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## Conseil des droits de l'homme

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**Promotion et protection de tous les droits de l'homme,  
civils, politiques, économiques, sociaux et culturels,  
y compris le droit au développement**

## **Rapport du Rapporteur spécial sur les exécutions extrajudiciaires, sommaires ou arbitraires, Christof Heyns**

### **Additif**

### **Suite donnée aux recommandations adressées aux États-Unis d'Amérique\***

#### *Résumé*

Dans le présent rapport, le Rapporteur spécial sur les exécutions extrajudiciaires, sommaires ou arbitraires analyse les mesures prises par les États-Unis d'Amérique pour donner effet aux recommandations formulées par le précédent titulaire de mandat qui s'était rendu dans le pays du 16 au 30 juin 2008. Si les États-Unis d'Amérique méritent d'être salués pour la situation positive en ce qui concerne les exécutions extrajudiciaires, il demeure trois domaines dans lesquels des améliorations importantes sont nécessaires. Ces domaines, exposés dans le rapport de mission (A/HRC/11/2/Add.5), sont le respect des garanties judiciaires dans les procès à l'issue desquels la peine de mort est prononcée, la transparence dans les interventions de police et les opérations militaires et de renseignement, et la responsabilité pour les décès qui pourraient résulter d'actes illicites, survenus dans le cadre des opérations internationales.

\* Le résumé du présent rapport est distribué dans toutes les langues officielles. Le rapport proprement dit est joint en annexe au résumé, et il est distribué dans la langue originale seulement.

Il faut donner acte au Gouvernement des mesures concrètes qu'il a prises pour mieux enquêter sur les décès de personnes détenues dans les centres pour immigrants et éviter que ne surviennent de tels cas. Toutefois, aucun progrès majeur n'a été fait en ce qui concerne les trois domaines prioritaires signalés dans le rapport de mission. Le Rapporteur spécial engage vivement le Gouvernement à mettre en œuvre à titre prioritaire les recommandations relatives à ces domaines.

## Annexe

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

#### Follow-up to country recommendations: United States of America

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## I. Methodology

1. In its resolution 17/5, the Human Rights Council urged States to cooperate with and assist the Special Rapporteur on extrajudicial, summary or arbitrary executions, in the performance of his task, to supply all necessary information requested by him and to ensure appropriate follow-up to the recommendations and conclusions formulated by him, including providing information on the actions taken on those recommendations.

2. The Special Rapporteur concurs with the previous mandate holder on the importance of follow-up reports as critical components of country visits to investigate allegations of violations of the right to life.

3. In accordance with established practice,<sup>1</sup> the present follow-up report concerns the recommendations made by the previous mandate holder, following his visit to the United States of America (A/HRC/11/2/Add.5) in 2008. The Special Rapporteur requested information from the Government and other actors about the steps taken to implement the recommendations in the mission report and about the non-implementation of recommendations. In addition, information was sought on the current situation concerning extrajudicial executions in the country, particularly on whether and how the situation has improved, deteriorated or remained the same.

4. The Special Rapporteur thanks the Government of the United States of America for having provided information on measures taken to implement the recommendations contained in the mission report. He deems cooperation with governments important to the understanding and assessment of progress. The Special Rapporteur also wishes to thank to all stakeholders who contributed to the preparation of the present report.

## II. Introduction

5. In the present report, the Special Rapporteur analyses the steps taken by the United States of America in implementing the recommendations made by the previous mandate holder, following his visit to the country from 16 to 30 June 2008. The mission report (A/HRC/11/2/Add.5) was presented to the Human Rights Council at its 11th session in June 2009. Despite there being much to commend about the United States' record in relation to extrajudicial killings, several areas requiring significant improvement were identified in the mission report. Since the country visit, improvements have been made in certain areas. On the domestic level, while significant progress has been made in better tracking and responding to deaths in immigration detention, some problem areas have either been addressed insufficiently or not at all. These relate mainly to due process in the imposition of the death penalty, the situation of Guantánamo Bay detainees, accountability failures for unlawful deaths due to the Government's international operations and lack of transparency regarding the legal framework and targeting choices for targeted killings.

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<sup>1</sup> In 2006, the previous mandate holder initiated follow-up reports on country visits to assess the extent to which States implement recommendations.

### III. Domestic issues

#### A. Due process in death penalty cases

6. The mission report highlighted several deficiencies that increase the risk of innocent individuals being executed erroneously in the United States, and which raise concerns about the fairness of judicial proceedings and racial discrimination.<sup>2</sup>

##### 1. Imposition of the death penalty

7. According to available figures, some 3,251 people are currently on death row in the United States.<sup>3</sup> It is widely acknowledged that innocent individuals have very likely been sentenced to death and executed in the United States.<sup>4</sup> The 2008 country visit focused largely on the death penalty in Alabama and Texas, both of which have extremely high rates of executions.<sup>5</sup> The Special Rapporteur concluded that, in both states, there was a “shocking lack of urgency with regard to the need to reform glaring criminal justice flaws.”<sup>6</sup> Information received for the present report does not indicate that reform proposals are under way.

8. Nevertheless, some positive steps should be underscored with respect to other states. People continue to be exonerated,<sup>7</sup> and figures available suggest a continuous decline in death sentences over the past decade.<sup>8</sup> Evidence of growing frustration with the death penalty can be gleaned from opinion polls, the fact that fewer death sentences are being handed down by juries, and legislative activity has increased with a higher number of bills calling for an end to the death penalty in several states.<sup>9</sup> Senate Bill 3539, adopted on 9 March 2011, abolished the death penalty in Illinois, bringing the number of states which have abolished the death penalty to 16 out of 50<sup>10</sup>, thus taking a step in the direction of a

<sup>2</sup> See examples in Richard C. Dieter, *Struck by Lightning: The Continuing Arbitrariness of the Death Penalty Thirty-Five Years After Its Re-instatement in 1976*, Report of the Death Penalty Information Center (DPIC) (Washington D.C., July 2011) pp. 5-9.

<sup>3</sup> NAACP Legal Defense and Educational Fund, *Death Row U.S.A.*, Winter 2011, p. 1, available from [http://naacpldf.org/files/publications/DRUSA\\_Winter\\_2011.pdf](http://naacpldf.org/files/publications/DRUSA_Winter_2011.pdf).

<sup>4</sup> A/HRC/11/2/Add.5, para. 7; also DPIC, *The Death Penalty in 2010: Year End Report*, December 2010, p. 3, available from <http://www.deathpenaltyinfo.org/documents/2010YearEnd-Final.pdf>.

<sup>5</sup> Equal Justice Initiative fact sheets on death sentencing and execution rates in Alabama, available from <http://www.eji.org/eji/node/357>; for number of people executed see DPIC, *Facts about the Death Penalty*, available from <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>; for number of people on death row in Texas, see Texas Department of Criminal Justice, Offenders on Death Row, available from [http://www.tdcj.state.tx.us/stat/dr\\_offenders\\_on\\_dr.html](http://www.tdcj.state.tx.us/stat/dr_offenders_on_dr.html).

<sup>6</sup> A/HRC/11/2/Add.5, summary, p. 2.

<sup>7</sup> For number of people exonerated, see DPIC, *Facts about the Death Penalty* (see footnote 5); and for exonerations due to DNA testing, see Innocence Project, *250 Exonerated, too many wrongfully convicted*, available from <http://www.innocenceproject.org/news/250.php>.

<sup>8</sup> DPIC, *The Death Penalty in 2010* (see footnote 4), pp. 3-4; for executions and death sentences halved since 2000, see Dieter, *Struck by Lightning* (see footnote 2), p. 2.

<sup>9</sup> Dieter, *Struck by Lightning* (see footnote 2), p. 2; also DPIC, Recent legislative activity, available from <http://www.deathpenaltyinfo.org/recent-legislative-activity>. Controversy over lethal injections has contributed to slowing down executions, see DPIC, *The Death Penalty in 2010* (see footnote 4), p. 1; and Brandi Grissom, “A Drug Used in Executions Becomes Very Hard To Get” in *The New York Times*, 6 February 2011.

<sup>10</sup> DPIC, States With and Without the Death Penalty, available from <http://www.deathpenaltyinfo.org/states-and-without-death-penalty>.

worldwide effort to abolish the death penalty. Furthermore, the sentences of 16 individuals on death row were commuted to life imprisonment without parole.<sup>11</sup>

9. Notwithstanding these developments, the problems identified in the mission report persist.

## 2. Judicial independence

10. Judicial independence requires justice to be rendered fairly and without improper influence or pressure. However, it is reported that in many instances the death penalty continues to be imposed arbitrarily.<sup>12</sup> Despite a public appeal to the Government and the state of Georgia to stop the execution of Troy Davis, the Special Rapporteur deplors that his execution was carried out, although serious concerns had been raised about procedural irregularities in his case.<sup>13</sup>

11. The Special Rapporteur had recommended that the system of partisan elections for judges be reformed, as it politicized the death penalty and unfairly increased the likelihood of a capital sentence.<sup>14</sup> No information has been received to indicate that the authorities have taken steps to undertake relevant reforms.

12. Given the heightened politicization of the death penalty in Alabama, due to the ability of judges to “override” the jury’s opinion in sentencing, the Special Rapporteur recommended that Alabama repeal the law permitting judicial override, which enables judges to impose the death penalty, even if a jury has unanimously decided to sentence a defendant to life imprisonment. No information has been received on the intention to abrogate it. A recent study indicates that since 1976, Alabama judges have overridden 107 jury verdicts, 92 per cent of which commuted life imprisonment to the death sentence.<sup>15</sup> In Alabama, 21 per cent of prisoners currently on death row have been sentenced to death through judicial override. The study highlights that a significant increase in death sentences is noted in election years, when trial and appellate court judges up for election often base their campaign on their support for the death penalty. The Special Rapporteur contends that the power to decide on the life and death of an individual should not be conferred to a single judge who may be sensitive to political pressure, as it could result in arbitrariness in decisions. Therefore, he reiterates the recommendation that Alabama abrogate the law on judicial override.

