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

Overview of the work done by the Special Rapporteur on extrajudicial, summary or arbitrary executions during her tenure (2016–2021)

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Agnès Callamard^{*}, ^{}, ^{***}**

Summary

In the present report, the outgoing Special Rapporteur, Agnès Callamard, reflects on her work for the mandate over the past five years, its links to her predecessors' work and her contribution to themes on which the mandate has made a major normative contribution over the past 30 years.

* The present report was submitted after the deadline in order to reflect the most recent developments.
** The present report was processed after the departure of the mandate holder.
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I. Introduction

1. In the present report, the Special Rapporteur on extrajudicial, summary or arbitrary executions reflects on her work for the mandate over the past five years, its links to her predecessors' work and her contribution to themes on which the mandate has made a major normative contribution over the past 30 years.
2. The Special Rapporteur presents her methodology and approach and highlights the issues she has addressed and the normative and policy contributions she has sought to make. She also reflects on the global context and the challenges it presents for protecting and respecting the right not to be arbitrarily killed.
3. The Special Rapporteur thanks victims and their families, advocates and lawyers and civil society organizations who contributed generously to her work, in particular those whom she met during her country and academic visits. She is grateful to those who entrusted her with personal and all too often painful accounts of the cruelty they endured. She also thanks the Member States that supported her throughout her tenure, replied to her queries, agreed to her visits and engaged on the substance of her findings and allegations.
4. She thanks her predecessors for their camaraderie, collaboration and regular exchanges. She pays tribute to Asma Jahangir, who passed away in 2018, and to Christof Heyns, who died as she was writing the present report. The Special Rapporteur took to heart Ms. Jahangir's ground-breaking work to fully integrate gender sensitivity into the mandate. One of her last conversations as Special Rapporteur was with Mr. Heyns, who leaves behind him an incredible human rights legacy, a legacy that the Special Rapporteur has sought to emulate and build upon. The human rights community owes Ms. Jahangir and Mr. Heyns an enormous debt of gratitude.

II. History and scope of the mandate

5. Since the mandate was established in 1982,¹ mandate holders have addressed a broad range of situations and killings, as detailed in the first chapter of the recent digital volume by previous mandate holders Philip Alston and Christof Heyns. It was Theo van Boven, head of the Division for Human Rights (the forerunner to the Office of the United Nations High Commissioner for Human Rights), who called upon the Commission on Human Rights to focus on the right to life and, in particular, to prevent deliberate killing perpetrated by organized power. He listed a range of crimes, from genocide to political liquidation, that engaged the responsibilities of Governments and highlighted the failure of States to prevent killings by other actors. In 1980, at the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, States adopted resolution 5 entitled "Extra-legal executions", in which they did not define the term but singled out for condemnation the practice of killing and executing political opponents or suspected offenders carried out by armed forces, law enforcement or other governmental agencies or by paramilitary or political groups acting with the tacit or other support of such forces or agencies. In 1992, the title of the Special Rapporteur was amended to include the word "extrajudicial".
6. The brief overview above highlights that, from the beginning, the mandate has covered diverse situations and diverse crimes, many of which have been the focus of special rapporteurs during the past 40 years. A significant evolution occurred, however, when the first woman special rapporteur, Ms. Jahangir, who was appointed in 1998, highlighted killings of persons because of their sexual orientation and the so-called "honour" killings of women, thus mainstreaming gender in her work.
7. The list of issues covered during the past 40 years is indeed impressive:
 - (a) Genocide;
 - (b) Violations of the right to life during armed conflict, especially of civilians and other non-combatants, contrary to international humanitarian law;

¹ Economic and Social Council resolution 1982/35.

- (c) Deaths by State security forces or by paramilitary groups, death squads or other private forces cooperating with or tolerated by one or several States;
- (d) Targeted killings using drones;
- (e) Deaths by law enforcement officials or persons acting in direct or indirect compliance with the State, where the use of force is inconsistent with the criteria of absolute necessity and proportionality;
- (f) Deaths in custody resulting from torture, excessive use of force, neglect or life-threatening conditions of detention;
- (g) The death penalty;
- (h) Death threats and fear of imminent extrajudicial executions by State officials, paramilitary groups, private individuals or groups cooperating with or tolerated by the Government, as well as by unidentified but linked persons;
- (i) Violations of the right to life by armed groups;
- (j) Failure to protect against or prevent foreseeable deaths or murders such as honour killings; femicide; maternal mortality; killing of persons with albinism and witches; inter-ethnic and interreligious killings; killings of lesbian, gay, bisexual, transgender and intersex persons; and killings by gangs and cartels;
- (k) Failure to investigate and bring to justice those responsible for alleged violations of the right to life and to compensate victims;
- (l) The notion of “life with dignity”.

8. The addition in 1992 of the word “extrajudicial” to the mandate’s scope and title prompted many debates about its definition and the different meanings of “extrajudicial”, “summary” and “arbitrary”. Shortly after he was appointed in 2004, the fourth special rapporteur, Philip Alston, reported to the Commission on Human Rights that the mandate’s terms of reference were not best understood through efforts to define individually the terms “extrajudicial”, “summary” or “arbitrary”, or to seek to categorize any given incident accordingly.² Whenever he could, Mr. Alston would “boil down” the mandate’s title to “Special Rapporteur on unlawful killings”, a version also routinely used by Mr. Heyns, the fifth special rapporteur, who would explain that the mandate’s aim was to protect aspects of the right to life.

9. In the 2016 revision of the 1991 *United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, “unlawful deaths” were defined as deaths resulting from acts or omissions of the State, its organs or agents, deaths in custody and deaths resulting from the failure of the State to protect life.³ This reflects an evolution in international law according to which the failure to investigate thoroughly a death in which foul play is suspected may itself amount to a violation of the right to life.

10. The Special Rapporteur too has found the mandate’s title cumbersome. For the public, victims and lawyers, the purported distinctions between the three terms are at best unclear and at worse suggest an unwarranted hierarchy. She has tended to use “arbitrary killings” and “unlawful deaths” and, when possible, has referred to the International Covenant on Civil and Political Rights, which states that no one shall be arbitrarily deprived of his or her life. As her predecessors have remarked, “as practice accumulated, and as precedents were established, the definitional boundaries became much less significant and what might be termed a constructive blurring took place”.⁴

11. In view of the above, the Special Rapporteur believes that the mandate holder’s title should be revised. She recommends that its sponsors and Member States should consider

² E/CN.4/2005/7, para. 6.

³ *Minnesota Protocol on the Investigation of Potentially Unlawful Death* (United Nations publication, Sales No. E.17.XIV.3).

⁴ Philip Alston and others, eds., *Alston and Heyns on Unlawful Killings: A Compendium of the Jurisprudence of the United Nations Special Rapporteurs on extrajudicial, summary or arbitrary executions from 2004–2016* (Pretoria, Pretoria University Law Press, 2020), p. 8.

situating the title squarely within article 6 of the International Covenant on Civil and Political Rights by renaming it “Special Rapporteur on the arbitrary deprivation of life”. Good alternatives would be “Special Rapporteur on unlawful killings and unlawful deaths” and “Special Rapporteur on the right to life”, in reference to Human Rights Committee general comment No. 36 (2018). Those titles would still allow mandate holders to speak of extrajudicial killings in political rather than legal terms and to convey a special element of shock and outrage about the callous and deliberate disregard by states of the international norm against the arbitrary deprivation of life.

12. The Special Rapporteur’s two immediate predecessors support this recommendation. Mr. Alston has explained that it is most important to come up with a label that is meaningful to the public at large, rather than satisfy the nit-picking of a few lawyers,⁵ while Mr. Heyns has agreed that renaming the mandate holder’s title as proposed would emphasize the fact that at the foundation of the mandate lies the enforcement of a legally binding standard.

