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

### **Extrajudicial, summary or arbitrary executions**

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

##### *Summary*

In the present report, the outgoing Special Rapporteur, Agnès Callamard, offers a reflection on her work for the Mandate over the last five years, its links to her predecessors' work, and analyses her contribution to themes on which the Mandate has made a major normative contribution over the last thirty years.

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\* The present report was submitted after the deadline in order to reflect the most recent developments.

\*\* The annex of this report is reproduced as received without editing or translation.

## I. Introduction

1. In the present report, the Special Rapporteur reflects on her work for the Mandate over the last five years, its links to her predecessors' work, and analyses her contribution to themes on which the Mandate has made a major normative contribution over the last thirty years.
2. She presents her methodology and approach, highlights issues addressed and the normative and policy contributions she sought to make. She also reflects on the global context and the challenges it presents for protection of and respect for the right not to be arbitrarily killed.
3. The Special Rapporteur thanks victims and their families, advocates and lawyers and civil society organisations who contributed generously to her work, in particular those whom she met during her country and academic visits. She is grateful to those who entrusted her with personal and all too often, painful accounts of the cruelty they endured. She also thanks Member States who supported her throughout her Mandate, replied to her queries, agreed to her visits and engaged on the substance of her findings and allegations.
4. She thanks her Mandate's predecessors for their camaraderie, collaboration and regular exchanges. She pays tribute to Asma Jahangir who passed away in 2018 and to Christof Heyns, who died as she was writing the present report. This Special Rapporteur took to heart Ms Jahangir's ground-breaking work to fully integrate gender sensitivity into the Mandate. One of her last conversations as Special Rapporteur was with Christof Heyns who leaves behind an incredible human rights legacy; a legacy that this Special Rapporteur sought to emulate and build upon. The human rights community owes Ms. Jahangir and Mr. Heyns an enormous debt of gratitude.

## II. History and scope of the Mandate

5. From its inception in 1982, the Mandate addressed a broad range of situations and killings, as detailed in the first chapter of the recent digital volume by previous Mandate holders, Philip Alston and Christof Heyns. It was Theo van Boven, head of the UN's Division of Human Rights, (the forerunner to the Office of the High Commissioner for Human Rights), who called on the Commission on Human Rights to focus on the right to life, and in particular, "to prevent deliberate killing perpetrated by organized power." He listed a range of crimes that engaged the responsibility of governments from genocide to political liquidation, as well as the failure to prevent killings by other actors. The subsequent adoption of an uncontroversial resolution on "Summary or Arbitrary executions" led to the appointment of a Special Rapporteur in 1982, Mr. Amos Wako. In 1992, the resolution was amended adding the term "extra-judicial" to the Mandate's title. The resolution focused on "extra-legal executions" without defining the term but singled out for condemnation "the practice of killing and executing political opponents or suspected offenders carried out by armed forces, law enforcement or other governmental agencies or by paramilitary or political groups acting with the tacit or other support of such forces or agencies".
6. This brief overview highlights that from its beginning, the Mandate covered diverse situations and diverse crimes; topics that have been the focus of Special Rapporteurs over the last 40 years. A significant evolution occurred however, when the first woman special rapporteur, Ms Asma Jahangir, appointed in 1998, highlighted killings of persons because of their sexual orientation, killings of women for so-called "honour" and on that basis introduced mainstreaming of gender in her work.
7. The list of issues covered over the Mandate's 40 years is indeed impressive:
  - Genocide;
  - Violations of the right to life during armed conflict, especially of civilian population and other non-combatants, contrary to international humanitarian law.
  - Deaths by State's security forces, or by paramilitary groups, death squads or other private forces cooperating with or tolerated by one or several States.

- Drone targeted killings.
- Deaths by law enforcement officials or persons acting in direct or indirect compliance with the State, where the use of force is inconsistent with the criteria of absolute necessity and proportionality.
- Deaths in custody due to torture, excessive use of force, neglect or life-threatening conditions of detention.
- The death penalty.
- Death threats and fear of imminent extrajudicial executions by State officials, paramilitary groups, private individuals or groups cooperating with or tolerated by the Government, as well as by unidentified by linked persons.
- Violations of the right to life by armed groups
- Failure to protect against or prevent foreseeable deaths or murders: honor killings; femicide; maternal mortality; killing of albinos and witches; inter-ethnic and inter-religious killings; killings of LGBTI persons; killings by gangs and cartels.
- Failure to investigate and bring to justice those responsible for alleged violations of the right to life and to compensate victims.
- Additionally, the notion of “Life with Dignity” has also been referenced.

8. The 1992 addition of “extrajudicial” to the Mandate’s scope and title prompted many debates about the definitions and distinctions of the three terms. However, shortly after his appointment, the fourth special rapporteur (Philip Alston), reported to the Commission on Human Rights in 2005 that the mandate’s terms of reference were “not best understood through efforts to define individually the terms ‘extrajudicial’, ‘summary’ or ‘arbitrary’, or to seek to categorize any given incident accordingly.” On that basis, whenever he could, Philip Alston would “boil down” the Mandate’s title to “unlawful killings”; a term also routinely used by Christof Heyns, the fifth Special Rapporteur, who would explain the Mandate’s object as being protection of “aspects of the right to life”.

9. In 2016, revision of the 1991 United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions saw unlawful deaths defined as “deaths resulting from acts or omissions of the State, its organs or agents, deaths in custody and failure of the State to protect life”. That reflected the evolution in international law, according to which failure to investigate thoroughly a death in which foul play is suspected, may itself amount to a violation of the right to life.

10. This Special Rapporteur also found the Mandate’s title cumbersome. For the public, victims and lawyers distinctions between the three terms are at best unclear, and at worse, suggest an unwarranted hierarchy. She tended to use “arbitrary killings” along with “unlawful deaths” and, when possible, referred to the terms of the International Covenant for Civil and Political Rights (ICCPR), “arbitrary deprivation of life.” As her predecessors remarked, “as practice accumulated, and as precedents were established, the definitional boundaries became much less significant and what might be termed a constructive blurring took place.”<sup>1</sup>

11. In view of the above, she believes the Mandate’s title should be revised. She recommends its sponsors and Member States consider situating the title squarely within article 6 of the ICCPR by renaming it “Special Rapporteur on arbitrary deprivation of life.” Good alternatives would be “Special Rapporteur on unlawful killings and unlawful deaths,” or “Special Rapporteur on the Right to Life” in reference to the Human Rights Committee General Comment 36. Those titles would still allow mandate holders to speak of extrajudicial killings, as a political rather than legal term, “to convey a special element of shock and

<sup>1</sup> A Compendium of the Jurisprudence of the United Nations Special Rapporteurs on extrajudicial, summary or arbitrary executions from 2004-2016, Chapter 1, p. 8.

outrage about the callous and deliberate disregard by states of the international norm against the arbitrary deprivation of life.<sup>2</sup>

12. Her two immediate predecessors support this recommendation. Philip Alston explained that it is most important “to come up with a label that is meaningful to the public at large, rather than satisfying the nitpicking of a few lawyers”<sup>3</sup> while Christof Heyns agreed that renaming the mandate as proposed “would emphasize the fact that at the foundation of the mandate lies the enforcement on a legally binding standard.”

### III. Working methods

13. Over her five years, the Special Rapporteur produced thematic reports on:

- Human rights standards and possible steps towards the respectful and lawful handling of mass graves A/75/384
- Targeted killings through armed drones A/HRC/44/38
- Application of the death penalty to foreign nationals and the provision of consular assistance by the home State A/74/318
- Investigation, accountability and prevention of intentional state killings of human rights defenders, journalists and prominent dissidents A/HRC/41/36
- Saving lives is not a crime A/73/314
- Armed non-State actors: the protection of the right to life: report of the Special Rapporteur on extrajudicial, summary or arbitrary executions A/HRC/38/44
- The unlawful death of refugees and migrants A/72/335
- A gender-sensitive approach to extrajudicial, summary or arbitrary killings. A/HRC/35/23

14. She also produced two in-depth case studies as addendums to thematic reports:

- The killing of Iranian General Quassem Soleimani A/HRC/44/38 (Annex)
- The unlawful death of Mr. Jamal Khashoggi A/HRC/41/ CRP.1

15. She undertook country visits to Iraq, El Salvador and Nigeria. She also conducted thematic visits to Italy and Brussels to investigate unlawful deaths of refugees and migrants and to Turkey to investigate the extrajudicial killing of journalist Jamal Khashoggi. From August 2016 to February 2021, the Special Rapporteur authored or co-authored 695 communications, with reply rates of 51% in line with Special Procedures’ average of 53%.

### IV. Standpoint

16. The Special Rapporteur was driven first and foremost by the realities for victims, survivors and witnesses. Her standpoint sought to question how their experiences could shape and enrich the normative principles at the heart of her Mandate, and in turn, how the normative framework could give human rights meaning to those experiences. She applied the principles that underpin the entire human rights framework: universality, indivisibility and interdependence.

17. This standpoint had three main implications:

- First, as reflected in her thematic reports, she worked to ensure that her Mandate was meaningful to a broad range of victims and experiences, including those that had not received the same degree of attention previously, including women, LGBTI persons, refugees, victims of armed groups.

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<sup>2</sup> Christof Heyns, Entry on extrajudicial killing.

<sup>3</sup> Personal communication.