## 3. Right to counsel

13. Given the irreversibility of sentences, cases involving criminal offences punishable by the death penalty require stringent respect of the accused’s right to a fair trial, including the right to appropriate legal representation. During the country visit in 2008, a broad range of stakeholders, including Government officials in Texas and Alabama, acknowledged that existing programmes providing criminal defence counsel to indigent defendants were inadequate.<sup>16</sup>

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<sup>11</sup> See Illinois Government News Network, Statement from Governor Pat Quinn on Senate Bill 3539, 9 March 2011, available from:

<http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=2&RecNum=9265>.

<sup>12</sup> Dieter, *Struck by Lightning* (see footnote 2).

<sup>13</sup> See statement from Special Rapporteur of 21 September 2011, available from

<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11410&LangID=E>, as well as two communications, A/HRC/8/3/Add.1, pp. 417-419 and A/HRC/11/2/Add.1, pp. 418-420.

<sup>14</sup> A/HRC/11/2/Add.5, paras. 10-12.

<sup>15</sup> Equal Justice Initiative, *The Death Penalty in Alabama: Judge Override*, July 2011, pp. 5-6, available from [http://eji.org/eji/files/Override\\_Report.pdf](http://eji.org/eji/files/Override_Report.pdf).

<sup>16</sup> See A/HRC/11/2/Add.5, para. 13; also communication in A/HRC/17/28/Add.1, pp. 393-394.

14. The Government has acknowledged the need to improve its system of providing legal representation to indigent criminal defendants. Civil society groups consulted during the preparation of the report also pointed to these deficiencies.<sup>17</sup> The Supreme Court ruling in *Harbison v. Bell* that held that federal law allows indigent death row inmates the right to federally appointed counsel to represent them in post-conviction state clemency procedures is to be commended.<sup>18</sup> However, this right to representation is even more critical at the end of the process where there is minimal chance of success. In many states, inmates sentenced to death are still not entitled to lawyers for the critical stage of the state habeas procedure, when all claims must be raised or they will be defaulted in the Federal habeas procedure under the Antiterrorism and Death Penalty Act of 1996 (AEDPA).

15. The Special Rapporteur further notes the establishment in March 2010 of the Access to Justice Initiative,<sup>19</sup> an office within the Justice Department charged with finding ways to improve the provision of legal services in the justice system. Like the previous mandate holder, the Special Rapporteur strongly recommends the establishment of adequately funded, state-wide public defender services, in both Alabama and Texas, which would significantly reduce the risk of poor legal representation for defendants in capital cases. It is important that oversight of such services be independent of the executive and judicial branches.

16. It was further recommended that regulations enabling the Department of Justice (DoJ) to certify the adequacy of state indigent defence systems based on factors at the state's discretion be amended or repealed. The Government indicated that all retentionist states had adopted their own procedures on providing counsel to represent indigent capital defendants in state court.

#### 4. Racial disparities

17. The mission report outlined studies from across the country showing racial disparities in the imposition of the death penalty.<sup>20</sup> Reports released since then corroborate the persistence of this problem.<sup>21</sup> The Government has expressly acknowledged that racial and ethnic disparities exist in the criminal justice system. This new approach by the Government constitutes a significant departure from federal officials' vehement denial of such problems during the 2008 country visit,<sup>22</sup> and is to be commended. The Government also supported the recommendation of the universal periodic review to undertake studies to determine the factors of racial disparity in the application of the death penalty and to prepare effective strategies aimed at ending possible discriminatory practices.<sup>23</sup> The materialization of the DoJ's stated intentions to conduct further statistical analysis and studies on sentencing disparities is highly anticipated.

<sup>17</sup> See also A/HRC/WG.6/9/USA/3/Rev.1, para. 30.

<sup>18</sup> See *Edward Jerome Harbison v. Ricky Bell, Warden*, 556 U.S. 180 (2009).

<sup>19</sup> Information provided by the Government for the present report.

<sup>20</sup> A/HRC/11/2/Add.5, para. 17.

<sup>21</sup> American Civil Liberties Union (ACLU) of Georgia, *The Persistence of Racial Profiling in Gwinnett – Time for Accountability, Transparency, and an End to 287(g)*, March 2010; ACLU of Georgia, *Terror and Isolation in Cobb – How Unchecked Police Power under 287(g) Has Torn Families Apart and Threatened Public Safety*, October 2009; Inter-American Court of Human Rights, Report No. 77/09, Petition 1349-09, *Orlando Cordia Hall v. United States*, 5 August 2009; DPIC, Research Shows that Race of the Victim Matters in North Carolina Death Penalty, available from <http://www.deathpenaltyinfo.org/studies-research-shows-race-victim-matters-north-carolina-death-penalty>; Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, August 2010.

<sup>22</sup> A/HRC/11/2/Add.5, para. 18.

<sup>23</sup> A/HRC/16/11, para. 92.95.

18. The Special Rapporteur notes the Government's intention to revise the 2003 Guidance Regarding the Use of Race by Federal Law Enforcement Agencies, which prohibits racial profiling in federal law enforcement activities. Bearing in mind that its review was initiated in 2009,<sup>24</sup> he encourages the Government to finalize the revised document in consultation with the civil society. For such an instrument to have practical relevance, it should be enforceable and law enforcement officials should be held accountable for any violations.<sup>25</sup> Likewise, it should be binding on all law enforcement officers, including intelligence agencies.

19. Federal and state governments should systematically review and respond to concerns about persistent racial disparities in the criminal justice system, in general, and more specifically, in the imposition of the death penalty. The Special Rapporteur urges the Government to effectively address these issues by supporting the recommendation made by the Committee on the Elimination of Racial Discrimination to adopt all necessary measures, including a moratorium, to ensure that the death penalty is not imposed as a result of racial bias.<sup>26</sup>

## **5. Systematic evaluation of the criminal justice system**

20. The mission report placed the onus on states to systematically review their criminal justice system to ensure that the death penalty is not imposed unjustly. The previous mandate holder welcomed the establishment of the Criminal Justice Integrity Unit within the Texas Court of Criminal Appeals,<sup>27</sup> but highlighted the need for an Innocence Commission in Texas. Recently, this proposal failed on the final reading.<sup>28</sup> Information concerning Alabama does not mention any measures taken to evaluate and respond to the findings and recommendations of the American Bar Association's report on the implementation of the death penalty,<sup>29</sup> as recommended in the mission report.<sup>30</sup>

## **6. Federal habeas corpus review**

21. No steps have been taken concerning the implementation of the recommendation that Congress enact legislation permitting federal courts to review the merits on all issues in post-conviction death penalty cases. Thus, the Special Rapporteur is still concerned about the AEDPA as it prevents federal habeas review of many issues, imposes a six-month statute of limitation for inmates seeking to file federal habeas claims, and restricts access to evidentiary hearings at the federal level.<sup>31</sup>

22. Sufficient information was not provided to enable assessment of the usefulness of a comprehensive methodology enacted by Congress to ensure that capital defendants have a post-conviction right to DNA testing.

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<sup>24</sup> A/HRC/WG.6/9/USA/1, para. 52.

<sup>25</sup> Submission by the ACLU for the present report.

<sup>26</sup> CERD/C/USA/CO/6, para. 23; A/HRC/WG.6/9/USA/2, para. 25.

<sup>27</sup> See website <http://www.cca.courts.state.tx.us/tcju/tcjuhome.asp>.

<sup>28</sup> Erin Mulvaney, "House Bill to create an Innocence Commission fails on final reading," *Dallas News*, 21 April 2011.

<sup>29</sup> American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report - An Analysis of Alabama's Death Penalty Laws, Procedures, and Practices*, June 2006.

<sup>30</sup> A/HRC/11/2/Add.5, para. 74.

<sup>31</sup> A/HRC/11/2/Add.5, para. 21; see also at 28 U.S. Code, section 2261: Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment.



## 7. Most serious crimes

23. The mission report recommended that states ensure that capital punishment is imposed only for the most serious crimes, requiring an intent to kill with a resultant loss of life. However, in certain jurisdictions, lesser criminal offences are punishable by the death sentence.<sup>32</sup>

24. The Government also indicated that certain serious non-homicide crimes, such as espionage, treason and those relating to terrorism, may result in capital punishment. The Special Rapporteur reiterates the above-mentioned recommendation. Moreover, concern has been raised that individuals with severe mental illness have been sentenced to death.<sup>33</sup> The Special Rapporteur calls on federal and state governments to ensure that the death penalty is not imposed on the mentally ill.

## 8. Consular notification

25. Although the Government expressed its commitment to comply with article 36 of the Vienna Convention on Consular Relations (VCCR),<sup>34</sup> failure to notify foreign citizens of their right to consular assistance at the appropriate time persists.<sup>35</sup> The execution in Texas of Humberto Leal García, a Mexican national, has again brought to the fore the Government's failure to comply with its obligations under the VCCR. In the *Avena and Other Mexican Nationals* judgment, the International Court of Justice (ICJ) concluded that the United States had breached its obligations under such provisions.<sup>36</sup> The United States was requested to review and reconsider the conviction and sentence of the Mexican nationals, including Mr. Leal García. In 2009, the ICJ specified that the Government's obligation not to execute Mr. Garcia pending a review of his case, and the reconsideration afforded to him was fully intact and accepted by the Government.<sup>37</sup> However, despite the request made by the Solicitor General, the Supreme Court denied a stay of execution. Furthermore, the Governor of Texas did not satisfy the appeals for clemency. The Special Rapporteur denounced the execution of Mr. Garcia, which was carried out on 7 July 2011, in breach of international law.<sup>38</sup>

26. Nevertheless, the Government has taken some steps to comply with its obligations under the VCCR. A Memorandum was issued by the President directing state courts to give effect to the decisions in the cases of 51 Mexican nationals, identified in the ICJ judgment.<sup>39</sup> The Department of State Bureau of Consular Affairs also issued a Consular Notification and

<sup>32</sup> CCPR/C/79/Add.25, para. 8; A/HRC/4/20, para. 53; see also the communication concerning Donald Lee Gilson in A/HRC/14/24/Add.1, paras. 1154-1161.