III. Working methods

13. During the five years of her tenure, the Special Rapporteur has produced thematic reports on the following topics:

- (a) Human rights standards and possible steps towards the respectful and lawful handling of mass graves;⁶
- (b) Use of armed drones in targeted killings;⁷
- (c) Application of the death penalty to foreign nationals and the provision of consular assistance by the home State;⁸
- (d) Investigation of, accountability for and prevention of intentional State killings of human rights defenders, journalists and prominent dissidents;⁹
- (e) Saving lives is not a crime;¹⁰
- (f) Armed non-State actors: the protection of the right to life;¹¹
- (g) Unlawful death of refugees and migrants;¹²
- (h) A gender-sensitive approach to extrajudicial, summary or arbitrary killings.¹³

14. She has also produced two in-depth case studies, one on the killing of General Soleimani and the other on the unlawful death of Jamal Khashoggi.¹⁴

15. She undertook country visits to El Salvador, Iraq and Nigeria, as well as thematic visits to Belgium and Italy, to investigate the unlawful deaths of refugees and migrants, and to Turkey, to investigate the extrajudicial killing of Mr. Khashoggi. From August 2016 to February 2021, the Special Rapporteur authored or co-authored 695 communications, 51 per cent of which received replies, in line with the special procedures’ average of 53 per cent.

⁵ Personal communication.

⁶ [A/75/384](#).

⁷ [A/HRC/44/38](#).

⁸ [A/74/318](#).

⁹ [A/HRC/41/36](#).

¹⁰ [A/73/314](#).

¹¹ [A/HRC/38/44](#).

¹² [A/72/335](#).

¹³ [A/HRC/35/23](#).

¹⁴ [A/HRC/44/38](#), annex; and the conference room paper of the Special Rapporteur on the investigation into the unlawful death of Mr. Jamal Khashoggi. Available at www.ohchr.org/en/hr-bodies/hrc/regular-sessions/session41/list-reports.

IV. Standpoint

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

17. This standpoint had three main implications:

(a) First, as reflected in her thematic reports, she worked to ensure that her mandate was meaningful to a broad range of victims and experiences, including those that had not received the same degree of attention previously, including women, lesbian, gay, bisexual, transgender and intersex persons, refugees and victims of armed groups;

(b) Second, she sought to draw out the economic, social and cultural dimensions of arbitrary killings and unlawful deaths. This was evident in her thematic reports (e.g., those on a gender-sensitive approach and on mass graves), in her communications to Governments (e.g., on establishing a contextual relationship between climate change and mass killings and also between poverty and protection) and in her missions (e.g., to Nigeria). She also initiated joint communications and press releases with Special Rapporteurs covering economic, social and cultural rights;

(c) Third, she used case studies to strengthen the monitoring and investigatory component of the mandate. Seeing an opportunity previously unexplored, she took up individual cases in real time and, by investigating and documenting them through the lens of norms, standards and law, she sought to show how violations of one person's rights erode the rights of all. She developed an inductive approach, starting with detailed empirical observations from which normative and policy-based generalizations could be made. This helped identify weaknesses in international and national institutions and mechanisms responsible for protection and investigation. The findings of those in-depth inquiries included: the investigation into the killing of Saudi journalist Mr. Khashoggi; an allegation letter regarding the death in custody of former President Morsi; the investigation into the targeted killing of Iranian General Soleimani; an allegation letter regarding the murders of Syrian journalists and human rights defenders Halla and Orouba Barakat; an allegation letter regarding the downing of Ukraine International Airlines flight 752; an allegation letter regarding the poisoning and attempted killing of Russian anti-corruption activist Alexei Navalny (with the Special Rapporteur for freedom of expression); and an allegation letter on the murders of French journalists Ghislaine Dupont and Claude Verlon.

V. Application of a gender lens to the mandate

18. From the outset, the Special Rapporteur analysed her mandate through a "gender lens", seeking to question the ways in which dominant understandings of the right not to be arbitrarily deprived of life may negate and even render invisible the experiences of certain people, in particular women and lesbian, gay, bisexual, transgender and intersex persons.

19. As the Human Rights Committee has noted in its general comment No. 36 (2018), the right to life is a right that should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions intended or that may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity. Article 6 of the International Covenant on Civil and Political Rights guarantees this right for all human beings, without distinction of any kind, including for persons suspected or convicted of even the most serious crimes.

20. The Special Rapporteur's predecessors have found that States' failure to address systematic patterns of violence through due diligence leads to violations of the right to life, as does the absence of accountability when such violence occurs. Once a pattern of violence

becomes clear, and if the response of the Government is inadequate, State responsibility under international human rights law becomes applicable.¹⁵

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

(a) The definition of arbitrariness. Having analysed the characteristics usually attributed to "arbitrariness" – namely, that an arbitrary fact or act is inappropriate, unjust and unpredictable;¹⁶ unreasonable, unnecessary and disproportionate;¹⁷ and outside the framework of due process of law¹⁸ – the Special Rapporteur has found that arbitrariness may also be inferred from laws and practices that violate the principle of non-discrimination, both procedurally and substantively;

(b) Intention and arbitrary killing. The Special Rapporteur has pointed out that the "deliberate intent" of a State is not required for a killing or a deprivation of life to be deemed arbitrary. Killings in circumstances of unnecessary or disproportionately excessive use of force by the police, for example, are likely to be arbitrary, even if the police in question did not kill intentionally;

(c) The standard of due diligence. The Special Rapporteur has emphasized that any assessment of who is responsible for preventing arbitrary and unlawful gender-based killings must include an assessment of how much the State knew or should have known, the risks or likelihood of harm and the seriousness of the harm;

(d) The positive obligation on States to protect the right to life and prevent arbitrary killings. Given the sanctity of human life and thus the importance of protecting it, the Special Rapporteur has noted that the positive obligations on States impose a high burden on them, as they should demonstrate effectiveness (*vis-à-vis* efforts to prevent, investigate, punish and remedy), non-discrimination in State efforts and firm legal protection.

A. Unlawful gender-based death

22. The Special Rapporteur has reiterated the finding of the Human Rights Council that States are responsible for doing more than not kill and more than preventing murder. State responsibility concerns not only intentional acts of deprivation of life (murder) by a State or a non-State actor, but also the deprivation of basic conditions that guarantee life, such as access to food and health care. State responsibility for violations of the right to life is also engaged through acts of omission, in other words when a State knew or should have known but failed to take action to prevent deaths. Courts too have suggested that reckless negligence should be evaluated with reference to intrinsic and systemic discrimination, such as that based on gender, race or class, among other forms of discrimination.

23. The Special Rapporteur has highlighted the indivisibility of human rights, particularly where endemic economic and social deprivation leads to preventable mortality.

B. Respecting and protecting the right to life: areas of overlap

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

¹⁵ E/CN.4/2005/7, para. 72.

¹⁶ Human Rights Committee, *Van Alphen v. the Netherlands* (CCPR/C/39/D/305/1988), para. 5.8.

¹⁷ African Commission on Human and Peoples' Rights, general comment No. 3, para. 12.

¹⁸ *Ibid.* See also *Gorji-Dinka v. Cameroon* (CCPR/C/83/D/1134/2002), para. 5.1.

abortions and the number of deaths resulting from it. Yet, some still choose to impose prohibitive policies.

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

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

26. Several troubling developments over the course of her mandate have prompted the Special Rapporteur to analyse how the State's obligation to protect human rights overlaps with its obligation to respect human rights, for example in cases involving the unlawful deaths of refugees and migrants and the criminalization of life-saving actions and organizations.

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

28. The Special Rapporteur has found that there are substantial grounds to conclude that the deaths of migrants along migration routes constitute arbitrary deaths engaging State responsibility. Militarization has made excessive use of force more likely, transforming migrants into "the enemy" and suggesting to State agents that they are dealing with them as soldiers deal with enemy combatants, rather than acting as police officers whose deployment of force is restricted by law.

