

## Drones

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**N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents.** Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

### A. Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations

**[Source:** UN Doc. A/68/389, EMMERSON Ben, "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism", 18 September 2013, available at [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=134](http://ap.ohchr.org/documents/dpage_e.aspx?m=134)]

#### A. Introduction

[...]

20. In January 2013, the Special Rapporteur launched an inquiry into the use of remotely piloted aircraft, or drones, in extraterritorial lethal counter-terrorism operations, including in the context of asymmetrical armed conflict. The central objective of the inquiry is to evaluate allegations that the increasing use of remotely piloted aircraft has caused disproportionate civilian casualties, and to make recommendations concerning the duty of States to conduct independent and impartial investigations. The present report is in parallel to that submitted to the General Assembly by the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/68/382). While the two reports are separate and independent, they cover, to some extent, the same ground.

[...]

24. The Special Rapporteur does not use the expression “targeted killing” herein because its meaning and significance differ according to the legal regime applicable in specific factual circumstances. In a situation qualifying as an armed conflict, the adoption of a pre-identified list of individual military targets is not unlawful; if based upon reliable intelligence it is a paradigm application of the principle of distinction. Conversely, outside situations of armed conflict, international human rights law prohibits almost any counter-terrorism operation that has the infliction of deadly force as its sole or main purpose (A/HRC/14/24/Add.6, paras. 28 and 32-33). The threshold question therefore is not whether a killing is targeted, but whether it takes place within or outside a situation of armed conflict (see paras. 62-68 below).

[...]

#### **B. Overview of deployment of remotely piloted aircraft and reported civilian casualty rates**

25. In conventional theatres of armed conflict, the primary function of remotely piloted aircraft is the provision of intelligence, surveillance, targeting and reconnaissance. Since 1999, remotely piloted aircraft have been used in a direct combat role for target acquisition, using laser markers to designate a target that is then attacked by precision-guided missiles discharged from conventional fixed-wing or rotary-blade aircraft. In February 2001, a missile was remotely test-fired for the first time from a Predator remotely piloted aircraft. The tactical military advantage of arming remotely piloted aircraft, rather than using them simply for the purposes of intelligence, surveillance, targeting and reconnaissance, is said to be speed of response from the moment of sighting a target to the swift delivery of deadly force by precision-guided missile.

[...]

28. Modern remotely piloted aircraft can provide near-real-time video feeds around the clock. If used in strict compliance with the principles of humanitarian law, they can reduce the risk of civilian casualties by significantly improving overall situational awareness. The ability of drones to loiter and gather intelligence for long periods before a strike, coupled with the use of precision-guided munitions, is therefore a positive advantage from a humanitarian law perspective. As the International Committee of the Red Cross (ICRC) has noted, “any weapon that makes it possible to carry out more precise attacks, and helps avoid or minimise incidental loss of civilian life, injury to civilians, or damage to civilian objects, should be given preference over weapons that do not”.

[...]

#### **Yemen**

34. [...] By the end of 2011, the United States was reported to have conducted 29 strikes in Yemen by means

of remotely piloted aircraft, although the Special Rapporteur has not yet been able to confirm the figure. In 2012, United States remotely piloted aircraft and other air strikes intensified as the United States supported actions by Yemeni ground forces to dislodge militants from their positions in the south of the country. In mid-2013, the United States launched a series of remotely piloted aircraft strikes following reported terrorist threats to United States interests.

35. Many of the confirmed strikes in Yemen appear to have been directed at vehicles moving between conurbations, in an apparent effort to minimize civilian loss of life. In general, and with the notable exception of a cruise missile strike on a tented camp in Al Majalah in 2009, in which more than 40 civilians were reported to have been killed, the United States appears to have succeeded in avoiding the infliction of large-scale loss of civilian life in Yemen. Nonetheless, there have been a number of incidents in which civilians have reportedly been killed or injured. The highest estimates monitored by the media suggest that the total number of civilians to have been killed or injured as the result of confirmed remotely piloted aircraft strikes since 2011 is between 21 and 58 (of a total of between 268 and 393 fatalities).

[...]