<sup>33</sup> DPIC, *The Death Penalty in 2010* (see footnote 4), p. 5.

<sup>34</sup> A/HRC/WG.6/9/USA/1, para. 54.

<sup>35</sup> A/HRC/11/2/Add.5, para. 24. According to the DPIC, only seven cases of full compliance with art. 36 of the VCCR have been identified so far, see <http://www.deathpenaltyinfo.org/foreign-nationals-and-death-penalty-us#Reported-DROW>.

<sup>36</sup> Case concerning *Avena and Other Mexican Nationals (Mexico v United States of America)*, I.C.J. Reports 2004, p. 12, and in particular p. 72.

<sup>37</sup> *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v United States of America)*, Judgment, I.C.J. Reports 2009, p. 3, see also para. 54.

<sup>38</sup> Special Rapporteur's press release of 1 July 2011, available from <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11198&LangID=E>; also statement of the United Nations High Commissioner for Human Rights of 8 July 2011, available from <http://www.ohchr.org/EN/NewsEvents/Pages/Media.aspx>; and the Inter-American Commission on Human Rights press release No. 67/11 of 8 July 2011, available from [http://www.oas.org/en/iachr/media\\_center/PReleases/2011/067.asp](http://www.oas.org/en/iachr/media_center/PReleases/2011/067.asp).

<sup>39</sup> Case concerning *Avena and Other Mexican Nationals* (see footnote 36), p. 12.

Access Manual to guide federal, state and local law enforcement and other officials.<sup>40</sup> Most importantly, a bill has been introduced to facilitate compliance with article 36 of the VCCR.<sup>41</sup>

27. The Supreme Court, however, held that the President was not empowered to enforce the judgment in domestic courts by means of a Memorandum.<sup>42</sup> During the country visit, Texas officials contended that their refusal to provide review of the cases of Mexican nationals on death row was supported by this decision.<sup>43</sup>

28. The Special Rapporteur is also concerned about the situation of 133 foreign nationals currently on death row across the country,<sup>44</sup> and strongly recommends the adoption of the 2011 Consular Notification Compliance Act to ensure respect for their rights in accordance with the VCCR.

## **B. Deaths in immigration detention**

29. At the time of the country visit in 2008, the Department of Homeland Security (DHS) had no complete record of the number and names of people who had died in immigration detention. The number of deaths and lack of transparency regarding the circumstances of these deaths were subjects of concern.<sup>45</sup> It was recommended that all deaths in immigration detention be promptly and publicly reported and fully investigated. To remedy the causes of such deaths, reported denial of necessary medical care, inadequate or delayed care, and provision of inappropriate medication, it was recommended that the DHS promulgate regulations for the provision of medical care, consistent with international standards.

30. Deaths in immigration detention remain worrying. The recurrence of and lack of transparency surrounding such deaths have continually been denounced. Some reported deaths occurred in prison-like conditions where detention was neither necessary nor appropriate, and where no proper medical care was provided. The lack and/or denial of adequate health care violates the right of immigration detainees to medical care and endangers their lives.

31. The Special Rapporteur notes that significant progress has been made to address transparency failures highlighted in the mission report and to track deaths of immigration detainees. In accordance with United States Immigration and Customs Enforcement (ICE) Directive No. 7-9.0 on Notification and Reporting of Detainee Deaths, deaths in custody must now be regularly reported and published. This directive requires ICE Enforcement and Removal Operations (ERO) to notify various components of the DHS, the appropriate consulate and the detainee's next-of-kin within 24 hours of a detainee's death.<sup>46</sup> Furthermore, the ICE Office of Congressional Relations (OCR) must notify Congress of media statements prepared by the ICE Office of Public Affairs, and the ICE Office of State, Local and Tribal Coordination is required to notify non-governmental organizations (NGOs). Currently, ICE compiles all detainee deaths occurring in ICE custody. Between

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<sup>40</sup> See new edition of manual, published September 2010, available from [http://www.travel.state.gov/pdf/cna/CNA\\_Manual\\_3d\\_Edition.pdf](http://www.travel.state.gov/pdf/cna/CNA_Manual_3d_Edition.pdf).

<sup>41</sup> Senate Bill 1194 (Consular Notification Compliance Act of 2011).

<sup>42</sup> *Medellin v. Texas*, 552 U.S. 491 (2008).

<sup>43</sup> *Medellin v. Texas*, 128 S. Ct. 1346 (2008).

<sup>44</sup> See DPIC, *Foreign Nationals and the Death Penalty in the US*, available from:

<http://www.deathpenaltyinfo.org/foreign-nationals-and-death-penalty-us#Reported-DROW>.

<sup>45</sup> A/HRC/11/2/Add.5, paras. 28-32.

<sup>46</sup> United States Immigration and Customs Enforcement (ICE), Directive No. 7-9.0, section 7.

October 2003 and October 2011, 124 detainees reportedly died in ICE custody.<sup>47</sup> Detainees' deaths are investigated by the Director of the Office of Professional Responsibility (OPR) and a mortality review is conducted by the Office of Health Affairs (OHA).

32. On 20 September 2011, the House of Representatives approved the Death in Custody Reporting Act. Should this Act be passed, federal and state law enforcement agencies would be legally obliged to report deaths in custody to the Attorney General, who must produce within two years a study analyzing the individual reports. The Special Rapporteur strongly supports enactment of this law. While the Government is commended for its efforts to address transparency failures over the deaths of detained immigrants, it should also ensure the accountability of the individual(s) responsible for such deaths.

33. In 2008, the Detainee Basic Medical Care Act was introduced in Congress, but has regrettably not been enacted. Nevertheless, on 16 December 2010, ICE officials took concrete steps to recognize the constitutional entitlement of immigration detainees to adequate levels of medical and mental health care by settling a lawsuit filed by the American Civil Liberties Union (ACLU) alleging that the deficient care at the San Diego Correctional Facility caused unnecessary suffering and death.<sup>48</sup>

34. The Special Rapporteur welcomes the appointment of regional clinical directors and field medical coordinators to provide medical case management and review denials of requests for medical services. Furthermore, the Government indicated that as part of the drafting process of the 2010 Performance-Based National Detention Standards, all medical care standards for medical assistance to care facilities for ICE detainees were under review. However, even if implemented, such an instrument would not apply to county jails, where a large number of immigration detainees are held.<sup>49</sup>

35. The Special Rapporteur recommends that legislation on detainee medical care be enacted, including the 2011 Refugee Protection Act, which contains important provisions on improving detention conditions, including medical care. The 2010 Performance-Based National Detention Standards should be finalized and adopted, consistent with international standards, and applied to all detention facilities. An independent oversight system should be established to monitor all facilities where immigration detainees are held.<sup>50</sup> The DIHS should also establish an independent review panel, which would permit detainees to appeal denials of care.<sup>51</sup> To prevent further abuse and denials of care which may endanger their lives, detainees should have access to legal representation.

### C. Killings by law enforcement officials

36. The previous mandate holder made two recommendations aimed at better tracking and responding to killings by law enforcement officials. He recommended increased use of video and audio recordings of interactions between law enforcement officers and members of the public, as they serve as evidence and are believed to have a deterrent effect on law enforcement officers. In addition, measures should be taken to safeguard tapes, including

<sup>47</sup> Ibid., List of deaths in ICE custody, October 2003 – December 19, 2011, available from <http://www.ice.gov/doclib/foia/reports/detaineedeaths2003-present.pdf>.

<sup>48</sup> See *Eamma Jean Woods, et al. v. John Morton, et al.*, settlement agreement, available from <http://www.aclu.org/files/assets/2010-12-16-WoodsvMorton-SettlementAgreement.pdf>.

<sup>49</sup> A/HRC/11/2/Add.5, para. 29.

<sup>50</sup> Including non-IHSC (ICE Health Service Corps) staffed facilities.

<sup>51</sup> Recommendation made by the Inter-American Commission on Human Rights, *Report on Immigration in the United States: Detention and Due Process*, 30 December 2010 (OEA/Ser.L/V/II. Doc. 78/10), para. 437.

penalties and making access to the tapes technically impossible.<sup>52</sup> The Special Rapporteur also recommended that existing data collection efforts be more comprehensive so as to increase their usefulness as “early warning” and “hot spot identification” mechanisms for unlawful killings by law enforcement officers.

37. The Government indicated that data on deaths are included in monitoring reports which assess compliance with settlement agreements. The Government further mentioned that the DoJ regularly requires local and state law enforcement agencies to develop and implement early warning systems in its settlement agreements to prevent police-involved deaths and to enable the detection of systemic failures or at-risk behaviour.

38. The Special Rapporteur was not provided with sufficient information to assess progress. He encourages federal, state and local authorities to pursue their efforts to implement the recommendations in the mission report.

## IV. International operations

### A. Guantánamo Bay detainees

#### 1. Death penalty under the Military Commissions Act

39. Following the issue of Executive Order 13492<sup>53</sup> expressing the Government’s intention to close the Guantánamo Bay detention facility, an interagency task force was created to review each detainee’s situation and to recommend the appropriate disposition of each case. Its findings were made public in January 2010.<sup>54</sup> The task force concluded that 36 detainees could be tried in civil or military courts, while 48 of the remaining detainees were considered too dangerous to be released, but could not be brought to trial. Despite the Government’s commitment to close the detention centre,<sup>55</sup> 172 people remain in custody, of whom six are to be tried by a military commission for capital offences.

40. Due process concerns surrounding trials conducted under the Military Commissions Act (MCA) prompted the previous mandate holder to recommend that the MCA not be applied to death penalty cases, as prosecutions thereunder would not meet due process requirements under international human rights and humanitarian law.<sup>56</sup> On 21 January 2009, the President ordered the immediate suspension of military trials at Guantánamo Bay. However, in a reversal of its earlier position that detainees should be tried before civilian courts, on 7 March 2011, the Government announced its intention to resume military trials, thereby lifting a two-year freeze on military trials.

