

INVESTIGATION AND PROSECUTION OF KILLINGS

This chapter of the Handbook collects the observations and recommendations of the UN Special Rapporteur with respect to States' investigation and prosecution of killings. A State's obligation to ensure the right to life includes a duty to promptly and effectively investigate alleged violations of that right, whether by the State itself or by non-state actors. The material in this chapter addresses the various governmental institutions necessary to carry out this obligation, including police, prosecutors and the judiciary. Accountability for violations of the right to life requires the consistent functioning and cooperation of all of these institutions.

This chapter also collects the Special Rapporteur's observations regarding the efficacy of mechanisms for investigating alleged violations of the right to life in special contexts, such as in armed conflict and societies in transition. Finally, the Special Rapporteur discusses how international assistance can complement domestic efforts to investigate and prosecute killings.

A. OBLIGATION TO INVESTIGATE, PROSECUTE AND PUNISH EXTRAJUDICIAL EXECUTIONS	3
B. THE CRIMINAL JUSTICE SYSTEM	12
C. POLICE INVESTIGATIONS	29
D. PROSECUTIONS	38
E. THE JUDICIARY	42
F. COMMISSIONS OF INQUIRY	50
G. WITNESS PROTECTION PROGRAMS	67
H. POLICE INTERNAL AFFAIRS	85
I. OMBUDSMEN	89
J. NATIONAL POLICE COMMISSIONS	92
K. POLICE OVERSIGHT BOARDS	96
L. CORONERS	97
M. RELATIONSHIP BETWEEN POLICE AND PROSECUTORS	98
N. CORRUPTION AND IMPUNITY	103
O. POOR FORENSICS AND IMPUNITY	110
P. TRANSPARENCY AND CRIMINAL JUSTICE SYSTEMS	112
Q. CRIMINAL JUSTICE SYSTEM AND THE PROSECUTION OF MILITARY OFFICIALS	114
R. INVESTIGATIONS AND PROSECUTION ISSUES ARISING IN ARMED CONFLICT	122
Military justice systems	122
Accountability for civilian deaths	135
Command responsibility	139
Transparency in armed conflict	142
Armed opposition groups and their "justice" systems	149
Prosecutions of private contractors and civilian government employees	153
S. TRANSITIONAL JUSTICE AND EXTRAJUDICIAL EXECUTIONS	157
Amnesties and extrajudicial executions	157
Obligation to preserve evidence	157
T. INDEPENDENT OR EXTERNAL AND INTERNATIONAL INVESTIGATIONS AND MONITORING	158

Role of the Office of the High Commissioner for Human Rights.....	158
National commissions on human rights	160
Non-governmental organisations.....	165
The International Criminal Court	166
Ceasefire monitoring	169

A. OBLIGATION TO INVESTIGATE, PROSECUTE AND PUNISH EXTRAJUDICIAL EXECUTIONS

Report of the Special Rapporteur to the Human Rights Council (A/HRC/14/24, 20 May 2010, ¶¶ 53-55):

53. Impunity is often a central cause of continued killings. In many of the countries visited, impunity is maintained through problems at every level of the criminal justice system. Thus, police may be unwilling or unable to carry out an independent investigation of the killing. The State may lack forensic capacity to conduct investigations. Crimes scenes may not be secured. The police may fail to refer cases to the prosecution service. Prosecutors may be corrupt or poorly trained. Witnesses may justifiably be unwilling to testify because of inadequate witness protection programmes. Judges' dockets may be so overcrowded that cases are delayed for years, or judges may also take bribes to delay cases or absolve perpetrators. If perpetrators are convicted, prison systems may be insecure or susceptible to corruption, resulting in prisoners escaping or bribing their way out of detention.

54. In response to these challenges, specific studies have addressed:

- (a) The need for external oversight of the police, including a study of the various forms of oversight, and the applicable law and principles (A/HR/14/24/Add.8);
- (b) The obstacles to effective national commissions of inquiry, and the requirements for the creation and implementation of effective commissions;²²
- (c) Best practices in witness protections programmes (A/63/313);
- (d) How States can make their military justice systems compatible with human rights standards (A/63/313).

55. Mission reports have also addressed the important role of international and nongovernmental actors, including NGOs, national human rights institutions, OHCHR, and the International Criminal Court, in promoting accountability.

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (E/CN.4/2006/53, 8 March 2006, ¶¶ 33-43):

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

weapons and tactics on the incidental loss of civilian life generally remain ad hoc, leaving compliance with requirements of proportionality and precautionary measures under-examined.¹

34. These practices threaten to roll back 50 years of progress in subjecting armed conflict to the rule of law. The Geneva Conventions of 12 August 1949 first established the legal obligation of States to investigate alleged unlawful killings and to prosecute their perpetrators. Elaborating the general obligation to “respect and to ensure respect” for humanitarian law,² the Geneva Conventions mandated the penal repression of violations. In particular, when a State receives allegations that someone has committed or ordered a grave breach - such as the “wilful killing” of a protected civilian³ - the State is then legally obligated to search for him and either try him before its own courts or extradite him to another State that has made out a prima facie case.⁴ Should he be found guilty, the State must impose an “effective penal sanction[.]”.⁵ However, gaps remained in this accountability regime. In international armed conflicts, some individuals were excluded from protection by their nationality.⁶ In non-international armed conflicts, no mechanism for penal repression was provided.⁷ The scope of legal protection has, however, steadily improved. Since the Geneva Conventions were adopted in 1949, States have both filled its gaps and supplemented its protections with new instruments of human rights law, such as the ICCPR, which was adopted in 1966. Thus, with respect to non-international conflicts, the additional protection offered by human rights law was acknowledged in the Preamble to the

¹ See e.g. Marco Sassòli, “Targeting: the scope and utility of the concept of military objectives for the protection of civilians in contemporary armed conflicts”, in D. Wippman and M. Evangelista (eds.), *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts* (2005) 181 at 204-205.

² Common article 1 to the Geneva Conventions of 12 August 1949; see also Protocol I, article 87, paragraph 3.

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

(a) Making the civilian population or individual civilians the object of attack;

(b) Launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in article 57, paragraph 2 (a) (iii);

(c) Launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in article 57, paragraph 2 (a) (iii);

(d) Making non-defended localities and demilitarized zones the object of attack;

(e) Making a person the object of attack in the knowledge that he is “hors de combat”.

⁴ Article 49/50/129/146 of the Geneva Conventions (I-IV).

⁵ Article 49/50/129/146 of the Geneva Conventions (I-IV).

⁶ See Geneva Convention (IV), article 4. Note that the broader substantive reach of the prohibition of willful killing. Common article 3 to the Geneva Conventions; Protocol I, article 75. These provisions reflect customary international law.

⁷ Common article 3 to the Geneva Conventions. Protocol II does not include any accountability mechanisms either.

Second Additional Protocol adopted in 1977.⁸ Today, human rights law and humanitarian law together require accountability in all circumstances.

35. Human rights law imposes a duty on States to investigate alleged violations of the right to life “promptly, thoroughly and effectively through independent and impartial bodies”.⁹ This duty is entailed by the general obligation to ensure the right to life to each individual. The particular measures States may take to fulfill this duty have been elaborated in detail with respect to law enforcement operations. Most prominently, in 1989 the Economic and Social Council adopted the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.¹⁰ These detailed principles should guide States whenever they carry out law enforcement operations, including during armed conflicts and occupations.¹¹ However, in other situations arising out of armed conflict and occupation, the modalities of the duty to investigate alleged violations have received less attention.

36. Armed conflict and occupation do not discharge the State’s duty to investigate and prosecute human rights abuses. The right to life is non-derogable regardless of circumstance.¹² This prohibits any practice of not investigating alleged violations during armed conflict or occupation. As the Human Rights Committee has held, “It is inherent in the protection of rights explicitly recognized as non-derogable ... that they must be secured by procedural guarantees ... The provisions of the [ICCPR] relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights.”¹³ It is undeniable that during armed conflicts circumstances will sometimes impede investigation. Such circumstances will never discharge the obligation to investigate - this would eviscerate the non-derogable character of the right to life - but they may affect the modalities or particulars of the investigation. In addition to being fully responsible for the conduct of their agents, in relation to the acts of private actors States are also held to a standard of due diligence in armed conflicts as well as peace. On a case-by-case basis a State might utilize less effective measures of

⁸ For an analysis of the simultaneous and complementary relationship of human rights and humanitarian law see E/CN.4/2005/7, paragraphs 41-54.

⁹ Human Rights Committee, general comment No. 31, “Nature of the legal obligation on States Parties to the Covenant” (2004), (CCPR/C/21/Rev.1/Add.13, para. 15). See also Commission on Human Rights resolution 2004/37, paragraph 5, in relation to the mandate of the Special Rapporteur: “Reiterates the obligation of all States to conduct exhaustive and impartial investigations into all suspected cases of extrajudicial, summary or arbitrary executions, to identify and bring to justice those responsible, while ensuring the right of every person to a fair and public hearing by a competent, independent and impartial tribunal established by law, to grant adequate compensation within a reasonable time to the victims or their families and to adopt all necessary measures, including legal and judicial measures, in order to bring an end to impunity and to prevent the recurrence of such executions, as stated in the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.”

¹⁰ Economic and Social Council resolution 1989/65 of 24 May 1989.

¹¹ See Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Principle 1 (“... Exceptional circumstances including a state of war or threat of war, internal political instability or any other public emergency may not be invoked as a justification of such executions. Such executions shall not be carried out under any circumstances including, but not limited to, situations of internal armed conflict, excessive or illegal use of force by a public official or other person acting in an official capacity or by a person acting at the instigation, or with the consent or acquiescence of such person, and situations in which deaths occur in custody.”).

¹² ICCPR, article 4, paragraph 2.

¹³ Human Rights Committee, general comment No. 29, “Derogations from provisions of the Covenant during a state of emergency” (2001), paragraph 15.

investigation in response to concrete constraints. For example, when hostile forces control the scene of a shooting, conducting an autopsy may prove impossible. Regardless of the circumstances, however, investigations must always be conducted as effectively as possible and never be reduced to mere formality.¹⁴ In this regard, there are several areas of special concern.

37. The State obligation to conduct independent and impartial investigations into possible violations does not lapse in situations of armed conflict and occupation.¹⁵ While the modalities of this obligation in situations of armed conflict have not been fully settled, some points are clear:

- States must establish institutions capable of complying with human rights law obligations; there is no double standard for military justice. While human rights law does not dictate any particular institutional arrangement for the administration of justice, neither does it permit exceptions to its requirements. Investigations and prosecutions proceeding under military jurisdiction must - in each case and without exception - comply with the requirements of independence and impartiality;
- As an empirical matter, subjecting allegations of human rights abuse to military jurisdiction often leads to impunity.¹⁶ In such situations, investigation and prosecution by bodies independent of the military is necessary;
- While commanding officers have a duty to investigate and repress violations,¹⁷ there is growing awareness that additional mechanisms of investigation are needed in order to ensure impartiality.¹⁸

¹⁴ See Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, Judgment of July 29, 1988, paragraph 177: "The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government."

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

¹⁶ Former Special Rapporteurs on extrajudicial, summary or arbitrary executions have identified this relationship time and again. E/CN.4/1995/61, paragraph 93 ("Military tribunals, particularly when composed of military officers within the command structure of the security forces, very often lack the independence and impartiality required under international law. Military jurisdiction over human rights violations committed by members of the security forces very often results in impunity"). E/CN.4/1999/39, paragraph 67 ("In some cases situations of impunity are a direct product of laws or other regulations which explicitly exempt public officials or certain categories of State agents from accountability or prosecution ... The Special Rapporteur is also increasingly concerned about the practice of prosecuting members of security forces in military courts, which often fall short of international standards regarding the impartiality, independence, and competence of the judiciary").

¹⁷ Protocol I, article 87.

¹⁸ The development of the United Kingdom's policy on investigations over the past few years is instructive. The June 2003 policy of having the Royal Military Police (RMP) investigate and then decide on prosecution was shortly replaced with the July 2003 policy under which, "If the Commanding Officer (CO) of the soldier was satisfied, on the basis of the information available to him, that the soldier had acted lawfully and within the rules of engagement,

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

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

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

40. It is especially important to note that the stress and confusion of combat do not justify the rejection or avoidance of the applicable standards; the realities of armed conflict are fully accommodated by the substance of the applicable law and by the established defences to criminal culpability.¹⁹ Soldiers must be trained and held to the standards of international law. Any double standard in punishment is inimical to the rule of law and may implicate the prohibition of discrimination in human rights law.

then there was no requirement to initiate an investigation by the military police." Initially, then, the United Kingdom moved from a greater to lesser level of independence in the investigative process. However, according to Lieutenant General Sir John Reith, Chief of Joint Operations, "Between January and April 2004 there was a further reconsideration of this policy. This was prompted by the fact that the environment had become less hostile and also by the considerable media and Parliamentary interest in incidents involving UK forces in which Iraqis had died. On 24 April, a new policy was adopted by MND (SE) [Multi-National Division - Southeast] which required all shooting incidents involving UK forces which result in a civilian being killed or injured to be investigated by SIB (RMP). Exceptionally the Brigade Commander may decide that an investigation is not necessary and in any such case the decision must be notified to the Commander MND (SE) in writing." *Al Skeini v. Secretary of State for Defence*, High Court of Justice, Queen's Bench Division, Divisional Court, [2004] EWHC 2911 (Admin), 14 December 2004, paragraphs 47-54. [The quote from Lt. Gen. Reith is from his written witness statement].

¹⁹ See generally Marco Sassòli, "Le génocide rwandais, la justice militaire suisse et le droit international", Volume 12, *Revue suisse de droit international et de droit européen* (2002) 151, at 175-176.

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

42. Finally, it is important to acknowledge the unique characteristics of armed conflict. However, the question of what rules govern the use of lethal force is completely distinct from the question of investigating violations of these rules. While even intentional killing is often permitted in armed conflict, a State cannot determine whether a particular act was lawful without first investigating what occurred. Whether, for example, the deceased was taking part in hostilities is an inherently factual question, requiring factual investigation. Likewise, the Special Rapporteur cannot determine whether a particular incident falls within his mandate without first examining its facts. When he receives information alleging a violation, he will often need to be informed by the State concerned of the evidentiary basis for its determination regarding any status or activity that may have justified the use of lethal force. Conclusory determinations that the deceased was a combatant or was taking part in hostilities when killed do not enable the Special Rapporteur to respond effectively to information and swiftly pursue the elimination of extrajudicial, summary or arbitrary executions.

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

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

29. The international forces in Afghanistan should take seriously the principles of accountability and transparency, the importance of which they so frequently proclaim in other contexts.²⁰

²⁰ Human rights law imposes a duty on States to investigate alleged violations of the right to life “promptly, thoroughly and effectively through independent and impartial bodies” (Human Rights Committee, general comment No. 31, “Nature of the legal obligation on States Parties to the Covenant” (2004), (CCPR/C/21/Rev.1/Add.13), para.

Report on Mission to Israel and Lebanon (A/HRC/2/7, 2 October 2006, ¶¶ 31, 107):

31. Because of time, informational and other constraints, the mission was not in a position to evaluate the responsibility of individuals for crimes under national or international law. However, serious violations mentioned above and other principles of international humanitarian law by individuals constitute war crimes. States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects.²¹ They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.²²

107. The mission makes the following recommendations to the international Commission of Inquiry:

(a) Within the framework of resolution S-2/1, the Commission should examine a cross-section of Israeli attacks to evaluate whether they were directed against legitimate military objectives and respected the principle of proportionality. It should also investigate reported attacks against fleeing civilians, ambulances and health facilities, large-scale displacement and the destruction of housing and property, and determine whether any such acts amounted to war crimes;

Report on Mission to the Central African Republic (A/HRC/11/2/Add.3, 27 May 2009, ¶ 5):

5. International human rights law requires the Central African Republic to both respect and ensure the right to life.²³ The Government has an obligation to prevent extrajudicial killings of civilians, including alleged criminals, by the police and other security forces. It also has an obligation to use its security forces to ensure, insofar as possible, that the people living in the country are not murdered by non-State actors, such as bandits. The State must also investigate and prosecute those responsible for the unlawful killings that do occur.²⁴

Report on Mission to Sri Lanka (E/CN.4/2006/53/Add.5, 27 March 2006, ¶ 34):

34. The Government has failed to effectively investigate most political killings. This is due both to the police force's general lack of investigative ability and to other impediments. When I asked police officers why a particular killing had not been resolved, I generally received the same

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

²¹ See also the recommendation contained in para. 107 of report.

²² Ibid., pp. 568-603, 607-611 (Rules 156 and 158); see also E/CN.4/2006/53, paras. 33-43.

²³ ICCPR, arts. 2 (1), 6 (1).

²⁴ Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.

answer: the suspect escaped into an LTTE-controlled area. While it is true that the police are unable to enter these areas,²⁵ two observations are in order. First, in many cases the belief that the suspect was in an LTTE-controlled area was speculation inasmuch as no investigation had been carried out. Second, the police have lost much of their appetite for serious investigations of political killings. Many officers operate under the impression that investigating any crime presumed to involve the LTTE would imperil the ceasefire. These cases are simply too hot to handle. The Government should unambiguously instruct the police that, while they are obligated not to violate the CFA, they continue to be obligated to investigate crimes and apprehend suspects within the terms of the law, regardless of who those suspects might be.

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

The international law definition of extrajudicial execution is far broader than that under DRC law. It encompasses any killing by Government forces as well as killings by any other groups or individuals which the Government fails to investigate, prosecute and punish when it is in a position to do so.

Report on Mission to the United States of America (A/HRC/11/2/Add.5, 28 May 2009, Summary, ¶ 3):

All States have an obligation to effectively investigate, prosecute and punish violations of the right to life, including in situations of armed conflict. It is important, of course, to acknowledge the unique characteristics and challenges of armed conflict, including that intentional killing may be permitted. The obligation to enforce the law, however, does not change: the rule of law must be upheld in war as in peace. Some aspects of the rule of law have been taken seriously during United States military operations. Thus, after visiting Afghanistan in May 2008, I noted no evidence that international forces in Afghanistan, including those of the United States, were committing widespread intentional killings in violation of human rights or humanitarian law. In addition, the Government has implemented compensation programmes for civilian victims of United States military operations. While these programmes should be improved, the United States has shown admirable leadership in relation to compensation payments.

However, there have been chronic and deplorable accountability failures with respect to policies, practices and conduct that resulted in alleged unlawful killings, including possible war crimes, in the international operations conducted by the United States. The Government has failed to effectively investigate and punish lower-ranking soldiers for such deaths, and has not held senior officers responsible under the doctrine of command responsibility. Worse, it has effectively created a zone of impunity for private contractors and civilian intelligence agents by failing to investigate and prosecute them.

²⁵ The structural constraints the Ceasefire Agreement (CFA) places on police work must also be overcome. While the CFA's provisions restricting the movement of Government "armed forces" and LTTE "fighting formations" into areas controlled by the other party do not expressly address police officers, the understanding of the parties has given these provisions a prudent breadth. (CFA arts. 1.4-1.7.) It is clear that both parties have genuine security concerns regarding the movement of all armed personnel into their areas of control and understandable that police officers do not, in practice, have access to areas controlled by the opposing party.

[...]

3. Although the title of my mandate may seem complex, it should be simply understood as including any killing that violates international human rights or humanitarian law. This may include unlawful killings by the police, deaths in military or civilian custody, killings of civilians in armed conflict in violation of humanitarian law, and patterns of killings by private individuals which are not adequately investigated and prosecuted by the authorities. [...]

B. THE CRIMINAL JUSTICE SYSTEM

Report on Mission to Kenya (A/HRC/11/2/Add.6, 26 May 2009, ¶¶ 22-24, 93-94):

22. Failures in the criminal justice system, and in internal and external police accountability mechanisms, encourage the commission of unlawful killings by police.

23. The criminal justice system as a whole was widely described as “terrible”. Investigation, prosecution, and judicial processes are slow and corrupt. Predictably, this leads to widespread distrust of the system, and impunity for criminals (particularly for those with power and money). It also acts as an incentive for police to kill, rather than arrest suspects: because of the low probability of securing convictions, many police think it is easier and more effective to take “justice” into their own hands. And, significantly, police themselves also benefit from the systemic faults - they are rarely held to account for the abuses they commit.

24. In theory, if a killing occurs, the police provide the relevant information to a magistrate, so that an inquest can be opened.²⁶ Where investigations disclose evidence that a private individual or a police officer is criminally responsible for a death, a murder case file is opened, and the case is prosecuted in Kenya’s High Court by state counsel from the Attorney-General’s office. The reality is very different.

[...]

93. The Attorney-General should resign. This is necessary to restore public trust in the office, and to end its role in promoting impunity.

94. Political control over prosecutions should be eliminated and the prosecutorial powers currently held by the Attorney-General should be vested in an independent Department of Public Prosecutions.

Report on Mission to Colombia (A/HRC/14/24/Add.2, 31 March 2010, ¶¶ 29-41):

29. Lack of sufficient accountability has been a key factor in the continuation of *falsos positivos*. Estimates of the current rate of impunity for alleged killings by the security forces are as high as 98.5 per cent.²⁷ Soldiers simply knew that they could get away with murder. Recently, delays caused in part by defence counsel in the Soacha cases threaten to result in impunity.²⁸ More generally, other problems, discussed below, occur at each stage of the investigation and disciplinary or criminal justice process.

30. Colombia has a complex and sophisticated government structure and responsibility for responding to citizens’ complaints about killings is shared by a number of different institutions,

²⁶ Criminal Procedure Code, s 386.

²⁷ See, e.g., US Office on Colombia, “A State of Impunity in Colombia: Extrajudicial Executions Continue, Injustice Prevails”, 2009.

²⁸ See, e.g., *El Tiempo*, “Por lentitud en la justicia quedaron libres 17 militares implicados en; ‘falsos positivos’ de Soacha”, 8 January 2010.

including the Offices of the Attorney-General (*Fiscalía*), the Inspector-General (*Procuraduría*), and the Ombudsman (*Defensoría*). Each of these institutions has an important role under the 1991 Constitution's system of checks and balances. The *Fiscalía*, part of the judicial branch, is the civilian prosecutorial authority with prosecutors (*fiscales*) assigned both at the national level, sometimes in specialized units, and to local offices. The *Procuraduría* is a civilian entity that has jurisdiction over disciplinary matters related to public servants (including the military) and can conduct investigations and impose administrative sanctions, such as suspension or dismissal. The *Defensoría* is the national public defender service and also incorporates a nationwide system of regional ombudsmen (*personeros*) to whom citizens can complain of abuses.

(i) Forensics and the Technical Investigation Unit

31. When a military unit reports a killing in combat, the initial inspection of the scene and the corpse is now generally undertaken by the *Fiscalía*'s Technical Investigation Unit (*Cuerpo Técnico de Investigación, CTI*).²⁹ To the Government's credit, it ensures a CTI presence at combat death sites in most cases, even at considerable expense and practical difficulty.³⁰ Within 36 hours, CTI officials must report to the relevant prosecutor on their investigation.³¹ However, as of July 2009, CTI had 1,800 cases that it had held for more than six months without turning them over to the *Fiscalía*, resulting in significant case delays.³²

32. The presence of external investigators reduces opportunities for the military to cover up unlawful killings, and promotes transparency. It does not, however, prevent members of the military from interfering with the scene before CTI arrives.

(ii) Disciplinary investigations

33. Disciplinary investigations are opened by the Commanders of relevant units,³³ but jurisdiction can be taken by the *Procuraduría* upon request of the Commander or of the *Procuraduría*.

34. I was provided limited information on the disciplinary measures imposed by the Armed Forces on its members. From 2004–2009, a total of 75 members of the army were dismissed

²⁹ Under the Military Criminal Code, the military prosecutor has the duty to examine the corpse. Law No. 522 (1999), art. 472. However, by an agreement between the Minister of Defence and the *Fiscalía* dated 14 June 2006, deaths in combat must first be inspected by CTI. A standing directive also requires commanding officers of military units to "exhaust all available resources" to ensure that CTI can carry out its investigations. See Ministry of Defence, Standing Directive No. 19 (2007), instruction No. 5; see also Ministry of Defence, Standing Directive No. 10 (2007), instruction No. 5.

³⁰ The Ministry of Defence informed me that, while it does not have records on operations that CTI inspected, CTI attends the "great majority". CTI officials stated they were able to attend 95 per cent of crime scenes. CTI was unable to attend the other 5 per cent because of a lack of transportation, danger (e.g., ongoing conflict) or difficulty in reaching the site because of terrain and geography. According to the military, its facilitation of CTI investigations can cost US\$ 8,000 per case.

³¹ Criminal Procedure Code, art. 205.

³² Ministry of Defence, written response to requests from Special Rapporteur, annex 3 (Ministry of Defence response).

³³ Where there is a death, the relevant law would generally be Law No. 836 (2003), art. 58, para. 30.

from service, though the Government did not provide information on how many of these were dismissed for having committed unlawful killings.

35. The *Procuraduría*'s office reported 639 preliminary inquiries relating to unlawful killings by security forces since 2000; 506 disciplinary investigations have been opened, and there have been indictments in 78 cases, judgement in 18 cases, and 33 cases were closed. While this indicates some limited progress, most cases remain at the preliminary stage only.

(iii) Defensoría

36. The *Defensoría* received and processed 169 complaints of unlawful killings by security forces in 2008 and 22 in the first six months of 2009.³⁴ While the *Defensoría*'s *personeros* can play an important role in local communities, they generally lack any real power and are often prevented from rigorously pursuing cases due to resource constraints, threats and intimidation.

(iv) Military and civilian criminal investigations

37. Criminal investigations can take place either in the military or civilian criminal justice system. The most significant obstacle to effective prosecution of extrajudicial executions by members of the security forces are the continuing jurisdictional conflicts between these two systems and the failure of military judges to transfer cases to the civilian justice system.

38. The *Fiscalía* has and should have primary responsibility for prosecution of military personnel accused of human rights violations. The Constitution provides (art. 221) that "crimes committed by members of the National Security Forces on active service, and related to that same service" are within the jurisdiction of the *military* criminal justice system. However, the Constitutional Court and the Superior Council of the Judicature have clarified that the military courts do not have jurisdiction when force members engage in conduct contrary to the constitutional functions of the forces (such as unlawful killings) and that where there is doubt, civilian jurisdiction should apply.³⁵

39. Despite these clear judicial rulings, directives to the same effect from the Minister of Defence and a memorandum of agreement (2006) between the Ministry of Defence and the *Fiscalía*, it remains the case that jurisdiction over far too many cases is contested. There have been some improvements in recent years – a total of 526 cases have now been voluntarily sent by the military criminal courts to civilian courts.³⁶ Another 75 cases have been transferred following orders from the Superior Judicial Council. However, as of May 2009, there were still 221 cases of conflict between the military and civilian jurisdictions. One cause of delay can be the Supreme Judicial Council's failure to decide jurisdictional challenges on a timely basis. These decisions should be made more expeditiously.

³⁴ In 2009, there were 18 complaints against the army and 4 against the police. Most of the facts underlying the complaints occurred before October 2008. *Defensoría*, Written Response to Questions by the Special Rapporteur (*Defensoría* response).

³⁵ See Constitutional Court Judgements C-358 (1997) and C-878 (2000); *Case of "Jamundi"* of 14 August 2008 (Superior Council of the Judicature).

³⁶ Government response.

40. In some of the areas visited, including Medellín and Villavicencio, there appears to be a conscious attempt by military judges to frustrate the efforts of the civilian justice system. This also creates incredible delays — often of months or years — in the investigation and prosecution of alleged extrajudicial executions, during which time alleged perpetrators are often at large and the value of testimony and evidence can be lost. Military judges who do assist the civilian justice system may be subject to harassment, threats or transfer to other jurisdictions.

41. Resource constraints also inhibit effective prosecutions. The *Fiscalía* has a specialized human rights unit, including a sub-unit for extrajudicial executions (established in 2007). In 2008, the numbers of prosecutors focusing on executions more than doubled (from 8 to 20). However, the *Fiscalía* continues to suffer from a lack of staff and funding, which prevents it from investigating and prosecuting all of the cases reported to it. I met, for example, with families of victims who were told that they would have to wait for the Soacha cases to finish before their own cases could be examined. Of the 1,056 cases of killings by Armed Forces that were assigned to the *Fiscalía*'s Human Rights Unit through to the end of April 2009, only 16 have resulted in convictions.³⁷

Report on Mission to Guatemala (A/HRC/4/20/Add.2, 19 February 2007, Summary, ¶¶ 15, 30, 42-48):

With a criminal justice system unable to achieve more than a single-digit conviction rate for murder, the State bears responsibility under human rights law for the many who have been murdered by private individuals. There are 5,000 or more killings per year, and the responsibility for this must rest with the State. Guatemala is not a failed State and is not an especially poor State. The reason that extrajudicial executions are widespread is a distinct lack of political will. Important legislation is not enacted. Necessary budget allocations are not made.

[...]

15. Guatemala is experiencing a high and rising murder rate. In 2001, there were 3,230 homicides; in 2002, 3,631; in 2003, 4,236; in 2004, 4,507; in 2005, 5,308; and by mid-August 2006, there had been 2,905.³⁸ In other words, the homicide rate increased an alarming 64 per cent over five years.³⁹ (By comparison, the population increased by 8 per cent.⁴⁰) In this context, it is natural that few believe that the criminal justice system is functioning properly. One response has been the emergence - or re-emergence - of social cleansing as a desperate and lawless means of confronting gang violence. Today, a significant number of youth are summarily executed for their presumed participation in crime or membership in gangs.

[...]

³⁷ Another important cause of impunity is witness fear. See section X.D.

³⁸ These data are based on PNC figures and were provided to the SR by the PDH.

³⁹ The homicide rate includes acts of social cleansing. Based on the PDH's count of likely social cleansing victims over the years studied, roughly nine percentage points of this increase may be due to acts of social cleansing.

⁴⁰ United States Census Bureau, International Data Base, Table 001 for Guatemala, *available at* <http://www.census.gov/ipc/www/idbprint.html>

30. This analysis led MINUGUA to very clear policy prescriptions that remain valid today. First, lynching can be combated by revitalizing indigenous systems of justice. Second, lynching can be combated by extending the presence of State criminal justice institutions geographically and by better adapting their working methods to the needs of rural communities. Both measures would respond to the power vacuum left by the incomplete transition from the armed confrontation.

[...]

42. Guatemala has a single-digit conviction rate for murder.⁴¹ The implication is obvious and disturbing: Guatemala is a good place to commit a murder, because you will almost certainly get away with it.

43. To understand the causes of this low conviction rate, I spoke with officials of the principal organs of Guatemala's criminal justice system, including the Policía Nacional Civil (PNC), the Ministerio de Gobernación (which oversees the PNC), the Ministerio Público (which prosecutes criminal cases), and the Supreme Court of Justice. These institutions are responsible for the various phases of the criminal justice process, from crime detection and prevention, to investigation and prosecution, to the adjudication of individual criminal responsibility.

44. The PNC is responsible for crime detection and prevention, but with rising crime rates the public has little confidence in its efforts.⁴² In our discussion, the Ministro de Gobernación argued that the principal failings of the PNC were due to a lack of resources. Guatemala has 19,000 police officers, 5,000 of which participate in specialized units - largely devoted to protecting government buildings, foreign embassies, and individuals - rather than in general crime prevention. Of the remaining 14,000, approximately 7,000 are serving each day, and 3,500

⁴¹ Dividing the number of crimes recorded by the number of convictions achieved in a particular year does not provide an accurate calculation of the conviction rate, inasmuch as some convictions will be for earlier years, and some unresolved cases will result in convictions in later years. To accurately calculate the (current) conviction rate for a given year requires dividing the number of crimes recorded in that year by the number of convictions that have been achieved *for those crimes* today. This calculation cannot be performed in Guatemala, because the databases of the various institutions of justice are not integrated, making it impossible to trace individual cases as they move from a complaint to a final disposition. While this should be remedied, in the meantime a study tracing a random sample of murders through the system would be invaluable in clarifying both the extent of impunity and in more precisely identifying the bottlenecks in the system. Some general insight may, nevertheless, be gleaned from the data that the Ministerio Público was able to provide. The Ministerio Público recorded 8,003 crimes against life (*delitos contra la vida*) in 2005. In that year, the Ministerio Público filed charges in 480 cases of crimes against life. In 97 cases involving 111 victims, the defendant was found guilty (*sentencia condenatoria*), and in 34 cases involving 34 victims the defendant was found not guilty (*sentencia absolutoria*). In an additional 55 cases involving 90 victims, a judgement was pending (*pendiente de dictarse sentencia*), and in 294 cases involving 349 victims, the charges remained in process (*acusaciones en trámite*).

Thus, convictions were reached for 1.4 per cent of the victims of crimes against life. If all pending judgements and outstanding charges should result in convictions, the conviction rate would still rise to only 6.9 per cent. It would seem quite unlikely that any reasonable measure of the conviction rate for crimes against life - or for that subset constituting homicides - would exceed a single digit.

⁴² In a survey conducted in the municipality of Antigua in August 2006 of a representative sample of 410 residents, only 10 per cent believed the actions of the PNC against crime to be "adecuada" or "muy adecuada". *Informe de un Estudio Cuantitativo de Victimización en el Municipio de Antigua Guatemala, designed and executed by Aragón & Asociados a solicitud de l'Asociación para la Prevención del Delito (APREDE)*.

during a given shift. A number of my interlocutors suggested that, for Guatemala to be in line with the policing levels achieved in El Salvador, it would require between 35,000 and 38,000 police - a doubling of the force. The Government has supplemented the number of police by instituting joint patrols between the PNC and the military. Several thousand soldiers are participating in these joint patrols, and a typical patrol will consist of 10 soldiers and 2 police officers. Notwithstanding the need to end the use of social cleansing by elements with the police, as discussed in chapter III (A), there is no question but that Guatemala needs a far larger police force, but enlargement would need to be accompanied by thoroughgoing reform of existing arrangements. It is, however, far from clear that the use of large patrols comprising primarily persons untrained in policing techniques is beneficial even as a short-term measure; moreover, this remilitarization of policing marks a significant step back from the aspirations expressed in the Peace Accords.

45. The challenges of investigation and prosecution confront three key obstacles: a problematic division of responsibility, severely limited resources, and endemic corruption.

46. Responsibility for investigating crimes is shared by the PNC and the Ministerio Público, and the latter then prosecutes suspected perpetrators. The majority of investigative personnel are employed by the PNC. However, by law the PNC investigators must comply with the direction of those from the Ministerio Público in investigating crime scenes. This arrangement requires close cooperation between the investigators of the PNC and of the Ministerio Público. Despite an inter-institutional accord on improving criminal investigations reached by the two bodies in 2004, by all accounts the level of coordination and cooperation is often unsatisfactory, making many investigations inefficient and often unproductive in terms of successfully pursuing prosecution. While disappointing, the failure of a system in which a single function is divided between institutions with inevitably competing interests is unsurprising and deeper reforms should be considered. One possible model, from which much might be learned, is the approach taken by Chile in establishing a system of investigative prosecutors.

47. Limited resources are another cause of inefficient investigations that often produce insufficient evidence for effective prosecution. I was informed that there are roughly 350 investigators working for the PNC and roughly 100 working for the Ministerio Público. The latter receives 250,000 complaints each year, and while not all require the attention of an investigator, the gap between resources and requirements is enormous. It is understandable that government officials believe that at least 700 additional investigators are needed.

48. Another problem caused by a lack of resources, along with inadequate training, is that investigations rely overwhelmingly on testimonial rather than physical evidence. The provision of better forensic resources is vital, because, not only is testimonial evidence generally of less probative value than physical evidence, but reliance on the former produces the expected incentives for the police to coerce confessions and for criminals to intimidate witnesses. Congress has passed a bill to establish a National Forensics Institute, there is no guarantee that that institute will have adequate resources to make a difference. As one government official noted, Guatemala needs more laboratories, not more legislation.

[...]

59. The Congress has demonstrated little political will to establish a functioning criminal justice system, often allowing key legislation to linger for years. In addition, the inadequacy of the resources allocated to the institutions constituting the criminal justice is a justified complaint of nearly every interlocutor in and out of Government. This complaint is widely articulated by comparing the resources available in Guatemala to those available in other countries, especially El Salvador, a neighbouring country that also emerged from a devastating civil war in the recent past. As discussed above, Guatemala has, even after accounting for the difference in population, far fewer police officers, criminal investigators, prosecutors and judges than El Salvador. When government officials complain about a lack of resources, it serves in part as a convenient excuse: Yes, people get away with murder, but you cannot expect more when I have so few employees, such poor equipment, etc. As an excuse, it is indeed somewhat self-serving: one would imagine that Guatemala could do better than a single-digit conviction rate for murder without spending an additional dollar. Nevertheless, the resources provided to the PNC, the Ministerio Público, and the courts are woefully inadequate and place a harsh upper limit on how effective the criminal justice system will be.

60. It is important to emphasize that, while limited resources may provide some excuse for particular Government agencies, it provides no excuse at all for the State as a whole. Guatemala is not an exceptionally poor country, and it could readily afford a criminal justice system on par with that provided in other Central American countries. While Guatemala's per capita gross domestic product is significantly less than those of Belize, Costa Rica, and Panama, it is roughly equal to that of El Salvador, twice that of Honduras, and nearly three times that of Nicaragua.⁴³

Follow-up Report on Mission to Guatemala (A/HRC/11/2/Add.7, 4 May 2009, ¶¶ 27-32):

27. To address the high rates of unlawful killings and impunity in Guatemala, the Special Rapporteur recommended a number of reforms to the criminal justice sector, witness protection, the method of investigations, the role of foreign donors, and fiscal policy. As might be assumed given the worsening security situation over the last few years, these reforms have been only partially implemented.

A. Establishment of the International Commission Against Impunity in Guatemala

28. In his February 2007 report, the Special Rapporteur supported the establishment of the International Commission Against Impunity in Guatemala (CICIG). While not a panacea for addressing impunity, it had the potential to play an important role in pushing cases through the criminal justice system. The CICIG was subsequently established, and began its work in January 2008.⁴⁴ The CICIG's mandate is to investigate and dismantle violent criminal networks.⁴⁵ It is

⁴³ UNDP, *Human Development Report 2005*, table 14: GDP per capita expressed in US dollars: Costa Rica, 4,352; Panama, 4,319; Belize, 3,612; El Salvador, 2,277; Guatemala, 2,009; Honduras, 1,001; Nicaragua, 745.

⁴⁴ The Secretary-General appointed a Public Prosecutor of the Supreme Court of Spain, Carlos Castresana Fernández, as Commissioner. Currently the staff is made up of a diverse, mostly international staff, with the hope that the number of Guatemalan staff will be increased in the future. See CICIG report, "One Year Later".

⁴⁵ CICIG's functions include "determining the existence of illegal security groups and clandestine security structures, collaborating with the State in dismantling of such groups and structures, promoting the investigation, criminal prosecution and punishment of crimes committed by their members, and recommending to the State the

not a replacement for Guatemala's criminal justice institutions; rather, it may carry out investigations and act as a complimentary prosecutor, helping to bring representative cases to trial in national courts. The stated goal of the CICIG is not just to prosecute these cases but also to strengthen the national criminal justice system and demonstrate that it can be made to work.⁴⁶

29. To date, there are important reasons to be optimistic about CICIG's work. It has signed cooperation agreements with the Office of the Public Prosecutor and the Ministry of the Interior. These have allowed the CICIG to create a Special Prosecution Unit which is able to bring cases. The Minister of the Interior assigned 30 members of the National Civil Police (PNC) to CICIG, to create a joint PNC-CICIG police force. The existence of this joint police force is designed to facilitate the investigation of the cases CICIG chooses to pursue. Together with the United Nations Office of the High Commissioner for Human Rights, CICIG provided these officers with training on how to investigate extrajudicial executions, the use of firearms, and the function of the police in respecting human rights.

30. In his August 2006 report, the Special Rapporteur noted the dysfunctional relationship between the police and the Office of the Public Prosecutor. In a step towards combating this, the CICIG has encouraged the creation of joint investigative teams, with the hope that, as the CICIG international staff are gradually replaced, these police officers and prosecutors will be able to take over an increasing amount of the work of the CICIG.

31. CICIG is currently investigating approximately 20 open cases and is prosecuting 4 cases together with local officials. The cases focus on targeting the clandestine networks within Guatemala; they include a gunfight between narco-trafficking groups which led to at least 11 deaths and several injuries in Zacapa province, which is being brought in conjunction with the Special Prosecutor for Drug Activities. Because the CICIG's mandate is to assist with the investigation and prosecutions, each of these cases also helps train the local police and investigators working on the case. In addition, the pursuit of each case functions to build capacity and trust in Guatemala's justice system.

32. While CICIG should continue to receive strong support, neither Guatemala nor the international community should fall into the trap of seeing CICIG as "the" solution to Guatemala's failing criminal justice system. While its international staff and independent funding have guaranteed a certain level of independence, it still faces obstruction from police and government officials. CICIG has the power to file criminal and/or administrative complaints against civil servants who contribute to impunity by interfering with their investigations. While progress is being made in this area, corruption extends through all sectors of society in Guatemala, including the legislative and executive branches. Since CICIG's power only extends to civil servants, its efficacy as a method for eradicating corruption outside of the PNC and the judiciary is limited. More importantly, CICIG must be seen as one component of a package of necessary reforms to the criminal justice sector. CICIG's mandate is limited to organized crime syndicates, and so it cannot address other sources of crime. While it is positioned to contribute to the training of police and prosecutors, the numbers are small, and do not represent the form of

adoption of public policies for eradicating such groups and structures and preventing their re-emergence". CICIG report, "One Year Later".

⁴⁶ CICIG report, "One Year Later".

change necessary to effect structural reform. CICIG's term will expire in September 2009. While Guatemala should extend its mandate for a second two-year term, this should serve as a reminder that CICIG is a temporary solution to a lasting problem.

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

The problem of extrajudicial executions in Nigeria is closely linked to the remarkable inadequacies of almost all levels of the Nigerian criminal justice system, as exemplified by the following:

- Investigation: there is no tradition of systematic forensic investigation in Nigeria, only one ballistics expert in the entire country, only one police laboratory, and no fingerprint database. According to one estimate, confessions are the basis for 60 percent of prosecutions;
- Coroner's inquiries: coroners are an endangered species and inquiries a rarity; it is commonplace for pathologists to sign reports without even examining the body; Prosecution: public prosecutors have no control over police investigations, nor can they demand that individuals be produced in court;
- Judiciary: adjournments are handed out with reckless abandon, resulting in thousands charged with capital offences being left to rot in prison;
- Detention: police routinely obtain a "holding charge" that permits suspects to be held more or less indefinitely in a legal limbo based on little more than a suspicion of criminal activity.

Press Statement on Mission to Albania, 23 February 2010:

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.

Report on Mission to Sri Lanka (E/CN.4/2006/53/Add.5, 27 March 2006, ¶¶51-61):

51. The lessening of tensions following the February 2002 ceasefire provided an ideal opportunity to transform the police force and introduce effective accountability measures. This has happened to some extent. In 2002 the Constitution was amended to establish an independent National Police Commission (NPC) with power over police discipline and a mandate to respond to public complaints. The NPC and the Human Rights Commission (HRC) have undertaken promising initiatives - but their efforts will be thwarted without political support and adequate resources. The other half of the problem is the broader deficiency of the Sri Lankan system of criminal justice. Progress requires transforming the culture and practices of police, prosecutors, and the judiciary. This is a daunting but not a hopeless task – these institutions have functioning bureaucracies with no small number of sophisticated and well-intentioned officials.

52. In Sri Lanka no single sweeping reform will transform the system of justice; instead, many relatively small problems must be solved. Such incremental reforms will be achievable only once their necessity is recognized. Today most Sri Lankans - in and out of Government - are complacent about the criminal justice system. Reform will require the recognition of uncomfortable truths. A single-digit conviction rate is unacceptable. And the conviction of only a handful of government officers implicated in the killing of Tamils is a travesty that has deeply corrosive effects. Recording confessions extracted with torture bears no relation to criminal investigation. An ineffective justice system creates a climate of public opinion conducive to condoning police torture and the summary execution of suspects. If these principles are recognized, and if the current sense of complacency is replaced with a sense of urgency, Sri Lankans face no insuperable obstacles to expeditiously establishing an effective system of democratic policing and criminal justice.⁴⁷

[...]

⁴⁷ In this respect it is highly problematic that the Sri Lanka Police are now subject to the jurisdiction of the Ministry of Defence, Public Security, Law and Order (see <http://www.mod.gov.lk/role.html>). Inasmuch as the police are responsible for investigating crimes committed by the military, this arrangement limits the independence of these investigations. And inasmuch as the militarization of the police is part of the problem, this reorganization is surely not a helpful part of the solution.

59. The failure to effectively prosecute government violence is a deeply-felt problem in Sri Lanka. The paucity of cases in which a government official - such as a soldier or police officer - has been convicted for the killing of a Tamil is an example. Few of my interlocutors could name any such case, with the exception of Krishanthi, in which six soldiers and a policeman were convicted.⁴⁸ The cause of this impunity is unclear. The result, however, is clear: many people doubt that their lives will be protected by the rule of law.

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 case⁴⁹ and, during my visit, I met with the mothers of Bindunuwewa victims, a survivor, and an attorney for the families.

61. That there was both State and individual criminal responsibility is undeniable, and supported by multiple government reports.⁵⁰ However, not a single person has been convicted of any crime related to the events at Bindunuwewa.⁵¹ 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

⁴⁸ The case involved the 1996 rape and murder of an 18 year old high school student and the murder of family members who went looking for her.

⁴⁹ Letter of 10 August 2005, in E/CN.4/2006/53/Add. 1.

⁵⁰ 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.

⁵¹ 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.

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.⁵²

Report on Mission to the Central African Republic (A/HRC/11/2/Add.3, 27 May 2009, ¶¶ 56-61):

56. The criminal justice system is widely condemned as dysfunctional. A senior Government official told the Special Rapporteur that it had reached “rock bottom” and that no one trusted it - neither the citizens of the Central African Republic, nor the Government or the international community.

57. Three different judicial organs are involved in the initial investigative process: the judicial police, the public prosecutor and the investigative judge. The public prosecutor receives complaints and decides whether to proceed with an investigation. The judicial police gather information on crimes, under the supervision of the public prosecutor and the investigative judge. The investigative judge can investigate following an indictment by the prosecutor or following a complaint by a civil party.

58. Depending on the severity of the offence, crimes may be tried in the ordinary courts, police courts, regional criminal courts, or jury courts. These courts apply the Criminal Code and the Code of Criminal Procedure, which have remained essentially unchanged since their adoption in 1961 and 1962. The Special Rapporteur was informed during his visit of efforts, supported by BONUCA, to update these codes. While this is welcome, it must also include reforms to remove sections criminalizing “witchcraft”.

59. The justice system is plagued by a lack of resources, severely limiting its capacity to address impunity. Human resources are minimal in the capital, and nearly non-existent in the rest of the country. In Bangui, the public prosecutor’s office has just two prosecutors for criminal cases. In Paoua, the justice system barely functions. It is composed of one magistrate, who is simultaneously president of the tribunal, prosecutor and investigative judge. Across the country, there are not enough buildings to house courtrooms and offices of judges and key personnel. Basic equipment is in short supply. In Paoua, the magistrate had his files destroyed and typewriter stolen during an attack by the APRD in January 2007. A year later he had not yet been provided with new equipment.

⁵² 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.

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. The criminal justice system theoretically has jurisdiction over all persons in the Central African Republic, including members of the security forces, but the latter jurisdiction is rarely exercised. The Special Rapporteur received information in Bangui on one incident in which police were being tried in the criminal justice system for alleged killings. But no information on the criminal prosecution of members of the FACA could be obtained. Several interlocutors working in conflict-affected areas noted that the local prosecutors took no action whatsoever with respect to alleged crimes by the military, whether committed in connection to the armed conflict or otherwise. The preference is apparently to leave cases involving soldiers to the military justice system.

Report on Mission to the Philippines (A/HRC/8/3/Add.2, 16 April 2008, ¶¶ 45-49):

45. There is impunity for extrajudicial executions. No one has been convicted in the cases involving leftist activists,⁵³ and only six cases involving journalists have resulted in

⁵³ According to Task Force Usig, of the 116 cases of slain party list members or militants that it considers within its remit, their current status is as follows:

Under investigation 66

Case filed - Preliminary investigation 25

Case filed – Suspect(s) arrested or surrendered 6

Case filed – Suspect(s) remain at large 19

Case resulted in acquittal(s) 0

Case resulted in conviction(s) 0

Total 116

The information in this table was accurate as of 2 April 2007. (Letter from the Philippine Mission to the United Nations, dated 23 May 2007.) The Government has more recently informed me that Task Force Usig has now filed 56 cases (or, an additional 6 cases); I do not have a detailed breakdown of their status. The Government also stated that it is “prosecuting fourteen (14) alleged EJK cases” and provided a list thereof. (Letter from the Philippine Mission to the United Nations, dated 18 October 2007.)

There is no reason to assume that a significant proportion of cases in which suspects have been identified will ultimately result in convictions. In multiple instances in which the PNP has “resolved” a case, others following that case have raised serious doubts as to whether the evidence points to the suspect identified. One such instance is the case of Madonna Castillo y Lucban: The police filed charges against an alleged NPA, but others have pointed to allegedly recorded deathbed testimony that her attackers belonged to the AFP. (See the case study on Alice Omengan-Claver and Constancio Claver in Appendix A, paras. 28-54, for more on this case.) Another such instance is the case of Enrico Cabanit. Enrique Solon was identified as the gunman shortly after he was killed by the police. However, numerous factors suggest that this identification is unreliable, and, based on my own interviews and review of the documents, I concur with the view of the Melo Commission that “there are numerous discrepancies and suspicious details regarding the investigation which tended to disprove the police theory”. The Government's progress in achieving justice for these killings cannot be measured by anything less than convictions following fair trials.

According to information provided by the AFP, there are 18 cases of murder or frustrated murder implicating AFP members or units, CAFGU members, or “suspected military assets” that have “appeared on the records of TF Usig,

convictions.⁵⁴ The criminal justice system's failure to obtain convictions and deter future killings should be understood in light of the system's overall structure. Crimes are investigated by two bodies: the PNP, which is organized on a national level but is generally subject to the "operational supervision and control" of local mayors; and the National Bureau of Investigation (NBI), which is centrally controlled.⁵⁵ Prosecutors, who are organized in the National

available DOJ Resolution, and those reported to the Office of the Provost Marshal General". (The 18 individuals are implicated in a total of 14 incidents.) The AFP reported the status of these cases as follows: (see table in original report) (*) One of these individuals, Cpl Lordger Pastrana, implicated in the killing of Isaias Sta Rosa, is dead. (**) A case against CAFGU member Perfecto Banlawaon for the murder of Delio Apolinar was "dismissed because it was settled pursuant to Customary Laws and Practice of the Buaya and Salegseg Tribes".

The information for the table is from "Status of Cases of Regular Members, CAFGUs, Suspected Military Assets and Units of the AFP Implicated/Involved in the Killing of Militants (from 2001 – 8 March 2007)", AFP Human Rights Office, enclosed in letter from Philippine Mission to the United Nations, dated 23 May 2007.

⁵⁴ According to Task Force Usig, of the 26 cases of slain media men that it considers within its remit, their current status is as follows:

Under investigation 5

Case filed - Preliminary investigation 1

Case filed – Suspect(s) arrested or surrendered 12

Case filed – Suspect(s) remain at large 6

Case resulted in acquittal(s) 0

Case resulted in conviction(s) 2

Total 26

The information in this table was accurate as of 2 April 2007. (Letter from the Philippine Mission to the United Nations, dated 23 May 2007.) The two cases with convictions are those of Edgar Damalerio and Marlene Esperat. For the period from 1986 to the establishment of Task Force Usig, there have also been convictions in two other cases, those of Alberto Berbon and Nesino Paulin Toling. (Rachel E. Khan and Nathan J. Lee, "The Danger of Impunity", CMFR (5 September 2005).) More recently, the Government has also informed me that convictions have been achieved in two other cases — those of Allan Dizon and Frank Palma — that are not among the 26 being handled by Task Force Usig. (Letter from the Philippine Mission to the United Nations, dated 18 October 2007.) Note that Task Force Usig reports that of the 45 incidents reported by the National Union of Journalists, 24 were included in the Task Force Usig list of 26, 15 were excluded, and 6 are still in need of verification.

⁵⁵ Prior to 1991, the police forces of the Philippines, comprising the Philippine Constabulary and the Integrated National Police, formed a branch of the AFP. However, the 1987 Constitution provided that, "The State shall establish and maintain one police force, which shall be national in scope and civilian in character, to be administered and controlled by a national police commission. The authority of local executives over the police units in their jurisdiction shall be provided by law." (Constitution of the Republic of the Philippines (1987), art. XVI, section 6). To implement this provision, DILG, the PNP, and the National Police Commission (NAPOLCOM) were established by the "Department of the Interior and Local Government Act of 1990" (Republic Act No. 6975) (signed into law 13 December 1990). The PNP and NAPOLCOM are both found within DILG. The NAPOLCOM is "an agency attached to [DILG]" that exercises "administrative control and operation supervision" over the PNP. (Republic Act No. 6975, sections 13-14 (as amended by Republic Act No. 8551).) The NAPOLCOM comprises a Chairperson, four regular Commissioners, and the Chief of PNP. Of the regular Commissioners, three "shall come from the civilian sector who are neither active nor former members of the police or military" and one "shall come from the law enforcement sector either active or retired". (Republic Act No. 6975, section 13 (as amended by Republic Act No. 8551).)

While the PNP is a national organization, local executives exercise considerable control over its operations. City and municipal mayors are "deputized" as representatives of the NAPOLCOM, and "exercise operational supervision and control over PNP units in their respective jurisdictions" including the "power to direct, superintend, and oversee the day-to-day functions of police investigation of crime, crime prevention activities, and traffic control in accordance with the rules and regulations promulgated by the [NPC]". (Republic Act No. 6975, section 51(b) (as amended by Republic Act No. 8551)). However, the Commission on Elections (COMELEC) assumes control during the 30 days before and the 30 days after elections. Moreover, NAPOLCOM may "suspend or withdraw" local control at any time for any of four specified reasons: "[f]requent unauthorized absences", "[a]buse of authority", "[p]roviding material support to criminal elements", or "[e]ngaging in acts inimical to national security or which negate the

Prosecution Service (NPS) of the DOJ, determine whether there is probable cause and then prosecute the cases in the courts.⁵⁶ This is the normal process; however, in cases implicating public officials, the Ombudsman should take over the investigation and conduct the prosecution. Cases are tried before the courts, with the Supreme Court both administering the judiciary and providing the highest level of appellate review.⁵⁷ Cases against senior Government officials should be prosecuted by the Ombudsman before the Sandiganbayan⁵⁸ rather than the ordinary courts, but the Supreme Court still provides the highest level of appellate review. The Inter-Agency Legal Action Group (IALAG) is the latest addition to the system, affecting the operations of the NBI, NPS, and PNP.