- Second, she sought to draw out the economic, social and/or cultural dimensions of arbitrary killings and unlawful deaths. This was evident in her thematic reports (e.g. gender sensitive approach, and mass graves), communications to governments (e.g. establishing a contextual relationship between climate change and massive killings, between poverty and protection) and missions (e.g. Nigeria). She also initiated joint communications and press releases with Special Rapporteurs covering economic, social, or cultural rights.
- Thirdly, she used case studies to strengthen the monitoring and investigatory component of the Mandate. Seeing an opportunity previously unexplored, she took up individual cases in real time and, by investigating and documenting them through the lens of norms, standards and law, she sought to show how violations of one person’s rights erode rights for all. She developed an inductive approach, starting with detailed empirical observations from which normative and policy based generalisations could be drawn. This helped identify weaknesses in international and national institutions and mechanisms responsible for protection and investigation. The findings of those in-depth inquiries were produced either as addendums to thematic reports or in the form of allegation letters and included:
  - Investigation into the extrajudicial execution of Saudi journalist Jamal Khashoggi
  - Allegation letter regarding the death in custody of ex-President Morsi
  - Investigation into the targeted killing of Iranian General Soleimani
  - Allegation letter regarding the murders of Syrian journalists and human rights defenders Halla and Orouba Barakat
  - Allegation letter regarding the Iranian downing of Ukrainian flight PS752
  - Allegation letter regarding the poisoning and attempted killing of Russian anti-corruption activist Alexei Navalny (with Special Rapporteur on freedom of expression)
  - Allegation letter regarding the murders of French journalists Ghislaine Dupont and Claude Verlon.

## V. A gender lens to the Mandate

18. From the outset, the Special Rapporteur analysed her Mandate through a “gender lens”, seeking to question ways in which dominant understandings of the right not to be arbitrarily deprived of life may negate certain people’s experiences i.e. those of women and LGBTQI persons, and may even render unlawful death invisible.

19. As the Human Rights Committee noted in its General Comment 36, “The right to life is a right which should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions intended or that may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity. Article 6 guarantees this right for all human beings, without distinction of any kind, including for persons suspected or convicted of even the most serious crimes.”

20. The Special Rapporteur’s predecessors found that States’ failure to address systematic patterns of violence through due diligence, opens it up to violations of the right to life, as does the absence of accountability where such violence occurs. Once a pattern of violence becomes clear, but the response of the State is inadequate, its responsibility under international human rights law becomes applicable.<sup>4</sup>

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

21. The Special Rapporteur sought to elaborate on those findings, exploring the State's responsibility to protect the right to life of women and girls, and the conditions under which their deaths may amount to arbitrary killings or arbitrary deprivation of life. She addressed:

- *Definition of arbitrariness*: Along with its characteristics usually attributed, namely inappropriate, unjust and unpredictable,<sup>5</sup> unreasonable, unnecessary and disproportionate<sup>6</sup>, as well as outside due process of law<sup>7</sup>, she found that, arbitrariness may also be inferred from laws and practices that violate the principle of non-discrimination, both procedurally and substantively.
- *Intention and arbitrary killing*: She pointed out that “deliberate intent” of the State is not required for a killing or a deprivation of life to be deemed ‘arbitrary’. Killings in circumstances of unnecessary or disproportionate excessive use of force by the police are likely to be arbitrary, even if the police may not have killed intentionally.
- *The standard of due diligence*: She emphasized that assessment of responsibility of preventing arbitrary and unlawful gender-based killing, must include an assessment of: (a) how much the State knew or should have known; (b) the risks or likelihood of harm; and (c) the seriousness of the harm.
- *Positive obligation applied to the protection against, and prevention of arbitrary killing*: Given the sanctity of human life and thus the importance of its protection, she advised that positive obligations impose a high burden on the State and that this implies a demonstration of effectiveness (vis-à-vis efforts to prevent, investigate, punish and remedy), non-discrimination in State efforts and firm legal protection.

### **Unlawful gender-based death**

22. The Special Rapporteur reiterated the Human Rights Council's finding that States' responsibility encompasses more than an injunction not to kill and more than prevention of murder. It concerns not only intentional acts of deprivation of life (murder) by the State or a non-State actor, but the deprivation of basic conditions that guarantee life, such as access to food and health. State's responsibility for violations of the right to life is also engaged through acts of omission where the State 'knew or should have known' but failed to take actions that could have prevented deaths. Courts also suggested that reckless negligence should be evaluated with reference to intrinsic and systemic discrimination, such as that based on gender, race, class, and other forms of discrimination.

23. This allowed the Special Rapporteur to highlight the indivisibility of human rights, particularly where endemic economic and social deprivation leads to preventable mortality.

### **Respect and Protect the Right to Life: Areas of Overlap**

24. The Special Rapporteur's focus on preventable deaths of women and girls, such as from preventable maternal mortality or unsafe abortion, brought her to examine a grey area between State acts of omission and those of commission - between a failure to protect, and the failure to respect. For instance, does States' imposition of an absolute ban on abortion even when the life of the woman is at risk, constitute an act of omission or the deliberate intention to inflict pain, suffering and ultimately death on women because they are women? Similarly, States have extensive knowledge of the life-threatening implications of unsafe

<sup>5</sup> See communication No. 305/1988, *Van Alphen v. The Netherlands*, Views adopted on 23 July 1990, para. 5.8.

<sup>6</sup> See African Commission on Human and Peoples' Rights, general comment No. 3 (footnote 17 above).

<sup>7</sup> Ibid. See also communications No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.1.

abortion and the number of deaths resulting from recourse to this. Yet, some still choose to impose prohibitive policies.

25. The Special Rapporteur considered the jurisprudence, empirical evidence on preventable maternal mortality and the justification offered for policies that would result in maternal deaths. She determined that where the death of a woman or girl can be clinically linked to a deliberate denial of access to life-saving medical care that can affect only women or girls, such as through an absolute legal ban on abortion, that would amount to a gender-based arbitrary killing, suffered only by women and girls as a result of discrimination enshrined in law.

## **VI. Overlap between States' obligation to protect against arbitrary deprivation of life and to respect**

26. Several troubling developments over the course of her mandate prompted the Special Rapporteur to analyse the overlap between the State's obligations to respect and protect human rights. These included unlawful deaths of refugees and migrants and the criminalization of life-saving actions and organisations.

27. She recognised that unlawful deaths of refugees and migrants are international crimes - not unfortunate deaths caused by their own actions. It is an arbitrary death when State agents at the border use firearms to kill a migrant who poses no risk to life. In some instances, it may constitute an extrajudicial execution. But State responsibility extends further to the "three pillars of immigration control" - militarization, extraterritoriality, and deterrence - which are often explicitly designed to increase risk to migrants' lives. Policies premised on increasing such risks violate a State's obligation to exercise due diligence to protect against foreseeable risks, including risks created by non-State actors. The endangering of migrants' lives may be so purposeful that the State may be deemed to have failed to respect the right to life.

28. The Special Rapporteur found there to be substantial grounds for concluding that deaths of migrants along migration routes constitute arbitrary deaths engaging States' responsibility. Militarization has made excessive use of force more likely, transforming migrants into the "enemy" and suggesting to State agents that they are dealing soldier-like with enemy combatants, rather than acting as police officers restricted in the force that may lawfully be deployed.

29. States are allowing, and sometimes encouraging, tactics on land and at sea to repel or scatter migrants that purposefully put migrants' lives at risk. In some instances, the dangers are from natural elements, such as when officials push rubber dinghies back out to sea. In others, migrants have been deliberately placed in areas where gangs and other dangerous individuals are known to prey on migrants. The State bears responsibility under international law for any deaths or injuries that may occur in these circumstances, even if deaths are caused by such gangs. State officers themselves may be potentially culpable for murder.<sup>8</sup>

30. States adopt a policy of extraterritoriality aimed at avoiding legal responsibility by placing the onus on other States to keep migrants out of State borders. However, where "destination" States fund States of origin or transit to arrest, detain or return migrants, the destination States may bear responsibility for aiding and abetting resulting violations of the right to life, especially given that egregious practices of some funded States are well known. Destination States cannot feign ignorance to escape responsibility.<sup>9</sup>

31. State restrictions on the necessary conditions of life, such as medical care, water and shelter, violate the prohibition against arbitrary deprivation of life, and may result, in arbitrary killings involving State's responsibility. An essential corollary is that when a State is unwilling or unable to provide those services, it must agree to and facilitate humanitarian actors to do so and cannot lawfully impede them.

<sup>8</sup> A/72/335, paras. 25-35.

<sup>9</sup> A/72/335, paras. 36-40.

32. A State has a positive obligation to provide life-saving services to the maximum extent possible including all resources from the national and international community, and those of humanitarians. It has a negative obligation not to refuse or disallow humanitarian services. Only the imminent and equivalent loss of life directly attributable to the provision of such humanitarian services would warrant their prohibition. When civilian lives are at stake – as they are when migrants need water or shelter, or when populations are starving while under the control of non-State actors who are deemed to be “terrorists”, it is hard to imagine how the State could articulate a justification for denying aid.

33. States that criminalize essential humanitarian services in the name of immigration control are thus failing to respect and protect the right to life. Yet States are even criminalizing families helping other family members, when the Smuggling Protocol itself exempted humanitarian acts to protect migrant rights.

34. States must uphold their obligation to exempt humanitarian aid from counter-terrorism restrictions, up to and including medical aid to members of armed groups. A fundamental norm of international humanitarian law is the impartial provision of medical care to all wounded and sick, including enemy combatants and populations under their control. That bedrock principle is violated (A/73/314, para. 33). Humanitarian aid must be allowed to flow freely and unencumbered.

## VII. A “functional” approach to the extra territorial obligations to respect and protect against arbitrary killings and unlawful death

35. The Special Rapporteur was drawn to elaborate on States’ extra-territorial obligations with regard to the right to life on numerous occasions – including in the context of extraterritorial use of force, and the responsibility to protect, prevent and investigate.

36. Under international human rights law, States may assume extra-territorial jurisdiction for a number of circumstances, including cases involving detention overseas,<sup>10</sup> use of force by state agents abroad,<sup>11</sup> consular and diplomatic agents acting abroad,<sup>12</sup> and the exercise of law enforcement and other legislative and administrative powers, including the issuance of passports.<sup>13</sup>

37. The Special Rapporteur adopted a functional approach to extra-territorial jurisdiction, building on the conclusions of General Comment No. 36 of the Human Rights Committee, and those of the European Court for Human Rights (ECtHR).