41. On 31 May 2011, the Department of Defense (DoD) announced that the office of military commission prosecutors had sworn charges against five Guantánamo Bay detainees<sup>57</sup> alleged to have been leading conspirators of the 9/11 terrorist attacks.<sup>58</sup> Capital

<sup>52</sup> A/HRC/11/2/Add.5, para. 36.

<sup>53</sup> Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities (2009).

<sup>54</sup> Guantánamo Review Task Force, Final Report, 22 January 2010, available from <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>.

<sup>55</sup> A/HRC/16/11/Add.1, para. 14.

<sup>56</sup> A/HRC/11/2/Add.5, paras. 38-41.

<sup>57</sup> Namely, Khalid Sheikh Mohammed, Walid Muhammad Bin Attash, Ramzi Bin al-Shibh, Ali Abdul-Aziz Ali and Mustafa Ahmed al-Hawsawi.

<sup>58</sup> United States Department of Defense, news release No. 458-11 of 31 May 2011, available from <http://www.defense.gov/releases/release.aspx?releaseid=14532>.

punishment was recommended in all five cases, subject to the approval of the Convening Authority.

42. On 20 April 2011, the DoD announced that military commission charges had been sworn against Saudi Arabian national Abd al Rahim Hussein al-Nashiri, inter alia, for his involvement in the bombing of the USS Cole in Yemen in 2000. The Convening Authority referred capital charges against him and arraignment was set before a military judge in Guantánamo on 26 October 2011.<sup>59</sup>

43. The Special Rapporteur notes that the Government introduced changes to its military commission to address some shortcomings highlighted in the mission report,<sup>60</sup> including prohibition to admit statements obtained through cruel, inhuman and degrading interrogation methods as evidence at trial, limitation on the use of hearsay, and the burden of proof is no longer on the objecting party.<sup>61</sup> However, the prohibition on statements obtained under torture does not go far enough, as hearsay statements obtained under torture can be admitted as evidence. A further improvement is that the 2009 MCA requires the appointment of “learned counsel” in death penalty cases, and provides payment for civilian lawyers in that role. Nonetheless, the Special Rapporteur reiterates his predecessor’s concerns. No matter what improvements have been made, the tribunals still remain military courts and raise due process concerns.<sup>62</sup> The Special Rapporteur strongly supports the view that Guantánamo detainees should be tried before ordinary Federal courts and recommends that the Government seek to repeal the restrictions and ensure that defendants are tried before civilian courts, in full compliance with fair trial safeguards, especially in light of the fact that the death penalty may be sought against them.

## 2. Detainee deaths at Guantánamo

44. The previous mandate holder expressed concern about the reported deaths at the Guantánamo Bay detention facility, four out of five having been classified as suicides.<sup>63</sup> In the case of custodial deaths there is the rebuttable presumption of State responsibility, given the State’s heightened duty to protect the right to life.<sup>64</sup> In February 2011, the death of Awal Gul, followed by the death of a detainee known as Inayatullah, brought the number of deaths in custody at Guantánamo to eight; it is alleged that none of these deaths has been adequately investigated.<sup>65</sup> On 22 February 2010, the Special Rapporteur sent an allegation letter to the Government, requesting clarification on the deaths of three prisoners at the Guantánamo Bay detention facility.<sup>66</sup> The Government’s response indicated that the deaths were suicides.<sup>67</sup> A death reported on 19 May 2011, again prompted investigation into the circumstances surrounding these incidents. The Special Rapporteur reiterates the recommendation that complete and unedited investigations and autopsy results into the deaths of Guantánamo detainees be released to family members, if this has not yet been done.

<sup>59</sup> United States Department of Defense, news release No. 322-11 of 20 April 2011.

<sup>60</sup> A/HRC/WG.6/9/USA/1, para. 88.

<sup>61</sup> The White House, Statement of President Obama on Military Commissions, 15 May 2009.

<sup>62</sup> Amnesty International, *USA: Trials in Error – Third go at misconceived military commission experiment*, 6 July 2009 (AI Index: AMR 51/083/2009).

<sup>63</sup> A/HRC/11/2/Add.5, para. 42.

<sup>64</sup> Human Rights Committee, Communication No. 84/1981 (1990), *Dermitt Barbato et al. v Uruguay*.

<sup>65</sup> Center for Constitutional Rights (CCR), Statement in response to the death of Awal Gul, 3 February 2011; “Afghan prisoner at Guantanamo dies in apparent suicide,” *Reuters*, 18 May 2011.

<sup>66</sup> Namely, Salah Ahmed Al-Salami, Mani Shaman al-Utaybi and Yasser Talal Al-Zahrani; see A/HRC/14/24/Add.1, paras. 1169-1178.

<sup>67</sup> *Ibid.*, paras. 1179-1182.

## B. Strategies to protect civilians and enhance transparency regarding civilian casualties

45. The United States is involved in international military operations in Afghanistan and Iraq, and more recently in Libya. Despite efforts made to spare non-combatants, United States international operations have caused a large number of civilian casualties. Transparency is a requirement under both international humanitarian and human rights law,<sup>68</sup> as was reaffirmed by the Security Council on 13 October 2010, when it renewed the mandate of the International Security Assistance Force (ISAF), and called on all parties to comply with their obligations under international humanitarian and human rights law and for all appropriate measures to be taken to ensure the protection of civilians. The Security Council also recognized the importance of ongoing monitoring and reporting to it, including by ISAF, of the situation of civilians, and in particular civilian casualties.<sup>69</sup> In its resolution extending the mandate of the United Nations Assistance Mission for Iraq (UNAMI), the Security Council again made a similar recommendation.<sup>70</sup>

### 1. Military

46. While acknowledging the challenges of compiling statistics on civilian casualties during military operations owing to the lack of secure access to incident sites, the Special Rapporteur underscored in the mission report that systematic tracking was critical for minimizing casualties. The DoD noted that information on civilian casualties is included in significant activity (SIGACT) reports; however, the data is not necessarily accurate and has not been consolidated in a comprehensive and searchable database.<sup>71</sup>

47. In Afghanistan, United States troops take part in ISAF and still operate under Operation Enduring Freedom (OEF). ISAF established the Civilian Casualty Tracking Cell in 2008, but has reportedly not accurately recorded civilian casualties. Although most of the United States Special Forces (USSF) in Afghanistan were reportedly brought under COM-ISAF (Commander of ISAF) in March 2010, their procedures for investigating civilian casualties remain unclear.<sup>72</sup> In December 2010, members of the North Atlantic Treaty Organization (NATO) agreed to review the tracking cell to address shortfalls in effectiveness and inadequacies in resourcing. Despite these efforts, the tracking cell appears to have insufficient investigatory capacity and empowerment from the military leadership. A further shortcoming is that the tracking cell relies heavily on forces on the ground to report incidents on their own initiative.<sup>73</sup>

48. While some progress has been made, inappropriate data collection technology, the lack of consistency and of full-time investigators need to be addressed. In the event that an incident causes civilian harm, the unit involved conducts an assessment and reports to the tracking cell within 24 hours. After 10 days, the unit submits an assessment report to the tracking cell, containing all results, including lessons learned and whether compensation has been paid. In high-profile cases involving multiple deaths and significant media coverage, an incident assessment team of experts (IAT) is deployed by COM-ISAF. The Special

<sup>68</sup> See the Geneva Conventions I-IV of 12 August 1949, arts. 1, 50, 51, 130 and 147; Protocol I Additional, arts. 11, 85, 87(3); and Economic and Social Council resolution 1989/65, annex, para. 17.

<sup>69</sup> S/RES/1943 (2010), p. 3.

<sup>70</sup> S/RES/1936 (2010), p. 2.

<sup>71</sup> A/HRC/11/2/Add.5, para. 44. The DoD occasionally includes civilian casualty figures within its reports on Afghanistan. For example, see Congressional Research Service, *Afghanistan Casualties. Military Forces and Civilians*, 3 February 2011, summary, available from <http://www.fas.org/sgp/crs/natsec/R41084.pdf>.

<sup>72</sup> Submission by Amnesty International for the present report.

<sup>73</sup> A/HRC/17/28/Add.6, para. 35.

Rapporteur is concerned however that the IAT operates on an ad hoc basis, in particular in high-profile cases, in the absence of clearly established criteria. Furthermore, in each case, the team is composed of different experts, making it difficult to ensure continuity in analysis and identification of lessons learned. Additionally, the tracking cell may not always capture all information relating to civilian casualties, since some incidents take place in areas where thorough battle damage assessments are not systematically conducted.<sup>74</sup>

49. Regarding civilian casualty estimates, figures are provided by the United Nations Assistance Mission in Afghanistan (UNAMA) and the Afghanistan Independent Human Rights Commission (AIHRC). Between 2010 and mid-2011, most civilian casualties in Afghanistan were attributed to Anti-Government Elements (AGE),<sup>75</sup> accounting for 75 per cent of 2,777 civilian casualties in 2010 and 80 per cent of 1,462 civilian casualties in the first half of 2011.<sup>76</sup> While a rising death toll caused by AGE is noted, fewer civilians were killed and injured by Pro-Government Forces (PGF) in 2010 than in previous years, due to efforts by international and Afghan military forces to reduce civilian casualties. Air strikes claimed the largest number of civilian deaths resulting from PGF operations.<sup>77</sup> According to UNAMA, night raids and other tactics resulted in less civilian casualties in 2010, primarily through the effect of regulations. The Counterinsurgency Guidelines and the Tactical Directive on the disciplined use of force were revised and updated by General David Petraeus, who took over command of ISAF in July 2010. The Standard Operating Procedures on the escalation of force were also published, and two Tactical Directives on night raids were issued in January and December 2010, respectively.<sup>78</sup>

50. UNAMA and AIHRC mentioned difficulties in monitoring USSF operations due to both tactical reasons and deliberate lack of information. The number of raids conducted by USSF increased as they are believed to be more successful in gathering intelligence and reducing civilian losses. However, night raids reportedly generate anger and resentment among the Afghan population towards the international military presence.<sup>79</sup> In some instances, excessive use of force, death and injury to civilians have been reported. AIHRC and UNAMA documented 13 such incidents which occurred in 2010.<sup>80</sup> No information has been received regarding OEF operations to indicate that measures have been taken to enhance transparency regarding civilian casualties.