B. The Inter-Agency Legal Action Group (IALAG) distorts the criminal justice system's priorities

46. Senior Government officials are attempting to use prosecutions to dismantle the numerous civil society organizations and party list groups that they believe to be fronts for the CPP. While this project is sometimes discussed as if it were a dark conspiracy, it was explained to me openly and directly by numerous officials as the very function of IALAG, which was established in 2006.⁵⁹ IALAG is an executive rather than advisory body and, while it includes representatives of various criminal justice, intelligence, and military organs, institutional power and legal authority over its operations is concentrated in the Office of the National Security Adviser.⁶⁰ At the national level, IALAG meets at least once every other week, discusses the evidence in

effectiveness of the peace and order campaign". (Republic Act No. 6975, sections 51(b), 52 (as amended by Republic Act No. 8551)).

The National Bureau of Investigation (NBI) is another law enforcement body. However, in contrast to the semi-decentralized PNP, the DOJ controls the operations of the National Bureau of Investigation (NBI) throughout the country. (Republic Act No. 157 (signed into law 19 June 1947) (as amended).)

⁵⁶ The structure of the NPS was established in Presidential Decree No. 1275, "Reorganizing the Prosecution Staff of the Department of Justice and the Offices of the Provincial and City Fiscals, Regionalizing the Prosecution Service, and Creating the National Prosecution Service" (11 April 1978).

⁵⁷ Constitution of the Republic of the Philippines (1987), art. VIII.

⁵⁸ The Sandiganbayan was provided for in article XIII, section 5 of the 1973 Constitution and maintained under article XI, section 4 of the 1987 Constitution. It has jurisdiction over, *inter alia*, "offenses or felonies whether simple or complexed with other crimes" when committed by senior public officials, including "Philippine Army and Air force colonels, naval captains and all officers of higher rank" and "[o]fficers of the PNP while occupying the position of Provincial Director and those holding the rank of Senior Superintendent or higher" (Presidential Decree No. 1606, sections 4(a)(1)(d)-(e), 4(b) (as amended by Republic Act No. 8249 and previously)).

⁵⁹ IALAG was established by Executive Order 493, "Providing for the Creation of the Inter-Agency Legal Action Group (IALAG) for the Coordination of National Security Cases" (17 January 2006). Its stated purpose is "to provide effective and efficient handling and coordination of the investigative and prosecutorial aspects of the fight against threats to national security" (section 1).

⁶⁰ IALAG comprises representatives of the Office of the National Security Advisor, DOJ, Department of National Defense, DILG, National Intelligence Coordinating Agency, AFP, PNP, NBI, and "[s]uch other units as may be tasked by the National Security Adviser" (section 3). With respect to oversight, "The IALAG shall report directly and shall be accountable to the National Intelligence Board (NIB) for its objectives and performance" (section 4); the NSA chairs the NIB. The "concerned departments and agencies" are directed to "institute mechanisms and procedures to operationalize the mandate of the IALAG and its subgroups down to the most basic organizational unit in the provincial and regional levels", states that "[a]ll other government agencies may be called upon or deputized to provide active support and assistance to the IALAG which shall be given priority above other concerns", and provides that "[t]he IALAG shall closely supervise and monitor operations" (section 5). IALAG's secretariat is established under the Office of the National Security Adviser, which "may issue IALAG rules to clarify or to carry out provisions of this Executive Order" (section 6).

particular cases and debates whether it is sufficient to file a criminal complaint. There are also regional and provincial IALAG bodies with a similar structure and role. It has been due to the efforts of IALAG that charges have been brought against a number of leftist lawmakers and persons who had been given immunity guarantees to facilitate peace negotiations with the NDF.

47. The reason that such an *ad hoc* mechanism was established for bringing charges against members of these civil society organizations and party list groups is that they have seldom committed any obvious criminal offence. Congress has never reversed its decision to legalize membership in the CPP or to facilitate the entry of leftist groups into the democratic political system.⁶¹ But the executive branch, through IALAG, has worked resolutely to circumvent the spirit of these legislative decisions and use prosecutions to impede the work of these groups and put in question their right to operate freely.

48. What justification is given for waging this legal offensive? One explanation that I received was that when membership in the CPP was legalized, the expectation was that its members would lay down their arms and participate in the parliamentary struggle. On this interpretation, the CPP has instead sought to pursue simultaneously the armed and parliamentary struggles. Many senior government officials stated unequivocally that they consider the party list groups in Congress as part of the insurgency. It is evidently the case that there are persons in Congress as well as in the hills who adhere to a “national democratic” ideology, but when I would ask interlocutors in what respect party list members of Congress belonging to the most criticized parties — Bayan Muna, Anakpawis, and Gabriela — had gone beyond expressing sympathy for the armed struggle to actually supporting it, I was repeatedly provided the same unsubstantiated allegation, that these congresspersons provide their “pork barrel” to the NPA.⁶² Cases filed against several congresspersons on these grounds have failed. This has not discouraged senior government officials. One insisted that although the publicly available evidence might be inadequate, the charges were amply supported by intelligence information that could not be disclosed. Another informed me simply that warrants had been issued based on probable cause and that he would not stop treating the congresspersons as criminals simply because no conviction had yet been achieved.

49. The central purpose of IALAG is to prosecute and punish members of the CPP and its purported front groups whenever there is any legal basis for doing so. I received no evidence that it was designed or generally functions to plan extrajudicial executions. However, IALAG’s proactive legal strategy requires drawing up lists of individuals who are considered enemies of

⁶¹ Some activists and politicians with whom I spoke feared that the Human Security Act of 2007, which was signed into law on 6 March 2007, would be used by the Government to proscribe the CPP. That piece of legislation defines crimes of terrorism (section 3) and conspiracy to commit terrorism (section 4) and provides for the proscription of “[a]ny organization, association, or group of persons organized for the purpose of engaging in terrorism, or which, although not organized for that purpose, actually uses the acts to terrorize mentioned in this Act or to sow and create a condition of widespread and extraordinary fear and panic among the populace in order to coerce the government to give in to an unlawful demand. . . .” (section 17).

⁶² Each year, the General Appropriations Act includes funds for each congressional representative to allocate at his or her discretion. These funds are commonly referred to as the representative’s “pork barrel”. The most notable such program is the Priority Development Assistance Fund (PDAF), previously known as the Countryside Development Fund (CDF). In the 2007 budget, PP 11.445 billion (USD 241.302 million), or approximately 1% of the budget, was allocated to the PDAF.

the state but many of whom will not be reachable by legal process. The temptation to execute such individuals is clear, representatives of the AFP and PNP with the capacity to do so participate in IALAG bodies at all levels, and there is circumstantial evidence that this has sometimes occurred.⁶³ The most deleterious role played by IALAG bodies may, however, be to encourage prosecutors to act as team players with the AFP and PNP in counterinsurgency operations and to de-prioritize cases involving the deaths of leftist activists.

Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009, ¶¶ 56-57):

56. In addition to the many killings of Afghan civilians which occur in the context of the armed conflict, Afghans also face insecurity from a general lack of law and order. Very few criminal murder cases are properly investigated or prosecuted and few perpetrators are convicted.⁶⁴ This impunity is due to failings in the functioning of the criminal justice system. Although practice varies considerably, the criminal justice system's formal structure is similar to that of many civil law countries.⁶⁵ Generally, police report crimes to the prosecutor, who investigates on his own or in collaboration with the police.⁶⁶ If the prosecutor finds sufficient evidence against the suspected perpetrator, he submits an indictment to the District Court.⁶⁷ The decision of the District Court may be appealed to the Provincial Court.⁶⁸ Recourse to the Supreme Court may be had if the lower court's decision involved legal error or was based on unlawfully collected evidence.⁶⁹ The Supreme Court may also appoint a committee to revise a decision based on newly discovered evidence.⁷⁰ Despite these formally appropriate procedures, I received many complaints that killings are not investigated, that prosecutions are not pursued, and that the judiciary corruptly exonerates many individuals.

57. Part of the problem at the early stages of crime detection and investigation is that there is a lack of cooperation between the police and the prosecutors. Constitutionally the police engage in "detection" and the prosecutors in "investigation". This appears not to work well in practice. In the past, it has been suggested that the Minister of Interior (who can issue orders binding on the police) and the Attorney General (who can issue binding orders on the prosecutors) meet as part of a committee, agree on how to cooperate on the combined process of detection and investigation, and simultaneously issue the appropriate orders. This has not come to pass.

⁶³ See, e.g., the case of Alice Omengan-Claver and Constancio Claver in Appendix A, paras. 28- 54.

⁶⁴ The Ministry of Interior provided statistics on the number of crimes that were detected by the ANP, that were delivered to a prosecutor, and that resulted in a judicial verdict. For all offences, the MoI reported that 100% of cases detected were referred to a prosecutor. See table in full report. The figures given for judicial verdicts obtained were provided by the MoI rather than by the judiciary, and the true figures are likely higher. According to the MoI, "It's worth mentioning that the continuous efforts of this organ to obtain the exact number of all three courts' decisions about criminal cases have not ended with an acceptable result, due to a lack of coordination and interest of the judicial organs with police in most of the provinces. ... There are usually tangible mistakes in this regard."

⁶⁵ The system's formal structure is laid out in the *Interim Criminal Procedure Code of 2004* (ICPC) together with other statutes and the Constitution. However, it is generally acknowledged that there is weak compliance with some of this code's detailed provisions. Moreover, many cases are dealt with in customary legal systems.

⁶⁶ ICPC, arts. 21, 23.

⁶⁷ ICPC, art. 39.

⁶⁸ ICPC, arts. 25, 63.

⁶⁹ ICPC, art. 71.

⁷⁰ ICPC, arts. 81, 83.

C. POLICE INVESTIGATIONS

Report on Mission to Kenya (A/HRC/11/2/Add.6, 26 May 2009, ¶¶ 25-27):

25. Police investigations of murders are generally inadequate, due in large part to resource, training, and capacity constraints. But investigations are especially poor when the police themselves are implicated in a death. The cause of this is in part institutional: there is no independent internal affairs unit within the police force. Such cases are generally investigated by the Criminal Investigations Division (CID) - the division responsible for all complex or serious investigations. But the problem is also one of will: those at the top of the force lack the determination to investigate themselves, or the will to institute the reforms that would improve transparency and accountability.

26. The police response to the KNCHR's report on extrajudicial executions is a typical example of police unwillingness to conduct serious investigations. The police report on the KNCHR investigations challenges the investigative capacity and skill of the KNCHR, criticizes the KNCHR for reporting the allegations to the President of Kenya and the UN, and concludes that there was "no" evidence of police complicity in the killings.⁷¹ A similar response was given in response to the KNCHR's public release of the whistleblower testimony in February 2009. The police issued a statement challenging the reputation of the whistleblower, questioning why the KNCHR released the statement when it did, questioning the KNCHR's commitment to human rights, and intimating that KNCHR officers receive payments from the Mungiki.⁷²

27. During my visit, police officials throughout the country blocked my attempts to find detailed information on investigations and inquests. For instance, the response to my written request for the number of inquiries opened by the police in response to complaints received against the police, was simply to state that every "action against a police officer is preceded by an inquiry file which is guided by the following regulations", and then to quote the law. Nevertheless, particularly damning evidence of the quality of police investigations is revealed in communications between the police and the Attorney-General. The Attorney-General provided me a significant volume of correspondence between his office and police headquarters with respect to various cases in which police were alleged to have killed. The correspondence consisted of repeated letters from the Attorney-General directing the police to charge certain individuals or to conduct further investigations. In one matter, two police officers opened fire at a group of youths on 31 December 2001. One person was killed, and three were seriously wounded. In March 2002, the police forwarded the investigation file to the Attorney-General. In May 2002, the Attorney-General directed the police to charge two police officers with murder and unlawful wounding, once certain gaps in investigations were remedied. After a number of months and reminder letters from the Attorney-General, the two policemen were eventually charged. However, a Magistrate dismissed the murder case because of a lack of evidence. The police had failed to conduct the additional investigations requested. In another murder case, the Attorney-General, through the DPP, sent letters to no avail in April, June, August, and

⁷¹ "Kenya Police Preliminary Report by a Board of Inquiry to Investigate the Alleged Execution and Disappearance of Persons", sent to the KNCHR by the Permanent Secretary, Secretary to the Cabinet and the Head of the Public Service on 17 March 2008.

⁷² "Allegations by KNHRC", Statement by Kiraithe E.K., For Commissioner of Police, 24 February 2009.

September 2008, and January 2009 requesting the police to conduct further investigations so that a trial could proceed.

Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009, ¶¶ 54-55):

54. Finally, the problem of killings by the police and other armed personnel acting under the authority of Government officials has been largely overlooked. This should end. While there are no reliable figures on the number of such unlawful killings, known cases clearly indicate that the overall number is high. There is a crying need for a system which ensures that when the police and/or their political masters are accused of multiple killings an independent investigation is launched. The killing of nine and the wounding of 42 unarmed protesters in Sheberghan (Jawzjan province) on 28 May 2007 by either the ANP or the Governor's private bodyguards provides a classic example.⁷³ Local and national political interests have conspired to ensure that no effective investigation was undertaken. The technique is to let time pass until the evidence has faded and other political concerns have claimed the limelight. The matter can then be quietly filed away. The victims and their families are simply ignored.

55. Local police are, not unusually, incapable of meaningfully investigating themselves.⁷⁴ A national police investigative task force should be established for this purpose. The investigative powers of the AIHRC should also be strengthened and the local and national government should have a time limit within which to respond in detail to the Commission's findings.

Report on Mission to Sri Lanka (E/CN.4/2006/53/Add.5, 27 March 2006, ¶¶ 34-37, 56-58):

34. The Government has failed to effectively investigate most political killings. This is due both to the police force's general lack of investigative ability and to other impediments. When I asked police officers why a particular killing had not been resolved, I generally received the same answer: the suspect escaped into an LTTE-controlled area. While it is true that the police are unable to enter these areas,⁷⁵ two observations are in order. First, in many cases the belief that

⁷³ I spoke with members of civil society who investigated the incident, a number of witnesses to the demonstration, and to those wounded in the shooting. I received credible accounts from some of those who were shot whilst running away from the protest area. When the AIHRC prepared a detailed but damning report on the incident, the response of the Government was to ignore it and set up separate inquiries. These inquiries appear to be going the way of most such efforts.

⁷⁴ According to statistics provided by the Ministry of Interior (MoI), in year 1386 of the Afghan calendar (21 March 2007 - 21 March 2008), the General MoI's Directorate of Internal Affairs addressed 436 cases, referring 351 officers and 12 generals being reported to the Prosecution Office. According to the Attorney General, during the year prior to my visit, prosecutions had resulted in the jailing of 17 police officers, all of whom were involved in one case. After serving 20 months, they were released pursuant to a judgment by the Court of Appeals. These cases would not, however, appear to concern issues arising under the mandate. While the MoI was able to provide statistics on civilian casualties due to Taliban and IMF attacks, with respect to those caused by ANP, it reported only that "There are no statistics of arbitrary executions by the National Police reported by any sources." The NDS also monitors the ANP for abuses. However, according to an NDS official, however, no action is taken on abuses reported, whether they are reported to the MoI or to more senior Government officials.

⁷⁵ The structural constraints the CFA places on police work must also be overcome. While the CFA's provisions restricting the movement of Government "armed forces" and LTTE "fighting formations" into areas controlled by the other party do not expressly address police officers, the understanding of the parties has given these provisions a prudent breadth. (CFA arts. 1.4-1.7.) It is clear that both parties have genuine security concerns regarding the

the suspect was in an LTTE-controlled area was speculation inasmuch as no investigation had been carried out. Second, the police have lost much of their appetite for serious investigations of political killings. Many officers operate under the impression that investigating any crime presumed to involve the LTTE would imperil the ceasefire. These cases are simply too hot to handle. The Government should unambiguously instruct the police that, while they are obligated not to violate the CFA, they continue to be obligated to investigate crimes and apprehend suspects within the terms of the law, regardless of who those suspects might be.

35. This has interfered with criminal investigations. Government officials brought several instances to my attention. In September 2005, government police entered an LTTE-controlled area in Mannar in pursuit of a suspected paedophile. The police officers were captured by the LTTE, and three were still being held in early January 2006. In the meantime, the suspect escaped and was detained only when he turned himself in to the police in Colombo. A more prosaic incident was raised by the police in Welikanda: they had reason to believe that a man had robbed at least five cars, but he escaped into an LTTE-controlled area, ending the investigation. A representative of the “Tamil Eelam Police” provided me with another example. He related that two years ago there had been a murder in an LTTE-controlled area of Mannar. The persons suspected of having committed this murder escaped into Government-controlled territory and were subsequently captured by the government police. It was his understanding that, for lack of evidence, the suspects were released by the Government within a month. Other similar cases were brought to my attention by victims, and the lack of cooperation in policing appears to be a persistent problem that adversely affects the protection accorded the population from crime.

36. The parties have a common interest in controlling crime and, as a confidence-building measure, the Government and the LTTE should initiate and regularize contact between the government police and the policing forces that operate in LTTE-controlled areas. This contact would allow access to evidence, information, and detainees. I raised this possibility with the Inspector General of Police (IGP) and the head of the “Tamil Eelam Police”, himself a former government police officer. I sensed that both had political reservations but also understood the limitations the current arrangement imposed on their work. It is my view that such contact might be quickly and helpfully initiated as a pragmatic confidence-building measure. If appropriate, the Sri Lanka Monitoring Missions (SLMM) could assist in facilitating this dialogue.

37. The police also lack sufficient linguistic ability and cultural sensitivity to interview witnesses and gather the information required to effectively investigate killings that occur within the Tamil and Muslim communities.⁷⁶ The political killings have disproportionately affected these communities, both of which speak Tamil. The police force, however, is only 1.2 per cent Tamil and 1.5 per cent Muslim, and Sinhala officers seldom speak Tamil proficiently. The only practical way for the police to acquire a larger number of fluent Tamil speakers is to recruit Tamil and Muslim officers.⁷⁷ While it was sometimes argued that the low proportion of Tamils

movement of all armed personnel into their areas of control and understandable that police officers do not, in practice, have access to areas controlled by the opposing party.

⁷⁶ Note also the finding of the National Human Rights Commission that the paucity of Tamil speaking officers “remains a major grievance [that] is linked to the deteriorating security situation”. *The Human Rights Situation in the Eastern Province: Update* (April 2005), p. 24.

⁷⁷ The IGP noted that there were already financial incentives for Sinhala officers to learn Tamil and that he had introduced a program of three-months training in Tamil for new recruits. These measures have been inadequately

in the police force was inevitable, given the fear that the LTTE would target Tamil officers, it was acknowledged by informed actors that if the Government made such recruitment a priority, it could be achieved with meaningful financial incentives and preferences for promotion.

[...]

56. The lack of investigative capacity is due to a lack of police training and resources, ineffective forensics, and an unwillingness to ensure the security of witnesses. The Judicial Medical Officers (JMOs) who carry out most autopsies typically lack the requisite vehicles, equipment and specialized training. The range of obstacles to a prompt and effective examination means that too much evidence simply bleeds out onto the floor. Investigations are also impeded by the lack of effective witness protection. This makes witnesses especially reluctant to provide evidence on crimes committed by police officers, and led several interlocutors to joke that it would be better to be a victim than a witness. Inadequate investigations result in evidence insufficient to sustain a conviction. Various police and forensic training programmes have been supported through development assistance initiatives. In the absence of any detailed evaluations, my impression is that they have been worthwhile but regrettably limited in scope.

57. The frequent failure to prosecute police accused of responsibility for deaths in custody is due partly to deficiencies in internal investigation. Complaints about police misconduct are received by the Inspector General of Police (IGP), who selects either the Special Investigations Unit (SIU) or the Criminal Investigation Department (CID) to carry out an internal investigation. Internal investigations into serious incidents typically last from two to four years, and it seems likely that by no means all such complaints are investigated at all. When grave misconduct, such as torture or murder, has been alleged, the investigation is generally conducted by CID. The primary role of CID is assisting local police, and for it to also conduct internal investigations undermines both their actual effectiveness and outside perceptions of impartiality. Reform is needed, and it may be hoped that this can be spearheaded by a strong National Police Commission.⁷⁸

58. Cases that are referred to the Attorney-General seldom lead to convictions. This is partly due to the lack of evidence gathered, and partly to a judiciary that moves cases along slowly, sometimes tolerating years of delay preceding verdicts. One government official suggested that the judiciary was so overloaded that judges would seize on any plausible excuse to allow a postponement and cut the caseload. He pointed out that if indictments reliably resulted in interdiction, as the law requires, police officers and other government officials would be less likely to seek dilatory adjournments. I regret that I did not have the opportunity to meet with judges, but I note the widespread perception that the courts manage cases inefficiently.

implemented. The current financial incentives are based, not on demonstrating a high level of proficiency, but on completing a relatively short course. The language-training plan holds greater potential, but because there has been no regular recruitment since 2001, it remains a theoretical innovation.

⁷⁸ Notably, the police disciplinary process is least effective when dealing with more senior officers. Statistics relating to “departmental lapses” show that disciplinary proceedings are almost exclusively initiated against low-ranking officers. There is a determined unwillingness to hold police officers with command responsibility accountable for torture and killings engaged in by their subordinates, whether at the disciplinary or at the criminal level. This applies to both internal and external accountability mechanisms. In 2001, constables were found responsible for 86% of “departmental lapses”; superintendents were found responsible for only 0.04% of such lapses. (*Sri Lanka Administration Report, 2001, Appendix 1, Table 6.*)

Prosecutors must also share the blame for the low conviction rates. The Attorney-General has become increasingly active in prosecuting police torture cases, and he informed me that there have been 64 indictments, 2 convictions, and 2 or 3 acquittals (most cases are pending). Time will tell whether this is the beginning of accountability or a further exercise in shadow-boxing.⁷⁹

Report on Mission to Nigeria (E/CN.4/2006/53/Add.4, 7 January 2006, ¶¶ 52-54. 89):

52. On paper, the system for investigating police misconduct is impressive. In practice, it is too often a charade. The outcome of investigations usually seems to justify inaction or to ensure that complaints are dealt with internally through “orderly-room hearings” or the like.⁸⁰ While police officers are certainly disciplined and some dismissed, the system has rarely worked in cases in which police are accused of extrajudicial executions. In these instances genuine investigations are rare and referral to the DPP for prosecution are even rarer. It is also not uncommon for the primary accused police officer to escape, for charges to be brought against others, and for the latter to be acquitted on the grounds either of insufficient evidence or of prosecution of the wrong officers. The result gives the appearance of a functioning investigative system, while in fact promoting the goal of de facto police impunity.

53. This scenario is illustrated in two, apparently all too typical, cases. In the first, two boys⁸¹ were arrested by police in Nsukka, Enugu state. They were bundled into the trunk of a car by Police Superintendent Gambo Sarki, and taken to the police station. Their presence was not recorded, they were denied bail, and their parents were told they were not at the station. Their mutilated bodies were subsequently found dumped in a nearby town.⁸² Following public protests an inquiry was held which concluded that Sarki had ordered junior officers to shoot the boys. When they refused, he did it himself.⁸³ Sarki “escaped” before he could be tried, as a result of

⁷⁹ I should note that the deficiencies in the system of criminal justice are not mitigated by the more effective process for vindicating the fundamental rights guaranteed by the Constitution, including the right to life and to freedom from torture. In the last two years, the Supreme Court has awarded compensation in a number of such cases. But while reparations are an important component of effective remedies, they are not a substitute for prosecution. In Sri Lanka the Court determines what portion of the compensation shall be paid by the State and what portion by the convicted officer. In one prominent case, involving the killing of WMGM Perera, less than a quarter of the compensation awarded was to be paid by the persons responsible, while the State paid the rest. The State’s contribution undercuts the deterrent effect of the Court’s fundamental rights jurisdiction and further emphasizes the importance of effective prosecution and punishment in cases of official torture and summary execution.

⁸⁰ For a detailed analysis of these issues see Human Rights Watch, *“Rest in Pieces”: Police Torture and Deaths in Custody in Nigeria*, July 2005, Chapter X.

⁸¹ Nnaemeka Ugwuoke and Izuchukwu Ayogu.

⁸² In addition to meeting with the fathers of the boys and hearing evidence from their legal representative, the Special Rapporteur was provided with a copy of the official Police Report into the incident entitled, “Detailed Police Investigation Report, Re: Case of Suspected Murder”, signed by the Deputy Commissioner of Police, Enugu State Command, 9 April 2002. The case has also been widely reported on in the press and by civil society. See e.g. Civil Liberties Organization, *I Can Kill You and Nothing will Happen: A Report of Extra-Judicial Killings and Impunity by Law Enforcement Agencies in Nigeria between May 1999 - June 2005*, pp. 12-13; and “Nsukka Killings - Recurring Cry for Justice”, *Vanguard*, 6 August 2003, and “Justice Delayed”, *The News*, 22 March 2004.

⁸³ The inquiry also indicted a range of other police for complicity in various aspects of the incident. Enugu State Police Command report entitled, “Detailed Police Investigation Report re. case of suspected murder. Complaints: 1. Chief Nicholas Ugwoke 2. Chief Reuben Ayogu. Suspects: 1. Mr. Gambo Sarki (SP) and others. Deceased: 1. Nnaemeka Ugwuoke (m) 2. Izuchukwu Ayogu (m).”

which all other prosecutions were suspended. Most of the other accused officers continue to serve and be promoted.⁸⁴

54. In the second case, the grandmother of Nnamdi Francis Ekwuyasi told the Special Rapporteur of how he was shot and killed at a checkpoint only 200 meters from his home. The accused was a drug and alcohol intoxicated policeman whose name was well known to the community. He promptly absconded. Charges were proposed against two other policemen but the DPP concluded that they were not responsible. The accused has never been “found”.

[...]

89. Only the Police are authorized to investigate killings, even where the principal suspects are police officers. But the police service is so under-funded that the family of the deceased are often requested to fund any investigation, an expense which is well beyond the capacity of most Nigerians. Notions such as sealing off a crime scene or allocating the best officers to investigate a particular crime are foreign to a force for whom the phrase “police investigation” has become an oxymoron. There is no tradition of systematic forensic investigation in Nigeria, there is a single ballisticsian in the entire country, only one police laboratory, and no fingerprint database. The result, unsurprisingly, is that the police rely heavily upon confessions which, on one estimate, are the basis for 60 per cent of prosecutions. The temptation to “extract” a confession by all available means seems hard to resist.

Report on Mission to Guatemala (A/HRC/4/20/Add.2, 19 February 2007, ¶¶ 43-50):

43. To understand the causes of this low conviction rate, I spoke with officials of the principal organs of Guatemala’s criminal justice system, including the Policía Nacional Civil (PNC), the Ministerio de Gobernación (which oversees the PNC), the Ministerio Público (which prosecutes criminal cases), and the Supreme Court of Justice. These institutions are responsible for the various phases of the criminal justice process, from crime detection and prevention, to investigation and prosecution, to the adjudication of individual criminal responsibility.

44. The PNC is responsible for crime detection and prevention, but with rising crime rates the public has little confidence in its efforts.⁸⁵ In our discussion, the Ministro de Gobernación argued that the principal failings of the PNC were due to a lack of resources. Guatemala has 19,000 police officers, 5,000 of which participate in specialized units - largely devoted to protecting government buildings, foreign embassies, and individuals - rather than in general crime prevention. Of the remaining 14,000, approximately 7,000 are serving each day, and 3,500 during a given shift. A number of my interlocutors suggested that, for Guatemala to be in line with the policing levels achieved in El Salvador, it would require between 35,000 and 38,000 police - a doubling of the force. The Government has supplemented the number of police by

⁸⁴ See also, “Nsukka Killings - Recurring Cry for Justice,” *Vanguard*, August 6, 2003 and “Justice Delayed”, *The News*, March 22, 2004.

⁸⁵ In a survey conducted in the municipality of Antigua in August 2006 of a representative sample of 410 residents, only 10 per cent believed the actions of the PNC against crime to be “adecuada” or “muy adecuada”. *Informe de un Estudio Cuantitativo de Victimización en el Municipio de Antigua Guatemala, designed and executed by Aragón & Asociados a solicitud de l’Asociación para la Prevención del Delito (APREDE)*.

instituting joint patrols between the PNC and the military. Several thousand soldiers are participating in these joint patrols, and a typical patrol will consist of 10 soldiers and 2 police officers. Notwithstanding the need to end the use of social cleansing by elements with the police, as discussed in chapter III (A), there is no question but that Guatemala needs a far larger police force, but enlargement would need to be accompanied by thoroughgoing reform of existing arrangements. It is, however, far from clear that the use of large patrols comprising primarily persons untrained in policing techniques is beneficial even as a short-term measure; moreover, this remilitarization of policing marks a significant step back from the aspirations expressed in the Peace Accords.

45. The challenges of investigation and prosecution confront three key obstacles: a problematic division of responsibility, severely limited resources, and endemic corruption.

46. Responsibility for investigating crimes is shared by the PNC and the Ministerio Público, and the latter then prosecutes suspected perpetrators. The majority of investigative personnel are employed by the PNC. However, by law the PNC investigators must comply with the direction of those from the Ministerio Público in investigating crime scenes. This arrangement requires close cooperation between the investigators of the PNC and of the Ministerio Público. Despite an inter-institutional accord on improving criminal investigations reached by the two bodies in 2004, by all accounts the level of coordination and cooperation is often unsatisfactory, making many investigations inefficient and often unproductive in terms of successfully pursuing prosecution. While disappointing, the failure of a system in which a single function is divided between institutions with inevitably competing interests is unsurprising and deeper reforms should be considered. One possible model, from which much might be learned, is the approach taken by Chile in establishing a system of investigative prosecutors.

47. Limited resources are another cause of inefficient investigations that often produce insufficient evidence for effective prosecution. I was informed that there are roughly 350 investigators working for the PNC and roughly 100 working for the Ministerio Público. The latter receives 250,000 complaints each year, and while not all require the attention of an investigator, the gap between resources and requirements is enormous. It is understandable that government officials believe that at least 700 additional investigators are needed.

48. Another problem caused by a lack of resources, along with inadequate training, is that investigations rely overwhelmingly on testimonial rather than physical evidence. The provision of better forensic resources is vital, because, not only is testimonial evidence generally of less probative value than physical evidence, but reliance on the former produces the expected incentives for the police to coerce confessions and for criminals to intimidate witnesses. Congress has passed a bill to establish a National Forensics Institute, there is no guarantee that that institute will have adequate resources to make a difference. As one government official noted, Guatemala needs more laboratories, not more legislation.

49. That many investigations and prosecutions have been impeded by officials corrupted either by intimidation or financial inducement is widely acknowledged in and out of Government. In Guatemala, as in many countries, there are networks of personal connections, trust, and loyalty that lead government officials to do favours for their friends and associates in private life. There

have also been indications, however, that some corruption is less personal and more organized, with “illegal groups” and “clandestine apparatuses” associated with organized crime and elements of the military infiltrating criminal justice institutions to ensure impunity for their actions, including murders of rivals as well as of those who seek to expose their crimes. In my discussions with the Minister of Defence, I was disturbed by the apparent evasion of responsibility for ensuring that military personnel were not involved in organized crime. I was informed first that the Ministerio Público could not take action without a referral from the Department of Military Justice, then that the Department of Military Justice took no proactive steps to identify criminal activity but would only initiate investigations upon receiving a complaint, and finally that the problem could not be too bad because the Ministerio Público was not investigating any cases against drug traffickers in the military. This circular reasoning does little to dispel the widespread belief that military personnel are involved with drug traffickers, organized crime, and clandestine groups. Whatever the precise contours of the problem, the fact of corruption is undisputed and must be addressed. It is both a cause and a consequence of impunity.

50. In December 2006, the Government reached an agreement with the United Nations to establish the International Commission against Impunity in Guatemala (Comisión Internacional Contra la Impunidad en Guatemala, CICIG). A similar agreement had been reached in 2004 whereby a similar body would act as an independent prosecutor for cases involving human rights violations, organized crime, drug trafficking, and corruption, but this agreement was rejected by the Congress and the Corte Constitucional as an affront to Guatemala’s sovereignty. CICIG is to have a less expansive mandate, acting not as an independent prosecutor but as a *querellante adhesivo* or, that is, as a “third-party prosecutor” intervening in a prosecution on behalf of the victim. Traditionally, such third-party prosecutors have played a key role in pushing cases through the system, and this arrangement has the potential to make a difference. The establishment of CICIG, while important, is not a panacea. To end widespread impunity will continue to require major reforms to the PNC and the Ministerio Público.

Report on Mission to Brazil (A/HRC/11/2/Add.2, 23 March 2009, ¶¶ 49-53):

49. The Civil Police have primary responsibility for homicide investigations. This is true whether the suspected perpetrator is a private citizen or a member of either police force. The Civil Police then refer the case to the Public Prosecutor’s Office, which may initiate criminal proceedings. In homicide cases, it is a jury that pronounces the verdict and the judge who decides on the sentence. Two other institutions help to ensure the quality of the investigation and the integrity of the subsequent process. A state Institute of Forensic Medicine may support the investigation by conducting an autopsy. And witness protection programs may be used to prevent suspects from intimidating witnesses.

50. While each of these institutions performs well some of the time, obtaining a conviction requires them all to work well at the same time, and this happens infrequently. For example, in Rio de Janeiro and São Paulo, only about 10% of homicides end up being tried in the courts; in Pernambuco the rate is about 3%. Of the 10% tried in São Paulo, it is estimated that about half are actually convicted. These rates are even lower for cases implicating police.

B. Criminal investigations by the civil police

51. I received many allegations that Civil Police investigations, particularly of killings by police, are often grossly inadequate. I was informed by prosecutors that police investigations are often not recorded properly, and sometimes the only evidence would be a crime scene description and a police statement. The use of DNA and ballistics evidence is rare and technical and human resources are lacking.

52. These problems are exacerbated when the case is one in which members of the Military Police report the killing as a “resistance” death. As detailed above in Part III (C) a strong *esprit-de-corps* results in Civil Police poorly investigating such cases.⁸⁶ I was repeatedly told by Civil Police that when a resistance case occurs, they assume that the Military Police were dealing with criminals, and acting in self-defence.

53. I was also given examples of police negligently or intentionally allowing cases to sit in police precincts, without passing them to prosecutors. For example, in Pernambuco, prosecutors found 2,000 cases where files had been left in police precincts and not passed on to the prosecution service. The files had been left for over 20 years - well past the period of prescription - so prosecutions are now impossible.

⁸⁶ Although the Civil Police and Military Police are independent institutions, members of the respective forces in a given area will routinely cooperate on ordinary cases. The relationships that develop can impede effective investigations implicating the Military Police. This problem is ameliorated when a specialized Civil Police unit with broader geographical coverage, such as the Department of Homicides and Protection of the Person (Departamento de Homicídios e Proteção à Pessoa (DHPP)) in São Paulo, takes over a case involving a killing by police.

D. PROSECUTIONS

Report on Mission to Colombia (A/HRC/14/24/Add.2, 31 March 2010, ¶¶ 70-73):

70. Investigations of IAGs are largely conducted by the local office of the National Police, with prosecutions conducted by the local *Fiscalía*. While many do commendable work under difficult circumstances, senior *Fiscalía* officials expressed scepticism about the likelihood of successful prosecution in some parts of Colombia because, in the words of one, IAGs “are very economically powerful and they have infiltrated the military and political establishment who help them by providing cover” for their activities and “a lot of money changes hands to prevent justice”.

71. Institutional barriers also compromise the Government’s ability to shut down IAGs or prosecute their leaders. The *fiscales* are separate from the police, who do the investigation and arrest and both are separate from the National Reparation Fund, which manages seized assets. *Fiscales* indicated that this often results in failures to cooperate and coordinate.

72. Another institutional weakness is that local *fiscales* generally approach the prosecution of each defendant as an individual case. They may not have the sophistication or resources to oversee the kind of complex investigation and multiple prosecutions necessary to target the leadership of an IAG and economic structure and the sources of its support among local elites.

73. To address these problems the *Fiscal General* should create a national unit dedicated to complex prosecutions that would seek to shut down all the major actors in and sources of support for particular IAGs (which could be prioritized by the extent of their organization and illegal activity). Teams of prosecutors from the unit could be assigned to cover different parts of the country, thus avoiding the pressures to which local *fiscales* can be subjected. Donor country agencies with experience in such complex litigation could provide training and support. In addition, the Government should consider seconding police, investigators, and asset confiscation and management experts to such a unit so that all investigation and prosecution activities are strategically coordinated.

Report on Mission to Kenya (A/HRC/11/2/Add.6, May 2009, ¶¶ 28-30):

28. The Attorney-General is a constitutional office-holder, a member of the National Assembly, a member of the Judicial Service Commission, the principal legal advisor to the Government, and has the constitutional power to conduct or stop prosecutions.⁸⁷ For offences which can be heard in Magistrate’s Courts (including, for example, robbery), prosecutorial functions are delegated by the Attorney-General to the police. For offences over which only the High Court has jurisdiction (such as murder), prosecutorial functions are delegated to the Director of Public Prosecutions (DPP). The DPP has no security of tenure. His is a department of the office of the Attorney-General, not an independent office.

29. The Attorney-General has security of tenure, for life, and has been in office since 1991. He has overseen, for nearly two decades, a system that clearly does not work. The Attorney-General

⁸⁷ Constitution of Kenya, Arts 26, 36, 68.

has the constitutional power to “require” the Police Commissioner to investigate any matter relating to an alleged offence.⁸⁸ As documents provided by the Attorney-General clearly indicate, he is all too aware of the grave deficiencies in police investigations. But instead of using his constitutional powers to force individual investigations, and to promote essential institutional reforms, letters simply go back and forth for years, with cases neither investigated sufficiently, nor prosecuted. In addition, the repeated failure to prosecute *any* senior officials for their role in large-scale election violence over a period of many years (discussed below in section IV on post-election violence) has led to a complete loss of faith in the commitment of his office to prosecute those in Government with responsibility for crimes.

30. The Attorney-General and successive police commissioners have engaged in a game in which each insists the ball is in the court of the other, while both know that it has in fact been hidden so that no outcome can ever be declared. The Attorney-General then presents himself as the helpless victim of the intransigence or malfeasance of others. But this is a complete misrepresentation of the situation of an individual who has wielded immense power through a succession of government. In fact, his unrelenting failure to prosecute any senior officials implicated in extrajudicial executions renders him not just complicit in, but absolutely indispensable to, a system which has institutionalized impunity in Kenya. In order to restore the integrity of the office, the current Attorney-General should resign or be required to leave office. In future, prosecutions should be undertaken by a constitutionally entrenched and independent Department of Public Prosecutions. The powers to prosecute and to intervene in prosecutions should not be held by a political office-holder.

Report on Mission to Nigeria (E/CN.4/2006/53/Add.4, 7 January 2006, ¶¶ 6, 93-95):

6. A leading Nigerian NGO, the Legal Defence and Assistance Project, recorded 997 cases of extrajudicial killing in 2003, of which 19 resulted in a prosecution. For 2004 there were 2,987 cases and not a single prosecution.⁸⁹

[...]

93. If the system worked, suspects would be brought before a court, charged and remanded. Instead the police consistently resort to a short cut by taking suspects before a magistrate who remands them indefinitely without formal charges while the police conduct their investigation. The result of this “holding charge” is that individuals can be jailed more or less indefinitely in a legal limbo based on little more than a suspicion of criminal activity, unsupported by any evidence. This practice continues despite a declaration of its unconstitutionality by the Court of Appeal.⁹⁰ It has contributed significantly to the extremely high rates of individuals in Nigerian prisons who have not been formally charged, a situation which can endure for a decade and beyond. It is an insidious but pervasive practice which shields police inefficiency and severely punishes many innocent persons.

⁸⁸ Constitution of Kenya, Art 26.

⁸⁹ “Extra-Judicial Killings on the Increase in Nigeria”, This Day (Lagos), 31 Oct. 2005, available at <http://allafrica.com/stories/200511010208.html>.

⁹⁰ *Bayo Johnson v. Olufadeju* (2002) 8NWLR Part 768, 192-222 (cited in Human Rights Law Service, *Travesty of Justice: An Advocacy Manual Against the Holding Charge* (2004)).

94. Proposals in Lagos State would limit the remand period to 100 days.⁹¹ This would constitute a vast improvement, although 100 days is still far too long.⁹²

95. Public Prosecutors have no control over police investigations, nor can they demand that individuals be produced in court. As a result, most police killings are never referred to the DPP and the latter cannot initiate a prosecution. Moreover, a police officer must be dismissed from the police force before being prosecuted.

Report on Mission to Sri Lanka (E/CN.4/2006/53/Add.5, 27 March 2006, ¶¶ 57-58):

57. The frequent failure to prosecute police accused of responsibility for deaths in custody is due partly to deficiencies in internal investigation. Complaints about police misconduct are received by the Inspector General of Police (IGP), who selects either the Special Investigations Unit (SIU) or the Criminal Investigation Department (CID) to carry out an internal investigation. Internal investigations into serious incidents typically last from two to four years, and it seems likely that by no means all such complaints are investigated at all. When grave misconduct, such as torture or murder, has been alleged, the investigation is generally conducted by CID. The primary role of CID is assisting local police, and for it to also conduct internal investigations undermines both their actual effectiveness and outside perceptions of impartiality. Reform is needed, and it may be hoped that this can be spearheaded by a strong National Police Commission.⁹³

58. Cases that are referred to the Attorney-General seldom lead to convictions. This is partly due to the lack of evidence gathered, and partly to a judiciary that moves cases along slowly, sometimes tolerating years of delay preceding verdicts. One government official suggested that the judiciary was so overloaded that judges would seize on any plausible excuse to allow a postponement and cut the caseload. He pointed out that if indictments reliably resulted in interdiction, as the law requires, police officers and other government officials would be less likely to seek dilatory adjournments. I regret that I did not have the opportunity to meet with judges, but I note the widespread perception that the courts manage cases inefficiently. Prosecutors must also share the blame for the low conviction rates. The Attorney-General has become increasingly active in prosecuting police torture cases, and he informed me that there have been 64 indictments, 2 convictions, and 2 or 3 acquittals (most cases are pending). Time will tell whether this is the beginning of accountability or a further exercise in shadow-boxing.⁹⁴

⁹¹ Thereafter the suspect would be entitled to release unless good cause is shown for a further 30 day remand. Human Rights Law Service, *Travesty of Justice: An Advocacy Manual Against the Holding Charge* (2004) pp. 52-57.

⁹² For a similar criticism see Human Rights Law Service, *Travesty of Justice: An Advocacy Manual Against the Holding Charge* (2004) p. 55.

⁹³ Notably, the police disciplinary process is least effective when dealing with more senior officers. Statistics relating to “departmental lapses” show that disciplinary proceedings are almost exclusively initiated against low-ranking officers. There is a determined unwillingness to hold police officers with command responsibility accountable for torture and killings engaged in by their subordinates, whether at the disciplinary or at the criminal level. This applies to both internal and external accountability mechanisms. In 2001, constables were found responsible for 86% of “departmental lapses”; superintendents were found responsible for only 0.04% of such lapses. (Sri Lanka Administration Report, 2001, Appendix 1, Table 6.)

⁹⁴ Notably, the police disciplinary process is least effective when dealing with more senior officers. Statistics relating to “departmental lapses” show that disciplinary proceedings are almost exclusively initiated against low-

ranking officers. There is a determined unwillingness to hold police officers with command responsibility accountable for torture and killings engaged in by their subordinates, whether at the disciplinary or at the criminal level. This applies to both internal and external accountability mechanisms. In 2001, constables were found responsible for 86% of “departmental lapses”; superintendents were found responsible for only 0.04% of such lapses. (*Sri Lanka Administration Report, 2001, Appendix 1, Table 6.*)

E. THE JUDICIARY

Report on Mission to Kenya (A/HRC/11/2/Add.6, May 2009, ¶¶ 31-32, 95):

31. The judiciary in Kenya is an obstacle in the path to a well-functioning criminal justice system.⁹⁵ Its central problems are crony opaque appointments, and extraordinary levels of corruption. I received considerable evidence of judges and magistrates being paid to slow the progress of cases, to “lose” files, or to decide a case in a particular manner. Many reports over the last decade have documented this, and significant structural reforms have repeatedly been proposed to increase the transparency and accountability of the judiciary.⁹⁶ The Kibaki Government botched its 2003 “radical surgery” strategy,⁹⁷ and has done little since, despite the strongly proclaimed views of the Prime Minister and the former Minister of Justice that drastic reforms are required. The Chief Justice is of the view that the courts generally function well, and that corruption and discipline are being adequately dealt with by the Judicial Service Commission (JSC). In fact the JSC has done precious little to improve the functioning of the courts, and they are in need of radical reform.

32. It is essential that the judicial appointments procedure, and oversight of discipline of judges and magistrates is reformed. To this end, the JSC should be transformed so that its membership is representative; judicial officials are transparently vetted before appointment; merit-based criteria are met by appointees; and the Commission should have a more significant and transparent role in monitoring and removing judges. It should also establish an independent complaints procedure in relation to judicial behaviour.

[...]

95. To reduce corruption and incompetence in the judiciary:

(a) Radical surgery needs to be undertaken to terminate the tenure of the majority of the existing judges and replace them with competent and non-corrupt appointees; (b) Judicial appointment procedures should be made more transparent, and all appointments made following a merits-based review of the appointee;

(c) The Judicial Service Commission should be reformed so that its membership is representative; and its role in appointments, discipline and dismissal of judicial officers be clarified and strengthened;

⁹⁵ The structure and powers are set out in the Constitution of Kenya, Chapter IV; the Judicature Act; the Magistrates Courts Act.

⁹⁶ See, “Report of the Committee on the Administration of Justice” (1998) (the Kwach report) (detailing allegations that there was “actual payment of money to judges and magistrates to influence their decisions.”); Constitution of Kenya Review Commission, “Report of the Advisory Panel of Eminent Commonwealth Judicial Experts” (2002) (concluding that “the Kenyan judicial system suffers from a serious lack of public confidence and is generally perceived as being in need of fundamental structural reform.”). Also see yearly reports on Kenya by Transparency International (reporting the judiciary as one of the most corrupt institutions in Kenya).

⁹⁷ The Government set up an “Integrity and Anti-Corruption Committee of the Judiciary in Kenya”, which released its report (the Ringera Report) in 2003. The report implicated 5 (out of 9) Court of Appeal justices, and 18 (out of 36) High Court justices, and 82 (out of 254) magistrates in corruption. Many of the named justices and magistrates resigned, others challenged the report’s findings. See International Commission of Jurists, “Kenya: Judicial Independence, Corruption and Reform” (April 2005).

(d) The Judicial Service Commission should create a complaints procedure on Judicial conduct.

Report on Mission to Nigeria (E/CN.4/2006/53/Add.4, 7 January 2006, ¶¶ 88, 98):

88. There is no single entry point for reformers of the dismally inadequate Nigerian criminal justice system. Virtually every component part of the system functions badly. The result is a vicious circle in which each group contributing to the problem is content to blame others. Thus for example, police officers complain about a lack of resources, but the politicians complain that the police are thugs and their performance undeserving of increased resources. The judiciary blames the prison system and the police for the scandalous number of uncompleted cases, while the police observe that arresting robbers is futile because the courts will never convict them. It is essential to understand the vicious cycle of blame and for all actors to acknowledge their own responsibilities. The following list illustrates some of the pathologies.

[...]

98. The judiciary cannot absolve itself of responsibility for the unconscionable amount of time taken to resolve serious criminal charges, the adjournments handed out with reckless abandon (the Special Rapporteur met accused persons who had endured more than 50 adjournments), and the subsequent long-term rotting in prison of thousands charged with capital offences. There seem to have been remarkably few efforts to develop alternative dispute resolution mechanisms or more efficient methods of resolving criminal charges.

Report on Mission to Brazil (A/HRC/11/2/Add.2, 23 March 2009, ¶¶ 64-67, 96-98):

64. All intentional homicides are tried by juries in regular, civilian courts.⁹⁸ But few convictions against police are achieved. I received many complaints from victims, families, police, prosecutors, and Government officials that the judicial system in Brazil is overburdened and slow.

65. The period of prescription for intentional homicide is, depending on whether there are aggravating factors, either 12 or 20 years.⁹⁹ The period of prescription continues to run until all appeals have been completed. (Appeals may be made to higher state courts, to the federal *Superior Tribunal de Justiça* and, if there is a constitutional issue, ultimately to the *Supremo Tribunal Federal*.) In the context of a very slow justice system, this creates impunity for serious crimes. This problem is exacerbated by the tendency of some judges to put off dealing with cases

⁹⁸ This represents significant progress: Prior to a 1996 statute, homicide cases against members of the Military Police were tried by special military courts. Now, jury trials are used, but only in cases involving intentional crimes against life. Law 9.299 (adopted 7 August 1996) amended Art. 9 of the *Código Penal Militar* and Art. 82 of the *Código de Processo Penal Militar* so as to remove “intentional crimes against life committed against a civilian” from the military justice system. The system used for jury selection is not designed to produce a “jury of one’s peers” as in common law systems. Instead, each year, a judge selects several hundred individuals to compose the jury pool based on his “personal knowledge or reliable information” with the assistance of lists provided by local authorities and professional guilds. The jury for a particular trial is chosen at random from this list. (*Código de Processo Penal*, Arts. 74, 427, 439.)

⁹⁹ *Código Penal*, Art. 109.

implicating the police and other powerful actors, and to manage their dockets so as to prioritize civil cases over criminal cases.

66. Recent reforms have allowed crimes implicating the State's international human rights obligations to be investigated by the Federal Police and, at the request of the Prosecutor-General, transferred from the state to the federal courts.¹⁰⁰ While these reforms hold promise,¹⁰¹ the criteria for jurisdiction to be transferred have been narrowly construed by the courts, and, up to the time of my visit, only one case has actually been transferred.

67. The National Council of Justice was recently established to provide external oversight of the judiciary, and it has the power to propose reforms, monitor judicial activity, and to remove a judge or impose other sanctions. The Council should consider how its rulemaking powers could be used to improve the judiciary's response to impunity. Useful measures would include designating judges who would handle solely cases involving killings by on- or off-duty police and promulgating a protocol for prison inspections by Judges of Penal Execution.

[...]

96. The period of prescription (statutory period of limitation) for intentional crimes against life should be abolished.

97. Recognizing that permitting persons convicted of murder by a trial court to remain free while their appeal is ongoing facilitates the intimidation of witnesses and fosters a sense of impunity, judges should give careful consideration to alternative interpretations of the norm guaranteeing the "presumption of innocence" found in foreign and international jurisprudence.

98. The National Council of Justice and other appropriate bodies should take measures to ensure that:

(a) In making docket management decisions, judges do not put off dealing with cases involving killings by powerful actors, including the police, or prioritize civil above criminal cases;

(b) Judges of penal execution conduct prison inspections pursuant to a written protocol which requires private interviews with prisoners randomly selected by the judge.

Report on Mission to Philippines (A/HRC/8/3/Add.2, 16 April 2008, ¶¶ 51, 59):

¹⁰⁰ Pursuant to a constitutional amendment made in 2004, Art. 109 of the Constitution provides for the involvement of the Prosecutor-General of the Republic and the jurisdiction of the federal courts "[i]n the case of grave violations of human rights . . . with the purpose of ensuring compliance with obligations under international human rights treaties to which Brazil is party". Similarly, the law permits the Federal Police to investigate "criminal offences . . . related to the violation of human rights, that the Federative Republic of Brazil is obligated to repress as a result of international treaties to which it is a party" (Law 10.446 (adopted 8 May 2002), Art. 1; see also Constitution of Brazil, Art. 144(1)).

¹⁰¹ Following her visit in 2003, my predecessor observed that the anticipated amendment would be a "welcome step forward to combat impunity". Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Asma Jahangir, E/CN.4/2004/7/Add.3.

51. The current system so discourages cooperation between prosecutors and police that each is tempted to simply blame the other for failing to achieve convictions. Prosecutors rather than judges make the determination whether the evidence provides probable cause for the charges to be brought. During this preliminary hearing, prosecutors are expected to show absolute impartiality. Prosecutors thus perceive themselves unable to guide the police with respect to the testimony and physical evidence that must be obtained to make a case. Even when prosecutors find the evidence presented by the police at the preliminary hearing insufficient, they seldom provide a reasoned explanation for that insufficiency for fear of appearing biased. Police thus lack expert guidance in building cases. While this problem is deeply embedded in the culture of the criminal justice system, changes in the role of the prosecutor could be effected by amending the Rules of Criminal Procedure, which are promulgated by the Supreme Court.¹⁰² The Supreme Court should use this power to require prosecutors to provide reasoned decisions for probable cause determinations and to insist that prosecutors take a more proactive role in the ensuring the proper investigation of criminal cases.

[...]

59. When most cases stall at the investigation or prosecution stage, it is difficult to evaluate the effectiveness of the judiciary. Two issues specific to the judiciary were, however, raised by my interlocutors. First, trials are routinely delayed and are generally not held on consecutive days, increasing the opportunities for witness intimidation. If fully implemented, the Supreme Court's decision to establish "special courts" for "cases involving killings of political activists and members of the media" should remedy this problem for those cases.¹⁰³ Second, witnesses often relocate to avoid retaliation, but judges seldom grant a change of venue on that basis.¹⁰⁴ The judiciary should ensure that docket management and venue decisions facilitate witness participation and protection.

Report on Mission to the Central African Republic (A/HRC/11/2/Add.3, 27 May 2009, ¶¶ 56-60):

¹⁰² See Constitution of the Republic of the Philippines (1987), art. VIII, section 5: "The Supreme Court shall have the following powers: . . . Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the integrated bar, and legal assistance to the under-privileged. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase, or modify substantive rights. Rules of procedure of special courts and quasi-judicial bodies shall remain effective unless disapproved by the Supreme Court."

The Government has also informed me that the President has recently promulgated an administrative order to "ensure proper coordination and cooperation between the prosecutors and the police". (Letter from the Philippine Mission to the United Nations, dated 18 October 2007.) That order provides that, in cases falling under the jurisdiction of the special courts established by the Supreme Court to deal with extrajudicial executions (see Part X(H)), that the PNP and NBI are directed to cooperate with the NPS "by, among other things, consulting with public prosecutors at all stages of the criminal investigation". (Administrative Order No. 181 (3 July 2007).)

¹⁰³ This reform would require DOJ to revise its rules and regulations implementing the "Witness Protection, Security and Benefit Act" (Republic Act No. 6981, signed into law 24 April 1991), but it would not require any legislative amendment.

¹⁰⁴ One worthy proposal that *would* require a statutory amendment is to increase the penalties for harassing witnesses. These are minimal: a fine of not more than 3,000 pesos (USD \$65) or imprisonment of not less than 6 months but not more than 1 year. (Republic Act No. 6981, section 17(e).)

56. The criminal justice system is widely condemned as dysfunctional. A senior Government official told the Special Rapporteur that it had reached “rock bottom” and that no one trusted it - neither the citizens of the Central African Republic, nor the Government or the international community.

57. Three different judicial organs are involved in the initial investigative process: the judicial police, the public prosecutor and the investigative judge. The public prosecutor receives complaints and decides whether to proceed with an investigation. The judicial police gather information on crimes, under the supervision of the public prosecutor and the investigative judge. The investigative judge can investigate following an indictment by the prosecutor or following a complaint by a civil party.

58. Depending on the severity of the offence, crimes may be tried in the ordinary courts, police courts, regional criminal courts, or jury courts. These courts apply the Criminal Code and the Code of Criminal Procedure, which have remained essentially unchanged since their adoption in 1961 and 1962. The Special Rapporteur was informed during his visit of efforts, supported by BONUCA, to update these codes. While this is welcome, it must also include reforms to remove sections criminalizing “witchcraft”.

