
The Competence of the UN Human Rights Council and its Special Procedures in relation to Armed Conflicts: Extrajudicial Executions in the ‘War on Terror’

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Abstract

Since 2003, as part of its ‘war on terror’, the United States has taken the position that the UN Commission on Human Rights and its successor, the UN Human Rights Council, as well as the system of ‘special procedures’ reporting to both bodies, all lack the competence to examine abuses committed in the context of armed conflicts. The article examines the arguments put forward by the US in the specific context of the work of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions. The authors conclude that the consistent practice of the human rights organs for almost 25 years, often supported and until 2003 never opposed by the US, runs counter to the current US position. Acceptance of the US position would not only undermine efforts to hold the US accountable but would also have a major impact on the international system of accountability as a whole.

1 Introduction

In the aftermath of the terrorist attacks of 11 September 2001 the United States began to assert the view that the United Nations Human Rights Council, its predecessor the

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UN Commission on Human Rights, and the system of ‘special procedures’¹ reporting to both bodies, all lack the competence to examine abuses committed in the context of armed conflicts. This policy is only one part of a broader set of legal arguments advanced by the United States in support of its strategy in the ‘war on terror’, which has challenged various previously accepted interpretations of international law. While much has been written about this topic in terms of substantive law – especially in relation to issues such as *jus ad bellum*,² non-discrimination,³ and torture⁴ – the claim of institutional lack of competence has not been addressed.

Yet the consequences of accepting the claim are far-reaching, especially in terms of undermining the potential effectiveness of the international human rights legal regime in holding governments to account. The number and scope of active armed conflicts in the world today underscore the importance of the issue, but the claim that the ‘war on terror’ is a war without any necessary temporal or geographic limitations makes it even more problematic. The United States position is tantamount to suggesting that the monitoring of abuses committed in armed conflicts, and efforts to hold the parties accountable, should be left to the International Committee of the Red Cross (ICRC), other non-governmental organizations, and military lawyers. While each of these actors has an important role to play, none are equipped or mandated to hold governments to account systematically or effectively. The ICRC’s mandate only rarely permits it to publicly address violations. Military lawyers represent the interests of states and are likely to construe the law in a way which allows a broad scope for military conduct. Even when applying human rights and international humanitarian law conscientiously, they should not be relied upon to provide the only check on military activities. And while some NGOs routinely undertake public evaluations of the legality of particular actions, most are ill-equipped to do so, especially since their access to the necessary information is often very limited. None of these provide a forum in which states and other actors which are not involved in a particular conflict can exert pressure on the parties to the conflict to comply with international norms. Excluding armed conflicts from the purview of the Human Rights Council and its special procedures would eliminate the major forum in which governments are most likely to be held to account for abuses committed in that context and thus diminish the likelihood

¹ ‘Special procedures’ is the generic name given to the mechanisms established by the Commission on Human Rights and the UN Human Rights Council to undertake activities of a promotional, protective and fact-finding nature in relation to specific themes or country situations. For an analysis and critique of the system see Amnesty International, *United Nations Special Procedures: Building on a Cornerstone of Human Rights Protection*, AI Index IOR 40/017/2005 (1 Oct. 2005).

² See, e.g., Sapiro, ‘Iraq: The Shifting Sands of Pre-emptive Self-Defence’, 97 *AJIL* (2003) 599; Franck, ‘What Happens Now? The United Nations After Iraq’, 97 *AJIL* (2003) 607.

³ See, e.g., Roberts, ‘Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11’, 15 *EJIL* (2004) 721.

⁴ See, e.g., Concluding Observations of the Committee Against Torture concerning the second periodic report of the United States, UN Doc. CAT/C/USA/CO/2 (25 July 2006); Center for Constitutional Rights, *Report on Torture and Cruel, Inhuman, and Degrading Treatment of Prisoners at Guantánamo Bay, Cuba* (July 2006); American Civil Liberties Union, *Enduring Abuse: Torture and Cruel Treatment by the United States at Home and Abroad* (April 2006).

that they would be called upon to justify their conduct publicly and in a systematic manner. It would also be likely to encourage individual governments to put forward very narrow interpretations of the protections accorded the victims of armed conflict and to encourage the emergence of a wide variety of interpretations of what the relevant standards require in times of armed conflict.

