of necessity will, thus, never justify the use of disproportionate force. If all proportionate measures have proved insufficient to apprehend a suspect, he or she must be permitted to escape.

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<sup>25</sup> *Ibid.*, principle 5 (b); see also principle 11 (b).

<sup>26</sup> *Basic Principles*, principle 9; see also *Code of Conduct*, art. 31. The distinction drawn between the use of firearms and the intentionally lethal use of firearms stems from the recognition that any use of firearms is potentially lethal. Shots fired to warn rather than strike or to stop rather than kill cannot be relied upon not to cause death. Indeed, any use of force may result in death, whether by happenstance or due to the condition of the target. Principle 9 interprets the principle of proportionality as it applies to two points on a continuum, specifying the objectives that would be proportionate to that level of force.

<sup>27</sup> Metaphors of weighing and balancing are difficult to avoid in this context, but they risk conjuring up the idea of cost-benefit analysis. The balancing to be applied in human rights law is more in keeping with the framework used for evaluating restrictions on rights under which the reconciliation of competing values must respect “the just requirements of morality, public order and the general welfare in a democratic society” (Universal Declaration of Human Rights, art. 29 (2)).

<sup>28</sup> *Basic Principles*, principle 5 (a); see also *Code of Conduct*, art. 3, commentary (b) (see para. 38).

<sup>29</sup> See also *Code of Conduct*, art. 3, commentary (c) (see para. 38).

45. It is tempting to focus on the ethical probity of law enforcement officials rather than the domestic rules regulating the use of lethal force. However, as I indicated in my first report to the Commission, in relation to respect for the right to life by military personnel, “Remedial proposals to inculcate higher ‘ethical’ standards or to develop a greater ‘moral’ sensibility [are] inadequate. Respect for human rights and humanitarian law are legally required and the relevant standards of conduct are spelled out in considerable detail. Remedial measures must be based squarely on those standards”.<sup>30</sup>

### *C. The central concept of due diligence*

#### 1. General applicability: the case of disappearances

46. The adoption by the Human Rights Council by its resolution 2006/1 of the International Convention for the Protection of All Persons from Enforced Disappearance (hereafter Disappearance Convention) was a key accomplishment of its first session both for its potential to protect individuals and for its contribution to the development and codification of the principle of due diligence.

47. In my first report to the Commission,<sup>31</sup> I reviewed the antecedents of the principle in the context of the struggle against disappearances more than 25 years ago. The approach pioneered within the United Nations setting<sup>32</sup> was adopted and further developed by the Inter-American Court of Human Rights in particular.<sup>33</sup>

48. The Disappearance Convention represents the most sophisticated effort to date in articulating the due diligence standard relating to a State’s affirmative obligations to ensure human rights. It exemplifies the process by which a principle that is implicit in the international human rights regime is developed by experts and refined in the jurisprudence of human rights courts before being effectively codified in treaty law. Although the offence is defined primarily in terms of acts for which the State bears some direct responsibility,<sup>34</sup> the Convention specifically requires States to “take appropriate measures to investigate [the relevant] acts [when they have been] committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice”.<sup>35</sup> In addition it elaborates in some detail upon the required investigative process,<sup>36</sup> it makes the connection between transparency and proper record-keeping and the avoidance of disappearances,<sup>37</sup> and it addresses not only the necessity for, but also the content of, training for those responsible for detainees.<sup>38</sup> These provisions will be influential in interpreting the implications of States’ due diligence obligations in other contexts.

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<sup>30</sup> See E/CN.4/2005/7, para. 54.

<sup>31</sup> *Ibid.*, paras. 73-74.

<sup>32</sup> See A/34/583/Add.1, para. 124.

<sup>33</sup> Velásquez Rodríguez v. Honduras, Annual Report of the Inter-American Court of Human Rights, OAS/Ser.L/V/III.19, doc. 13 (1988), in *International Legal Materials*, vol. 28 (1989), p. 291.

<sup>34</sup> Disappearance Convention, art. 2.

<sup>35</sup> *Ibid.*, art. 3.

<sup>36</sup> *Ibid.*, art. 10.

<sup>37</sup> *Ibid.*, arts. 17, 18.

<sup>38</sup> *Ibid.*, art. 23.

## 2. Specific applicability: deaths in custody

49. The category “deaths in custody” encompasses a staggering array of abuses. With respect to this issue, my last report to the Commission on Human Rights referred to 25 communications sent to 19 countries regarding more than 185 victims.<sup>39</sup> (Roughly one out of four of the individual cases brought to the attention of this mandate concerns a death in custody.) These communications concerned allegations of prisoners being executed with firearms and, in one case, by immolation; torture or other ill-treatment, often for the purpose of extracting a confession, beatings, and sexual abuse resulting in death; killings by guards to break up riots or demonstrations; detainees being transported or held in containers that were so overcrowded or lacking in ventilation as to lead to the deaths of large numbers of detainees; and guards standing by while persons in custody were killed by private citizens. This catalogue of abuses indicates that the specificity of custodial death as a category of violation is not due to the cause of death. Executions, the use of excessive force, and other abuses resulting in death occur against persons outside of custody as well as in custody.