59. The justice system is plagued by a lack of resources, severely limiting its capacity to address impunity. Human resources are minimal in the capital, and nearly non-existent in the rest of the country. In Bangui, the public prosecutor’s office has just two prosecutors for criminal cases. In Paoua, the justice system barely functions. It is composed of one magistrate, who is simultaneously president of the tribunal, prosecutor and investigative judge. Across the country, there are not enough buildings to house courtrooms and offices of judges and key personnel. Basic equipment is in short supply. In Paoua, the magistrate had his files destroyed and typewriter stolen during an attack by the APRD in January 2007. A year later he had not yet been provided with new equipment.

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.

Report on Mission to Sri Lanka (E/CN.4/2006/53/Add.5, 27 March 2006, ¶58):

58. Cases that are referred to the Attorney-General seldom lead to convictions. This is partly due to the lack of evidence gathered, and partly to a judiciary that moves cases along slowly, sometimes tolerating years of delay preceding verdicts. One government official suggested that the judiciary was so overloaded that judges would seize on any plausible excuse to allow a postponement and cut the caseload. He pointed out that if indictments reliably resulted in interdiction, as the law requires, police officers and other government officials would be less likely to seek dilatory adjournments. I regret that I did not have the opportunity to meet with judges, but I note the widespread perception that the courts manage cases inefficiently. Prosecutors must also share the blame for the low conviction rates. The Attorney-General has

become increasingly active in prosecuting police torture cases, and he informed me that there have been 64 indictments, 2 convictions, and 2 or 3 acquittals (most cases are pending). Time will tell whether this is the beginning of accountability or a further exercise in shadow-boxing.¹⁰⁵

Press Statement on Mission to Albania, 23 February 2010:

The Constitutional Court is a vital component in upholding the rule of law in Albania. Two-thirds of the judges are due to be replaced by the President, with the consent of the Assembly, when their terms expire in the coming months. In any such situation, a government runs the risk of being seen to use the opportunity to significantly alter the composition of the court in its own favour. It is therefore important for the Government to demonstrate that the replacement process is governed by procedures that both are, and can be seen to be, fair. It is desirable for the Government to commit itself, in all judicial appointments, to transparent procedures formulated to ensure a qualified and independent judiciary, and to reflect those procedures in legislation.

Report on Mission to the United States (A/HRC/11/2/Add.5, 28 May 2009, ¶¶ 9-12, 21-22):

9. Given the rising number of innocent people being exonerated nationwide, both state and federal Governments need to investigate and fix the problems in their criminal justice systems. As a start, I recommend that:

(1) problems already recognized as such, including lack of judicial independence and the absence of an adequate right to counsel, should be addressed immediately; (2) systematic review of criminal justice system flaws, including racial disparities in capital cases, should be undertaken to identify needed reforms; and (3) federal courts should be authorized to review all substantive claims of injustice in capital cases. In light of the United States' international law obligations with respect to the death penalty, I also recommend that:

(4) state and federal legislatures ensure that the death penalty only be applied for the "most serious crimes"; and (5) review and reconsideration be provided to foreign nationals on death row who were denied the right to consular notification.

10. Alabama and Texas both have partisan elections for judges.¹⁰⁶ My mandate does not extend to an evaluation of how a system of multi-million dollar campaigns for judicial office comports with judicial independence requirements. But if - as research and practice show - the outcome of

¹⁰⁵ I should note that the deficiencies in the system of criminal justice are not mitigated by the more effective process for vindicating the fundamental rights guaranteed by the Constitution, including the right to life and to freedom from torture. In the last two years, the Supreme Court has awarded compensation in a number of such cases. But while reparations are an important component of effective remedies, they are not a substitute for prosecution. In Sri Lanka the Court determines what portion of the compensation shall be paid by the State and what portion by the convicted officer. In one prominent case, involving the killing of WMGM Perera, less than a quarter of the compensation awarded was to be paid by the persons responsible, while the State paid the rest. The State's contribution undercuts the deterrent effect of the Court's fundamental rights jurisdiction and further emphasizes the importance of effective prosecution and punishment in cases of official torture and summary execution.

¹⁰⁶ Judges in both states are elected for 6-year terms. See Article 5, Constitution of the State of Texas; Amendment 328, Constitution of Alabama.

such a system is to jeopardize the right of capital defendants to a fair trial and appeal, there is clearly a need to consider changes. Studies reveal that in states where judges are elected there is a direct correlation between the level of public support for the death penalty and judges' willingness to impose or uphold death sentences. There is no such correlation in non-elective states. In particular, research shows that, in order to attract votes or campaign funds, judges are more likely to impose or refuse to reverse death sentences when: elections are nearing; elections are tightly contested; pro-capital punishment interest organizations are active within a district or state; and judges have electoral experience.¹⁰⁷

11. The goal of an independent judiciary is to ensure that justice is done in individual cases according to law. Too often, though, under judicial electoral systems, the death penalty is treated as a political rather than a legal matter.¹⁰⁸ The significant impact of judicial electoral systems on capital punishment cases was recognized by many with whom I spoke. They strongly suggested that judges in both Texas and Alabama consider themselves to be under popular pressure to impose and uphold death sentences and that decisions to the contrary would lead to electoral defeat. Numerous government officials in both states openly stated that it was not possible to speak out against the death penalty and hope to get re-elected.¹⁰⁹

12. In Alabama, the problem of politicizing death sentences is heightened because state law permits judges to "override" the jury's opinion in sentencing.¹¹⁰ Thus, even if a jury unanimously decides to sentence a defendant to life in prison, the judge can instead impose a death sentence. When judges override jury decisions, it is nearly always to increase the sentence to death rather than to decrease it to life - 90% of overrides imposed the death penalty. And a significant proportion of those on death row would not be there if jury verdicts had been respected. Over 20% of those currently on death row were given the death sentence by a judge overruling a jury decision for life without parole.¹¹¹ According to one study, judicial overrides are twice as common in the year before a judge seeks re-election than in other years.¹¹² In light of concerns about possible innocence and the irreversible nature of the death penalty, Alabama should relieve judges of the invidious influence of politics by repealing the law permitting judicial override.

[...]

¹⁰⁷ Brace and Boyea, "State Public Opinion, the Death Penalty, and the Practice of Electing Judges", 52 *American Journal of Political Science* (2008) 360; Baum, "Judicial Elections and Judicial Independence: The Voter's Perspective", 64 *Ohio State Law Journal* (2003) 13; and Hall, "Justices as Representatives: Elections and Judicial Politics in the American States", 23 *American Politics Quarterly* (1995) 485.

¹⁰⁸ De Muniz, "Politicizing State Judicial Elections: A Threat to Judicial Independence", 38 *Willamette Law Review* (2002) 367, 387-388.

¹⁰⁹ Indeed, I viewed a number of election advertisements by prospective judges in which the underlying message was the judge's commitment to handing down death sentences.

¹¹⁰ Alabama Code § 13A-5-47. For a detailed review of the politicization of the death penalty in Alabama see, American Bar Association, "Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report" (June 2006), (hereinafter "ABA Alabama Report"), pp. 226-228.

¹¹¹ Equal Justice Initiative, "Judicial Override in Alabama" (March 2008).

¹¹² See Burnside, "Dying to Get Elected: A Challenge to the Jury Override", [1999] *Wisconsin Law Review* 1017, 1039-44.

21. A capital defendant convicted by a state court can (after exhausting state habeas corpus review) bring a habeas corpus suit in federal court to challenge the conviction.¹¹³ But federal courts' role in reviewing state-imposed death sentences has been curtailed by legislation designed to "expedite" such cases. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) prevents federal habeas review of many issues, imposes a six-month statute of limitation for inmates seeking to file federal habeas claims, and restricts access to an evidentiary hearing at the federal level.¹¹⁴ As initially enacted, AEDPA permitted states to opt in to expedited federal review of death penalty cases if the state provided counsel for indigent death row inmates in post-conviction cases.¹¹⁵ But federal courts, which were originally responsible for determining whether states qualified for expedited review, found that few states met statutory requirements for proper provision of counsel. (Texas was among those states denied qualification.) The appropriate response to the federal courts' findings would have been to improve state indigent defense systems. Instead, Congress amended the law to permit the Department of Justice (DOJ) to issue regulations under which DOJ, rather than the courts, would certify state indigent defense systems.¹¹⁶ The regulations that came into effect on 12 January 2009 are grossly inadequate.¹¹⁷ They do not specify: the level of competency that must be exhibited by state appointed counsel; the amount of litigation expenses that counsel must be provided with; or that counsel must receive reasonable or adequate compensation. Such matters are left to the discretion of the states, thus effectively eviscerating both the federal oversight function and incentives for states to improve indigent defense. These regulations should be amended or repealed.

22. When I asked one official with responsibility for handling federal habeas cases about the impact of AEDPA, I was told that although the restrictive legislation may prevent some meritorious claims from being raised, rules were necessary to enforce finality. I agree that finality is important in criminal cases, and that it serves important purposes both for victims and the system as a whole. But presently, too much weight is given to finality and too little to the due process rights of the accused and to the Government's obligation to ensure that innocent people are not executed. Given the serious concerns about the fairness of state-level trials and appeals, the federal writ of habeas corpus plays a critical role in capital cases. Congress should investigate whether state criminal justice systems fail to protect constitutional rights in capital cases, and also enact legislation permitting federal courts to review *de novo* all merits issues in death penalty cases, with appropriate exceptions, such as where a defendant attempts deliberately to bypass state court procedures.

¹¹³ In California, for example, "70 per cent of the habeas petitions in death cases have achieved relief in the federal courts, even though relief was denied when the same claims were asserted in state courts". See *Report and Recommendations on the Administration of the Death Penalty in California* (30 June 2008), p. 57.

¹¹⁴ As amended, these provisions are at 28 U.S.C. § 2261.

¹¹⁵ Public Law 104-132 (enacted 24 April 1996).

¹¹⁶ Public Law 109-177 (enacted 9 March 2006).

¹¹⁷ AG Order 3024-2008, 73 FR 75338, (11 December 2008).

F. COMMISSIONS OF INQUIRY

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (E/CN.4/2006/53, ¶¶ 25-27):

25. One of the recommendations contained in the Special Rapporteur's report to the Commission in 2005 was that national-level investigations of alleged violations of international law by the armed or security forces are indispensable. To be credible and acceptable, however, the results must be made public, including details of how and by whom the investigation was carried out, the findings, and any prosecutions subsequently undertaken.¹¹⁸

26. This recommendation is closely related to the question of impunity which has long been a major focus of the work of the Special Rapporteur on extrajudicial executions. The problem is typically manifested by a failure to investigate, a failure to report effectively and openly following investigations, or a failure to punish (commensurately) those responsible. An important role in this regard has been played by commissions of inquiry established at the national level. When such initiatives are launched, which is frequently the case following massacres, deaths in custody, police or military shootings, or other extrajudicial forms of execution, they are all too often designed mainly to blunt outrage rather than to establish the truth. Some such commissions are undertaken in good faith and result in published reports which contribute significantly to the promotion of respect for human rights. An excellent example is that established in 2005 by the Government of Nigeria to investigate the killing of the so-called Apo 6.¹¹⁹ In other cases, however, the procedures, results and responses are much less satisfactory. Some commissions are close to being pro forma activities, in others they are undertaken in good faith but the results are never released, and in still others Governments do eventually release the reports but there is no follow-up of any type.

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

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/HRC/8/3, 2 May 2008, ¶¶ 12-58):

12. The duty arising under international human rights law to respect and protect life imposes an obligation upon Governments to hold an independent inquiry into deaths where an extrajudicial

¹¹⁸ E/CN.4/2005/7, paragraph 86.

¹¹⁹ See E/CN.4/2006/53/Add.4, paragraphs 8-14.

execution may have taken place.¹²⁰ While an independent police investigation will often suffice for this purpose, the creation of an official commission of inquiry with a human rights mandate is a time-honoured and oft-repeated response, especially to incidents involving multiple killings or a high-profile killing. These commissions vary greatly as to the terminology used, and their composition, terms of reference, time frames and powers. Even elementary Internet research provides the details of a plethora of examples of royal commissions, independent commissions, judicial commissions, parliamentary commissions and the like. While such inquiries are by definition established at the initiative of the government authorities, they are most often a result of concerted demands by civil society and sometimes also by the international community. Indeed it is now almost standard practice for a commission to be demanded in the aftermath of major incidents in which the authorities which would normally be relied upon to investigate and prosecute are feared to be reluctant or unlikely to do so adequately.

13. In historical terms, the technique of creating inquiries can be traced back to many examples in the early part of the twentieth century, including in colonial and immediately post-colonial contexts. More recently, the number and range of inquiries has been expanded significantly by two relatively new phenomena. The first is the considerable increase in internationally mandated inquiries, set up by bodies like the Human Rights Council or its predecessor. The second is the proliferation of transitional justice commissions, including truth and reconciliation commissions, designed to review historical injustices and help map a balanced response. The focus in the present analysis, however, is upon nationally mandated inquiries.

14. The thrust of the analysis is that the mere setting up of a commission of inquiry and even its formal completion will often not be adequate to satisfy the obligation to undertake an independent inquiry. Empirical inquiry, based on the many examples that have come to the attention of the Special Rapporteur and his predecessors, indicates that such inquiries are frequently used primarily as a way of avoiding meaningful accountability. The international human rights community needs to scrutinize such initiatives far more carefully in the future and to develop a mechanism for monitoring and evaluating their adequacy.

1. Reasons to establish inquiries

15. Whenever an arbitrary deprivation of life occurs, States are obligated to undertake a thorough, prompt and impartial investigation, to prosecute and punish the perpetrators and to ensure that adequate compensation is provided to the relatives of victims.¹²¹ This would normally be assured through the regular functioning of the criminal justice system, including police, public prosecutors, courts and oversight mechanisms, such as ombudsmen. All too often, however, and especially in the case of large-scale or politically-charged killings, the system in place is unable to function effectively and extraordinary measures are needed in order to bring justice.

16. Such failings can occur in a variety of situations. First, the police may lack the necessary investigative capacities. The investigation required may be complex, far-reaching or require scientific and forensic resources that may not be available. Second, those charged with

¹²⁰ *McCann v. United Kingdom* (1995) 21 EHRR 97.

¹²¹ Commission on Human Rights resolution 2005/34; Human Rights Committee, general comment No. 31, CCPR/C/21/Rev.1/Add.13 (2004).

investigating the events might themselves be suspected, or closely connected to suspects. Relations between the police and the military or paramilitary groups are of particular relevance in this regard. Third, victims, relatives and witnesses might lack confidence in the police or other investigating authorities and be unprepared to cooperate with them. Fourth, political interference at the local, State or federal levels might be hindering an effective investigation. Fifth, the killings might be part of a broader phenomenon which needs to be investigated more broadly and not confined to a criminal investigation. Sixth, a solution to the problem, including the punishment of those responsible, might require the mobilization of a degree of public pressure and political will which require more than a regular investigation.

17. Whatever the reason for the shortcomings of the established system for carrying out investigations and prosecutions, States are obliged to take positive steps to ensure that their administrative and judicial institutions do in fact operate effectively, and to take measures to avoid the recurrence of violations. This may require the State to make changes to its institutions, laws or practices.¹²²

18. National commissions of inquiry are a common response in such situations. The inquiry will often be set up to address the victim-specific violation by being tasked to investigate the alleged abuses, give a detailed account of a particular incident or series of abuses, or recommend individuals for prosecution. In an effort by the State to prevent future violations or to strengthen the criminal justice system, a commission may also be given a broader mandate to report on the causes of the violation and to propose recommendations for institutional reform. Use of this technique is by no means confined to any particular group or type of countries, but takes place in a great many countries regardless of their level of development or their legal system.

19. Paradoxically, the circumstances that lead to the creation of such inquiries very often carry with them the seeds of the initiative's subsequent failure. In other words, Governments are pressured by the momentum of events, diplomatic pressures or for other reasons to do something which they perceive to be contrary to their own interests. Thus the initiative may, from the outset, be pursued in ways designed to minimize its ultimate impact.

20. The procedures and results of these inquiries have been a recurring concern throughout the 26 years of the Special Rapporteur's mandate. Governments have frequently replied to a communication from the Special Rapporteur in relation to an alleged extrajudicial execution by Specific national commissions have also been studied in depth in a great many of the country reports of the Special Rapporteurs following in situ visits indicating that a special commission of inquiry has been set up to investigate the matter.¹²³ The Special Rapporteur has frequently welcomed this measure,¹²⁴ and in many cases where a State has not yet signalled its intention to create a commission, the Special Rapporteur has called on the State to do so.¹²⁵ Specific national commissions have also been studied in depth in a great many of the country reports of the

¹²² Ibid., para. 17.

¹²³ E.g. E/CN.4/2003/3/Add.1, paras. 301 and 331; E/CN.4/1997/60/Add.1, para. 225; E/CN.4/1995/61, paras. 135 and 164; E/CN.4/1996/4, paras. 188-91; E/CN.4/1994/7, para. 199; E/CN.4/1993/46, paras. 115-18; E/CN.4/1993/46, para. 348; E/CN.4/1991/36, para. 296; E/CN.4/1991/36, para. 124; E/CN.4/1992/30, paras. 502 and 543; E/CN.4/1991/36, paras. 290-96.

¹²⁴ E.g., E/CN.4/1992/30, para. 281.

¹²⁵ E.g. E/CN.4/2005/7/Add.1, p. 291; E/CN.4/1990/22, para. 378; E/CN.4/1991/36, para. 455.

Special Rapporteurs following in situ visits.¹²⁶ All too often, however, the commissions of inquiry are found wanting, and successive Special Rapporteurs have expressed the concern that commissions are frequently designed to deflect criticism by international actors of the Government rather than to address impunity.¹²⁷ Once the establishment of a commission has been announced, the State, in response to criticisms from the international community, often uses the special inquiry as evidence that it is currently taking action to address impunity. This often succeeds in defusing domestic or international criticism and preventing strong advocacy by international actors to promote accountability within the State; however, given that commissions of inquiry are often deficient and that attempts to use commissions to avoid rather than advance accountability often succeed, the international community must find more effective ways of engaging with them.

21. Thus, in my 2006 report to the Commission on Human Rights,¹²⁸ I signalled my intention to report to the Human Rights Council on the principal problems that had been experienced in relation to commissions of inquiry and to make recommendations in that regard.¹²⁹ To that end, the present analysis: (a) discusses the positive role that commissions of inquiry can play; (b) outlines the established guiding principles for a national commission of inquiry; (c) examines the principal problems that have been encountered in this regard in the work of the Special Rapporteur; and (d) proposes conclusions and recommendations based on lessons learned.

2. Positive role of commissions of inquiry in addressing impunity

22. In principle, commissions of inquiry can play an important role in combating impunity. First, the commission may be tasked with carrying out some of the functions normally performed by criminal justice institutions. A commission will often be established to provide an independent investigation where the criminal justice institutions are seen to be biased or incompetent. This is often the case where key government agents, such as the police or military, are themselves involved in abuses and where there is no reliable system of police or military oversight.¹³⁰ It is also the case where there is long history of repeated abuses that police fail to investigate, public prosecutors fail to prosecute, or courts fail to punish due to incompetence, bias, or lack of expertise.¹³¹ A commission may also be seen as desirable where one incident is particularly complex and significant, requiring sustained and focused investigation in order to be understood.¹³² In such cases, a commission can help to explain or analyse a complex situation,

¹²⁶ E/CN.4/2006/53/Add.5; E/CN.4/2006/53/Add.4; E/CN.4/2005/7/Add.2; E/CN.4/2004/7/Add.2; E/CN.4/2003/3/Add.3; E/CN.4/1996/4/Add.1; E/CN.4/1995/61/Add.1; E/CN.4/1994/7/Add.2; E/CN.4/1992/30/Add.1; E/CN.4/1990/22/Add.1; E/CN.4/1987/20.

¹²⁷ A/62/265, para. 11; E/CN.4/2006/53/Add.4, para. 103; E/CN.4/2003/3, para. 31; E/CN.4/1999/39, para. 67; E/CN.4/1998/68, para. 97; E/CN.4/1997/60, para. 97; A/51/457, para. 124; E/CN.4/1995/61, para. 402; E/CN.4/1994/7, para. 695.

¹²⁸ E/CN.4/2006/53, paras. 25 and 61-62.

¹²⁹ This report focuses on national, rather than international commissions of inquiry. For reporting on international commissions of inquiry, see E/CN.4/2006/89 examining the international commissions for East Timor (1999), Togo (2000), the Occupied Palestinian Territory (2001), Côte d'Ivoire (2004), and the Darfur region of the Sudan (2004).

¹³⁰ E/CN.4/2001/9/Add.2, para. 60; and E/CN.4/1990/22, para. 11.

¹³¹ E/CN.4/1994/7, para. 148; E/CN.4/1990/22, para. 378; E/CN.4/1991/36, para. 448; E/CN.4/1994/7/Add.2, para. 108.

¹³² E/CN.4/1993/46, para. 139; and E/CN.4/1994/7, para. 695.

and thus perform important functions normally beyond the scope of police investigations or judicial procedures.

23. Second, a commission can provide informed advice to the Government on the institutional reforms necessary to prevent similar incidents from occurring in the future. It can perform an essential function that is generally unsuitable to police, prosecutors or courts, and explain the underlying causes for serious human rights abuses or the causes of impunity for those abuses. In addressing the causes of the abuses, a commission can be the first step in a Government's effort to take measures to prevent the recurrence of violations and to ensure that its institutions, policies, and practices ensure the right to life as effectively as possible.¹³³ Importantly, where it appears that the regular institutions are incapable of combating impunity, a commission can propose structural or long-term reforms to address criminal justice institutional deficiencies. When used in this way, and when the commission's recommendations are followed up by the Government, a commission can be an effective way for the State to reform its criminal justice institutions so that it will meet its obligation to investigate, prosecute and punish violations of human rights in the future.¹³⁴

3. Guiding principles for a national commission of inquiry

24. The basic question that must guide an assessment of a commission is whether it can, in fact, address impunity. In Special Rapporteur Wako's first report in 1983 for the extrajudicial executions mandate, he recommended that "[m]inimum standards of investigation need to be laid down to show whether a Government has genuinely investigated a case reported to it and that those responsible are fully accountable".¹³⁵ Since then, and due in part to the work of successive Special Rapporteurs, the general standards which govern how a commission of inquiry should be conducted are now clear and well established.¹³⁶ I will not detail in full those standards again here, except to highlight the following.

25. In order for a commission to address impunity, it must be independent, impartial and competent. The commission's mandate should give the necessary power to the commission to obtain all information necessary to the inquiry but it should not suggest a predetermined outcome. Commission members must have the requisite expertise and competence to effectively investigate the matter and be independent from suspected perpetrators and from institutions with an interest in the outcome of the inquiry. Commissions should be provided transparent funding and sufficient resources to carry out their mandate. Effective protection from intimidation and violence needs to be provided to witnesses and commission members. When it establishes the

¹³³ E/CN.4/2006/53, para. 41.

¹³⁴ E/CN.4/2006/53, para. 41; E/CN.4/1986/21, paras. 80-81.

¹³⁵ E/CN.4/1983/16, para. 230.4. See also E/CN.4/1985/17, paras. 59-60; E/CN.4/1988/22, para. 189.

¹³⁶ Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, E/1989/89 (1989), especially Principle 11; Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly resolution 55/89, Annex, especially Principle 5; Updated Set of principles for the protection and promotion of human rights through action to combat impunity, Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, E/CN.4/2005/102/Add.1 (8 February 2005), especially Principles 6-13; United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, Model Protocol for a Legal Investigation of Extra-Legal Arbitrary and Summary Executions ("Minnesota Protocol"), E/ST/CSDHA/12 (1991); Report of the Secretary-General, E/CN.4/2006/89 (15 February 2006), para. 2.

commission, the Government should undertake to give due consideration to the commission's recommendations; when the report is completed, the Government should reply publicly to the commission's report or indicate what it intends to do in response to the report. The commission's report should be made public in full and disseminated widely.

26. As the examination below of the problems encountered in relation to commissions indicates, these standards are more than just desirable best practice. Experience shows that conformity with them is essential if a commission is to be effective.

4. Problems encountered in relation to commissions of inquiry

27. A comprehensive review of the work of the Special Rapporteur since 1982 indicates that many commissions have achieved very little. They are often set up to show domestic constituents and the international community that the Government has the will and capability to address impunity. Subsequent assessments undertaken by the Special Rapporteurs, however, indicate that many of them have in fact done little other than deflect criticism. A review of the specific commissions reported on by the Special Rapporteurs indicates that they have consistently failed to meet the basic standards set out above. In order to understand more fully where commissions commonly fail and how international actors should engage with them, this section details the main problems encountered in relation to the conduct or outcomes of commissions of inquiry.

(a) Inquiry fails to take place

28. Sometimes, commissions are announced with great fanfare, but an inquiry never actually begins its work.¹³⁷ Self evidently, in such cases, a commission is simply put forward to appease Government critics, but there is no actual Government will to use the institution to address impunity.

(b) Limited mandate

29. A commission may be limited in its effectiveness by the terms of its mandate. The mandate may be unduly narrow or restricted in a way that undermines its credibility or usefulness. This is particularly the case where the mandate preempts the outcome of the inquiry or where a mandate restricts who a commission may investigate (for example, by prohibiting it from investigating Government actors).¹³⁸

(c) Insufficient funding or resources

30. In some cases, the lack of funding or provision of basic resources to a commission have been extremely detrimental to the ability of the commission to function, even where its members have the will to conduct investigations. This is more than simply a technical matter; the adequacy of resources provided to a commission upon its establishment can be a useful indicator of the good faith of the Government and perhaps also of its potential effectiveness.

¹³⁷ E/CN.4/1994/7, para. 202; E/CN.4/1996/4/Add.1, para. 38

¹³⁸ E/CN.4/2005/7/Add.2, para. 43.

31. In his 1987 report, for example, Special Rapporteur Amos Wako reported on his visit to Uganda.¹³⁹ In 1984 and 1985, the Special Rapporteur had sent allegation letters to Uganda, and in March 1986, Uganda promised the Commission on Human Rights that it would establish a commission to investigate violations of human rights. In August 1986, the Special Rapporteur visited Uganda to follow up the allegations he had received and to report on the work of the commission.¹⁴⁰ He reported that the commission was urgently in need of (a) basic human rights materials; (b) logistical support (vehicles and transport); and (c) stationery and office machinery.¹⁴¹ He noted that strengthening United Nations support to the commission could “minimize its logistical problems and enhance its efficiency”.¹⁴²

(d) Lack of expertise

32. A commission needs the appropriate expertise to carry out the mandated investigations. For instance, in his mission report on Indonesia and East Timor, Special Rapporteur Bacre Waly Ndiaye observed that “[n]one of the members of the [commission] had the necessary technical expertise to correct the shortcomings found in the investigations carried out by the police”.¹⁴³ Similarly, in his report on Uganda, Rapporteur Wako noted that the commission “needed expert advice on several aspects of its work, particularly in regard to the definition of offences against human rights”.¹⁴⁴

(e) Lack of independence

33. Where a commission is not independent from the parties to a conflict or from any institution or person with an interest in the outcome of the inquiry, its inquiry is unlikely to be capable of providing an unbiased assessment of the incident. Just as importantly, where the commission is not perceived to be independent, its work will lack credibility and its conclusions are unlikely to be trusted. Independence has often been a central concern of assessments of commissions made by special rapporteurs. It has three important aspects.

34. First, independence must be structurally guaranteed so that the commission is set up as a separate institution from the Government. This formal independence can often be assessed by examining the terms of the mandate before the commission begins its work, or through an examination of the early investigatory practices of the commission. For instance, a major Sri Lankan commission, established in November 2006, the progress of which I have followed closely,¹⁴⁵ has been criticized for its failure to secure formal independence. The commission was appointed by the President of Sri Lanka to, inter alia, investigate incidents of human rights abuses committed since August 2005, to report on the prior investigations into the abuses and to

¹³⁹ E/CN.4/1987/20.

¹⁴⁰ E/CN.4/1987/20, paras. 62-65, and 226-234.

¹⁴¹ E/CN.4/1987/20, para. 8. He stated that “[N]o progress whatsoever could be achieved unless certain clearly essential requirements were met. For example, the investigative functions of the Commission of Inquiry were paralysed without transport and office supplies, including photographic equipment.” (para. 13).

¹⁴² Ibid., para. 16.

¹⁴³ E/CN.4/1995/61/Add.1, para. 54.

¹⁴⁴ E/CN.4/1987/20, para. 12.

¹⁴⁵ E/CN.4/2006/53/Add.5.

recommend measures to prevent abuses in the future.¹⁴⁶ Sri Lanka also invited the formation of an International Independent Group of Eminent Persons to monitor the work of the national commission and to report on its conformity with international standards.¹⁴⁷ But following a year of public statements by the Group expressing concern about the functioning of the commission,¹⁴⁸ on 6 March 2008, the Group announced that it was terminating its functions because of the serious shortcomings in the work of the national inquiry and because of the lack of institutional support for the commission's work.¹⁴⁹ The Group stated that the national inquiry had "fallen far short of the transparency and compliance with basic international norms and standards pertaining to investigations and inquiries".¹⁵⁰ It noted that one of the many flaws in the commission was that there were structural conflicts of interest which seriously compromised the independence of the commission. The State Attorney-General's Department provided legal counsel to the commission, playing a leading role in the panel of counsel to the commission. Given that the Attorney-General's Department is also the chief legal adviser to the Government of Sri Lanka and had been involved in the original investigations into some of the cases being investigated by the commission, the Department was potentially going to be investigating itself.¹⁵¹ In addition, Department members could be potential witnesses to the commission. As the Group noted, this is a serious conflict of interest.¹⁵² A later assessment by the Group indicated that the formal conflict did in fact have a serious negative impact on the quality of the commission's investigations.¹⁵³

35. In some cases, it will be virtually impossible for the State to assure its citizens and the international community that a government-established commission can ever be truly independent. This may be the case where a commission is set up to investigate human rights abuses in the context of an internal armed conflict.¹⁵⁴ In such cases, it has been the experience of the Special Rapporteur that an international commission of inquiry may be necessary.

36. Second, where formal independence has been established, actual independence may still be lacking. It is essential to look beyond the formal independence of the commission from the Government, and to assess whether the commission is capable in practice of carrying out its work independently. This may require the work of the commission to be monitored for the entire period of its operation. As Special Rapporteur Amos Wako noted in 1987, "in a number of countries, the investigating body, which was given an independent or quasi-independent status ... did not, in reality, secure its independence".¹⁵⁵

¹⁴⁶ The Presidential Commission of Inquiry to Investigate and Inquire into Alleged Serious Violations of Human Rights was established in a Presidential Warrant by his Excellency Mahinda Rajapaksa, President of the Democratic Socialist Republic of Sri Lanka, P.O. No: CSA/10/3/8.

¹⁴⁷ The IIGEP is composed of 11 international law and human rights experts from 11 different countries, and was formally established in February 2007.

¹⁴⁸ See International Independent Group of Eminent Persons, Public Statements dated 11 June 2007, 15 June 2007, 19 September 2007, and 19 December 2007.

¹⁴⁹ Ibid., Public Statement of 6 March 2008.

¹⁵⁰ Ibid.

¹⁵¹ Ibid., Public Statement of 11 June 2007.

¹⁵² Ibid.

¹⁵³ Ibid., Public Statement of 15 June 2007.

¹⁵⁴ E/CN.4/2005/7/Add.2, para. 60.

¹⁵⁵ E/CN.4/1987/20, para. 178.

37. An extreme example of Government interference is that of a commission established by Ethiopia in 2006 to investigate excessive force by Government forces in 2005 during anti-government demonstrations. It reportedly found initially that excessive force had in fact been used. However, government officials reportedly requested commission members to change their votes. The final report found that excessive force had not been used.¹⁵⁶ Another is provided in the report of Special Rapporteur Wako's mission to Zaire in May 1991. Following allegations of a massacre between 8 and 12 May 1991, the Shaba Regional Assembly established a commission. It operated for one month, but "as its report was about to be presented, it was seized, reportedly on orders of the central authorities, and quashed".¹⁵⁷

38. Third, a commission's members must also be judged to be individually independent and not be seen to have a vested interest in the outcome.¹⁵⁸ Where members are not in fact or are not perceived to be independent, the commission lacks legitimacy in the eyes of the public and its findings are unlikely to be accepted.¹⁵⁹ In addition, witnesses may be too afraid to come forward to the Commission for fear of bias by commission members.¹⁶⁰

(f) Inadequate provision of witness protection

39. Inadequate protection provided to commission members or to witnesses appearing before the commission has severely hampered the work of some commissions.¹⁶¹ The Sri Lankan national commission, ongoing at the time of the present report, has been strongly criticized by the International Independent Group of Eminent Persons for failing to have an effective witness-protection programme.¹⁶² Witness protection within the commission was so poor that the possible whereabouts of witnesses was reported in a news article, which cited a commission member as the source of the confidential information.¹⁶³ The international independent group noted that this, together with the lack of a comprehensive witness-protection programme, would discourage critical witnesses coming forward which would inhibit "any effective future pursuit of the filing of indictments, convictions, and appropriate accountability for the alleged grave human rights violations under review".

40. In some circumstances, it will be necessary to provide security to all members of the commission for it to function independently, or for it to function at all. An extreme example was provided in Special Rapporteur Wako's report on his visit to Colombia in October 1989, in which he detailed the massacre of 12 of the 15 members of a commission on 18 January 1989.¹⁶⁴ The commission was said to have succeeded in identifying those responsible for a massacre in October 1987. Even after the massacre of most of the commission members, proper protection

¹⁵⁶ *Amnesty International Report 2007*, at <http://thereport.amnesty.org/eng/Regions/Africa/Ethiopia>.

¹⁵⁷ E/CN.4/1992/30/Add.1, para. 222.

¹⁵⁸ E/CN.4/1990/22, para. 11.

¹⁵⁹ E/CN.4/1995/61/Add.1, para. 54.

¹⁶⁰ *Ibid.*

¹⁶¹ E/CN.4/2001/9/Add.1, para. 263; E/CN.4/1994/7/Add.2, para. 109; E/CN.4/1993/46, para. 527;

E/CN.4/1990/22/Add.1, para. 37.

¹⁶² International Independent Group of Eminent Persons, Public Statements of 6 March 2008 and 19 September 2007.

¹⁶³ *Ibid.*, Public Statement of 6 March 2008.

¹⁶⁴ E/CN.4/1990/22/Add.1.

was not provided to the three surviving members or to the witnesses to the attacks.¹⁶⁵ The Special Rapporteur noted that this “[c]ontributes to the phenomena known as impunity. Witnesses cannot come forward to give evidence and even if they make statements, they are later retracted because of intimidation and fear of being killed. Proper investigations cannot be carried out and, therefore, many files are closed for lack of evidence”.¹⁶⁶

(g) Lack of power to have access to important evidence

41. Some commissions have been refused access to evidence necessary for the inquiry.¹⁶⁷ A commission needs to have the authority to obtain all information necessary to form fully informed conclusions, and this will often mean that a commission needs the power to compel the production of documents and witness testimony.¹⁶⁸ In my country report on Nigeria, for example, a commission was established to investigate alleged killings by the army, but the army did not acknowledge or reply to the commission’s correspondence.¹⁶⁹ A similar problem was experienced with the Sri Lankan commission, in which State authorities refused to fully cooperate with investigations.¹⁷⁰

(h) Failure to make public, respond to or follow up on commission findings

42. One of the most common problems encountered with a commission of inquiry is that, even where it has carried out its work effectively and submitted a timely report to the Government, the findings of the commission are simply never made public.¹⁷¹ This has, for example, been the trend in Nigeria.¹⁷² In a report on my visit to that country, I noted that there was a consistent pattern: violations are alleged; a commission is established; the reports are never published or are ignored.¹⁷³ After my visit, I reported that the “Apo 6” inquiry, set up to investigate killings by police, appeared to be exemplary. At the time of reporting in 2005, it was only slightly delayed, and I called for it to be made public immediately.¹⁷⁴ Unfortunately, nearly three years later, it has reportedly still yet to be made officially public.

43. Crucially, when a commission report is not made public, Government failure to officially respond to the report or to follow up on the commission’s recommendations usually follows. Lack of Government follow-up to completed commission reports has been a notable feature of cases observed by the Special Rapporteur.¹⁷⁵ During my mission to Nigeria, for example,

¹⁶⁵ E/CN.4/1990/22/Add.1, para. 37.

¹⁶⁶ E/CN.4/1990/22/Add.1, para. 68.

¹⁶⁷ E/CN.4/1994/7/Add.2, para. 44.

¹⁶⁸ E/CN.4/1990/22, para. 11; E/CN.4/1988/22, para. 194.

¹⁶⁹ E/CN.4/2006/53/Add.4, para. 67.

¹⁷⁰ The IIGEP noted that, “In fact, state officials have refused to render the required answers to relevant questions”: International Independent Group of Eminent Persons, Public Statement of 19 December 2007.

¹⁷¹ E/CN.4/2003/3/Add.1, para. 573; E/CN.4/1995/61, para. 402; E/CN.4/1995/61, para. 65; E/CN.4/1991/36, para. 26 (c).

¹⁷² E/CN.4/2006/53/Add.4, para. 62.

¹⁷³ Ibid., para. 64.

¹⁷⁴ Ibid., para. 103.

¹⁷⁵ E/CN.4/1997/62/Add.1, para. 64; A/51/457, para. 124; E/CN.4/1996/4/Add.1, para. 41; E/CN.4/1994/7, para. 202; E/CN.4/1994/7/Add.2, para. 46; E/CN.4/1995/61, para. 402; E/CN.4/1984/29, para. 114; E/CN.4/1991/36, para. 437.

although a commission recommended in 2004 that compensation be paid to the victims of violence, at the time of my visit in mid-2005, none had been paid.¹⁷⁶

(i) Inadequate prosecutions follow commission report

44. Frequently, one of the central purposes of establishing a commission is to investigate and report on the responsibility for alleged abuses. When a commission carries out an effective investigation, it will often be able to recommend directly the prosecution of individuals or to submit evidence to prosecutors for the same purpose. In some cases, arrests follow the submission of a commission report, but the suspects will later be released without being prosecuted.¹⁷⁷ Alternatively, prosecutions may follow the commission report, but the sentences handed down are grossly inadequate.¹⁷⁸ In other cases, those recommended for prosecution by the commission are never successfully prosecuted, or sometimes never even charged.¹⁷⁹ A State attorney-general in Nigeria, for example, told me during my country visit in 2005 that he could recall “no case of prosecutions” following an inquiry in that country, and that their main purpose was just to facilitate a “cooling of the political temperature”.¹⁸⁰ In one case, although the Nigerian commission had reported in detail on the identities of those security personnel responsible for serious human rights abuses, not one soldier was subsequently charged or disciplined in any way.¹⁸¹

45. In such cases, all that the commission achieves is a delay, often of many years, of the prospect of adequate prosecution of human rights abuses. In practice, this means that the international community has been deterred from pushing for prosecutions or from calling for the strengthening of regular criminal justice institutions, while the results of the commission are awaited. Once the commission has reported, it will usually be too late for meaningful pressure to be brought and the impetus or incentive for doing so will have greatly diminished in the meantime.

46. A related problem is that evidence is gathered by a commission in such a way as to compromise the possibility of successful subsequent prosecution. In a communication to Israel in September 2005, I wrote that there was no doubt that the Government commission had investigated at length whether the use of lethal force in question had been proportionate. The commission carried out its work for three years and produced an 800-page report, which concluded that, in some cases, the lethal force used had not been justified. During most of the period of the commission’s investigations, those undertaken by the Police Investigations Department were halted by the State prosecutor so that witnesses could testify before the commission without fear of criminal investigation. However, after the commission’s report was released, it was disavowed by the Department on the basis that it was no longer possible to “determine whether the use of lethal force was disproportionate and, if so, who is responsible for that disproportionate use of lethal force”.¹⁸² The Department did not issue indictments. As I

¹⁷⁶ E/CN.4/2006/53/Add.4, para. 66.

¹⁷⁷ E/CN.4/1996/4, para. 425.

¹⁷⁸ E/CN.4/2006/53/Add.1, para. 242; E/CN.4/1993/46, paras. 350-353.

¹⁷⁹ E/CN.4/2006/53/Add.1, pp. 223-224.

¹⁸⁰ E/CN.4/2006/53/Add.4, para. 103.

¹⁸¹ Ibid., para. 67.

¹⁸² E/CN.4/2006/53/Add.1, pp. 127-128.

noted in the communication, this “outcome - and particularly the way in which the interplay of the commission inquiry and Police Investigations Department investigation have produced it - would appear to fall short of the international standards”.¹⁸³

(j) The inquiry’s final report fails to adequately justify its conclusions

47. Some commissions appear on their face to be appropriately established, but a close review of the substance of the final report reveals a failure to conduct a meaningful inquiry.¹⁸⁴ Its conclusions may be untenable in the face of the available evidence. The commission may simply accept the Government version of events without explanation or analysis. It may reach conclusions without any apparent investigation having taken place to support them.

48. During my visit to Nigeria, for example, I reviewed a commission report into a “sectarian crisis” in Kano state in 2004. Credible and detailed civil society reports put the number killed at between 200 and 250; the commission, however, without providing any evidence whatsoever that it had conducted independent investigations into the number killed, recommended that the police figure of 84 be taken as the “official position”.¹⁸⁵ The commission, again without having undertaken any adequate investigation, also accepted the Government’s assessment of the overall damage caused by the crisis. In recommending the compensation that should be paid, the commission arrived at figures without any explanation or argument.¹⁸⁶

(k) Lack of information about the conduct of or response to the commission

49. One significant problem encountered in the work of the Special Rapporteur in seeking to address widespread impunity for extrajudicial executions is a dearth of information on the conduct of established commissions of inquiry and of the Government response to the final commission report.¹⁸⁷ Rarely is the progress of most national commissions carefully monitored by the international community. Commissions often take many months or years to produce their reports, and it can take as long again before the Government issues an official response to the inquiry’s conclusions. Long-term monitoring is thus necessary in order to determine whether a particular commission was, at the end of the day, effective. But there is no centralized monitoring of commissions of inquiry worldwide accessible to view the progress of a commission or to judge its effectiveness.

5. Lessons learned from 26 years of reporting on commissions of inquiry

50. Experience demonstrates that, while commissions of inquiry tasked with examining alleged extrajudicial executions have much to recommend them in principle, in practice the balance sheet is often much less positive. Far too many of the commissions dealt with by the Special Rapporteur over the past 26 years have resulted in de facto impunity for all those implicated.

¹⁸³ Ibid.

¹⁸⁴ E/CN.4/2003/3/Add.3, paras. 32 and 41; E/CN.4/2004/7/Add.2, paras. 43-44.

¹⁸⁵ E/CN.4/2006/53/Add.4, para. 65.

¹⁸⁶ Ibid., paras. 65-66.

¹⁸⁷ E/CN.4/1996/4/Add.1, para. 41.

51. In essence, the problem is that commissions can be used very effectively by Governments for the wrong purposes: to defuse a crisis, to purport to be upholding notions of accountability and to promote impunity. The mere announcement by a Government of a commission is often taken at face value to mean that the Government is “doing something” to address impunity. Because a commission creates the appearance of government action, its announcement often prevents or delays international and civil society advocacy around the human rights abuses alleged. Moreover, an ineffective commission can be more than just a waste of time and resources; it can contribute to impunity by deterring other initiatives, monopolizing available resources and making subsequent endeavours to prosecute difficult or impossible.

52. These conclusions raise an important issue for the international community. How should international actors respond to announcements that commissions of inquiry are to be established?

53. The principal answer is that the international community should not, solely because a commission of inquiry has been established, suspend its engagement with the relevant Government when serious violations of human rights are alleged. International actors should assess from the outset whether the commission has been given the tools it would need to be able to address impunity effectively. The commission’s mandate, its membership, the process by which it was selected, its terms of appointment, the availability of effective witness-protection programmes and the provision of adequate staffing and funding should all be examined to ascertain whether the commission meets the relevant international standards. Experience demonstrates that the standards are more than just best practice guidelines: they are necessary preconditions for an investigation capable of addressing impunity. If they are not met in practice, a commission is highly unlikely to be effective.

54. If a commission is not established in accordance with international standards, the international community should not adopt a “wait and see” approach. Rather, it should promptly draw attention to the inadequacies and advocate implementation of necessary reforms. Where a Government appears to have a genuine will to establish an effective commission, but lacks the necessary expertise, funding or resources, international assistance will be appropriate.

55. A commission is not a substitute for a criminal prosecution.¹⁸⁸ 71 It does not have the powers of a court to declare the guilt or innocence of a person. It usually cannot order punishment for a wrongdoer. A commission’s role in terms of the State’s obligation to prosecute and punish is to gather evidence for a subsequent prosecution, identify perpetrators or recommend individuals for prosecution. If the commission’s mandate overlaps significantly with that of the regular criminal justice institutions (for example, where it is tasked with investigating and identifying perpetrators, duties normally performed by police and public prosecutors), a sound rationale needs to be provided by the Government to justify the creation of the commission. Without such justification, the commission is likely to be a tool to delay prosecutions or deflect the international community’s attention from advocating for prosecutions.

56. If there is no sound rationale for the commission or if the commission’s mandate is inadequate to achieve its purpose, international actors should continue to focus on the need for prosecutions to progress through the regular criminal justice system and for reforms to that

¹⁸⁸ E/CN.4/2004/7/Add.2, para. 86.

system to be made where necessary. Experience shows that, where the regular criminal justice institutions are biased, or lack expertise or competence, or are the subject of Government interference, it is unlikely that a commission of inquiry will be able to achieve the independence needed to address impunity effectively. Furthermore, even if the commission defies the odds and does its work effectively, there is no reason to expect the criminal justice system to do its part by way of follow-up. It might thus be better for the international community to insist from the outset that the system itself be reformed.

57. Where the international community determines that a commission of inquiry is an appropriate response, it should then track its progress closely. Failures to meet international standards in the functioning of the commission should be noted and appropriate steps taken in response. Inordinate delays and failures to publish reports should be matters of comment. Once a commission has reported, the Government should be pressed to respond formally and address the recommendations. Finally, the Government's actual follow-up to those recommendations should be carefully monitored.

58. In sum, the announcement or establishment of a commission should not take the pressure off a Government to address impunity, and it should not silence international actors. Instead, the international community should monitor commissions actively, push for their compliance with international standards, offer assistance where appropriate and insist that a commission does not distract from the need to maintain strong criminal justice institutions. Governments and international actors should never lose sight of the substance of what a commission of inquiry is supposed to achieve: accountability for serious human rights abuses and underlying reform to prevent the recurrence of violations.

Report on Mission to Nigeria (E/CN.4/2006/53/Add.4, 7 January 2006, ¶¶ 8-14, 19-20, 65, 76, 103):

8. The Abuja Police reported that on 8 June 2005 in the Apo district of Abuja five young male traders and a female student¹⁸⁹ were arrested on suspicion of armed robbery, taken to the Garki police station, and subsequently killed while trying to escape. The dead robbers were photographed with their weapons, a post-mortem was conducted as required, death certificates were issued after examination by a doctor, and the bodies were buried. When challenges to this story first emerged the Federal Capital Territory Police Commissioner, Emmanuel Adebayo, publicly affirmed these details. The case looked very typical of many reported by the police in Nigeria.

9. Unfortunately for the police, however, one of the "robbers" had managed to phone a relative from the police station and reported that the six had been involved in an altercation in a pub with a police officer. Their car had subsequently been ambushed by other police who were called in, they had all been badly beaten, and they were taken to the police station. Family members immediately sought their release but were unable to pay the bribe of 5000 Nairas (\$40) demanded by the police. Several of them were executed a few hours later. Another managed to escape but was recaptured and brutally killed by the police. In fact, no post-mortems were

¹⁸⁹ The victims were: Anthony Nwokike, Chinedu Meniru, Ifeanyi Ozor, Ozor, Issac Ekene, Paul Ogbonna and Augustina Arebu. Their ages ranged between 20 and 28.

carried out, death certificates were not completed by a medical officer, and the bodies were hastily buried in a common grave.

10. The news of the killings spread rapidly. Rioters ransacked the Apo police station and demanded an investigation. The relatively new Acting Inspector-General of Police convened an internal investigation. But he also took the unprecedented and commendable step of making its proceedings public. Two further elements compounded the horror story that was to emerge. One police officer who took part in the killings allegedly provided the victims' relatives with information on what really happened. He died of "tonsillitis" the day before he was supposed to give evidence to the inquiry. He was subsequently deemed to have been poisoned by two of his colleagues. Meanwhile, the Divisional Police Office in charge of the Garki police station on the fateful night "escaped" from detention.¹⁹⁰

11. In the course of the inquiry one police officer and the photographer on duty that night confirmed that the youths had been killed in cold blood. It was subsequently revealed that the "robbers" alleged weapons had been in police storage until they were removed by a police officer shortly before the incident. As a result of the inquiry ten police officers were arrested.

12. On 27 June 2005, one day after the Special Rapporteur arrived in Abuja, the President unprecedentedly appointed a Federal judicial commission of enquiry.¹⁹¹ In December 2005 the Government paid compensation of 3 million Naira to the relatives of each of the six.

13. If the Apo 6 were an isolated incident it would be a tragedy and a case of a few bad apples within the police force. Unfortunately, many of the ingredients - the false labelling of people as armed robbers, the shooting, the fraudulent placement of weapons, the attempted extortion of the victims' families, the contempt for post mortem procedures, the falsified death certificates, and the flight of an accused senior police officer - are all too familiar occurrences.

14. Thus the Apo 6 killings were not an aberration. The Government response, however, was noteworthy in four important respects: the Inspector-General of Police was responsive to protests; the internal police inquiry was public; a judicial inquiry was established; and compensation was paid. These elements need to become routine in the future.

[...]

19. On 11 May 2004, violent clashes broke out in the city of Kano. Estimates of the number killed within a two day period range from the Police figure of 84 to a more commonly cited 200-250.¹⁹² The response of the security forces involved disproportionate force, aided by an order to shoot on sight, and dozens of people appear to have been killed by police and soldiers. The

¹⁹⁰ "Blood chilling tales", *Newswatch*, July 11, 2005.

¹⁹¹ A leading NGO, Access to Justice, implied that the inquiry had been set up partly because of the Special Rapporteur's visit in order to show the Government in a good light ("to launder the ... Government's very disappointing record" in response to executions). Apo Police Killings: Federal Government's Indulgent Attitude to Extrajudicial Killings Produced the Apo Killings, available at http://www.humanrightsigeria.org/sitenews/news/news_item.asp?NewsID=22.

¹⁹² See Human Rights Watch, *Revenge in the Name of Religion: The Cycle of Violence in Plateau and Kano States*, p. 62.

killing of Lawan Rafa'i Rogo, a civil servant in the State Ministry of Commerce, is emblematic. Rogo expressed concern to a neighbour who was being militarily escorted to her house that the sight of the soldiers could raise tensions in the area due to the prior killing of a neighbourhood child by the military. The soldiers left the area, but soon returned in larger numbers. They broke into the house where those in mourning for the child had assembled, firing indiscriminately. Rogo appears to have been singled out and was shot in the chest, thigh and legs. He died several hours later.

20. A subsequent State Government commission of inquiry effectively confirmed the impunity of the military which had refused to cooperate in any way.

[...]

65. The Special Rapporteur officially requested copies of the major reports resulting from recent commissions of inquiry. The Federal Government provided none. The Governor of Kano State cooperated fully. The report on the 2004 Kano "sectarian crisis" is instructive and apparently typical.¹⁹³ It reported in November 2004. By July 2005 nothing had been made public and the State Government was still working on a White Paper in response. One of the key questions for the inquiry concerned the number killed. Credible and detailed civil society reports put the figure at 200-250.¹⁹⁴ The report, on the basis of no investigation or analysis of any sort, notes that there are "conflicting figures" but recommends that the Police figures of 84 be taken as the "official position". This step removed in one fell swoop the prospect that the overall inquiry could be meaningful.

[...]

76. With relatively few exceptions, a consistent pattern of governmental response to inter-communal violence has emerged. Security forces respond slowly, resulting in higher casualties; they then use force indiscriminately and excessively. A few arrests and prosecutions of minor players follow. If an inquiry is held it quells popular anger but the report remains confidential, is ignored, or adopts a formalistic approach. And almost no long-term preventive measures are taken. Just as predictable as this routine is the future occurrence of more serious incidents of inter-communal violence unless Federal and State Governments take seriously the need for thorough-going reforms.

[...]

103. *Commissions of inquiry*

Inquiries are often used for whitewashing purposes. One State Attorney-General could recall no case of prosecutions following such an inquiry. Their main purpose, he observed, was to facilitate a "cooling of the political temperature".

¹⁹³ *Report of the Administrative Committee of Inquiry on May 11, 2004 Kano Sectarian Crisis.*

¹⁹⁴ See Human Rights Watch, *Revenge in the Name of Religion: The Cycle of Violence in Plateau and Kano States*, p. 62.

(a) The only slightly delayed publication of the report of the Apo 6 inquiry is exemplary and this should become standard practice. To that end the Federal Government should legislate to require the publication within six months of all commission of inquiry reports relevant to extrajudicial executions. In cases of non-publication a specific national security exemption should need to be invoked, and justified;

(b) The full report of the Apo 6 inquiry should be made public immediately.

Follow-up Report on Mission to Nigeria (A/HRC/8/3/Add.3, 14 May 2008, ¶¶ 71-72):

71. The Special Rapporteur reported in 2006 that while Nigeria often seemed to attempt to address impunity for extrajudicial executions by creating special commissions of inquiry subsequent to allegations of killings by police, commissions were in fact often simply a whitewash. The Government rarely made commission reports public, responded to or implemented commission recommendations, or used the evidence gathered to conduct prosecutions. When commission reports are kept confidential, it is all too easy for the Government to ignore the inquiry's conclusions and recommendations. Thus, the Special Rapporteur recommended that Nigeria legislate to require that all commission of inquiry reports relevant to extrajudicial executions be made public within 6 months of their completion. He also recommended that a specific inquiry (the "Apo 6" commission on the killing of 6 civilians by police), which submitted its report to the Federal Government in August 2005, but which had not been officially made public by the time of the publication of the Special Rapporteur's report in January 2006, be made public immediately.

72. There has been no progress to date on either of these recommendations. Nigeria has not passed any legislation requiring the publication of inquiry reports. The Apo 6 report has been leaked, but the Government has failed to release it officially to the public. The Apo 6 commission seemed promising to the Special Rapporteur at the time of his 2006 report. The commission concluded that eight police officers killed six innocent individuals in their custody, and falsely labeled the victims as armed robbers. It is positive that the inquiry has since led to the arraignment of the eight officers. But criminal trials are yet to be conducted, and two of the officers were reportedly released on bail in August 2006 for health issues could have been addressed through treatment in prison. The long delays in starting the criminal trials suggests that impunity may result. Moreover, in most similar cases, there is even less progress than there has been in that of the Apo 6. Numerous allegations of extrajudicial executions by police in Nigeria have been made before and after the commission of inquiry, without any investigation or prosecution.