## **Libya**

36. The 2011 operation by the North Atlantic Treaty Organization (NATO) in Libya was carried out almost exclusively through the deployment of air power. [...] [T]he United States carried out armed attacks using Predator and Reaper remotely piloted aircraft between April and September 2011. The Royal Air Force of the United Kingdom also flew remotely piloted aircraft combat flights. [...] NATO informed the International Commission of Inquiry on Libya that it had utilized a standard of zero expectation of death or injury to civilians in its campaign, and that no targets had been struck if there had been any reason to believe civilians would be killed or injured (A/HRC/19/68). The Commission reported that NATO had succeeded in conducting a highly precise campaign with demonstrable determination to avoid civilian casualties, but nonetheless found evidence of civilian loss of life and recommended investigations to determine the precise level of civilian casualties.

[...]

## **C. Accountability and transparency**

41. The single greatest obstacle to an evaluation of the civilian impact of drone strikes is lack of transparency, which makes it extremely difficult to assess claims of precision targeting objectively. [...] [The current lack of transparency creates an accountability vacuum and affects the ability of victims to seek redress.

42. In February 2013, the Public Commission to Examine the Maritime Incident of 31 May 2010 (Turkel Commission) published its careful and comprehensive review of Israeli mechanisms for examining and

investigating complaints and claims of violations of the laws of armed conflict according to international law. The Commission recommended that principles derived from international human rights law should apply, with appropriate modifications, to the investigation of alleged violations of international humanitarian law. From an analysis of a broad range of sources, the Commission concluded that a preliminary inquiry (which it referred as a “fact-finding assessment”) must take place in any case in which there have been, or appear to have been, civilian casualties that were not anticipated when the attack was planned. According to the Commission, the requirement for such an inquiry does not depend on the existence of a *prima facie* suspicion of the commission of a war crime. A preliminary fact-finding investigation is required in any case where the information about possible civilian casualties is partial or circumstantial. The Commission rightly stressed that the information necessary to trigger such an inquiry could come from any plausible source, including a non-governmental organization.

43. Where an initial fact-finding investigation discloses reasonable grounds to suspect that a war crime may have been committed, a formal criminal investigation must be opened. The context in which civilian casualties have occurred will determine whether such a suspicion exists. Any criminal investigation must meet the core international human rights law standards of independence, impartiality, promptness, effectiveness and transparency, suitably adapted to the context. The requirement for independence and impartiality does not preclude an investigation conducted within the framework of a military justice system. As the Commission emphasized, however, those conducting the investigation must be independent of those under investigation, and certainly not subject to the same chain of command. The requirements of promptness and effectiveness must of course be applied in a manner that takes account of the circumstances of the conflict.

44. Significantly, the Commission considered that the principle of transparency should apply to investigations into alleged war crimes because it enhances public scrutiny and contributes to accountability. As the Commission rightly observed, transparency promotes the central objectives of humanitarian law, namely increasing compliance with the principles of distinction, proportionality and precaution, and deterring the commission of future violations.

45. Although the Commission’s recommendations on transparency were directed primarily to formal criminal investigations, the purposive considerations that it identified apply with equal force to preliminary fact-finding enquiries. Indeed, where there is found to be no basis for opening a criminal investigation into civilian deaths, the need for transparency is arguably heightened. Put simply, there is an onus on any State using lethal force to account for civilian casualties. [...] [T]he Special Rapporteur considers that the principle of transparency should apply to the preliminary fact- finding inquiries required in any case where there are grounds to believe that civilians may have been killed or injured. Subject to redactions on grounds of national security, a full explanation should be made public in each case. In the view of the Special Rapporteur, this obligation ought to be viewed as an inherent part of the State’s legal obligations of accountability under international humanitarian law and international human rights law.

## **United States**

46. In the United States, the involvement of CIA in lethal counter-terrorism operations in Pakistan and Yemen has created an almost insurmountable obstacle to transparency. This is because, just as all secret services, it operates on the basis of neither confirming nor denying its operations. Similarly, the conduct of covert targeting operations by United States special forces under the auspices of the Joint Special Operations Command is almost invariably classified. [...]

47. One consequence is that the United States has to date failed to reveal its own data on the level of civilian casualties inflicted through the use of remotely piloted aircraft in classified operations conducted in Pakistan and elsewhere, or any information on its methodology for evaluating this. The Special Rapporteur does not accept that considerations of national security justify withholding statistical and basic methodological data of this kind, and he notes that the Director of CIA has publicly called for information on civilian casualties to be released in the interests of transparency.

[...]