Claims of institutional competence, or alternatively a lack thereof, are of major importance in international law in general. But they are of even greater importance in the areas of human rights and humanitarian law in which the standards are often relatively open-ended and contingent, thereby rendering crucial the issue of which body will be empowered to apply the given norm to a specific fact situation and draw conclusions as to its legality. Indeed, as Martti Koskenniemi has observed, the politics of international law is largely a debate about institutional jurisdiction. In his view, this reality 'reflects the realization that once one knows which institutions will deal with a matter, one already knows how it will be disposed of'.⁵

The United States' challenge to the institutional competence or jurisdiction of the UN Human Rights Council runs in parallel to its contention that human rights law does not apply during armed conflicts. This article examines both the substantive legal challenge and the institutional challenge through the lens of attempts within the framework of the Commission on Human Rights and the Human Rights Council to hold the United States to account for actions taken in the context of what may or may not be characterized as an armed conflict. It does so with specific reference to recent exchanges that have taken place between the United States Government and the United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions (hereinafter referred to as 'the Special Rapporteur').⁶

The article begins by examining the position put forward by the United States as to the proper interpretation of the mandate of the Special Rapporteur, and by extension, that of the Human Rights Council as a whole. It then analyses each of the component parts of the United States position in light of the relevant law and practice, and concludes by considering some of the implications which would follow if the US position were to be accepted.

2 The United States' position

The approach adopted by the United States in relation to whether targeted killings of suspected terrorists⁷ fall within the competence of the Human Rights Council in

⁵ M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2006), at 610.

⁶ Since one of us currently holds the position of Special Rapporteur on this issue, and the other two have worked extensively on the questions in that context, this article draws significantly upon the correspondence exchanged between the Special Rapporteur and the United States Government. It should be noted that the correspondence cited herein is all in the public domain and that discussions between the parties are ongoing in the context of the continuing activities of the Special Rapporteur.

⁷ For analyses of the implications of the 'war on terror' for the law governing extrajudicial executions, but without any specific focus on the mandate of the Special Rapporteur, see Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?', 16 *EJIL* (2005) 171, 178; and Nolte, 'Preventive Use of Force and Preventive Killings: Moves into a Different Legal Order', 5 *Theoretical Inquiries in Law* (2004) 111.

general, and of the Special Rapporteur in particular, provides an illuminating case study of questions of substantive law as well as of institutional competence. In schematic form, The United States' position appears to be predicated upon four basic propositions: (1) that the United States government is in a continuing state of armed conflict with Al Qaida, i.e. that the 'war on terror' is in fact an armed conflict in the legal sense and not merely in the rhetorical sense; (2) that international humanitarian law is applicable to situations of armed conflict and operates in that context to the exclusion of human rights law; (3) that the mandate of the Human Rights Council and thus of its special procedures is limited to international human rights law; and that therefore (4) the Human Rights Council and its special procedures lack competence to address killings taking place within the framework of the United States 'war on terror'.

Before examining each of these propositions in turn it is necessary to consider the context in which the United States and the Special Rapporteur came to exchange views on these issues. The first exchange concerned allegations that six men traveling in a car in Yemen on 3 November 2002 were killed by a missile launched by a United States-controlled predator drone aircraft. The then Special Rapporteur, Asma Jahangir, sent a communication to the US Government on 15 November 2002 querying whether the alleged attack was consistent with applicable international legal norms. In response, the United States replied in detail in a letter which it expressly requested be circulated to all of the members of the Commission on Human Rights as a separate document.⁸ This response of 14 April 2003 began by indicating that the Government was not prepared to offer any comment on the specific factual allegations contained in the communication or on their accuracy. The reason for this refusal to cooperate was straightforward:

The Government of the United States respectfully submits that inquiries related to allegations stemming from any military operations conducted during the course of an armed conflict with Al Qaida do not fall within the mandate of the Special Rapporteur.