51. The Special Rapporteur welcomes efforts made in Afghanistan to spare civilians from military operations, notably through the adoption of regulations emphasizing civilian protection and restricting the use of force. He notes that positive measures have been taken to enhance transparency regarding civilian casualties, namely through the ISAF tracking cell. However, in light of its shortfalls, the Special Rapporteur calls on the international security forces in Afghanistan, including the United States, to allocate sufficient financial and human resources to the tracking cell, including full-time experienced investigators to carry out its functions and to ensure continuity, analysis and integration of lessons learned.<sup>81</sup> Additionally, given the allegations that investigations by the tracking cell depend on forces

<sup>74</sup> Submission by Campaign for Innocent Victims in Conflict (CIVIC).

<sup>75</sup> Suicide attacks and improvised explosive devices (IEDs) caused the most civilian deaths.

<sup>76</sup> See UNAMA and Afghanistan Independent Human Rights Commission (AIHRC), *Afghanistan, Annual Report 2010: Protection of Civilians in Armed Conflict*, March 2011, p. i.; also *Afghanistan, Midyear Report 2011*, July 2011, p. 2; and Congressional Research Service, *Afghanistan Casualties* (see footnote 72).

<sup>77</sup> UNAMA and AIHRC, *Afghanistan, Annual Report 2010*, p. 23; and *Midyear Report 2011*, p. 23.

<sup>78</sup> UNAMA and AIHRC, *Afghanistan, Annual Report 2010*, p. 22.

<sup>79</sup> *Ibid.*, pp. 29 and 33. It was reported that 3,000 night raids were carried out from May to the end of July 2010.

<sup>80</sup> *Ibid.*

<sup>81</sup> Submissions by Amnesty International and CIVIC.

on the ground to report incidents on their own initiative, the Special Rapporteur contends that in order for the tracking cell to record losses systematically, relevant binding instruments should be adopted to impose on officers the obligation to systematically report incidents. Such an obligation is also strongly advisable in respect of incidents in Iraq.

52. In Iraq, United States troops were involved in Operation Iraqi Freedom until 31 August 2010, when it was redesignated as Operation New Dawn (OND). Despite the withdrawal of United States Forces (USF-I) from Iraqi cities on 30 June 2009, civilian deaths have continued to be reported as a result of joint Iraqi Security Forces (ISF) and USF-I operations. In 2010, 113 deaths reportedly resulted from ISF and/or USF-I operations, while 64 deaths were reported in 2009. Civilian casualties caused by USF-I stood at 17, significantly lower than the 64 deaths reported in 2009.<sup>82</sup> It is reported that USF-I opened fire on a vehicle, killing an Iraqi journalist and her husband. No further clarification was provided by USF-I. Likewise, on 12 February 2010, it is alleged that up to 10 people were killed and five wounded in a joint ISF/USF-I raid some 75 km north of Amarah in Missan Governorate.<sup>83</sup> As mentioned above, information on casualties is contained in SIGACTS reports.<sup>84</sup> In a report to Congress, the DoD explained that as a consequence of USF-I withdrawal from Iraqi cities, the Government's visibility and ability to verify Iraqi reports have been reduced. While United States and Iraqi forces data are close, some values differ.<sup>85</sup> The Special Rapporteur notes the challenges encountered by the United States forces in this regard, but recalls that it is the Government's duty to gather information on civilian casualties resulting from USF-I operations, be they joint operations or not. The Special Rapporteur reiterates the recommendation that the Government systematically and consistently track and publicly disclose information on all civilian losses resulting from its international operations. This is important in terms of transparency and accountability, and the collected data may be analysed to draw lessons with a view to preventing further deaths and collateral damage to civilians.

53. Unlike in the battlefield, operational difficulties cannot be invoked to justify a failure to compile statistics on deaths in military custody. When a State detains an individual, it is held to a heightened level of diligence to protect the individual's rights,<sup>86</sup> meaning that it should prevent deaths, conduct investigations and prosecute unlawful conduct.<sup>87</sup>

## 2. Private contractors

54. The Government relies heavily on private military and security companies (PMSCs)<sup>88</sup> within the framework of its international operations. As of March 2011, there were reportedly 28,000 private contractors employed by DoD in Afghanistan and Iraq,<sup>89</sup>

<sup>82</sup> UNAMI Human Rights Office, *2010 Report on Human Rights in Iraq*, January 2011, p. 10.

<sup>83</sup> *Ibid.*

<sup>84</sup> United States Department of Defense, *Measuring Stability and Security in Iraq*, Report to Congress, June 2010, p. 29.

<sup>85</sup> *Ibid.*, p. iii.

<sup>86</sup> Human Rights Committee, Communication No. 84/1981 (1990), *Dermitt Barbato et al. v Uruguay*, para. 9.2.

<sup>87</sup> Economic and Social Council resolution 1989/65, annex, para. 9.

<sup>88</sup> Commission on Wartime Contracting in Iraq and Afghanistan, *At what risk? Correcting over-reliance on contractors in contingency operations*, Second Interim Report to Congress, 24 February 2011, p. 1; see also *Transforming Wartime Contracting, Controlling Costs, Reducing Risks*, Final Report to Congress, August 2011, pp. 18-20.

<sup>89</sup> Schwartz Moshe, *The Department of Defense's Use of Private Security Contractors in Afghanistan and Iraq: Background, Analysis, and Options for Congress*, Congressional Research Service, 13 May 2011, p. 6. Other sources report higher numbers. See for example, Human Rights First, *State of*



amounting to 18 per cent of DoD's workforce. In total, over 200,000 PMSCs have worked for the Government. Since the release of the mission report in 2009, there have been instances of killings by PMSCs.<sup>90</sup>

55. It is worth noting, however, that deaths caused by PMSCs in Iraq have greatly decreased due to legal and other restrictions on the activities of PMSCs.<sup>91</sup> On 10 February 2010, the Ministry of Interior reportedly ordered the PMSC Blackwater (now known as Xe Services) to leave the country within one week. In over a year, only one incident involving private security officers and resulting in the death of a civilian had been reported.<sup>92</sup> Likewise, only one incident was reported in 2009.<sup>93</sup> The decrease is reportedly attributed to several factors, including the decrease in military activities in Iraq, stricter regulation by Iraqi authorities, and efforts by the United States to tighten oversight of contractors.<sup>94</sup> Following the Nissour Square shooting in 2007, the Government has reviewed and improved reporting procedures and oversight mechanisms for PMSCs working for the United States in Iraq. For instance, video-recording systems must be installed in all vehicles used by PMSCs, who must also submit information on their movements to USF-I.<sup>95</sup> Irrespective of the number of deaths caused by PMSCs in the context of international operations, the Government should track and publicly disclose all civilian casualties caused by private contractors.

### 3. Civilian intelligence agencies

56. The mission report highlighted five cases of custodial deaths involving the CIA. Since then further information on those and other cases has been disclosed in the media and by civil society organizations.<sup>96</sup> There are also accounts of the involvement of CIA agents who allegedly carried out targeted attacks.<sup>97</sup> The Special Rapporteur recommends that the Government also track and disclose civilian casualties caused by intelligence agents.

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*Affairs: Three Years After Nissour Square - Accountability and Oversight of U.S. Private Security and Other Contractors*, September 2010.

<sup>90</sup> In June 2009, the provincial police chief of Kandahar, Noor Khan, was killed. See "Afghan minister calls for disbanding of private security forces after killing of police chief," *Associated Press*, June 30, 2009.

<sup>91</sup> UNAMI Human Rights Office, *2010 Report on Human Rights in Iraq*, January 2011, p. 11; see also A/HRC/18/32/Add.4, para. 76.

<sup>92</sup> UNAMI Human Rights Office, *2010 Report on Human Rights in Iraq*, January 2011, p. 11.

<sup>93</sup> UNAMI, Human Rights Report: 1 January-30 June 2009, para. 24; and Human Rights Report: 1 July-31 December 2009, para. 20.

<sup>94</sup> A/HRC/18/32/Add.4, para. 54.

<sup>95</sup> *Ibid.*, para. 58.

<sup>96</sup> Ibn Al-Sheikh Al-Libi was found dead in his cell in Abu Salim prison in Tripoli in May 2009. See Human Rights Watch, "Libya/US: Investigate Death of Former CIA Prisoner," 12 May 2009, available from: <http://www.hrw.org/news/2009/05/11/libyaus-investigate-death-former-cia-prisoner>. In 2010, information was released on the death of Gul Rahman which occurred on 20 November 2002 in a CIA compound in the north of Kabul.

<sup>97</sup> See for example, CIVIC, *Civilians in Armed Conflict: Civilian Harm and Conflict in Northwest Pakistan*, October 2010, p. 9, available from <http://www.civicworldwide.org/storage/civicdev/documents/civic%20pakistan%202010%20final.pdf>; also Joby Warrick and Pamela Constable, "CIA base attacked in Afghanistan supported airstrikes against al-Qaeda, Taliban in Pakistan," *The Washington Post*, 1 January 2010.

## C. Transparency and accountability for unlawful killings and custodial deaths

57. The failure to track and inform about civilian casualties is inevitably linked to questions of transparency and accountability for unlawful killings and deaths in the Government's international military and intelligence operations. Transparency in the administration of justice is a pre-requisite for all States governed by the rule of law.

### 1. Investigations and accountability through the military justice system

58. The mission report highlighted the lack of transparency and effective investigation and prosecution in the military justice system. During his mission to Afghanistan, the previous mandate holder observed that the opacity of the military justice system reduced confidence in the United States Government's commitment to accountability for illegal conduct. Information received indicates that NATO International Security Assistance Force (ISAF) does not routinely disclose information about its investigations into cases of civilian casualties caused by international security forces.<sup>98</sup> In his mission report, the Special Rapporteur recommended that the DoD establish a central office or "registry" to maintain a docket and track cases from investigation through final disposition, which should be publicly accessible. However, the Government specified that each Military Service maintains its own court docketing system to which access is available by an Internet website, which suggests that no central registry exists. The Government indicated that trials under the Uniform Code of Military Justice are open to the public and often draw in extensive media coverage. However, the military trial judge may exclude the public from part of the proceedings in order to protect classified information if the prosecution demonstrates an overriding need for such exclusion, which cannot be broader than necessary.<sup>99</sup>

59. As recommended in the mission report, consideration should be given to establishing a Director of Military Prosecutions to ensure separation between the chain of command and the prosecution function. No information has been provided in this regard.