## **United Kingdom**

49. The Royal Air Force is accountable, through the Ministry of Defence, to Parliament. This allows for a degree of transparency, including as to civilian casualties, although the Ministry does not comment publicly on the use of remotely piloted aircraft in connection with special operations. The Ministry has informed the Special Rapporteur that, under operating procedures followed by the United Kingdom in Afghanistan, every remotely piloted aircraft weapons discharge is the subject of internal review involving the senior qualified weapons instructor. [...] Individuals are presumed to be civilian for this purpose unless it can be established that they were directly involved in immediate attempts or plans to threaten the lives of ISAF personnel.

## **Israel**

50. The current system for investigating alleged violations of humanitarian law in Israel is described in detail in the Turkel Commission report, in which the Commission recommended a number of significant changes to improve independence and accountability (see para. 42). Israel has not to date publicly acknowledged or explained the role played by remotely piloted aircraft in its counter-terrorism operations in Gaza. In 2006, however, the Israeli Supreme Court issued specific guidance on the circumstances in which it was lawful for the State to engage in preventative strikes against persons involved in the planning, dispatching or commission of terror attacks. On the subject of accountability and transparency, the Court held that after such an attack there should be a thorough and independent investigation by a specially appointed commission concerning the identification of the target and the circumstances in which the attack was carried out, which would itself be subject to judicial review.

## **D. Principal areas of legal controversy**

[...]

### **2. International human rights and humanitarian law**

59. The overwhelming majority of remotely piloted aircraft strikes have been conducted within conventional theatres of armed conflict. The United States, however, has publicly asserted a right under international law to use lethal force in counter-terrorism operations conducted outside areas of active hostilities. This gives rise to a number of issues on which there is either no clear international consensus, or United States policy appears to challenge established norms.

#### *International human rights law*

60. International human rights law prohibits arbitrary killing. This prohibition is reflected in specific treaty obligations and forms part of customary international law. Outside situations of armed conflict, the use of deadly force by the State is lawful only if strictly necessary and proportionate, if aimed at preventing an immediate threat to life and if there is no other means of preventing the threat from materializing. It follows that lethal remotely piloted aircraft attacks will rarely be lawful outside a situation of armed conflict, because only in the most exceptional of circumstances would it be permissible under international human rights law for killing to be the sole or primary objective of an operation.

61. It is now reasonably well settled that, in a situation of armed conflict (whether of an international or non-international character), the international human rights law prohibition on arbitrary killing continues to apply, but the test of whether a deprivation of life is arbitrary must be determined by the applicable targeting rules of international humanitarian law. It is thus critical to determine whether an armed conflict has come into existence and, if so, to delineate its scope with reasonable precision.

#### *Geographical scope of non-international armed conflict*

62. The United States considers itself to be involved in a non-international armed conflict with Al-Qaida and associated forces that are transnational in character, a position that was endorsed by the United States Supreme Court in *Hamdan v. Rumsfeld*. Accordingly, the United States does not appear to recognize any express territorial limitation on the applicability of the targeting rules of international humanitarian law.

63. The classic formulation for deciding whether a state of non-international armed conflict has come into existence focuses on the intensity and protraction of the conflict and the degree of organization of the parties. In one view, these criteria are premised upon an assumption of territorial limitation. Intensity, for example, is a relative criterion that has traditionally been measured by analysing the frequency and severity of armed attacks being conducted within a given area. Moreover, on a practical and operational level, it is necessary to define the geographical scope of the conflict in order to determine whether international humanitarian law

principles of targeting apply to any particular operation. If it were otherwise, the law would permit attacks that result in proportionate civilian casualties in areas that are otherwise free of hostilities, a result that may be thought to undermine the very object and purpose of international humanitarian law. Among those subscribing to this analysis, most make allowance for a situation in which a non-international armed conflict spills across the border of a neighbouring State. Nonetheless, even in this analysis, the threshold rules for engaging international humanitarian law remain primarily territorial in character (see A/HRC/14/24/ Add.6).

64. ICRC has noted the absence of a clear international consensus on the issue. Its view, however, is that the existence of a non-international armed conflict must be determined by reference to each situation of violence on a case-by-case basis, and that international humanitarian law does not permit the targeting of persons directly participating in hostilities who are located in non-belligerent States, given that, otherwise, the whole world is potentially a battlefield.

[...]

### *Organization*

66. To amount to a non-international armed conflict, one of the parties must be an organized armed group. Organization implies at least a common command structure, adequate communications, joint mission planning and execution, and cooperation in the acquisition and distribution of weaponry. Some argue that the core Al-Qaida group responsible for armed attacks on the United States may no longer meet this criterion because its leadership and command structure appear to have been so degraded that it no longer constitutes, in itself, a sufficiently organized armed group.