The United States also disagrees with the premise of the letter and the conclusions contained in the report that military operations against enemy combatants could be regarded as 'extrajudicial executions by consent of Governments'. The conduct of a government in legitimate military operations, whether against Al Qaida operatives or any other legitimate military target, would be governed by the international law of armed conflict.⁹

⁸ For further information on the growth of the controversial CIA unmanned drone targeted killing program, see Meyer, 'CIA Expands Use of Drones in Terror War', *Los Angeles Times*, 29 Jan. 2006, at A1 (noting the deliberate United States failure to recognize the mandate of the Special Rapporteur); McManus, 'A United States License to Kill', *Los Angeles Times*, 11 Jan. 2003, at 1.

⁹ Letter dated 14 April 2003 from the Chief of Section, Political and Specialized Agencies, of the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the secretariat of the Commission on Human Rights, UN Doc. E/CN.4/2003/G/80, at 2–3 (22 April 2003).

After providing a list of terrorist attacks against it that the United States had attributed in whole or in part to the Al Qaida network,¹⁰ the United States concluded that

[t]he continuing military operations undertaken against the United States and its nationals by the Al Qaida organization both before and after September 11 necessitate a military response by the armed forces of the United States. To conclude otherwise is to permit an armed group to wage war unlawfully against a sovereign state while precluding that state from defending itself.¹¹

The United States then reviewed the law to be applied in such circumstances:

International humanitarian law is the applicable law in armed conflict and governs the use of force against legitimate military targets. Accordingly, the law to be applied in the context of an armed conflict to determine whether an individual was arbitrarily deprived of his or her life is the law and customs of war. Under that body of law, enemy combatants may be attacked unless they have surrendered or are otherwise rendered hors de combat. Al Qaida terrorists who continue to plot attacks against the United States may be lawful subjects of armed attack in appropriate circumstances.¹²

The United States concluded that '[f]or the foregoing reasons, the Commission and Special Rapporteur lacks [sic] competence to address issues of this nature arising under the law of armed conflict'.¹³

Subsequently, Asma Jahangir addressed two other communications to the United States relating to issues of armed conflict. The first concerned reports that United States military personnel had used excessive force against civilians during demonstrations in the city of Fallujah, Iraq, in 2003.¹⁴ The US replied that 'inquiries related to military operations in Iraq do not fall in the mandate of the Special Rapporteur, which does not extend to the

¹⁰ In addition to recalling the attacks of 11 September 2001, the United States cites the following examples: '[T]he Al Qaida network headed by Abu Musab al-Zarqawi helped establish a poison and explosive training center camp located in northeastern Iraq in cooperation with the radical organization Ansar al-Islam. Other attacks attributed to Al Qaida and Al Qaida-linked groups include the attempted bombing on December 22, 2001, of a commercial transatlantic flight from Paris to Miami by convicted shoe bomber Richard Reid; on January 23, 2002, the kidnapping of United States reporter Daniel Pearl from Karachi, Pakistan, who was later killed; on March 17, 2002, a grenade attack on a Protestant church in Islamabad killing five people, including two United States citizens; on June 14, 2002, a car bomb attack on the United States Consulate in Karachi, Pakistan, killing 12 Pakistanis and damaging the consulate; on October 2, 2002, a bomb explosion in the Philippines, resulting in the death of a United States serviceman; on October 12, 2002, a car bomb outside a nightclub in Bali, Indonesia, killing nearly 200 international tourists and injuring about 300; on October 28, 2002, the fatal shooting of a USAID employee in Amman, Jordan; on November 28, 2002, a suicide car bombing at a hotel in Mombasa, Kenya, killing 15, and the simultaneous near-miss SA-7 missile attack on a civilian jet departing Mombasa for Israel; on February 28, 2003, attacks by a gunman on police posts outside the United States Consulate in Karachi, killing four local police; and several other attacks since the war started in Afghanistan. Moreover, no one needs reminding of the attacks on United States persons and property prior to 9/11 linked to Al Qaida, including the embassy bombings in Kenya and Tanzania and the attack on the United States' S. Cole in Yemen.' Letter dated 14 April 2003, *supra* note 9, at 3–4.