38. In its General Comment No. 36, the Human Rights Committee affirmed that a State may exercise control over a person’s rights by carrying out activities which impact them in a direct and reasonably foreseeable manner.<sup>14</sup> The extent of the State’s control over the applicant<sup>15</sup> – or over some of their rights<sup>16</sup> – is a consistent theme in cases before the ECtHR and other bodies. For instance, in the context of armed forces operating outside a State’s national territory, the ECtHR recognises that acts of a State which impact on the Convention rights of an individual outside that State’s national territory, may fall under the jurisdiction

<sup>10</sup> See, e.g., *Al-Skeini and Others v. United Kingdom* (op. cit.).

<sup>11</sup> See, e.g., *Isaak v. Turkey*, Application No. 44587/98, 28 September 2006; *Andreou v. Turkey*, Application No. 45653/99, Admissibility Decision, 3 June 2008.

<sup>12</sup> See paragraph 21ff below.

<sup>13</sup> See paragraph 27ff below; paragraph 32 on passports.

<sup>14</sup> Para. 63. Footnotes omitted.

<sup>15</sup> Human Rights Committee: *Lopez Burgos v. Uruguay*, (op.cit.) para. 12.3; Inter American Commission on Human Rights: *Coard v. United States*, Report No. 109/99, Case 10.951, 29 September 1999, para. 37 and *Armando Alejandro Jr and Others v. Republica de Cuba*, Report No 86/99, Case No 11.589, 29 September 1999, para. 25.

<sup>16</sup> See paragraph 12 below.



of the Court even when the person is not in the custody of the State, provided that the rights violations flow directly from the State's acts.<sup>17</sup>

39. The Special Rapporteur applied this approach when a State has the capacity to protect the right to life against an immediate or foreseeable threat.<sup>18</sup> She did so in the context of unlawful death of refugees and migrants, consular assistance, State duty to warn, etc.

40. For instance, in her work with the Special Rapporteur on the protection of human rights while countering terrorism on foreign nationals in camps in northern Syrian Arab Republic, she found that States may have jurisdiction over their nationals in camps abroad because their actions directly influence their right to life, and only the State may have the capacity to protect them against foreseeable harms, including torture, enforced disappearance and death.<sup>19</sup>

41. In her work on the unlawful death of refugees and migrants, she explained that States have assumed functional jurisdiction over seas such as the Mediterranean. Having assumed jurisdiction for purposes of security, States simultaneously assumed responsibility for taking measures to preserve lives.<sup>20</sup>

## VIII. Unlawful killings in the context of armed conflicts

42. Over the last five years, the Special Rapporteur also confronted a multiplication of resorts to force extra-territorially in the name of the war on terror or other reasons. These were mostly in violation of international law and resulted in low-intensity drawn-out conflicts without clear geographical or temporal boundaries, increasingly blurring the distinction between war and peace, causing many civilian casualties.

43. The technological prowess of the “second drone age” enabled this substantial increase in the extraterritorial use of force, with legal and ideological distortions on which they are founded leading eventually to the targeted killing of a State actor in a third State and bringing “the signature technique of the so-called “war on terror” into the context of inter-state relations.”<sup>21</sup>

44. This focus on drones was also prompted by the reality that it is a ‘gateway’ technology, opening the door to emergent weaponised artificial intelligence, algorithmic and robotic warfare, drone swarms, and an overall loosening of ‘human control’ over the deployment of lethal force. Indeed, today’s armed drones are tomorrow’s killer robots.<sup>22</sup>

45. The last five years have seen intensification of deliberate targeting of civilians and civilian objects, such as schools and hospitals, in Syria, Yemen and Libya for instance (S/2019/373), manifesting a tragic erosion of adherence to humanitarian principles.<sup>23</sup>

### The Mandate’s work on armed conflicts

46. There is a long history of interplay between the Mandate, international humanitarian law and armed conflicts. And, from the outset, it has been concerned with killings in the context of hostilities, on the front line or beyond. Hence,

- In the Mandate’s very first report in 1983, Special Rapporteur S. Amos Wako observed that summary and arbitrary executions frequently occur during armed

<sup>17</sup> *Andreou v. Turkey*, Application No. 45653/99, Admissibility Decision, 3 June 2008.

<sup>18</sup> *Osman v. The United Kingdom*, Application No. 23452/94, 28 October 1998, para. 32-33.

<sup>19</sup> A/74/318: <https://undocs.org/A/74/318>.

<sup>20</sup> A/72/335, para. 64.

<sup>21</sup> <https://www.justsecurity.org/67937/soleimani-strike-marks-a-novel-shift-in-targeted-killing-dangerous-to-the-global-order/>.

<sup>22</sup> James Roger’s communication, March 2021

<sup>23</sup> When the vast majority of wars’ casualties are civilians, it is clear that the principles of distinction, proportionality, necessity and precaution, are being disregarded on a large scale. See S/2019/373. It has been estimated that 85% of war casualties are civilians.

conflicts making international humanitarian law an important element of the mandate's legal framework.

- Special Rapporteur Bacre Waly Ndiaye worked on the genocide in Rwanda, and investigated mass graves in Croatia.
- Special Rapporteur Asma Jahangir focused on massacres in the Democratic Republic of Congo and on the conflict in Kosovo.
- Special Rapporteur Philip Alston focused on drones targeted killings in Afghanistan and elsewhere, and in a range of conflict situations, such as in Colombia.
- Special Rapporteur Christof Heyns put the issue of autonomous weapons squarely on the international agenda.

47. The major resolutions that define the Mandate include several references to armed conflicts and killings in the context of armed conflicts. All in recent years have referred explicitly to international humanitarian law, urging 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."

48. Normatively, this led the Mandate to consider the interaction between international human rights and humanitarian law. Over time, and in response to specific incidents or legal developments, other legal regimes have also been included: the first being related to self-defence and implementation of the UN Charter's prohibition of the use of force; the second being the so-called international counter-terrorism legal regime, which greatly impacted on both international human rights and humanitarian law.

49. Special Rapporteurs Philip Alston (2004-2010) and Christof Heyns (2010-2016), elaborated on the relationship between these legal regimes and strongly advocated for the continuing applicability of international human rights law in the context of armed conflicts.

50. Philip Alston clarified that international humanitarian law does not replace human rights law during an armed conflict and suggested that, in respect of certain human rights, more specific rules of international humanitarian law may be relevant for the purposes of their interpretation.

51. Christof Heyns took this further particularly in the context of drones targeted killings, arguing for a holistic approach to international law, meaning that for a particular drone strike to be lawful under international law it had to satisfy the legal requirements under all applicable international legal regimes. Although a particular drone strike may satisfy the requirements for the use of inter-State force, it may nevertheless be inconsistent with applicable rules of international humanitarian law and international human rights law, or vice versa, and thus be unlawful under international law. He argued that the right to life can be adequately secured only if all the distinct requirements of the various constitutive parts of international law are met.

## **Reaffirming the centrality of international human rights law in contemporary conflicts**

### **Implications of the use of extra territorial lethal force**

52. This Special Rapporteur sought to persuasively reconstruct the illegality of the use of lethal force (for instance, via armed drones) outside active armed hostilities. She focused on two main issues: the determination of the beginning of an international armed conflict; the application of the self-defence doctrine.

53. With regard to the first, she applied hypothetically the doctrine of "first strike" according to which humanitarian law ought to apply from the first moment of use of force by one State against another, to the targeted killing of Iranian General Soleimani. She highlighted the empirical and legal difficulties this application generates, such as applying it in a non-belligerent State. She recommended that unless a number of stringent conditions are met, the prevailing legal regime ought to be international human rights law.

54. With regard to the self-defense doctrine, she highlighted that the expansionist approach of a minority of States is based on three distortions: of time in that the notion of “imminence” is no longer just a temporal criterion, of geography in that States can target armed groups anywhere, even in non-belligerent countries, if these are unable or unwilling to deal with their threats, thus leading to a third distortion, that of sovereignty.

55. The Special Rapporteur also warned that international counter-terrorism legal regime may have become the de facto legal regime for armed non-State actors, displacing and weakening international humanitarian and criminal law, while eroding victims’ protection and accountability, including victims of said armed groups.

#### **No legal regime hierarchy or superiority**

56. The Special Rapporteur sought to address conflicts of norms and of assessment between international human rights and humanitarian law. She rejected the *lex specialis* approach arguing, along with other experts<sup>24</sup>, that the notion of a legal regime’s superiority is not supported by rules governing the relationship between different legal regimes in international or domestic law, that there is little State practice or opinion juris supporting the theory, and that the ICJ determined that “both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration.”<sup>25</sup>

57. She emphasized that many contemporary international and non-international conflicts occur on sporadic, unpredictable frontlines, often leaving large areas of a country or region with little to no exposure to active or ongoing exchange of fire. Under those situations, she suggests, unlawful deaths ought to be assessed through a systemic integration approach<sup>26</sup> derived from Article 31(3)(c) of the Vienna Convention on Treaties, and applied in the International Court of Justice’s Oil Platforms case.<sup>27</sup> Under that approach, treaty obligations are interpreted by reference to their full normative environment with separate treaties’ provisions connected and one treaty interpreted by reference to another. This requires consideration of the purpose of the laws, alongside contextual and situational analyses of cases at hand.

#### **Human rights obligations of armed groups**

58. The Special Rapporteur also suggested that the legal frameworks traditionally applied to armed groups, international humanitarian law, international criminal law, and international instruments in the area of counter-terrorism, fail to consider the control exercised by armed groups and the extent of their governance-like functions. She advises that those functions are best apprehended through international human rights law. Tracing armed groups’ legal personality and their human rights obligations to treaty and customary law, she offered a framework to hold armed groups accountable. Building on legal and sociological scholarship, she highlighted the following:

59. Territorial control: Empirical accounts point to the shifting, elusive nature of territory in conflict contexts, highlighting the need for a nuanced approach.<sup>28</sup> In situations where an armed non-State actor does not control territory, it remains bound by customary international human rights law by virtue of its functionality and provided it meets the organizational requirement.<sup>29</sup> The multiplication of cyber-attacks against public, military and civilian targets underscores the need for a nuanced approach, in both international or non-international armed conflict.

<sup>24</sup> Milanovic, *The Lost Origins of Lex Specialis*, 2014,

<sup>25</sup> *Democratic Republic of the Congo v. Uganda*, 2005, para 216.