67. Serious questions have also been raised concerning the definition of the term “associated forces” or “co-belligerents” adopted by the United States, a definition that is closely related to the United States analysis of the geographical scope of its non-international armed conflict with Al-Qaida in various parts of the world. The United States defines the term “associated force” as applying to an organized armed group that has entered the fight alongside Al-Qaida and is a co-belligerent with Al-Qaida in the sense that it engages in hostilities against the United States or its coalition partners. There is, however, considerable doubt as to whether the various armed groups operating under the name of Al-Qaida in various parts of the world, or claiming or alleged to be affiliated with Al-Qaida, share an integrated command structure or mount joint military operations.

[...]

### *Intensity of hostilities*

68. The second key criterion for the existence of a non-international armed conflict is intensity of hostilities.

Some argue that, given the lapse of time since the devastating attacks on the United States in 2001, and the relative infrequency of organized armed attacks on the United States since then (outside what can be termed the “hot battlefields” of Iraq and Afghanistan), the intensity criterion is no longer met. Even those who support the United States position recognize that groups engaging in infrequent armed attacks, however serious, do not cross the threshold of intensity required for the application of the law of armed conflict.

[...]

#### *Targeting rules*

69. For the purposes of international humanitarian law, organized armed groups are those that recruit their members primarily from the civilian population but develop a sufficient degree of military organization to conduct hostilities on behalf of a party to the conflict, albeit not always with the same means, intensity and level of sophistication as State armed forces. ICRC takes the view that such individuals can be regarded as members of an armed group, such that they may be targeted for lethal operations at any time, only if they have assumed a continuous combat function within the group. Continuous combat function implies lasting integration into an armed group. This encompasses individuals whose continuous function involves the preparation, execution or command of acts or operations amounting to direct participation in hostilities; individuals who have been recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf; and individuals who have directly participated in hostilities on repeated occasions in support of an organized armed group in circumstances indicating that their conduct reflects a continuous combat role rather than a spontaneous or sporadic or temporary role assumed for the duration of a particular operation.

70. If the criterion of continuous combat function is not met, then an individual who is otherwise affiliated with an armed group is to be regarded as having protected civilian status and may be targeted with deadly force only if and for so long as he or she is directly participating in hostilities. According to ICRC, examples of direct participation include taking part in a direct act of violence; transmitting information for immediate use in an armed attack; transporting equipment in close proximity to an attack; and acting as a guard, intelligence agent or lookout. Conduct that does not cross the ICRC threshold for direct participation includes the commercial sale of equipment or supplies, publication of propaganda, recruitment, financing of terrorism, hiding weapons, helping fighters to escape capture and supplying fighters with food, lodging or logistical support.

71. It is unclear whether or to what extent United States targeting rules incorporate these standards or observe them as a matter of policy. Lethal targeting directed at senior operational leaders of Al-Qaida and those who pose an imminent threat of violent attack would appear to satisfy the ICRC tests of continuous combat function and direct participation, respectively. There is, however, evidence to indicate that attacks have been launched against much lower-level operatives, including those who have harboured identified

targets. The disclosure by States of the criteria that they adopt for direct participation in hostilities is critical to achieving transparency as to the forms of conduct that may expose a civilian to the threat of deadly force.

[...]

#### *Targeting intelligence*

73. The accuracy of targeting intelligence is critical to the proper application of the principles of distinction, proportionality and precaution, in particular in asymmetrical conflict where non-State armed groups often intermingle with the civilian population, whose members provide varying degrees of voluntary or involuntary support that may or may not amount to direct participation in hostilities.

[...]

74. United States policy appears to recognize at least three categories of target for lethal counter-terrorism operations. The first is what is known as the “high-value target”. This classification implies that the identity, function and importance of the individual be established in advance. While it may be assumed that the list includes individuals identified by intelligence as senior leaders of Al-Qaida or an associated group, who would thus be deemed to have a continuous combat function, it is far from clear that the list is so confined. A second category consists of what are known as “signature strikes”, in which a group or individual is identified as a target on the basis of their activities. United States forces in Iraq pioneered what became known as “pattern of life” analysis using remotely piloted aircraft for intelligence, surveillance, targeting and reconnaissance purposes. This has since become a routine part of the armed conflict in Afghanistan, where it is also used for targeting purposes by the Royal Air Force of the United Kingdom. In this context, the analysis is used to determine whether an individual or group falls within the criteria identified in military targeting directives. The United States has formally denied that the mere fact that an individual is a military-aged male located in the vicinity of an armed group is sufficient to justify a targeting decision. There remains, however, considerable uncertainty as to the criteria used for the purpose of determining whether an individual’s habits of daily life are assessed as sufficient to identify him or her as a combatant. Inevitably, some of this information will be legitimately classified, but the Special Rapporteur considers that there is scope for further clarification. A third category is the use of remotely piloted aircraft for the purposes of contact force protection, which is governed by conventional rules of engagement adopted by the Department of Defense.