60. The Special Rapporteur further recommended that the doctrine of "command responsibility" be codified as a basis for criminal liability in the Uniform Code of Military Justice and the War Crimes Act. The Special Rapporteur welcomes the fact that, in March 2010, the former Commander of the United States forces and ISAF brought most of the United States Special Operations Forces under the same chain of command as regular United States and NATO forces.<sup>100</sup> This is a first step towards greater accountability.

61. The Special Rapporteur notes that in 2010 and 2011, court proceedings were conducted in five cases involving soldiers who had served in Iraq and/or Afghanistan for alleged violations of the Uniform Code of Military Justice implementing rules of international humanitarian law. However, many deaths remain unpunished and it is reported that there are no prosecutions or even investigations of high-level officials potentially responsible for abuses, including deaths.

62. Information received suggests that the current lack of accountability fuels resentment and the belief among Afghans that international forces are above the law and unaccountable for their actions.<sup>101</sup> The Special Rapporteur calls on the United States

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<sup>98</sup> Submission by Amnesty International.

<sup>99</sup> See Rule for Court-Martial (R.C.M.) 806: *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977).

<sup>100</sup> Amnesty International, "Control of US Special Forces in Afghanistan: a step toward accountability," news update, 17 March 2010 (AI Index: ASA 11/002/2010).

<sup>101</sup> Submission by Amnesty International.

Government and Afghan authorities to take all necessary measures to ensure that unlawful killings do not remain unpunished, to bring perpetrators to justice and to provide remedies for the victims.

## 2. Investigations and accountability through the civilian justice system

63. The previous mandate holder found that there was a lack of political and prosecutorial will and that a zone of impunity seems to have been created for private contractors and civilian intelligence agents. According to information received, the inadequate oversight and inability to hold Blackwater and other PMSCs accountable for serious crimes have alienated local populations and undermined United States military efforts in Iraq and Afghanistan.

64. While United States law provides several avenues for DoD contractors who commit serious crimes overseas,<sup>102</sup> criminal jurisdiction for non-DoD contractors remains unclear.<sup>103</sup> In this regard, the Special Rapporteur welcomes the information that the Government is currently considering legislation in the form of the Civilian Extraterritorial Jurisdiction Act (CEJA) that would expand criminal jurisdiction over Federal contractors and employees working outside the United States, which would cover non-DoD contractors,<sup>104</sup> as recommended in the mission report.<sup>105</sup> This Act would further establish units to investigate allegations of criminal offences committed by private contractors, thereby increasing oversight. Additionally, the Attorney General would be requested to report annually to Congress on the number of offences received, investigated and prosecuted.

65. While this is a commendable initiative, it should be noted that it would only apply to felony offences and not to nationals of the host country working for the United States; as such, its scope of application would be somewhat limited. Furthermore, concern is expressed about the wording of section 5(b) which explicitly exempts “lawful” intelligence activities.<sup>106</sup> The Special Rapporteur contends that this provision is unclear, as no lawful conduct may ever be prosecuted. It is feared that this provision could be interpreted too broadly. Consequently, the said bill should be revised so as to include those working for intelligence agencies and to delete the above-mentioned provision.

66. On 24 August 2009, the Attorney General announced that he had ordered a preliminary review into whether Federal laws were violated in connection with the interrogation of specific detainees at overseas locations.<sup>107</sup> However, it was made clear from

<sup>102</sup> For example, section 2340A of title 18 of the United States Code authorizes prosecutions of United States nationals who commit torture outside the United States. Also, section 2441 criminalizes a “grave breach” of common art. 3 of the Geneva Conventions, when committed overseas and within an armed conflict. Under the Military Extraterritorial Jurisdiction Act (MEJA), persons employed by or accompanying the Armed Forces outside the United States may be prosecuted domestically if they commit a serious criminal offence overseas. The MEJA specifically covers all civilian employees and contractors directly employed by the DoD or supporting its mission overseas.

<sup>103</sup> Human Rights First, *The Case For the Civilian Extraterritorial Jurisdiction Act (CEJA): Why U.S. Needs to Clarify U.S. Criminal Jurisdiction over U.S. Contractors Fielded Abroad*, fact sheet, 25 May 2011.

<sup>104</sup> Human Rights First, *House and Senate Introduce Bill on U.S. Civilian Contractor Accountability Abroad*, 6 June 2011.

<sup>105</sup> See also Human Rights First, *State of Affairs: Three Years After Nisoor Square – Accountability and Oversight of U.S. Private Security and Other Contractors*, September 2010.

<sup>106</sup> Submission by Amnesty International.

<sup>107</sup> United States Department of Justice, *Statement of the Attorney General Regarding Investigation into the Interrogation of Certain Detainees*, 30 June 2011, available from <http://www.justice.gov/opa/pr/2011/June/11-ag-861.html>; see also Central Intelligence Agency, *Message from the Director, DoJ Investigations Moving Toward Closure*, 30 June 2011, available

the outset that those who acted within the scope of the legal guidance regarding interrogation methods would not be prosecuted. Moreover, it is now clear that the DoJ does not intend to criminally investigate the high-level officials nor the lawyers who respectively commissioned and authored the legal memoranda authorizing the use of so-called “enhanced interrogation techniques”. This is so despite revelations by the former President and Vice President that they had authorized at least one of the techniques that the International Committee for the Red Cross had deemed as amounting to torture and/or cruel, inhuman or degrading treatment.<sup>108</sup>

67. Attorney John Durham examined the possible involvement of the CIA in the interrogation of 101 detainees placed into United States custody following the 9/11 terrorist attacks. Mr. Durham advised that full investigations be conducted into the deaths in custody of two individuals. In this context, Steve Stormoen, former supervisor of an unofficial CIA programme in which individuals were detained and interrogated without their names being entered in the Army’s books, came under scrutiny by the prosecution.<sup>109</sup>

68. While the Special Rapporteur notes that a number of private contractors have recently been convicted for unlawful killings,<sup>110</sup> he also notes that a federal judge in Washington D.C. dismissed charges against five of the six guards accused of the killings in the Nisoor Square incident. Consequently, new legislation was sought in Iraq to enable prosecution of foreign contractors in Iraqi courts. The United States Government has consistently rejected requests by the Iraqi Government that former Blackwater employees be prosecuted in Iraqi Courts. In related developments, a United States prosecutor ruled on 18 October 2010 that there was insufficient evidence to support a criminal conviction of a former Blackwater employee who had killed an Iraqi guard.<sup>111</sup> In this regard, the Special Rapporteur endorses the concern expressed by the Working Group on the use of mercenaries, following its visit to Iraq in June 2009, about the lack of accountability of contractors for violations committed between 2003 and 2009, and recalls that victims of violations and their families are still waiting for justice.<sup>112</sup>

### 3. Ensuring transparency and accountability through a national “commission of inquiry”

69. Despite the recommendation made by the previous mandate holder in the 2009 mission report, no commission of inquiry has been established to conduct independent, systematic and sustained investigations of policies and practices that have led to deaths and other abuses in United States operations. However, an independent prosecutor was appointed in August 2009 to investigate alleged CIA interrogation abuses, including cases

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from <https://www.cia.gov/news-information/press-releases-statements/press-release-2011/message-from-the-director-doj-investigations-moving-toward-closure.html>.

<sup>108</sup> International Committee of the Red Cross, ICRC Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody, February 2007, p. 5, available from <http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>. Nine of the fourteen detainees reported having been “brought close to death,” see p. 18.

<sup>109</sup> Matt Apuzzo, “Feds eye CIA officer in prisoner death,” *Associated Press*, 13 July 2011.

<sup>110</sup> United States Department of Justice, press releases: “U.S. Army Contractor Sentenced to 42 Months in Prison for Stabbing at Kandahar Airfield in Afghanistan,” 8 July 2011; “Contractor Sentenced to 30 Months in Prison for Death of Afghan National in Kabul, Afghanistan,” 27 June 2011; “Contractor Sentenced to 37 Months in Prison for Death of Afghan National in Kabul, Afghanistan,” 14 June 2011; “Two Contractors Convicted of Involuntary Manslaughter for Death of Afghan National in Kabul, Afghanistan,” 11 March 2011; “Two Individuals Charged with Murder and Other Offenses Related to Shooting Death of Two Afghan Nationals in Kabul, Afghanistan,” 7 January 2010, all available from <http://www.justice.gov/opa/pr/>.

<sup>111</sup> UNAMI Human Rights Office, *2010 Report on Human Rights in Iraq*, January 2011, p. 11.

<sup>112</sup> A/HRC/18/32/Add.4, para. 77.

which resulted in the death of prisoners.<sup>113</sup> However, it should be noted that the prosecutor will examine the deaths of only two CIA prisoners. The potential responsibility of DoD officials for the wide-scale abuses documented during DoD interrogations in Iraq, Afghanistan and Guantánamo Bay will not be reviewed.

70. No information has been received on the establishment, within the DoJ, of an office dedicated to investigating and prosecuting crimes by private contractors, civilian Government employees, and former military personnel, which should receive the resources and investigative support necessary to handle these cases. The Special Rapporteur reiterates this recommendation.

#### 4. Reparation for civilian casualties

71. The United States has played a leading role in granting compensation and restitution to civilian victims of United States military operations and implemented a number of programmes in this respect. These include payment of legal claims under the Foreign Claims Act for non-conflict related losses, condolence payments drawn from the Commander's Emergency Response Program (CERP) in Iraq and Afghanistan, as well as *solatia* payments in the latter, together with various programmes providing assistance for damages caused.<sup>114</sup> In Afghanistan and in Iraq, the United States Congress created and allocated money for assistance programmes for civilian victims of United States military actions.