29. States are allowing, and sometimes encouraging, tactics on land and at sea to repel or scatter migrants, tactics that purposefully put migrants' lives at risk. In some instances, the dangers are from natural elements, such as when officials push rubber dinghies back out to sea. In others, migrants have been deliberately placed in areas where gangs and dangerous individuals are known to prey on migrants. The State bears responsibility under international law for any deaths or injuries that may occur in these circumstances, even if the deaths are caused by such gangs. State officers themselves may potentially be culpable of murder.¹⁹

30. Some States have adopted a policy of extraterritoriality aimed at avoiding legal responsibility by placing the onus on other States to keep migrants out. However, Governments in countries of destination that fund Governments in countries of origin or transit to arrest, detain or return migrants may bear responsibility for aiding and abetting violations of the right to life, especially given that the egregious practices of some funded States are well known. Governments in countries of destination cannot feign ignorance to escape responsibility.²⁰

31. State restrictions on necessary goods and services, such as medical care, water and shelter, violate the prohibition against arbitrary deprivation of life and may result in arbitrary killings involving State responsibility. An essential corollary is that States that are unwilling

¹⁹ A/72/335, paras. 25–35.

²⁰ Ibid., paras. 36–40.

or unable to provide those goods or services must agree to and facilitate humanitarian actors to do so and cannot lawfully impede them.

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

33. States that criminalize essential humanitarian services in the name of immigration control are thus failing to respect and protect the right to life. Yet, States are even criminalizing families helping other family members, whereas the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, exempted humanitarian acts to protect migrant’s rights.

34. States must uphold their obligation to exempt humanitarian aid from counter-terrorism restrictions, including in respect of allowing medical aid to be provided to members of armed groups. A fundamental norm of international humanitarian law is the impartial provision of medical care to all wounded and sick, including enemy combatants and populations under their control. That bedrock principle is violated.²¹ Humanitarian aid must be allowed to flow freely and unencumbered.

VII. Functional approach to the extraterritorial obligations to respect and protect against arbitrary killings and unlawful death

35. The Special Rapporteur has elaborated on States’ extraterritorial obligations with regard to the right to life on numerous occasions, including in the context of extraterritorial use of force and in respect of the responsibilities to protect, prevent and investigate.

36. Under international human rights law, States may assume extraterritorial jurisdiction in a number of circumstances, including in cases involving detention overseas,²² the use of force by State agents abroad,²³ the use of force by consular and diplomatic agents abroad and the exercise of law enforcement and other legislative and administrative powers, including for the issuance of passports.

37. The Special Rapporteur has adopted a functional approach to extraterritorial jurisdiction, building on the conclusions reached by the Human Rights Committee in its general comment No. 36 (2018) and by the European Court of Human Rights.

38. In its general comment No. 36 (2018), the Human Rights Committee affirmed that a State may exercise control over a person’s rights by carrying out activities that affect them in a direct and reasonably foreseeable manner.²⁴ The extent of the State’s control over the applicant²⁵ – or over some of their rights – is a consistent theme in cases before the European Court of Human Rights and other bodies. For instance, in the context of armed forces

²¹ [A/73/314](#), para. 33.

²² See, e.g., European Court of Human Rights, *Al-Skeini and others v. United Kingdom*, Application No. 55721/07, Judgment, 7 July 2011.

²³ See, e.g., European Court of Human Rights, *Isaak v. Turkey*, Application No. 44587/98, Judgment, 28 September 2006; and *Andreou v. Turkey*, Application No. 45653/99, Admissibility Decision, 3 June 2008.

²⁴ Human Rights Committee, general comment No. 36 (2018), para. 63.

²⁵ Human Rights Committee: *Lopez Burgos v. Uruguay* ([CCPR/C/13/D/52/1979](#)), para. 12.3. See also Inter-American Commission on Human Rights, *Coard et al. v. United States*, Report No. 109/99, Case 10.951, 29 September 1999, para. 37; and *Alejandro Jr. et al. v. Cuba*, Report No. 86/99, Case 11.589, 29 September 1999, para. 25.

operating outside a State's national territory, the Court recognizes that acts of a State that affect the rights protected under the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) of an individual outside that State's national territory, may fall under the jurisdiction of the Court even when the person is not in the custody of the State, provided that the violations flow directly from the State's acts.²⁶

39. The Special Rapporteur has applied this approach in cases when a State has the capacity to protect the right to life against an immediate or foreseeable threat.²⁷ She did so in relation to the unlawful death of refugees and migrants, consular assistance and the State duty to warn, among others.

40. For instance, in her work with the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on foreign nationals in camps in the northern Syrian Arab Republic, she found that States may have jurisdiction over their nationals in camps abroad because their actions directly influence their right to life, and only the State may have the capacity to protect them against foreseeable harms, including torture, enforced disappearance and death.²⁸

41. In her work on the unlawful death of refugees and migrants, she found that States have assumed functional jurisdiction over seas such as the Mediterranean. By assuming jurisdiction for the purposes of security, States have simultaneously assumed responsibility for taking measures to preserve lives.²⁹

VIII. Unlawful killings in the context of armed conflict

42. During the past five years, the Special Rapporteur has also witnessed a multitude of efforts to forcibly gain extraterritorial jurisdiction in the name of the war on terror or for other reasons. These were mostly in violation of international law and resulted in low-intensity, drawn-out conflicts without clear geographical or temporal boundaries that have increasingly blurred the distinction between war and peace and caused many civilian casualties.

43. The technological prowess of the "second drone age" has enabled this substantial increase in the extraterritorial use of force. The legal and ideological distortions on which they are founded have led to the targeted killing of a State actor in another State and brought "the signature technique of the so-called 'war on terror' ... into the context of inter-state relations".³⁰

44. This focus on drones was also prompted by the reality that drones are a "gateway" technology that open the door to emergent weaponized artificial intelligence, algorithmic and robotic warfare, drone swarms and an overall loosening of human control over the deployment of lethal force. Indeed, today's armed drones are tomorrow's killer robots.³¹

45. The past five years have seen an intensification of the deliberate targeting of civilians and civilian objects, such as schools and hospitals, in Libya, the Syrian Arab Republic and Yemen, for instance, manifesting a tragic erosion of adherence to humanitarian principles.³²

²⁶ *Andreou v. Turkey*.

²⁷ European Court of Human Rights, *Osman v. United Kingdom*, Application No. 23452/94, 28 October 1998, paras. 32–33.

²⁸ [A/74/318](#).

²⁹ [A/72/335](#), para. 64.

³⁰ See www.justsecurity.org/67937/soleimani-strike-marks-a-novel-shift-in-targeted-killing-dangerous-to-the-global-order/.

³¹ James Rogers, Assistant Professor in War Studies, Centre for War Studies, University of Southern Denmark, personal communication, March 2021.

³² When the vast majority of casualties in wars are civilians, it is clear that the principles of distinction, proportionality, necessity and precaution are being disregarded on a large scale ([S/2019/373](#)). It has been estimated that 85 per cent of war casualties are civilians.

A. Mandate holder's work on armed conflict

46. There is a long history of interplay between the mandate of the Special Rapporteur, international humanitarian law and armed conflict. From the outset, the mandate has addressed killings in the context of hostilities. In particular, mandate holders have tackled the following aspects:

(a) Special Rapporteur Amos Wako observed that summary and arbitrary executions frequently occurred during armed conflicts, making international humanitarian law an important element of the mandate's legal framework;

(b) Special Rapporteur Bacre Waly Ndiaye worked on the genocide in Rwanda and investigated mass graves in Croatia;

(c) Special Rapporteur Asma Jahangir focused on massacres in the Democratic Republic of the Congo and on the conflict in Kosovo;³³

(d) Special Rapporteur Philip Alston focused on targeted killings using drones in Afghanistan and Colombia, among other locations;

(e) Special Rapporteur Christof Heyns put the issue of autonomous weapons squarely on the international agenda.