75. Within the United Kingdom, it is the responsibility of the Ministry of Defence to draw up a targeting directive and rules of engagement in any armed conflict. The targeting directive sets out legitimate targets (which may be individuals, groups or locations). It also includes a list of restricted and prohibited targets. Mission planning routinely involves an assessment of the collateral effects radius of any weapon deployed. For all remotely piloted aircraft sorties there is a customary “nine line exchange” of information between the forward air controller on the ground and the remotely piloted aircraft crew. This will record the assessment of any potential civilian casualties. While Israel has sometimes invoked the principle of proportionality to justify

civilian casualties sustained in the course of lethal counter- terrorism operations in Gaza, the United Kingdom has specifically informed the Special Rapporteur that in making targeting decisions involving the use of remotely piloted aircraft in Afghanistan it does not authorize strikes on the basis that the infliction of civilian casualties would be proportionate to a high-value military target. It is the policy of the Ministry of Defence that weapons should not be discharged from any aerial platform unless there is a zero expectation of civilian casualties, and that any individual or location should be presumed to be civilian in nature unless there is clear evidence to the contrary.

76. The President of the United States recently appeared to adopt the same standard for lethal counter-terrorism operations being conducted outside areas of active hostilities, indicating that, "before any strike is taken, there must be near- certainty that no civilians will be killed or injured". One United States military lawyer has since emphasized, however, that this is not a legal requirement, arguing that "the degree of requisite certainty would drop in the case of a very high value target because less certainty would be justified in light of the military advantage likely to accrue from the operation". Moreover, at the time of writing, it remains unclear whether the United States adopts the same standard for operations on the "hot" battlefield.

#### **IV. Conclusions and recommendations**

77. If used in strict compliance with the principles of international humanitarian law, remotely piloted aircraft are capable of reducing the risk of civilian casualties in armed conflict by significantly improving the situational awareness of military commanders.

78. Having regard to the duty of States to protect civilians in armed conflict, the Special Rapporteur considers that, in any case in which civilians have been, or appear to have been, killed, the State responsible is under an obligation to conduct a prompt, independent and impartial fact-finding inquiry and to provide a detailed public explanation. This obligation is triggered whenever there is a plausible indication from any source that civilian casualties may have been sustained, including where the facts are unclear or the information is partial or circumstantial. The obligation arises whether the attack was initiated by remotely piloted aircraft or other means, and whether it occurred within or outside an area of active hostilities.

### **B. Report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations**

**[Source:** UN Doc. A/HRC/25/59, EMMERSON Ben, "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism", 11 March 2014 available at

<http://www.ohchr.org/en/HRBodies/HRC/RegularSessions/Session25/Pages>ListReports.aspx>

[...]

#### **iii. Civilian impact of remotely piloted aircrafts**

[...]

## **B. Recent developments**

### **1. Civilian casualty rates**

[...]

#### **Yemen**

27. [T]he frequency of reported drone strikes in Yemen has increased since the Special Rapporteur's interim report, resulting in a significant number of reported civilian casualties in the final weeks of 2013 [...]. Recent estimates provided by Human Rights Watch allege that, since 2009, the United States has conducted at least 86 lethal counter-terrorism operations, using remotely piloted aircraft and other means, killing up to 500 people. The majority of those killed is believed to have been individuals with a "continuous combat function" in Yemeni internal armed conflicts, and therefore to have been legitimate military targets under the principles of international humanitarian law. However, media monitoring organizations allege that between 24 and 71 civilians have been killed in confirmed drone strikes between 2009 and 2013.