G. WITNESS PROTECTION PROGRAMS

Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions (A/63/313, 20 August 2008, ¶¶ 12-47):

12. The successful prosecution of those responsible for extrajudicial executions is difficult, if not impossible, in the absence of effective witness protection programmes. All too rarely are prosecutions built on painstaking forensic and other investigative work which would reduce the need to rely upon witnesses. If witnesses can be easily intimidated, if they and their families remain vulnerable, or if they sense that the protections offered to them cannot be relied upon, they are unlikely to testify. As a result, it is often the case that the only people willing to take the risk of testifying are the victims' family members. Usually, however, they are poorly placed to provide the most compelling evidence against the perpetrators. Ending impunity for killings thus requires institutionalizing measures to reduce the risks faced by witnesses who testify. Yet it is often the States that have the biggest problems that also have the least adequate witness protection arrangements.¹⁹⁵ Similarly, many States have sophisticated programmes to protect witnesses to murders involving organized crime, but they devote much less attention to protecting witnesses to murders implicating their military or police forces. This latter challenge requires distinctive solutions, in part because relying on the police to provide protection may itself compromise at least the appearance and often the reality of protection.

13. The central importance of effective witness protection programmes in efforts to combat extrajudicial executions has been generally overlooked by the international community and there have been all too few efforts to encourage States to devote the necessary efforts and resources to the issue. This report thus aims to highlight examples of global best practice and identify some of the key issues that need to be addressed in the design of effective programmes. The resulting survey is far from comprehensive and relies heavily upon scholarly works, reports commissioned by governments, and observations from country visits by the Special Rapporteur.¹⁹⁶

14. The starting point for effective programmes is to acknowledge that the successful prosecution of killers is in the best interests of the society. Witness protection should thus not be seen as a favour to the witnesses who are in fact often making immense personal sacrifices on behalf of society. The provision of adequate assistance to witnesses, family members, and others against whom retaliation is feared, is thus a necessary condition for breaking the cycle of impunity. Such assistance must be provided in a constructive and pragmatic spirit. Dogmatic approaches must be avoided. For example, witnesses may consider the whole of the security forces to be systematically engaged in abusing rights, while the government may believe that the security forces are basically reliable despite the presence of rogue officers in some specific units. In such cases, it is tempting for the government to adopt a dogmatic attitude and insist that any

¹⁹⁵ See A/HRC/8/3/Add.4, paras. 19 and 21 (d) (Brazil); A/HRC/4/20/Add.2, paras. 51 and 63 (Guatemala); A/HRC/8/3/Add.2, paras. 52-54 and 71 (Philippines); and E/CN.4/2006/53/Add.5, para. 56 (Sri Lanka).

¹⁹⁶ Particularly helpful resources included: Law Commission of India, *Consultation Paper on Witness Identity Protection and Witness Protection Programmes* (Aug. 2004); K. Dedel, *Witness Intimidation* (US Department of Justice, July 2006); N. Fyfe and J. Sheptycki, "International Trends in the Facilitation of Witness Co-operation in Organized Crime Cases", 3 *European Journal of Criminology* (2006) 319; Council of Europe, *Report on Witness Protection (Best Practice Survey)* (1999); and P. Finn and K. M. Healey, *Preventing Gang- and Drug-Related Witness Intimidation* (National Institute of Justice, Nov. 1996).

protection be provided by the security forces, thus refuting assumptions that systemic problems exist. A pragmatic approach, however, would place a premium on winning the trust of the witnesses and would provide protection in the most effective and acceptable manner.

A. Witness protection as a challenge for the whole criminal justice system

15. Witness protection cannot be viewed as an isolated challenge. Rather, it must be seen as a crucial part of a comprehensive system designed to effectively investigate, prosecute, and try perpetrators of human rights abuse. Witness protection will be ineffective if the other components of the criminal justice system are not also functioning well. Moreover, a holistic approach will help to identify ways in which less reliance can be placed on testimonial evidence and methods of witness protection which do not require full-blown witness protection programmes. Every step of the process from investigation through conviction and incarceration should be analysed to identify ways in which witnesses are placed at risk and potential reforms designed to limit those risks.

1. The investigative phase

16. Already at this phase there can be problematic disclosures of witness identities. When this risk is foreseen by witnesses, they may simply choose not to speak with investigators. Conversely, safeguarding the identity of a witness at this early point enhances the potential for safely obtaining testimony at trial without resorting to a full-blown witness protection programme. A British report identified several policing methods designed to limit risks in the early phases of the investigation:

- Police should give only minimal information about witnesses over their radios
- Police should not visit witnesses on the day of the incident, and should either encourage the witness to come to the station to give a statement, send a plain-clothes officer to the home of the witness, or conduct a number of house-to-house calls in order to prevent the witness from being singled out. The choice should be left to the witness
- Physical screens hiding the witness from the suspect should be used in all identity parades
- A suspect should not be released when the witness is in the vicinity of the police station
- Police should warn witnesses of the risks of potential retaliation in a pragmatic manner that facilitates both their security and their cooperation
- A contact officer should be provided, so that any intimidation can be reported and acted upon immediately
- In some cases, police can hold suspects on remand and restrict their telephone rights to prevent them from contacting witnesses or accomplices to encourage intimidation¹⁹⁷

17. In the special case of crimes implicating police or other state agents, the institutional affiliation of investigators may lead to an actual or perceived risk that witness identities will be improperly disclosed. This risk may be mitigated through respect for international norms requiring the removal of suspected perpetrators from positions of power or control over

¹⁹⁷ W. Maynard, *Witness Intimidation: Strategies for Prevention*, Crime Detection and Prevention Series No. 55, London: Home Office Research Development and Statistics Directorate (1994), pp. 26-30.

witnesses.¹⁹⁸ The existence of respected police internal affairs units might also foster confidence on the part of witnesses. But breaking the cycle of impunity will often require an independent investigative unit devoted to solving crimes involving members of the police or security forces.¹⁹⁹ Thus, for example, the Department of Special Investigation in Thailand was established partly to facilitate the investigation of such cases. Another approach is to remove responsibility for this kind of investigation from the normal investigative police to some other existing body. In Brazil, the Public Prosecutor's Office sometimes directly investigates murders implicating the police, even though criminal investigations are normally conducted by police detectives.²⁰⁰

18. Reforms designed to improve the collection of non-testimonial evidence should also be considered. In his visits to countries, the Special Rapporteur observed that investigators often lack the training and resources required to gather forensic evidence — e.g. to match a bullet to a particular gun — leading to excessive reliance on witness testimony.²⁰¹ Insofar as the capacity to use forensic evidence can be increased, both the importance of witness testimony and the risks posed to witnesses may be reduced.

2. Prosecutorial arrangements

19. The role played by prosecutors in the criminal justice system may also lead to real or perceived risks that prevent the safe cooperation of witnesses. Prosecutors generally have close professional relationships with the police, who usually gather the evidence on which their cases are based and often testify in court. These close relationships can lead witnesses to perceive, sometimes correctly, that prosecutors will not push the case aggressively (which makes becoming a witness a pointless risk) or will even be likely to improperly disclose witness identities or locations to implicated members of the police force. There are a number of possible responses to this problem. One is to assign a few prosecutors to work solely on cases involving the police or other government agents in human rights abuses, thus seeking to minimize the normal professional solidarity between prosecutors and police. In one Brazilian city I observed that a prosecutor who played this role had earned the trust of victims of police violence despite their wariness of the prosecutor's office as a whole.²⁰² Another approach is to establish a separate institution for the prosecution of police. In the Philippines, for example, a special institution was established to investigate and prosecute crimes and other misconduct committed

¹⁹⁸ See Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, para. 15. For the text of the Principles, see *Official Records of the Economic and Social Council, 1989, Supplement No. 1* (E/1989/89), res. 1989/65, annex.

¹⁹⁹ See para. 22 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, 27 August to 7 September 1990 (A/CONF.144/28/Rev.1); and para. 11 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, para. 11 (see note 7 above).

²⁰⁰ See A/HRC/8/3/Add.4, para. 21 (f).

²⁰¹ See A/HRC/8/3/Add.4, para. 21 (c) (Brazil); A/HRC/4/20/Add.2, para. 48 (Guatemala); E/CN.4/2006/53/Add.4, paras. 89 and 105 (b) (Nigeria); A/HRC/8/3/Add.2, para. 55 (Philippines); and E/CN.4/2006/53/Add.5, para. 56 (Sri Lanka).

²⁰² For preliminary observations on Brazil, see A/HRC/8/3/Add.4.

by public officials and its independence from the executive branch was constitutionally guaranteed.²⁰³

3. Conduct of trials

20. The manner in which trials are conducted has both indirect and direct implications for witness protection. Scheduling and venue decisions, for example, can have a major bearing on witness participation and protection, but their importance is often overlooked. Opportunities for witness intimidation increase when trials are repeatedly delayed or are not held on consecutive days. Even if the overall workload of the courts makes delays inevitable in many cases, it is worth considering whether the kinds of cases that generally place witnesses at risk can be expedited.²⁰⁴ Similarly, judges should avoid summoning witnesses on days other than when they have been scheduled to testify.²⁰⁵ The way in which rules on venue changes are interpreted is also important. Whether or not they are in a formal witness protection programme, witnesses often relocate to avoid retaliation; if the trial venue can be changed to accommodate their need to remain at a distance from where the perpetrator or his associates live, this can facilitate witness participation.

21. Permitting witnesses to give testimony anonymously is one of the most controversial but important ways of protecting them. It avoids the need for relocation and other protection measures and can be arranged in such a way as to offer relatively assured protection. But anonymous testimony risks violating the defendant's right to fair hearing and "to examine, or have examined, the witness against him".²⁰⁶ For that reason, courts have subjected such schemes to close scrutiny,²⁰⁷ while at the same time leaving some space for approaches designed to protect both the due process rights of defendants and the lives of witnesses. Procedures and criteria for permitting anonymous testimony that attempt to respect these rights have been developed by a large number of states,²⁰⁸ as well as by the International Criminal Tribunal for

²⁰³ See Constitution of the Republic of the Philippines (1987), art. XI, sect. 13; see also A/HRC/8/3/Add.2, paras. 56-58.

²⁰⁴ For an example of one approach, see Philippines Administrative Order No. 25-2007, "Designation of Special Courts to Hear, Try and Decide Cases Involving Killings of Political Activists and Members of Media" (1 March 2007); see also A/HRC/8/3/Add.2, para. 59.

²⁰⁵ See also the 154th Report of the Law Commission of India, *On the Code of Criminal Procedure 1973* (1976), pp. 43-44.

²⁰⁶ See International Covenant on Civil and Political Rights, General Assembly resolution 2200 (XXI), annex, art. 14.

²⁰⁷ See, esp., the judgements of the European Court of Human Rights in *Kostovski v. The Netherlands* (1990) 12 EHRR 434; *Windisch v. Austria* (1991) 13 EHRR 281; *Isgro v. Italy* (1991) Yearbook of the ECHR, p. 151; *Doorson v. The Netherlands*, Reports of Judgments and Decisions 1996-II, p. 446; *Van Mechelen v. The Netherlands*, Reports of Judgments and Decisions 1997-III, p. 691; *Fisser v. The Netherlands* 13 Human Rights Case Digest (2002) pp. 65-68.

²⁰⁸ Two illustrative examples are Portugal and the United Kingdom. In Portugal, Section 16 of Act. No. 93/99 of 14 July 1999 lays down the conditions precedent for any grant of anonymity to a witness: the testimony must relate to a specific group of crimes; the witness, his relatives or other persons in close contact with him must face a serious danger of attempt against their lives, physical integrity, freedom or property of a considerably high value; the credibility of the witness is beyond reasonable doubt; and the testimony provides a relevant contribution to the evidence in the proceedings. The situation in the United Kingdom is more complicated. In 1995 the Court of Appeal upheld full anonymity, provided that certain criteria were satisfied. *R v. Taylor* (1995), Crim. LR 253. In June 2008, however, the House of Lords held that the use of anonymous witnesses prevented the accused from adequately

the Former Yugoslavia (ICTY).²⁰⁹ In general, the following criteria applied in New Zealand appears reasonably representative of efforts to achieve an appropriate balance:

- (4) The Judge may make a witness anonymity order if satisfied that —
 - (a) The safety of the witness or of any other person is likely to be endangered, or there is likely to be serious damage to property, if the witness's identity is disclosed; and
 - (b) Either —
 - (i) There is no reason to believe that the witness has a motive or tendency to be untruthful, having regard (where applicable) to the witness's previous convictions or the witness's relationship with the accused or any associates of the accused; or
 - (ii) The witness's credibility can be tested properly without disclosure of the witness's identity; and
 - (c) The making of the order would not deprive the accused of a fair trial.
- (5) Without limiting subsection (4), in considering the application, the Judge must have regard to —
 - (a) The general right of an accused to know the identity of witnesses; and
 - (b) The principle that witness anonymity orders are justified only in exceptional circumstances; and
 - (c) The gravity of the offence; and
 - (d) The importance of the witness's evidence to the case of the party who wishes to call the witness; and
 - (e) Whether it is practical for the witness to be protected by any means other than an anonymity order; and
 - (f) Whether there is other evidence which corroborates the witness's evidence.²¹⁰

22. But witness anonymity throughout a trial requires more than an appropriate legal framework. The trial itself is one of the most dangerous phases in the criminal justice process for witnesses, when they are often out in the open and thus more susceptible to intimidation; and, where a decision has been made to grant either full anonymity or confidentiality, the possibilities of their

examining his accusers and thus violated the right to a fair trial. *R v. Davis* [2008] UKHL 36. The Government immediately adopted new legislation authorizing the continued use of anonymous witnesses in certain circumstances. See Criminal Evidence (Witness Anonymity) Act 2008. The human rights implications of the legislation have been strongly criticized.

²⁰⁹ The ICTY held that five criteria must be satisfied to permit the use of protective measures:

- 1) A real fear for the safety of the witness or his or her family;
- 2) The testimony must be important to the prosecutor's case;
- 3) The Court must be satisfied that there is no prima facie evidence that the witness is untrustworthy;
- 4) The ineffectiveness or non-existence of a witness protection programme;
- 5) If a less restrictive measure would give the desired level of protection, it must be used. See *Tadić* (IT-94-1), Decision on the Prosecutor's Motion Requesting Protective Measures for Victims And Witnesses (10 August 1995), paras. 53-86.

²¹⁰ See section 13C of the amended New Zealand Evidence Act of 1908 (amended 1997) available at www.legislation.govt.nz/act/public/1908/0056.

identities being disclosed are high during their visits to the courtroom, whether or not they are actually on the witness stand.²¹¹

23. One approach designed to avoid these dangers is to permit the use of anonymous hearsay testimony in criminal trials. But this shortcut exacerbates the normal problems associated with witness anonymity, while also depriving the accused of the right to confront his accusers in open court, even if he retains the possibility to “question” them at an earlier stage. Nevertheless, a number of states allow the use of hearsay evidence,²¹² and some commentators and institutions have even called for this practice to be extended, perhaps with the introduction of safeguards such as videotaping the original statement. The Committee of Ministers of the Council of Europe has encouraged the use of statements given during the preliminary phase of the procedure as evidence in court when it is not possible for witnesses to appear before the court or when appearing in court might result in great and actual danger to the witnesses/collaborators of justice or to people close to them. Consequently, pre-trial statements should be regarded as valid evidence if the parties have, or have had, the chance to participate in the examination and interrogate and/or cross-examine the witness and to discuss the contents of the statement during the procedure.²¹³

24. The use of anonymous hearsay evidence in trial is thus extremely controversial. While it undoubtedly provides a high level of protection to the witness, it will most often do so at unacceptable cost to the fair trial rights of the accused, as the jurisprudence of the European Court on this matter suggests. It is beyond the scope of this report to evaluate when or whether it might be an acceptable practice.

25. One of the most common, and cost-effective, mechanisms for operationalizing anonymity orders is the erection of a screen between the witness testifying and the defendant. In many countries, the use of screens for witnesses is considered an unproblematic — if usually exceptional — measure.²¹⁴ To protect anonymity, a common practice is for the witness in question to be assigned a pseudonym, which is then used for all trial purposes and public records. If necessary to protect the witness’s identity, voice-distorting technology is also used. Where the decision has been made to keep a witness’s identity secret from the accused, the use of screens provides one way of balancing the right to fair trial with the exigencies of witness protection that is significantly more robust than the use of anonymous hearsay evidence in that it allows for greater cross-examination. The risk that inevitably accompanies courtroom appearances, however, is that a witness’s identity will be disclosed.

²¹¹ See P. Finn and K. M. Healey, *Preventing Gang- and Drug-Related Witness Intimidation* (U.S. Department of Justice, National Institute of Justice, Nov. 1996), p. 13.

²¹² See, for example, s. 96 of the German Code of Criminal Procedure, which allows under certain circumstances for hearsay evidence to be taken from those who have questioned a witness who is to remain anonymous, and used as substantive evidence at trial. See Fyfe and Sheptycki, p. 343.

²¹³ See Council of Europe, Committee of Ministers, loc. cit. n. 48, at paras. 5 and 17.

²¹⁴ It is included, for example, in section 13G(1)(b) of the New Zealand Evidence Act of 1908. With respect to the United Kingdom, see also *Foster* [1995] Crim.L.R. 333. The requisite balancing was also discussed in some detail in *Donaughy Re Application for Judicial Review* (2002) NICA (8.5.2002), where police witnesses testifying in the Bloody Sunday investigations were allowed to do so from behind screens.

26. Some of the high risks of identity disclosure associated with courtroom appearances can be lessened by giving testimony through video links. The ICTY has used this option to protect witnesses. Rule 75B(i) (c) of its Rules of Evidence and Procedure states that the Chamber can hold in camera proceedings to decide whether to allow, inter alia, the “giving of testimony through image- or voice-altering devices or closed circuit television”.²¹⁵ The use of videoconferencing (that is, witnesses testifying via video-link from locations far away from The Hague) has also been allowed by the Tribunal due to the “extraordinary circumstances” in which it operates, provided that the testimony is so important that it would be unfair to proceed without it, and the witness in question is unwilling or unable to come to the seat of the ICTY. The Trial Chamber appointed a presiding officer who was to be present when the witness was testifying, to ensure that it was done freely, to identify the witness, and to administer the oath; moreover, only he and some technical staff were permitted to be present. Lastly, the witnesses had to be able to see the judge, accused and questioner on a monitor, and had to be seen by them on theirs.

27. By the same token, these technological solutions come with problems of their own: Quite apart from creating a new layer of technical issues and costs, the witness is not subject to the symbolism of the courtroom, nor fully to the solemnity of its procedures. This in itself can be viewed as not entirely fair to the accused. It is for these reasons that the ICTY in *Prosecutor v. Dusko Tadić* saw fit to reaffirm the basic principle that witnesses should be present in the courtroom, and to extend the exceptional measure of videoconferencing only where there were good reasons as to why that was not possible.

28. Another technique which has been used to reduce the impact of such witness protecting measures on the rights of the defendant is the use of “special counsel” for the accused. This involves a court-appointed lawyer who represents the interests of the accused in any context in which witness protection measures might lessen the effectiveness of his own counsel. The special counsel thus acts in something like an *amicus curiae* capacity, representing the interests of the accused but with no legal responsibility to him. In cases in which full anonymity has been ordered, then, the special counsel could be provided with full details of the witness’s identity and pose questions based thereon, without any obligation to make these known to the defence. This approach has, for example, been adopted by the United Kingdom in response to certain European Court judgements.²¹⁶

29. A final option to which reference might be made is for judges to consider making greater use of pre-trial detention involving police defendants who are deemed likely to seek to intimidate witnesses. It is common in Uruguay for accused police officers to be detained pending trial. While a strong rule of this kind would raise due process concerns, an approach which signals a willingness to consider detention if obstruction of justice problems arise might be warranted.

B. The design of a formal witness protection programme

²¹⁵ Such measures are granted by the ICTY almost as a matter of course; see *Prosecutor v. Sikirica et al.*, IT-95-8 (2001) (order on request for protective measures), in which protective measures of this sort were ordered for 23 witnesses.

²¹⁶ See Special Judgment on Appeals Commission Act, 1997, and the Northern Ireland Act, 1998. For a discussion of this issue, see also 1997 New Zealand Law Commission report on Witness Anonymity, paras. 46-47.

30. Whatever measures are introduced within the criminal justice system to lessen the risk posed to witnesses to extrajudicial executions by state agents, it will generally also be necessary to adopt a formal witness protection programme for some cases. This section considers questions of formal structure, criteria and procedures for both admission to such programmes and termination of protection, and the basic design of witness relocation plans. In addition, consideration is given to some of the challenges specific to witness protection in cases involving human rights abuse by state agents and to innovative responses that states have made in such contexts.

1. The structure of a witness protection programme

31. One of the most well-established witness protection schemes is the United States Federal Witness Security Program. In many respects it can be viewed as “paradigmatic”, having served as a model for similar arrangements in other countries. It has been suggested that a comprehensive witness protection model must include: (a) an organizing committee, composed of policymakers from key stakeholders; (b) an operational team, often composed of officials of those institutions involved in the day-to-day running of the programme; (c) a programme administrator; (d) case investigators, or a specially trained law enforcement unit; and (e) designated contact people in all cooperating authorities, agencies and institutions.²¹⁷

32. It is important that information regarding witness identities and locations be carefully safeguarded even within such a structure. Thus, for instance, while the operational team may need to weigh the range of protection options available for a particular witness, there is no reason for this information to flow upward to the group dealing with policy questions.

33. While some countries establish witness protection programmes as units within the police force, this approach is inappropriate for programmes designed to facilitate cases against state agents involved in human rights abuse. One alternative is to appoint officials in key criminal justice system institutions to a committee to administer or oversee the programme. In Belgium, for example, decisions about whom and when to protect are taken by a Witness Protection Board, consisting of public prosecutors, senior police officers and representatives of the Ministries of Justice and the Interior. Another approach is to create a witness protection agency as a separate body, funded by and ultimately responsible to the government, but with decisions on inclusion and exclusion taken by the project director rather than with broader governmental input on the matter, and with law enforcement agencies playing no direct role in the programme. It is worth noting, however, that, if an independent agency is established, it must be given the necessary resources. In some cases, notionally independent agencies have ended up depending on the police force to implement protection measures due to a lack of internal resources.

34. A formal, institutionalized structure is preferable to an informal, ad hoc one for several reasons. The first is efficiency: a formal structure can involve all key cooperating stakeholders in the planning and execution of protection programmes, thereby minimizing the risk of breakdowns in communication or cooperation, gaps in services to witnesses, and inefficient or ineffective procedures. The second is security: informal procedures involving many agencies (such as housing applications, welfare benefit transfers, etc.) are unlikely to have the necessary bureaucratic safeguards in place to ensure that the new locations or identities of protected

²¹⁷ See Finn and Healey (see note 20 above), pp. 59-74.

witnesses are not too readily disclosed. The third is consistency: ad hoc arrangements are extremely sensitive to changes in personnel at the various cooperating agencies. The fourth is communication: formal, structured programmes assign witnesses with a single, constant contact person, who can provide the round-the-clock support and assistance that many witnesses require if they are to testify. It is important that witnesses are able to build up relationships of trust with the programme administrators with whom they deal, and this is not possible if the latter keep changing. The final reason for preferring a formal, structured programme is evaluation. Frequent and well-planned evaluations are critical to the success of any witness protection effort, allowing administrators to fine-tune the programme and prevent any errors that may have been made from happening again.²¹⁸

35. With respect to criteria for admission to the programme, key considerations include: (a) the importance of the case in terms of ending a cycle of impunity for human rights abuse; (b) the importance of the witness's testimony to the case; (c) the level of threat to the witness; (d) the suitability of the witness for the programme, including whether he or she is genuinely willing to relocate and break ties with family and friends; and (e) the availability and adequacy of less onerous forms of protection.²¹⁹

36. It is equally important to develop a clear set of criteria as to when the programme participation of a witness or family member may be terminated. Most jurisdictions provide for termination if the participant breaks any of the rules of conduct that have been agreed upon (on which more below), if they in some way threaten the security of the programme itself, or if the circumstances which necessitated the original provision of protection have ceased to exist. They also always provide for some sort of review by an official or body other than the programme director or administrator.²²⁰ The provisions of the Witness Protection Act of South Africa are perhaps among the clearest and most detailed in this regard, stating that the Director may discharge any protected person from protection if he is of the opinion that:

- (a) the safety of the person is no longer threatened;
- (b) satisfactory alternative arrangements have been made for the protection of the person;
- (c) the person has failed to comply with any obligations imposed upon him or her by or under this Act or the protection agreement;
- (d) the witness, in making application for placement under protection, wilfully furnished false or misleading information ...;
- (e) the person refuses or fails to enter into a protection agreement when he or she is required to do so ...;
- (f) the behaviour of the person has endangered or may endanger the safety of any protected person or the integrity of a witness protection programme ...; or
- (g) the person has wilfully caused serious damage to the place of safety where he or she is protected, or to any property in or at such place of safety.²²¹

²¹⁸ Ibid., pp. 59-60.

²¹⁹ Similar criteria may be found in the legislation of a number of countries. See e.g. art. 6 of the Witness Protection Programme Act of Canada, 1996.

²²⁰ See, for ex., the Victoria State Witness Protection Act 1991, sect. 16.

²²¹ Witness Protection Act of 1998, Article 13.

37. The legislation also provides for the right to request a review of any decision to terminate, to be made by the relevant Government Minister.²²²

38. Establishing mechanisms for inter-agency cooperation is essential to an effective witness protection programme. Such programmes need to provide much more than simply physical protection for those in their care; a whole host of other issues inevitably arise, from health to housing and other welfare benefits and beyond. These difficulties are, moreover, compounded when witnesses are provided with new and secret identities or addresses, and, as the number of different agencies and institutions involved increases, so do the chances for either inefficient bureaucratic procedures, opportunities to exploit the system or security lapses. The risk of all three can be minimized by employing certain good practices including:

(a) Establishing a contact person within each agency who is in a position to take action when a request is made. Again, the creation and maintenance of relationships of mutual trust between individuals in the various government agencies and officials of the witness protection programme can be crucial in ensuring that requests for assistance are dealt with in a timely and efficient manner;

(b) Gaining support from the top. It is important to ensure that the head of each agency is both aware and approving of the relationship between the witness protection officials and their contact person within the relevant agency, and of the actions taken by the latter at the request of the former;

(c) Developing inter-agency memorandums of understanding. These written agreements between agencies can be extremely useful in ensuring the clarity, consistency and efficiency of the inter-agency relationship. The reasons for using these are many and varied: they create stability despite personnel changes in either agency; making a commitment in writing makes agencies less likely to attempt to evade responsibility, but it also makes it less likely that they will be asked to do more than they should; and a written document serves to reduce uncertainties surrounding the role and responsibilities of each party. The contents of the memorandums will vary from context to context; however, at a minimum, each should specify the services each agency will provide, the staff and funding they will make available, and the allowable expenses or services.²²³

2. Protection measures short of relocation

39. Within the context of a formal witness protection programme, there can be a range of possible protective measures employed on the basis of a case-specific risk assessment. In some countries, the measure of first resort has been protective incarceration. Witnesses are placed in what amounts to a cell inside a police station, unused prison, or other security forces establishment. Except as an extremely temporary measure, this kind of approach must be avoided. Witnesses quite reasonably can seldom accept their own detention as a condition for participating in what will generally be a lengthy trial. Nevertheless, it is not always necessary or advisable to escalate directly to witness relocation or identity change. Sometimes it may be possible to employ lower level physical protection measures. One possibility is the provision of a “rapid response alarm”, connected directly to the local police station. This allows officers to

²²² Witness Protection Act of 1998, Article 14.

²²³ Finn and Healey (see note 20), pp. 71-74; see also Kelly Dedel, *Witness Intimidation* (U.S. Department of Justice, Community Oriented Policing Services, July 2006), pp. 18-19.

arrive quickly if any threat materializes, without having the expense of providing round-the-clock protection.²²⁴ Another possibility may be the installation of locks, grates, security alarms and outdoor lighting for the witness's house,²²⁵ or increasing patrols in the area. On occasion, police officers in some jurisdictions can assist by taking at-risk witnesses and their families to and from work and school for a short time. Lastly, it is common practice for police to send vulnerable witnesses to live with out-of-town relatives (as a cheap alternative to making complex and costly relocation arrangements within the witness protection programme).²²⁶ Many of these measures will, however, be generally inadequate when witnesses fear retaliation from the police or other security forces.

3. Relocation

40. Relocation is the central mechanism in effective witness protection programmes and is generally viewed as the most effective way of protecting highrisk witnesses from intimidation, threats and violence. It is, however, also often expensive and time-consuming, and it requires a high degree of inter-agency cooperation and planning if it is to be carried out effectively.²²⁷ There are broadly three different types of relocation: emergency, short-term, and longterm/permanent.²²⁸

41. Emergency relocation is used when a threat is imminent and often requires an expedited initial process in terms of acceptance into the witness protection programme, with a more detailed evaluation to take place when the danger has passed. The accommodation used is very often a hotel (which is very expensive); however, it can also be a police station or another public building designated for that purpose. Such protective incarceration should, however, never last longer than a few days or weeks, at most.

42. Short-term relocation is used when the witness remains at risk for longer periods. It is in this context that the practice of sending witnesses to live with family or friends out of town is most popular, as by far the most cost-effective measure; it also provides a source of emotional support and means that a number of risks attendant to relocation measures, in particular boredom and subsequent returns to visit friends and family, are minimized.²²⁹ However, depending on the structure of a society and the character of the threat, this may not provide adequate protection. Indeed, in some circumstances, it will only increase the danger to family members. Other possibilities include social housing or rental property. Here already, however, logistical difficulties begin to arise: it may be necessary to transfer schools; the witness will in all likelihood no longer be able to work; it may also be necessary to make arrangements for the transfer of social benefits to the other jurisdiction. As always, the more people and agencies are involved in the process, the higher the risk of disclosure of the whereabouts of the witness, accidental or otherwise.

²²⁴ Maynard (see note 6 above), p. 4.

²²⁵ Dedel (see note 32), pp. 22-23.

²²⁶ Finn and Healey (see note 27), p. 29.

²²⁷ Dedel (see note 32), p. 27.

²²⁸ Finn and Healey (see note 27), pp. 23-38.

²²⁹ Finn and Healey (see note 27), p. 29.

43. Long-term/permanent relocation is most commonly used in cases in which the threat of violent retaliation does not end even with the conviction of the defendant. This has often been true in major gang-related or organized crime cases, but the same problem exists when the police or security forces continue to commit abuses with impunity and may retaliate on behalf of their convicted colleague. Permanent relocation need not be significantly more costly than its short-term counterpart. The major outlays mostly come at the beginning in any event, such as housing costs, and subsistence payments until either social security benefits can be transferred or the witness finds employment.

4. Innovative approaches to relocation

44. There are some innovative approaches to relocation that may be useful in meeting the special challenges of protecting witnesses to human rights abuses perpetrated by state agents. These include involving foreign governments and non-governmental organizations in the implementation of relocation plans.

45. It is relatively common for non-governmental human rights advocacy organizations to help victims and witnesses on an ad hoc basis. In some cases, such assistance has been transformed into full-fledged witness protection programmes and even into joint arrangements between government and non-governmental organizations. For example, in Brazil the witness protection programme began as a project of the non-governmental organization *Gabinete de Assessoria Jurídica às Organizações Populares* (GAJOP) and was subsequently developed into a programme that involves both government agencies and a number of non-governmental organization partners.²³⁰ Today, a committee that includes judges, prosecutors, and others, provides policy direction and makes final decisions on the admission and expulsion of witnesses while day-to-day operations are conducted by the state's secretariat for justice in tandem with a non-governmental organization.²³¹ The non-governmental organization receives government funds to relocate witnesses and help them integrate into a new community. This innovative structure, in which government officials are not actually informed of the witness's location, has provided witnesses to crimes committed by government agents a much higher level of protection than most systems that rely solely on the government to provide protection. However, some of the non-governmental organizations providing protection services to witnesses reported dissatisfaction with the structure of the programme and questioned the long-term viability of a programme that relies so extensively on non-governmental organization implementing partners. Non-governmental organization involvement in witness protection can be invaluable in overcoming the difficulties caused by a severe lack of trust in state institutions, and in law enforcement agencies in particular.

46. It is important to note, however, that even a strong and respected non-governmental organization will find protection difficult or impossible without corresponding government action. The process of investigation, prosecution, and trial will still require contact between witnesses and government officials, and reforms to minimize the risks posed by these contacts will still be necessary. Moreover, it is impossible for non-governmental organizations to arrange

²³⁰ The involvement of non-governmental organizations also features prominently in the history of witness protection in South Africa.

²³¹ Law No. 9.807 (13 July 1999); Decree No. 3.518 (20 June 2000).

new identities for witnesses without the cooperation of numerous government agencies. Finally, the risks posed to non-governmental organization staff implementing such a programme may exceed even those posed to government witness protection personnel.

47. When secure and trusted relocation within a state's territory is not feasible, whether due to limited government capacity or to the pervasiveness of the threat, relocation to another country may be considered. South Africa is one state that has successfully resorted to international cooperation on witness protection to enable the prosecution of human rights cases. For example, in the trial of the commander of a police hit squad, Eugene de Kock, three witnesses who were police officers themselves and feared intimidation from colleagues, were sent to Denmark for 18 months. This type of cooperation is already common, on an informal basis, between the heads of the European witness protection programmes, and a best practice survey by the Council of Europe has called for more formalized action along these lines.²³² It is worth considering whether countries with established witness protection programmes could more routinely agree to relocate witnesses to their territory in order to assist countries attempting to successfully prosecute state agents so as to break with a pattern of impunity. Any such arrangement would, of course, need to take into account how witness participation in investigations and trials could be ensured. Either secure transport involving both governments would need to be provided or the provision of testimony through videoconferencing would need to be authorized.

Report on Mission to Colombia (A/HRC/14/24/Add.2, 31 March 2010, ¶¶ 87-88):

87. Witness fear is a major cause of impunity for unlawful killings. I spoke with witnesses who had previously refused to report the details of their cases to any other officials because they did not believe the information would be secure. Significant numbers of witnesses never report their cases at all because of a well-justified fear of retaliation. Some who have filed or discussed cases publicly — including relatives of the Soacha victims — have received death threats or been killed. Witnesses' fear extends not just to alleged perpetrators but, especially in more rural and remote areas, to Government actors such as the local *fiscal* or *procurador*, whom witnesses believe may be cooperating with or under the influence of alleged perpetrators. In some instances, the fear may be justified, but in others Government agents are themselves under threat as they seek to prosecute unlawful killings.²³³ In all such circumstances, it is difficult for cases to proceed.

88. Presently, multiple sources can provide protection: the police, the Interior and Justice Ministry or, for victims or witnesses participating in criminal proceedings, the *Fiscalía*. Efforts have been made by the Government to improve protection. The budget for the Ministry's protection programme grew 187 per cent between 2002 and 2007, and the United States has worked with the *Fiscalía* to improve its protection programme. Nevertheless, current protection is insufficient to meet witness needs and stronger protection efforts need to be made.

Report on Mission to Guatemala (A/HRC/4/20/Add.2, 19 February 2007, ¶ 51):

²³² Council of Europe Witness Protection Best Practice Survey, 1999, p. 25.

²³³ In local jurisdictions, *fiscales* may also have fewer resources and investigatory personnel, resulting in slower development and prosecution of cases, which may give rise to suspicion that the *fiscal* is not proceeding for more nefarious reasons.

51. Another reform that must be introduced to overcome impunity in cases involving powerful perpetrators is the introduction of an effective witness protection programme for these kinds of cases. It is difficult for the PNC to gather evidence or for the Ministerio Público to sustain prosecutions when witnesses may be intimidated from providing testimony. There are currently multiple systems of witness protection in Guatemala. One is administered by the Ministerio Público. While this system should be preserved and strengthened, its association with a body widely believed to be corrupted by clandestine groups makes it inherently unsuitable for protecting witnesses involved in some cases. Another system provides witness protection when orders for precautionary measures are received from the Inter-American Commission for Human Rights. These are received and processed by the presidential human rights body the Comisión Presidencial Coordinadora de la Política del Ejecutivo en Materia de Derechos Humanos (COPREDEH), which in turn arranges for officers from the PNC to watch over the witness. This system is also highly problematic when witnesses are involved in cases concerning clandestine groups or the police. One possibility for reform would be to establish a witness protection programme under the PDH. At a minimum, the current requirement that the PDH pass on complaints to the implicated Government agencies must be changed to avoid endangering complainants.

Follow-up Report on Mission to Guatemala (A/HRC/11/2/Add.7, 4 May 2009 ¶¶ 38-39):

38. In his first report, the Special Rapporteur stressed the importance of instituting an effective witness protection programme. Without it, witnesses would continue to be too afraid to testify, especially in cases involving abuses by State actors. Since his visit, the Ministry of Justice approved in 2007 the Regulations on the Law of Protection of Subjects, Proceedings and Persons Connected with the Administration of Criminal Justice,²³⁴ which establishes the regulations and organs governing witness protection. To the knowledge of the Special Rapporteur, the law has however been left without the structure that would allow it to be effectively applied.

39. As a result, CICIG has focused strongly on the need to improve security for witnesses and members of the judiciary who are involved in high profile cases and is working with the Government to completely rebuild the witness protection programme. The CICIG is currently in the process of trying to create special, high security courts to deal with cases involving transnational criminal networks, which are currently not being prosecuted because of security concerns. The courts would be located in the capital of Guatemala, but would have jurisdiction over crimes committed throughout the country, particularly crimes committed in the border areas where there are drug-affiliated gangs. In addition to the creation of the special courts, CICIG has suggested allowing witnesses to testify via video conference, and recommended the creation of a maximum-security prison to hold former criminal members who are testifying against their colleagues. Such measures would assist greatly in protecting witnesses, and thereby enable the successful prosecution of perpetrators. The Government should work with CICIG to ensure the implementation of these reforms.

Report on Mission to Sri Lanka (E/CN.4/2006/53/Add.5, 27 March 2006, ¶56):

²³⁴ MINUGUA, “Los Linchamientos: Un Flagelo que Persiste” (July 2002), p. 6.

56. The lack of investigative capacity is due to a lack of police training and resources, ineffective forensics, and an unwillingness to ensure the security of witnesses. The Judicial Medical Officers (JMOs) who carry out most autopsies typically lack the requisite vehicles, equipment and specialized training. The range of obstacles to a prompt and effective examination means that too much evidence simply bleeds out onto the floor. Investigations are also impeded by the lack of effective witness protection. This makes witnesses especially reluctant to provide evidence on crimes committed by police officers, and led several interlocutors to joke that it would be better to be a victim than a witness. Inadequate investigations result in evidence insufficient to sustain a conviction. Various police and forensic training programmes have been supported through development assistance initiatives. In the absence of any detailed evaluations, my impression is that they have been worthwhile but regrettably limited in scope.

Report on Mission to the Philippines (A/HRC/8/3/Add.2, 16 April 2008, ¶¶ 52-54):

52. The absence of witnesses is a key explanation for why extrajudicial executions hardly ever lead to convictions. One expert suggested to me that the absence of witnesses results in 8 out of 10 cases involving extrajudicial killings failing to move from the initial investigation to the actual prosecution stage. In a relatively poor society, in which there is heavy dependence on community and very limited geographical mobility, witnesses are uniquely vulnerable when the forces accused of killings are all too often those, or are linked to those, who are charged with ensuring their security. The present message is that if you want to preserve your life expectancy, don't act as a witness in a criminal prosecution for killing.

53. The witness protection program is administered by the NPS. This is problematic only because the impartial role prosecutors are expected to play in the early phases of a criminal case can make them loath to propose witness protection. This problem might be remedied by establishing a separate witness protection office independent of the prosecutors but still within the Department of Justice (DOJ).²³⁵ That office would then be free to take a proactive role in providing witness protection.

54. Implementation of the statute establishing the witness protection program is deeply flawed.²³⁶ It would seem to be truly effective in only a very limited number of cases. The rights and benefits mandated by law are too narrowly interpreted in practice to make participation possible for some witnesses.²³⁷ Another widely-cited shortcoming, likely caused by inadequate resources, is that at-risk family members are not admitted into the program, although in theory “any member of his family within the second civil degree of consanguinity or affinity” who is at

²³⁵ This reform would require DOJ to revise its rules and regulations implementing the “Witness Protection, Security and Benefit Act” (Republic Act No. 6981, signed into law 24 April 1991), but it would not require any legislative amendment.

²³⁶ One worthy proposal that *would* require a statutory amendment is to increase the penalties for harassing witnesses. These are minimal: a fine of not more than 3,000 pesos (USD \$65) or imprisonment of not less than 6 months but not more than 1 year. (Republic Act No. 6981, section 17(e).)

²³⁷ Thus, for the witnesses in one case brought to my attention, the “secure housing facility” promised by law consisted of small rooms in the NBI compound. Implicated officials were not prevented from coming directly to where the witnesses were housed, and other financial and medical benefits provided were inadequate. (For the rights and benefits provided under the witness protection program, see Republic Act No. 6981, section 8.) Most of the witnesses in that case ultimately left the program and recanted their testimony.

risk may be admitted.²³⁸ A more fundamental problem is that, even when a witness is available, cases seldom move quickly through the justice system,²³⁹ and when a case fails to prosper, the witness is expelled from the program, although he or she may still be at risk.

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

Fear on the part of victims and potential witnesses greatly inhibits the reporting of crimes. There is no Government witness protection program whatsoever in the Congo. MONUC operates an invaluable but very small protection program, and limited staff and resources restrict its ability to protect those in need.

Report on Mission to Brazil (A/HRC/11/2/Add.2, 23 March 2009, ¶¶ 61-63, 94):

61. The high number of homicides in Brazil, together with significant levels of organized crime and police corruption and violence, means that an effective and comprehensive witness protection program is essential in order to protect particularly vulnerable witnesses and to ensure that impunity does not result from widespread witness intimidation. I interviewed many victims' relatives who told me they had spoken with witnesses to the victim's death. But in many cases the witnesses feared police reprisals and refused to come forward publicly. I also spoke to a number of family members taking action to investigate the circumstances of the victim's death who had received death threats.

62. Brazil has recognized the importance of witness protection and has taken positive steps over the past decade to improve its programs. The most important of its witness protection programs, the *Programa de Assistência a Vítimas e a Testemunhas Ameaçadas*²⁴⁰ (PROVITA), currently operates in 16 states and the federal district.²⁴¹ Between 1998 and 2006, it protected a total of 2265 people (870 witnesses and 1395 family members).²⁴² Between 2003 and 2007, 355 people were protected in relation to executions. PROVITA's structure is defined by federal legislation, it receives a combination of federal and state funding, and is administered at the state level. In each state, a committee that includes judges, prosecutors, and others, provides policy direction

²³⁸ Republic Act No. 6981, section 3(c).

²³⁹ This is so notwithstanding the legal provision, Republic Act No. 6981, section 9: "In any case where a Witness admitted into the Program shall testify, the judicial or quasi-judicial body, or investigating authority shall assure a speedy hearing or trial and shall endeavor to finish said proceeding within three (3) months from the filing of the case."

²⁴⁰ Law No. 9.807, of the 13th of July, 1999. PROVITA was started in 1996 in Pernambuco by the NGO *Gabinete de Assessoria Jurídica às Organizações Populares* (GAJOP).

²⁴¹ Acre, Amazonas, Bahia, Ceará, Espírito Santo, Goiás, Maranhão, Mato Grosso do Sul, Minas Gerais, Pará, Paraná, Pernambuco, Rio de Janeiro, Rio Grande do Sul, São Paulo, and Santa Catarina. See Presidência da República, Secretaria Especial dos Direitos Humanos, Subsecretaria de Promoção e Defesa dos Direitos Humanos. In addition to PROVITA, the National Special Secretariat for Human Rights developed the National Programme for the Protection of Human Rights Defenders. However, it currently only operates in a few states, and does not protect many human rights defenders. According to SDDH, the National Program for the Protection of Human Rights Defenders has a list of 90 human rights defenders in Pará threatened with execution, but only 10% of these are under protection.

²⁴² See Presidência da República, Secretaria Especial dos Direitos Humanos, Subsecretaria de Promoção e Defesa dos Direitos Humanos, Coordenação-Geral de Proteção a Testemunhas, "Programa de Assistência a Vítimas e a Testemunhas Ameaçadas" (2007).

and makes final decisions on the admission and expulsion of witnesses.²⁴³ Day-to-day operations are conducted by the state's secretariat for justice in tandem with an NGO. The NGO receives government funds to relocate witnesses and help them integrate into a new community. This innovative structure, in which government officials are not actually informed of the witness's location, has provided witnesses to crimes committed by Government agents a much higher level of protection than most systems that rely solely on the Government to provide protection. However, some of the NGOs providing protection services to witnesses reported dissatisfaction with the structure of the program and questioned the long-term viability of a program that relies so extensively on NGO implementing partners.

63. In practice, some State Governments have not fulfilled their PROVITA obligations. At the time of my visit, the program in Rio de Janeiro had been operating for over a year without state funding,²⁴⁴ and the program in Pernambuco had been doing so for 5 months. Another problem identified by officials and NGO representatives responsible for PROVITA was that they face problems when there is a need to escort witnesses to court (the most dangerous time for a witness under protection), and when there is a need for emergency transportation. These services are to be provided by state police forces, but this provides an opportunity for obstruction and intimidation.

[...]

94. In many respects, the existing witness protection programs constitute a model, but reforms are also needed:

- (a) State governments should provide adequate, timely, and reliable funding;
- (b) State governments should ensure that police cooperate in escorting witnesses to court appearances in a safe and non-threatening manner;
- (c) The federal government should conduct a study on whether there are ways to protect witnesses who are unwilling to comply with the current programs' strict requirements, and on whether the use of NGOs as implementing partners should be phased out or restructured.

Report on Mission to Kenya (A/HRC/11/2/Add.6, May 2009, ¶¶ 78-80, 105-106):

78. In the Kenyan context - where many potential witnesses are justifiably afraid that testifying will lead to reprisals²⁴⁵ - an effective and reliable witness protection program is a necessary component of efforts to fight impunity. It will be one of the most vital factors in the success or otherwise of attempts to prosecute those accused of offences during the PEV, in Mt Elgon, and in relation to police killings. Without a trusted and well-functioning witness protection program, many people will simply be unwilling to testify, and there will consequently be insufficient evidence to prosecute. And without protection, far too many of those who do testify will be putting their lives at risk.

²⁴³ Law No. 9.807 of the 13th of July, 1999, Art. 4; Decree No 3.518, of the 20th of June, 2000, s. 1.

²⁴⁴ See PROVITA Rio: Centro de Defesa dos Direitos Humanos de Petrópolis (9 November 2007). This has had obvious effects on the numbers of people that can be protected by the program. In Rio de Janeiro, at November 2007, 41 people were being protected, while numbers in prior years were notably higher (2000 (70), 2001 (76), 2002 (66), 2003 (78), 2004 (68), 2005 (58), 2006 (75)).

²⁴⁵ See Appendix II: Case 5, Case 9, Case 10, Case 13, Case 22, Case 25, Case 28.

79. A number of important steps have recently been taken to set up a witness protection program. In September 2008, a witness protection law came into effect.²⁴⁶ The Attorney-General promulgated regulations pursuant to the Act in December 2008, and began the process of setting up a Witness Protection Unit in his office.²⁴⁷ But to date, witness protection exists on paper only: the Director of Public Prosecutions informed me that the unit has not yet provided protection to any witness.

80. The current design of the program is also likely to lead to significant problems in the Kenyan context. The Attorney-General is provided the “sole responsibility” to decide whether to include a witness in the witness protection program.²⁴⁸ The set-up of this program can be expected to work well where witnesses are testifying against private actors or criminal organizations. But this expectation is unlikely to hold true where witness testimony implicates police and Government officials. In light of the history of impunity and intimidation, witnesses and civil society justifiably have little faith in a program that entrusts their safety to the very system they fear.

[...]

105. A well-funded witness protection program that is institutionally independent from the security forces and from the Office of the Attorney-General should be created as a matter of urgency.

106. The international community should continue to support Kenya’s efforts to create an effective witness protection program.

²⁴⁶ The Witness Protection Act, 2006. (Commenced 1 September 2008: *see* Gazette Notice No. 110 of 2008).

²⁴⁷ The Witness Protection Regulations, 2008. The Government allocated 20 million shillings this year for the program.

²⁴⁸ The Witness Protection Act, 2006, s 5.

H. POLICE INTERNAL AFFAIRS

Report on Mission to Nigeria (E/CN.4/2006/53/Add.4, 7 January 2006, ¶¶ 52, 55-57):

52. On paper, the system for investigating police misconduct is impressive. In practice, it is too often a charade. The outcome of investigations usually seems to justify inaction or to ensure that complaints are dealt with internally through “orderly-room hearings” or the like.²⁴⁹ While police officers are certainly disciplined and some dismissed, the system has rarely worked in cases in which police are accused of extrajudicial executions. In these instances genuine investigations are rare and referral to the DPP for prosecution are even rarer. It is also not uncommon for the primary accused police officer to escape, for charges to be brought against others, and for the latter to be acquitted on the grounds either of insufficient evidence or of prosecution of the wrong officers. The result gives the appearance of a functioning investigative system, while in fact promoting the goal of de facto police impunity.

[...]

55. In 2005 the acting Inspector-General of Police (IGP) announced that “the days of extra-judiciary killings” and of “corruption in the service” must end.²⁵⁰ The question for Nigeria is how to introduce some notion of accountability. While no single country can provide a model, efforts to promote democratic policing²⁵¹ in South Africa are of major relevance.²⁵² It is generally accepted that three different levels of control are needed: internal, governmental, and societal.

56. In terms of *internal accountability* the Nigeria Police system is weak. What few statistics were made available to the Special Rapporteur in response to repeated requests indicate that few serious disciplinary measures are taken except against rogue individuals. Indeed the single greatest impediment to bringing police officers to justice for their crimes is the Nigeria Police force itself. Evidence indicates that it systematically blocks or hampers investigations and allows suspects to flee. In order to break this cycle of impunity, a new investigation and prosecution mechanism is required.

57. A ten-point police reform plan put forward by the acting IGP includes reviewing and strengthening mechanisms for public complaints of police misconduct, introducing a zero-tolerance policy on corruption, particularly in relation to roadblocks, and efforts to ensure that police obey court orders.²⁵³ The initiative is encouraging, but it needs to be implemented and

²⁴⁹ For a detailed analysis of these issues see Human Rights Watch, “*Rest in Pieces*”: *Police Torture and Deaths in Custody in Nigeria*, July 2005, Chapter X.

²⁵⁰ Quoted in W.A. Johnson, “A Memo to Mr Ehindero”, *Security and Safety*, Issue 65, 2005, p.3.

²⁵¹ Democratic policing is characterized by: respectful conduct, effective performance and transparency and accountability to the different clients or consumers of policing. D.H. Bayley, *Democratising the Police Abroad: What to Do and How to Do it*, (Washington DC, National Institute of Justice, US Department of Justice, 2001).

²⁵² See Open Society Foundation for South Africa, Strengthening oversight of police in South Africa. Report on the workshop on police accountability held on May 10th 2004 in Cape Town, available at:

<http://www.policeaccountability.co.za/Publications/Pub-Categories.asp?PubCatID=23>.

²⁵³ <http://www.nigeriapolice.org/10pointprogramme.html>.

monitored.²⁵⁴ The Police Complaints Bureaux and the Human Rights Desks set up within the Police structures since 2003 have yielded little. The offices that the Special Rapporteur saw in various states looked forlorn and determinedly unavailable and he received evidence that they had achieved little of substance. The internal vacuum must be filled since external accountability procedures can “only be effective if they complement well developed internal forms of control”.²⁵⁵

Report on Mission to Sri Lanka (E/CN.4/2006/53/Add.5, 27 March 2006, ¶ 57):

57. The frequent failure to prosecute police accused of responsibility for deaths in custody is due partly to deficiencies in internal investigation. Complaints about police misconduct are received by the Inspector General of Police (IGP), who selects either the Special Investigations Unit (SIU) or the Criminal Investigation Department (CID) to carry out an internal investigation. Internal investigations into serious incidents typically last from two to four years, and it seems likely that by no means all such complaints are investigated at all. When grave misconduct, such as torture or murder, has been alleged, the investigation is generally conducted by CID. The primary role of CID is assisting local police, and for it to also conduct internal investigations undermines both their actual effectiveness and outside perceptions of impartiality. Reform is needed, and it may be hoped that this can be spearheaded by a strong National Police Commission.²⁵⁶

[...]

Report on Mission to Brazil (A/HRC/11/2/Add.2, 23 March 2009, ¶¶ 68-72):

68. An effective system of police accountability requires both internal and external oversight mechanisms. In Brazil, both sets of mechanisms should be improved so that they might better play their complementary roles.

69. In each state, the Military Police and the Civil Police each have an Internal Affairs Department (*Corregedoria*) responsible for conducting administrative proceedings and recommending disciplinary sanctions. (In some states, the two police forces share a single Internal Affairs Department.) In the case of a crime, such as homicide, this internal affairs process will run in parallel to the criminal investigation. However, few police are sanctioned or disciplined, even for serious crimes. And many police accused of serious crimes not only remain

²⁵⁴ A proposal pending in 2005 is to establish a new Police Public Complaints Bureau for the purpose of receiving public complaints lodged against police officers. The Bureau would be granted independent powers of investigation and prosecution and have its own investigative department staffed by a permanent police squad and security service. It is unclear whether this initiative will be adopted or will be pursued independently and funded adequately. See, *The Police Public Complaints Bureau (Establishment) Bill 2005*, in particular, Sections 6 and 12.

²⁵⁵ T. Jones, “The Governance and Accountability of Policing” in Tim Newburn (ed), *The Handbook of Policing*, (Devon, Willan Publishing, 2003) p. 603.

²⁵⁶ Notably, the police disciplinary process is least effective when dealing with more senior officers. Statistics relating to “departmental lapses” show that disciplinary proceedings are almost exclusively initiated against low-ranking officers. There is a determined unwillingness to hold police officers with command responsibility accountable for torture and killings engaged in by their subordinates, whether at the disciplinary or at the criminal level. This applies to both internal and external accountability mechanisms. In 2001, constables were found responsible for 86% of “departmental lapses”; superintendents were found responsible for only 0.04% of such lapses. (*Sri Lanka Administration Report, 2001*, Appendix 1, Table 6.)

free from detention during the course of an investigation but remain on active duty. This permits police to intimidate witnesses and increases community perceptions that impunity exists for police murderers, in turn decreasing the willingness of witnesses to report crimes.

70. According to prosecutors and other informed interlocutors, the quality of work done by Internal Affairs Departments varies widely. Some conduct careful investigations and recommend appropriate sanctions. Others uncritically accept the accounts given by implicated police or simply stall the process. When the new government took office in Pernambuco they found over 300 proceedings against police stalled in Internal Affairs - waiting for the head of department to authorize the continuance of proceedings.