<sup>26</sup> <https://www.tandfonline.com/doi/abs/10.1080/18918131.2017.1353213?journalCode=rnh20>.

<sup>27</sup> *Oil Platforms (Islamic Republic of Iran v United States of America)* [2003] ICJ Rep 161.

<sup>28</sup> Under the jurisprudence on crimes against humanity, armed non-State actors must demonstrate that they have a capacity to carry out an attack of the scale required by article 7 of the Rome Statute International Criminal Court, *The Prosecutor v. Germain Katanga*, case No. ICC-01/04-01/07, judgement of 7 March 2014, para. 1119; Fortin, *The Accountability of Armed Groups under Human Rights Law*, chap. 10.

<sup>29</sup> Fortin, *The Accountability of Armed Groups under Human Rights Law*, pp. 382–385.

60. Organisation as governance: While international law and scholarship have largely defined the concept of organization in military-like terms<sup>30</sup>, the Special Rapporteur recommended that it be approached through a focus on armed non-State actors' governance functions. She points to the vast empirical evidence concluding that rebel groups<sup>31</sup> as well as criminal organizations<sup>32</sup>, may govern through lawlessness, uncertainty and fear, but may also promulgate and implement rules, dispute-resolution mechanisms and quasi-law enforcement functions.<sup>33</sup> The evidence shows that the ability of armed groups to establish and maintain control is largely grounded in their capacity either to outperform the State or to impose their own governance systems and elicit civilian collaboration. At a normative level, this confirms the importance of applying international human rights law to armed non-State actors, in non-international armed conflicts and in situations of unconventional violence. It also underscores the need to better understand armed non-State actors' governance and to develop indicators aimed at improving human rights protection, fostering engagement and ensuring accountability in such settings.

61. A graduated approach to obligations: The Special Rapporteur recommended that the application of human rights obligations to armed non-State actors be context-dependent, specific to each group and undertaken in a graduated manner through a review of interlinked indicators: (i) the nature and extent of control; (ii) the level of governance and (iii) consequently, the extent of their capacity.

62. She also identified obligations that should be binding on armed groups: (i) the principle of non-discrimination; (ii) prohibition against arbitrary deprivation of life; (iii) prohibition from withholding access to international assistance, along with the obligation to take all reasonable steps to protect and ensure access to humanitarian aid, and other services, particularly to vulnerable groups, without discrimination.<sup>34</sup>

## IX. Responding to police killings

63. During her tenure, the Special Rapporteur recorded a staggering number of killings by the police or other security forces globally; many in three archetypical situations:

64. Firstly, the largest number of police killings occurred in the context of so-called wars on drugs or anti-gang and anti-criminal activities, leading her to issue dozens of allegation letters and urgent actions concerning unlawful killings of residents of impoverished communities in the Philippines<sup>35</sup>, Venezuela<sup>36</sup>, Brazil<sup>37</sup>, Nigeria<sup>38</sup>, among others countries. She highlighted *modi operandi* that indicated violations of the principles of proportionality, necessity and/or precaution and the role of Government leadership in inciting or justifying these massive killings. Their repeated and systemic nature led her to suggest that such police killings amount to a form of social cleansing. In the later years of her mandate, she noted a troubling escalation with killings by security forces targeting perceived political opponents

<sup>30</sup> Indicators include the existence of a command structure, the modes of communication, whether military training is provided, external relations, the ability to control territory and the ability to procure.

<sup>31</sup> Zachariah Mampilly, *Rebel Rulers: Insurgent Governance and Civilian Life during War* (Cornell University Press, 2011); Ana Arjona, Nelson Kasfir and Zachariah Mampilly, eds., *Rebel Governance in Civil War* (Cambridge University Press, 2015).

<sup>32</sup> Enrique Desmond Arias, *Criminal Enterprises and Governance in Latin America and the Caribbean* (Cambridge University Press, 2017); Kent Eaton, "The downside of decentralization: armed clientelism in Colombia", *Security Studies*, vol. 15 No. 4 (2006), pp. 533–562; Angélica Durán-Martínez, "To kill and tell? State power, criminal competition and drug violence", *Journal of Conflict Resolution*, vol. 59, No. 8 (2015), pp. 1377–1402.

<sup>33</sup> Fortin, *The Accountability of Armed Groups under Human Rights Law*, p. 362.

<sup>34</sup> UN doc. S/PRST/2014/3, p.1.

<sup>35</sup> See, for example, [AL PHL 2/2020](#); [AL PHL 4/2019](#); [AL PHL 10/2018](#); [AL PHL 9/2018](#).

<sup>36</sup> See, for example, [AL VEN 9/2020](#); [AL VEN 2/2019](#).

<sup>37</sup> See, for example, [AL BRA 9/2019](#); [AL BRA 10/2018](#).

<sup>38</sup> See, for example, [AL NGA 6/2020](#); [AL NGA 5/2020](#); [AL NGA 5/2019](#).

en masse as well as lawyers and civil society members critical of the official position on police violence. Nowhere was this more clearly exhibited than in the Philippines.

65. A second, related focus has been on the disproportionate affect of police violence and killings on minorities (e.g. people of African descent, Indigenous groups, etc.). The killing in 2020 of George Floyd in the USA galvanized the global movement against racism in policing. The Special Rapporteur notes that over the last decade it was those communities and individuals within them that had been specifically targeted through various “wars” - “on drugs,” “on crime” and on “terrorism”. She believes that effective responses require an historical and all-encompassing reframing of policing, placing it within the larger public policy context and linking it squarely with commensurate investment in social and economic policies, including education and mental and physical health.

66. The COVID-19 pandemic exacerbated social and economic inequalities, leading to millions falling into poverty and extreme poverty. Unless urgent action is taken to address those impacts, the Special Rapporteur fears that the years ahead will see another epidemic but of a different type: police killings on a scale not seen before.

67. In the later years of her Mandate, demonstrations in such places as Belarus, Hong Kong, Iraq, Israel and the USA were met with use of force that also led to a staggering loss of life. Drawing on the normative standards laid out by her predecessor (A/HRC/17/28 and A/HRC/31/66), the Special Rapporteur pointed out that excessive use of force against demonstrators is very rarely effectively investigated and thus accountability remains rare as are needed reforms in police preparedness and techniques. She called for far stringent measures in regulating the use of so-called non-lethal weapons<sup>39</sup>.

## X. Death Penalty

68. The death penalty is an important focus of the Mandate, with urgent actions frequently addressed to States imposing death penalty in violation of the provisions of Article 6 (2) of the ICCPR.

69. The Special Rapporteur promoted the positions of her predecessors, namely that death penalty can be imposed only in situations of intentional killing; that international law requires the progressive abolition of the death penalty, and that death penalty may constitute torture, cruel or inhuman treatment (prohibited in article 7 of the ICCPR) and violates the right to dignity (see A/67/279, para. 36).

70. She referred to the emerging international customary norm prohibiting the death penalty as a form of cruel, inhuman, or degrading punishment; cruelty that goes beyond the execution itself. The “death row phenomenon” explains that prisoners on death row may experience severe mental trauma and physical deterioration, which may amount to degrading, cruel or inhuman treatment, or even torture. The Human Rights Committee has observed that “extreme delays in the implementation of a death penalty sentence, which exceed any reasonable period of time necessary to exhaust all legal remedies, may also entail the violation of article 7 of the Covenant, especially when the long time on death row exposes sentenced persons to harsh or stressful conditions, ... and when they are particularly vulnerable due to factors such as age, health or mental state.”<sup>40</sup>

71. The Special Rapporteur also emphasized that although the Covenant permits retentionist States to continue applying the death penalty within stringent parameters, that should not be construed as a justification for the deprivation of the life of individuals, albeit lawfully sentenced to death, and does not make the execution of a death sentence, strictly speaking, legal. In other words, the death penalty violates the right to life under article 6 of ICCPR and amounts to cruel or inhuman treatment under article 7.<sup>41</sup>

<sup>39</sup> AL USA 31/2020; and USA: UN experts urge far-reaching reforms on policing and racism

<sup>40</sup> General Comment 36, supra note 5, para. 40.

<sup>41</sup> Supreme Court of the United Kingdom of Great Britain and Northern Ireland, *The Death Penalty Project (intervening), Elgizouli (AP) (Appellant) v Secretary of State for the Home Department (Respondent)*, Case No. UKSC 2019/0057.

## Women on death row

72. The Special Rapporteur sought to strengthen the gender perspective on the death penalty. Women and girls constitute a minority on state death rows but, as a result, they are often invisible, their plight and needs often ignored, as are the specificities of what brought them there - very often multiple human rights violations, stemming from gender discrimination and poverty. Most women on death row come from backgrounds of severe socio-economic deprivation; many are illiterate. In a number of countries, the vast majority are migrants or foreign nationals. Some may be on death row for drugs-related crimes, i.e. acting as drug mules, however, such crimes do not meet the threshold of gravity required under international law for a death sentence to be lawful. Most girls on death row are there for the killing of an authority figure in the context of child marriage and/or gender-based violence, even though the execution of any one for offences committed when they were below 18 years of age is strictly prohibited by international law.

## Consular assistance

73. From early on in her Mandate, the Special Rapporteur received many complaints that detainees' countries of origin consider the provision of consular assistance to their nationals as discretionary. She also received alarming evidence that foreign nationals, especially migrant workers from Asia and Africa, were disproportionately affected by the death penalty in several States. She therefore sought to explore the extent to which States had an obligation to provide consular assistance to their nationals facing the death penalty abroad.

74. The Special Rapporteur argued that the right to receive consular assistance comprises the obligation of the detaining State to inform foreign detainees of their right to consular assistance and the obligation of the home State to provide their nationals detained with adequate consular assistance. A State's responsibility to protect may be invoked extra-territorially in circumstances where that State has the capacity to protect a person's right to life against an immediate or foreseeable threat. The home State may have jurisdiction over their nationals detained abroad, in that it directly influences the exercise of their right to life. She demonstrated through an in-depth examination of opinion juris and state practices that the provision of consular assistance by the home State may correspond to an emerging customary international norm.