¹¹ *Ibid.*, at 4.

¹² *Ibid.*, at 4–5.

¹³ *Ibid.*, at 5.

¹⁴ Communication dated 12 May 2003, in Report of the Special Rapporteur, Asma Jahangir, Summary of cases transmitted to the government and replies received, UN Doc. E/CN.4/2004/7/Add.1, para. 579 (2004).

laws and customs of war'.¹⁵ Nevertheless, the US noted that although it was not required to respond to questions posed by a Special Rapporteur outside that Special Rapporteur's mandate it would do so 'in order to correct the record'.¹⁶ In that regard, it noted that:

U.S. Military Personnel operate under the Rules of Engagement that protect American servicemen and women in accomplishing their mission, while also ensuring appropriate protection for the civilian population. The Rules of Engagement in effect in Iraq are carefully drafted and comply fully with the law of war.¹⁷

In a second communication the Special Rapporteur expressed concern about reports that United States soldiers had been given orders to 'shoot on sight' persons suspected of looting property in Iraq.¹⁸ In response, the United States repeated its assertion that such matters are outside the mandate of the Special Rapporteur and requested that consideration of the incidents raised be discontinued.¹⁹

There the matter rested until July 2004 when a new Special Rapporteur, Philip Alston, took up the issue in two different settings. The first setting was his initial annual report submitted to the Commission on Human Rights in December 2004 and considered in March 2005 (hence referred to as 'the 2005 report'). In that report the Special Rapporteur referred specifically to all three incidents described above and noted that the responses provided to his predecessor by the United States Government raised 'a number of matters which warrant clarification'.²⁰ The analysis then proceeded to rehearse the various arguments that are considered in depth below.

The second setting involved another specific fact situation. It involved new allegations that the United States had conducted the targeted killing of an Al Qaida suspect on 10 May 2005. In that incident, Haitham al-Yemeni was killed on the Pakistan–Afghanistan border, allegedly by a missile fired by an unmanned aerial drone operated by the United States Central Intelligence Agency. A communication sent by the Special Rapporteur on 26 August 2005 in response to that incident did not allege that any specific violation of the applicable law had taken place but rather sought to obtain clarification in relation to the positions which had been asserted in a rather dismissive manner in the earlier response. Thus the Special Rapporteur requested further information regarding the rules of international law that the United States Government considered applicable to the incident, what procedural safeguards were employed to

¹⁵ Response dated 8 April 2004 of the United States to the Special Rapporteur on extrajudicial, summary, or arbitrary executions, in UN Doc. E/CN.4/2005/7/Add.1, para. 765 (2005).

¹⁶ *Ibid.* A similar approach was taken by the United States in its dialogue concerning detention in Guantanamo Bay with the Working Group on Arbitrary Detention. See Letter dated 2 April 2003 from the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the secretariat of the Commission on Human Rights, UN Doc. E/CN.4/2003/G/73 (2003) ('[T]he mandate of the Working Group does not include competence to address the Geneva Conventions of 1949 or matters arising under the law of armed conflict. Nevertheless, the United States Government, in a spirit of cooperation, offers this response to the Working Group Report...').

¹⁷ Response dated 8 April 2004, *supra* note 15.

¹⁸ Communication of 12 May 2003, UN Doc. E/CN.4/2004/7/Add.1 (2004), para. 572.