71. One factor contributing to poor performance is that Internal Affairs Departments are not independent of the police chain of command. Thus their effectiveness largely depends on the individual head of department. Reforms are, however, complicated. After all, the principal role of an internal affairs service is to ensure the accountability of police to their chain of command. Nevertheless, such departments should conduct investigations and recommend sanctions in an autonomous and professional manner. Various interlocutors proposed a separate career path for those working in internal affairs. Presently, officers can work in internal affairs investigating allegations of police misconduct and then return to work alongside the officers whom they had previously investigated. Clear procedures and time limits for investigations should also be followed. Another key step would be for the disciplinary sanctions recommended by internal affairs services, including recommendations of expulsion which require the governor's consent to take effect, be fully accessible to Ombudsman Offices and made public by them.

72. In addition, those police implicated in crimes constituting extrajudicial executions must be removed from active duty for the entire period of all internal affairs and criminal investigations.²⁵⁷

Follow-up report on Mission to Brazil (A/HRC/14/24/Add.4, 28 May 2010, ¶¶ 52-55):

52. In his report, the Special Rapporteur noted the need for an effective witness protection programme in order to combat impunity. He observed that many witnesses feared police, militia, or gang reprisals, and thus refused to come forward.

53. Some reports have indicated that detainees have been permitted to leave detention in order to threaten or kill witnesses to their crimes.²⁵⁸ In August 2008 in Pernambuco, indigenous leader Mozeni Araújo de Sá – a witness to two murders of Truká people – was shot to death in broad daylight.²⁵⁹ Similarly, in March 2009, a military police officer was convicted for organizing a militia to kill seven people. Three months after the trial, four relatives of the main witness were reported missing.²⁶⁰

²⁵⁷ Principle 15, Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.

²⁵⁸ Amnesty International, "Brazilian politician at risk of assassination by militia groups" (4 June 2009).

²⁵⁹ Amnesty International, *Report 2009: State of the World's Human Rights* (Brazil) (May 2009).

²⁶⁰ U.S. Department of State, *2009 Human Rights Report* (Brazil).

54. The most significant witness protection programme in Brazil is the Programa de Assistência a Vítimas e a Testemunhas Ameaçadas (PROVITA). As the Special Rapporteur observed, PROVITA is a model for witness protection in many respects, but requires some improvements. The Special Rapporteur recommended that state governments provide adequate, timely and reliable funding and that they ensure the police cooperate in escorting witnesses to court. The Special Rapporteur also recommended that the federal Government conduct a study to determine the appropriateness of the use of non-governmental organizations (NGOs) as implementing partners for the programme.

55. To date, most state governments have disbursed fewer funds than the federal Government had committed to PROVITA, except São Paulo, Ceará and Espírito Santo, which maintain adequate funding levels. These funding deficiencies undermine the ability of NGOs to fulfil their mandates, and ensure protection for witnesses. The states have also been slow in setting up systematic relocation programmes, which further weakens the objectives of PROVITA.

Report on Mission to Kenya (A/HRC/11/2/Add.6, May 2009, ¶¶ 6, 92):

6. There are six primary factors which account for the frequency with which police can kill at will in Kenya: (i) official sanctioned targeted killings of suspected criminals; (ii) a dysfunctional criminal justice system incentivizes police to counter crime by killing suspected criminals, rather than arresting them; (iii) internal and external police accountability mechanisms are virtually non-existent; there is little check on, and virtually no independent investigations of, alleged police abuses; (iv) use of force laws are contradictory and overly permissive; (v) witnesses to abuse are often intimidated, and fear reporting or testifying; and (vi) the police force lacks sufficient training, discipline and professionalism.

[...]

92. Internal and external accountability for police should be improved through the following institutional reforms:

(a) An internal affairs division should be created within the police force, with an element of autonomy from senior management, composed of police who are specially tasked to investigate complaints against the police; ...

I. OMBUDSMEN

Report on Mission to the Philippines (A/HRC/8/3/Add.2, 16 April 2008, ¶¶ 56-58):

56. The Office of the Ombudsman is responsible for investigating and prosecuting crimes and other misconduct committed by public officials.²⁶¹ However, the Ombudsman's office has done almost nothing in recent years to investigate the involvement of Government officials in extrajudicial executions. Despite having received a significant number of complaints alleging extrajudicial executions attributed to State agents, no information was provided by the Ombudsman's office indicating that it had undertaken any productive investigations.

57. The Office of the Ombudsman has surrendered its constitutionally-mandated independence from the executive branch. First, it has adopted an untenably narrow interpretation of its jurisdiction, choosing not to initiate an investigation into an extrajudicial execution unless there is already very strong evidence that a public official was responsible in the particular case. Second, the Office of the Ombudsman often operates as a *de facto* subsidiary of the Department of Justice. The NBI conducts most of its investigations. Pursuant to a Memorandum of Agreement between the DOJ and the Office of the Ombudsman, the relevant Regional State Prosecutor and other senior members of DOJ's NPS monitor and oversee the "successful prosecution and speedy disposition of Ombudsman cases". "Deputized prosecutors" from the NPS "have the primary responsibility of prosecuting Ombudsman cases", and prosecutor investigators from the Office of the Ombudsman "assist, if practicable, the Deputized Prosecutor in the prosecution of the case" and "may, with prior clearance from the Ombudsman or his Deputy, take over the prosecution of the case at any stage".²⁶² As a practical matter, these arrangements serve to all but completely subordinate the Ombudsman to the DOJ.

58. The Ombudsman insists that her office can take over a case being handled by the DOJ at any time, but it is unclear how the Ombudsman would even be aware that such a measure was necessary given her Office's lack of involvement. One NPS prosecutor at the local level explained that, in his locality, the local representative of the Ombudsman sits in the DOJ office, reviews the work of DOJ prosecutors and passes this on to the Ombudsman in Manila. It is, in his words, a "chummy" relationship, because the person from the Office of the Ombudsman is disinclined to criticize the conduct of what are, in effect, his colleagues.

Report on Mission to Brazil (A/HRC/11/2/Add.2, 23 March 2009, ¶¶ 73-75, 90):

²⁶¹ The Ombudsman has the authority and duty to investigate and prosecute on complaint or by its own initiative "any act or omission of any public official, employee, office or agency, when such act or omission appears to be illegal, unjust, improper, or inefficient", to "[d]irect" any public official "to perform and expedite any act or duty required by law, or to stop, prevent, and correct any abuse or impropriety in the performance of duties", "[d]irect" public officials to "take appropriate action against a public official or employee at fault, and recommend his removal, suspension, demotion, fine, censure, or prosecution, and ensure compliance therewith", and to "[p]ublicize matters covered by its investigation when circumstances so warrant and with due prudence". (Constitution of the Republic of the Philippines (1987), art. XI, section 13.) This unit within the Office of the Ombudsman responsible for dealing with extrajudicial executions is headed by the Deputy Ombudsman for the Military and Other Law Enforcement Offices.

²⁶² Memorandum of Agreement dated 12 November 2004 and signed by Raul M. Gonzalez, Secretary, Department of Justice and Simeon V. Marcelo, Tanodbayan, Office of the Ombudsman.

73. Police Ombudsman Offices (*Ouvidorias*) are a relatively new institution in Brazil - the first was set up in 1995 in São Paulo.²⁶³ Their precise role and powers differ slightly between the states, but in general they are empowered to receive complaints about police from the public, and may forward complaints to police Internal Affairs Departments or the Public Prosecutor's Office. They can also monitor ongoing police investigations and provide information to the public on the progress of investigations.²⁶⁴

74. The existence of Ombudsman Offices has made it possible for many people to make complaints about police behavior who otherwise would not have done so for fear of having to report such complaints directly to police.²⁶⁵ However, the effectiveness of these offices is hampered by their lack of independence, resources, and investigative powers. Ombudsman Offices are unable to conduct their own investigations and thus rely almost entirely on information provided by the internal affairs services of the police. Both factors undermine the ability of Ombudsman Offices to provide genuinely *external* oversight.

75. Efforts to strengthen the institution of the Ombudsman should keep in mind its place within the overall system of police accountability. It does not need more teeth: The Public Prosecutor's Office already has the power to prosecute police and, more broadly, to "exercise external control over police conduct".²⁶⁶ But to provide *external* accountability, it should report directly to the governor rather than to the state secretary of public security.²⁶⁷ In addition, it needs to be better equipped to gather its own information on individual cases and on broad trends and patterns of police abuse. And to provide external *accountability* it does need to better communicate the information it gathers to the general public.

[...]

90. Offices of police Ombudsman, as they exist in most states, should be reformed so as to be better able to provide external oversight:

(a) They should report directly to the state governor rather than to the state secretary of public security;

²⁶³ Decree n° 39,900, of 1 January 1995; Complementary Law n° 826, of 20 June 1997. There are now ombudsmen in 14 states, including Rio de Janeiro and Pernambuco.

²⁶⁴ For example, the Ombudsman in São Paulo has been tracking 54 (at least 11 with suspected police involvement) cases involving 89 victims of crimes from May 2006 in which the perpetrator was unknown, and making public the progress of police investigations into each killing.

²⁶⁵ In São Paulo, the Ombudsman received 3668 complaints in 2006. Of these, 476 concerned murders, of which 20% implicated the Civil Police and 68% implicated the Military Police (with the residual implicating either or both). A number of states have also created telephone hotlines (*disque-denúncia*), which have made it easier for anonymous complaints to be made. In São Paulo, for instance, 34% of complaints received in 2006 were made by telephone, with another 15% made by email. The existence of the hotline has also played an important role in information gathering on death squads in Pernambuco.

²⁶⁶ Constitution of Brazil, Art. 129(VII).

²⁶⁷ Additional measures for further ensuring the independence of Ombudsman Offices recommended by the parliamentary commission of inquiry into extermination groups in the Northeast should also be given careful consideration. See *Relatório Final da Comissão Parlamentar de Inquérito do Extermínio no Nordeste*. Criada por meio do Requerimento n° 019/2003 - destinada a "Investigar a ação criminosa das milícias privadas e dos grupos de extermínio em toda a região nordeste" - (CPI - extermínio no nordeste), pp. 565-566.

- (b) They should be provided with the resources and legal powers necessary to reduce dependence on information from the internal affairs services of the police forces;
- (c) They should issue regular public reports providing accessible information on patterns of police abuse and on the effectiveness of disciplinary and criminal proceedings. This information should be compiled so as to enable meaningful comparisons across time and geographical areas;
- (d) In order for them to provide more reliable information on the strengths and weaknesses of existing policing strategies in terms of both respecting and protecting rights, they should be provided resources to conduct or commission surveys on citizen experiences with crime and the police.

Follow-up report on Mission to Brazil (A/HRC/14/24/Add.4, 28 May 2010, ¶¶ 58-61):

58. In his report, the Special Rapporteur recognized the important role for police ombudsman offices in contributing to police oversight, and he encouraged the Government to strengthen the institution through more resources, powers and independence.²⁶⁸

59. Since the Special Rapporteur's visit, the São Paulo office has taken some important proactive measures to address police accountability. The office has started a project to quickly send information on suspected unlawful police killings to the Attorney-General, who forwards them to the relevant prosecutor. In this way, reporting delays by the Civil Police can be circumvented, and prosecutors' work can be focused on suspect cases. The office also makes data on police killings available on its website.

60. Generally, however, all police ombudsman offices continue to have restrictive mandates, independence and budgets. The Rio de Janeiro Police Ombudsman is still selected by the State Secretary for Security (who is also responsible for the police), and neither the Pernambuco or Rio de Janeiro offices appear to publicly disseminate data on police killings.

61. The Special Rapporteur notes the positive announcement in the information provided by the Government for this follow-up report that one of its strategic targets (within the PNDH-3 framework) is to "establish independent police ombudsman units" for the federal police departments.²⁶⁹

²⁶⁸ A/HRC/11/2/Add.2, paras. 75, 90.

²⁶⁹ Information provided by Brazil to the Special Rapporteur in the preparation of this follow-up report, para. 22.

J. NATIONAL POLICE COMMISSIONS

Report on Mission to Nigeria (E/CN.4/2006/53/Add.4, 7 January 2006, ¶¶ 55-58, 106):

55. In 2005 the acting Inspector-General of Police (IGP) announced that “the days of extra-judiciary killings” and of “corruption in the service” must end.²⁷⁰ The question for Nigeria is how to introduce some notion of accountability. While no single country can provide a model, efforts to promote democratic policing²⁷¹ in South Africa are of major relevance.²⁷² It is generally accepted that three different levels of control are needed: internal, governmental, and societal.

56. In terms of *internal accountability* the Nigeria Police system is weak. What few statistics were made available to the Special Rapporteur in response to repeated requests indicate that few serious disciplinary measures are taken except against rogue individuals. Indeed the single greatest impediment to bringing police officers to justice for their crimes is the Nigeria Police force itself. Evidence indicates that it systematically blocks or hampers investigations and allows suspects to flee. In order to break this cycle of impunity, a new investigation and prosecution mechanism is required.

57. A ten-point police reform plan put forward by the acting IGP includes reviewing and strengthening mechanisms for public complaints of police misconduct, introducing a zero-tolerance policy on corruption, particularly in relation to roadblocks, and efforts to ensure that police obey court orders.²⁷³ The initiative is encouraging, but it needs to be implemented and monitored.²⁷⁴ The Police Complaints Bureaux and the Human Rights Desks set up within the Police structures since 2003 have yielded little. The offices that the Special Rapporteur saw in various states looked forlorn and determinedly unavailable and he received evidence that they had achieved little of substance. The internal vacuum must be filled since external accountability procedures can “only be effective if they complement well developed internal forms of control”.²⁷⁵

58. In terms of *governmental accountability*, the Police Service Commission is charged with police discipline, but has opted to refer all complaints of extrajudicial police killings back to the police for investigation. The Commission’s mandate is potentially empowering. But despite

²⁷⁰ Quoted in W.A. Johnson, “A Memo to Mr Ehindero”, *Security and Safety*, Issue 65, 2005, p.3.

²⁷¹ Democratic policing is characterized by: respectful conduct, effective performance and transparency and accountability to the different clients or consumers of policing. D.H. Bayley, *Democratising the Police Abroad: What to Do and How to Do it*, (Washington DC, National Institute of Justice, US Department of Justice, 2001).

²⁷² See Open Society Foundation for South Africa, Strengthening oversight of police in South Africa. Report on the workshop on police accountability held on May 10th 2004 in Cape Town, available at: <http://www.policeaccountability.co.za/Publications/Pub-Categories.asp?PubCatID=23>.

²⁷³ <http://www.nigeriapolice.org/10pointprogramme.html>.

²⁷⁴ A proposal pending in 2005 is to establish a new Police Public Complaints Bureau for the purpose of receiving public complaints lodged against police officers. The Bureau would be granted independent powers of investigation and prosecution and have its own investigative department staffed by a permanent police squad and security service. It is unclear whether this initiative will be adopted or will be pursued independently and funded adequately. See, *The Police Public Complaints Bureau (Establishment) Bill 2005*, in particular, Sections 6 and 12.

²⁷⁵ T. Jones, “The Governance and Accountability of Policing” in Tim Newburn (ed), *The Handbook of Policing*, (Devon, Willan Publishing, 2003) p. 603.

efforts by one or two excellent commissioners, its performance has been dismal and self-restraining.²⁷⁶ Its Quarterly Reports to the President are not published and present a dismal chronicle of rubber-stamping decisions taken by the police, coupled with inaction in relation to pressing concerns. A radical overhaul of its procedures and composition is warranted.

[...]

106. *Police reform*

(a) There should be an independent external review of the Police Service Commission, taking account of recent South African reforms, designed to establish an effective police accountability system. The Commission needs (i) commissioners committed to achieving results; (ii) the capacity to collect and disseminate information on police misconduct; (iii) independence from the Nigeria Police, including its own investigative capacity; (iv) assured funding; and (v) an obligation to publish its results;²⁷⁷

Report on Mission to Sri Lanka (E/CN.4/2006/53/Add.5, 27 March 2006, ¶¶ 51, 57, 62-65, 80-82):

51. The lessening of tensions following the February 2002 ceasefire provided an ideal opportunity to transform the police force and introduce effective accountability measures. This has happened to some extent. In 2002 the Constitution was amended to establish an independent National Police Commission (NPC) with power over police discipline and a mandate to respond to public complaints. The NPC and the Human Rights Commission (HRC) have undertaken promising initiatives - but their efforts will be thwarted without political support and adequate resources. The other half of the problem is the broader deficiency of the Sri Lankan system of criminal justice. Progress requires transforming the culture and practices of police, prosecutors, and the judiciary. This is a daunting but not a hopeless task – these institutions have functioning bureaucracies with no small number of sophisticated and well-intentioned officials.

[...]

57. The frequent failure to prosecute police accused of responsibility for deaths in custody is due partly to deficiencies in internal investigation. Complaints about police misconduct are received by the Inspector General of Police (IGP), who selects either the Special Investigations Unit (SIU) or the Criminal Investigation Department (CID) to carry out an internal investigation. Internal investigations into serious incidents typically last from two to four years, and it seems likely that by no means all such complaints are investigated at all. When grave misconduct, such as torture or murder, has been alleged, the investigation is generally conducted by CID. The primary role of CID is assisting local police, and for it to also conduct internal investigations undermines both

²⁷⁶ Some of its members are alleged to have accepted official cars provided by the Police Force whose behaviour they are supposed to monitor.

²⁷⁷ See generally Themba Masuku, *Strengthening Democratic Policing in South Africa: Enhancing and Coordinating the Internal and External Accountability Systems of the South African Police Service*, (Braamfontein, Centre for the Study of Violence and Reconciliation, 2005).

their actual effectiveness and outside perceptions of impartiality. Reform is needed, and it may be hoped that this can be spearheaded by a strong National Police Commission.²⁷⁸

[...]

62. The shortcomings of law enforcement and the justice system clearly require reforms of the relevant institutions. But independent bodies can play an important role in driving the reform process. While both the National Police Commission and the Human Rights Commission) have made valuable contributions, they lack resources and, even more importantly, political support.

63. The HRC has been acting as an independent oversight body for complaints concerning police conduct since 1997.²⁷⁹ Its mandate is to investigate and respond to violations of fundamental rights under the Constitution and human rights under international law, including the right to life. It can receive complaints, and its investigations are facilitated by statutory powers to, for instance, pay unannounced visits to police stations and other places of detention. It has exercised its mandate with regard to torture cases, and is currently conducting an inquiry into the police shooting of criminal suspects. While the Commission lacks the power to impose remedial and preventative measures, it is empowered to recommend prosecutions and to refer cases to the courts. While it has the potential to play a crucial role, it lacks the necessary resources. Thus, for instance, it does not have enough vehicles to respond to all major mistreatment complaints by visiting detention places.

64. The NPC was established in 2001 by the Seventeenth Amendment to the Constitution. While it has a mandate to conduct independent investigations²⁸⁰ and effective disciplinary procedures for police misconduct, its long-term effectiveness is threatened by the lack of a strong constituency supporting its independence. At one level this is unremarkable, given that many interlocutors reported a long history in Sri Lanka of politicians influencing appointments, transfers and promotions of police. Thus, vesting administrative powers over the police in an independent body promised to replace patronage and politics with professionalism. While most members of civil society and Government that I talked with had favourable impressions of the

²⁷⁸ Notably, the police disciplinary process is least effective when dealing with more senior officers. Statistics relating to “departmental lapses” show that disciplinary proceedings are almost exclusively initiated against low-ranking officers. There is a determined unwillingness to hold police officers with command responsibility accountable for torture and killings engaged in by their subordinates, whether at the disciplinary or at the criminal level. This applies to both internal and external accountability mechanisms. In 2001, constables were found responsible for 86% of “departmental lapses”; superintendents were found responsible for only 0.04% of such lapses. (*Sri Lanka Administration Report, 2001*, Appendix 1, Table 6.)

²⁷⁹ The HRC was established pursuant to the Human Rights Commission of Sri Lanka Act of August 1996 available at <http://www.hrc-srilanka.org/docs/HRAcfe.pdf>. In 2002 it was brought under the Seventeenth Amendment to the Constitution.

²⁸⁰ Apart from its disciplinary powers, discussed below, the NPC has an investigate mandate to “entertain and investigate public complaints and complaints of any aggrieved person made against a police officer or the police service, and provide redress in accordance” with the law. (Constitution, Article 155(G)(2).) The NPC’s Public Complaints Investigation Unit (PCIU) has been operating since October 2004. While the PCIU remains in its infancy, the plan is to take a multi-pronged approach. A centralized office will investigate especially serious complaints, such as summary execution and torture, determine disciplinary sanctions, and report cases to the Attorney-General as appropriate. Other complaints, especially of police inaction, will be resolved by staff in the field engaging directly with local police stations and still others will be delegated to the IGP. This approach promises to be fruitful if the NPC receives the resources and political support it needs.

NPC's efforts thus far, some also feared that, in struggling to insulate the police from politics, it would fall victim to politics itself.²⁸¹

65. The gap between theory and practice is illustrated by a turf war that played out over much of 2005. In March the NPC provided the IGP with a list of 106 officers to be interdicted (suspended), pursuant to the Establishment Code, due to their indictments for torture. I received varying accounts of the subsequent events from persons inside and outside of Government. Some insisted that no one had yet been interdicted; others that some had been interdicted but only after a delay of many months. According to the IGP, he did not move immediately because of the need to double-check the list provided by the NPC against his own files to avoid any errors. He reported to me that he found a few such errors and then proceeded to interdict the remaining officers. To have interdicted the officers based solely on the NPC's list would, he insisted, have compromised the due process rights of the officers. But this reflects a fundamental misunderstanding of the institutional structure set up by the Seventeenth Amendment. The IGP was given a purely consultative role subordinate to the NPC's power to discipline officers; while the NPC may well make mistakes, those are its responsibility.²⁸² Unless the NPC's independence is ensured in practice, its great potential will remain unrealized.

[...]

80. The members of the National Police Commission should be promptly appointed.

81. The Government should publicly confirm that it will insist upon respect for the Constitution's allocation of powers between the NPC and the IGP. Accordingly, the IGP should play only a consultative role in the NPC's exercise of its "powers of promotion, transfer, disciplinary control and dismissal".²⁸³

82. The Government should provide the NPC with the resources required to enable it to effectively exercise its investigative and disciplinary powers.

²⁸¹ I met only with the NPC's secretariat since the Commissioners' mandates had expired and new members had not yet been appointed. While this was due to a political stalemate blocking the appointment of members of the Constitutional Council, concern was expressed by some that there might be a lack of political will to support the NPC and the other independent commissions created by the Seventeenth Amendment. At the time of writing, this worrying situation persisted. "Govt keen to resolve CC impasse", *Daily News*, 17 December 2005.

²⁸² "The appointment, promotion, transfer, disciplinary control and dismissal of police officers other than the Inspector-General of Police, shall be vested in the Commission. The Commission shall exercise its powers of promotion, transfer, disciplinary control and dismissal in consultation with the Inspector General of Police." Constitution, Article 155(G)(1)(a).

²⁸³ Article 155G(1)(a) of the Constitution. The NPC may delegate this power, but has not and should not. See Article 155J.

K. POLICE OVERSIGHT BOARDS

Report on Mission to Kenya (A/HRC/11/2/Add.6, May 2009, ¶¶ 33-37):

33. External oversight of the police - through ombudsmen, oversight boards, or other institutional models - is essential in any system designed to ensure police accountability. The Kenyan police have long lacked such oversight, and this is a key systemic flaw ensuring impunity and continued killings.

34. While the police have demonstrated little will to promote real accountability, they should in fact be the first to support improved oversight. It would permit them to demonstrate to the public that they are professional, transparent, and trustworthy.

Public Complaints Standing Committee

35. A Public Complaints Standing Committee (PCSC) was set up on 21 June 2007.²⁸⁴ Its mandate is to receive complaints from the public against public servants, including the judiciary and police. I met with the PCSC, and its members are serious, and well-intentioned. However, the PCSC has no investigative capacity, and - short of the ability to receive complaints and channel them to the relevant Government department for response - no power. In fact, the PCSC often refers cases to the KNCHR because of the KNCHR's greater capacity to investigate and follow-up on cases. At the time of my visit to Kenya, the PCSC had three complaints of killings by police before it. The complainants conducted their own investigations. The PCSC brought the cases to the attention of the police, but no progress had been made. The PCSC clearly does not have the teeth necessary to bring to account police perpetrators of abuse.

Police Oversight Board

36. On 4 September 2008, the Minister of State for Provincial Administration and Internal Security established a Police Oversight Board (POB).²⁸⁵ While the creation of such a board should have been a positive, it exists on paper only, devoid of offices, a secretariat, any full-time members, and the powers it would need to be effective.

37. It can "receive" complaints from the public and "evaluate" them, but its investigative powers are entirely inadequate. It can do no more than make recommendations to the Commissioner of Police, and has no authority to enforce its recommendations, make any binding decisions, or impose disciplinary measures on police officers. The board was set-up not by legislation, but by the Minister through a gazette notice. It can thus be dismantled by decision of the Minister. Its members are appointed and dismissed by the Minister, and no requisite qualifications are set out. In sum, the board lacks the independence and powers required to achieve even minimal accountability.

²⁸⁴ The Kenya Gazette, "Public Complaints Standing Committee Establishment", Gazette Notice No 5826, 29 June 2007.

²⁸⁵ The Kenya Gazette, Vol CX-No.71, Gazette Notice No. 8144, "Police Oversight Board", Nairobi, 4 September 2008.

L. CORONERS

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

90. The Nigeria Police informed the Special Rapporteur that “[c]oronial inquiries [have] been conducted in all relevant cases, however records are not available ...”.²⁸⁶ According to virtually every other source, however, coroners are an endangered species and inquiries a rarity. It is unsurprising that the records are unavailable.

91. In practice, unspecialized magistrates act as coroners. It is commonplace for pathologists to sign reports without examining the body and when police killings are involved, there is often no signature.

²⁸⁶ See Figures provided by the Inspector-General of Police, 2 July 2005 at p. 2.

M. RELATIONSHIP BETWEEN POLICE AND PROSECUTORS

Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009, ¶¶ 56-57):

56. In addition to the many killings of Afghan civilians which occur in the context of the armed conflict, Afghans also face insecurity from a general lack of law and order. Very few criminal murder cases are properly investigated or prosecuted and few perpetrators are convicted.²⁸⁷ This impunity is due to failings in the functioning of the criminal justice system. Although practice varies considerably, the criminal justice system's formal structure is similar to that of many civil law countries.²⁸⁸ Generally, police report crimes to the prosecutor, who investigates on his own or in collaboration with the police.²⁸⁹ If the prosecutor finds sufficient evidence against the suspected perpetrator, he submits an indictment to the District Court.²⁹⁰ The decision of the District Court may be appealed to the Provincial Court.²⁹¹ Recourse to the Supreme Court may be had if the lower court's decision involved legal error or was based on unlawfully collected evidence.²⁹² The Supreme Court may also appoint a committee to revise a decision based on newly discovered evidence.²⁹³ Despite these formally appropriate procedures, I received many complaints that killings are not investigated, that prosecutions are not pursued, and that the judiciary corruptly exonerates many individuals.

57. Part of the problem at the early stages of crime detection and investigation is that there is a lack of cooperation between the police and the prosecutors. Constitutionally the police engage in "detection" and the prosecutors in "investigation". This appears not to work well in practice. In the past, it has been suggested that the Minister of Interior (who can issue orders binding on the police) and the Attorney General (who can issue binding orders on the prosecutors) meet as part of a committee, agree on how to cooperate on the combined process of detection and investigation, and simultaneously issue the appropriate orders. This has not come to pass.

[...]

85. The proper investigation of crimes is hampered by poor coordination between police and prosecutors. The relationship between police and prosecutors needs to be improved: The Minister of Interior and the Attorney General should agree on how to cooperate on the combined

²⁸⁷ The Ministry of Interior provided statistics on the number of crimes that were detected by the ANP, that were delivered to a prosecutor, and that resulted in a judicial verdict. For all offences, the MoI reported that 100% of cases detected were referred to a prosecutor. See table in full report, FN 46.

The figures given for judicial verdicts obtained were provided by the MoI rather than by the judiciary, and the true figures are likely higher. According to the MoI, "It's worth mentioning that the continuous efforts of this organ to obtain the exact number of all three courts' decisions about criminal cases have not ended with an acceptable result, due to a lack of coordination and interest of the judicial organs with police in most of the provinces. ... There are usually tangible mistakes in this regard."

²⁸⁸ The system's formal structure is laid out in the *Interim Criminal Procedure Code of 2004* (ICPC) together with other statutes and the Constitution. However, it is generally acknowledged that there is weak compliance with some of this code's detailed provisions. Moreover, many cases are dealt with in customary legal systems.

²⁸⁹ ICPC, arts. 21, 23.

²⁹⁰ ICPC, art. 39.

²⁹¹ ICPC, arts. 25, 63.

²⁹² ICPC, art. 71.

²⁹³ ICPC, arts. 81, 83.

process of detection and investigation of crimes, and simultaneously issue the appropriate orders to police and prosecutors.

Report on Mission to the Philippines (A/HRC/8/3/Add.2, 16 April 2008, ¶¶ 51):

51. The current system so discourages cooperation between prosecutors and police that each is tempted to simply blame the other for failing to achieve convictions. Prosecutors rather than judges make the determination whether the evidence provides probable cause for the charges to be brought. During this preliminary hearing, prosecutors are expected to show absolute impartiality. Prosecutors thus perceive themselves unable to guide the police with respect to the testimony and physical evidence that must be obtained to make a case. Even when prosecutors find the evidence presented by the police at the preliminary hearing insufficient, they seldom provide a reasoned explanation for that insufficiency for fear of appearing biased. Police thus lack expert guidance in building cases. While this problem is deeply embedded in the culture of the criminal justice system, changes in the role of the prosecutor could be effected by amending the Rules of Criminal Procedure, which are promulgated by the Supreme Court.²⁹⁴ The Supreme Court should use this power to require prosecutors to provide reasoned decisions for probable cause determinations and to insist that prosecutors take a more proactive role in the ensuring the proper investigation of criminal cases.

Report on Mission to Brazil (A/HRC/11/2/Add.2, 23 March 2009, ¶¶ 57-60, 90):

57. The Public Prosecutor's Office (*Ministério Público*) is a widely-respected institution in Brazil, and I was told of many examples of prosecutors who had taken action to hold to account offending police officers. The independence of the Public Prosecutor's Office from both the executive and the judiciary is provided by the Constitution, and the employment guarantees provided to individual prosecutors ensure that they have a high-level of independence in practice.²⁹⁵

58. In areas in which progress has been made against police impunity, prosecutors have generally played a key role both in pursuing criminal proceedings and ensuring evidence gathering. In some instances, prosecutors have cooperated closely with Civil Police investigations; in others, prosecutors have re-interviewed witnesses and gathered evidence on their own initiative.

59. In practice, the prosecutors' investigative role has often been discouraged by Civil Police and impeded by legal controversy over prosecutorial powers. First, Civil Police show little awareness of the value of consulting with prosecutors to make sure that the evidence they are gathering will

²⁹⁴ See Constitution of the Republic of the Philippines (1987), art. VIII, section 5: "The Supreme Court shall have the following powers: . . . Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the integrated bar, and legal assistance to the under-privileged. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase, or modify substantive rights. Rules of procedure of special courts and quasi-judicial bodies shall remain effective unless disapproved by the Supreme Court."

²⁹⁵ It is also worth noting that the Public Prosecutor's Office has a broad range of other, non-prosecutorial powers and responsibilities with respect to protecting individual rights and exercising external control over police activities: Constitution of Brazil, Arts. 127-129.

suffice to sustain criminal charges. For this reason, they seldom inform prosecutors until they reach a stage at which the law requires them to do so. This will typically not be until 30 days after the crime took place, by when the crime scene will almost certainly be destroyed, bodies are likely to have been buried, and witnesses may have fled. Second, some have challenged the legal power of prosecutors to gather evidence, arguing that only the Civil Police have the right to conduct investigations. While this argument appears to be motivated more by institutional jealousies than constitutional analysis, the courts have not provided a definitive answer, meaning that prosecutors who gather evidence cannot be certain that it will prove admissible at trial.

60. From the perspective of combating impunity for violations of the right to life, it would be a significant step forward if Civil Police routinely consulted with prosecutors from the beginning of homicide investigations. Moreover - while it goes without saying that the Civil Police will and should remain the main institution carrying out criminal investigations - in cases in which the police are implicated, prosecutors should routinely conduct their own independent inquiries to ensure the appearance and reality of justice. The practice of the Public Prosecutor's Office in São Paulo of having all "resistance" cases handled by a specialist prosecutor is notable in this regard.

[...]

95. The involvement of the Public Prosecutor's Office in building criminal cases must be strengthened:

- (a) State governments should ensure that Civil Police notify public prosecutors at the onset of their investigations so that prosecutors can provide timely guidance on what evidence must be gathered in order to obtain a conviction;
- (b) The legal authority of public prosecutors to independently gather evidence admissible in court should be unequivocally affirmed;
- (c) Public prosecutors should routinely conduct their own investigations into the lawfulness of killings by the police.

Follow-up report on Mission to Brazil (A/HRC/14/24/Add.4, 28 May 2010, ¶¶ 47-50):

47. During his mission the Special Rapporteur observed that the Public Prosecutor's Office is a widely respected institution and that, where progress had been made against police impunity, prosecutors had often played a key role. However, their role in investigations, particularly important with respect to police killings, was impeded in practice because the Civil Police often did not notify prosecutors of crimes until after 30 days, and because of challenges to prosecutors' legal power to conduct investigations. The Special Rapporteur recommended that the Civil Police consult with prosecutors from the start of a homicide investigation, that prosecutors conduct independent inquiries where police were implicated in a killing, and that the right of prosecutors to conduct their own investigations should be clarified and affirmed.

48. Today, the Civil Police continue to delay notification of police killings to prosecutors for 30 days, and sometimes even longer,²⁹⁶ seriously undermining the ability of prosecutors to gather important evidence. Disputes over the legal power of prosecutors to investigate are ongoing at

²⁹⁶ See, e.g., Human Rights Watch, *Lethal Force*, pp. 101-102.

the time of this report, although the Special Rapporteur welcomes comments by the Government that “today the majority of Court decisions favours” investigations by prosecutors.²⁹⁷

49. There is currently no specialized prosecution unit dedicated to police killings in either Rio de Janeiro or São Paulo. Instead, police killings are assigned to prosecutors on a geographic basis, together with other killings.²⁹⁸ In São Paulo, the State Prosecutor’s office has a Special Action Group of External Control of Police Activities (GECEP), which has a mandate for police oversight, but cannot currently cover police intentional killings, or any abuses by the military police.²⁹⁹ The Special Rapporteur was informed that the Attorney- General for São Paulo has proposed that the GECEP be given the authority to investigate police killings, including “resistance killings” in the greater São Paulo region. This would be a key step in addressing police impunity for killings. It is important that the proposal be approved by the college of appellate-level prosecutors, and that it have the mandate to investigate off-duty police killings (including those by militias and death squads), and killings by both civil and military police. It is also essential that it be given the necessary resources and staff to function effectively.

Report on Mission to Guatemala (A/HRC/4/20/Add.2, 19 February 2007, ¶¶ 43-46):

43. To understand the causes of this low conviction rate, I spoke with officials of the principal organs of Guatemala’s criminal justice system, including the Policía Nacional Civil (PNC), the Ministerio de Gobernación (which oversees the PNC), the Ministerio Público (which prosecutes criminal cases), and the Supreme Court of Justice. These institutions are responsible for the various phases of the criminal justice process, from crime detection and prevention, to investigation and prosecution, to the adjudication of individual criminal responsibility.

44. The PNC is responsible for crime detection and prevention, but with rising crime rates the public has little confidence in its efforts.³⁰⁰ In our discussion, the Ministro de Gobernación argued that the principal failings of the PNC were due to a lack of resources. Guatemala has 19,000 police officers, 5,000 of which participate in specialized units - largely devoted to protecting government buildings, foreign embassies, and individuals - rather than in general crime prevention. Of the remaining 14,000, approximately 7,000 are serving each day, and 3,500 during a given shift. A number of my interlocutors suggested that, for Guatemala to be in line with the policing levels achieved in El Salvador, it would require between 35,000 and 38,000 police - a doubling of the force. The Government has supplemented the number of police by instituting joint patrols between the PNC and the military. Several thousand soldiers are participating in these joint patrols, and a typical patrol will consist of 10 soldiers and 2 police officers. Notwithstanding the need to end the use of social cleansing by elements with the police, as discussed in chapter III (A), there is no question but that Guatemala needs a far larger police force, but enlargement would need to be accompanied by thoroughgoing reform of existing

²⁹⁷ Information provided by Brazil to the Special Rapporteur in the preparation of this follow-up report, para. 52.

²⁹⁸ Ibid., p. 102.

²⁹⁹ Ibid., p. 103.

³⁰⁰ In a survey conducted in the municipality of Antigua in August 2006 of a representative sample of 410 residents, only 10 per cent believed the actions of the PNC against crime to be “adecuada” or “muy adecuada”. *Informe de un Estudio Cuantitativo de Victimización en el Municipio de Antigua Guatemala*, designed and executed by Aragón & Asociados a solicitud de l’Asociación para la Prevención del Delito (APREDE).

arrangements. It is, however, far from clear that the use of large patrols comprising primarily persons untrained in policing techniques is beneficial even as a short-term measure; moreover, this remilitarization of policing marks a significant step back from the aspirations expressed in the Peace Accords.

45. The challenges of investigation and prosecution confront three key obstacles: a problematic division of responsibility, severely limited resources, and endemic corruption.

46. Responsibility for investigating crimes is shared by the PNC and the Ministerio Público, and the latter then prosecutes suspected perpetrators. The majority of investigative personnel are employed by the PNC. However, by law the PNC investigators must comply with the direction of those from the Ministerio Público in investigating crime scenes. This arrangement requires close cooperation between the investigators of the PNC and of the Ministerio Público. Despite an inter-institutional accord on improving criminal investigations reached by the two bodies in 2004, by all accounts the level of coordination and cooperation is often unsatisfactory, making many investigations inefficient and often unproductive in terms of successfully pursuing prosecution. While disappointing, the failure of a system in which a single function is divided between institutions with inevitably competing interests is unsurprising and deeper reforms should be considered. One possible model, from which much might be learned, is the approach taken by Chile in establishing a system of investigative prosecutors.

N. CORRUPTION AND IMPUNITY

Report on Mission to the Democratic Republic of the Congo (A/HRC/14/24/Add.3, 1 June 2010, ¶¶ 96-98):

96. The Government's failure to hold perpetrators to account is the central factor driving continued human rights abuses in the DRC. The justice system is in shambles, and impunity is widespread for all forms of killings. Alleged war criminals continue to hold senior command positions in the armed forces, massacres are committed without sanction or investigation, and nearly all extrajudicial executions remain unpunished.

97. I held many meetings with military and civilian judges and other experts on the criminal and military justice systems. The institutional, financial, resource, and structural problems in those systems are generally well-acknowledged.³⁰¹

As the Ministry of Justice's recent Roadmap to Justice itself states, "The background, the causes, and the diagnosis of the ills and dysfunctions that plague our system of justice, have been the objects of numerous reports, studies, workshops, colloquia and seminars."

98 Corruption and political interference are key problems. Accused individuals with money or connections can escape punishment with relative ease. Corruption extends through the entire justice system: police request money to arrest or release alleged perpetrators; judges take bribes to decide cases; and registrars and other officials request money to enforce judgments. Magistrates told me of frequent attempts to bribe them, and of threats against their careers and lives. Political interference also frequently affects the appointment, career path, and removal of judges, although judges rarely speak publicly of such matters for fear of retaliation. The newly established High Council of Judicature is a positive measure to increase oversight of judges, and to promote independent appointments, although at the time of this report it was not yet fully operational.

Report on Mission to Nigeria (E/CN.4/2006/53/Add.4, 7 January 2006, Summary, ¶¶ 39-41, 44, 55-57, 59, 85, 102):

There is no single starting point for reform. A necessary first step is that each institution accepts its share of responsibility. While this report focuses on major problems, there are also many encouraging developments. In particular, the fight against corruption at all levels is closely linked to issues of extrajudicial executions, and recent initiatives have succeeded in targeting some of the most prominent cases. In August 2005, President Obasanjo acknowledged that extrajudicial executions are widespread and made a clear commitment to rooting out this practice and punishing those responsible. Earlier in 2005, the acting Inspector-General of Police announced that "the days of extrajudiciary killings" must end. Fortunately, there are elements within the police and the armed forces committed to promoting reforms. Much will rest on their

³⁰¹ For detailed recent examinations, see: International Bar Association and International Legal Assistance Consortium, *Rebuilding courts and trust: An assessment of the needs of the justice system in the DRC* (August 2009); AFRIMAP and the OSI for Southern Africa, *The DRC: Military justice and human rights – An urgent need to complete reforms* (2009).

shoulders. To further this process of reform, the present report identifies measures required to improve the situation.

[...]

39. The Nigeria Police have grown significantly under civilian rule to 325,000 in 2005. But the numbers are still inadequate, their level of training and funding insufficient, and their morale low. Although Nigeria suffers from high violent crime rates, the force is chronically under-resourced. All too often new recruits pay for their own uniforms, salaries are delayed for many months, equipment required in an emergency needs to be borrowed from other agencies,³⁰² and complainants (even those alleging murder) are asked to cover the costs of the police investigation including travel and accommodation. Where they cannot afford to do so, the investigation fizzles. In addition, corruption is widespread among police officers, in part due to very low salaries.³⁰³

40. For these reasons, and because police tactics are often marked by the arbitrary and unnecessary use of force, including high rates of extrajudicial killings, there is little public confidence in the police. Indeed, they are criticized by virtually all sectors of civil society.³⁰⁴

41. Common complaints include the carrying of firearms in public by un-uniformed police, the wearing of uniforms by police when they are off-duty,³⁰⁵ and the widespread practice of police requiring payment to ensure the safe delivery of goods. As a result, the overriding public attitude towards the police is one of fear and mistrust.

[...]

44. The case of the Enugu Six³⁰⁶ is telling in that the Nigerian Civil Liberties Organisation was able to predict, with chilling accuracy, the execution of six alleged armed robbers. Tragically, the practice of summarily executing suspected criminals by the Nigeria Police is widespread and systematic. This is both illegal and counter-productive. There are no circumstances under which summary executions are legally permissible let alone justifiable. The practice is counter-productive for several reasons. Summary executions of suspects, many of whom are innocent of

³⁰² In responding to communal violence in Kano, for example, the police were loaned unmarked vehicles from the Governor's office, without which they would have been unable to respond. The use of unmarked vehicles makes it very difficult to identify alleged wrongdoers in any subsequent investigation of human rights violations.

³⁰³ Information provided to me by the Inspector-General of Police indicated that the entry level salary for a Nigerian Police officer is 65,700 Naira (approximately \$500 USD) per year. This figure, however, is misleading in that it does not include standard allowances that take the annual salary to around 100,000 Naira (\$760) per year.

³⁰⁴ The lead editorial in a security-focused magazine observed that the "[o]peratives of Nigeria Police are dreaded agents of death who decimate human lives at will." The editorial continued: "Looking scruffy and ferocious in different shades of gear, operatives of Nigeria Police would storm the roads armed with guns, horsewhips and batons ... It is business time. And the road and its users no longer know peace. From [the police] standpoint, everybody is a criminal and every crime has a price." W.A. Johnson, "A Memo to Mr Ehindero", *Security and Safety*, Issue 65, 2005, p.3.

³⁰⁵ "Hordes of policemen are seen engaged in illegal activities, using their uniforms and other official paraphernalia to confer legitimacy on their criminal pursuits". W.A. Johnson, "A Memo to Mr Ehindero", *Security and Safety*, Issue 65, 2005, p.3.

³⁰⁶ See notes 8-11 above.

the crime of which they have been accused, does nothing to stem the high rate of armed robbery in Nigeria. For all the killings at the hands of the police, this rate has shown no diminution. The practice also confirms the public sense of the police as being out of control, brutal, and relatively unconcerned with protecting the public and upholding the law. Fundamentally different police tactics are thus required by law and for pragmatic reasons.

[...]

55. In 2005 the acting Inspector-General of Police (IGP) announced that “the days of extra-judiciary killings” and of “corruption in the service” must end.³⁰⁷ The question for Nigeria is how to introduce some notion of accountability. While no single country can provide a model, efforts to promote democratic policing³⁰⁸ in South Africa are of major relevance.³⁰⁹ It is generally accepted that three different levels of control are needed: internal, governmental, and societal.

56. In terms of *internal accountability* the Nigeria Police system is weak. What few statistics were made available to the Special Rapporteur in response to repeated requests indicate that few serious disciplinary measures are taken except against rogue individuals. Indeed the single greatest impediment to bringing police officers to justice for their crimes is the Nigeria Police force itself. Evidence indicates that it systematically blocks or hampers investigations and allows suspects to flee. In order to break this cycle of impunity, a new investigation and prosecution mechanism is required.

57. A ten-point police reform plan put forward by the acting IGP includes reviewing and strengthening mechanisms for public complaints of police misconduct, introducing a zero-tolerance policy on corruption, particularly in relation to roadblocks, and efforts to ensure that police obey court orders.³¹⁰ The initiative is encouraging, but it needs to be implemented and monitored.³¹¹ The Police Complaints Bureaux and the Human Rights Desks set up within the Police structures since 2003 have yielded little. The offices that the Special Rapporteur saw in various states looked forlorn and determinedly unavailable and he received evidence that they had achieved little of substance. The internal vacuum must be filled since external accountability procedures can “only be effective if they complement well developed internal forms of control”.³¹²

³⁰⁷ Quoted in W.A. Johnson, “A Memo to Mr Ehindero”, *Security and Safety*, Issue 65, 2005, p.3.

³⁰⁸ Democratic policing is characterized by: respectful conduct, effective performance and transparency and accountability to the different clients or consumers of policing. D.H. Bayley, *Democratising the Police Abroad: What to Do and How to Do it*, (Washington DC, National Institute of Justice, US Department of Justice, 2001).

³⁰⁹ See Open Society Foundation for South Africa, Strengthening oversight of police in South Africa. Report on the workshop on police accountability held on May 10th 2004 in Cape Town, available at: <http://www.policeaccountability.co.za/Publications/Pub-Categories.asp?PubCatID=23>.

³¹⁰ <http://www.nigeriapolice.org/10pointprogramme.html>.

³¹¹ A proposal pending in 2005 is to establish a new Police Public Complaints Bureau for the purpose of receiving public complaints lodged against police officers. The Bureau would be granted independent powers of investigation and prosecution and have its own investigative department staffed by a permanent police squad and security service. It is unclear whether this initiative will be adopted or will be pursued independently and funded adequately. See, *The Police Public Complaints Bureau (Establishment) Bill 2005*, in particular, Sections 6 and 12.

³¹² Some of its members are alleged to have accepted official cars provided by the Police Force whose behaviour they are supposed to monitor.

[...]

59. In terms of *societal accountability* there are various initiatives to promote community policing and reinvigorate the Police-Community Relations Committees that exist in some states.³¹³ But these efforts fall far short of the need. Some external authority needs to be equipped and empowered to monitor police abuses, including instances of illegal checkpoints, demands for bribes and other forms of corruption and abuse.

[...]

85. Community policing initiatives are in their infancy in Nigeria but offer an important opportunity. A pilot Community Policing Programme, launched in 2004 in Enugu State, involves local, highly visible patrols interacting cooperatively with the public to reduce and prevent criminal activity, as well as improved police training and accountability. It has succeeded in reducing levels of police corruption and public fear of crime, while improving police-public relations and the treatment of prisoners. The expansion of such programmes throughout Nigeria offers the potential to fill the vacuum in local law enforcement that has facilitated the rise of vigilante groups.

[...]

102. While this report focuses on major problems within Nigeria, there are also many encouraging developments underway. In particular, the fight against corruption at all levels is closely linked to issues of extrajudicial executions. African leaders have identified corruption as one of the biggest problems confronting Africa,³¹⁴ and Nigeria has ranked especially badly.³¹⁵ Recent initiatives, however, have succeeded in targeting some of the most prominent cases,³¹⁶ and other governance reforms have facilitated significant debt relief. It should also be acknowledged that there are elements within the police and the armed forces which are committed to promoting reforms. Much will rest on their shoulders.

Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009, ¶¶ 58-60):

58. While specific reforms to the justice system are essential, corruption is the common thread running through many of the problems. It is routine among police, prosecutors, and judges. To their credit, this was candidly acknowledged by Government officials. Senior Government officials described corruption as being so “widespread” as to be “unbelievable”, and admitted

³¹³ For a detailed analysis of many of these arrangements see “*Rest in Pieces*” [note 43 in Special Rapporteur’s full report].

³¹⁴ See *Our Common Interest: Report of the Commission for Africa* (2005), available at http://www.commissionforafrica.org/english/report/thereport/english/11-03-05_cr_report.pdf, Chapter 4.5.

³¹⁵ Nigeria is ranked 152nd out of 158 countries on the Corruption Perceptions Index prepared by Transparency International in 2005. The Index measures “perceptions of the degree of corruption as seen by business people and country analysts”. Available at <http://www.transparency.org/cpi/2005/cpi2005.sources.en.html>. Only Haiti, Myanmar, Turkmenistan, Bangladesh and Chad received lower rankings than Nigeria.

³¹⁶ In March 2005 the Inspector-General of Police, the Minister for Education and the Speaker of the Senate were dismissed for corruption. Charges have subsequently been brought against each of them.

that they had corruption within their offices. According to many Afghans with whom I spoke, the problem is as blatant as it is rampant. One interlocutor told me that, as you approach a courthouse, you will be approached by persons with some link to the judge who will inquire as to your problem and solicit bribes. It was widely affirmed that when wealthy or powerful people do get convicted, they will not spend long in prison. With respect to the police, one senior foreign police trainer noted that, while individual police could be properly trained, the entire policing system was so corrupt that putting a new officer into the system was like “throwing people into a cesspool and expecting them to stay clean”. The result is a system which provides a thoroughly unacceptable degree of impunity to those accused of killings.

59. On a day-to-day basis, it is the Attorney General who has the authority to proactively monitor corruption, and to monitor the operations of other government agencies. This can involve both periodic visits to investigate offices and the long-term presence of a representative of the Attorney General’s office in the offices of another government agency. These may provide corrective guidance when officials are ignorant of their legal obligations and, when necessary, commence prosecutions. In 2007, this had led to the prosecution of 300 officials, 95% of whom were prosecuted for corruption. There have not, however, been any prosecutions of senior officials. The Government’s anti-corruption efforts have also included a number of specialized commissions, including, most recently, the High Office of Oversight and Anti-Corruption. Thus far, however, all governmental anti-corruption initiatives have been routinely undermined by political considerations when powerful figures have been implicated.

60. Pervasive corruption cannot be eliminated overnight, but there is a pressing need to establish a visible and credible mechanism with the power to subpoena witnesses and evidence, and to launch prosecutions. Above all, it must be designed to withstand the inevitable pressures of both corrupt politicians and those in government who feel obliged to turn a blind eye to corruption so as not to jeopardize their ability to govern. Independent corruption agencies have been successfully established in many states including Nigeria, Hong Kong and Australia. A series of carefully targeted prosecutions of egregious cases would be beneficial in terms of sending the necessary message. While this will require international funding, national ownership is indispensable. There is also a need for the international community to recognize that, insofar as international aid money provides the resources on which much of this corruption thrives, it has a responsibility to use mechanisms, such as high-level appointment review boards, to support Government anti-corruption efforts.

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

Impunity is a key cause of continuing killings, and results from deficiencies at every stage of the justice system. Impunity is so pervasive that even Bosco Ntaganda – wanted by the ICC for enlisting and using child soldiers in Ituri – was integrated into the FARDC and now holds an unofficial yet widely acknowledged senior command position in Kimia II. Many others with their names on thick files that detail war crimes and other grave abuses, also hold senior positions in the army. This includes Sultani Makenga, Bernard Byamungu and Salumu Mulenda.

Across the country, endemic corruption and political interference ensure that anyone with money or connections can escape investigation, prosecution, and judgment. In meetings with

magistrates, I was told of threats they have received in the course of their work, attempts to bribe them, and their crippling lack of resources. Judges' appointments, removals and promotions are subjected to frequent political interference. The new Operational Military Court for Kimia II has made some progress in prosecuting a small number of low-ranking perpetrators. But it does not have adequate staff, the ability to conduct its own independent investigations, or the power to undertake high-level prosecutions.

Fear on the part of victims and potential witnesses greatly inhibits the reporting of crimes. There is no Government witness protection program whatsoever in the Congo. MONUC operates an invaluable but very small protection program, and limited staff and resources restrict its ability to protect those in need.

[...]

1. Impunity is chronic. The FARDC often gets away with murder. Its soldiers also face no significant risk of punishment for raping and looting the civilian population. Their anonymity, combined with their arms, provides the perfect cover for criminality that goes unpunished. As an immediate step, all of its members should be required to wear uniforms that identify their individual names and unit affiliation. The Security Council should make this a pre-condition for UN assistance.

2. Permitting key members of the military who are alleged to have committed war crimes, crimes against humanity and other serious offences to serve in the armed forces sends an immensely powerful message to the rest of the military. The message is that impunity rules and that brutality and power prevail over law. The slogan that peace will come first and justice later fundamentally misunderstands the dynamic involved. Peace will not come, nor will justice, until the Government and the international community take seriously the notion that those accused of heinous crimes must be indicted immediately. Giving individuals like Bosco Ntaganda, Innocent Zimulinda, Sultani Makenga, Bernard Byamungu and Salumu Mulenda a get out of jail free card, even if ostensibly "just for a few years", only serves to mock human rights. No amount of sophisticated strategic rationalization should be permitted to obscure that fact.

Report on Mission to Guatemala (A/HRC/4/20/Add.2, 19 February 2007, ¶¶ 49-51):

49. That many investigations and prosecutions have been impeded by officials corrupted either by intimidation or financial inducement is widely acknowledged in and out of Government. In Guatemala, as in many countries, there are networks of personal connections, trust, and loyalty that lead government officials to do favours for their friends and associates in private life. There have also been indications, however, that some corruption is less personal and more organized, with "illegal groups" and "clandestine apparatuses" associated with organized crime and elements of the military infiltrating criminal justice institutions to ensure impunity for their actions, including murders of rivals as well as of those who seek to expose their crimes. In my discussions with the Minister of Defence, I was disturbed by the apparent evasion of responsibility for ensuring that military personnel were not involved in organized crime. I was informed first that the Ministerio Público could not take action without a referral from the Department of Military Justice, then that the Department of Military Justice took no proactive

steps to identify criminal activity but would only initiate investigations upon receiving a complaint, and finally that the problem could not be too bad because the Ministerio Público was not investigating any cases against drug traffickers in the military. This circular reasoning does little to dispel the widespread belief that military personnel are involved with drug traffickers, organized crime, and clandestine groups. Whatever the precise contours of the problem, the fact of corruption is undisputed and must be addressed. It is both a cause and a consequence of impunity.

50. In December 2006, the Government reached an agreement with the United Nations to establish the International Commission against Impunity in Guatemala (Comisión Internacional Contra la Impunidad en Guatemala, CICIG). A similar agreement had been reached in 2004 whereby a similar body would act as an independent prosecutor for cases involving human rights violations, organized crime, drug trafficking, and corruption, but this agreement was rejected by the Congress and the Corte Constitucional as an affront to Guatemala's sovereignty. CICIG is to have a less expansive mandate, acting not as an independent prosecutor but as a *querellante adhesivo* or, that is, as a "third-party prosecutor" intervening in a prosecution on behalf of the victim. Traditionally, such third-party prosecutors have played a key role in pushing cases through the system, and this arrangement has the potential to make a difference. The establishment of CICIG, while important, is not a panacea. To end widespread impunity will continue to require major reforms to the PNC and the Ministerio Público.