75. She produced Guidelines to States to strengthen the provision of consular assistance to their nationals on death row, although these can be applied to all nationals detained on other charges<sup>42</sup>.

## Death row and "terrorism" crimes

76. Her death penalty work also focused on ill-defined "terrorist action", the expansion of the scope of offenses punishable by death and the resumption of executions for terrorist-related offences after years of moratoriums in executions. She denounced the vagueness of anti-terrorism laws and broad definitions of terrorist offenses that include death penalty for nonviolent acts, or acts that do not constitute the "most serious crimes" (intentional killing). Similarly, the establishment, organization or management of a "terrorist" group may be punishable by death in some States, even in circumstances where no intentional killings have been perpetrated or ordered.

77. The Special Rapporteur also focused on the withdrawal of consular assistance to nationals detained abroad on terrorism charges and argued that should a state party to the ICCPR withhold consular protection from an individual on the grounds of their purported crime, that would violate both the State's obligation to protect the right to life and the prohibition against discrimination.

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<sup>42</sup> A/74/318

78. Even stoutly abolitionist States have indulged a tolerance for capital punishment of their nationals, in contravention of their legal obligations and moral positions. They seemingly have engaged in death penalty by proxy, sub-contracting its application against nationals whom they deem “unworthy” of protection. That is tantamount to importing the brutality of death penalty into the home society, normalizing it with its inequality, arbitrariness, and cruelty. Human rights are inherent to human beings, not earned. They cannot be arbitrarily “cancelled”, no matter how repugnant the crime. Where a State has committed to uphold the prohibition against the death penalty, that must be applied universally, including extra territorially for their nationals abroad.

## **XI. Last rites and rights**

79. Notoriety trails this mandate in multiple ways and perhaps most infamously in respect to the beginning and end of life itself. Under her tenure, the Special Rapporteur probed a neglected dimension, namely human rights at death: where does the right to life terminate and under which conditions?

80. She stressed that human rights obligations extend beyond life and into death to encompass the dignity of human remains and the rights of loved ones to mourn also in dignity. The “last” human rights include rights to “last rites”<sup>43</sup>.

81. In the context of mass graves, she brought the applicable legal standards together to set out a human rights framework for their respectful and lawful handling. She noted States’ obligations for the respectful treatment of human remains, identification and preservation of evidence about the cause of death, respectful memorialization, and for active participation of families and communities etc. She urged the international community to step up its support for countries and communities where mass graves are located and urged greater respect for the diversity of the claims to such sites, attention to the local context and for recognition that rights and obligations can help strike fair balance across competing interests.

## **XII. New international tools for a world of tensions**

82. Throughout her Mandate, the Special Rapporteur sought to recommend policies and instruments appropriate for an increasingly tense world, as evident at many levels, including in policies of securitization and militarization but also in the normative realm. Her recommendations in this context are:

### **Politically motivated killings**

83. The Special Rapporteur warned the present era is reminiscent of the cold war. A new age of politically motivated killings is emerging, with State and non-State actors increasingly choosing extrajudicial killing as a means to silence those who criticize them or oppose their political objectives.

84. She points to the presence of new weapons, such as microwave or acoustic weapons, designed to cause high-levels of physical distress, memory loss, mental stupor, hearing problems, and headaches<sup>44</sup> and recommends the United Nations equip itself with the means and instruments to effectively respond these developments and to targeted violations against specific individuals.

85. She further notes that while the international community has been fairly responsive to situations characterized as “massive human rights violations”, it has largely failed to respond to crimes targeting individuals. Yet, they are often early warnings of much worse to come. She recommends the establishment of a Standing Investigatory and Accountability Mechanism, composed of independent international experts in investigations and

<sup>43</sup> A/72/335, A/75/384

<sup>44</sup> James Rogers, Assistant Professor in War Studies, Centre for War Studies, at the University of Southern Denmark, Personal Communications, March 2021.

prosecutions, as well as Special Procedures and Treaty-Bodies members to: a) investigate, in accordance with criminal law standards (international or national standards), allegations of targeted killing or disappearances; b) facilitate strengthened judicial accountability, including by identifying possible avenues for the administration of justice at national, regional and international levels; c) prepare files to facilitate and expedite fair and independent criminal proceedings in accordance with international, regional or national law standards, in courts or tribunals that have, or may have in the future, jurisdiction over the crimes being investigated; d) identify other mechanisms for delivery of justice and ending impunity, including at political and diplomatic levels.

86. She also called on States to ensure security agencies and other relevant actors meet their due diligence obligations to protect the right to life of those who may be targeted by States and non-State actors for their peaceful expression and activities, both online and offline. She calls on all relevant actors to strengthen the implementation of their “duty to warn” potential victims against potential violent attempts against their life, including in situations outside national territories where States have power, control or authority over the enjoyment of the right to life.

87. She further recommended the development of “Khashoggi Sanctions” to protect journalists, human rights defenders and dissidents from acts of violence, and associated impunity. Such sanctions would focus on high-level individual actors responsible for persistent threats, acts of violence, targeted killings, abuse of power to circumvent investigation and obstruct the search for justice for such crimes. Sanctions should be imposed, taking into account any undesired collateral effect on human rights enjoyment of the larger population of the relevant States.

## **Drone Technology Control Regime**

88. The Special Rapporteur strongly emphasizes the threat that the absence of a meaningful drones regime represents given the renewed armaments race and rapid weapons development triggered by Artificial Intelligence. Drone swarms, with thousands of pre-programmed drones, each with a set role, are paving the way for a new generation of weapons of mass destruction<sup>45</sup> not the least because of their inherent inability to differentiate between military and civilian targets. Weaponised drones that ‘pick their own target’ if they lose signal contact with central control already exist. Lethal Autonomous Weapons System (LAWS) raise grave questions about ‘meaningful human control’. The latest generation of armed drones includes a capacity for automated flight, meaning one team of drone pilots and sensor operators can, in theory, ‘supervise’, not directly control, multiple drone systems at the same time. In combination with problematic facial recognition technology, such weapons can track down and kill high-profile individuals without a single ‘human in the loop’. Talks on controls of LAWS have been stalled since November 2020, when the Convention on Conventional Weapons (CCW) failed to agree on its 2021 programme of work yet the need for renewed multilateral dialogue is urgent.<sup>46</sup>

89. To control the “free for all” of the second drone age, the Special Rapporteur has called for a “Drone Technology Control Regime” and recommended that States establish a transparent, multilateral process to develop robust standards for the design, export, and use of drones; enact stricter controls on the transfer of military and dual-use drone technologies and, apply clear criteria to prevent irresponsible transfers. Drone sales agreements must include civilian protection and adherence to international human rights and humanitarian law. States must work together to adopt a dedicated process of operational end-use monitoring to report transparently on the outcome of drone strikes and their impacts on civilians and so-called “targets.” She further recommends that the Secretary-General set up international commissions of inquiry or fact-finding missions to investigate targeted killings using drones in the name of “self-defence.”

<sup>45</sup> Zachary Kallenborn (2020).

<sup>46</sup> James Roger, Personal communication, March 2021.



## **Justice for victims of armed non-State actors**

90. The Special Rapporteur examined arbitrary killings by armed non-State actors, including armed groups or criminal cartels and denounced the lack of justice for the victims of such groups, particularly where they are characterized as “terrorist” by states or through a UN Resolution. She recommended that the international community or individual States establish, possibly as a trial test initially, trust funds to provide remedies and reparations for victims. These funds could be constituted from finances collected through sanctions imposed on the leaders of armed non-State actors responsible for human rights violations, including arbitrary killings. In the context of her work on violations committed by ISIL in Iraq and Syria, the Special Rapporteur noted that member States have an obligation to freeze assets of individuals and entities supporting ISIL (UNSC resolution 2253 of 2015). The Special Rapporteur supports calls for UN member states to proactively publish the figures of the frozen assets that they hold, and for these assets to be held strictly for the purpose of covering reparations to victims of the armed group.

91. Where possible, the Universal Jurisdiction principle should be applied to investigate and try violations by individual members of armed non-State actors, including arbitrary killings, against principles of international criminal and human rights law.

92. The Special Rapporteur also called on countries of citizenship to repatriate foreign fighters currently held by Kurdish forces in North East Syria for the purpose of investigating their possible involvement in violations of international human rights, humanitarian and criminal law, and for trying them, in accordance with domestic law.

93. She further recommends development of a coherent taxonomy of armed non-State actors and identification of indicators to assess their governance and capacity to shoulder human rights obligations.

## **Truth and justice for refugees and migrants**

94. The Special Rapporteur called for the establishment of international permanent multi-stakeholder mechanism for the governance and coordination of search, identification and tracing of missing migrants and refugees, along with the development of common protocols for search and rescue operations, and the treatment of dead migrants and refugees. She also recommended the establishment of an international inquiry and truth commission to uncover and reveal the extent of massive violations of people on the move, including their arbitrary killings and unlawful deaths, by States and non-State actors.

## **Effective and principled management of mass graves**

95. In the view of the vast numbers of mass graves globally, some of which may hold thousands of bodies, the Special Rapporteur called on the international community to prioritise their effective and principled management. She recommended legal frameworks to govern mass graves’ management, including their identification, preservation and investigation over time and for their protection establishment of a legal entity or legal guardian comprising representatives of authorities, families and communities concerned and UN agencies.

## **Protecting civilian airspace**

96. The Special Rapporteur investigation into the Iranian strike against Ukrainian Flight PS752 highlighted the insufficiencies of existing international conventions on air safety, when dealing with military actions against civilian planes. Building upon the findings of the Dutch Safety Board investigation into the downing of flight MH17, she too found that the international system on civilian air safety is not fit for purpose and ought to be urgently optimized to effectively address air safety in conflict zones or, indeed, a complete overhaul ought to be on the agenda.

97. She called for the establishment of an independent body (from both States and airlines) to monitor air safety in relation to conflicts, and to compile and disseminate transparently information about risks to civil aviation related to flying over conflict zones. She urged the international community to develop clear, explicit and unambiguous standards on when States should close airspace under their jurisdiction. She called on Airlines to make their flight paths available to the public and strengthen their capacity for risk assessment, including by following the highest standards and checking all information sources when planning flights routes<sup>47</sup>.