47. The main resolutions that define the mandate include several references to armed conflict and killings in the context of armed conflict. In recent years, the General Assembly has referred explicitly to international humanitarian law and urged Governments to take all necessary and possible measures, in conformity with international human rights law and international humanitarian law, to prevent loss of life during armed conflicts.³⁴

48. Normatively, this has led the mandate holders to consider the interaction between international human rights and humanitarian law. Over time, and in response to specific incidents or legal developments, other legal regimes have also been included: the first being related to self-defence and the implementation of the prohibition set out in the Charter of the United Nations of the use of force; the second being the so-called international counter-terrorism legal regime, which has had a great impact on both international human rights law and international humanitarian law.

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

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

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

³³ References to Kosovo shall be understood to be in the context of Security Council resolution 1244 (1999).

³⁴ See resolutions 59/197, 61/173 and 63/182.

B. Reaffirming the centrality of international human rights law in contemporary conflicts

1. Implications of the use of extraterritorial lethal force

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

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

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

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

2. No legal regime hierarchy or superiority

56. The Special Rapporteur has sought to address conflicts of norms and of assessments between international human rights law and international humanitarian law. She rejects the *lex specialis* approach, arguing, along with other experts,³⁵ that the notion of a legal regime’s superiority is not supported by rules governing the relationship between different legal regimes in international or domestic law, that there is little State practice or *opinio juris* supporting the theory and that the International Court of Justice has determined that “both branches of international law, namely, international human rights law and international humanitarian law, would have to be taken into consideration”.³⁶

57. She has emphasized that many contemporary international and non-international conflicts occur on sporadic, unpredictable front lines, often leaving large areas of a country or region with little to no exposure to the active or ongoing exchange of fire. In those situations, she suggests, unlawful deaths ought to be assessed through a systemic integration approach³⁷ derived from article 31 (3) (c) of the Vienna Convention on the Law of Treaties and applied by the International Court of Justice in the *Oil Platforms* case.³⁸ Under that approach, treaty obligations are interpreted by reference to their full normative environment, with separate treaties’ provisions connected and one treaty interpreted by reference to another. This requires a consideration of the purpose of the laws, alongside contextual and situational analyses of the cases at hand.

3. Human rights obligations of armed groups

58. The Special Rapporteur has also suggested that the legal frameworks traditionally applied to armed groups – international humanitarian law, international criminal law and

³⁵ Marko Milanovic, “The lost origins of *lex specialis*: rethinking the relationship between human rights and international humanitarian law”, in *Theoretical Boundaries of Armed Conflict and Human Rights* (New York, Cambridge University Press, 2016), Jens David Ohlin, ed.

³⁶ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168, at para. 216.

³⁷ See www.tandfonline.com/doi/abs/10.1080/18918131.2017.1353213?journalCode=rnh20.

³⁸ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, p. 161.

international instruments in the area of counter-terrorism – fail to consider the control exercised by armed groups and the extent of their governance-like functions. She submits that those functions are best addressed through international human rights law. Tracing armed groups’ legal personality and their human rights obligations to treaty and customary law, she has offered a framework to hold armed groups accountable. Building on legal and sociological scholarship, she has highlighted the following:

(a) Territorial control. Empirical accounts point to the shifting, elusive nature of territory in the context of conflicts, highlighting the need for a nuanced approach.³⁹ In situations where an armed non-State actor does not control territory, it remains bound by customary international human rights law by virtue of its functionality and provided it meets the organizational requirement.⁴⁰ The multiplication of cyberattacks against public, military and civilian targets underscores the need for a nuanced approach, in both international and non-international armed conflict;

(b) Organization as governance. While international law and scholarship have largely defined the concept of organization in military-like terms,⁴¹ the Special Rapporteur has recommended that it be approached through a focus on armed non-State actors’ governance functions. She points to the vast empirical evidence concluding that rebel groups⁴² and criminal organizations⁴³ may govern through lawlessness, uncertainty and fear, but may also promulgate and implement rules, introduce dispute-resolution mechanisms and carry out quasi-law enforcement functions.⁴⁴ The evidence shows that the ability of armed groups to establish and maintain control is largely grounded in their capacity either to outperform the State or to impose their own governance systems and elicit civilian collaboration. At a normative level, this confirms the importance of applying international human rights law to armed non-State actors, in non-international armed conflicts and in situations of unconventional violence. It also underscores the need to better understand armed non-State actors’ governance and to develop indicators aimed at improving human rights protection, fostering engagement and ensuring accountability in such settings;

(c) A graduated approach to obligations. The Special Rapporteur has recommended that the application of human rights obligations to armed non-State actors be context-dependent, specific to each group and undertaken in a graduated manner through a review of interlinked indicators that take into consideration the nature and extent of armed non-State actors’ control, the level of their governance and consequently the extent of their capacity.

59. She has also identified obligations that should be binding on armed groups: (a) the principle of non-discrimination; (b) the prohibition against arbitrary deprivation of life; and (c) the prohibition against withholding access to international assistance, along with the obligation to take all reasonable steps to protect and ensure access to humanitarian aid and other services, particularly to vulnerable groups, without discrimination.⁴⁵

³⁹ In accordance with the jurisprudence on crimes against humanity, armed non-State actors must demonstrate that they have the capacity to carry out an attack of the scale required by article 7 of the Rome Statute of the International Criminal Court (International Criminal Court, *The Prosecutor v. Germain Katanga*, Case ICC-01/04-01/07, Judgement pursuant to article 74 of the Statute, 7 March 2014, para. 1119; Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press, 2017), chap. 10.

⁴⁰ Fortin, *The Accountability of Armed Groups under Human Rights Law*, pp. 382–385.

⁴¹ Indicators include the existence of a command structure, the modes of communication used, whether military training is provided, the existence of external relations, the ability to control territory and the ability to procure.

⁴² Zachariah Mampilly, *Rebel Rulers: Insurgent Governance and Civilian Life during War* (Cornell University Press, 2011); Ana Arjona, Nelson Kasfir and Zachariah Mampilly, eds., *Rebel Governance in Civil War* (Cambridge University Press, 2015).

⁴³ Enrique Desmond Arias, *Criminal Enterprises and Governance in Latin America and the Caribbean* (Cambridge University Press, 2017); Kent Eaton, “The downside of decentralization: armed clientelism in Colombia”, *Security Studies*, vol. 15, No. 4 (2006), pp. 533–562; Angélica Durán-Martínez, “To kill and tell? State power, criminal competition and drug violence”, *Journal of Conflict Resolution*, vol. 59, No. 8 (2015), pp. 1377–1402.

⁴⁴ Fortin, *The Accountability of Armed Groups under Human Rights Law*, p. 362.

⁴⁵ S/PRST/2014/3.

IX. Responding to killings by the police

60. During her tenure, the Special Rapporteur has recorded a staggering number of killings by the police or other security forces globally, many in three archetypical situations, namely, in the context of so-called wars on drugs or anti-gang and anti-criminal activities; in the context of violence and killings by the police against minorities; and in the context of demonstrations.

61. Having observed that most police killings have occurred in the context of so-called wars on drugs or anti-gang and anti-criminal activities, the Special Rapporteur has issued dozens of allegation letters and urgent actions concerning the unlawful killings of residents of impoverished communities, including in Brazil,⁴⁶ Nigeria,⁴⁷ the Philippines⁴⁸ and Venezuela (Bolivarian Republic of).⁴⁹ She has highlighted *modi operandi* that indicate violations of the principles of proportionality, necessity and/or precaution and the role of government leaders in inciting or justifying these numerous killings. Their repeated and systemic nature have led her to conclude that such police killings amount to a form of social cleansing. During the later years of her mandate, she noted a troubling escalation in killings by security forces targeting perceived political opponents *en masse*, as well as lawyers and civil society members critical of the official position on police violence. Nowhere was this more clearly exhibited than in the Philippines.