51. Another reform that must be introduced to overcome impunity in cases involving powerful perpetrators is the introduction of an effective witness protection programme for these kinds of cases. It is difficult for the PNC to gather evidence or for the Ministerio Público to sustain prosecutions when witnesses may be intimidated from providing testimony. There are currently multiple systems of witness protection in Guatemala. One is administered by the Ministerio Público. While this system should be preserved and strengthened, its association with a body widely believed to be corrupted by clandestine groups makes it inherently unsuitable for protecting witnesses involved in some cases. Another system provides witness protection when orders for precautionary measures are received from the Inter-American Commission for Human Rights. These are received and processed by the presidential human rights body the Comisión Presidencial Coordinadora de la Política del Ejecutivo en Materia de Derechos Humanos (COPREDEH), which in turn arranges for officers from the PNC to watch over the witness. This system is also highly problematic when witnesses are involved in cases concerning clandestine groups or the police. One possibility for reform would be to establish a witness protection programme under the PDH. At a minimum, the current requirement that the PDH pass on complaints to the implicated Government agencies must be changed to avoid endangering complainants.

O. POOR FORENSICS AND IMPUNITY

Report on Mission to Nigeria (E/CN.4/2006/53/Add.4, 7 January 2006, ¶ 89):

89. Only the Police are authorized to investigate killings, even where the principal suspects are police officers. But the police service is so under-funded that the family of the deceased are often requested to fund any investigation, an expense which is well beyond the capacity of most Nigerians. Notions such as sealing off a crime scene or allocating the best officers to investigate a particular crime are foreign to a force for whom the phrase “police investigation” has become an oxymoron. There is no tradition of systematic forensic investigation in Nigeria, there is a single ballisticsian in the entire country, only one police laboratory, and no fingerprint database. The result, unsurprisingly, is that the police rely heavily upon confessions which, on one estimate, are the basis for 60 per cent of prosecutions. The temptation to “extract” a confession by all available means seems hard to resist.

Follow-up Report to Mission on Nigeria (A/HRC/8/3/Add.3, 14 May 2008, ¶ 85):

85. There is only one police laboratory and only one ballisticsian in all of Nigeria, and no fingerprint database. Because forensic investigations are grossly inadequate, police must rely almost entirely on confessions to build cases. This reality has too often led police to force confessions by torturing prisoners.³¹⁷ The Special Rapporteur recommended that the Nigerian police increase its forensic capabilities by establishing properly equipped and staffed forensic laboratories in key centres throughout Nigeria. The Apo 6 commission of inquiry made similar recommendations, calling for enhanced police “intelligence gathering mechanisms”, including “a police science forensic laboratory” and the “immediate training of more ballisticsians”. But there have not been any improvements in this regard. As the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment observed during his March 2007 visit to Nigeria that, “[f]orensic medical examinations which could sustain complaints are non-existent even in cases of death in police custody.

Report on Mission to the Philippines (A/HRC/8/3/Add.2, 16 April 2008, ¶¶ 55):

55. A greater capacity to use physical evidence would allow more cases to go forward without witness testimony. The information that I received from officials was that, while there are some forensic laboratories and experts in Manila, there is very limited access to these resources throughout most of the country.

Report on Mission to Sri Lanka (E/CN.4/2006/53/Add.5, 27 March 2006, ¶56):

56. The lack of investigative capacity is due to a lack of police training and resources, ineffective forensics, and an unwillingness to ensure the security of witnesses. The Judicial Medical Officers (JMOs) who carry out most autopsies typically lack the requisite vehicles, equipment and specialized training. The range of obstacles to a prompt and effective examination means that too much evidence simply bleeds out onto the floor. Investigations are also impeded by the lack of

³¹⁷ See also: Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Mission to Nigeria (4-10 March 2007), A/HRC/7/3/Add.4.

effective witness protection. This makes witnesses especially reluctant to provide evidence on crimes committed by police officers, and led several interlocutors to joke that it would be better to be a victim than a witness. Inadequate investigations result in evidence insufficient to sustain a conviction. Various police and forensic training programmes have been supported through development assistance initiatives. In the absence of any detailed evaluations, my impression is that they have been worthwhile but regrettably limited in scope.

Report on Mission to Kenya (A/HRC/11/2/Add.6, May 2009, ¶¶ 63):

63. Independent forensic analysis of mass graves in Mt Elgon should also take place. In the forests of Mt Elgon there are mass graves and sites where bodies were simply dumped on the forest floor. It is likely that both victims of the SLDF and the security forces are contained in those sites. Government authorities have made no systematic or transparent attempts to protect these sites or have them examined by independent forensic experts. NGOs who have attempted to study the sites have received veiled threats and been prevented from doing so. The District Commissioner for Mt Elgon assured me that future attempts to study those sites would not be obstructed, and the Government should ensure that access is unimpeded.

P. TRANSPARENCY AND CRIMINAL JUSTICE SYSTEMS

Report on Mission to the Philippines (A/HRC/8/3/Add.2, 16 April 2008, ¶¶ 62, 69):

62. The Philippines Commission on Human Rights (CHRP) stands out as an oversight mechanism that has safeguarded its independence and mandate. However, more resources must be devoted to ensure the effectiveness of its investigations.

[...]

69. Convictions in a significant number of extrajudicial executions must be achieved. Appropriate institutional arrangements exist but they must be more transparent if they are to be effective. Thus:

- (a) CHRP should issue a monthly report listing allegations of extrajudicial executions that it has received together with the current status of its investigations.
- (b) Members of the public should be able to submit cases to be overseen by Task Force Usig. If it concludes that a case does not fall within its mandate, it should provide a reasoned explanation in writing.
- (c) Task Force Usig should issue a monthly report on the status of all cases it is attempting to resolve.
- (d) The Supreme Court should issue a monthly report on the status of all cases before the special courts.

Report on Mission to the Central African Republic (A/HRC/11/2/Add.3, 27 May 2009, ¶ 87):

87. Reforms should be implemented in the criminal and military justice systems to promote accountability over the long-term:

- (a) The reforms proposed by the Government to, inter alia, improve court infrastructure, recruit more magistrates and clerks, and revise magistrate training should be welcomed and supported by the international community;
- (b) The role of gendarmes in gathering information and reporting on abuses by the military units which they accompany should be clarified and strengthened. Gendarmes should receive training in human rights and humanitarian law directed at ensuring that they investigate, report on, and arrest perpetrators of abuses;
- (c) Prosecutors and investigative judges should recognize their obligation to take on cases in which the security forces are implicated in serious abuses of human rights and humanitarian law, and treat such cases as a priority;
- (d) The Criminal Code should be amended so that genocide, crimes against humanity, war crimes, and other offences under the Rome Statute are criminalized in domestic legislation;
- (e) The Permanent Military Tribunal should be provided with sufficient resources to hold regular sessions;
- (f) There should be transparency regarding the investigation, prosecution and punishment of members of the security forces. The security forces should maintain records and regularly issue reports on allegations of abuse by soldiers and on the numbers of soldiers disciplined and referred for prosecution. Similarly, the Permanent Military Tribunal and administrators of the

ordinary judicial system should regularly report on the status of cases against security force members.

Report on Mission to Kenya (A/HRC/11/2/Add.6, 26 May 2009, ¶¶ 31-32):

31. The judiciary in Kenya is an obstacle in the path to a well-functioning criminal justice system.³¹⁸ Its central problems are crony opaque appointments, and extraordinary levels of corruption. I received considerable evidence of judges and magistrates being paid to slow the progress of cases, to “lose” files, or to decide a case in a particular manner. Many reports over the last decade have documented this, and significant structural reforms have repeatedly been proposed to increase the transparency and accountability of the judiciary.³¹⁹ The Kibaki Government botched its 2003 “radical surgery” strategy,³²⁰ and has done little since, despite the strongly proclaimed views of the Prime Minister and the former Minister of Justice that drastic reforms are required. The Chief Justice is of the view that the courts generally function well, and that corruption and discipline are being adequately dealt with by the Judicial Service Commission (JSC). In fact the JSC has done precious little to improve the functioning of the courts, and they are in need of radical reform.

32. It is essential that the judicial appointments procedure, and oversight of discipline of judges and magistrates is reformed. To this end, the JSC should be transformed so that its membership is representative; judicial officials are transparently vetted before appointment; merit-based criteria are met by appointees; and the Commission should have a more significant and transparent role in monitoring and removing judges. It should also establish an independent complaints procedure in relation to judicial behaviour.

³¹⁸ The structure and powers are set out in the Constitution of Kenya, Chapter IV; the Judicature Act; the Magistrates Courts Act.

³¹⁹ See, “Report of the Committee on the Administration of Justice” (1998) (the Kwach report) (detailing allegations that there was “actual payment of money to judges and magistrates to influence their decisions.”); Constitution of Kenya Review Commission, “Report of the Advisory Panel of Eminent Commonwealth Judicial Experts” (2002) (concluding that “the Kenyan judicial system suffers from a serious lack of public confidence and is generally perceived as being in need of fundamental structural reform.”). Also see yearly reports on Kenya by Transparency International (reporting the judiciary as one of the most corrupt institutions in Kenya).

³²⁰ The Government set up an “Integrity and Anti-Corruption Committee of the Judiciary in Kenya”, which released its report (the Ringera Report) in 2003. The report implicated 5 (out of 9) Court of Appeal justices, and 18 (out of 36) High Court justices, and 82 (out of 254) magistrates in corruption. Many of the named justices and magistrates resigned, others challenged the report’s findings. See International Commission of Jurists, “Kenya: Judicial Independence, Corruption and Reform” (April 2005).

Q. CRIMINAL JUSTICE SYSTEM AND THE PROSECUTION OF MILITARY OFFICIALS

Report on Mission to the Central African Republic (A/HRC/11/2/Add.3, 27 May 2009, ¶ 22-26, 61):

22. Killings, beatings, forced displacement, and village burnings committed by the FACA/GP, usually as reprisals against perceived civilian support for or cooperation with rebel forces, were widespread during the mid-2005 to mid-2007 period. These abuses were reported widely.³²¹ During his visit, the Special Rapporteur received many credible and detailed accounts of violations from civil society, United Nations agencies and humanitarian organizations working directly in the areas of conflict, and from victims and witnesses.

23. These accounts indicate that the abuses by Government forces followed a similar pattern across the north-west. Typically, a group of APRD rebels would pass through or attack a village or town. The FACA/GP would then arrive, kill those believed to be rebels, and attack villagers perceived to be rebel supporters, or simply engage in indiscriminate shooting. The Government forces typically also burned the homes of villagers - targeting the homes of perceived rebel supporters, but also burning indiscriminately. The burning of over 10,000 civilian homes in the north-west in December 2005 by Government forces is well documented.³²² The majority of the villages were subsequently abandoned by their former residents, who moved to live in makeshift bush settlements, temporarily settled in larger towns, or fled to Chad or Cameroon. Travelling by road from Bossangoa to Paoua, the Special Rapporteur saw, after 100 kilometres from Bossangoa, village after village of burned homes.

24. Civil society interlocutors met by the Special Rapporteur estimated that hundreds of civilians were murdered by Government forces during this period. They also reported that the military had killed suspected rebel group members in violation of international humanitarian law.³²³ The Special Rapporteur received many credible reports that one GP commander in particular, Lt. Eugene Ngaïkossé, was responsible for commanding troops who carried out the more egregious instances of village burnings, the targeting of civilians, and unlawful killings of suspected rebels.

25. One significant incident about which the Special Rapporteur received much detail was a massacre of civilians in Paoua on 29-31 January 2006. On 29 January, the APRD attacked Paoua, looting Government offices and attacking the prison and police station. After initially retreating, soldiers from the FACA and the GP were then able to force the rebels to flee the area. However, instead of ensuring the safety of the population of Paoua during and after the APRD attack, the GP reinforcements from Bossangoa attacked Paoua's residents, killing at least 33 civilians. The Special Rapporteur spoke with one witness whose house was ransacked by the APRD on the first day of the attack, and then witnessed the GP burning down his neighbours'

³²¹ See e.g., Human Rights Watch, *State of Anarchy: Rebellion and Abuses against Civilians*, September 2007, vol. 19, No. 14 (A).

³²² See e.g., Human Rights Watch, *State of Anarchy: Rebellion and Abuses against Civilians*, September 2007, vol. 19, No. 14 (A), p. 6; FIDH, *Central African Republic – Forgotten, stigmatised: the double suffering of victims of international crimes*, No. 457/2, October 2006, pp. 49-51.

³²³ In one case, two suspected rebels were detained by the FACA close to Kaga-Bandoro. The two were taken to the town and publicly executed.

homes and killing four Paoua residents. Other witnesses saw one incident in which three civilian men from Paoua were shot by Government soldiers while the men were trying to flee the fighting. Witnesses described how the GP fired indiscriminately into gatherings of civilians in the town. After the APRD attack, soldiers also entered civilian homes, took men outside, and executed them. Other civilians detained by the FACA were also tortured to death. One victim was detained with seven other men from Paoua and taken to the FACA base. All of the detained men were beaten, and left in the sun for two days; only one survived.

26. A Government official in the prefecture informed the Special Rapporteur that no public investigations and prosecutions took place after this massacre. Indeed, impunity for such actions is the norm, and section VII discusses its causes and the reforms.

[...]

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. The criminal justice system theoretically has jurisdiction over all persons in the Central African Republic, including members of the security forces, but the latter jurisdiction is rarely exercised. The Special Rapporteur received information in Bangui on one incident in which police were being tried in the criminal justice system for alleged killings. But no information on the criminal prosecution of members of the FACA could be obtained. Several interlocutors working in conflict-affected areas noted that the local prosecutors took no action whatsoever with respect to alleged crimes by the military, whether committed in connection to the armed conflict or otherwise. The preference is apparently to leave cases involving soldiers to the military justice system.

Report on Mission to Colombia (A/HRC/14/24/Add.2, 31 March 2010, ¶¶ 16-18, 37-41, 89-90):

16. From at least as early as 2007, the Government began to take a number of steps to confront the issue of these killings. After the publicity surrounding the Soacha killings, additional significant and specific steps were taken. Measures (analysed further below) have included: disciplinary sanctions, including the dismissal of 3 generals and 24 other soldiers; increased cooperation with the International Committee of the Red Cross and the United Nations with respect to monitoring; the installation of operational legal advisors in military units to advise on specific military operations; increased oversight of payments to informers; the creation of a temporary special commission to investigate operations (the “Suarez report”); appointment of delegated inspectors to army divisions; the introduction of the requirement that deaths in combat be investigated first by judicial police (Directive No. 19); modifying award criteria (Directive No. 142) and military unit performance criteria (Directive No. 300-28); the creation of a specialized unit in the Fiscalía to deal with alleged extrajudicial executions; and the requirement that military criminal judges transfer cases to the civilian justice system.¹⁶ In 2009, the Ministry of Defence also issued Directive No. 208, which lays out 15 measures intended to implement the Ministry’s human rights and humanitarian law policies throughout the Armed Forces and strengthen internal command, control, training and evaluation systems.

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

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

[...]

37. Criminal investigations can take place either in the military or civilian criminal justice system. The most significant obstacle to effective prosecution of extrajudicial executions by members of the security forces are the continuing jurisdictional conflicts between these two systems and the failure of military judges to transfer cases to the civilian justice system.

38. The *Fiscalía* has and should have primary responsibility for prosecution of military personnel accused of human rights violations. The Constitution provides (art. 221) that “crimes committed by members of the National Security Forces on active service, and related to that same service” are within the jurisdiction of the *military* criminal justice system. However, the Constitutional Court and the Superior Council of the Judicature have clarified that the military courts do not have jurisdiction when force members engage in conduct contrary to the constitutional functions of the forces (such as unlawful killings) and that where there is doubt, civilian jurisdiction should apply.³²⁴

39. Despite these clear judicial rulings, directives to the same effect from the Minister of Defence and a memorandum of agreement (2006) between the Ministry of Defence and the *Fiscalía*, it remains the case that jurisdiction over far too many cases is contested. There have been some improvements in recent years – a total of 526 cases have now been voluntarily sent by the military criminal courts to civilian courts.³²⁵ Another 75 cases have been transferred following orders from the Superior Judicial Council. However, as of May 2009, there were still 221 cases of conflict between the military and civilian jurisdictions. One cause of delay can be the Supreme Judicial Council’s failure to decide jurisdictional challenges on a timely basis. These decisions should be made more expeditiously.

³²⁴ See Constitutional Court Judgements C-358 (1997) and C-878 (2000); *Case of “Jamundi”* of 14 August 2008 (Superior Council of the Judicature).

³²⁵ Government response.

40. In some of the areas visited, including Medellín and Villavicencio, there appears to be a conscious attempt by military judges to frustrate the efforts of the civilian justice system. This also creates incredible delays — often of months or years — in the investigation and prosecution of alleged extrajudicial executions, during which time alleged perpetrators are often at large and the value of testimony and evidence can be lost. Military judges who do assist the civilian justice system may be subject to harassment, threats or transfer to other jurisdictions.

41. Resource constraints also inhibit effective prosecutions. The *Fiscalía* has a specialized human rights unit, including a sub-unit for extrajudicial executions (established in 2007). In 2008, the numbers of prosecutors focusing on executions more than doubled (from 8 to 20). However, the *Fiscalía* continues to suffer from a lack of staff and funding, which prevents it from investigating and prosecuting all of the cases reported to it. I met, for example, with families of victims who were told that they would have to wait for the Soacha cases to finish before their own cases could be examined. Of the 1,056 cases of killings by Armed Forces that were assigned to the *Fiscalía*'s Human Rights Unit through to the end of April 2009, only 16 have resulted in convictions.³²⁶

[...]

89. In all cases of alleged killings by security forces, the civilian criminal justice system should have jurisdiction. Within two months after publication of this report, the head of the military justice system should conduct an audit of all cases of alleged extrajudicial executions still pending before military courts and should then ensure that such cases are transferred within a short time period. Judges who fail to effect such transfers should be disciplined.

90. The Supreme Judicial Council should adhere to time limits for the resolution of jurisdictional conflicts between the military and civilian justice systems. The Council should publish regularly — and at least biannually — the list of such cases before each judge and the amount of time any such case has been pending before the Council.

Press statement on Mission to Colombia, 18 June 2009:

The most prominent concern is the incidence of so-called “false positives” (*falsos positivos*) and the most publicized examples are the killings of young men from Soacha in 2008. The phenomenon is well known. The victim is lured under false pretenses by a “recruiter” to a remote location. There, the individual is killed soon after arrival by members of the military. The scene is then manipulated to make it appear as if the individual was legitimately killed in combat. The victim is commonly photographed wearing a guerrilla uniform, and holding a gun or grenade. Victims are often buried anonymously in communal graves, and the killers are rewarded for the results they have achieved in the fight against the guerillas.

But there are two problems with the narrative focused on *falsos positivos* and Soacha. The first is that the term provides a sort of technical aura to describe a practice which is better characterized as cold-blooded, premeditated murder of innocent civilians for profit. The second is that the focus on Soacha encourages the perception that the phenomenon was limited both geographically

³²⁶ Another important cause of impunity is witness fear. See section X.D.

and temporally. But while the Soacha killings were undeniably blatant and obscene, my investigations show that they were but the tip of the iceberg. I interviewed witnesses and survivors who described very similar killings in the departments of Antioquia, Arauca, Cali, Casanare, Cesar, Cordoba, Huila, Meta, Norte de Santander, Putumayo, Santander, Sucre, and Vichada. A significant number of military units were thus involved.

Some officials continue to assert that many of the cases were in fact legitimate killings of guerrillas or others. But the evidence – including ballistics and forensics reports, eyewitness testimony, and the testimony of soldiers themselves – strongly suggests that this was not the case. The “dangerous guerrillas” who were killed include boys of 16 and 17, a young man with a mental age of nine, a devoted family man with two in-laws in active military service, and a young soldier home on leave. I cannot rule out the possibility that some of the *falsos positivos* were, in fact, guerillas, but apart from sweeping allegations, I have been provided with no sustained evidence to that effect by the Government. Evidence showing victims dressed in camouflage outfits which are neatly pressed, or wearing clean jungle boots which are four sizes too big for them, or lefthanders holding guns in their right hand, or men with a single shot through the back of their necks, further undermines the suggestion that these were guerillas killed in combat.

A further problem concerns the systematic harassment of the survivors by the military. A woman from Soacha described how, in 2008, one of her sons disappeared and was reported killed in combat two days later. When another of her sons became active in pursuing the case, he received a series of threats. He was shot and killed earlier this year. Since then, the mother has also received death threats. This is part of a common pattern.

The key question is who was responsible for these premeditated killings? On the one hand, I have found no evidence to suggest that these killings were carried out as a matter of official Government policy, or that they were directed by, or carried out with the knowledge of, the President or successive Defence Ministers. On the other hand, the explanation favoured by many in Government – that the killings were carried out on a small scale by a few bad apples – is equally unsustainable. The sheer number of cases, their geographic spread, and the diversity of military units implicated, indicate that these killings were carried out in a more or less systematic fashion by significant elements within the military.

Starting in 2007, the Government has taken important steps to stop and respond to these killings. They include: disciplinary sanctions, increased cooperation with the ICRC and the UN, the installation of Operational Legal Advisors to advise on specific military operations, increased oversight of payments to informers, the appointment of the Suarez Temporary Special Commission, the appointment of Delegated Inspectors to army divisions, requiring deaths in combat to be investigated first by judicial police, modifying award criteria, and creating a specialized unit in the Prosecutor’s Office (*Fiscalia*).

These encouraging steps demonstrate a good faith effort by the Government to address past killings and prevent future ones. But there remains a worrying gap between the policies and the practice. The number of successful prosecutions remains very low, although improved results are hoped for in the coming year. Three problems stand out. The first is that the *Fiscalia*, and

especially its Human Rights Unit, lack the requisite staff, resources and training. A substantial increase in resources is essential. The second is that in some areas military judges ignore the rulings of the Constitutional Court and do all in their power to thwart the transfer of clear human rights cases to the ordinary justice system. The transfer of information is delayed or obstructed, wherever possible jurisdictional clashes are set up, and delaying tactics are standard. Delays, often of months or years, result and the value of testimony and evidence is jeopardized.

Report on Mission to the Democratic Republic of the Congo (A/HRC/14/24/Add.3, 1 June 2010, ¶¶ 105-108):

104. Despite these limited improvements, impunity for senior commanders remains pervasive. The cause is not significantly related to the resource and institutional obstacles facing the Government described above. Rather, it is a lack of political will to investigate, arrest or prosecute senior officers accused of grave abuses. The Government has even ordered that some legal proceedings against suspected war criminals be discontinued. The Minister of Justice confirmed to me that he wrote a letter on 9 February 2009 to military justice authorities in the Kivus, ordering them not to prosecute CNDP or ex-CNDP members.

105. On 5 July 2009, the Government took the positive step of announcing a “Zero Tolerance” policy with respect to ill-discipline and criminal activity by FARDC members. However, it has not been seriously implemented and known perpetrators have not been arrested. When I publicly reported in October 2009 on the Shalio massacre, the Congolese Communications and Information Minister announced that the Government was already aware of the FARDC’s responsibility for the massacre. But he stated Lt. Col. Zimurinda would not be arrested, purportedly because they did not want to cause instability.

106. The most brazen example of impunity was the role of Bosco Ntaganda as a senior commander in the Kimia II operation. Ntaganda is wanted by the ICC for enlisting and using child soldiers in Ituri in 2002-2003, and has been accused of command responsibility for further war crimes, including those committed during the 2008 Kiwanja massacre. Although the Congolese Minister of Defence wrote a letter to the Special Representative of the Secretary-General for the DRC on 29 May 2009 stating that General Bosco Ntaganda was not involved in Kimia II, his current command role is widely acknowledged and not seriously disputed. Other FARDC Kimia II commanders suspected of responsibility for killings in violation of international humanitarian and human rights law include:

- Colonel Sultani Makenga (suspected involvement in massacres in Pinga and Lukweti in 2003-2004; killings of children in Nyamilima in 2005; command responsibility for Buramba massacre; killings near Katwiguru, Kisegeuru, Rubare)
- Colonel Innocent Zimurinda (suspected command responsibility for killings in Rutshuru; Buramba massacre; Kiwanja killings; Shalio massacre)
- Colonel Bernard Byamungu (suspected responsibility for killings in Kindu; massacres in Songwe, Route Camp Luama, Nyonga in 2002; Kisangani massacre in 2002) and
- Lieutenant Colonel Salumu Mulenda (suspected involvement in Mogwalu attack in 2002; killings in Lipri and Bambu areas)

107. I asked officials why these individuals had not been arrested, despite their records of abuse and their whereabouts generally being well-known. The Government's stated position is that arresting senior commanders, especially ex-CNDP members, would potentially destabilize CNDP integration, provoke the splintering of armed groups, and result in further violence to civilians.

108. The complexity of the security situation in the Kivus is vast, and the barriers to peace cannot be underestimated. But the Government's blanket argument for "peace" over "justice" is profoundly mistaken. While it is not practical to immediately arrest every perpetrator, targeted arrests of key senior figures, planned so that they do not jeopardize civilian security, are realistic. The rapes, looting, and massacres committed by FARDC soldiers through 2009 show only too clearly that peace does not come if justice is compromised to allow those accused of serious human rights abuses to command military units. The continued leadership role of individuals such as Ntaganda sends a clear message to all soldiers that power and violence will outweigh the rule of law and respect for human rights.

Follow-up report on Mission to the Central African Republic (A/HRC/14/24/Add.5, 19 May 2010, ¶¶ 46-50):

46. The Permanent Military Tribunal is charged with trying crimes and violations of military law committed by members of the security forces. It remains largely ineffective, and sometimes does not even convene because it lacks the necessary funds from the Government. When the Tribunal does hear cases, they deal almost exclusively with lowerranking officials who have committed less serious offenses. For example, the session of the Tribunal held from 15 to 24 April 2009 tried 30 cases involving the theft of arms, abandonment of positions, violence and arbitrary detention, and one case concerning the alleged killing of a police chief by the Presidential Guard in March 2009.³²⁷

47. Senior members of the military and of the Government have, without exception, escaped judicial scrutiny. The Special Rapporteur had recommended that all members of security forces implicated in abuses be suspended from duty, investigated and prosecuted. He called on the Government to begin the effort to end impunity by investigating Eugène Ngaïkossé, who is alleged to have commanded troops who carried out particularly egregious instances of village burnings, targeting of civilians and unlawful killings. Far from facing charges, he has instead been promoted to the rank of captain and placed in charge of a Presidential Guard brigade. The Central African Republic State Prosecutor has not yet even initiated prosecutions into the allegations against Captain Ngaïkossé. Information provided by experts in the Central African Republic indicate that the Government has been "complacent" in seeking prosecution of members of the security forces, especially regarding abuses by the Presidential Guard and FACA in the north of the country. Interlocutors noted that a key cause was the lack of prosecutorial and judicial independence from the executive.

³²⁷ Humanitarian and Development Partnership Team-Central African Republic, news bulletin 104, 13-20 April 2009.

48. The general population's access to, and knowledge of, the justice system remains minimal. Average citizens often rely on local justice mechanisms rather than the formal court system for redress.

49. Corruption is rampant throughout the judiciary, which has little independence from the Government. Judges are subject to intimidation, with threats to both their physical and job security. In the north, the courts, like everything else, have suffered from the ongoing insecurity. Many of the magistrates themselves have fled or been displaced by the conflict.

50. The amnesty law promulgated by the Government on 13 October 2008 also raises questions about whether the perpetrators of serious abuses in the Central African Republic will be brought to justice.³²⁸ As the Special Rapporteur stated in his 2009 report (A/HRC/11/2/Add.3, para. 67), it is important that the amnesty law only be applied to acts committed in the context of armed conflict, and that it not be applied to private acts or those in a law enforcement context.

Report on Mission to the Philippines (A/HRC/8/3/Add.2, 16 April 2008, ¶¶ 45-49):

50. No one I spoke with questioned the PNP's [Philippines National Police] authority and duty to investigate crimes allegedly committed by the AFP [Armed Forces of the Philippines]. However, in practice, it does so in only a perfunctory manner. Plausible explanations for this reticence include fear, a tacit understanding that crimes by the AFP should not be investigated, the personal bonds felt among senior AFP and PNP officers,³²⁹ and the solidarity fostered by current cooperation in counterinsurgency operations.³³⁰

³²⁸ The law grants amnesty for "all offences committed by members of the defence and security forces and the civil and military authorities as part of their operations to maintain order and defend national territory" since the overthrow of former President Patassé on 15 March 2003. In effect, the law constitutes a blanket pardon for Government security and defence forces as well as for many rebel fighters and specifically named political figures including former President Ange-Félix Patassé, APRD President Jean-Jacques Demafouth and Abdoulaye Miskine. However, the law contains some critical and important limitations. First, the law recognizes the exclusion from the amnesty of perpetrators of acts amounting to war crimes, crimes against humanity or other crimes over which the International Criminal Court has jurisdiction.

³²⁹ Most senior officers in the PNP began their careers when the police still formed part of the AFP, and they attended the Philippine Military Academy (PMA) along with current senior AFP officers. Today, recruits are trained at the Philippine Public Safety College (PPSC), and officers are trained at the Philippine National Police Academy (PNPA). Senior AFP and PNP officers, as well as senior civilian officials, all take courses at the National Defense College.

³³⁰ The bill creating the PNP in 1990 allocated to it the "primary role" in counterinsurgency, giving the AFP a "supportive role" ("Department of the Interior and Local Government Act of 1990" (Republic Act No. 6975) (signed into law 13 December 1990), section 12). These roles were reversed in 1998, which "relieved [DILG and PNP] of the primary responsibility on matters involving the suppression of insurgency" ("Philippine National Police Reform and Reorganizations Act of 1998" (Republic Act No. 8551) (signed into law 25 February 1998), section 3). Most recently, Executive Order No. 546 (14 July 2006) ordered that "[t]he PNP shall support the AFP in combat operations involving the suppression of insurgency and other serious threats to national security" (section 1) and also authorized the PNP "to deputize the barangay tanods as force multipliers in the implementation of the peace and order plan in the area" (section 2). In practice, the PNP typically conducts counterinsurgency operations in urban areas while the AFP does so in rural areas.

R. INVESTIGATIONS AND PROSECUTION ISSUES ARISING IN ARMED CONFLICT

1. Military justice systems

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (E/CN.4/2006/53, ¶¶ 33-43):

33. It is of continuing concern that States often fail to comply with their obligation to effectively investigate, prosecute, and punish violations of the right to life in situations of armed conflict and occupation. This failure has taken a number of forms. Policies on investigating deaths have permitted unjustifiable exceptions and have often failed to provide for impartiality and independence. During armed conflicts, even grave crimes such as murder are often leniently punished when committed by members of the armed forces. Trends in the investigation, prosecution, and punishment of commanding officers have been even less encouraging. Impunity for individuals has not been the only failure. In some cases, a strategic reluctance to engage in “body counts” may have impeded full consideration of how the impact of armed conflict on civilian populations can be minimized. Efforts at monitoring the consequences of choices of weapons and tactics on the incidental loss of civilian life generally remain ad hoc, leaving compliance with requirements of proportionality and precautionary measures under-examined.³³¹

34. These practices threaten to roll back 50 years of progress in subjecting armed conflict to the rule of law. The Geneva Conventions of 12 August 1949 first established the legal obligation of States to investigate alleged unlawful killings and to prosecute their perpetrators. Elaborating the general obligation to “respect and to ensure respect” for humanitarian law,³³² the Geneva Conventions mandated the penal repression of violations. In particular, when a State receives allegations that someone has committed or ordered a grave breach - such as the “wilful killing” of a protected civilian³³³ - the State is then legally obligated to search for him and either try him

³³¹ See e.g. Marco Sassòli, “Targeting: the scope and utility of the concept of military objectives for the protection of civilians in contemporary armed conflicts”, in D. Wippman and M. Evangelista (eds.), *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts* (2005) 181 at 204-205.

³³² Common article 1 to the Geneva Conventions of 12 August 1949; see also Protocol I, article 87, paragraph 3.

³³³ This is not the only grave breach that may intentionally or unintentionally result in loss of life. See Geneva Conventions I-IV, articles 50/51/130/147; Protocol I, articles 11, 85. Under the Geneva Conventions of 1949, “torture or inhuman treatment, including biological experiments” and “wilfully causing great suffering or serious injury to body or health” might well lead to a death that is not itself wilful. Less directly, the same is true of “compelling a prisoner of war [or person protected in Geneva (IV)] to serve in the forces of the hostile Power” or “wilfully depriving a prisoner of war [or person protected in Geneva (IV)] of the rights of fair and regular trial prescribed in this Convention”. Grave breaches related to medical procedures are extended in article 11, paragraph 4 of Protocol I. In addition, article 85, paragraph 3 of Protocol I classifies a number of acts as grave breaches “when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health”.

(a) Making the civilian population or individual civilians the object of attack;

(b) Launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in article 57, paragraph 2 (a) (iii);

before its own courts or extradite him to another State that has made out a *prima facie* case.³³⁴ Should he be found guilty, the State must impose an “effective penal sanction[]”.³³⁵ However, gaps remained in this accountability regime. In international armed conflicts, some individuals were excluded from protection by their nationality.³³⁶ In non-international armed conflicts, no mechanism for penal repression was provided.³³⁷ The scope of legal protection has, however, steadily improved. Since the Geneva Conventions were adopted in 1949, States have both filled its gaps and supplemented its protections with new instruments of human rights law, such as the ICCPR, which was adopted in 1966. Thus, with respect to non-international conflicts, the additional protection offered by human rights law was acknowledged in the Preamble to the Second Additional Protocol adopted in 1977.³³⁸ Today, human rights law and humanitarian law together require accountability in all circumstances.

35. Human rights law imposes a duty on States to investigate alleged violations of the right to life “promptly, thoroughly and effectively through independent and impartial bodies”.³³⁹ This duty is entailed by the general obligation to ensure the right to life to each individual. The particular measures States may take to fulfil this duty have been elaborated in detail with respect to law enforcement operations. Most prominently, in 1989 the Economic and Social Council adopted the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.³⁴⁰ These detailed principles should guide States whenever they carry out law enforcement operations, including during armed conflicts and occupations.³⁴¹ However, in

(c) Launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in article 57, paragraph 2 (a) (iii);

(d) Making non-defended localities and demilitarized zones the object of attack;

(e) Making a person the object of attack in the knowledge that he is “hors de combat”.

³³⁴ Article 49/50/129/146 of the Geneva Conventions (I-IV).

³³⁵ Article 49/50/129/146 of the Geneva Conventions (I-IV).

³³⁶ See Geneva Convention (IV), article 4. Note that the broader substantive reach of the prohibition of wilful killing. Common article 3 to the Geneva Conventions; Protocol I, article 75. These provisions reflect customary international law.

³³⁷ Common article 3 to the Geneva Conventions. Protocol II does not include any accountability mechanisms either.

³³⁸ For an analysis of the simultaneous and complementary relationship of human rights and humanitarian law see E/CN.4/2005/7, paragraphs 41-54.

³³⁹ Human Rights Committee, general comment No. 31, “Nature of the legal obligation on States Parties to the Covenant” (2004), (CCPR/C/21/Rev.1/Add.13, para. 15). See also Commission on Human Rights resolution 2004/37, paragraph 5, in relation to the mandate of the Special Rapporteur: “Reiterates the obligation of all States to conduct exhaustive and impartial investigations into all suspected cases of extrajudicial, summary or arbitrary executions, to identify and bring to justice those responsible, while ensuring the right of every person to a fair and public hearing by a competent, independent and impartial tribunal established by law, to grant adequate compensation within a reasonable time to the victims or their families and to adopt all necessary measures, including legal and judicial measures, in order to bring an end to impunity and to prevent the recurrence of such executions, as stated in the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.”

³⁴⁰ Economic and Social Council resolution 1989/65 of 24 May 1989.

³⁴¹ See Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Principle 1 (“... Exceptional circumstances including a state of war or threat of war, internal political instability or any other public emergency may not be invoked as a justification of such executions. Such executions shall not be carried out under any circumstances including, but not limited to, situations of internal armed conflict, excessive or illegal use of force by a public official or other person acting in an official capacity or by a person acting at the instigation, or with the consent or acquiescence of such person, and situations in which deaths occur in custody.”).

other situations arising out of armed conflict and occupation, the modalities of the duty to investigate alleged violations have received less attention.

36. Armed conflict and occupation do not discharge the State's duty to investigate and prosecute human rights abuses. The right to life is non-derogable regardless of circumstance.³⁴² This prohibits any practice of not investigating alleged violations during armed conflict or occupation. As the Human Rights Committee has held, "It is inherent in the protection of rights explicitly recognized as non-derogable ... that they must be secured by procedural guarantees ... The provisions of the [ICCPR] relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights."³⁴³ It is undeniable that during armed conflicts circumstances will sometimes impede investigation. Such circumstances will never discharge the obligation to investigate - this would eviscerate the non-derogable character of the right to life - but they may affect the modalities or particulars of the investigation. In addition to being fully responsible for the conduct of their agents, in relation to the acts of private actors States are also held to a standard of due diligence in armed conflicts as well as peace. On a case-by-case basis a State might utilize less effective measures of investigation in response to concrete constraints. For example, when hostile forces control the scene of a shooting, conducting an autopsy may prove impossible. Regardless of the circumstances, however, investigations must always be conducted as effectively as possible and never be reduced to mere formality.³⁴⁴ In this regard, there are several areas of special concern.

37. The State obligation to conduct independent and impartial investigations into possible violations does not lapse in situations of armed conflict and occupation.³⁴⁵ While the modalities of this obligation in situations of armed conflict have not been fully settled, some points are clear:

- States must establish institutions capable of complying with human rights law obligations; there is no double standard for military justice. While human rights law does not dictate any particular institutional arrangement for the administration of justice, neither does it permit exceptions to its requirements. Investigations and prosecutions

³⁴² ICCPR, article 4, paragraph 2.

³⁴³ Human Rights Committee, general comment No. 29, "Derogations from provisions of the Covenant during a state of emergency" (2001), paragraph 15.

³⁴⁴ See Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, Judgment of July 29, 1988, paragraph 177: "The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government."

³⁴⁵ Human Rights Committee, general comment No. 31 (2004), paragraph 15 ("the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies ... A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant"); Human Rights Committee, general comment No. 29: Derogations from provisions of the Covenant During a State of Emergency (2001), paragraph 15 ("It is inherent in the protection of rights explicitly recognized as non-derogable ... that they must be secured by procedural guarantees ... The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights").

proceeding under military jurisdiction must - in each case and without exception - comply with the requirements of independence and impartiality;

- As an empirical matter, subjecting allegations of human rights abuse to military jurisdiction often leads to impunity.³⁴⁶ In such situations, investigation and prosecution by bodies independent of the military is necessary;
- While commanding officers have a duty to investigate and repress violations,³⁴⁷ there is growing awareness that additional mechanisms of investigation are needed in order to ensure impartiality.³⁴⁸

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

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

³⁴⁶ Former Special Rapporteurs on extrajudicial, summary or arbitrary executions have identified this relationship time and again. E/CN.4/1995/61, paragraph 93 ("Military tribunals, particularly when composed of military officers within the command structure of the security forces, very often lack the independence and impartiality required under international law. Military jurisdiction over human rights violations committed by members of the security forces very often results in impunity"). E/CN.4/1999/39, paragraph 67 ("In some cases situations of impunity are a direct product of laws or other regulations which explicitly exempt public officials or certain categories of State agents from accountability or prosecution ... The Special Rapporteur is also increasingly concerned about the practice of prosecuting members of security forces in military courts, which often fall short of international standards regarding the impartiality, independence, and competence of the judiciary").

³⁴⁷ Protocol I, article 87.

³⁴⁸ The development of the United Kingdom's policy on investigations over the past few years is instructive. The June 2003 policy of having the Royal Military Police (RMP) investigate and then decide on prosecution was shortly replaced with the July 2003 policy under which, "If the Commanding Officer (CO) of the soldier was satisfied, on the basis of the information available to him, that the soldier had acted lawfully and within the rules of engagement, then there was no requirement to initiate an investigation by the military police." Initially, then, the United Kingdom moved from a greater to lesser level of independence in the investigative process. However, according to Lieutenant General Sir John Reith, Chief of Joint Operations, "Between January and April 2004 there was a further reconsideration of this policy. This was prompted by the fact that the environment had become less hostile and also by the considerable media and Parliamentary interest in incidents involving UK forces in which Iraqis had died. On 24 April, a new policy was adopted by MND (SE) [Multi-National Division - Southeast] which required all shooting incidents involving UK forces which result in a civilian being killed or injured to be investigated by SIB (RMP). Exceptionally the Brigade Commander may decide that an investigation is not necessary and in any such case the decision must be notified to the Commander MND (SE) in writing." *Al Skeini v. Secretary of State for Defence*, High Court of Justice, Queen's Bench Division, Divisional Court, [2004] EWHC 2911 (Admin), 14 December 2004, paragraphs 47-54. [The quote from Lt. Gen. Reith is from his written witness statement].

particular schedule of sentences, but there are many indications of whether a State is effectively penalizing unlawful killings, including:

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

40. It is especially important to note that the stress and confusion of combat do not justify the rejection or avoidance of the applicable standards; the realities of armed conflict are fully accommodated by the substance of the applicable law and by the established defences to criminal culpability.³⁴⁹ Soldiers must be trained and held to the standards of international law. Any double standard in punishment is inimical to the rule of law and may implicate the prohibition of discrimination in human rights law.

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

42. Finally, it is important to acknowledge the unique characteristics of armed conflict. However, the question of what rules govern the use of lethal force is completely distinct from the question of investigating violations of these rules. While even intentional killing is often permitted in armed conflict, a State cannot determine whether a particular act was lawful without first investigating what occurred. Whether, for example, the deceased was taking part in hostilities is an inherently factual question, requiring factual investigation. Likewise, the Special Rapporteur cannot determine whether a particular incident falls within his mandate without first examining its facts. When he receives information alleging a violation, he will often need to be informed by the State concerned of the evidentiary basis for its determination regarding any status or activity that may have justified the use of lethal force. Conclusory determinations that the deceased was a combatant or was taking part in hostilities when killed do not enable the Special Rapporteur to respond effectively to information and swiftly pursue the elimination of extrajudicial, summary or arbitrary executions.

³⁴⁹ See generally Marco Sassòli, "Le génocide rwandais, la justice militaire suisse et le droit international", Volume 12, *Revue suisse de droit international et de droit européen* (2002) 151, at 175-176.

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

Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions (A/63/313, 20 August 2008, ¶¶ 48-65):

48. When extrajudicial executions are committed by military personnel it usually falls to the national system of military justice to investigate, prosecute and punish. Yet, historically, the human rights track record of military justice has been dismal. Commanders have routinely used their power to mete out military justice to absolve their personnel of responsibility for brutal abuses against civilians — even as they have harshly punished conscripts and enlisted men for minor breaches of military discipline. At its best, military justice has been a separate and inferior system of justice. At its worst, it has provided a pretext for impunity. In too many countries around the world military justice systems continue to have little in common with human rights and are thus ineffectual in responding to extrajudicial executions.

49. On a positive note, an increasing number of States have adopted far-reaching reforms designed to subject soldiers to criminal justice systems consistent with international human rights norms. Procedures and institutional structures have been reformed and the relevance of the civilian justice system expanded. This section reviews the experience of several countries with widely different legal traditions which have instituted major reforms. The purpose of the review is to illustrate the problems identified in the previous systems, and to show that fundamental reform is both necessary and feasible.

50. Two caveats are applicable to the following analysis. First, it is based on published analyses rather than empirical surveys.³⁵⁰ There may thus be significant discrepancies between theory and practice which are not reflected here. Second, the focus is on procedures relating to violations of the right to life and not on other offences.

³⁵⁰ Particularly helpful resources included *Justicia Militar, Códigos Disciplinarios y Reglamentos Generales Internos, Informe Final* (eds. Gustavo Fabián Castro & Dolores Bermeo Lara) (2008); Arne Willy Dahl, “International Trends in Military Justice” (January 2008) at <http://home.scarlet.be/~ismllw/index_UK.htm>; Victor Hansen, “Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from this Revolution?”, 16 *Tulane Journal of International & Comparative Law* (2008) 419; Peter Rowe, *The Impact of Human Rights Law on Armed Forces* (2006); Federico Andreu-Guzmán, *Military Jurisdiction and International Law: Military Courts and Gross Human Rights Violations* (2004); *European Military Law Systems* (ed. Georg Nolte) (2003); Eugene R. Fidell, “A World-Wide Perspective on Change in Military Justice”, 48 *Air Force Law Review* (2000) 195.

51. The obligation to effectively investigate, prosecute, and punish violations of the right to life in situations of armed conflict has been a consistent theme of reports under this mandate.³⁵¹ The most systematic survey of the implications of international law in this area is contained in the report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights,³⁵² Emmanuel Decaux, which included draft principles governing the administration of justice through military tribunals. These principles state that “the jurisdiction of military courts should be limited to offences of a strictly military nature”.³⁵³ That jurisdiction “should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes”.³⁵⁴

52. The principles also state that “the organization and operation of military courts should fully ensure the right of everyone to a competent, independent and impartial tribunal at every stage of legal proceedings from initial investigation to trial. The persons selected to perform the functions of judges in military courts must display integrity and competence and show proof of the necessary legal training and qualifications. Military judges should have a status guaranteeing their independence and impartiality, in particular vis-à-vis the military hierarchy”.³⁵⁵

53. Violations of these norms affect the rights of both the accused and the victims. The Inter-American Court of Human Rights has emphasized the “close connection”³⁵⁶ among these rights, has developed a unified jurisprudence looking at questions of independence and jurisdiction from both perspectives, and has gone so far as to refer to the rights of victims to due process.³⁵⁷

B. Case studies

1. United Kingdom

54. The United Kingdom provides an important case study in rapidly transforming a military justice system of ad hoc courts-martial dominated by military commanders, of the type that still exists in many other States today, into one overseen by a standing court and independent and professional prosecutors and judges.

55. While national institutions drove the reform process, the European Court of Human Rights played a catalytic role.³⁵⁸ In *Findlay v. the United Kingdom*, the European Court ruled that the British system of military justice was incompatible with the requirement of the European Convention on Human Rights of an “independent and impartial tribunal”.³⁵⁹ At that time, the

³⁵¹ See, for ex., E/CN.4/1995/61, para. 93; E/CN.4/1999/39, para. 67; and E/CN.2006/53, paras. 33-43.

³⁵² E/CN.4/2006/58.

³⁵³ Ibid, paras. 29-31 (Principle No. 8).

³⁵⁴ Ibid., paras. 32-35 (Principle No. 9).

³⁵⁵ Ibid., paras. 45-48 (Principle No. 13).

³⁵⁶ See *Vargas-Areco v. Paraguay* (2006), para. 73.

³⁵⁷ *Las Palmeras Case* (2001), para. 54.

³⁵⁸ M. Oakes, *The Armed Forces Bill*, House of Commons Research Paper 01/03 (8 January 2001), p. 12.

³⁵⁹ European Convention on Human Rights, art. 6 (1); European Court of Human Rights, *Findlay v. the United Kingdom*, judgement of 25 February 1997, paras. 68-80.

British system conferred broad authority on the “convening officer”, who was an officer with command authority over the accused.³⁶⁰ Among other responsibilities, the convening officer would decide which charges would be brought, choose the members of the courtmartial (who could be his subordinates), and appoint the prosecuting officer.³⁶¹ The convening officer could also “discontinue the court-martial either before or during the trial”.³⁶² The convening officer also generally played the role of the “confirming officer” with the power to “withhold confirmation or substitute, postpone or remit in whole or in part any sentence”.³⁶³ Thus, those responsible for judging the accused would be appointed by and often be subordinate to the accused’s commanding officer. Moreover, the ultimate authority both to prosecute and to sentence rested with the commander. The role of the Judge Advocate General was limited to providing advice to the convening officer, the members of the court-martial, and the confirming officer.³⁶⁴

56. The far-reaching reforms in the United Kingdom began in 1996.³⁶⁵ While the new system leaves commanders with considerable discretion in conducting summary hearings for various disciplinary breaches,³⁶⁶ it shifts most authority to professional investigators and prosecutors in relation to serious crimes, such as murder. In such cases, the commanding officer is obligated to bring the crime to the attention of the military police.³⁶⁷ The police must investigate and, should the evidence warrant, refer the case to the Director of Service Prosecutions (DSP).³⁶⁸ It is the Director of Service Prosecutions who then has the authority to direct that charges be brought.³⁶⁹ (The powers of the Director of Service Prosecutions may be delegated to legally qualified “prosecuting officers” appointed by him.³⁷⁰) The Court Martial, a standing body, itself is composed of a judge advocate and a number of “lay members”.³⁷¹ The judge advocate is appointed by the Judge Advocate General, and the lay members, who are officers or warrant officers, are appointed by the “court administration officer”. The judge advocate makes binding rulings on questions of law and procedure, the lay members make the finding as to guilt, and the lay members and the judge advocate together decide on the sentence.³⁷² If someone is convicted by the Court Martial, he or she may appeal the conviction and sentence to the Court Martial

³⁶⁰ *Findlay* (see above), para. 36.

³⁶¹ *Ibid.*, paras. 34-37.

³⁶² *Ibid.*, para. 40.

³⁶³ *Ibid.*, para. 48.

³⁶⁴ *Ibid.*, paras. 42-45.

³⁶⁵ Armed Forces Act 1996; Armed Forces Discipline Act 2000; Armed Forces Act 2001; Armed Forces Act 2006. With respect to the phased implementation of reforms, see Armed Forces Act 2006, para. 383, and the statutory instruments made by the Secretary of State, including especially those made on 10 May 2007, 8 October 2007 and 24 June 2008.

³⁶⁶ The Bill’s provisions retain the Commanding Officer at the centre of the summary dealing process, which represents more than 95 per cent of Service discipline cases. House of Commons, Session 1995-96, *Special Report from the Select Committee on the Armed Forces Bill*, HC 828-I (30 April 1996), para. 43.

³⁶⁷ *Ibid.*, paras. 113-115.

³⁶⁸ *Ibid.*, para. 116.

³⁶⁹ *Ibid.*, paras. 113-122.

³⁷⁰ *Ibid.*, para. 365.

³⁷¹ *Ibid.*, para. 155.

³⁷² *Ibid.*, paras. 159-160.

Appeal Court.³⁷³ The Attorney General may also refer a case to this appeal court if he concludes that the sentence imposed by the Court Martial was “unduly lenient”.³⁷⁴ Points of law may also be referred to the country’s highest court.³⁷⁵

57. Decision-making authority has, thus, been shifted from commanders to the Director of Service Prosecutions, Judge Advocate General, and court administration officers. In varying manners and to varying degrees, provisions have been made to ensure that these institutions are independent from each other, the chain of command, and the executive branch. The Director of Service Prosecutions is legally qualified and appointed by the Queen.³⁷⁶ The Judge Advocate General is appointed by the Queen on the recommendation of the Lord Chancellor.³⁷⁷ The court administration officer of the Court Martial is appointed by the Defence Council, which is chaired by the Secretary of Defence.³⁷⁸

58. There are also lessons to be learned from a reform process that has made periodic reviews of the military justice system routine.³⁷⁹ In the United Kingdom, as a matter of constitutional law, statutes establishing the military justice system will lapse unless parliament enacts new legislation every five years. In practice, this has meant that both the Ministry of Defence and a special committee established by the lower house of parliament systematically review the existing military justice system in light of the experience of the intervening years, changed circumstances and human rights norms.³⁸⁰

2. Colombia

59. Reforms adopted in Colombia provide a case study in transferring jurisdiction over serious human rights violations, such as extrajudicial executions, from military jurisdiction to that of ordinary courts.

60. The reform process in Colombia has been driven by efforts to interpret and apply the provisions of the Constitution of 1991, including its provision that crimes committed by members of the military and police are subject to military jurisdiction when they are “in active service” and the conduct was “in relation to that service”.³⁸¹ In 1997 the Constitutional Court held that this must be construed narrowly to require a “proximate and direct” link between the crime and some broader mission or task that falls within the constitutionally defined role of the security forces.³⁸² It noted that a broader interpretation risked transforming military jurisdiction into the personal privilege of a separate military class. It held that there are acts, such as crimes

³⁷³ Courts-Martial (Appeals) Act 1968, para. 8, as amended by the Armed Forces Act 2006, Schedule 8. The court itself is composed of judges and other persons with legal experience appointed by the Lord Chief Justice and the Lord Chancellor.

³⁷⁴ Ibid., Armed Forces Act 2006, para. 273.

³⁷⁵ Ibid., para. 274.

³⁷⁶ Ibid., para. 364.

³⁷⁷ Courts-Martial (Appeals) Act 1951, Ch. 46, para. 29, as amended by the Armed Forces Act 2006, Schedule 16.

³⁷⁸ Armed Forces Act 2006, para. 363.

³⁷⁹ See also E/CN.4/2006/58, paras. 64-66 (Principle No. 20).

³⁸⁰ M. Oakes [(see note 50 above), pp. 10-14] discusses this review process.

³⁸¹ See Article 221.

³⁸² See Sentencia C-358-97 (5 August 1997).

against humanity, that are “so flagrantly at odds with the constitutional function of the [military and police forces] that their commission alone breaks any functional link between the agent and the service” regardless of the context in which they were committed and that, thus, must be tried by a court of general jurisdiction. This reflected the court’s earlier judgement that international obligations prevented the concept of due obedience from being interpreted so as to extinguish criminal liability for human rights violations committed by soldiers.³⁸³

61. Judgments of the Inter-American Court of Human Rights have reinforced this approach. The Court has held that “the penal military jurisdiction shall have a restrictive and exceptional scope” and may only extend to offences “against legally protected interests of military order”.³⁸⁴ The American Convention on Human Rights requirement that crimes be tried by a “competent” tribunal would be violated if ordinary crimes were to be tried under military jurisdiction.³⁸⁵ The Court has ruled against the use of military jurisdiction in various cases, including one involving extrajudicial executions by police during a counterinsurgency operation³⁸⁶ and a case in which a state’s military suppressed prison riots, resulting in 111 deaths.³⁸⁷

62. In 1999, the Congress enacted a new military penal code which reiterated that military jurisdiction is contingent upon a link between the crime and a proper military function and expressly barred military jurisdiction over the crimes of torture, genocide, and enforced disappearance,³⁸⁸ a list which is not considered exhaustive.³⁸⁹ Similarly, in 2000, the Congress adopted a new general penal code, which contains a section on “crimes against persons and goods protected by international humanitarian law”,³⁹⁰ which includes “homicide of a protected person”.³⁹¹

63. Today, an extrajudicial execution by a Colombian soldier may be characterized as an offence under the ordinary penal code. This offence would then be prosecuted by the Attorney General’s Office and tried before a court of general jurisdiction. Disputes regarding whether jurisdiction lies with the military justice system or the regular courts are resolved by the Supreme Judicial Council.³⁹²

3. Netherlands

64. Since 1991, the Netherlands has had neither military courts nor courtmartial,³⁹³ although commanders still play a large role in disciplinary cases.³⁹⁴ But cases implicating soldiers,

³⁸³ Sentencia C-578/95 (4 December 1995).