72. These programmes have been developed on an ad hoc basis and although some progress has been made, there are discrepancies in practice. In the absence of guidelines or training, each commander handles claims at his discretion.<sup>115</sup> The Special Rapporteur commends the adoption by the North Atlantic Council in June 2010 of guidelines on civilian compensation for all troop-contributing nations in Afghanistan. The guidelines focus on prompt acknowledgement by ISAF of combat-related civilian harm, proper investigations and the pro-active offering of assistance to survivors. However, the guidelines are non-binding and the ISAF commander has merely forwarded them to the regional commanders with no detailed instructions, leaving a gap between political will and practice.<sup>116</sup> Some troop-contributing forces, including the United States,<sup>117</sup> consider the guidelines insufficient.

73. Reportedly, the United States runs its own *solatia* programme,<sup>118</sup> while several NATO countries do not offer any assistance to civilians injured by their actions. It appears that public records are insufficient for an estimate of the number of victims who receive payments and the proportion of compensations to be made.

74. While noting that there is no unified system of compensation among the NATO/ISAF contributing states for civilian casualties and injuries, the Special Rapporteur reiterates that existing reparation programmes should be combined or replaced by a comprehensive and adequately-funded compensation programme for the families of those

<sup>113</sup> Johnson Carrie, "Holder Hires Prosecutor to Look Into Alleged CIA Interrogation Abuses," *Washington Post*, 25 August 2009.

<sup>114</sup> A/HRC/11/2/Add.5, para. 68; see also CIVIC, *United States Military Compensation to Civilians in Armed Conflict*, May 2010, pp. 2-3.

<sup>115</sup> Submission by CIVIC .

<sup>116</sup> A/HRC/17/28/Add.6, paras. 38-40.

<sup>117</sup> Submission by CIVIC.

<sup>118</sup> Information received suggested that, in some regions of Afghanistan, some monetary compensation was distributed to victims of night raids and air strikes. In the first quarter of 2010, this included 60 families in Kapisa province, who were mostly victims of night raids and air strikes. In a separate incident, on 21 March 2010, international military forces reportedly left 50,000 Afs (approximately \$1,000) in a house following a night raid. See A/HRC/17/28/Add.6, para. 41.

killed in United States operations. In missions involving a range of international forces, such as those in Afghanistan and Iraq, the Government should urge allies to implement similar programmes and should promote coordination to ensure that all casualties are compensated.

75. Concern has been expressed that the tracking cell is currently compiling information, albeit without much analysis, and “storing” it, instead of creating a comprehensive database on civilian harm.<sup>119</sup> The Special Rapporteur recommends that the Government adopt uniform procedures and guidelines or a compensation system for civilian casualties. Such system should not only be limited to financial compensation, but should also take into account the harm caused to families of the deceased and provide adequate compensation. Adequate human and financial resources should be allocated to the system and all stakeholders, including commanders, troops and judges should receive proper and mandatory training on the guidelines. The system should integrate and analyse lessons learned with a view to minimizing civilian harm. Finally, consideration should be given to creating a high-level Pentagon position to track and assess the impact of United States-led international operations.

#### **D. Targeted killings: lack of transparency regarding legal framework and targeting choices**

76. As mentioned in the 2009 report<sup>120</sup> and evidenced by a number of studies,<sup>121</sup> the Government has continuously engaged in targeted killings on the territory of other States. Such attacks have been reported particularly in Afghanistan, Iraq, Pakistan, Somalia and Yemen where the United States has conducted raids and airstrikes as well as deployed unmanned aerial vehicles to target particular individuals. The previous mandate holder was disturbed by the lack of transparency regarding the legal framework and targeting choices. He called on the Government to clarify the rules of international law it considers to cover targeted killings. To date, the Government has not provided an official and satisfactory response, but has referred to a statement made by the Department of State Legal Adviser.<sup>122</sup>

77. The legal framework governing targeted killings had already been addressed by the mandate,<sup>123</sup> and a report presented to the General Assembly in 2011<sup>124</sup> considered the extent to which an advance decision, ruling out the possibility of offering or accepting an opportunity to surrender, renders such operations unlawful; it makes reference also to the killing of Osama bin Laden.<sup>125</sup> Human rights law dictates that every effort must be made to arrest a suspect, in accordance with the principles of necessity and proportionality on the use

<sup>119</sup> Submission by CIVIC.

<sup>120</sup> See A/HRC/11/2/Add.5, para. 71; and A/HRC/14/24/Add.6, paras. 18-22.

<sup>121</sup> See for example, Peter Bergen and Katherine Tiedemann, *The Year of the Drone – An Analysis of U.S. Drone Strikes in Pakistan, 2004-2010*, New America Foundation, 24 February 2010; “The Hidden War,” feature, *Foreign Policy*, 21 December 2010; Amnesty International, ‘As if Hell Fell on Me’: *The Human Rights Crisis in Northwest Pakistan*, June 2010, pp. 87-90; Human Rights Commission in Pakistan, *State of Human Rights in 2010*, April 2011, pp. 75-76.

<sup>122</sup> See United States Department of State, Speech by Harold, Hongju Koh, Legal Adviser, to the Annual Meeting of the American Society of International Law, 25 March 2010, in which he evokes a number of legal bases to justify targeted killing, including the assertion that the Government is engaged in an “armed conflict” against al-Qaeda, the Taliban and associated forces, who the Government considers as legitimate targets under international humanitarian law. He also evokes the right to self-defence. Available from <http://www.state.gov/s/l/releases/remarks/139119.htm>.

<sup>123</sup> A/HRC/14/24/Add.6, paras. 18-22.

<sup>124</sup> A/66/330, paras. 65-85.

<sup>125</sup> See press statement by two Special Rapporteurs on Osama bin Laden, 6 May 2011, available from <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10987&LangID=E>.

of force. In cases where international humanitarian law may apply, the situation in each country should be assessed on a case-by-case basis in order to determine the existence or not of armed conflict.

78. With regard to targeted killings in the context of an armed conflict, the Special Rapporteur notes with appreciation that an updated directive on “population-centric counterinsurgency principles” was adopted in August 2010. However, no information has been made available on substantial changes to procedures applied on the ground to ensure that strikes targeting Taliban fighters were based on reliable information, and did not cause unnecessary suffering and damage to the civilian population. The Special Rapporteur is unable to comment on the content and criteria established in the July 2009 Tactical Directive on the disciplined use of force, the Standard Operating Procedures on the escalation of force and the two Tactical Directives on night raids that were issued in January and December 2010, respectively.<sup>126</sup>

79. The Special Rapporteur again requests the Government to clarify the rules that it considers to cover targeted killings, as mere reference to a statement made by a senior State official is insufficient. The Special Rapporteur reiterates his predecessor’s recommendation that the Government specify the bases for decisions to kill rather than capture “human targets” and whether the State in which the killing takes place has given consent. It should also specify procedural safeguards in place to ensure in advance that targeted killings comply with international law, as well as the measures taken after such killing to ensure that its legal and factual analysis is accurate.

80. In the absence of Government transparency, civil society has conducted considerable research on drone strikes. Although figures vary widely with regard to drone attack estimates, all studies concur on one important point: there has been a dramatic increase in their use over the past three years.<sup>127</sup> While these attacks are directed at individuals believed to be leaders or active members of al-Qaeda or the Taliban, in the context of armed conflict (e.g. in Afghanistan), in other instances, civilians have allegedly also perished in the attacks<sup>128</sup> in regions where it is unclear whether there was an armed conflict or not (e.g. in Pakistan).

81. Since June 2004, some 300 drone strikes have been carried out in Pakistan<sup>129</sup> and the number of resulting deaths has allegedly reached quadruple figures according to unconfirmed reports,<sup>130</sup> of which about 20 per cent are believed to be civilians.<sup>131</sup> According to the non-governmental Pakistan Human Rights Commission, United States drones strikes were responsible for at least 957 deaths in Pakistan in 2010.<sup>132</sup> Information also indicates that the attacks increasingly fuel protests among the population.<sup>133</sup> In the mission report, the Special Rapporteur recommended that the Government publish the number of civilians collaterally killed as a result of drone attacks, and the measures in place to prevent such

<sup>126</sup> UNAMA and AIHRC, *Afghanistan, Annual Report 2010*, p. 22.

<sup>127</sup> New American Foundation database on drone strikes 2004-2011, available from <http://counterterrorism.newamerica.net/drones>; also Peter Bergen and Katherine Tiedemann, *The Year of the Drone* (see footnote 124).

<sup>128</sup> Amnesty International, *'As if Hell Fell on Me'* (see footnote 124), p. 87.

<sup>129</sup> Chris Woods, 'Number of CIA drone strikes in Pakistan hit 300,' 14 October 2011', All Stories, Covert Drone War, Human Rights, Bureau of Investigative Journalism.

<sup>130</sup> See New American Foundation database on drone strikes 2004-2011.

<sup>131</sup> *Ibid.*

<sup>132</sup> Human Rights Commission in Pakistan, *State of Human Rights in 2010*, April 2011, p. 6. Figures however vary.

<sup>133</sup> Chris Woods, "Number of CIA drone strikes in Pakistan hit 300," *The Bureau of Investigative Journalism*, 14 October 2011; also Center for Constitutional Rights, "Pakistani Drone Victims and Families Seek Arrest Warrant for Former CIA Counsel John Rizzo," 19 July 2011.

casualties. The DoD formally confirmed that such estimates of civilian casualties are not compiled separately from estimates related to other weapons systems.<sup>134</sup> The Special Rapporteur reiterates the recommendation that the Government track civilian casualties in disaggregated data so as to identify the number of casualties resulting from the use of drone attacks.