62. A related focus has been on the disproportionate effect of police violence and killings on minorities (e.g., people of African descent and indigenous groups). The killing in 2020 of George Floyd in the United States of America galvanized the global movement against racism in policing. The Special Rapporteur notes that, during the past decade, it is precisely those communities and individuals within them that have been specifically targeted through various “wars” – on drugs, on crime and on “terrorism”. She believes that effective responses require a historical and all-encompassing reframing of policing, placing it within the larger public policy context and linking it firmly to a commensurate investment in social and economic policies, including on education and mental and physical health.

63. The coronavirus disease (COVID-19) pandemic has exacerbated social and economic inequalities, leading millions of people falling into poverty and extreme poverty. Unless urgent action is taken to address the impacts of the pandemic, the Special Rapporteur fears that the years ahead will bear witness to another type of epidemic: police killings on a scale not seen before.

64. During the later years of her mandate, demonstrations in Belarus, Iraq, Israel and the United States, as well as Hong Kong, China, were met with a use of force that led to a staggering loss of life. Drawing on the normative standards laid out by a predecessor,⁵⁰ the Special Rapporteur has pointed out that the excessive use of force against demonstrators is very rarely effectively investigated and that accountability thus remains rare, as do needed reforms in police preparedness and techniques. She has called for far more stringent measures to be taken to regulate the use of so-called non-lethal weapons.⁵¹

X. Death penalty

65. The death penalty is an important focus of the mandate and mandate holders have frequently addressed urgent action letters to States that impose the death penalty, in violation of article 6 (2) of the International Covenant on Civil and Political Rights.

66. The Special Rapporteur has reiterated the positions of her predecessors, namely, that the death penalty can be imposed only in situations of intentional killing, that international

⁴⁶ See, e.g., AL BRA 9/2019 and AL BRA 10/2018.

⁴⁷ See, e.g., AL NGA 6/2020, AL NGA 5/2020 and AL NGA 5/2019.

⁴⁸ See, e.g., AL PHL 2/2020, AL PHL 4/2019, AL PHL 10/2018 and AL PHL 9/2018.

⁴⁹ See, e.g., AL VEN 9/2020 and AL VEN 2/2019.

⁵⁰ [A/HRC/17/28](#) and [A/HRC/31/66](#).

⁵¹ AL USA 31/2020. See also

www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26805&LangID=E.

law requires the progressive abolition of the death penalty and that the death penalty may constitute torture or other cruel, inhuman and degrading treatment, which is prohibited by article 7 of the International Covenant on Civil and Political Rights and violates the right to dignity.⁵²

67. She has referred to the emerging international customary norm prohibiting the death penalty as a form of cruel, inhuman and degrading punishment and viewing it as cruelty that goes beyond the execution itself. The “death row phenomenon” explains how prisoners on death row may experience severe mental trauma and physical deterioration that may amount to cruel, inhuman or degrading treatment, or even torture. The Human Rights Committee has observed that:

Extreme delays in the implementation of a death penalty sentence that exceed any reasonable period of time necessary to exhaust all legal remedies may also entail the violation of article 7 of the Covenant, especially when the long time on death row exposes sentenced persons to harsh or stressful conditions ... and when sentenced persons are particularly vulnerable due to factors such as age, health or mental state.⁵³

68. The Special Rapporteur has also emphasized that, although the Covenant permits retentionist States to continue to apply the death penalty, albeit within stringent parameters, that should not be construed as a justification for depriving the life of individuals, even if they have been lawfully sentenced to death, nor does it make the execution of a death sentence strictly speaking legal. In other words, the death penalty violates the right to life protected under article 6 of Covenant and amounts to cruel, inhuman or degrading treatment under article 7.⁵⁴

A. Women on death row

69. The Special Rapporteur has sought to strengthen a more gender-balanced perspective on the death penalty. Women and girls constitute a minority on death row and, as a result, are often invisible. Their plight and needs are often ignored, as are the specific circumstances that have brought them there, which very often include multiple human rights violations stemming from gender-based discrimination and poverty. Most women on death row come from backgrounds of severe socioeconomic deprivation; many are illiterate. In some countries, the vast majority are migrants or foreign nationals. Some may be on death row for drug-related crimes – e.g., for having acted as drug “mules” – but such crimes do not meet the threshold of gravity required under international law for a death sentence to be lawful. Most girls on death row are there for the killing of an authority figure in the context of child marriage and/or gender-based violence, even though the execution of any one for offences committed when they were below the age of 18 years is strictly prohibited by international law.

B. Consular assistance

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

71. The Special Rapporteur has argued that the right to receive consular assistance comprises the obligation of the detaining State to inform foreign detainees of their right to

⁵² See [A/67/279](#), para. 36.

⁵³ General comment No. 36 (2018), para. 40.

⁵⁴ United Kingdom of Great Britain and Northern Ireland, Supreme Court, *Elgizouli (Appellant) v. Secretary of State for the Home Department (Respondent)*, Case UKSC 2019/0057, Judgment, 25 March 2020.

consular assistance and the obligation of the home State to provide their detained nationals with adequate consular assistance. A State's responsibility to protect may be invoked extraterritorially in circumstances where that State has the capacity to protect a person's right to life against an immediate or foreseeable threat. The home State may have jurisdiction over their nationals detained abroad, in that it directly influences the exercise of their right to life. She has demonstrated, through an in-depth examination of *opinio juris* and State practices, that the provision of consular assistance by the home State may correspond to an emerging customary international norm.

72. She has produced guidelines aimed at helping States to better provide consular assistance to their nationals on death row but that can also be applied to all detained nationals, irrespective of the charge against them.⁵⁵

C. Death row and "terrorism" crimes

73. The Special Rapporteur's work on the death penalty has also been focused on ill-defined "terrorist actions", the expansion of the scope of offences punishable by death and the resumption of executions for terrorism-related offences after years of moratoriums in executions. She has denounced the vagueness of antiterrorism laws and broad definitions of terrorism-related offences that include the death penalty for non-violent acts or acts that do not constitute the "most serious crimes" (intentional killings). Similarly, the establishment, organization or management of a "terrorist" group may be punishable by death in some States, even when no intentional killings have been perpetrated or ordered.

74. The Special Rapporteur has also focused on the withdrawal of consular assistance to nationals detained abroad on terrorism charges and argued that States parties to the International Covenant on Civil and Political Rights that withhold consular protection from an individual on the grounds of their purported crime would violate the State's obligations to protect the right to life and uphold the prohibition against discrimination.

75. Even stoutly abolitionist States have tolerated the use of capital punishment against their nationals, in contravention of their legal obligations and moral positions. They have seemingly engaged in death penalty by proxy, subcontracting its application against nationals whom they deem unworthy of protection. That is tantamount to importing the brutality of the death penalty and to normalizing its inequality, arbitrariness and cruelty. Human rights are inherent to human beings, not earned. They cannot be arbitrarily cancelled, no matter how repugnant the crime. Where a State has committed to uphold the prohibition against the death penalty, it must do so universally, including extraterritorially for their nationals abroad.

XI. Last rites and human rights

76. Notoriety trails this mandate in multiple ways and perhaps most infamously in respect of the beginning and end of life. During her tenure, the Special Rapporteur has probed a neglected dimension, namely, human rights at the time of death: until when should the right to life be upheld and under which conditions?

77. She has stressed that human rights obligations extend beyond life and into death to encompass the dignity of human remains and the rights of loved ones to mourn in dignity. The last of our human rights include those linked to last rites.⁵⁶

78. In the context of mass graves, she has brought the applicable legal standards together to set out a human rights framework for the respectful and lawful handling of such graves. She has noted States' obligations on the respectful treatment of human remains, on the identification and preservation of evidence about the cause of death, on respectful memorialization and on the active participation of families and communities. She has urged the international community to step up its support for countries and communities where mass graves are located and urged for greater respect for the diversity of the claims to such sites,

⁵⁵ A/74/318.

⁵⁶ A/72/335 and A/75/384.

for attention to be paid to the local context and for recognition that rights and obligations can help strike a fair balance among competing interests.