³⁸⁴ *Durand and Ugarte v. Peru*, judgement of 16 August 2000, para. 117.

³⁸⁵ *Ibid.*, paras. 113-131.

³⁸⁶ *Las Palmeras*, paras. 2, 32-47.

³⁸⁷ *Durand and Ugarte* (see note 76 above), para. 59.

³⁸⁸ Código Penal Militar, Law 522 of 1999 (13 August 1999), arts. 1-3.

³⁸⁹ Sentencia C-878/00 (12 July 2000).

³⁹⁰ Código Penal, Law 599 of 2000 (24 July 2000), Title 2.

³⁹¹ Código Penal, art. 135.

³⁹² Constitution, art. 256(6). The Supreme Judicial Council is composed of judges serving eight year terms (Constitution, art. 254). For a discussion of jurisprudence on this issue, see *Military Jurisdiction and International Law*, pp. 241-247.

³⁹³ For this legislation and its background, see *Military Jurisdiction and International Law*, pp. 293-294.

³⁹⁴ L. Besselink, “Military Law in the Netherlands”, *European Military Law Systems*, pp. 624-628.

including those arising in armed conflict situations, are dealt with under the same system of trial and appellate review that is used for ordinary criminal cases implicating civilians.³⁹⁵ However, cases involving military personnel in both the district court and the court of appeal use a special military chamber comprising two civilian judges and one military member.³⁹⁶ The cases are prosecuted by a regular, civilian prosecutor attached to the Office of the Public Prosecutor (Openbaar Ministerie).³⁹⁷

65. Most rules of substantive and procedural law are provided by the general criminal code and code of criminal procedure, but there are some military-specific offences and rules included in the Military Criminal Code and Act of Military Criminal Procedure.³⁹⁸ These include provisions to increase sentences and provide additional defences to criminal liability when an offence takes place in an armed conflict.³⁹⁹ There is also the Laws of War Act, which criminalizes violations of “the laws and customs of war”.⁴⁰⁰

Report on Mission to the United States of America (A/HRC/11/2/Add.5, 28 May 2009, Summary, ¶¶ 49-55):

49. During my visit to Afghanistan, I saw first hand how the opacity of the military justice system reduces confidence in the Government’s commitment to public accountability for illegal conduct.⁴⁰¹ It is remarkably difficult for the U.S. public, victims’ families, or even commanders to obtain up-to-date information on the status of cases, the schedule of upcoming hearings, or even judgments and pleadings.⁴⁰² This lack of transparency is, in part, a side-effect of the decentralized character of the system, in which commanders around the world are given the authority to conduct preliminary investigations and act as “convening authorities” to initiate courts-martial.

50. This problem can be solved relatively quickly and easily. Each service, for example, is required by law to maintain a Court-Martial Management Information System for records of general and special courts-martial. A centralized system for reporting and providing public information about all courts-martial and non-judicial proceedings relating to civilian casualties could be added to the existing system, and this would markedly improve accountability and reduce the sense among Afghan and Iraqi civilians, and others around the world, that U.S. forces operate with impunity.

³⁹⁵ A.F.M. Brenninkmeijer, “Judicial Organization”, *Introduction to Dutch Law*, pp. 56-57.

³⁹⁶ L. Besselink (see note 86 above), p. 631.

³⁹⁷ *Ibid.*, p. 632.

³⁹⁸ *Ibid.*, pp. 630-631.

³⁹⁹ D-J Dieben & T. Dieben, *When does War become Crime? Aspects of the Criminal Case against Eric O.* (2005), pp. 21-22; P. C. Tange, “Netherlands State Practice for the Parliamentary Year 2005-2006”, *Netherlands Yearbook of International Law* (2007), pp. 307-309, 342-349 (excerpting letters from Minister of Defence to members of the parliament concerning deployments in Afghanistan and other contexts).

⁴⁰⁰ L. Besselink (see note 86), pp. 632-636.

⁴⁰¹ Appendix B (describing lack of transparency into 4 March 2007 incident in which, in response to a suicide attack, U.S. Marines killed some 19 individuals and wounded many others).

⁴⁰² The military has only (and so far partially) released documents concerning civilian casualties in Iraq and Afghanistan since 1 January 2005 as a result of litigation brought under the Freedom of Information Act. The documents are available at www.aclu.org/civiliancasualties.

Lack of effective investigation and prosecution

51. While the U.S. military justice system has achieved a number of convictions for unlawful killings in Afghanistan and Iraq, numerous other cases have either been inadequately investigated or senior officers have used administrative (non-judicial) proceedings instead of criminal prosecutions. In cases in which criminal convictions were obtained, some sentences appear too light for the crime committed, and senior officers have not been held to account for the wrongful conduct of their subordinates.

52. The legal obligation to effectively punish violations is as vital to the rule of law in war as in peace. It is thus alarming when States either fail to investigate or permit lenient punishment of crimes committed against civilians and combatants. The legal duty to investigate and punish violations of the right to life is not a formality. Effective investigation and prosecution vindicates the rights of the victims and prevents impunity for the perpetrators. Yet, based on the military's own documents, one study of almost 100 detainee deaths in U.S. custody between August 2002 and February 2006 found that investigations were fundamentally flawed, often violated the military's own regulations for investigations, and resulted in impunity and a lack of transparency into the policies and practices that may have contributed to the deaths.⁴⁰³

53. States must punish individuals responsible for violations of law in a manner commensurate with the gravity of their crimes.⁴⁰⁴ I raised this issue with the Government in relation to the January 2006 sentencing of Chief Warrant Officer Lewis E. Welshofer Jr. to two months confinement to his base, a fine of \$6,000, and a letter of reprimand after being found guilty of negligent homicide and negligent dereliction of duty for the death of Major General Abed Hamed Mowhoush, an Iraqi general who had turned himself in to military authorities. I have received no response.

54. I also received no response to my request for data on sentences imposed for particular offences.⁴⁰⁵ But military records released in Freedom of Information Act litigation make clear that the Welshofer sentence is not an anomaly.⁴⁰⁶ Data compiled by journalists also reinforce the perception that sentences have not consistently been proportionate to the offence committed. According to a review of cases in Iraq between June 2003 and February 2006 conducted by the Washington Post, 39 service members were formally accused in connection with the deaths of 20 Iraqis, but only 24 were charged with murder, negligent homicide or manslaughter, of whom only 12 ultimately served prison time (with sentences ranging from 45 days to 25 years), 3 were

⁴⁰³ Human Rights First, *Command's Responsibility: Detainee Deaths in U.S. Custody in Iraq and Afghanistan* (2006).

⁴⁰⁴ See E/CN.4/2006/53, para. 39.

⁴⁰⁵ On 18 June 2008, during my visit to the U.S., I formally requested: "The number of courts-martial convened with charges of murder or manslaughter; of those that have concluded, their verdicts and sentences. These data would be broken down by charge (murder, manslaughter), time period (2007, 2008 to date) and country where the charged crime took place (Afghanistan, Iraq, elsewhere)."

⁴⁰⁶ For example, four U.S. service members were charged with forcing two Iraqi men to jump into the Tigris River, resulting in the death of one of the men; the highest punishment any of the four appear to have received is six months imprisonment, reduction in rank, and a \$2,000 fine. See courts-martial records released on 4 September 2007 and available at <http://www.aclu.org/natsec/foia/log.html> (Army Bates 2834 - 3640).

convicted with no confinement, 1 was acquitted, charges against two others were dropped, and 6 received administrative, non-judicial punishments.⁴⁰⁷

55. It is noteworthy that “command responsibility,” a basis for criminal liability recognized since the trials after World War II,⁴⁰⁸ is absent both from the Uniform Code of Military Justice (UCMJ) and the War Crimes Act. It appears that no U.S. officer above the rank of major has ever been prosecuted for the wrongful actions of the personnel under his or her command. Instead, in some instances, commanders have exercised their discretion to lessen the punishment of subordinates for wrongful conduct that resulted in a custodial death.⁴⁰⁹ Such failures of accountability undermine the importance of hierarchy and discipline within the military as well as the essential role of the commander in preventing and punishing war crimes. The criminal liability of commanders for failure to prevent or punish the crimes committed by subordinates should be codified in the UCMJ and the War Crimes Act.

⁴⁰⁷ Josh White, Charles Lane and Julie Tate, *Homicide Charges Rare in Iraq War*, Washington Post, Aug. 28, 2006.

⁴⁰⁸ *In re Yamashita*, 327 U.S. 1 (1946). The ICRC study on customary international humanitarian law surveys state practice and succinctly summarizes the law on command responsibility: “Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.” (Henckaerts & Doswald-Beck, *Customary International Humanitarian Law: Volume I: Rules* (ICRC 2005), p. 558.)

⁴⁰⁹ Department of the Army, *CID Report of Investigation-Final 0114-02-CID369-23525-5H1A*, Part 1 (May 23, 2003) available at http://www.aclu.org/torturefoia/released/745_814.pdf, at 11 (Army criminal investigation into shooting death of Afghan national Mohammed Sayari on 8 August 2002 recommended charges including conspiracy and murder against four members of Special Forces unit; commanding officer dropped all charges and issued only a written reprimand of a captain who had ordered his subordinates to destroy evidence).

2. Accountability for civilian deaths

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (E/CN.4/2005/7, 22 December 2004, ¶¶ 41-54):

41. Recent years have seen a growing number of civilians and persons *hors de combat* killed in situations of armed conflict and internal strife. One result has been a general lessening of respect for established and clearly binding international norms. This is manifested in part by the proliferation of proposals that seek to justify illegal executions. Thus, it is increasingly common to read arguments along the lines that “targeting and eliminating known terrorists is more efficient and costs fewer lives than waging conventional war”.⁴¹⁰ While there are a great many empirical arguments that might be made in order to show that such strategies will be counterproductive, the point is that such proposals directly undermine the essential foundations of human rights law. Empowering Governments to identify and kill “known terrorists” places no verifiable obligation upon them to demonstrate in any way that those against whom lethal force is used are indeed terrorists, or to demonstrate that every other alternative had been exhausted.

While it is portrayed as a limited “exception” to international norms, it actually creates the potential for an endless expansion of the relevant category to include any enemies of the State, social misfits, political opponents, or others. And it makes a mockery of whatever accountability mechanisms may have otherwise constrained or exposed such illegal action under either humanitarian or human rights law.

42. There are several responses which need to be made to recent developments, and the Commission can contribute significantly to this effort through its work. The first is to reject unequivocally the killing of all innocent civilians and non-combatants by no matter whom and in no matter what circumstances. This includes those struggling against foreign occupation, for whom an exception is sometimes claimed. But, as the High-level Panel on Threats, Challenges and Change concluded at the end of a detailed analysis of the issue, “the central point is that there is nothing in the fact of occupation that justifies the targeting and killing of civilians”.⁴¹¹

43. The second response is to underscore the fact that efforts to eradicate terrorism must be undertaken within a framework clearly governed by human rights law as well as international humanitarian law, and that executions occurring in the context of armed conflict that violate that framework fall squarely within the remit of the Special Rapporteur. These issues have assumed particular salience in the past couple of years because they have been contested by some Governments. The most important responses in this regard have come from the Government of the United States in relation to two sets of allegations. The first concerned the alleged killing of six men by a “U.S.-controlled Predator drone aircraft” when they were travelling in a car in Yemen. At least one of those killed was said to have been a suspected senior figure of Al-Qaida. While there was no armed conflict in Yemen at the time, the United States pointed out that since

⁴¹⁰ A variant of this argument is that the United Nations itself should approve targeted killings of “dangerous dictators”. Anne-Marie Slaughter, “Mercy killings: why the United Nations should issue death warrants against dangerous dictators”, *Foreign Policy*, 1 May 2003.

⁴¹¹ *A More Secure World*, op. cit., para. 160.

Al-Qaida was waging war unlawfully against it, the situation constituted an armed conflict and thus “international humanitarian law is the applicable law”. In its view, “allegations stemming from any military operations conducted during the course” of such an armed conflict “do not fall within the mandate of the Special Rapporteur”, or of the Commission itself (E/CN.4/2003/G/80, annex).

44. The second set of allegations concerned reports that United States military personnel had used excessive force against civilians in the city of Fallujah, Iraq, in 2003.⁴¹² In a subsequent communication the Special Rapporteur expressed concern about reports that United States soldiers had been given orders to “shoot on sight” persons suspected of looting property in Iraq. In reply, the United States Government stated that “inquiries related to military operations conducted by the United States do not fall within the mandate of the Special Rapporteur, which does not extend to the laws and customs of war”, and requested that consideration of the incidents raised be discontinued.⁴¹³

45. These responses raise a number of matters which warrant clarification. The first concerns the place of humanitarian law within the Special Rapporteur’s mandate. The fact is that it falls squarely within the mandate. All major relevant resolutions in recent years have referred explicitly to that body of law. Most recently, the General Assembly, in resolution 59/197 of 20 December 2004, dealing with the mandate of the Special Rapporteur, urged Governments “to take all necessary and possible measures, in conformity with international human rights law and international humanitarian law, to prevent loss of life ... during ... armed conflicts” (para. 8 (b)). Consistent with this approach, every single annual report of the Special Rapporteur since at least 1992 has dealt with violations of the right to life in the context of international and non-international armed conflicts.⁴¹⁴

46. The second matter concerns the applicability of the right to life in a situation such as that under which United States troops were operating in Iraq in 2003. The right to life in article 6 of the International Covenant on Civil and Political Rights, to which both the United States and Iraq are parties, is non-derogable. Thus, the existence of an armed conflict does not per se render the Covenant inapplicable in the territory of a State party. The Human Rights Committee has held that a State party can be held responsible for violations of rights under the Covenant where the violations are perpetrated by authorized agents of the State on foreign territory, “whether with the acquiescence of the Government of [the foreign State] or in opposition to it”.⁴¹⁵

47. In 2004 in an Advisory Opinion the International Court of Justice approved of the Human Rights Committee’s reasoning and held that the Covenant “is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”.⁴¹⁶ It follows that any case

⁴¹² Letter from the Special Rapporteur of 12 May 2003.

⁴¹³ Letter of 8 April 2004.

⁴¹⁴ See: E/CN.4/1993/46, paras. 60-61; E/CN.4/1994/7, paras. 10 (l)-(m) and 11 (d); E/CN.4/1995/61, paras. 7 (d) and 8; E/CN.4/1996/4, para. 10 (f); E/CN.4/1997/60, paras. 9 (f) and 38-41; E/CN.4/1998/68, paras. 8 (f) and 42-43; E/CN.4/1999/39, paras. 6 (f) and 27; E/CN.4/2000/3, paras. 6 (f) and 30; E/CN.4/2002/74, paras. 8 (b) and 66-71; E/CN.4/2003/3, paras. 8 (b) and 35-44; E/CN.4/2004/7, paras. 9 (c) and 26-29.

⁴¹⁵ *Lopez v. Uruguay*, communication No. 52/1979, CCPR/C/OP/1 at 88 (1984), paras. 12.1-12.3.

⁴¹⁶ Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (9 July 2004), paras. 108-111.

involving the arbitrary deprivation of life of Iraqi or other nationals by United States military personnel (or other authorized government agents) may amount to a violation of the Covenant and would thus fall squarely within the Special Rapporteur's mandate.

48. The third matter concerns the relationship between human rights law and humanitarian law. The implications of the United States position in this regard would appear to be twofold:

- (i) extrajudicial, summary or arbitrary executions, falling within the Special Rapporteur's mandate, can take place only in situations where international human rights law applies; and
- (ii) where humanitarian law is applicable, it operates to exclude human rights law.

49. Acceptance of this analysis would dramatically reduce the mandate of the Special Rapporteur since so many of the executions brought to his attention take place in contexts of armed conflict. It would mean that in many situations in which a Government declares itself to be under attack and argues that the resulting conflict is governed by the laws of armed conflict, the applicability of human rights law would be entirely excluded.

50. This proposition is not supported by general principles of international law. It is now well recognized that the protection offered by international human rights law and international humanitarian law are coextensive, and that both bodies of law apply simultaneously unless there is a conflict between them. In the case of a conflict, the *lex specialis* should be applied but only to the extent that the situation at hand involves a conflict between the principles applicable under the two international legal regimes. The International Court of Justice has explicitly rejected the argument that the International Covenant on Civil and Political Rights was directed only to the protection of human rights in peacetime:

“... [T]he protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 [derogation in a time of national emergency]. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.”⁴¹⁷

51. The Court repeated and approved of this passage in its 2004 Advisory Opinion.⁴¹⁸

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

53. One additional matter warrants particular attention in this context. Governments which are criticized for violating the right to life under human rights law or for failing to respect humanitarian law by killing civilians who are not directly taking part in hostilities sometimes announce that they have initiated an investigation into the relevant incidents. In such cases it is essential that the results of the investigation be published, including details of how and by whom it was carried out, the findings, and any prosecutions subsequently undertaken. Broad, general

⁴¹⁷ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (8 July 1996), para. 25.

⁴¹⁸ *Lopez v. Uruguay*, op. cit., para. 105.

statements of findings, or non-disaggregated information as to the number of investigations and prosecutions, are inadequate to satisfy the requirements of accountability in such contexts. Formalistic investigations are almost always the precursors of a degree of impunity.

54. Remedial proposals to inculcate higher “ethical” standards or to develop a greater “moral” sensibility in the offending military personnel are also 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.

Report on Mission to the United States of America (A/HRC/11/2/Add.5, 28 May 2009, Summary, ¶¶ 61-65):

61. The key to overcoming this record of failure, both in the civilian and military justice systems, is prosecutorial and political will to enforce the rule of law. However, the nearly universal sense I was given during my visit by those in Government is that systematic accounting of, and prosecutions for, wrongful deaths are unlikely. In short, war crimes prosecutions in particular are “politically radioactive.” That sense continues to be reflected by Government statements which indicate more of a commitment to “moving forward” than to ensuring transparency and accountability for policies, practices and conduct that led to illegal killings by Government personnel and their agents. But a refusal to look back inevitably means moving forward in blindness. Political expediency is never a permissible justification for a State’s failure to investigate and prosecute alleged crimes.

62. Although there is no substitute for prosecution of violations of the right to life, in the short term there are a number of steps the Government can take towards transparency and accountability. One such step is the creation of a national “commission of inquiry” tasked with carrying out an independent, systematic and sustained investigation of policies and practices that lead to deaths and other abuses. Over the 27 years of their mandate, successive Special Rapporteurs for extrajudicial execution have focused on the procedures and results that make such commissions effective and give them credibility. I described in a recent report to the Council the situations to which a commission is best suited, and the principles and standards necessary for it to be successful.⁴¹⁹

63. A commission is an especially attractive option in this context because it is likely that extrajudicial killings resulted from a set of policy failures on the part of a variety of Government actors and agents. In such complex circumstances, transparency may best be achieved through a commission rather than through prosecution alone. The commission could propose structural or long-term reforms that would better ensure the right to life and other fundamental human rights.⁴²⁰ Another option is the appointment of a special prosecutor who would be independent of the kinds of institutional and political pressures that could - and have - hindered effective

⁴¹⁹ A/HRC/8/3, paras. 12-58.

⁴²⁰ A successful example of such a commission of inquiry comes from Canada. E/CN.4/2006/53, p. 41 (“Canada’s experience in Somalia illustrates the complementary roles of criminal and non-criminal investigation. Canada prosecuted and punished several soldiers for their actions in Somalia, but it also established a Commission of Inquiry to determine the institutional defects that allowed those abuses to occur. By identifying pervasive problems in how rules of engagement were drafted, were disseminated through the chain of command, and were taught to soldiers on the ground, Canada improved its institutional capacity to better ensure the right to life in the future.”).

investigation and prosecution by DOJ. Some have made proposals about the particular form a commission could take, and the merits of a special or independent prosecutor. I do not endorse any specific proposal, although I do note that a commission and an independent prosecutor are not mutually exclusive.

64. Regardless of the specific form of the commission, it should meet certain fundamental requirements, including that it must: be independent, impartial and competent; have the powers necessary to obtain all the information it requires; have sufficient resources and personnel; and, report all of its findings and recommendations publicly and disseminate them widely.⁴²¹ When the report is completed, the Government should reply publicly and indicate what it intends to do in response.⁴²² Any commission designed to provide the appearance of accountability rather than to establish the truth, or one that undermines the possibility of eventual prosecution, would fall short of the same international standards to which the United States often seeks to hold other countries.

65. The most credible response to the military justice system's investigative failures and sentencing distortions would be the creation of a Director of Military Prosecutions (DMP) position. Such positions have recently been instituted in Australia, Canada, Ireland, New Zealand and the United Kingdom to ensure greater separation between the chain of command and the prosecution function. Rather than permitting commanding officers to decide whether to prosecute their own soldiers - a decision in which superior officers have a direct and potentially conflicting interest - a DMP makes independent decisions.

3. Command responsibility

Report on Mission to the Philippines (A/HRC/8/3/Add.2, 16 April 2008, ¶¶ 28, 29, 67):

28. The military is in a state of denial concerning the numerous extrajudicial executions in which its soldiers are implicated.⁴²³ Some military officers would concede that a few killings might have been perpetrated by rogue elements within the ranks, but they consistently and unequivocally reject the overwhelming evidence regarding the true extent of the problem. Instead, they relentlessly pushed on me the theory that large numbers of leftist activists are

⁴²¹ See generally A/HRC/8/3, paras 12-58. See also, Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, E/1989/89 (1989); United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, Model Protocol for a Legal Investigation of Extra-Legal Arbitrary and Summary Executions ("Minnesota Protocol"), E/ST/CSDHA/.12 (1991); Updated Set of principles for the protection and promotion of human rights through action to combat impunity, Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, E/CN.4/2005/102/Add.1 (8 February 2005) ("Combat Immunity Principles"); Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, annexed to UN General Assembly Resolution 55/89 of 4 December 2000.

⁴²² Combat Immunity Principles, fn. 86, Principle 12; Minnesota Protocol, fn.86, Principle 16.

⁴²³ According to a Government analysis, of the 184 incidents reported to the Joint Monitoring Committee established by CARHRIHL between 1 February 2001 and 31 October 2006, the alleged perpetrators were the AFP (88 incidents; 48%), the PNP (7 incidents; 4%), CAFGUs (6 incidents; 3%), private individuals (8 incidents; 4%), the Revolutionary Proletarian Army – Alex Boncayo Brigade (RPA-ABB) (1 incident; 1%), and unidentified persons (74 incidents; 40%). ("Report of the Technical Working Group (TWG) on the Alleged Political Killings (Covering the Period 1 February 2001 – 31 October 2006) as of 20 December 2006").

turning up dead because they were victims of internal purges within the CPP and NPA. I repeatedly sought evidence from the Government to support this contention. But the evidence presented was strikingly unconvincing ...

29. These pieces of evidence do not begin to support the contention that the CPP/NPA/NDF is engaged in a large-scale purge. Indeed, I met no one involved in leftist politics — whether aligned with the CPP, opposed to the CPP, or following an independent course — who believed that such a purge was currently taking place. The military’s insistence that the “correct, accurate, and truthful” reason for the recent rise in killings lies in CPP/NPA/NDF purges can only be viewed as a cynical attempt to displace responsibility.⁴²⁴

[...]

67. Extrajudicial executions must be eliminated from counterinsurgency operations:

(a) As Commander-in-Chief of the armed forces, the President must take concrete steps to put an end to those aspects of counterinsurgency operations which have led to the targeting and execution of many individuals working with civil society organizations.

(b) The necessary measures should be taken to ensure that the principle of command responsibility, as it is understood in international law, is a basis for criminal liability within the domestic legal order.

Report on Mission to the Central African Republic (A/HRC/11/2/Add.3, 27 May 2009, ¶¶ 13-15, 30, 75-76):

13. Government officials acknowledged that soldiers are poorly trained, lack discipline, and are unprofessional. Foreign military advisers⁴²⁵ described them as lacking effective command and control structures. This is particularly the case with the GP. Military officials stated that while the GP are structurally part of the FACA, they are not under the command of its Chief of Staff. As detailed below, some units of the GP seem to undertake military operations outside of any formal command structure. The GP were repeatedly singled out as being the least disciplined. They would consume alcohol while on duty, refuse to take care of their military equipment, and many were unable to properly handle their weapons. Human rights and humanitarian law training has, until recently, also been poor. A foreign adviser noted that during a recent humanitarian law training session it became evident that troops were ignorant of the content of the core legal principles.

⁴²⁴ On the day that the Melo Commission’s report was publicly released, the Chief of Staff of the AFP, General Hermogenes Esperon, issued a letter signed by himself raising the same arguments that he had presented to me in person, and stating that, “Following on page 56 of the [Melo Commission’s report] is the declaration that, except for the reason that the killings were perpetrated by the CPP/NPA to purge its ranks, no other plausible explanation has been given for the rise in extrajudicial killings. To be sure, the AFP need not search for any ‘plausible explanation’ because the purges conducted by the CPP/NPA are the correct, accurate and truthful reasons that explain the rise in extrajudicial killings.” This letter was provided together with a number of annexes in the document “AFP Reaction to the Melo Commission’s Initial Report”.

⁴²⁵ French, South African and regional *Mission de Consolidation de la Paix* (MICOPAX) personnel engage in training and other assistance for the CAR forces. This contribution was generally perceived to be positive.

14. Recruitment into the FACA since the early 1980s has not been based on consistent criteria over time. Rather, soldiers have all too often been recruited through personal relationships, or recruited for their ethnicity and loyalty to the current leader. The result of this today is that the army is not an integrated whole with regularized command and control lines, but includes various informal factions, including members of the Yacoma ethnic group recruited under former President André Kolingba, and the *ex-libérateurs* brought in by President Bozizé.

15. The army is woefully lacking in even basic infrastructure, equipment, and communications. Between the mid-1990s and 2003, much was destroyed in a series of mutinies. It is especially problematic that the FACA is primarily based only in the capital, Bangui. When units are deployed outside the capital, they generally have no access to properly equipped barracks. As one foreign military adviser explained, this means that FACA units sent to the north often live off the land and at the expense of the local population, resulting in low morale for troops and abuses of the civilian population.

[...]

30. A number of other Government officials stated that reports of violence were exaggerated. The officials admitted that some acts of violence by the military occurred, but stated that it was difficult to control individuals out in the field, or to know who did what to whom. This may be true, but it is not an acceptable excuse for inaction by the Government, nor can it form the basis of a credible denial of the accuracy of the many accounts of violence received. Rather, the Government's admissions of lack of control and lack of knowledge of events - in the face of comprehensive human rights reporting and the statements of many witnesses - indicate instead that it needs to undertake far-reaching security sector reforms so that the failings of command and control structures and investigative processes can be remedied.

[...]

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.

4. Transparency in armed conflict

Report on Mission to the United States of America (A/HRC/11/2/Add.5, 28 May 2009, Summary, ¶¶ 43-45, 49-55, Appendix II):

43. DOD officials confirmed to me that the military does not systematically compile statistics on civilian casualties in its operations in Afghanistan or Iraq. The purported reason is that “body counts” are not relevant to evaluating the effectiveness or legality of military operations. It is true that a simple “body count” may not on its own be useful. However, systematically tracking how different kinds of operations result in different levels of civilian casualties is critical if the United States is serious about minimizing casualties. Indeed, the Government’s own experience shows why this is so. Despite the general policy against tracking civilian casualties, in Iraq the military reportedly tracked checkpoint deaths when soldiers fire at civilians they believe, sometimes mistakenly, to be suicide bombers or other attackers. I understand these monitoring efforts resulted in procedural changes that saved lives. This kind of effort to track, analyze, and learn from the consequences of military operations should be routine, not exceptional. The numbers and trends should be reported publicly to strengthen external accountability.

44. The challenges of compiling statistics on civilian casualties during military operations are undeniable. The lack of secure access to incident sites, especially those of aerial bombardments, can make it difficult to determine the number of persons killed, much less the proportion that were civilians. Thus, the DOD has noted that, while information on civilian casualties is included in significant activity (SIGACT) reports, this information is not necessarily accurate. But the solution is not to avoid compiling civilian casualty statistics altogether but to eschew simple counts in favor of releasing information that continually and systematically presents ranges and estimates with the necessary qualifications.

45. In relation to deaths in military custody, operational difficulties cannot be used to justify a failure to compile statistics. Making the numbers and causes of such deaths public is part of the United States’ obligation to exercise diligence, to prevent deaths of prisoners in its custody, and to investigate and prosecute any illegal conduct.

[...]

49. During my visit to Afghanistan, I saw first hand how the opacity of the military justice system reduces confidence in the Government’s commitment to public accountability for illegal conduct.⁴²⁶ It is remarkably difficult for the U.S. public, victims’ families, or even commanders to obtain up-to-date information on the status of cases, the schedule of upcoming hearings, or even judgments and pleadings.⁴²⁷ This lack of transparency is, in part, a side-effect of the decentralized character of the system, in which commanders around the world are given the

⁴²⁶ Appendix B (describing lack of transparency into 4 March 2007 incident in which, in response to a suicide attack, U.S. Marines killed some 19 individuals and wounded many others).

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authority to conduct preliminary investigations and act as “convening authorities” to initiate courts-martial.

50. This problem can be solved relatively quickly and easily. Each service, for example, is required by law to maintain a Court-Martial Management Information System for records of general and special courts-martial. A centralized system for reporting and providing public information about all courts-martial and non-judicial proceedings relating to civilian casualties could be added to the existing system, and this would markedly improve accountability and reduce the sense among Afghan and Iraqi civilians, and others around the world, that U.S. forces operate with impunity.

(b) Lack of effective investigation and prosecution

51. While the U.S. military justice system has achieved a number of convictions for unlawful killings in Afghanistan and Iraq, numerous other cases have either been inadequately investigated or senior officers have used administrative (non-judicial) proceedings instead of criminal prosecutions. In cases in which criminal convictions were obtained, some sentences appear too light for the crime committed, and senior officers have not been held to account for the wrongful conduct of their subordinates.

52. The legal obligation to effectively punish violations is as vital to the rule of law in war as in peace. It is thus alarming when States either fail to investigate or permit lenient punishment of crimes committed against civilians and combatants. The legal duty to investigate and punish violations of the right to life is not a formality. Effective investigation and prosecution vindicates the rights of the victims and prevents impunity for the perpetrators. Yet, based on the military’s own documents, one study of almost 100 detainee deaths in U.S. custody between August 2002 and February 2006 found that investigations were fundamentally flawed, often violated the military’s own regulations for investigations, and resulted in impunity and a lack of transparency into the policies and practices that may have contributed to the deaths.⁴²⁸

53. States must punish individuals responsible for violations of law in a manner commensurate with the gravity of their crimes.⁴²⁹ I raised this issue with the Government in relation to the January 2006 sentencing of Chief Warrant Officer Lewis E. Welshofer Jr. to two months confinement to his base, a fine of \$6,000, and a letter of reprimand after being found guilty of negligent homicide and negligent dereliction of duty for the death of Major General Abed Hamed Mowhoush, an Iraqi general who had turned himself in to military authorities. I have received no response.

54. I also received no response to my request for data on sentences imposed for particular offences.⁴³⁰ But military records released in Freedom of Information Act litigation make clear

⁴²⁸ Human Rights First, *Command’s Responsibility: Detainee Deaths in U.S. Custody in Iraq and Afghanistan* (2006).

⁴²⁹ See E/CN.4/2006/53, para. 39.

⁴³⁰ On 18 June 2008, during my visit to the U.S., I formally requested: “The number of courts-martial convened with charges of murder or manslaughter; of those that have concluded, their verdicts and sentences. These data would be broken down by charge (murder, manslaughter), time period (2007, 2008 to date) and country where the charged crime took place (Afghanistan, Iraq, elsewhere).”

that the Welshofer sentence is not an anomaly.⁴³¹ Data compiled by journalists also reinforce the perception that sentences have not consistently been proportionate to the offence committed. According to a review of cases in Iraq between June 2003 and February 2006 conducted by the Washington Post, 39 service members were formally accused in connection with the deaths of 20 Iraqis, but only 24 were charged with murder, negligent homicide or manslaughter, of whom only 12 ultimately served prison time (with sentences ranging from 45 days to 25 years), 3 were convicted with no confinement, 1 was acquitted, charges against two others were dropped, and 6 received administrative, non-judicial punishments.⁴³²

55. It is noteworthy that “command responsibility,” a basis for criminal liability recognized since the trials after World War II,⁴³³ is absent both from the Uniform Code of Military Justice (UCMJ) and the War Crimes Act. It appears that no U.S. officer above the rank of major has ever been prosecuted for the wrongful actions of the personnel under his or her command. Instead, in some instances, commanders have exercised their discretion to lessen the punishment of subordinates for wrongful conduct that resulted in a custodial death.⁴³⁴ Such failures of accountability undermine the importance of hierarchy and discipline within the military as well as the essential role of the commander in preventing and punishing war crimes. The criminal liability of commanders for failure to prevent or punish the crimes committed by subordinates should be codified in the UCMJ and the War Crimes Act.

[...]

Appendix II

CASE STUDY: LACK OF TRANSPARENCY IN THE MILITARY JUSTICE SYSTEM

1. The troublingly opaque character both of investigation and of prosecution in the U.S. military justice system is well illustrated by a case described to me by witnesses and investigators when I visited Afghanistan.⁴³⁵ On 4 March 2007, U.S. Marines responded to a suicide attack on their convoy, in which one soldier was wounded, by killing some 19 Afghans and wounding many others in the space of a ten mile retreat. I asked the regional commander in Afghanistan what

⁴³¹ For example, four U.S. service members were charged with forcing two Iraqi men to jump into the Tigris River, resulting in the death of one of the men; the highest punishment any of the four appear to have received is six months imprisonment, reduction in rank, and a \$2,000 fine. See courts-martial records released on 4 September 2007 and available at <http://www.aclu.org/natsec/foia/log.html> (Army Bates 2834 - 3640).

⁴³² Josh White, Charles Lane and Julie Tate, *Homicide Charges Rare in Iraq War*, Washington Post, Aug. 28, 2006.

⁴³³ *In re Yamashita*, 327 U.S. 1 (1946). The ICRC study on customary international humanitarian law surveys state practice and succinctly summarizes the law on command responsibility:

“Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.” (Henckaerts & Doswald-Beck, *Customary International Humanitarian Law: Volume I: Rules* (ICRC 2005), p. 558.)

⁴³⁴ Department of the Army, *CID Report of Investigation-Final 0114-02-CID369-23525-5H1A*, Part 1 (May 23, 2003) available at http://www.aclu.org/torturefoia/released/745_814.pdf, at 11 (Army criminal investigation into shooting death of Afghan national Mohammed Sayari on 8 August 2002 recommended charges including conspiracy and murder against four members of Special Forces unit; commanding officer dropped all charges and issued only a written reprimand of a captain who had ordered his subordinates to destroy evidence).

⁴³⁵ Press Statement, Kabul, 15 May 2008.

follow-up had occurred. He could not tell me and explained that his unit had just arrived in Afghanistan, that accountability for incidents involving the previous unit was that unit's responsibility, and that the prior unit had taken all the relevant files when it left the country. In fact, at that time, a Court of Inquiry into the incident was proceeding in North Carolina.

2. Shortly after I returned from Afghanistan, the U.S. military released a short statement on this incident, indicating that the commander of U.S. Marine Corps Forces Central Command had conducted a "thorough review of the report of a Court of Inquiry" and had determined that the soldiers had "acted appropriately and in accordance with the rules of engagement and tactics, techniques and procedures in place at the time in response to a complex attack."⁴³⁶ Unsurprisingly, this conclusory and unsubstantiated response to such a serious incident was met with dismay in Afghanistan. Afghans - and Americans - have a right to ask on what basis this conclusion was reached. But all of the documents produced by the Court of Inquiry have remained classified. The record of proceedings has not been released. The 12,000-page report of the Court of Inquiry, including recommendations and factual findings, has not been released. The Government has even disregarded its own regulation requiring the convening authority to ensure that an executive summary of the report be made public.⁴³⁷ Whether or not the decision not to initiate criminal proceedings in this case was justified, the manner in which the military justice system operated in this case is entirely inconsistent with principles of public accountability and transparency.

Report on Mission to the Central African Republic (A/HRC/11/2/Add.3, 27 May 2009, ¶¶ 53, 62-65):

53. Given the frequency with which abuses have been committed by security forces in the north-west, particular attention should be paid to eliminating the sense that they are above the law. Although President Bozizé took the positive step of removing the GP from the north-west after seeing evidence of their crimes, the Special Rapporteur saw no evidence that any FACA/GP members had actually been prosecuted for abuses. The Minister of Defence stated that the

⁴³⁶ Press Statement, 23 May 2008.

⁴³⁷ The use of Courts of Inquiry is provided for in Article 135 of the Uniform Code of Military Justice (UCMJ). While the UCMJ authorizes the President to prescribe regulations to implement UCMJ provisions, with respect to Courts of Inquiry, the President has delegated most of this authority to the Secretaries of the Army, Navy, and Air Force. For the Navy, which includes the Marine Corps, the key regulation is JAGINST 5830.1A, "Procedures Applicable to Courts and Boards of Inquiry" (31 October 2005). This regulation distinguishes between three products of a Court of Inquiry: the "record of proceedings", the "report", and the "executive summary". On this last, the regulation states that:

"Given the nature of the major incidents investigated, officials of the DON, the DOD, other executive agencies, the legislative branch, and the media, often desire copies of the investigation. Where the incident results in death, the next of kin also will normally request a copy of the investigation. The report of the investigation, transcript of the proceedings, and enclosures can often be thousands of pages in length. For persons unfamiliar with military organizations, terminology, and operations, the task of deciphering an investigation can be difficult. Accordingly, convening authorities should ensure that an executive summary in plain English, which accurately reflects the findings, opinions, and recommendations of the investigation, is prepared prior to forwarding the investigation. The summary may be a part of the convening authority's endorsement or an enclosure thereto. There is nothing improper with requiring counsel to the investigation or the president of a Court or Board of Inquiry to prepare the summary. Participation by public affairs personnel in the preparation of the executive summary may also be advisable."(JAGINST 5830.1A, para. 9.)

soldiers responsible had been dismissed and prosecuted. However, neither he, nor any other official the Special Rapporteur asked could provide detailed information - e.g., about the number of soldiers who had been investigated, disciplined or charged - that would substantiate this assertion. The Director General of the GP stated that comprehensive documentation did not exist, and that the Special Rapporteur should ask the radio or TV stations for the numbers sanctioned, as such orders were announced there.

[...]

62. In practice, cases involving the FACA/GP are dealt with by the Permanent Military Tribunal. This Tribunal can be seized by the public prosecutor and has jurisdiction over offences committed by military personnel. The Tribunal is not a standing institution, and although Government officials stated that three sessions per year would be ideal, it generally meets just once or twice a year. In some years, a lack of funds has prevented sessions from taking place altogether.

63. In addition to resource shortages at the Tribunal, the military justice system - like the ordinary criminal justice system - is plagued by fundamental deficiencies at the investigative level. In theory, if the prosecutor receives allegations of abuse, an investigation is conducted with the assistance of the judicial police, and a report made to the Tribunal. Current arrangements should facilitate such investigations: gendarmes are officers of the judicial police and often accompany military units when they are deployed. Moreover, in the case of a flagrant offence, gendarmes have an obligation to inform the prosecutor and to proceed to the location of the crime and conduct the necessary investigation.

64. In practice, however, the reporting, investigating and prosecuting of human rights violations by the armed forces is almost non-existent. For example, despite the large number of violations committed by the armed forces during the first half of 2007, the Special Rapporteur was informed by the gendarmerie that they had made just 10 reports on acts of violence by the FACA in 2007, and most of those were qualified as relating to private incidents. In one report, the officer noted a rebel attack in the north-west, and discussed the subsequent intervention by the military. The report specifically detailed abuses and killings committed by the GP based in Bossangoa. The gendarme who drafted this report had the power to act as a member of the judicial police; however, there was no indication that any effort had been made to investigate further or arrest the perpetrators. Civil society representatives and witnesses to particular incidents reported a similar reluctance by prosecutors to investigate and refer cases to the Tribunal.

65. An effective military justice system must be considered an integral part of any effort to reduce and prevent killings. The Special Rapporteur recognizes that steps are being taken to improve the system, such as drafting a new military justice code. However, as long as there are almost no investigations and prosecutions, killings by members of the military will continue.

Report on Mission to the Philippines (A/HRC/8/3/Add.2, 16 April 2008, ¶¶ 11,17, 67, 69):

11. Over the past six years, there has been a spate of extrajudicial executions of leftist activists, including human rights defenders, trade unionists, land reform advocates, and others.⁴³⁸ The victims have disproportionately belonged to organizations that are members of Bagong Alyansang Makabayan (Bayan), or the “New Patriotic Alliance”, or that are otherwise associated with the “national democratic” ideology also espoused by the CPP/NPA/NDF.⁴³⁹ These killings have eliminated civil society leaders, intimidated a vast number of civil society actors, and narrowed the country’s political discourse. Responses to the problem have been framed by lists produced by civil society organizations. The most widely cited list is that of Karapatan, which contains 885 names.⁴⁴⁰ Task Force Detainees of the Philippines (TFD-P) has compiled a shorter list, but the different numbers indicate differences in the geographical coverage of their activist networks more often than disagreement about particular cases.⁴⁴¹ Due to a narrow definition of the phenomenon and its uncertainty regarding some cases, Task Force Usig, the PNP group charged with ensuring the effective investigation of these incidents, has a list of 116 cases that it is attempting to resolve.⁴⁴²

⁴³⁸ The category of “leftist activists” is employed due to its explanatory power. Human rights defenders and trade unionists, along with many other civil society leaders, appear to be killed due more to their association with leftist groups than to their particular activities. With respect to trade unionists, for instance, I spoke with representatives of both the Federation of Free Workers (FFW) and the Kilusang Mayo Uno (KMU). Both groups claim several hundred thousand members, but while KMU has lost numerous members to extrajudicial executions, FFW has not lost any. The key distinction appears to be that KMU is commonly cited by Government officials as a CPP front group and FFW is not. To clarify, disputes surrounding organizing campaigns and collective bargaining negotiations appear often to be the motivating factor behind decisions to attack workers and organizers, but the likelihood that such an attack will take the extreme form of an extrajudicial execution appears to be far higher if the worker is associated with what is purported to be a CPP front group. In contrast, the killing of journalists is discussed separately, because it appears to constitute a distinct phenomenon.

⁴³⁹ The list of extrajudicial victims maintained by Karapatan (as of 30 June 2007) provides the political or organizational affiliation of the 390 victims for which they are known. If these are correlated with documents originating in the AFP that list CPP/NPA/NDF front groups, we find that 94% of the victims with known affiliations belonged to alleged front groups. [See table of victims in Special Rapporteur’s full report, FN 12]

⁴⁴⁰ Number from list current as of 30 June 2007. Some comparisons in the report are based on earlier versions of Karapatan’s list, as noted.

⁴⁴¹ According to a Government analysis of the various lists of “alleged political killings” that was current as of 20 December 2006, while Karapatan’s list contained 725 names and TFD-P’s list contained 89 names, only 46 names appeared on both lists. (“Report of the Technical Working Group (TWG) on the Alleged Political Killings (Covering the Period 1 February 2001 – 31 October 2006) as of 20 December 2006”).

⁴⁴² In May 2006, the Secretary of the Interior and Local Government ordered the PNP to establish Task Force Usig to investigate and help to resolve the killings of journalists and leftist activists. The figure of 116 cases was accurate as of 2 April 2007 and refers to “slain party list members / militants”; Task Force Usig maintains a separate list of “slain mediamen”. (Letter from the Philippine Mission to the United Nations, dated 23 May 2007.) Note that the 116 cases that Task Force Usig considers within its remit is not the full number of incidents which human rights groups have alleged to constitute extrajudicial executions. For example, of the 783 such cases enumerated by Karapatan (as of 14 November 2006), Task Force Usig determined that 461 either fell outside of its remit or clearly did not involve a crime, and considers 207 cases still in need of verification. It is worth clarifying that Karapatan has alleged that Government agents — soldiers, police officers, and others — were the perpetrators in many but far from all of the cases that it has recorded. However, this does not explain the extent of the exclusions. I had a lengthy and productive discussion with the members of Task Force Usig regarding the grounds on which cases were excluded. After my visit, Task Force Usig also forwarded me a large quantity of documentation to substantiate the argument that a number of individuals listed by civil society organizations died in legitimate encounters between the NPA and the AFP or PNP. I ultimately concluded that a comprehensive, case-by-case analysis of the excluded cases could not usefully be undertaken by someone in my position. I continue to believe, however, that there is a need for greater transparency with respect to this aspect of Task Force Usig’s work if its efforts are to be fully accepted by all concerned, and I make a recommendation to this end in Part XIII.

[...]

17. The public vilification of “enemies” is accompanied by operational measures. The most dramatic illustration is the “order of battle” approach adopted systematically by the AFP and, in practice, often by the PNP. In military terms an order of battle is an organizational tool used by military intelligence to list and analyze enemy military units. The AFP adopts an order of battle in relation to the various regions and sub-regions in which it operates. A copy of a leaked document of this type, from 2006, was provided to me, and I am aware of no reason to doubt its authenticity. The document, co-signed by senior military and police officials, calls upon “all members of the intelligence community in the [relevant] region ... to adopt and be guided by this update to enhance a more comprehensive and concerted effort against the CPP/NPA/NDF”. Some 110 pages in length, the document lists hundreds of prominent civil society groups and individuals who have been classified, on the basis of intelligence, as members of organizations which the military deems “illegitimate”. While some officials formalistically deny that being on the order of battle constitutes being classified as an enemy of the state, the widespread understanding even among the political elite is that it constitutes precisely that.⁴⁴³

[...]

67. (d) Transparency must be introduced to the “orders of battle”, “watch lists”, and similar list of individuals and organizations maintained by the AFP, PNP, and other elements of the national security system. While their contents might justifiably be considered secret, which lists exist, their purposes, the criteria for inclusion, and the number of names on each should be made public.

[...]

69. Convictions in a significant number of extrajudicial executions must be achieved. Appropriate institutional arrangements exist but they must be more transparent if they are to be effective. Thus:

(a) CHRP should issue a monthly report listing allegations of extrajudicial executions that it has received together with the current status of its investigations.

⁴⁴³ This exchange between Representative Teodoro Casiño and Representative Joey Salceda, who was acting as the sponsor of a budget bill for the Department of National Defense, provides an illustration of how orders of battle are understood:

REP. CASIÑO. Ano po ang, sino po ang nasasama sa isang order pf battle? [What is, who are included in an order of battle?]

REP. SALCEDA. Enemies of the State.

REP. CASIÑO. Enemies of the State. At ano ang batayan sa paglagay ng isang tao sa order of battle? [And what is the basis for including a person in an order of battle?]

REP. SALCEDA. Those who have committed acts punishable under the Revised Penal Code for the crime of rebellion.

REP. CASIÑO. Mayroon po bang due process na ginagawa ang armed forces bago nila ilagay ang isang tao sa order of battle? [Is there due process conducted by the armed forces before including a person in its order of battle?]

REP. SALCEDA. Evidence based decision-making, Your Honor.

(Transcript of Congressional budget deliberations, March 22, 2006, 4:30pm.)

- (b) Members of the public should be able to submit cases to be overseen by Task Force Usig. If it concludes that a case does not fall within its mandate, it should provide a reasoned explanation in writing.
- (c) Task Force Usig should issue a monthly report on the status of all cases it is attempting to resolve.
- (d) The Supreme Court should issue a monthly report on the status of all cases before the special courts.

5. Armed opposition groups and their “justice” systems

Report on Mission to the Philippines (A/HRC/8/3/Add.2, 16 April 2008, ¶¶ 31-33):

31. Discussions with NDF representatives and review of published CPP/NPA/NDF documents did, however, reveal several practices that are inconsistent with international human rights and humanitarian law. First, the CPP/NPA/NDF considers “intelligence personnel” of the AFP, PNP, and paramilitary groups to be legitimate targets for military attack. Some such persons no doubt are combatants or civilians directly participating in hostilities; however, the CPP/NPA/NDF defines the category so broadly as to encompass even casual Government informers, such as peasants who answer when asked by AFP soldiers to identify local CPP members or someone who calls the police when faced with NPA extortion.⁴⁴⁴ Killing such individuals violates international law.

32. Second, the CPP/NPA/NDF’s system of “people’s courts” is either deeply flawed or simply a sham. The question whether the Comprehensive Agreement on Respect for Human Rights and

⁴⁴⁴ NDF representatives called my attention to a formal declaration it had made (*Declaration of Undertaking*):

The NDFP regards as legitimate targets of military attacks the units, personnel and facilities belonging to the following:

- a. The Armed Forces of the Philippines
- b. The Philippine National Police
- c. The paramilitary forces; and
- d. The intelligence personnel of the foregoing.

Civil servants of the GRP are not subject to military attack, unless in specific cases they belong to any of the four abovestated categories.

The interpretation given the concept of “intelligence personnel” is quite broad, including ordinary civilians who provide information to Government forces. NDF representatives stated that if there is certainty that someone is a Government informant, then he or she is considered a legitimate military target. If there is doubt as to whether someone is a Government informant, a process of escalating responses is followed: He or she will be approached and given a warning, then he or she will be asked to leave the area, and finally a judicial process will be commenced before a people’s court, perhaps ultimately resulting in arrest and punishment. Generally, however, they said that such people simply leave the area. When I inquired regarding the alleged killings of persons for being Government officials and for refusing to pay revolutionary taxes, the importance of how “intelligence personnel” is interpreted was further demonstrated. NDF representatives asserted that insofar as Government officials may have been killed, this would have been due to the role that particular Government officials had played in providing Government forces with intelligence information. Similarly, NDF representatives stated that they were unaware of any case in which tax evasion as such had resulted in the NPA killing someone. They explained that tax collection generally involves a negotiation to settle on a mutually agreeable amount. If that negotiation breaks down and the firm or individual refuses to pay taxes, then the NPA might take such actions as the confiscation or destruction of assets. They stated that when someone has been killed in connection with tax collection efforts, this has been because he or she tipped off the AFP or PNP with a view to getting CPP or NPA members arrested to avoid making payment.

International Humanitarian Law (CARHRIHL) can be interpreted to affirm the CPP/NPA/NDF's contention that it has a right to constitute courts and conduct trials is a matter of controversy.⁴⁴⁵ However, insofar as the CPP/NPA/NDF does conduct trials, international humanitarian law (IHL) unambiguously requires it to ensure respect for due process rights. One telling due process violation is that, while a people's court purportedly requires "specification of charges . . . prior to trial", the CPP/NPA/NDF lacks anything that could reasonably be characterized as a penal code.⁴⁴⁶ It is apparent that the CPP/NPA/NDF does impose punishments for both ordinary and counterrevolutionary crimes in areas of the country that it controls. But NDF representatives were unable to provide me with any concrete details on the operation of the people's court system. This suggests that little or no judicial process is involved. In some cases, the use of people's courts would appear to amount to little more than an end run around the principle of non-combatant immunity. In other words, it seeks to add a veneer of legality to what would better be termed vigilantism or murder. Failure to respect due process norms constitutes a violation of IHL for the NPA/CPP/NDF and may constitute a war crime for participating cadres.⁴⁴⁷

33. Third, public statements by CPP/NPA/NDF representatives that opponents owe "blood debts", have "accountabilities to the people", or are subject to prosecution before a people's court, are tantamount to death threats.⁴⁴⁸ Issuing such threats under the guise of revolutionary justice is utterly inappropriate and must be decisively repudiated.

⁴⁴⁵ The CPP/NPA/NDF variously considers itself a "sovereign", an armed group with "status of belligerency", and "the political authority representing the Filipino people and organized political forces that are waging an armed revolutionary struggle for national liberation and democracy, in the exercise of the right to self-determination". (*Declaration of Undertaking*). The CPP/NPA/NDF claims on this basis to have the authority to impose a system of criminal justice. Moreover, it claims that its right to do so is affirmed by the CARHRIHL signed by representatives of the Government and the NDF on 16 March 1998. CARHRIHL, Part III, Article 4 provides that, "The persons liable for violations and abuses of human rights shall be subject to investigation and, if evidence warrants, to prosecution and trial. . . ."

⁴⁴⁶ The basic procedure of the people's courts is provided in the "Guide for Establishing the People's Democratic Government" (1972), Chapter III, but this does not explain what law the courts apply. Representatives of the NDF claimed that, while the process of codification was ongoing, several existing documents constituted a penal code. These were the "Guide for Establishing the People's Democratic Government", "Basic Rules of the New People's Army" (1969), "Rules in the Investigation and Prosecution of Suspected Enemy Spies" (1989), and the "NDFP Declaration of Undertaking to Apply the Geneva Conventions of 1949 and Protocol I of 1977" (1996). While the "Basic Rules of the New People's Army" includes a list of offences that are to be punished by expulsion and death when committed by members of the NPA — "treachery, capitulation, abandonment of post, espionage, sabotage, mutiny, inciting for rebellion, murder, theft, rape, arson and severe malversation of people's funds" (Principle IV, Point 8) — neither this nor any other instrument cited actually defines the elements of any criminal offence.

⁴⁴⁷ Article 3(1)(d) common to the Geneva Conventions of 1949; Protocol I, Article 75(4); Rome Statute of the International Criminal Court, Article 8(2)(c)(iv); International Committee of the Red Cross, *Customary International Humanitarian Law*, Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), Cambridge University Press, 2005, Rules 100-103, 156.

⁴⁴⁸ NDF representatives explained that "accountabilities" to the people cover a range of situations including that a person has caused injury, damage, or death and warrants a warning; that a person has become part of the military structure and a legitimate military target; or that a person has been the subject of a criminal complaint before a people's court. When it is stated that a person has a "blood debt", that would generally mean that a complaint had been filed or a warrant of arrest issued. I have no evidence that the CPP/NPA/NDF uses such characterizations as a way of directing or inciting violence against individuals; however, the effect of intimidation that such statements must cause is highly irresponsible. Thus, for instance, Jose Maria Sison stated publicly that two prominent non-CPP leftists, Walden Bello and Etta Rosales, "can talk and write as much as they want against the CPP and other revolutionary forces [and] be sure that these targets of their malice will always respect their right of free speech" but

Press Statement on Mission to Columbia, 18 June 2009:

FARC and ELN guerrillas continue to carry out significant numbers of unlawful killings, especially in order to control and instill fear in rural populations, to intimidate elected officials, to punish those alleged to be collaborating with the Government, or to promote criminal objectives. Their indiscriminate and inhumane use of landmines also kills and maims many.

Report on Mission to the Central African Republic (A/HRC/11/2/Add.3, 27 May 2009, ¶¶ 20-21):

20. APRD rebels were responsible for a small number of extrajudicial executions. These related to the conflict as such, and to the efforts of APRD to govern areas under its control. With respect to the conflict, extrajudicial executions by the APRD were isolated incidents. Human rights monitors informed the Special Rapporteur of a small number of cases of the APRD killing civilians accused of supporting the Government. For instance, during the night of 30 May 2007, the APRD killed the *Sous-Préfet* of Ngaoundaye, allegedly because he supported the Government's defence forces. Likewise, the Special Rapporteur was informed of a case where three young men from Bélé were killed by the APRD on 2 September 2007 because they refused to join the APRD. Reports of killings by the APRD that were carried out to exact personal revenge were also received. In one case, an APRD commander executed a volunteer at a local organization because of a personal rivalry.