82. Disclosure of these killings is critical to ensure accountability, justice and reparation for victims or their families. No system of compensation and reparation such as those put in place in Iraq and Afghanistan exist in Pakistan, Yemen, Somalia or other States where such strikes have allegedly taken place. The Government should clarify the procedures in place to ensure that any targeted killing complies with international humanitarian law and human rights, and indicate the measures or strategies applied to prevent casualties, as well as the measures in place to provide prompt, thorough, effective and independent public investigation of alleged violations.<sup>135</sup>

83. In addition to the targeted killing of individuals alleged to be involved in terrorist activities, or those who pose a risk to national security, the collateral damages resulting from the operations carried out is also a matter of concern. In the mission report on his visit to Afghanistan, the previous mandate holder mentioned the use of night raids on housing compounds as a strategy to capture individuals suspected of links to the Taliban, which too often resulted in killings for which no one was held accountable.<sup>136</sup> In February 2011, it was reported that night raids had resulted in approximately 600 deaths within the space of three months, and allegedly shots were fired in 80 per cent of recent raids.<sup>137</sup> Nevertheless, casualties are much higher in the case of air and drone strikes. For instance, concern was raised about a missile strike in Abyan, South Yemen, in December 2009. According to a parliamentary inquiry, 41 residents, including 14 women and 21 children perished in the attack. Evidence of the use of United States weaponry was made public. The DoD has not commented or explained the precautions that had been taken to avoid casualties and deaths.<sup>138</sup>

84. Like his predecessor, the Special Rapporteur is seriously concerned that the practice of targeted killing could set a dangerous precedent,<sup>139</sup> in that any Government could, under the cover of counter-terrorism imperatives, decide to target and kill an individual on the territory of any State if it considers that said individual constitutes a threat.

## V. Conclusion

85. **The Government of the United States of America deserves credit for taking measures to implement some of the recommendations formulated by the previous mandate holder in the report of his visit to the country in 2008. At the domestic level, progress has been made in tracking and better responding to deaths in immigration detention. The commitment to analyse and address racial disparities in the imposition of the death penalty is also a welcome step.**

86. **Regarding international operations, some efforts have been made to provide greater transparency with regard to tracking civilian losses in Afghanistan, through**

<sup>134</sup> *American Civil Liberties Union, et al. v. Department of Justice*, No. 1:10-cv-00436-RMC (D.D.C).

<sup>135</sup> A/HRC/14/24/Add.6, pp. 27-28.

<sup>136</sup> A/HRC/11/2/Add.4, paras. 10 and 13.

<sup>137</sup> See Emma Graham-Harrison, "NATO's Afghan night raids come with high civilian cost," *Reuters*, 24 February 2011; and "Factbox: Night-time raids in Afghanistan," 24 February 2011, available from [www.reuters.com/article/2011/02/24/us-afghanistan-raids-factboxidUSTRE71N17320110224](http://www.reuters.com/article/2011/02/24/us-afghanistan-raids-factboxidUSTRE71N17320110224).

<sup>138</sup> Submission by Amnesty International.

<sup>139</sup> A/HRC/11/2/Add.5, para. 72.



the ISAF tracking cell. Several regulations have been issued to limit the use of force and enhance civilian protection, and compensation programmes for families of victims have been strengthened. The decrease in the number of incidents reported in Iraq, and the measures taken to improve oversight of private contractors are to be commended.

87. However, no significant improvement has been made on the three priority areas identified in the mission report. No progress has been noted to address due process concerns in the imposition of the death penalty, nor has the Government implemented the recommendations relating to the situation of Guantánamo Bay detainees. Insufficient measures have been taken to enhance transparency regarding civilian casualties resulting from United States international military and intelligence operations and to minimize casualties. Indeed, much remains to be done to bring about justice and to overcome the failure of political will to bring perpetrators to account.

88. Efforts should be strengthened to bring perpetrators of unlawful killings, be they military contractors, intelligence agents, high- or low-ranking Government officials, to justice. The lack of transparency regarding the legal framework and targeting choices for killings and the dangerous precedent that such practice represents remain of grave concern. Efforts should be redoubled to implement the recommendations in the 2009 mission report. The Special Rapporteur remains ready to assist the Government in this regard.

## Appendix

### Summary of follow-up to each recommendation<sup>140</sup>

#### A. Domestic issues

##### Due process in death penalty cases

1. **The system of partisan elections for judges should be reformed to ensure that capital defendants receive a fair trial and appeals process.**

No information was provided on relevant reforms.

2. **Alabama and Texas should establish well-funded, state-wide public defender services. Oversight of these should be independent of the executive and judicial branches.**

No information was provided on relevant reforms.

3. **Texas should establish a commission to review cases in which convicted people have been subsequently exonerated, analyze the reasons, and make recommendations to enable the criminal justice system to prevent future mistakes.**

This recommendation has not been implemented.

4. **Alabama should evaluate and respond in detail to the findings and recommendations of the American Bar Association report on the implementation of its death penalty.**

This recommendation has not been implemented.

5. **Federal and state governments should systematically review and respond to concerns about continuing racial disparities in the criminal justice system generally, and in the imposition of the death penalty specifically.**

This recommendation has not been implemented. However, it enjoys the support of the Government.

6. **In light of uncorrected flaws in state criminal justice systems, and given the finality of executions, Congress should enact legislation permitting federal courts to review on the merits all issues in death penalty post-conviction cases.**

This recommendation has not been implemented.

7. **Regulations permitting the Department of Justice to certify the adequacy of state indigent defence systems based on factors left to states' discretion should be amended or repealed.**

This recommendation has not been implemented.

8. **Federal and state governments should ensure that capital punishment is imposed only for the most serious crimes, requiring an intent to kill resulting in a loss of life.**

This recommendation has not been implemented.

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<sup>140</sup> See A/HRC/11/2/Add.5, paras. 74-83.

9. **Foreign nationals who were denied the right to consular notification should have their executions stayed and their cases fully reviewed and reconsidered.**

This recommendation has not been implemented.

#### **Deaths in immigration detention**

10. **All deaths in immigration detention should be promptly and publicly reported and investigated.**

This recommendation has been implemented.

11. **The Department of Homeland Security should promulgate regulations, through the normal administrative rule-making process, for provision of medical care that are consistent with international standards.**

This recommendation has been partially implemented.

#### **Tracking and responding to killings by law enforcement officials**

12. **Video and audio recording of interactions between law enforcement officers and members of the public should be increased. The destruction of tapes should be minimized through technical means and through the imposition of penalties.**

Sufficient information has not been provided to enable assessment of progress.

13. **Existing data collection efforts regarding killings by law enforcement officers should be improved to increase their usefulness in an “early warning” and “hot spot identification” role.**

Sufficient information has not been provided to enable assessment of progress.

## **B. International operations**

#### **Guantánamo Bay detainees**

14. **The Military Commissions Act should not be used for capital prosecutions of any detainees, including those in Guantánamo. Any such prosecutions should meet due process requirements under international human rights and humanitarian law.**

This recommendation has not been implemented.

15. **Complete and non-redacted investigations and autopsy results into the deaths of Guantánamo detainees should be released to family members.**

No information was made available to the Special Rapporteur to assess the implementation of this recommendation.

#### **Transparency into civilian casualties**

16. **The Government should track and publicly disclose all civilian casualties caused by military or other operations or that occur in the custody of the Government or its agents.**

This recommendation has been partially implemented through ISAF in Afghanistan.

**Enhancing military justice transparency**

17. **The Department of Defense should establish a central office or “registry” to maintain a docket and track cases from investigation through final disposition. The system should be capable of providing up-to-date statistical information. The registry should include information on upcoming hearings and copies of the findings of formal and informal investigations, rulings, pleadings, transcripts of testimony, and exhibits. Public internet access to the registry should be available, subject only to legal non-disclosure requirements related to national security and individual privacy.**

This recommendation has not been implemented.

**Ensuring comprehensive criminal jurisdiction over offences in armed conflict**

18. **The doctrine of “command responsibility” as a basis for criminal liability should be codified in the Uniform Code of Military Justice and the War Crimes Act.**

This recommendation has not been implemented.

19. **Congress should adopt legislation that comprehensively provides criminal jurisdiction over all private contractors and civilian employees, including those working for intelligence agencies.**

This recommendation has not been implemented, although it enjoys the support of the Government. In this regard, the Congress is currently considering passing the Civilian Extraterritorial Jurisdiction Act.

**Ensuring accountability**

20. **A commission of inquiry should be established to conduct an independent, systematic and sustained investigation of policies and practices that led to deaths and other abuses in United States operations. The commission should have the mandate and resources to conduct a full investigation. Its results and recommendations should be publicly and widely disseminated, and the Government should publicly respond thereto. Given the importance of prosecutions, an independent special prosecutor should be considered and the commission should not undermine the possibility of eventual prosecution.**

This recommendation has not been implemented.

21. **Consideration should be given to establishing a Director of Military Prosecutions to ensure separation between the chain of command and the prosecution function.**

This recommendation has not been implemented.

22. **An office dedicated to investigation and prosecution of crimes by private contractors, civilian Government employees, and former military personnel should be established within the DoJ. The office should receive the resources and investigative support necessary to handle these cases. The DoJ should make public statistical information on the status of these cases, disaggregated by the kind, year, and country of alleged offence.**

This recommendation has not been implemented.

**Enhancing reparations programmes**

23. **Existing reparation programmes should be combined or replaced by a comprehensive and adequately funded compensation programme for the families of those killed in United States operations, including by military and intelligence personnel and private contractors. In missions involving a range of international forces, such as those in Afghanistan and Iraq, the Government should urge allies to implement similar programmes and should promote coordination to ensure that all casualties are compensated.**

This recommendation has been partially implemented.

**Enhancing transparency in targeted killings**

24. **The Government should explicate the rules of international law it considers to cover targeted killings. It should specify the bases for decisions to kill rather than capture particular individuals, and whether the State in which the killing takes place has given consent. It should specify the procedural safeguards in place, if any, to ensure in advance of drone killings that they comply with international law, and the measures the Government takes after any such killing to ensure that its legal and factual analysis was accurate and, if not, the remedial measures it would take.**

This recommendation has not been implemented.

25. **The Government should make public the number of civilians collaterally killed as a result of drone attacks, and the measures in place to prevent such casualties.**

This recommendation has not been implemented.

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