XII. New international tools for a world of tensions

79. Throughout her mandate, the Special Rapporteur has sought to recommend policies and instruments appropriate for an increasingly tense world, as evident at many levels, including in policies of securitization and militarization but also in the normative realm. Her recommendations are set out below.

A. Politically motivated killings

80. The Special Rapporteur views the present era as reminiscent of the cold war. A new age of politically motivated killings is emerging, with State and non-State actors increasingly choosing extrajudicial killings as a means to silence critics and political opponents.

81. She points to the presence of new weapons, such as microwave or acoustic weapons, designed to cause high levels of physical distress, memory loss, mental stupor, hearing problems and headaches,⁵⁷ and calls upon the United Nations to equip itself with the means and instruments to effectively respond to these developments and to targeted violations against specific individuals.

82. She notes that, while the international community has been fairly responsive to situations of “massive human rights violations”, it has largely failed to respond to crimes against individuals. Yet, these are often early warnings of much worse to come. She recommends the establishment of a standing investigatory and accountability mechanism composed of independent international experts in investigations and prosecutions, as well as of the special procedures of the Human Rights Council and members of the human rights treaty bodies: (a) to investigate, in accordance with national and international criminal law standards, allegations of targeted killings or disappearances; (b) to facilitate strengthened judicial accountability, including by identifying possible avenues for the administration of justice at the national, regional and international levels; (c) to prepare files to facilitate and expedite fair and independent criminal proceedings in accordance with national, regional and international law standards, in courts or tribunals that have, or may have in the future, jurisdiction over the crimes being investigated; and (d) to identify other mechanisms involved in delivering justice and ending impunity, including at the political and diplomatic levels.

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

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

⁵⁷ James Rogers, Assistant Professor in War Studies, Centre for War Studies, University of Southern Denmark, personal communication, March 2021.

B. Drone technology control regime

85. The Special Rapporteur strongly emphasizes the threat posed by the absence of a meaningful drones regime given the renewed armaments race and rapid development of weapons triggered by artificial intelligence. Swarms of thousands of pre-programmed drones, each with a set role, are paving the way for a new generation of weapons of mass destruction, not the least because of their inherent inability to differentiate between military and civilian targets. Weaponized drones that pick their own target if they lose signal contact with central control already exist. Lethal autonomous weapons systems raise grave questions about meaningful human control. The latest generation of armed drones are capable of automated flight, meaning one team of drone pilots and sensor operators can, in theory, supervise, although not directly control, multiple drone systems at the same time. In combination with problematic facial recognition technology, such weapons can track down and kill high-profile individuals without a single human being involved. Talks on the imposition of controls on lethal autonomous weapons systems have stalled since November 2020, when parties to the Convention on Certain Conventional Weapons failed to agree on the 2021 programme of work, yet the need for renewed multilateral dialogue is urgent.⁵⁸

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

C. Justice for victims of armed non-State actors

87. The Special Rapporteur has examined arbitrary killings by armed non-State actors, including armed groups and criminal cartels, and denounced the lack of justice for the victims of such groups, particularly where they are characterized as “terrorists” by States or in a United Nations resolution. She has recommended that the international community or individual States establish, possibly on a trial basis initially, trust funds to provide remedies and reparations to victims. These funds could be constituted from finances collected through sanctions imposed on the leaders of armed non-State actors responsible for human rights violations, including arbitrary killings. In the context of her work on violations committed in Iraq and the Syrian Arab Republic by Islamic State in Iraq and the Levant (ISIL), the Special Rapporteur has noted that Member States have an obligation to freeze the assets of individuals and entities supporting ISIL.⁵⁹ The Special Rapporteur supports calls for Member States to proactively publish the figures of the frozen assets that they hold and for these assets be held strictly for the purpose of covering the costs of reparations to victims of the armed group.

88. Where possible, the universal jurisdiction principle should be applied to investigating violations, including arbitrary killings, of international criminal law and international human rights law by individual members of armed non-State actors, and to trying those responsible.

89. The Special Rapporteur has also called upon States to repatriate foreign fighters currently held by Kurdish forces in north-eastern Syrian Arab Republic to their countries of citizenship for the purposes of investigating their possible involvement in violations of

⁵⁸ James Rogers, Assistant Professor in War Studies, Centre for War Studies, University of Southern Denmark, personal communication, March 2021.

⁵⁹ Security Council resolution 2253 (2015).

international human rights law, international humanitarian law and criminal law and of trying them in accordance with domestic law.

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

D. Truth and justice for refugees and migrants

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

E. Effective and principled management of mass graves

92. In view of the vast numbers of mass graves globally, some of which may hold thousands of bodies, the Special Rapporteur has called upon the international community to prioritize the effective and principled management of mass graves. She has recommended legal frameworks to govern such management, including for the identification, preservation and investigation of mass graves over time and for their protection, as well as the establishment of a legal entity or legal guardianship body comprising representatives of the authorities, families and communities concerned and of United Nations agencies.

F. Protecting civilian airspace

93. The Special Rapporteur's investigation into the strike on Ukraine International Airlines flight 752 highlighted the insufficiencies of existing international conventions on air safety when dealing with military actions against civilian planes. Building upon the findings of the Dutch Safety Board's investigation into the downing of Malaysia Airlines flight 17, the Special Rapporteur too found that the international system for civilian air safety is not fit for purpose and ought to be urgently optimized to effectively address air safety in conflict zones. Indeed, a complete overhaul ought to be on the agenda.

94. She has called for the establishment of a body independent of both States and airlines to monitor air safety in relation to conflicts and to compile and disseminate transparently information about risks to civil aviation related to flying over conflict zones. She has urged the international community to develop clear, explicit and unambiguous standards on when States should close airspace under their jurisdiction. She has called upon airlines to make information on flight paths available to the public and strengthen their capacity for risk assessment, including by following the highest standards and checking all information sources when planning flight routes.⁶⁰

G. COVID-19-related arbitrary deprivation of life

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

⁶⁰ See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26782&LangID=E.

96. With regard to States' obligations regarding imprisonment during the COVID-19 pandemic, the Special Rapporteur has recalled that:

(a) Whenever States take an individual into their custody, they have the responsibility to care for the life and bodily integrity of that person. In these circumstances, deaths resulting from the denial of such essentials to life as adequate space, proper ventilation or adequate medical care are arbitrary deaths for which States are responsible;

(b) States must ensure that prisoners and other detainees have access to health services available in the country without discrimination. It is important to understand that States cannot invoke the lack of financial resources or other logistical problems to reduce or dodge this responsibility;

(c) States should release all prisoners whose incarceration is illegal or arbitrary, reduce the overall size of the prison population, consider alternatives to pretrial detention and consider for immediate release persons detained for misdemeanours and low-level crimes, with conditions attached as required.⁶¹

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

98. The Special Rapporteur has recalled that derogations from provisions guaranteeing freedom of movement, including curfews, are permitted under international law provided they meet the requirements of legality, necessity and proportionality. On their own, however, derogations should not constitute grounds for the use of force by the police and certainly not for the use of lethal force.

99. For millions of people, policies such as curfews can be more direct threats to their dignity and well-being than COVID-19. The Special Rapporteur has pointed out that there are other ways to police than through the application of force first. Community discussion, consultation and engagement should be the operating principles for the police as well. It is what international law demands and what protection of human rights in a pandemic requires.

100. She has also recommended that, for the purposes of non-recurrence and accountability, as well as to help avoid and prevent the governance and institutional failings that the pandemic has revealed, the causes and consequences of the pandemic must be fully and completely captured. She has called for a multidisciplinary, multisectoral and comparative human rights-based assessment of the international community's response to the pandemic. This independent, impartial and objective effort should be steered by a multidisciplinary, multi-stakeholder international group that could commission specific studies to review the range of institutional, legal and policy implications.⁶²

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

⁶¹ See

[www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25912&LangID=E#:~:text=GE NEVA%20\(29%20May%202020\)%20%20E2%80%93,States%20Government%20to%20act%20now.](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25912&LangID=E#:~:text=GE%20NEVA%20(29%20May%202020)%20%20E2%80%93,States%20Government%20to%20act%20now.)