### **2. Other significant developments**

#### **Yemen**

28. During the universal periodic review of Yemen in January 2014, the Government delegation informed the Working Group on the Universal Periodic Review that the National Dialogue Conference in Yemen had demanded the cessation of the use of armed drones (see A/HRC/26/8). The Working Group was also informed of a non-binding resolution passed by the Yemeni House of Representatives on 14 December 2013 calling for a ban on the use of armed drones in Yemen, and insisting that measures to fight terrorism should not harm civilians and should be based on human rights standards.

29. The Government of Yemen has informed the Special Rapporteur that the United States routinely seeks prior consent, on a case-by-case basis, for lethal remotely piloted aircraft operations on its territory through recognized channels, and that where consent is withheld, a strike will not go ahead. However, according to a recent report by Human Rights Watch, President Hadi told that organization during a meeting on 28 January 2014 that specific drone strikes were not pre-approved, but instead such strikes were "generally permitted" pursuant to an agreement concluded between the United States and former President Abdullah Saleh, which remains binding. The Special Rapporteur invites the Government of Yemen to clarify its position in that regard [...].

[...]

#### **Israel**

30. The Special Rapporteur attended a meeting with representatives of Israel on 26 January 2014 in London. [...] [T]he Special Rapporteur was briefed on, among other matters, the efforts made by the Israeli Air Force to avoid inflicting civilian loss of life, and was shown video recordings of operational measures taken for that purpose. The Government stressed the efforts taken by its forces in all aerial operations to give advanced warnings of attacks whenever possible. Referring to the Special Rapporteur's interim report (paras. 75 and 76), the Government emphasized that a standard of zero anticipated civilian casualties goes beyond the mandatory requirements of international humanitarian law and would remain unattainable whilst legitimate military targets, particularly in Gaza, used civilian institutions as a base for military operations. The Special Rapporteur has identified a number of examples of strikes in which there are credible allegations that civilians were killed or injured as the result of Israeli drone strikes in Gaza. [...]

### **C. Sample strike analysis**

[...]

35. It is important to emphasize that the mere existence of credible allegations that civilians were killed or injured in these incidents does not necessarily establish any violation of international humanitarian law or international human rights law.

[...]

### **Achieving a consensus on the applicable legal principles**

70. In his interim report to the General Assembly, the Special Rapporteur identified a number of legal issues on which there is currently no clear international consensus, or where current practices and interpretations appear to challenge established legal norms. Legal uncertainty in relation to the interpretation and application of the core principles of international law governing the use of deadly force in counter-terrorism operations leaves dangerous latitude for differences of practice by States. This runs counter to the obligation identified in paragraph 6 (s) of General Assembly resolution 68/178; fails to provide adequate protection for the right to life; poses a threat to the international legal order; and runs the risk of undermining international peace and security.

71. There is thus an urgent and imperative need to reach a consensus between States on, *inter alia*, the following issues:

(a) Does the international law principle of self-defence entitle a State to engage in non-consensual lethal counter-terrorism operations on the territory of another State against a non-State armed group that poses a direct and immediate threat of attack, even when the armed group concerned has no operational connection to its host State? If so, under what conditions does such a right of self-defence arise?

Does such a right arise where the territorial State is judged to be unable or unwilling to prevent the threat from materializing? If so, what are the criteria for determining “unwillingness” or “inability” to act?

- (b) Is the international law principle of self-defence confined to situations in which an armed attack has already taken place, or does it entitle a State to carry out pre-emptive military operations against a non-State armed group on the territory of another State, without the territorial State's consent, where it judges that there is an imminent risk of attack to its own interests? If so, how is imminence to be defined?
- (c) Does the international humanitarian law test of intensity of hostilities (which is one of the criteria determining whether a non-international armed conflict exists) require an assessment of the severity and frequency of armed attacks occurring within defined geographical boundaries? In applying the intensity test to a non-State armed group operating transnationally, is it legitimate to aggregate armed attacks occurring in geographically diverse locations in order to determine whether, taken as a whole, they cross the intensity threshold so as to amount to a non-international armed conflict? If it is possible for a State to be engaged in a non-international armed conflict with a non-State armed group operating transnationally, does this imply that a non-international armed conflict can exist which has no finite territorial boundaries?
- (d) Does international humanitarian law permit the targeting of persons directly participating in hostilities who are located in a non-belligerent State and, if so, in what circumstances?
- (e) Do the pattern and frequency of the armed attacks currently being perpetrated by Al-Qaida, and the various affiliate organizations in different parts of the world that claim allegiance to Al-Qaida, satisfy (or continue to satisfy) the criteria of organization and intensity required under international humanitarian law to qualify as a state of armed conflict?
- (f) Assuming that a non-international armed conflict exists, does the test of “continuous combat function”, as elaborated by the International Committee of the Red Cross for determining whether a person is a “member” of an armed group (such that that person may be targeted with lethal force at any time) reflect customary international law? If not, what is the correct test?
- (g) Does the guidance promulgated by the International Committee of the Red Cross for “direct participation in hostilities” reflect customary international law? In particular, does an individual who has participated in hostilities cease to be targetable during a pause in his or her active involvement? Does providing accommodation, food, financing, recruitment or logistical support amount to “direct participation in hostilities” for targeting purposes?
- (h) In the context of non-international armed conflict, when (and under what circumstances) does international humanitarian law impose an obligation to capture rather than kill a legitimate military target where this is feasible?