### **Covid-19 related arbitrary deprivation of life**

98. Throughout 2020, the Special Rapporteur closely followed impacts of the Covid-19 pandemic and measures taken in response, including the extent to which States met their obligations to respect and protect the right to life. She initially focused on two situations where she felt States' obligations were at their clearest: the protection of individuals in places of detention and the protection of individuals against police excessive use of force.

99. With regard to States' obligations regarding imprisonment under Covid-19, she recalled that:

- Whenever the State takes an individual into its custody, it has the responsibility to care for the life and bodily integrity of that person. In these circumstances, death resulting from the denial of such essentials to life as adequate space, proper ventilation, or adequate medical care are arbitrary deaths for which the State is responsible.
- The State must ensure prisoners and other detainees have access to health services available in the country without discrimination. It is important to understand that States cannot invoke the lack of financial resources or other logistical problems to reduce or dodge this responsibility.
- Along with many other experts, she called on Governments to release all prisoners whose incarceration is illegal or arbitrary, reduce the overall size of prisons' population, consider alternatives to pre-trial detention, and consider for immediate release, persons detained for misdemeanour and low-level crime, with conditions attached as required<sup>48</sup>.

100. While under health emergencies, temporary curtailment of some rights and freedoms is permitted, there is evidence of Governments failing to limit such measures to those that are strictly necessary and proportionate. There are also proven risks that, in the longer term, these newly acquired "pandemic powers" will be hardwired into legal and political systems. The Special Rapporteur emphasizes that states of emergency are increasing the exposure to police violence of already vulnerably groups and individuals. She reminds States that addressing increased vulnerability and the consecutive risks to life and dignity must be an integral to emergency regulations.

101. The Special Rapporteur recalled that derogations of freedom of movement, including curfews, are permitted under international law provided they meet the requirements of legality, necessity and proportionality. On their own however, the breaking of a curfew or of any restriction on freedom of movement should not constitute grounds for the use of force by the police, and certainly not for the use of lethal force.

102. For millions of people, policies such as curfews can be more direct threats to their dignity and wellbeing than the virus itself. The Special Rapporteur pointed out that there are other ways to police than application of force first. Community discussion, consultation and engagement should be the operating principles for police as well. It is what international law demands and what protection of human rights in a pandemic requires.

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<sup>47</sup> [Attack on PS752: Iran violated multiple human rights obligations - UN experts](#)

<sup>48</sup> [US Government urged to do more to prevent major outbreaks of COVID-19 in detention centres](#)

103. She also recommended that for the purpose of non-recurrence and accountability, as well as to help avoid and prevent the governance and institutional failings that the pandemic revealed, the causes and consequences of the pandemic must be fully and completely captured. She called for a multi-disciplinary, multi-sectoral, comparative human rights-based assessment of the international community's response to the pandemic. Independent, impartial and objective, it should be steered overall by a multi-disciplinary, multi-stakeholder international group, which could commission specific studies to review the range of institutional, legal and policy implications.<sup>49</sup>

104. The Special Rapporteur further calls on States to address inequities in access to vaccines and therapeutics. The right to life of each and every person underlies her call for global access to vaccines. She recalls that no State may allow its actions, or the actions of non-State actors within its borders, to infringe that right. In the context of a pandemic, a State's obligation to its own residents cannot be met without protecting also the lives of those outside its borders. Human security globally demands that life-saving vaccines and therapeutics be made quickly and equitably available to all.

### XIII. Conclusion

105. Over the decades of its existence, this mandate has addressed many issues; each Mandate-holder strengthening the Mandate's impact and relevance by making specific contributions in response to contextual demands. The five years of this Special Rapporteur's tenure saw a marked deterioration of human rights around the world, including those related to the right to life. It cumulated in the Covid-19 pandemic, which has laid bare structural and systemic inequality and injustice, disproportionately affected the most impoverished and led to the deaths of three million people. The world also witnessed heightened political, military and trade tensions, with a targeting of human rights defenders, dissidents and journalists both within and outside their countries, and a resurgence of conflicts as access to a multiplicity of military grade weapons expanded. Over this same period, the ideals of human rights have been undermined and the international normative system of Treaty-Bodies and Special Procedures starved of resources.

106. In that context, the Special Rapporteur wishes to recall the warnings issued in 1949, in the aftermath of World War Two and the Holocaust. The warnings were that evil progresses cunningly: a minority operates to remove the levers of control; freedoms are suppressed, one by one, in one sphere after another; public opinion and conscience asphyxiated; leading far, even unto the crematorium's oven. Against that evil progress even if seemingly more banal, alarm must be sounded to all nations. And for that, "a conscience must exist somewhere".<sup>50</sup>

107. That "somewhere" must include the Human Rights Council. The duties of Special Rapporteurs and Treaty Bodies are to empower and equip that conscience: to warn the Council of current perils and those that loom; to defend and help strengthen human rights guarantees; to demand that States respect their obligations. At times performance of those responsibilities makes for difficult debates and arduous journeys. But the alternatives – silencing, fear, threats?

108. It is to the duties of conscience that this Special Rapporteur has devoted the last five years, alongside other Special Procedures - the most committed group of colleagues she could have hoped for. She calls on the Human Rights Council to do all within its power to fully be that "somewhere" where conscience can indeed be relied upon to exist.

<sup>49</sup> The Special rapporteur has provided further details on the possible scope of these studies here: [Human Rights Dispatch No. 3: Call for a human rights assessment of the international's community response to the coronavirus pandemic: multi-disciplinary, multi-stakeholder, comparative](#)

<sup>50</sup> Pierre-Henri Teitgen, Address to the Consultative Assembly of the Council of Europe (Sept. 1949) as cited in Emmert, F. and Cerney, C., *The European Union Charter of Fundamental Rights vs. The Council of Europe Convention On Human Rights And Fundamental Freedoms – A Comparison*; Fordham International Law Journal, Volume 40, Issue 4, Article 1, 2017.

## **Recommendations**

109. **To The sponsors of the Mandate and Member States:**

**Situate the Mandate squarely within article 6 of the ICCPR by renaming it “Special Rapporteur on arbitrary deprivation of life” or “Special Rapporteur on unlawful killings and deaths” or “Special Rapporteur on the Right to Life.”**

## Annex

# Free and Equal Access to Vaccine: A Right to Life Issue

## Introduction

*“All efforts to prevent, treat and contain COVID-19 must be based on the bedrock human-rights based principles of international solidarity, cooperation and assistance. There is no room for nationalism or profitability in decision-making about access to vaccines, essential tests and treatments, and all other medical goods, services and supplies that are at the heart of the right to the highest attainable standard of health for all.”<sup>51</sup>*

1. The therapeutics and vaccines developed to combat COVID-19 are the product of a massive public and private collaboration. Governments around the world have provided significant funding, and many of the products developed have been built upon earlier work, also often funded at least partially by public sources<sup>52</sup>. Private citizens throughout the world have volunteered for clinical trials in significant numbers. Regulatory procedures have been streamlined. Private firms have likewise devoted their resources to the work. As a result, vaccines have been and are still being developed at record speed, and work on therapeutics continues. Yet, this progress threatens to be undone by the extensive control ceded by governments to private companies in the manufacture and distribution of these products. Intellectual property rights are important to innovation, and companies are entitled to remuneration, but in the context of a global pandemic, with above 3 millions of deaths already, profits and private control may not now take precedence.

2. The rates of vaccination throughout the world and even within State borders demonstrate a clear failure by States to protect the right to life, as required by Art. 6 of the ICCPR. Inequality in State access to therapeutics and vaccines, as well as discrimination based on race, immigration status, and income within States, has resulted to date in treatment and vaccines going predominantly to the wealthy. This failure must be addressed now.

## I. Background:

3. Today, the world sees growing competition among States for access to COVID-19 vaccines, with correspondingly widely varying rates of vaccination. The situation evolves by the week, but in the face of rising caseloads and bottlenecks in manufacturing, States are increasingly succumbing to vaccine nationalism, restricting the export of vaccines and other necessary supplies. At the current rate of vaccination, global herd immunity may not be reached for approximately 4.6 years, an untenable situation.<sup>53</sup>

4. COVAX, a collaborative effort by WHO, Gavi and the Coalition for Epidemic Preparedness Innovation (CEPI), has been attempting to address the issue of fair and equitable global supply. It is negotiating arrangements with multiple companies to produce supply for less wealthy countries, and currently projects 1.8 billion doses to be available by the end of the year, but these projections are subject to a variety of factors, including

<sup>51</sup> Statement by UN Human Rights Experts, “Universal Access to Vaccines is Essential for Prevention and Containment of COVID-19 around the World,” November 9, 2020

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26484&LangID=E>.

<sup>52</sup> It has been reported that public funding for COVID-19 vaccine development has been on the order of \$18 billion. I. T. Katz, R. Weintraub, L. Bekker, and A. M. Brandt, “From Vaccine Nationalism to Vaccine Equity – Finding a Path Forward,” *New England J. Med.* April 3, 2021.

<https://www.nejm.org/doi/full/10.1056/NEJMp2103614>.

<sup>53</sup> I. T. Katz, R. Weintraub, L. Bekker, and A. M. Brandt, “From Vaccine Nationalism to Vaccine Equity – Finding a Path Forward,” *New England J. Med.* April 3, 2021.

<https://www.nejm.org/doi/full/10.1056/NEJMp2103614>.

manufacturing supply, regulations, funding available and final contract terms<sup>54</sup>. COVAX will distribute vaccine equitably, proportional to population, “initially prioritising healthcare workers then expanding to cover 20% of their population”.<sup>55</sup> Yet these ambitious plans, even if successful, appear still to leave developing countries well behind wealthy nations in the proportion of their population vaccinated. The announcement that the United States will join COVAX is a welcome sign, as is its suggestion that any surplus purchases of vaccine will be donated.<sup>56</sup> But this is not enough.