⁶² Additional details on the possible scope of these studies are available from www.ohchr.org/EN/Issues/Executions/Pages/HumanRightsDispatches.aspx.

XIII. Conclusion

102. During the decades of its existence, the mandate has addressed many issues, each mandate holder strengthening the mandate's impact and relevance by making specific contributions in response to contextual demands. The five years of this Special Rapporteur's tenure saw a marked deterioration in human rights around the world, including those related to the right to life. That period culminated in the COVID-19 pandemic, which has laid bare structural and systemic inequalities and injustices and has disproportionately affected the most impoverished and led to the deaths of 3 million people. The world has also witnessed heightened political, military and trade tensions, an increase in the targeting of human rights defenders, dissidents and journalists both within and outside countries and a resurgence of conflicts as access to a multiplicity of military-grade weapons has expanded. Over this same period, the ideals of human rights have been undermined and the international normative system upheld by the treaty bodies and the special procedures has been starved of resources.

103. In this context, the Special Rapporteur recalls the warning issued in 1949, in the aftermath of the Second World War and the Holocaust, that evil progresses cunningly: a minority operates to remove the levers of control; freedoms are suppressed, one by one, in one sphere after another; public opinion and conscience are asphyxiated; all of which leads far, even unto the crematorium's oven. Against such evil, even if today's brand of evil might seem more banal, alarm must be sounded to all nations. And for that, "a conscience must exist somewhere".⁶³

104. That "somewhere" must include the Human Rights Council. It is the duty of the special procedures and the treaty bodies to empower and equip that conscience: to warn the Council of current and looming perils; to defend and help strengthen human rights guarantees; and to demand that States respect their obligations. At times, the performance of these responsibilities makes for difficult debates and arduous journeys. But the alternatives are silence, fear and threats.

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

XIV. Recommendation

106. The sponsors of the mandate and Member States should situate the mandate squarely within article 6 of the International Covenant on Civil and Political Rights by renaming it "Special Rapporteur on the arbitrary deprivation of life", "Special Rapporteur on unlawful killings and deaths" or "Special Rapporteur on the right to life".

⁶³ Pierre-Henri Teitgen, address to the Consultative Assembly of the Council of Europe in September 1949, as cited in Frank Emmert and Chandler Piché Carney, "The European Union Charter of Fundamental Rights vs. the Council of Europe Convention on Human Rights and Fundamental Freedoms – A Comparison", *Fordham International Law Journal*, vol. 40, No. 4 (2017).

Annex

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

Introduction

“All efforts to prevent, treat and contain COVID-19 must be based on the bedrock human-rights based principles of international solidarity, cooperation and assistance. There is no room for nationalism or profitability in decision-making about access to vaccines, essential tests and treatments, and all other medical goods, services and supplies that are at the heart of the right to the highest attainable standard of health for all.”¹

1. The therapeutics and vaccines developed to combat COVID-19 are the product of a massive public and private collaboration. Governments around the world have provided significant funding, and many of the products developed have been built upon earlier work, also often funded at least partially by public sources.² Private citizens throughout the world have volunteered for clinical trials in significant numbers. Regulatory procedures have been streamlined. Private firms have likewise devoted their resources to the work. As a result, vaccines have been and are still being developed at record speed, and work on therapeutics continues. Yet, this progress threatens to be undone by the extensive control ceded by governments to private companies in the manufacture and distribution of these products. Intellectual property rights are important to innovation, and companies are entitled to remuneration, but in the context of a global pandemic, with above 3 millions of deaths already, profits and private control may not now take precedence.

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

I. Background

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

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

¹ Statement by UN Human Rights Experts, “Universal Access to Vaccines is Essential for Prevention and Containment of COVID-19 around the World,” November 9, 2020

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

² It has been reported that public funding for COVID-19 vaccine development has been on the order of \$18 billion. I.T. Katz, R. Weintraub, L. Bekker, and A.M. Brandt, “From Vaccine Nationalism to Vaccine Equity – Finding a Path Forward,” *New England J. Med.* April 3, 2021.

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

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

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

manufacturing supply, regulations, funding available and final contract terms⁴. COVAX will distribute vaccine equitably, proportional to population, “initially prioritising healthcare workers then expanding to cover 20% of their population”.⁵ Yet these ambitious plans, even if successful, appear still to leave developing countries well behind wealthy nations in the proportion of their population vaccinated. The announcement that the United States will join COVAX is a welcome sign, as is its suggestion that any surplus purchases of vaccine will be donated.⁶ But this is not enough.

5. To address the current global shortage and inequities in distribution, India and South Africa have called for the waiver of provisions of the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS) to allow countries not to grant or enforce patents or other intellectual property rights related to COVID-19 drugs, vaccines or diagnostics during the pandemic, until “the majority of the world’s population has developed immunity”.⁷ This waiver would cover “copyright, industrial design, patent and undisclosed information”⁸ such as trade secrets. It is supported by 100 countries⁹ and certain UN institutions and civil society members.¹⁰ A small number of countries, particularly those home to pharmaceutical companies, are opposing this waiver, arguing that bilateral negotiations are sufficient to increase supply and that the waivers will do little to address the existing roadblocks. Yet, there are already reports that intellectual property rights have interfered with the supply of N95 masks and the reagents in testing kits and that patents covering developing treatments, such as monoclonal antibody treatment, will inhibit, if not prevent, the use of these treatments in developing countries¹¹. Many of the current vaccines rely on patents for background technology, owned by multiple companies, making it extremely difficult for countries to determine quickly how to address the IP issues. There appear already to be patent disputes between companies over underlying patents. In addition, production of vaccines and other materials essential to treatment and distribution involve trade secret and proprietary materials, protections that would remain in place without the waiver.

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

7. Both the limits on using intellectual property and the secrecy enforced by corporations are impeding life-saving relief. These issues must be addressed now, with the core need being

⁴ COVAX Global Supply Forecast, January 20, 2021

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

⁵ CEPI Survey Assesses Potential COVID-19 Vaccine Manufacturing Capacity, August 5, 2020

https://cepi.net/news_cepi/cepi-survey-assesses-potential-covid-19-vaccine-manufacturing-capacity/.

⁶ <https://www.scmp.com/news/china/diplomacy/article/3118907/us-sign-covax-shot-arm-who-vaccine-scheme>.

⁷ <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669.pdf&Open=True>.

⁸ https://msfaccess.org/sites/default/files/2020-12/MSF-AC_COVID_IP_TRIPSWaiverMythsRealities_Dec2020.pdf.

⁹ https://msfaccess.org/sites/default/files/2020-12/MSF-AC_COVID_IP_TRIPSWaiverMythsRealities_Dec2020.pdf.

¹⁰ See, e.g., Open Letter: Uniting Behind a People’s Vaccine Against COVID-19, May 13, 2020 <https://medium.com/@Oxfam/uniting-behind-a-peoples-vaccine-against-covid-19-87eec640976>;

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

¹¹ https://msfaccess.org/sites/default/files/2020-12/MSF-AC_COVID_IP_TRIPSWaiverMythsRealities_Dec2020.pdf.

to increase supply immediately. As the Director General of the World Trade Organization has stated, “[w]e have to scale up and scale out COVID-19 vaccine production, particularly in emerging markets and developing countries”. This means “making the most of existing manufacturing capacity – finding existing sites and turning them around.”¹² Private agreements between corporations suggest that existing manufacturing facilities may be able to produce vaccines supplies in approximately 6 months. “[E]ach additional day the vaccine shortage continues, people will pay with their lives.”¹³

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

8. UN Special Procedures and civic institutions have provided compelling arguments as to why prompt and adequate supplies of vaccines and therapeutics to the global community are required to fulfil every individual’s right to the enjoyment of the highest standards of physical and mental health.¹⁴ They have shown how the advance purchase of supplies by wealthy corporations and IP restrictions are impeding global access and have called for a “people’s vaccine”.¹⁵ The conditions they decry have become even more pressing with time. What the international community must not forget is that underlying all of these demands for access is the insistence that each and every person has the right to life, without discrimination, and no State may allow its actions, or the actions of non-State actors within its borders, to infringe that right. In the time of a pandemic, the State’s obligation to its own residents cannot be met without protecting the lives of those outside its borders. Human security demands that these life-saving vaccines and therapeutics be quickly and readily available to all.