¹⁹ UN Doc. E/CN.4/2005/7/Add.1 (2005), para. 765.

²⁰ Report of Mr. Philip Alston to the 61st session of the Commission on Human Rights, UN Doc. E/CN.4/2005/7, paras. 45–54 (22 Dec. 2004).

ensure that the killing complied with international law, and the basis on which it was decided to kill, rather than capture, Haitham al-Yemeni.²¹

In reply, the United States recalled and repeated the position stated earlier that 'inquiries related to allegations stemming from military operations conducted during the course of an armed conflict with Al Qaida do not fall within the mandate of the Special Rapporteur'.²² This time around, however, the Special Rapporteur's detailed analysis in his 2005 annual report made it difficult for the United States to leave the matter there. It thus opted to engage with the analysis and advanced three critiques of the Special Rapporteur's characterization of his role in relation to armed conflicts. First, in response to the assertion in the 2005 report that '[a]ll major relevant resolutions [of the Commission] in recent years have referred explicitly to [international humanitarian law]'²³, the United States countered that '[w]hile recent Commission on Human Rights and UN General Assembly resolutions have made mention of international humanitarian law in the context of suggestions or admonitions to governments, this does not somehow impart upon the Special Rapporteur a mandate to consider issues arising under the law of armed conflict'.²⁴ Second, in response to the observation in the 2005 report that 'the General Assembly, in resolution 59/197 of 20 December 2004, dealing with the mandate of the Special Rapporteur, urged Governments "to take all necessary and possible measures, in conformity with international human rights law and international humanitarian law, to prevent loss of life ... during ... armed conflicts"'²⁵, the United States argued that:

the General Assembly was urging Governments to take action, not modifying or extending the Special Rapporteur's mandate. This resolution did not, in fact, deal with the mandate of the Special Rapporteur other than to require the Special Rapporteur to operate within his mandate. For example, operative paragraph 13 of the Resolution '[u]rges the Special Rapporteur to continue, within his mandate, to bring to the attention of the United Nations High Commissioner for Human Rights ... situations of extrajudicial, summary, or arbitrary executions that are of particularly serious concern or in which early action might prevent further deterioration.'²⁶

In response to the Special Rapporteur's claim in his 2005 report that 'every single annual report of the Special Rapporteur since at least 1992 has dealt with violations of the right to life in the context of international and non-international armed conflicts',²⁷ the United States countered that 'while the Special Rapporteur may have reported on cases outside of his mandate, this does not give the Special Rapporteur the competence to address such issues'.²⁸

²¹ Allegation letter sent on 26 August 2005, in UN Doc. E/CN.4/2006/53/Add.1, pp. 264–65 (27 Mar. 2006).

²² Letter dated 4 May 2006 from the United States to the Special Rapporteur on extrajudicial, summary, or arbitrary executions, at 1.

²³ UN Doc. E/CN.4/2005/7, *supra* note 20, at para. 45.

²⁴ Letter dated 4 May 2006, *supra* note 22, at 3.

²⁵ UN Doc. E/CN.4/2005/7, *supra* note 20, para. 45.

²⁶ Letter dated 4 May 2006, *supra* note 22, at 3–4.

²⁷ UN Doc. E/CN.4/2005/7, *supra* note 20, para. 45.

²⁸ Letter dated 4 May 2006, *supra* note 22, at 4.

In some respects, this exchange is a model of the way in which relations between a government and a special procedure mandate-holder should be conducted in the event that there is a dispute not just as to the factual elements of a case but as to the applicable law. The system of communications, more accurately described by reference to another commonly used term – ‘allegation letters’ – is designed to encourage governments to shed light on specific cases and, in the event that human rights have been compromised, to take appropriate remedial action. To a distressing degree, however, the system has tended to degenerate, in the practice of many governments, into a pro forma exchange of correspondence with no serious engagement or response. Thus, in his 2005 report the Special Rapporteur noted that over the preceding year only 54 per cent of communications had received a response of any sort from the governments to whom they had been addressed. Such a response rate was clearly unsatisfactory, a problem which led the Special Rapporteur to adopt several steps designed to enhance the response rate. They included: (i) being more precise in detailing the human rights concerns as well as the measures that governments might consider taking; (ii) reducing the amount of information sought from a government in a particular case in order to ensure that the request was not unduly burdensome; and (iii) classifying the replies according to different categories which would, in effect, evaluate the government’s level of responsiveness.²⁹