5. To address the current global shortage and inequities in distribution, India and South Africa have called for the waiver of provisions of the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS) to allow countries not to grant or enforce patents or other intellectual property rights related to COVID-19 drugs, vaccines or diagnostics during the pandemic, until “the majority of the world’s population has developed immunity”<sup>57</sup>. This waiver would cover “copyright, industrial design, patent and undisclosed information”<sup>58</sup> such as trade secrets. It is supported by 100 countries<sup>59</sup> and certain UN institutions and civil society members.<sup>60</sup> A small number of countries, particularly those home to pharmaceutical companies, are opposing this waiver, arguing that bilateral negotiations are sufficient to increase supply and that the waivers will do little to address the existing roadblocks. Yet, there are already reports that intellectual property rights have interfered with the supply of N95 masks and the reagents in testing kits and that patents covering developing treatments, such as monoclonal antibody treatment, will inhibit, if not prevent, the use of these treatments in developing countries<sup>61</sup>. Many of the current vaccines rely on patents for background technology, owned by multiple companies, making it extremely difficult for countries to determine quickly how to address the IP issues. There appear already to be patent disputes between companies over underlying patents. In addition, production of vaccines and other materials essential to treatment and distribution involve trade secret and proprietary materials, protections that would remain in place without the waiver.

6. Secrecy imposed by pharmaceutical companies is compounding these difficulties. Patents specifically related to COVID-19 may still be subject to the 18-month period of non-disclosure. Moreover, all contracts with pharmaceuticals seem to be secret, and when they have been disclosed, key information has been redacted. As a result, countries may be paying very different amounts for the same vaccine, making vaccines potentially prohibitively expensive for lesser developed countries, and States appear largely subject to the whim of private companies as to when and how they will receive the needed materials. To the extent terms have been disclosed, they reveal limits on which entities within countries can manufacture vaccines, excluding manufacturers that have available capacity and capabilities, and they allow the company to decide when the pandemic is over, thereby affecting the contractual terms. Those countries without confirmed sources of vaccine are left to wonder when and if pharmaceutical countries will negotiate supplies with them and on what terms. They have little if any ability to determine how their terms compare to that offered to other countries. Even those governments with contracts have difficulty getting needed information.

<sup>54</sup> COVAX Global Supply Forecast, January 20, 2021

<https://www.gavi.org/sites/default/files/covid/covax/COVAX%20Supply%20Forecast.pdf>.

<sup>55</sup> CEPI Survey Assesses Potential COVID-19 Vaccine Manufacturing Capacity, August 5, 2020

[https://cepi.net/news\\_cepi/cepi-survey-assesses-potential-covid-19-vaccine-manufacturing-capacity/](https://cepi.net/news_cepi/cepi-survey-assesses-potential-covid-19-vaccine-manufacturing-capacity/).

<sup>56</sup> <https://www.scmp.com/news/china/diplomacy/article/3118907/us-sign-covax-shot-arm-who-vaccine-scheme>.

<sup>57</sup> <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669.pdf&Open=True>

<sup>58</sup> [https://msfaccess.org/sites/default/files/2020-12/MSF-AC\\_COVID\\_IP\\_TRIPSWaiverMythsRealities\\_Dec2020.pdf](https://msfaccess.org/sites/default/files/2020-12/MSF-AC_COVID_IP_TRIPSWaiverMythsRealities_Dec2020.pdf).

<sup>59</sup> [https://msfaccess.org/sites/default/files/2020-12/MSF-AC\\_COVID\\_IP\\_TRIPSWaiverMythsRealities\\_Dec2020.pdf](https://msfaccess.org/sites/default/files/2020-12/MSF-AC_COVID_IP_TRIPSWaiverMythsRealities_Dec2020.pdf).

<sup>60</sup> See, e.g., Open Letter: Uniting Behind a People’s Vaccine Against COVID-19, May 13, 2020

<https://medium.com/@Oxfam/uniting-behind-a-peoples-vaccine-against-covid-19-87eec640976>;

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26484&LangID=E>;

<sup>61</sup> [https://msfaccess.org/sites/default/files/2020-12/MSF-AC\\_COVID\\_IP\\_TRIPSWaiverMythsRealities\\_Dec2020.pdf](https://msfaccess.org/sites/default/files/2020-12/MSF-AC_COVID_IP_TRIPSWaiverMythsRealities_Dec2020.pdf).

7. Both the limits on using intellectual property and the secrecy enforced by corporations are impeding life-saving relief. These issues must be addressed now, with the core need being to increase supply immediately. As the Director General of the World Trade Organization has stated, “[w]e have to scale up and scale out COVID-19 vaccine production, particularly in emerging markets and developing countries”. This means “making the most of existing manufacturing capacity – finding existing sites and turning them around.”<sup>62</sup> Private agreements between corporations suggest that existing manufacturing facilities may be able to produce vaccines supplies in approximately 6 months. “[E]ach additional day the vaccine shortage continues, people will pay with their lives.”<sup>63</sup>

## **II. It is a violation of the right to life for States to cede control over the supply of vaccines and therapeutics to private corporations during the COVID-19 pandemic**

8. UN Special Procedures and civic institutions have provided compelling arguments as to why prompt and adequate supplies of vaccines and therapeutics to the global community are required to fulfill every individual’s right to the enjoyment of the highest standards of physical and mental health.<sup>64</sup> They have shown how the advance purchase of supplies by wealthy corporations and IP restrictions are impeding global access and have called for a “people’s vaccine”.<sup>65</sup> The conditions they decry have become even more pressing with time. What the international community must not forget is that underlying all of these demands for access is the insistence that each and every person has the right to life, without discrimination, and no State may allow its actions, or the actions of non-State actors within its borders, to infringe that right. In the time of a pandemic, the State’s obligation to its own residents cannot be met without protecting the lives of those outside its borders. Human security demands that these life-saving vaccines and therapeutics be quickly and readily available to all.

### **A. A State’s Obligation to Protect the Right to Life of Those Outside its Borders:**

9. Every State has an obligation to respect and ensure the right to life of all persons “over whose enjoyment of [that right] it exercises power or effective control.” GC36, para. 63. This duty extends to “reasonably foreseeable threats and life-threatening situations that can result in loss of life.” GC36, para. 7. It is invoked even when the threat does not ultimately result in death – such as the coronavirus which kills only a proportion of those infected. States have an obligation to protect individuals from contracting COVID-19 and, if those efforts fail, providing the most efficacious therapies to combat the disease. This protection must be provided equitably, without discrimination, and with special protection provided to those most vulnerable.

10. A State’s obligations do not end at the border. A State must protect the right to life of those whose lives are “affected by its ... activities in a direct and reasonably foreseeable manner.” GC36 para. 63. States must also “take appropriate legislative and other measures to ensure that all activities taking place in whole or in part within their territory and in other places subject to their jurisdiction, but having a direct and reasonably foreseeable impact on

<sup>62</sup> Press Release, World Trade Organization, March 9, 2021, [https://www.wto.org/english/news\\_e/news21\\_e/dgno\\_09mar21\\_e.htm](https://www.wto.org/english/news_e/news21_e/dgno_09mar21_e.htm).

<sup>63</sup> Id.

<sup>64</sup> See, e.g., E/C.12/2020/2; Statement by UN Human Rights Experts, “Universal Access to Vaccines is Essential for Prevention and Containment of COVID-19 around the World,” November 9, 2020 [https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26484&LangID=E.](https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26484&LangID=E;); <https://www.amnesty.org/download/Documents/POL3034092020ENGLISH.PDF>; <https://www.hrw.org/report/2020/10/29/whoever-finds-vaccine-must-share-it/strengthening-human-rights-and-transparency>.

<sup>65</sup> <https://peoplesvaccine.org/>; <https://medium.com/@Oxfam/uniting-behind-a-peoples-vaccine-against-covid-19-87ecc640976>;

the right to life of individuals outside their territory, including activities undertaken by corporate entities based in their territory or subject to their jurisdiction, are consistent with article 6” of the ICCPR, “taking due account of related international standards of corporate responsibility”. GC 36, para. 22.

## 1. The Actions of States:

11. Wealthy States are taking actions that have a direct and foreseeable impact on persons located outside their territories when they contract for most of the currently available vaccine, including quantities likely to become available this summer: they make it extremely difficult, if not impossible, for other States to protect their populations. The Special Rapporteur understands wealthy States are attempting to fulfill their obligation to protect the lives of their residents and that it would be politically untenable for them not to acquire the necessary vaccines for domestic use. Much of the alleged overbuying is likely an attempt by States to hedge their bets in case one vaccine or another is inadequate or has manufacturing issues. The overbuying may also be due to a concern that re-vaccination may become necessary. But this understandable effort must be matched with a concentrated and dedicated effort to expand supply quickly everywhere. It is morally and legally inexcusable to monopolize supply and, through restrictive contracts and IP protections, make it impossible for other States to fulfill their obligations to protect the lives of their residents. If States take actions that restrict supply globally, they risk being responsible for the arbitrary death of individuals in those States who are denied supplies. States with the means must instead ensure that all States have access to vaccines and other necessary materials on a similar timetable and at an affordable price. Given the political reality that wealthy States must meet the demand at home for quick vaccinations, expanded supply is the only solution that will realistically protect life both domestically and abroad.

12. As a practical matter, during a pandemic, a State cannot protect the right to life of its own residents without also ensuring that other States are able to vaccinate their own populations. Otherwise, through mutations and the pool of unvaccinated, the State’s own population remains at risk, even if costly travel bans are imposed. In a pandemic, “collective interest is the national interest.”<sup>66</sup>

13. In recent decades, it has been increasingly recognized that threats to international security must be defined more broadly than military security and include any event that leads to “large-scale death or lessening of life chances”, such as a pandemic.<sup>67</sup> “No State, no matter how powerful, can by its own efforts alone make itself invulnerable to today’s threats.” Instead, “we all share responsibility for each other’s security.”<sup>68</sup>

## 2. State Responsibility for Corporate Actions:

14. The greatest impediment to expanded supply appears to be the control private corporations have over intellectual property rights, and hence the means of production. By allowing corporations within their jurisdiction to prevent the broad manufacture and distribution of vaccines and other needed products through claims of intellectual property rights, States are allowing non-State actors to endanger the right to life of millions and they are undermining the ability of other States to meet their responsibilities.