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

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

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

¹² Press Release, World Trade Organization, March 9, 2021, https://www.wto.org/english/news_e/news21_e/dgno_09mar21_e.htm.

¹³ Id.

¹⁴ See, e.g., [E/C.12/2020/2](#); Statement by UN Human Rights Experts, “Universal Access to Vaccines is Essential for Prevention and Containment of COVID-19 around the World,” November 9, 2020 [https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26484&LangID=E.](https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26484&LangID=E;); <https://www.amnesty.org/download/Documents/POL3034092020ENGLISH.PDF>; <https://www.hrw.org/report/2020/10/29/whoever-finds-vaccine-must-share-it/strengthening-human-rights-and-transparency>.

¹⁵ <https://peoplesvaccine.org/>; <https://medium.com/@Oxfam/uniting-behind-a-peoples-vaccine-against-covid-19-87eec640976>.

article 6” of the ICCPR, “taking due account of related international standards of corporate responsibility”. GC 36, para. 22.

1. The Actions of States

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

12. As a practical matter, during a pandemic, a State cannot protect the right to life of its own residents without also ensuring that other States are able to vaccinate their own populations. Otherwise, through mutations and the pool of unvaccinated, the State’s own population remains at risk, even if costly travel bans are imposed. In a pandemic, “collective interest is the national interest.”¹⁶

13. In recent decades, it has been increasingly recognized that threats to international security must be defined more broadly than military security and include any event that leads to “large-scale death or lessening of life chances”, such as a pandemic.¹⁷ “No State, no matter how powerful, can by its own efforts alone make itself invulnerable to today’s threats.” Instead, “we all share responsibility for each other’s security.”¹⁸

2. State Responsibility for Corporate Actions

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

15. A partial solution is to grant the waiver requested by India and South Africa, with the support of multiple countries. While the protection of intellectual property rights is important, members of the World Trade Organization have declared that their strictures, as reflected in the TRIPS agreement, “can and should be interpreted and implemented in a manner supportive of WTO members’ right to protect public health and, in particular, to promote access to medicines for all.” (Doha Agreement 2001).¹⁹ As others have pointed out, given the plethora of patents at issue, not only for the vaccines, but also for diagnostics and treatments, it is unrealistic to expect that individual countries can follow the procedures for compulsory licenses in a timely fashion, if they even have the domestic legislature in place to accomplish

¹⁶ SG Kofi Annan, <https://www.un.org/press/en/1999/19990920.sgsm7136.html>.

¹⁷ A/59/565, at 11.

¹⁸ A/59/565, at 11.

¹⁹ A/59/565, at 11.

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

16. The waiver of additional TRIPS provisions requested by India and South America would help open more pathways towards sufficient global supplies of vaccines, diagnostics and therapeutics at an affordable price, even if it, standing alone, does not solve the problem. By its terms, the waiver would be limited in time. Those States opposing the waiver should consider whether their opposition accords with their obligation to protect the right to life.²⁰

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

3. Corporate Responsibility to Protect the Right to Life

18. No matter whether they derive naturally or from international legal sources, human rights are fundamentally the entitlements of humans. They are "inalienable" and thus ought to be applied against any "State, group, or person" aiming at the destruction of these rights.²¹ An "understanding of international human rights law acknowledges that State obligations are an essential attribute. They are the corner stone of the human rights regime. But they are not its *raison d'être*, which is the entitlement of humans."²² Instead, human rights norms "operate at three levels – as the rights of individuals, as obligations assumed by States, and as legitimate expectations of the international community" (E.CN.4/2006/53/Add.5).

19. As argued elsewhere, nonstate actors, such as pharmaceutical corporations, are subject to human rights norms based on the "nature of their control and degree of organisation, or capacity". This is a flexible standard, dependent on the context. In this case, the international community has legitimate expectations that the corporations developing and manufacturing therapeutics, diagnostics and vaccines – corporations currently granted almost absolute control over the manufacture and distribution of a lifesaving good – must respect and protect the prohibition against arbitrary deprivation of life. In today's context, these corporations have the control, organisation and capacity, in some cases seemingly to the exclusion of the States themselves, to respect the right to life of millions of people around the world. Accordingly, these corporations must be addressed as human rights duty-bearers²³, capable of violating human rights.²⁴

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

²⁰ The Special Rapporteur notes that the damage to the world economy from the continuing pandemic likely far outweighs the economic impact of these waivers.

²¹ A/HRC/38/44, para. 38.

²² Id., para. 39.

²³ A/HRC/38/44, para. 19.

²⁴ United Nations Guiding Principles on Business and Human Rights, Principles 11 and 13.

from invoking intellectual property rights in a manner that is inconsistent with the right of every person to access a safe and effective vaccine for COVID-19 and with the obligation of States to guarantee, as expeditiously as possible, universal equitable access to vaccines for COVID-19.”²⁵ They should also voluntarily disclose the terms of their agreements, so that the international community can ensure the fair and equitable manufacture and distribution of vaccines, therapeutics and diagnostic materials. o death by neglect or omission.

21. These obligations are confirmed by the Human Rights Guidelines for Pharmaceutical Companies in Relation to Access to Medicines.²⁶ These guidelines require pharmaceutical companies to “give particular attention to the needs of disadvantaged individuals, communities and populations, such as children, the elderly and those living in poverty” and “give particular attention to the very poorest in all markets, as well as gender-related issues.”²⁷ Companies must be “as transparent as possible.” Guideline 6. They must also issue “non-exclusive voluntary licenses with a view to increasing access, in low-income and middle-income countries, to all medicines” and all of their arrangements should ensure that medicines “are affordable to as many people as possible.”²⁸

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

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

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

24. There is clear evidence that States are not fulfilling these obligations. Wealthy individuals in the Global North are obtaining vaccines, prior to those more at risk within the same State, and there appears to be a racial disparity in distribution. In some places, the regions with the greatest rate of infection are the regions with the lowest rate of vaccination, and vaccines are instead going to wealthier areas with higher concentrations of whites and lower rates of infection.²⁹ Moreover, in some States correctional officers are being vaccinated but not those detained.³⁰

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

²⁵ E/C.12/2020/2, para. 7 (citations omitted).

²⁶ Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/63/264, Annex, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjT-rL-ju3vAhWvVN8KHR9sCVMQFjAAegQIBBAD&url=https%3A%2F%2Fwww.who.int%2Fmedicine%2Fareas%2Fhuman_rights%2FA63_263.pdf&usg=AOvVaw3AxO7zLb1hUhqLVPbfYFhx.

²⁷ Guideline 5.

²⁸ Guidelines 30, 33.

²⁹ See, e.g., <https://www.wbez.org/stories/half-of-chicago-residents-to-get-covid-19-vaccine-so-far-are-white/2668c0b9-3a19-4181-8c9b-e7af46e18bfc>; <https://www.cbsnews.com/news/racial-disparity-coronavirus-vaccine/>.

³⁰ Some States have justified vaccinating only prison officials on the grounds that this is the only route of exposure to the inmates. It is unlikely that the routes of exposure are so limited, and it has not yet been demonstrated that vaccination of prison officials will limit the transmission of the disease.

Recommendations

To States

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

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

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

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

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

Corporations

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

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