72. The Special Rapporteur invites Member States to express their views on these questions [...].

73. The Special Rapporteur recommends that the Council take effective steps, by means of an appropriate resolution aimed at:

- Urging all States to ensure that any measures taken to counter terrorism, including the use of remotely piloted aircraft, comply with their obligations under international law, including international humanitarian law and international human rights law, in particular the principles of precaution, distinction and proportionality;
- Urging all States to ensure that, in any case in which there is a plausible indication from any apparently reliable source that civilians have been killed or injured in a counter-terrorism operation, including through the use of remotely piloted aircraft, the relevant authorities conduct a prompt, independent and impartial fact-finding inquiry, and provide a detailed public explanation;
- Urging all States that use remotely piloted aircraft for lethal counter-terrorism operations, and all States on whose territory such operations occur, to clarify their position on the legal and factual issues raised in the present report and the Special Rapporteur's interim report to the General Assembly (A/68/389); to declassify, to the maximum extent possible, information relevant to lethal extraterritorial counter-terrorism operations; to make public the results of all fact-finding investigations into alleged civilian casualties resulting from such operations; and to release their own data on the level of civilian casualties inflicted through the use of remotely piloted aircraft, together with information on the evaluation methodology used.

## **DISCUSSION**

### **I. Classification of the conflict and applicable law**

1. (Document A, paras 34-36; B, paras 27-29) How could one argue for and against the position that IHL applies to all or some of the drone attacks in Yemen and Libya mentioned in the Report?
2. (Document A, paras 34-36, 42, 46-47, 49-50, 59, 62, 66-67 and 74-75; B, paras 27 and 29-30)
  - a. How could one argue for and against the existence of one or more international or non-international conflict(s) with the United States as a party to the conflict? With Israel as a party to the conflict? With the United Kingdom as a party to the conflict? (GC I-IV, Arts 2 and 3; P I, Art. 1; P II, Art. 1)
  - b. What further information would help to determine if IHL applied to the situations mentioned in the report?
3. (Document B, para. 29) How is the argument that the United States seeks consent from the Government of Yemen prior to conducting a military operation on the latter's territory relevant to IHL? Is it relevant under any other branches of international law?
4. (Document A, paras 66-68) What criteria shall be fulfilled for an armed struggle to be regarded as a non-international armed conflict? Can a single terrorist act amount to an armed conflict that would trigger the applicability of IHL? Can a single drone attack trigger the applicability of IHL? (GC I-IV, Arts 2 and 3; P I, Art. 1; P II, Art. 1)
5. (Document A, paras 59-64) Does IHL apply to an attack against a person linked to an armed conflict who is geographically removed from the actual site of hostilities? If such a person is in a State not party

to the conflict? Does IHL prohibit such attacks? If IHL does not apply to persons finding themselves in these situations, what other legal frameworks would they be covered by, if any? What problems could you imagine arising from the geographical distance separating a drone operator from the hostilities?

## **II. Relationship between IHL and IHRL**

1. (Document A, paras 24, 42-43, 60-61) Are drone strikes regulated by international human rights law (IHRL)? Does IHRL apply concurrently with IHL? As an alternative to IHL? If both apply, on which issues should IHL prevail? On which issues should IHRL prevail? Why?
2. (Document A, paras 24, 60-61) What is the Special Rapporteur's view on the relationship between IHL and IHRL? What is the Turkel Commission's view?
3. (Document A, para. 59) Why do you think it is important to establish a clear international consensus on the use of lethal force outside areas of active hostilities?