15. A partial solution is to grant the waiver requested by India and South Africa, with the support of multiple countries. While the protection of intellectual property rights is important, members of the World Trade Organization have declared that their strictures, as reflected in the TRIPS agreement, “can and should be interpreted and implemented in a manner supportive of WTO members’ right to protect public health and, in particular, to promote access to medicines for all.” (Doha Agreement 2001).<sup>69</sup> As others have pointed out, given the plethora of patents at issue, not only for the vaccines, but also for diagnostics and treatments, it is unrealistic to expect that individual countries can follow the procedures for compulsory licenses in a timely fashion, if they even have the domestic legislature in place

<sup>66</sup> SG Kofi Annan, <https://www.un.org/press/en/1999/19990920.sgsm7136.html>

<sup>67</sup> A/59/565, at 11.

<sup>68</sup> A/59/565, at 11.

<sup>69</sup> A/59/565, at 11.



to accomplish it. Should they wish to purchase from other countries that have issued a compulsory license, the required packaging and labeling procedures alone may prove prohibitive.

16. The waiver of additional TRIPS provisions requested by India and South America would help open more pathways towards sufficient global supplies of vaccines, diagnostics and therapeutics at an affordable price, even if it, standing alone, does not solve the problem. By its terms, the waiver would be limited in time. Those States opposing the waiver should consider whether their opposition accords with their obligation to protect the right to life.<sup>70</sup>

17. States are further compounding the current manufacturing insufficiency by allowing corporations to maintain secrecy over the terms of their contracts. If the terms of contracts were fully disclosed, States and the citizenry could learn the extent to which corporations are profiting, which States are being charged more, and how decisions on distribution and manufacturing are being made. Transparency is absolutely necessary. Only with transparency, can the international community understand whether potential manufacturing facilities are being left idle for reasons of profit, rather than saving lives. Without transparency, States around the world are hamstrung in managing the equitable and scientifically-sound distribution of vaccines and therapeutics. States have it within their power to require the disclosure of the terms of these agreements, terms which affect companies' commercial interests, not sensitive IP relating to technology. By permitting this secrecy to continue, States are affirmatively endangering the lives of people around the world as well as those of their own residents and failing in their obligation to protect the right to life.

### 3. Corporate Responsibility to Protect the Right to Life:

18. No matter whether they derive naturally or from international legal sources, human rights are fundamentally the entitlements of humans. They are "inalienable" and thus ought to be applied against any "State, group, or person" aiming at the destruction of these rights.<sup>71</sup> An "understanding of international human rights law acknowledges that State obligations are an essential attribute. They are the corner stone of the human rights regime. But they are not its *raison d'être*, which is the entitlement of humans."<sup>72</sup> Instead, human rights norms "operate at three levels – as the rights of individuals, as obligations assumed by States, and as legitimate expectations of the international community" (E.CN.4/2006/53/Add.5).

19. As argued elsewhere, nonstate actors, such as pharmaceutical corporations, are subject to human rights norms based on the "nature of their control and degree of organisation, or capacity". This is a flexible standard, dependent on the context. In this case, the international community has legitimate expectations that the corporations developing and manufacturing therapeutics, diagnostics and vaccines – corporations currently granted almost absolute control over the manufacture and distribution of a lifesaving good – must respect and protect the prohibition against arbitrary deprivation of life. In today's context, these corporations have the control, organisation and capacity, in some cases seemingly to the exclusion of the States themselves, to respect the right to life of millions of people around the world. Accordingly, these corporations must be addressed as human rights duty-bearers<sup>73</sup>, capable of violating human rights.<sup>74</sup>

20. As commendable their efforts have been in developing therapeutics and vaccines, corporations violate the right to life if their actions prevent the widespread manufacture and distribution of these therapeutics and vaccines. In the opinion of the Special Rapporteur, the pharmaceutical companies know or should know that by preventing the widespread manufacturing of the vaccine, they are condemning millions to deaths and entire communities to desperate economic situations. Further, as stated by the CESCR, "[i]n line with international standards, business entities, including pharmaceutical companies, have the

<sup>70</sup> The Special Rapporteur notes that the damage to the world economy from the continuing pandemic likely far outweighs the economic impact of these waivers.

<sup>71</sup> A/HRC/38/44, para. 38.

<sup>72</sup> *Id.*, para. 39.

<sup>73</sup> A/HRC/38/44, para. 19.

<sup>74</sup> United Nations Guiding Principles on Business and Human Rights, Principles 11 and 13.

obligation, as a minimum, to respect Covenant rights. Thus, business entities should refrain from invoking intellectual property rights in a manner that is inconsistent with the right of every person to access a safe and effective vaccine for COVID-19 and with the obligation of States to guarantee, as expeditiously as possible, universal equitable access to vaccines for COVID-19.<sup>75</sup> They should also voluntarily disclose the terms of their agreements, so that the international community can ensure the fair and equitable manufacture and distribution of vaccines, therapeutics and diagnostic materials. o death by neglect or omission

21. These obligations are confirmed by the Human Rights Guidelines for Pharmaceutical Companies in Relation to Access to Medicines.<sup>76</sup> These guidelines require pharmaceutical companies to “give particular attention to the needs of disadvantaged individuals, communities and populations, such as children, the elderly and those living in poverty” and “give particular attention to the very poorest in all markets, as well as gender-related issues.”<sup>77</sup> Companies must be “as transparent as possible.” Guideline 6. They must also issue “non-exclusive voluntary licenses with a view to increasing access, in low-income and middle-income countries, to all medicines” and all of their arrangements should ensure that medicines “are affordable to as many people as possible.”<sup>78</sup>

## B. A State’s Obligation to Protect Life Equally, without Discrimination

22. Within State borders, while there appear to be efforts to distribute the vaccine to those most vulnerable, there are still glaring inequities in distribution, calling into question States’ compliance with their obligations under international human rights law. Every State must use due diligence to distribute vaccines and therapeutics equitably and without discrimination, starting with those most in need of protection. It may not discriminate based on immigration status, citizenship, ethnicity or income. Ability to pay cannot be grounds for denying access.

23. To date, the science has indicated that those most at risk include the elderly, particularly those in residential facilities, individuals held in detention facilities, and individuals who cannot limit their exposures to others, such as those working in service industries or who live in more crowded circumstances. States have a heightened duty of care for those who are detained and must take steps to protect them, as they are deprived of the ability to protect themselves. GC 36, paras. 23-26.

24. There is clear evidence that States are not fulfilling these obligations. Wealthy individuals in the Global North are obtaining vaccines, prior to those more at risk within the same State, and there appears to be a racial disparity in distribution. In some places, the regions with the greatest rate of infection are the regions with the lowest rate of vaccination, and vaccines are instead going to wealthier areas with higher concentrations of whites and lower rates of infection.<sup>79</sup> Moreover, in some States correctional officers are being vaccinated but not those detained.<sup>80</sup>

25. Until these disparities are corrected, States are violating their obligation to protect the right to life.

<sup>75</sup> E/C.12/2020/2, para. 7 (citations omitted).

<sup>76</sup> Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/63/264, Annex, [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjT-rL-ju3vAhWvVN8KHR9sCVMQFjAAegQIBBAD&url=https%3A%2F%2Fwww.who.int%2Fmedicine%2Fareas%2Fhuman\\_rights%2FA63\\_263.pdf&usg=AOvVaw3AxO7zLb1hUqLVPbfYFhx](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjT-rL-ju3vAhWvVN8KHR9sCVMQFjAAegQIBBAD&url=https%3A%2F%2Fwww.who.int%2Fmedicine%2Fareas%2Fhuman_rights%2FA63_263.pdf&usg=AOvVaw3AxO7zLb1hUqLVPbfYFhx).

<sup>77</sup> Guideline 5.

<sup>78</sup> Guidelines 30, 33.

<sup>79</sup> See, e.g., <https://www.wbez.org/stories/half-of-chicago-residents-to-get-covid-19-vaccine-so-far-are-white/2668c0b9-3a19-4181-8c9b-e7af46e18bfc>; <https://www.cbsnews.com/news/racial-disparity-coronavirus-vaccine/>.

<sup>80</sup> Some States have justified vaccinating only prison officials on the grounds that this is the only route of exposure to the inmates. It is unlikely that the routes of exposure are so limited, and it has not yet been demonstrated that vaccination of prison officials will limit the transmission of the disease.

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## **Recommendations:**

### **To States:**

26. Members of the WTO should agree to the TRIPS COVID-19 waiver and take all other necessary actions to ensure that export controls and other restrictions do not impede the production and distribution of vaccines, therapeutics and other needed materials.

27. States should participate in COVAX and ensure that vaccines are distributed equitably throughout the world according to population. At a minimum, each State must restrict its purchases of vaccines to the needs of its population and release any surplus as soon as possible to COVAX for distribution to other countries. This is not a matter of “vaccine diplomacy,” whereby a State can burnish its reputation. It is an obligation under international law.

28. States should mandate that all companies subject to their jurisdiction disclose publicly the terms of all contracts relating to COVID-19 vaccines and therapeutics, so that the international community can ensure equitable supply, distribution and pricing of these public goods. Transparency is critical in this moment.

29. States should work together to identify all manufacturing facilities capable of manufacturing vaccines approved for use and facilitate agreements, and all other necessary measures, to produce vaccines at those locations.

30. States should work together to identify and eliminate roadblocks in the global distribution of vaccines and the export and distribution of other medically needed goods.

### **Corporations:**

31. Corporations should voluntarily disclose publicly the terms of all contracts relating to COVID-19 vaccines and therapeutics. In that way, the public can judge the equity of these arrangements.

32. Corporations should ensure that they take all steps possible, including the waiver of intellectual property rights, to ensure the global production and equitable of vaccines, and other products necessary for therapy and diagnosis, taking into account the need for equitable distribution to vulnerable populations, at prices that these communities can afford.

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