21. In areas of the north-west under its control, the APRD imposed "taxes", and ran an informal criminal justice system, which fell short of minimum due process standards. No information was received on specific cases in which failures to pay "taxes" resulted in executions, but reliable information is hard to come by, and some abuses have occurred (for example, in 2007 the APRD burned two villages on the Ouandago-Batangafo axis for not paying "taxes"). The Special Rapporteur also received information on a number of cases in which the APRD killed those accused of practising "witchcraft" (section VI addresses the killing of "witches" in detail).

Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009, ¶ 27):

27. The Taliban routinely resorts to assassinations to coerce and punish civilians. In 2008, 271 such executions were committed. These killings are the tip of an iceberg of intimidation, epitomized by the "night letters" distributed to civilians. Some letters are displayed in public places - nailed to a mosque door, a school, or in a public market - and contain general directives

then added that "it is another matter if for example there is a criminal complaint" against either of them and hinted at what basis such a hypothetical criminal complaint might have — "organizing groups dedicated to intelligence and psywar for the imperialists against the patriotic and progressive forces" and "stealing funds from her congressional committee, covering up human rights violations or conniving with Imee Marcos in blocking the indemnification of the winning plaintiffs in the US court judgment against the Marcos estate", respectively. (Press Statement, 27 December 2004.) In this context, it was hardly unreasonable for Bello and Rosales to wonder whether they might be subjected to the "revolutionary justice" of a "people's court". However, when I asked Sison whether there were such criminal complaints, he stated that he had no information that there were such complaints, and members of the NDF Negotiating Panel stated categorically that there were not.

or threats to the local population.⁴⁴⁹ One Kunar witness told of a letter justifying attacks on local school students and on all non-Muslims. Others are sent to specific addressees. A Kandahar woman told of letters instructing her son to stop working for the ANP. He was later killed by suspected Taliban. In Kunar, a night letter was been posted in the village's mosque threatening three people. Subsequently, two were assassinated and the third fled the country.⁴⁵⁰ Directives issued by the Taliban leadership to its fighters expressly authorize the execution of civilians.⁴⁵¹

⁴⁴⁹ In addition to the accounts that I received from witnesses, I reviewed a large number of night letters and other information gathered in Afghanistan. Threats made by the Taliban in person, by telephone, and through night letters and other publications have attempted to induce compliance with social norms favored by the Taliban and to deter various forms of collaboration with the Government, the international forces, and other actors. Persons threatened and targeted have included mullahs in Ulema Councils that advise the Government, members of Provincial Councils (especially female members), teachers, students attending school (especially female students), elders perceived to be collaborating with the Government, drivers supplying food to the international forces, persons employed by the Government, and persons working for non-governmental organizations.

A night letter in Kandahar referred to earlier general pronouncements that people should not work for the Government or NGOs and went on to warn that a specific individual's family members must cease to work for NGOs or be killed. Persons belonging to the ANA and persons suspected of passing information to Government or international forces have been routinely targeted. A night letter in a mosque in Khost read, "Anyone who reports any pending suicide bomber attacks will face death. Do not maintain links with the government as well as with the international forces." A night letter in Kunar read, "Don't cooperate with the government, don't spy, don't be recruited to the military or police."

Current and former members of the ANA have been abducted and killed. (While ANA combatants are legitimate military objectives, a party to a conflict is prohibited from killing someone that they have detained. In some instances, the Taliban has prohibited movement between areas that they control and areas controlled by the Government. Thus, in parts of Kandahar province, the Taliban has instructed people to travel to Pakistan rather than to Kandahar City to purchase goods or to obtain medical care. Some night letters have also attempted to impose social norms. (For instance, one in Kunar instructed locals not to shave.)

⁴⁵⁰ The East and the South see different patterns of abuse by the Taliban. In the East, night letters tend to be fairly general admonitions not to cooperate with foreigners; whereas, in the South, night letters tend to be more specific warnings that particular individuals must desist from particular activities. And, in the East, individuals labeled as collaborators are more likely to receive multiple warnings and even to be released after being detained by the Taliban, while, in the South, such individuals are more likely to be beheaded. Statistical evidence on assassinations show that they are far more common in the South and Southeast than in the East. The Taliban administers some kind of "judiciary" in a few areas, but most "punishments" are decided upon directly by Taliban fighters. These are only generalizations - individualized warnings, harsh intimidation, and beheadings take place in both regions with alarming frequency - but, nevertheless, these differences suggests that the proper approaches to reducing the risks war poses to the civilian population might also differ in some respects between the two regions. Informed interlocutors provided a number of explanations for these differences:

1. In the South, the Taliban is more hard-line ideologically. (Insofar as this is true, it may be, in part, because the South is dominated by the same Taliban leadership that exercised authority over much of the country in the late 1990s, while the East sees a greater diversity of armed actors - including Hezb-i Islami and groups directly linked to Al-Qaeda. In both regions, however, locals generally refer to all of these simply as "Taliban".)
2. In the East, tribal structures are stronger, making it easier for communities to resist Taliban coercion and infiltration.
3. The Taliban's more ruthless repression in the South reflects the fact that it is more dependent on the local population's cooperation there than in the East due to differences in geography and terrain. In the South, Taliban fighters must live amongst the local population and rely on them not to tip off the government or international forces as to their locations or identities; whereas, in the East, they can reside in Pakistan, only periodically crossing the

6. Prosecutions of private contractors and civilian government employees

Report on Mission to the United States of America (A/HRC/11/2/Add.5, 28 May 2009, ¶¶ 46-47, Appendix III):

46. There have been numerous and credible accounts of private security and other contractors (PCs) engaging in a pattern of indiscriminate or otherwise questionable use of force against civilians.⁴⁵² At least in Iraq, that use of force has resulted in a significant number of casualties, conservatively estimated to be in the hundreds, perhaps thousands. Yet the failures of reporting and transparency by PCs employed by various Government military and civilian agencies are even more dramatic than those for the military. For example, in Iraq, the DOD established Reconstruction Operating Councils (ROCs), administered by a private security contractor, to provide coordination between the military and security contractors. While in theory DOD contractors report casualties and use of force in serious incident reports (SIRs) to the ROCs, doing so has not been compulsory for all contractors.⁴⁵³ The most comprehensive study to date found that few firms ever report shooting incidents, that such incidents are often misreported, and that SIRs that are filed are almost uniformly cursory and uninformative.⁴⁵⁴

border to make attacks. (The Southern provinces, including Helmand and Kandahar, also border Pakistan but, in contrast to the East, populated areas are separated from the border by large expanses of inhospitable and sparsely-populated desert.) The East's terrain is also extremely rugged in contrast to the relatively flat South.

In the South, interlocutors also identified a difference in the kind of Taliban abuse between areas newly seized by the Taliban and areas under the sustained control of the Taliban. In the former, the Taliban is apt to kill elders who had previously collaborated with the Government and the international forces. In the latter, victims have more often been suspected spies. These are identified largely through circumstantial evidence, such as possession of US dollars. A number of those with whom I spoke were deeply fearful that speaking with a foreigner might lead others to label them as spies.

⁴⁵¹ A copy of the Taliban's *Layeha*, or Book of Rules, signed by the "highest leader of the Islamic Emirates of Afghanistan", was obtained by two journalists who met with a Taliban commander in late 2006. For example, with respect to teachers and NGO workers, the manual provides the following rules:

(24) It is forbidden to work as a teacher under the current puppet regime, because this strengthens the system of the infidels. True Muslims should apply to study with a religiously trained teacher and study in a Mosque or similar institution. Textbooks must come from the period of the Jihad or from the Taliban regime.

(25) Anyone who works as a teacher for the current puppet regime must receive a warning. If he nevertheless refuses to give up his job, he must be beaten. If the teacher still continues to instruct contrary to the principles of Islam, the district commander or a group leader must kill him.

(26) Those NGOs that come to the country under the rule of the infidels must be treated as the government is treated. They have come under the guise of helping people but in fact are part of the regime. Thus we tolerate none of their activities, whether it be building of streets, bridges, clinics, schools, madrases (schools for Koran study) or other works. If a school fails to heed a warning to close, it must be burned. But all religious books must be secured beforehand. The Book of Rules clarifies that these "rules are obligatory" and that "[a]nyone who offends this code must be judged according to the laws of the Islamic Emirates". ("A new layeha for the Mujahideen" (29 November 2006) at < <http://www.signandsight.com/features/1071.html>> (translated from version in *Die Weltwoche* (16 November 2006)).) One informed interlocutor stated that at least in the South, where the control of Mullah Mohammad Omar is most direct, these rules do appear to influence the conduct of fighters on the ground.

⁴⁵² Upwards of 200,000 contractors to the Government are currently working in Iraq and Afghanistan in support of U.S. military and civilian agency missions.

⁴⁵³ Steve Fainaru and Alec Klein, *In Iraq, a Private Realm of Intelligence Gathering*, Washington Post, July 1 2007.

⁴⁵⁴ Human Rights First, *Private Security Contractors at War: Ending the Culture of Impunity*(2008).

47. There are credible reports of at least five custodial deaths caused by torture or other coercion in which the Central Intelligence Agency (CIA) has been implicated.⁴⁵⁵ Although the role of the CIA in these wrongful deaths has reportedly been investigated (and in one instance, a CIA contractor prosecuted), no investigation has ever been released and alleged CIA involvement has never been publicly confirmed or denied. The CIA Inspector General told me that the number of cases involving possibly unlawful killings referred by the CIA to the DOJ is classified.

Appendix III

LEGAL FRAMEWORK APPLICABLE TO PROSECUTIONS OF PRIVATE CONTRACTORS AND CIVILIAN GOVERNMENT EMPLOYEES

1. Congress has adopted a series of statutes expanding and clarifying jurisdiction over offences committed by contractors and civilian Government employees operating in areas of armed conflict and in peacetime. To date, however, these legislative initiatives have been largely reactive to specific incidents such as the abuses at Abu Ghraib and the shooting incident at Nisoor Square. The result is legislation that closes particular jurisdictional gaps but leaves others. Nevertheless, these statutes together should permit the justice system to punish all or virtually all killings prohibited by human rights or humanitarian law.

2. The USA Patriot Act of 2001 expanded the scope of “special maritime and territorial jurisdiction” over crimes committed overseas to include offenses committed “by or against a national of the United States” on U.S. bases, facilities and diplomatic missions.⁴⁵⁶ This expanded jurisdiction applies to about 30 criminal statutes and is most likely to be of use in cases involving deaths in custody.⁴⁵⁷ Indeed, the only private security contractor ever successfully prosecuted in the civilian justice system was convicted under this statute after beating a detainee to death during an interrogation in Afghanistan.

3. When the Military Extraterritorial Jurisdiction Act (MEJA) was enacted in 2000, it covered Department of Defense employees, former military personnel, contractors, and sub-contractors accompanying the military outside the United States.⁴⁵⁸ After it came to light that contractors to other Government agencies were implicated in the torture and abuse of prisoners at Abu Ghraib, Congress amended MEJA in 2004 to cover any federal employee or Government contractor whose “employment relates to supporting the mission of the Department of Defense overseas” (except contractors who are nationals or residents of the country in which the missions takes place).⁴⁵⁹ The intent was to cover the range of civilian employees and contractors operating in Afghanistan and Iraq, but there is some debate whether a court would agree that all such persons

⁴⁵⁵ Mainstream media accounts and reports from civil society organizations indicate CIA involvement in the deaths of the following five people: an un-named detainee killed in November 2002 at a CIA site code-named the “Salt Pit,” reportedly located to the north of Kabul, Afghanistan; Abdul Wali, killed in U.S. custody in Asadabad, Afghanistan, on June 21, 2003; Manadel al-Jamadi, killed in U.S. custody in Abu Ghraib, Iraq, on November 4, 2003; Major General Abed Hamed Mowhoush, killed at U.S. Forward Operating Base Tiger, Iraq, on November 26, 2003; Lt. Col. Abdul Jameel, killed at a U.S. forward operating base in Iraq on January 9, 2004.

⁴⁵⁶ 18 U.S.C. § 7(9), as amended by PL 107-56 § 804.

⁴⁵⁷ The jurisdiction provision would not, however, apply if a foreign security contractor to the U.S.. Government were to kill a foreign national.

⁴⁵⁸ PL 106-523.

⁴⁵⁹ 18 U.S.C. § 3267, as amended by PL 108-375, § 1088.

are “supporting the mission of the Department of Defense.” I was briefed by a number of Congressional staffers on ongoing efforts to adopt new legislation that would definitively clarify MEJA in this regard.⁴⁶⁰ This is most encouraging. There was, however, also talk of including a so-called “intelligence carve-out” that would provide impunity for contractors and employees working for U.S. intelligence agencies. This would be wholly inappropriate, and Congress should adopt legislation that comprehensively provides criminal jurisdiction over contractors and civilian employees.

4. The War Crimes Act was adopted in 1996 and amended in 1997 and 2006.⁴⁶¹ In contrast to MEJA and the Patriot Act, which define the scope of federal jurisdiction but do not codify new criminal offences, the War Crimes Act provides jurisdiction over a number of violations of international humanitarian law, including, *inter alia*, the “willful killing” of “protected persons” within the meaning of the Geneva Conventions (in international armed conflicts) and “murder” (in a non-international armed conflict).⁴⁶² In accordance with the United States’ humanitarian law obligations, the War Crimes Act originally made all violations of the Common Article 3 of the Geneva Conventions a war crime under U.S. domestic law. The 2006 amendments to the War Crimes Act - made as part of the Military Commissions Act of 2006 - however, exempted certain violations of Common Article 3 from prosecution as war crimes, including “humiliating and degrading treatment,” and sentencing or execution by courts that fail to provide “all the judicial guarantees . . . recognized as indispensable by civilized peoples.” Such provisions narrow the United States’ obligations under international humanitarian law and, together with the MCA’s provisions that violate fair trial principles, should be repealed.

5. Finally, pursuant to a 2006 amendment, the Uniform Code of Military Justice (UCMJ) also provides jurisdiction over “persons serving with or accompanying an armed force in the field” whether “[i]n time of declared war or a contingency operation.”⁴⁶³ This first conviction of a private security contractor under this provision occurred in June 2008 in response to one contractor stabbing another in Iraq.

6. There may be incidents over which both the military justice system and the civilian justice system have jurisdiction. With respect to killings by contractors or civilian Government officials

⁴⁶⁰ The “Security Contractor Accountability Act of 2007” was passed by the House (HR 2740), and its companion bill (S 2147) is subject to ongoing discussions in the Senate.

⁴⁶¹ The War Crimes Act was originally adopted in Public Law 104-192 (enacted 21 August 1996) and was significantly amended in Public Law 105-118 (enacted 26 November 1997) and Public Law 109-366 (enacted 17 October 2006).

⁴⁶² Note that jurisdiction is also provided over several other offences that involve killing. The provision most relevant killings in the current conflicts in Afghanistan and Iraq is, however, that of “murder”. This is defined as: “The act of a person who intentionally kills, or conspires or attempts to kill, or kills whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause.”

This definition is qualified by another provision, which declares that the “intent specified . . . precludes the applicability of [the murder provision] to an offense under [Common Article 3] with respect to- (A) collateral damage; or (B) death, damage, or injury incident to a lawful attack.” (18 U.S.C. § 2441(d)(3).)

⁴⁶³ UCMJ, Art. 2(a)(10) was amended with Public Law 109-364 (enacted 17 October 2006) to expand its scope from declared wars to “contingency operations”. Military operations in Afghanistan and Iraq are characterized in U.S. law as “contingency operations.”

in the context of armed conflicts, the military justice system may have jurisdiction under the UCMJ, and the civilian justice system may also have jurisdiction under a variety of statutes. With respect to unlawful killings by soldiers, both the UCMJ and the War Crimes Act could apply.

7. The current arrangement in cases implicating contractors or civilian Government employees is that the DOJ will generally prosecute the case in the federal courts, and the military justice system will only act if the DOJ declines to do so.⁴⁶⁴ While the DOJ's performance in these cases has thus far been abysmal, as I discuss in the body of this report, this is the right arrangement in principle.⁴⁶⁵

⁴⁶⁴ In March 2008, the Secretary of Defense issued a memorandum to implement the 2006 amendment extending the UCMJ to cover private security contractors. *UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations* (10 March 2008). The memorandum provides that DOD will notify DOJ of cases so that the latter can “determine whether it intends to exercise jurisdiction”. If DOJ decides to pursue the case, DOD will withhold from commanders the authority to initiate court-martial charges. If DOJ decides not to pursue the case, DOD will notify the relevant geographic combatant commander that he may initiate action under the UCMJ and notifies DOJ that this authorization has been made.

⁴⁶⁵ The general framework for DOD - DOJ cooperation is the Memorandum of Understanding Between Departments of Justice and Defense Relating to the Investigation and Prosecution of Crimes (August 1984) contained in Manual for Courts-Martial 2008, appendix 3. This requires the DOD to notify the DOJ of certain cases. The issue of the propriety of military jurisdiction over civilians raises complex questions that I do not address here.

S. TRANSITIONAL JUSTICE AND EXTRAJUDICIAL EXECUTIONS

1. Amnesties and extrajudicial executions

Report on Mission to the Central African Republic (A/HRC/11/2/Add.3, 27 May 2009, ¶¶ 66-67):

66. On 29 September 2008, the National Assembly of the Central African Republic passed a General Amnesty Law, which came into effect upon its promulgation on 13 October 2008. This law provides for amnesty from prosecution for Government officials and rebels for all acts committed after 15 March 2003, except for acts amounting to war crimes, crimes against humanity, or other crimes over which the International Criminal Court has jurisdiction.

67. The Special Rapporteur attaches particular importance to those indispensable exclusions from the amnesty. Moreover, it is important that its application be limited to acts committed in the context of the armed conflict and that are consistent with international humanitarian law (although they would normally constitute crimes under domestic law), and that it not be interpreted to cover private acts or abuses committed in the law enforcement context. In addition, it must be ensured that the existence of the amnesty, together with ongoing investigations by the International Criminal Court in the Central African Republic,⁴⁶⁶ do not lead to Government inaction on prosecuting the most serious abuses committed by its soldiers.

2. Obligation to preserve evidence

Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009, ¶ 66):

66. I visited the site of the Dasht-e-Leili mass graves in northern Afghanistan. I witnessed what informed interlocutors believe to be the remnants of the mass graves of an estimated 2,000 Taliban fighters who had surrendered to the Afghan Northern Alliance and US Special Forces in 2001. The site appeared to have been disturbed, and it seemed likely that bodies had been removed. This was confirmed by reports issued subsequent to my visit.⁴⁶⁷ There is an urgent need to preserve and document evidence of what took place there, both in terms of understanding how those 2,000 surrendered men died, and in determining who is responsible for recent attempts to remove evidence from the site. It is necessary that this site, and other mass graves throughout Afghanistan, be secured and investigated to address impunity for past crimes, and to facilitate reconciliation grounded in a shared understanding of the abuses that have been perpetrated and suffered by all sides.

⁴⁶⁶ On 22 May 2007, ICC prosecutor Luis Moreno-Ocampo announced that the ICC would open investigations into crimes committed in the Central African Republic in 2002-2003, and would continue to gather evidence of current crimes. In the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, Mr. Bemba, President and Commander-in-Chief of the Mouvement de liberation du Congo (MLC), is alleged to be criminally responsible for war crimes and crimes against humanity committed on the territory of the Central African Republic from 25 October 2002 to 15 March 2003.

⁴⁶⁷ See e.g., Physicians for Human Rights, "PHR Demands that Authorities Fulfill Responsibilities toward Afghan Mass Graves" (December 2008).

T. INDEPENDENT OR EXTERNAL AND INTERNATIONAL INVESTIGATIONS AND MONITORING

1. Role of the Office of the High Commissioner for Human Rights

Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009, ¶¶ 42-43):

42. Others argued that there was a need for international actors to engage directly with the Taliban to understand the rationales for its abusive tactics and to apply targeted pressure for change. Prominent elders in the South told me directly that the problem with visits by international envoys was that they only spoke to one side. An international military commander expressed surprise that I was not speaking with Taliban representatives. In general, when I conduct country visits and fact-finding missions, I speak with armed opposition groups, but I did not speak with any formal representatives of the Taliban or other armed groups during my visit.⁴⁶⁸ In retrospect, this was a mistake. Taking account of information provided by such sources would permit a more nuanced understanding of Taliban and other AGE strategies. While some of the explanations and justifications provided for engaging in abusive tactics would be self-serving and deceitful, there is no reason to assume that the Taliban could never be persuaded to modify its conduct in ways that would improve its respect for human rights. And purely humanitarian contacts have had a positive impact in the past.⁴⁶⁹

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

⁴⁶⁸ Initially, I assumed that security concerns, largely of the armed groups' own making, would make doing so impossible. I was also aware that various actors had reservations about the political implications of doing so. Ultimately, I felt I had no option but to abide by these reservations despite the fact that realistic opportunities were presented to me.

⁴⁶⁹ In 2003 and 2004, Afghanistan was close to eliminating polio when Taliban fighters and others concluded that the polio vaccine was actually designed to cause infertility and limit the growth of the Muslim population worldwide. For this reason, they began executing nurses and doctors and forcing those transporting vaccines to drink them. In 2007, persons close to the Taliban leadership in Quetta were contacted to explain the vaccination program's purpose. In September 2007, a letter was produced by a Taliban leader in Quetta which permitted the WHO, UNICEF, and the Ministry of Health to vaccinate hundreds of thousands of children.

Report on Mission to the Central African Republic (A/HRC/11/2/Add.3, 27 May 2009, ¶¶ 80-82):

80. There is no independent national human rights commission in the Central African Republic. The *Ministre d'état responsable pour les droits de l'homme et la bonne gouvernance* has a human rights section, but it has largely been ineffective. Thus, for example, the relevant officials were unable to provide any details on the numbers of killings by police in Bangui, or information on crimes by the military. Structurally, it is not sufficiently independent from the other organs of Government. The department has no cars, and so can only conduct fact-finding missions with BONUCA support. There are 20 posts, but only 10 are filled. There is a decree to set up human rights offices in 16 areas of the Central African Republic, but there are no funds to implement this.

81. The Special Rapporteur met a number of committed local NGOs who were monitoring human rights abuses, engaging in human rights advocacy, and taking legal actions on behalf of victims. Civil society organizations, however, remain weak. They receive little support and are severely under-resourced. NGOs are often unable even to circulate or publish their human rights reports. It is essential for the long-term development of a culture of respect for human rights and for reliable independent monitoring of abuses that the capacity of the domestic civil society in the Central African Republic is strongly supported, especially by the international community.

82. BONUCA has been operating in the Central African Republic since 2000, with a mandate to both monitor human rights and support the Government in consolidating peace and reconciliation. BONUCA has an important role to play in the Central African Republic, and it is clear that the current Special Representative of the Secretary-General is a very positive force. However, there is general consensus that the human rights section of BONUCA has not fulfilled its mission. It has seldom taken a proactive role in information gathering and reporting. Limited resources, especially for the field offices, severely inhibit investigations. Part of the problem stems from the fact that BONUCA's mandate combines both peacebuilding and human rights monitoring. These different functions can sometimes be carried out effectively within the same mandate, but in some circumstances, the necessity for positive ongoing relationships required for effective peacebuilding, can conflict with the independent human rights assessments needed for effective human rights monitoring. This appears to be the case in the Central African Republic presently. While BONUCA's first public human rights report, published in October 2008, is a positive step forward, a more effective United Nations human rights monitoring and assistance presence needs to be established by clearly separating peacebuilding from human rights monitoring. This is unlikely to be achieved unless the Office of the High Commissioner for Human Rights establishes an office in the Central African Republic.

Report on Mission to Sri Lanka (E/CN.4/2006/53/Add.5, 27 March 2006, ¶ 73):

73. The Government should invite the Office of the High Commissioner for Human Rights to expand its field presence in Sri Lanka to enable it to provide technical support and assistance to the Human Rights Commission, SLMM and other United Nations agencies, pending the creation of a broader monitoring mechanism.

Press Statement on Mission to Columbia, 18 June 2009:

I am very grateful to the Government of Colombia for inviting me, and for its full and sustained cooperation with my mission. I am especially grateful to President Álvaro Uribe Vélez for an extended and very engaged discussion of some of the key issues. I also met with the Vice-President, the Minister for Foreign Relations, the Minister for Defence, and the Vice Ministers for Defence, and Interior and Justice. Further meetings were with the Constitutional Court, the Supreme Court, the Supreme Judicial Council, the Inspector General, the Public Prosecutor, the Ombudsman, and the National Commission on Reparation and Reconciliation. I met with the Commander of the Army, and the Commanders of the 7th, 4th, and 2nd divisions, as well as military legal advisors and military judges. I met with the Governor of Antioquia, *personeros* throughout the country, a range of Senators and Representatives, and many civil society organizations. I conducted over 100 interviews with witnesses, victims, and survivors. I am especially grateful to the extremely competent, dedicated and insightful officials in the Colombia Office of the UN High Commissioner for Human Rights for their assistance with my mission. They, however, bear no responsibility for the conclusions I have reached.

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

I express my deep appreciation to the Government of the DRC for having invited me to visit the country. This indication of its willingness to cooperate with the work of the UN Human Rights Council deserves full recognition. I am also grateful to MONUC which has done an enormous amount to facilitate the success of my mission. The two DSRSGs, Leila Zerrougi and Ross Mountain, the Force Commander Babacar Gaye, and Todd Howland, Director of the Joint Human Rights Office, have done far more than could reasonably have been expected. They are, however, not responsible for any of the recommendations or analysis offered in my capacity as an independent expert.

2. National commissions on human rights

Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009, ¶¶ 34, 54-55):

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

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

[...]

54. Finally, the problem of killings by the police and other armed personnel acting under the authority of Government officials has been largely overlooked. This should end. While there are no reliable figures on the number of such unlawful killings, known cases clearly indicate that the overall number is high. There is a crying need for a system which ensures that when the police and/or their political masters are accused of multiple killings an independent investigation is launched. The killing of nine and the wounding of 42 unarmed protesters in Sheberghan (Jawzjan province) on 28 May 2007 by either the ANP or the Governor's private bodyguards provides a classic example.⁴⁷⁰ Local and national political interests have conspired to ensure that no effective investigation was undertaken. The technique is to let time pass until the evidence has faded and other political concerns have claimed the limelight. The matter can then be quietly filed away. The victims and their families are simply ignored.

55. Local police are, not unusually, incapable of meaningfully investigating themselves.⁴⁷¹ A national police investigative task force should be established for this purpose. The investigative powers of the AIHRC should also be strengthened and the local and national government should have a time limit within which to respond in detail to the Commission's findings.

Report on Mission to Sri Lanka (E/CN.4/2006/53/Add.5, 27 March 2006, ¶ 34):

38. The CFA established the Sri Lanka Monitoring Mission (SLMM) to verify compliance with the terms of the ceasefire. It has played a difficult but vital role in maintaining the confidence of the parties. However, the public does not share this confidence. In numerous meetings, members of civil society expressed frustration with the SLMM for at least three reasons: (a) its narrow interpretation of its verification mandate to exclude investigation; (b) the conflict of interest inherent in its link to the facilitator of the peace process; and (c) the inadequate information about violations that it makes public.

⁴⁷⁰ I spoke with members of civil society who investigated the incident, a number of witnesses to the demonstration, and to those wounded in the shooting. I received credible accounts from some of those who were shot whilst running away from the protest area. When the AIHRC prepared a detailed but damning report on the incident, the response of the Government was to ignore it and set up separate inquiries. These inquiries appear to be going the way of most such efforts.

⁴⁷¹ According to statistics provided by the Ministry of Interior (MoI), in year 1386 of the Afghan calendar (21 March 2007 - 21 March 2008), the General MoI's Directorate of Internal Affairs addressed 436 cases, referring 351 officers and 12 generals being reported to the Prosecution Office. According to the Attorney General, during the year prior to my visit, prosecutions had resulted in the jailing of 17 police officers, all of whom were involved in one case. After serving 20 months, they were released pursuant to a judgment by the Court of Appeals. These cases would not, however, appear to concern issues arising under the mandate. While the MoI was able to provide statistics on civilian casualties due to Taliban and IMF attacks, with respect to those caused by ANP, it reported only that "There are no statistics of arbitrary executions by the National Police reported by any sources." The NDS also monitors the ANP for abuses. However, according to an NDS official, however, no action is taken on abuses reported, whether they are reported to the MoI or to more senior Government officials.

39. The SLMM draws a strong distinction between “monitoring” and “investigation”. It forwards complaints to the parties, elicits their responses, and attempts to determine whether a violation of the CFA occurred. However, as the SLMM has stated publicly, it “is not here to conduct police investigations”.⁴⁷² The SLMM explained to me that it continually presses the police to conduct effective investigations but is aware that these remain ineffective. The SLMM understands this limited role to reflect the parties’ tacit consensus on its mandate. However, the CFA does not preclude a broader investigative role for the SLMM and it makes the Head of the SLMM “[t]he final authority regarding interpretation of this Agreement”.⁴⁷³ It would behove the SLMM to advance a less restrictive interpretation of its mandate, as a means of shoring up the ceasefire with more comprehensive and public monitoring and reporting.

40. The SLMM steadfastly insists that it is completely independent of the peace process’s facilitator, Norway. This is not borne out by the perception of the public, the experience of the parties, or the terms of the CFA. Under the CFA, the Government of Norway appoints the head of the SLMM, who in turn reports to that Government.⁴⁷⁴ This arrangement gives Norway a conflict of interest. On the one hand, in its relationship with the SLMM it is charged with ensuring the disinterested verification of violations; on the other hand, as facilitator of the peace process, it has an interest in preventing ceasefire implementation issues from disturbing the broader peace process. For a public that needs accountability, this conflict of interest is disturbing. For the Government of Norway which has contributed so much, it is unnecessary.

41. Since it is the general public that has borne the brunt of the ceasefire violations it is unsurprising that so many complaints to the SLMM come from private individuals. The SLMM does not, however, provide public accountability. The complaints are confidential, going only to the parties, and the SLMM communicates to the public only aggregate statistical data. Most ceasefire violations implicate human rights and an effective monitoring arrangement must provide accountability for the victims as well as for the parties. This need is felt deeply by victims, civil society organizations, and politicians across the political spectrum.

E. Options for international monitoring

42. Many representatives of civil society pressed on me the need for international human rights monitoring. This proposal was motivated by dissatisfaction with the accountability provided by the SLMM and the police. Some favoured a strengthened SLMM while others made the case for a completely new mechanism.

43. Arguments made by the latter group included:

- Ceasefire monitoring is inherently bound up in the peace process and even de-linking the facilitator from the SLMM cannot remove this conflict of interest;
- Public findings of responsibility for violations have little impact on the LTTE or the support it enjoys;

⁴⁷² SLMM press release, 8 March 2005.

⁴⁷³ CFA art. 3.2.

⁴⁷⁴ CFA arts. 3.2–3.3.

- Conflict-related human rights violations occur frequently throughout the country, but SLMM field offices are located only in the north and east;⁴⁷⁵
- The SLMM's institutional inertia and low public standing call for an entirely new initiative;
- Human rights violations by the Karuna group must be investigated and exposed, but it is not bound by the CFA.

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.⁴⁷⁶ Few of my interlocutors felt that effective monitoring could be conducted without the participation of the LTTE.

[...]

62. The shortcomings of law enforcement and the justice system clearly require reforms of the relevant institutions. But independent bodies can play an important role in driving the reform process. While both the National Police Commission and the Human Rights Commission) have made valuable contributions, they lack resources and, even more importantly, political support.

63. The HRC has been acting as an independent oversight body for complaints concerning police conduct since 1997.⁴⁷⁷ Its mandate is to investigate and respond to violations of fundamental rights under the Constitution and human rights under international law, including the right to life. It can receive complaints, and its investigations are facilitated by statutory powers to, for instance, pay unannounced visits to police stations and other places of detention. It has exercised its mandate with regard to torture cases, and is currently conducting an inquiry into the police shooting of criminal suspects. While the Commission lacks the power to impose remedial and preventative measures, it is empowered to recommend prosecutions and to refer cases to the courts. While it has the potential to play a crucial role, it lacks the necessary resources. Thus, for instance, it does not have enough vehicles to respond to all major mistreatment complaints by visiting detention places.

Report on Mission to Kenya (A/HRC/11/2/Add.6, 26 May 2009, ¶¶ 25-27):

⁴⁷⁵ See CFA art. 3.6.

⁴⁷⁶ 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.

⁴⁷⁷ The HRC was established pursuant to the Human Rights Commission of Sri Lanka Act of August 1996 available at <http://www.hrc-srilanka.org/docs/HRAcfe.pdf>. In 2002 it was brought under the Seventeenth Amendment to the Constitution.

26. The police response to the KNCHR's [Kenyan National Commission on Human Rights] report on extrajudicial executions is a typical example of police unwillingness to conduct serious investigations. The police report on the KNCHR investigations challenges the investigative capacity and skill of the KNCHR, criticizes the KNCHR for reporting the allegations to the President of Kenya and the UN, and concludes that there was "no" evidence of police complicity in the killings.⁴⁷⁸ A similar response was given in response to the KNCHR's public release of the whistleblower testimony in February 2009. The police issued a statement challenging the reputation of the whistleblower, questioning why the KNCHR released the statement when it did, questioning the KNCHR's commitment to human rights, and intimating that KNCHR officers receive payments from the Mungiki.⁴⁷⁹

75. The KNCHR, Kenya's national statutory human rights institution has the authority to investigate complaints of human rights violations.⁴⁸⁰ It is a highly professional organization of committed and skilled staff. In the absence of other well-functioning accountability mechanisms, it has played a critical role in bringing to light serious human rights issues. Yet its legitimacy is questioned by officials, and especially by the police, every time it issues a report. Its carefully researched reports rarely draw a substantive response. Instead, officials opt to attack its mandate, credibility or expertise, and the police accuse its members of being in the pay of the Mungiki.⁴⁸¹

[...]

109. Police officials should cease their frequent accusations that KNCHR staff are paid by or work with criminal organizations. If the police have evidence of criminal behaviour by any person, such persons should be investigated, charged and prosecuted according to regular procedure.

110. Reports by the KNCHR should be tabled in Parliament as soon as practicable after they are presented to the Minister for Justice. The Government should provide a substantive response within a reasonable time period to all KNCHR reports.

Report on Mission to the Philippines (A/HRC/8/3/Add.2, 16 April 2008, ¶¶ 62-65):

62. The Philippines Commission on Human Rights (CHRP) stands out as an oversight mechanism that has safeguarded its independence and mandate. However, more resources must be devoted to ensure the effectiveness of its investigations.

63. The CHRP was established by the Constitution as an independent body charged with investigating human rights violations, providing preventive measures and legal assistance to

⁴⁷⁸ "Kenya Police Preliminary Report by a Board of Inquiry to Investigate the Alleged Execution and Disappearance of Persons", sent to the KNCHR by the Permanent Secretary, Secretary to the Cabinet and the Head of the Public Service on 17 March 2008.

⁴⁷⁹ "Allegations by KNHRC", Statement by Kiraithe E.K., For Commissioner of Police, 24 February 2009.

⁴⁸⁰ Kenya National Commission on Human Rights, Act No. 9 of 2002, s 16.

⁴⁸¹ See Press Statement, "Allegations by KNHRC", 24 February 2009 (EK Kiraithe, for Commissioner of Police). ("Our detectives started investigating information to the effect that some officers from the KNHRC have been regularly receiving payments from the outlawed Mungiki sect followers. Kenyans must ask themselves the services the Mungiki is paying for.")

victims, recommending reforms, and monitoring the Government's compliance with its human rights treaty obligations.⁴⁸²

64. In my discussions with CHRP commissioners, CHRP staff, and civil society advocates, they all expressed that the CHRP's highest priority must be to increase its investigative capacity. This requires hiring and training more investigators, devoting greater resources to investigations, and increasing investigators' capacity to make use of physical evidence.⁴⁸³ With this in mind, I was pleased to learn that in March the Government provided the CHRP significant additional funding.⁴⁸⁴

65. Many advocates and, indeed, many CHRP staff call for the CHRP to be given prosecutorial powers. This is a very tempting proposition: Today, CHRP investigators can submit cases to a prosecutor or ombudsman, but these cases seldom prosper. However, the proposal's risks outweigh its benefits. First, there are already other organs responsible for prosecuting cases, including one (the Ombudsman) that is independent of the executive. To give the CHRP prosecutorial powers would not only be redundant but would compromise a responsibility held solely by the CHRP: to monitor all of these other organs for human rights compliance. Second, while a grant of prosecutorial powers might give the CHRP more teeth, it would also increase the security risks faced by its investigators and witnesses. Today, the CHRP has the potential to publicly and authoritatively reveal the reality of widespread abuse despite the near absence of criminal convictions.

3. Non-governmental organisations

Report on Mission to the Central African Republic (A/HRC/11/2/Add.3, 27 May 2009, ¶¶ 79-82):

79. The ability to accurately assess the human rights situation in the Central African Republic and to take appropriate action based on those facts is severely hampered by the lack of reliable data collection on human rights abuses.

80. There is no independent national human rights commission in the Central African Republic. The *Ministre d'état responsable pour les droits de l'homme et la bonne gouvernance* has a human rights section, but it has largely been ineffective. Thus, for example, the relevant officials were unable to provide any details on the numbers of killings by police in Bangui, or information on crimes by the military. Structurally, it is not sufficiently independent from the other organs of Government. The department has no cars, and so can only conduct fact-finding missions with

⁴⁸² Constitution of the Republic of the Philippines (1987), art. XIII.

⁴⁸³ The CHRP's staff numbers roughly 600, with half in the central office and half in the regional offices, each of which has roughly 30 staff. Only about 10 percent of regional staff work as investigators. There are many examples of how inadequate resources impede investigations. Offices have few vehicles and work under gasoline allowances so strict as to inhibit investigations in rural areas. The CHRP is seldom able to provide victim assistance in excess of a bus fare, limiting its ability to help victims and potential witnesses to relocate. Only the central office has access to doctors for conducting autopsies, and regional offices have essentially no capacity for dealing with physical evidence.

⁴⁸⁴ "CHR to set up P25-M forensic center," GMA News TV (3/10/07); Letter from the Philippine Mission to the United Nations, dated 23 May 2007.

BONUSCA support. There are 20 posts, but only 10 are filled. There is a decree to set up human rights offices in 16 areas of the Central African Republic, but there are no funds to implement this.

81. The Special Rapporteur met a number of committed local NGOs who were monitoring human rights abuses, engaging in human rights advocacy, and taking legal actions on behalf of victims. Civil society organizations, however, remain weak. They receive little support and are severely under-resourced. NGOs are often unable even to circulate or publish their human rights reports. It is essential for the long-term development of a culture of respect for human rights and for reliable independent monitoring of abuses that the capacity of the domestic civil society in the Central African Republic is strongly supported, especially by the international community.

82. BONUSCA has been operating in the Central African Republic since 2000, with a mandate to both monitor human rights and support the Government in consolidating peace and reconciliation. BONUSCA has an important role to play in the Central African Republic, and it is clear that the current Special Representative of the Secretary-General is a very positive force. However, there is general consensus that the human rights section of BONUSCA has not fulfilled its mission. It has seldom taken a proactive role in information gathering and reporting. Limited resources, especially for the field offices, severely inhibit investigations. Part of the problem stems from the fact that BONUSCA's mandate combines both peacebuilding and human rights monitoring. These different functions can sometimes be carried out effectively within the same mandate, but in some circumstances, the necessity for positive ongoing relationships required for effective peacebuilding, can conflict with the independent human rights assessments needed for effective human rights monitoring. This appears to be the case in the Central African Republic presently. While BONUSCA's first public human rights report, published in October 2008, is a positive step forward, a more effective United Nations human rights monitoring and assistance presence needs to be established by clearly separating peacebuilding from human rights monitoring. This is unlikely to be achieved unless the Office of the High Commissioner for Human Rights establishes an office in the Central African Republic.

Report on Mission to Kenya (A/HRC/11/2/Add.6, 26 May 2009, ¶¶ 75):

75. The KNCHR, Kenya's national statutory human rights institution has the authority to investigate complaints of human rights violations.⁴⁸⁵ It is a highly professional organization of committed and skilled staff. In the absence of other well-functioning accountability mechanisms, it has played a critical role in bringing to light serious human rights issues. Yet its legitimacy is questioned by officials, and especially by the police, every time it issues a report. Its carefully researched reports rarely draw a substantive response. Instead, officials opt to attack its mandate, credibility or expertise, and the police accuse its members of being in the pay of the Mungiki.⁴⁸⁶

4. The International Criminal Court

⁴⁸⁵ Kenya National Commission on Human Rights, Act No. 9 of 2002, s 16.

⁴⁸⁶ See Press Statement, "Allegations by KNHRC", 24 February 2009 (EK Kiraithe, for Commissioner of Police). ("Our detectives started investigating information to the effect that some officers from the KNHRC have been regularly receiving payments from the outlawed Mungiki sect followers. Kenyans must ask themselves the services the Mungiki is paying for.").

Report on Mission to the Central African Republic (A/HRC/11/2/Add.3, 27 May 2009, ¶¶ 66-67):

66. On 29 September 2008, the National Assembly of the Central African Republic passed a General Amnesty Law, which came into effect upon its promulgation on 13 October 2008. This law provides for amnesty from prosecution for Government officials and rebels for all acts committed after 15 March 2003, except for acts amounting to war crimes, crimes against humanity, or other crimes over which the International Criminal Court has jurisdiction.

67. The Special Rapporteur attaches particular importance to those indispensable exclusions from the amnesty. Moreover, it is important that its application be limited to acts committed in the context of the armed conflict and that are consistent with international humanitarian law (although they would normally constitute crimes under domestic law), and that it not be interpreted to cover private acts or abuses committed in the law enforcement context. In addition, it must be ensured that the existence of the amnesty, together with ongoing investigations by the International Criminal Court in the Central African Republic,⁴⁸⁷ do not lead to Government inaction on prosecuting the most serious abuses committed by its soldiers.

Report on Mission to Sri Lanka (E/CN.4/2006/53/Add.5, 27 March 2006 ¶ 70, 83):

70. It is often asserted that there is a tension between peacemaking and the threat of prosecution. However true that may be in some situations, the two interests are complementary in Sri Lanka. The jurisdiction of the International Criminal Court extends only to crimes committed after the country's ratification has taken effect and cannot be retroactive. In the current situation of relative calm, ratification would work to deter a return to the massive violations of the past, thereby helping to consolidate the gains of the ceasefire and the place of human rights in the peace process. Both parties have committed the kind of massive, serious violations of international criminal law that might well have led to prosecution had the Rome Statute then been in force. In the current situation, ratification would provide a measure of confidence to all that such violations will never be committed again.⁴⁸⁸

[...]

83. The Government should ratify the Rome Statute of the ICC without reservation or declaration. Members of the Sri Lanka Army and LTTE fighters should be made aware of the rules of individual criminal responsibility and be trained in the provisions of international criminal law.

⁴⁸⁷ On 22 May 2007, ICC prosecutor Luis Moreno-Ocampo announced that the ICC would open investigations into crimes committed in the Central African Republic in 2002-2003, and would continue to gather evidence of current crimes. In the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, Mr. Bemba, President and Commander-in-Chief of the Mouvement de liberation du Congo (MLC), is alleged to be criminally responsible for war crimes and crimes against humanity committed on the territory of the Central African Republic from 25 October 2002 to 15 March 2003.

⁴⁸⁸ Ratification should be undertaken without making the declaration permitted under article 124 of the Statute that temporally limits the jurisdiction of the ICC.

Report on Mission to Kenya (A/HRC/11/2/Add.6, 26 May 2009 ¶¶ 66-67, 74):

66. Key among these investigative efforts have been those of the Waki Commission, established by the Government of Kenya to investigate the post-election violence (PEV).⁴⁸⁹ Kenya deserves much credit for establishing what was, in many respects, a model commission of inquiry.⁴⁹⁰ The Waki Commission produced a comprehensive 518 page report. The Commission found that 1,113 people were killed during the PEV. Those provinces with the highest levels of violence were the Rift Valley, Nyanza, and Nairobi; with 744, 134 and 125 deaths, respectively.

67. The report records both spontaneous and organized violence. In terms of failures by state actors, the Waki Commission found that officials failed to act on intelligence regarding potential violence; failed to respond adequately to violence; and that police lacked discipline and impartiality, and used unjustified force in responding to post-election demonstrations and violence. Shockingly, police were responsible for 405 deaths (35.7% of the total). In Nyanza, 79.9% of the PEV deaths were caused by police. The report also identified specific individuals from political parties who should be prosecuted for crimes relating to the PEV. The Commission recommended that a Special Tribunal should be created to investigate and prosecute those persons. And it recommended that, if the Special Tribunal is not established, the Prosecutor for the International Criminal Court should be provided the list of names.

[...]

74. Discussion, especially in Kenya's Parliament, about how to achieve accountability in light of the failures in the current system has tended to be presented as a choice *between* the Special Tribunal and the ICC. This contributed to the defeat of the Special Tribunal proposal in January 2009. Some felt that only an international tribunal could provide the needed accountability and so voted against a local tribunal. But for those who genuinely want to end impunity, the approaches should not be treated as mutually exclusive. A domestic tribunal is essential to address a large number of perpetrators, and to promote national ownership of accountability. But until an effective Special Tribunal is established, the Prosecutor for the ICC should undertake investigations. Given the evidence already available, the ICC would be able to move quickly. While an international tribunal is clearly designed to try only a small number of the most serious offenders, the extent of abuses during the PEV, their recent occurrence, and the certainty of

⁴⁸⁹ The Kenya Gazette, "Commission of Inquiry into the Post-Election Violence Experienced in Kenya after the General Elections held on 27th December, 2007", Nairobi, 23 May 2008, Vol. CX-No. 41, Gazette Notice No. 4474. See also: KNCHR, "On the Brink of the Precipice: A Human Rights Account of Kenya's Post 2007 Election Violence (August 2008); OHCHR, Fact-finding Mission to Kenya 6-28 February 2008; International Crisis Group, "Kenya in Crisis", African Report No 137 (February 2008); Independent Medico-Legal Institute, *Forensics Investigations into Post-Election Violence Related Deaths* (February 2008); Human Rights Watch, *From Ballots to Bullets: Organized Criminal Violence and Kenya's Crisis of Governance* (March 2008).

⁴⁹⁰ The Waki Commission had a clearly defined but sufficiently wide mandate. Independent and expert commission members were appointed, and staff with specialized expertise were hired. International commissioners and staff were brought in to maximize impartiality, and no serving members of the state security forces were permitted to apply for Commission positions. The Commission had the power to summon any person to testify and to produce any documents. Despite these many positive aspects, the Commission did encounter obstacles. While it could hold private hearings to protect witness identity, it did not have a comprehensive witness protection program. And, some Government officials interviewed were slow in producing requested documents or did not produce the proper materials.

further violence at the next elections in the absence of accountability makes this a critical case for the Prosecutor to take up.

5. Ceasefire monitoring

Report on Mission to Sri Lanka (E/CN.4/2006/53/Add.5, 27 March 2006, ¶¶ 8, 38-47, 72):

8. The conflict-related killings taking place in Sri Lanka today should be seen in the context of the Ceasefire Agreement (CFA) signed by the Government and the LTTE in February 2002. Both parties to the CFA have sought to consolidate and improve their positions by exploiting the ambiguities and opportunities presented by the terms of the agreement as well as weaknesses in its monitoring mechanism, the SLMM. The parties have continued to advance their interests, in significant part, by committing or permitting widespread killing.

[...]

38. The CFA established the Sri Lanka Monitoring Mission (SLMM) to verify compliance with the terms of the ceasefire. It has played a difficult but vital role in maintaining the confidence of the parties. However, the public does not share this confidence. In numerous meetings, members of civil society expressed frustration with the SLMM for at least three reasons: (a) its narrow interpretation of its verification mandate to exclude investigation; (b) the conflict of interest inherent in its link to the facilitator of the peace process; and (c) the inadequate information about violations that it makes public.

39. The SLMM draws a strong distinction between “monitoring” and “investigation”. It forwards complaints to the parties, elicits their responses, and attempts to determine whether a violation of the CFA occurred. However, as the SLMM has stated publicly, it “is not here to conduct police investigations”.⁴⁹¹ The SLMM explained to me that it continually presses the police to conduct effective investigations but is aware that these remain ineffective. The SLMM understands this limited role to reflect the parties’ tacit consensus on its mandate. However, the CFA does not preclude a broader investigative role for the SLMM and it makes the Head of the SLMM “[t]he final authority regarding interpretation of this Agreement”.⁴⁹² It would behove the SLMM to advance a less restrictive interpretation of its mandate, as a means of shoring up the ceasefire with more comprehensive and public monitoring and reporting.

40. The SLMM steadfastly insists that it is completely independent of the peace process’s facilitator, Norway. This is not borne out by the perception of the public, the experience of the parties, or the terms of the CFA. Under the CFA, the Government of Norway appoints the head of the SLMM, who in turn reports to that Government.⁴⁹³ This arrangement gives Norway a conflict of interest. On the one hand, in its relationship with the SLMM it is charged with ensuring the disinterested verification of violations; on the other hand, as facilitator of the peace process, it has an interest in preventing ceasefire implementation issues from disturbing the

⁴⁹¹ SLMM press release, 8 March 2005.

⁴⁹² CFA art. 3.2.

⁴⁹³ CFA arts. 3.2–3.3.

broader peace process. For a public that needs accountability, this conflict of interest is disturbing. For the Government of Norway which has contributed so much, it is unnecessary.

41. Since it is the general public that has borne the brunt of the ceasefire violations it is unsurprising that so many complaints to the SLMM come from private individuals. The SLMM does not, however, provide public accountability. The complaints are confidential, going only to the parties, and the SLMM communicates to the public only aggregate statistical data. Most ceasefire violations implicate human rights and an effective monitoring arrangement must provide accountability for the victims as well as for the parties. This need is felt deeply by victims, civil society organizations, and politicians across the political spectrum.

42. Many representatives of civil society pressed on me the need for international human rights monitoring. This proposal was motivated by dissatisfaction with the accountability provided by the SLMM and the police. Some favoured a strengthened SLMM while others made the case for a completely new mechanism.

43. Arguments made by the latter group included:

- Ceasefire monitoring is inherently bound up in the peace process and even de-linking the facilitator from the SLMM cannot remove this conflict of interest;
- Public findings of responsibility for violations have little impact on the LTTE or the support it enjoys;
- Conflict-related human rights violations occur frequently throughout the country, but SLMM field offices are located only in the north and east;⁴⁹⁴
- The SLMM's institutional inertia and low public standing call for an entirely new initiative;
- Human rights violations by the Karuna group must be investigated and exposed, but it is not bound by the CFA.

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.⁴⁹⁵ Few of my interlocutors felt that effective monitoring could be conducted without the participation of the LTTE.

45. A strengthened SLMM could achieve the following goals:

⁴⁹⁴ See CFA art. 3.6.

⁴⁹⁵ 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.

- Effective monitoring requires some investigative capacity, involving at least expanded SLMM staffing, the addition of persons with police training, and a significant number of Sinhala and Tamil interpreters;
- Effective investigations will involve protection for witnesses;
- The publication of information is indispensable. The current practice of publishing aggregate statistics and occasional press releases is insufficient and conducive to rumours and misinformation. The details of the alleged incidents, the results of investigation, and the basis for the monitoring mechanism's determination of responsibility must be made public (even if information is redacted to protect individuals);
- The inclusion of more human rights experts in the SLMM especially to assist in evaluating compliance with CFA article 2.1. The designation of such an official in each field office and in headquarters would have important symbolic and practical value.

46. These priorities may be realized by strengthening the SLMM without renegotiating its mandate under the CFA. Government officials and LTTE representatives alike emphasized that they would prefer this option. It would constitute an important and immediate confidence-building measure, but could not be achieved without significantly increased resources provided by the international community and a commitment by the parties to more effective monitoring.

47. From a human rights perspective, the goal of strengthening SLMM's human rights role is clearly not sufficient in itself in the medium-term.⁴⁹⁶ For pragmatic reasons it seems to be the best interim measure, but before long significantly more will be needed. If the ceasefire fails, and that now appears to be an all too real possibility, the SLMM's role will be in question and there will be an urgent and pressing need to establish a full-fledged international human rights monitoring mission. Equally, if progress is made towards a longer-term settlement, more comprehensive monitoring will be needed of its human rights dimensions.

[...]

72. In any revision of the CFA, the monitoring role of the SLMM should be de-linked from the role of facilitating the peace process. As a more immediate measure, steps should be taken to strengthen the SLMM's work, including:

- (a) More sustained follow-up to killings with a view to identifying the party and persons responsible;
- (b) The prompt and accessible publication, within necessary limits, of complaints received and of the results of investigations;
- (c) The establishment of a protocol to better protect witness identities;
- (d) The designation of a senior human rights officer in each SLMM field office and a senior focal point in headquarters.

⁴⁹⁶ However, in evaluating criticisms of the limited human rights dimension of the SLMM's mandate, it should be borne in mind that the limited "jurisdiction" of the Mission does not restrict in any way the pre-existing and continuing legal obligations of both the Government and the LTTE under human rights and humanitarian law. Similarly, it would be unwise to attach too much importance to the fact that human rights are not affirmed or codified in the CFA. The CFA does, after all, prohibit both "hostile acts" against the civilian population and all "offensive military action" regardless of its target. Because killings are the single most important element in undermining respect for the full range of human rights of Sri Lankans today, full compliance with the CFA would go very far in restoring peace and the enjoyment of human rights.

Follow-up Report on Mission to Sri Lanka (A/HRC/8/3/Add.3, 14 May 2008, ¶¶ 31-34):

31. The Sri Lanka Monitoring Mission (SLMM) established to monitor the Ceasefire Agreement (CFA) no longer exists. While it was still operating it made a significant and successful effort to implement the recommendations directed to it by the Special Rapporteur.

32. During his visit, the Special Rapporteur concluded that the SLMM could be strengthened in ways that would permit it to improve respect for human rights. The CFA prohibited not only “offensive military operation[s]” but also “hostile acts against the civilian population”. However, the SLMM had placed a low priority on this aspect of its mandate. The Special Rapporteur recommended that the SLMM be made more independent of the peace process, issue public reports, and prioritize civilian protection.

33. Following the Special Rapporteur’s visit, the Government of Norway and SLMM took various actions that represented a real attempt to play a more effective role in responding to human rights violations. In March 2006, Major General Ulf Henricsson of Sweden was appointed Head of Mission of SLMM, reducing Norway’s conflict of interest between providing accountability for violations and advancing the peace process. In April 2006, SLMM began to exhibit a greater concern with violence directed against civilians, referring for the first time to the “extrajudicial killings of civilians”.⁴⁹⁷ In a number of subsequent reports, the SLMM attempted to clarify responsibility for attacks on civilians.

34. Unfortunately, within six months of making these reforms, the SLMM was severely weakened by the decision of LTTE to insist on the withdrawal of monitors who were nationals of EU member States. The SLMM ended its work when the CFA was formally terminated on 16 January 2008 following a declaration by the Government.

⁴⁹⁷ SLMM, press release of 29 April 2006.