50. What makes “custodial death” a useful legal category is not the character of the abuse inflicted on the victim but the implications of the custodial context for the State’s human rights obligations. These implications concern the State obligations to both prevent deaths and respond to those deaths that occur. When the State detains an individual, it is held to a heightened level of diligence in protecting that individual’s rights. When an individual dies in State custody, there is a presumption of State responsibility. These interlocking implications produce the legal specificity of custodial death as a human rights violation.

51. With respect to the prevention of deaths in custody, States have heightened responsibilities for persons within their custody. In all circumstances, States are obligated both to refrain from committing acts that violate individual rights and to take appropriate measures to prevent human rights abuses by private persons. The general obligation assumed by each State party to the International Covenant on Civil and Political Rights (ICCPR) is, thus, “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant. ...”<sup>40</sup> This obligation has notably far-reaching implications in the custodial context. With respect to the obligation to respect rights, the controlled character of the custodial environment permits States to exercise unusually comprehensive control over the conduct of government officials — police officers, prison guards, soldiers, etc. — in order to prevent them from committing violations. With respect to the obligation to ensure rights, the controlled character of the custodial environment also permits States to take unusually effective and comprehensive measures to prevent abuses by private persons. Moreover, by severely limiting inmates’ freedom of movement and capacity for self-defence, the State assumes a heightened duty of protection. While the same basic standard applies in custodial and non-custodial settings — the State must exercise “due diligence” in preventing abuse<sup>41</sup> — the level of diligence that is due is considerably higher in the custodial context.

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<sup>39</sup> E/CN.4/2006/53/Add.1. The communications concerned 185 identified individual cases of death in custody; however, some communications also dealt with larger groups of unidentified persons.

<sup>40</sup> ICCPR, art. 2 (1).

<sup>41</sup> See E/CN.4/2005/7, paras. 71-75.

52. States are obligated to take measures to provide mechanisms of strict legal control and full accountability and to take measures to provide safe and humane conditions of detention. Some concrete measures are required by treaty or customary international law. Of particular note are ICCPR, the Convention on the Rights of the Child, and the Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention) and to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention). In addition, a number of instruments adopted by United Nations organs have formulated broadly applicable measures conducive to fulfilling general legal obligations to respect and ensure the right to life.<sup>42</sup> In addition there are various other instruments more specifically concerned with the problem of torture, a form of abuse that leads to death in some cases. While many of the provisions contained in these instruments would be best conceptualized as guidelines, they were generally developed with the extensive involvement of both human rights and correctional experts, suggesting that many of the measures they contain will typically be necessary in practice to effectively prevent human rights violations.

53. Another legal consequence of the fact of detention is that, in cases of custodial death, there is a presumption of State responsibility. The rationale for this presumption was illustrated in the case of *Dermit Barbato v. Uruguay*.<sup>43</sup> In that case, the Human Rights Committee found that Uruguay had violated the right to life of Hugo Dermit while he was detained at a military barracks. The cause of death found by the autopsy conducted by the State and recorded on his death certificate was not contested: he died of “acute haemorrhage resulting from a cut of the carotid artery”.<sup>44</sup> However, while the State claimed that “he had committed suicide with a razor blade”, the author of the communication claimed that he had been killed by the military through mistreatment and torture.<sup>45</sup> The State offered no evidence in support of its explanation, and the author of the communication was unable to adduce more than circumstantial evidence — mainly, that Dermit had been in good spirits inasmuch as he expected to be released shortly. The Human Rights Committee concluded that:

“While the Committee cannot arrive at a definite conclusion as to whether Hugo Dermit committed suicide, was driven to suicide or was killed by others while in custody; yet, the inescapable conclusion is that in all the circumstances the Uruguayan authorities either by act or by omission were responsible for not taking adequate measures to protect his life, as required by article 6 (1) of the Covenant.”<sup>46</sup>

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<sup>42</sup> See, e.g., Basic Principles for the Treatment of Prisoners; Basic Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions; Basic Principles on the Use of Force and Firearms; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; United Nations Standard Minimum Rules for the Administration of Juvenile Justice; Standard Minimum Rules for the Treatment of Prisoners; and United Nations Rules for the Protection of Juveniles Deprived of their Liberty. For a detailed study of these instruments, see Rodley, *op. cit.* at note 32.

<sup>43</sup> Communication No. 84/1981, *Dermit Barbato v. Uruguay*, Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 40 (A/38/40), annex IX.