## **III. Transparency and accountability**

1. (Document A, paras 41-50; B, para. 73) Under IHL, are States under an obligation to investigate all deaths resulting from an armed conflict? Only those incidents that involve civilian casualties? Only those incidents that may constitute war crimes? Are states under the obligation to report civilian casualties? Do States have to make the results of their investigations public? (CIHL, Rule 158; GC I, Arts 49-50; GC III Arts 120-121; GC IV Arts 129 – 131)
2. Would your answers to question 9 above change in any way if the legal framework for analysis was IHRL, rather than IHL? If your answers under IHRL are indeed different from IHL, is it possible to reconcile the two? Alternatively, which regime prevails and under what circumstances?
3. (Document A, para. 42) According to the Turkel Commission, when should a preliminary inquiry (or fact-finding assessment) be conducted?
4. (Document A, para. 43) According to the Turkel Commission, when should a formal criminal investigation be opened? What principles should it observe? Does the principle of transparency stem from IHL? From IHRL?
5. (Document A, paras 41-47) Does the Turkel Commission base its recommendations on when and how an enquiry should be conducted on IHL or IHRL? How does its position on transparency differ from that of the US?
6. Do all IHL violations amount to war crimes? (CIHL, Rule 156; GC I, Art. 50; GC II, Art. 51; GC III, Art. 130; GC IV, Art. 147; P I, Art. 85; ICC Statute, Art. 8)
7. (Document A, paras 41, 46-47) Is it lawful for the US to execute attacks in an armed conflict through the CIA? Does this make attribution to the State or criminal accountability of individuals more difficult? How could a CIA agent who commits a war crime be tried? Could such a trial be public?

## **IV. State practice**

(Document B, paras 70-71)

1. Please attempt to provide answers to questions (a) to (h) posed by the Special Rapporteur. Wherever relevant, state whether your answer would be different for international armed conflicts on one hand, and non-international armed conflicts on the other.
2. Please reflect on why the Special Rapporteur requests States to state their position on the legal and factual issues concerning the use of drones. Why might it be useful for a State to declare its practice?

Must States clarify how they interpret and apply IHL rules? Why would it be legitimate not to let the enemy know according to which criteria the legitimacy of a target or the proportionality of an attack is evaluated?

## V. Drones

1. Is the use of drones *per se* prohibited under IHL? Do IHL rules on conduct of hostilities apply to drone strikes? If the drone strike is carried out in the context of an international armed conflict? Non-international armed conflict? If the target is located outside the territory of the State involved in an armed conflict? (CIHL, Rules 1-24 and 70-71; GC I-IV, Arts 2 and 3; P I, Arts 1 and 49 (you may also consult P I, Arts 48-58 more generally); P II, Art. 1)
2. In your opinion, what principles and/or rules of IHL are particularly problematic when drones are used as a weapons platform? What principles and/or rules become easier to comply with when drones are used as a weapons platform? Is it easier or more difficult to respect precautions in attacks prescribed by IHL when drones are used as a platform? (CIHL Rules 1, 7 and 14-24; P I, Arts 1(2), 48, 52 and 57)
3. (Document A, paras 49 and 69) When conducting a military operation, is there a presumption regarding the status of individuals not taking direct part in hostilities? Does this apply in international armed conflict as CIHL? Does it apply in NIACs? (CIHL, Rules 5-6, P I Art. 50; see also, Document, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities)
4. (Document A, paras 59 – 64) Under IHL, may individuals be deliberately targeted with the sole aim of killing them? If yes, which individuals may be so targeted? Under IHL, is it lawful to target a known individual with the aim of killing him or her? Should less harmful measures be taken? If so, when/under what circumstances? (CIHL, Rule 1; P I, Arts 43, 48, 50-51; P II, Art. 13; see also, Document, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities)
5. (Document A, para. 74) Is it lawful under IHL to target unknown individuals merely based upon the way they behave?
6. (Document A, para. 36) According to the information provided, during its campaign in Libya, did NATO merely comply with IHL or go beyond the requirements of IHL in its efforts to avoid civilian casualties? If civilians died despite NATO policy, should it have opened inquiries? What would the Turkel Commission hold? (Document A, paras 41 – 45)? (CIHL, Rules 14-21)
7. In your opinion, is it unfair to use drones against an enemy who possesses none and/or is unable to shoot them down? Is it unethical that a drone operator does not run any personal risk of harm during the conduct of an operation? Are either of these situations illegal?
8. Is the current legal framework sufficient to respond to the development and use of drones or similar new technologies?