<sup>44</sup> *Ibid.*, paras. 1.4 and 6.1.

<sup>45</sup> *Ibid.*, para. 1.4.

<sup>46</sup> *Ibid.*, para. 9.2.

54. In other words, the State's two-fold obligation to ensure and respect the right to life, together with its heightened duty and capacity to fulfil this obligation in the custodial environment, justifies a rebuttable presumption of State responsibility in cases of custodial death.<sup>47</sup> One consequence of this presumption is that the State must affirmatively provide evidence that it lacks responsibility to avoid that inference.<sup>48</sup> Another important consequence of this presumption is that, absent proof that the State is not responsible, the State has an obligation to make reparations to the victim's family. This is the case even if the precise cause of death and the persons responsible cannot be identified.

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<sup>47</sup> This conclusion was also reached by the first person to hold this mandate: "A death in any type of custody should be regarded as prima facie a summary or arbitrary execution and appropriate investigations should immediately be made to confirm or rebut the presumption" (E/CN.4/1986/21, para. 209).

<sup>48</sup> The problem of States advancing implausible and unsubstantiated accounts that could not readily be disproved has confronted this mandate since the beginning. See E/CN.4/1983/16, para. 201. Such allegations cannot be resolved without evidence from the State.

## D. GENOCIDE AND CRIMES AGAINST HUMANITY

*Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (E/CN.4/2005/7, 22 December 2004, ¶¶ 36-40, 82-83):*

36. The way in which individual States and the international community as a whole deal with the most serious human rights violations of all - those involving genocide or crimes against humanity - tells us a lot about the priorities involved and about the current state of human rights protection. The overall picture is too often characterized by outright denial, refusal to address the issue, or positive undermining of initiatives designed to respond in some way to these most serious of all allegations. One continuing trend over the past year has been an excessive legalism which manifests itself in definitional arguments over whether a chronic and desperate situation has risen to the level of genocide or not. In the meantime, while some insist that the term is clearly applicable and others vigorously deny that characterization, all too little is done to put an end to the ongoing violations.<sup>49</sup> At the end of the day the international community must be judged on the basis of its action, not on its choice of terminology.

37. At the same time opposition has escalated in some quarters to the International Criminal Court, despite the fact that it is the only mechanism that has ever been established in order to determine systematically and objectively when the crime of genocide has been committed, and thus to lay down guidelines which will reduce the likelihood of legalistic arguments masking inaction in the future.

38. Nevertheless, there have been several encouraging developments in the past year. One of those was the appointment by the Secretary-General of Juan Méndez as his Special Adviser on the Prevention of Genocide. Another was the appointment of an independent International Commission of Inquiry “in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable” (Security Council resolution 1564 (2004), para. 12). This step followed the report of a country visit undertaken by the then Special Rapporteur, whose report is currently before the Commission. One of the conclusions of her report was that there are “strong indications that the scale of violations of the right to life in Darfur could constitute crimes against humanity for which the Government of the Sudan must bear responsibility” (E/CN.4/2005/7/Add.2, para. 57). In terms of action as opposed to inquiries, however, the High-level Panel on Threats, Challenges and Change commented in December 2004 on “the glacial speed at which our institutions have responded to massive human rights violations in Darfur”.<sup>50</sup>

39. A third positive development in 2004 was the High-level Panel’s emphasis on more concerted action against genocide, which included calling upon the Security Council to authorize

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<sup>49</sup> In this respect it is relevant to recall the situation of Rwanda in 1994 when United Nations officials did not use the term until one month after massive killings had begun and some Security Council members continued to resist use of the term for a considerable time thereafter.

<sup>50</sup> *A More Secure World: Our Shared Responsibility*, report of the Secretary-General’s High-level Panel on Threats, Challenges and Change (United Nations, 2004), para. 42.

“military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent”.<sup>51</sup> The Panel also asked “the permanent members [of the Security Council], in their individual capacities, to pledge themselves to refrain from the use of the veto in cases of genocide and large-scale human rights abuses”.<sup>52</sup> If the latter proposal were to have a serious prospect of being adopted, there would be a role for the Commission on Human Rights in suggesting when such situations exist.

40. The Special Rapporteur has already met with the Special Adviser on the Prevention of Genocide and the two experts have agreed that they will work closely together whenever the desired outcome would be facilitated thereby.

[...]

82. The International Criminal Court represents an essential element in the struggle to prevent genocide and crimes against humanity. In order to promote those objectives all States should ratify its Statute.

83. The permanent members of the Security Council should pledge themselves not to use the veto in cases involving genocide and large-scale human rights abuses. The Commission should consider how it can facilitate progress towards this goal.

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<sup>51</sup> Ibid., para. 203.

<sup>52</sup> Ibid., para. 256.