The allegation letter sent to the United States on 26 August 2005 followed this approach. In place of the relative generality of previous letters, the questions posed were quite specific and carefully targeted to reflect both the facts of the particular case and the past record of correspondence with the government. Whether this helped to elicit a detailed reply, or whether the government was simply under increasing pressure to defend its prosecution of the ‘war on terror’ is not for us to speculate. Either way, the exchange effectively served the purpose of clarifying the position on both sides and bringing the differences into sharper relief. Ideally, the next stage of the procedure will involve a determination of the merits by the Human Rights Council, although the easy way out is to leave matters to be resolved by the passage of time, a highly problematic possibility with regard to acts of questionable legality, since the accumulation of precedents pointing in one direction or the other can work to create international law.³⁰

3 An Analysis of the Key Elements in the United States’ Position

As noted above, the views expressed by the United States can be divided into four propositions. In this section we will subject each of these to careful scrutiny in light of legal precedents and institutional practice. The first of the propositions, however, can be dealt with rapidly. It is that the United States Government is in a continuing state

²⁹ UN Doc. E/CN.4/2005/7, *supra* note 20, paras 21–22.

³⁰ In order for such precedents to constitute the *opinio juris* necessary for the formation of customary law, however, ‘[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by existence of a rule of law requiring it.’ *North Sea Continental Shelf*, Judgment, ICJ Reports (1969) 3, at 44, para. 77.

of armed conflict with Al Qaida. Although it has been argued by a group of five Special Rapporteurs that ‘the global struggle against international terrorism does not, as such, constitute an armed conflict for the purposes of the applicability of international humanitarian law’,³¹ even this position does not preclude the conclusion that, in at least some contexts of the ‘war on terror’, international humanitarian law applies. Thus, we begin with the second proposition which is that international humanitarian law is applicable to situations of armed conflict and operates to the exclusion of human rights law.

A Human Rights Law and Humanitarian Law are Complementary, Not Mutually Exclusive

A commonly accepted starting point for understanding the relationship between international human rights law and international humanitarian law is the *Nuclear Weapons* Advisory Opinion of the International Court of Justice. In *Nuclear Weapons*, the Court examined the relationship between human rights law and humanitarian law during armed conflict and concluded that the test of what constitutes an arbitrary deprivation of life in the context of hostilities ‘falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities’.³² The United States has consistently supported the use of this *lex specialis* test, from its illuminating written submission in *Nuclear Weapons*³³ through to the present correspondence with the Special Rapporteur. However, its communications and interventions discussed in Section 2 above reveal that it adopts a far broader notion of that test than is generally accepted in international practice, taking the position that, as a general matter, international humanitarian law operates to the complete exclusion of international human rights law in times of armed conflict. Because the United States also takes the position that international humanitarian law does not fall within the mandate of the Special Rapporteur, the combined result would be that the Special Rapporteur simply has no role at all to play during an armed conflict.

This section analyses two critical steps in the logic of the United States position, providing an alternative analysis which more clearly frames the operation of the *lex specialis* test governing the relationship between human rights law and humanitarian law as it currently operates in international law. First, we argue that the United States

³¹ Situation of detainees at Guantánamo Bay, Report of the Chairperson of the Working Group on Arbitrary Detention, Ms. Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Mr. Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Ms. Asma Jahangir and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mr. Paul Hunt, UN Doc. E/CN.4/2006/120 (15 Feb. 2006), para. 21.

³² *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports (1996) 240, para. 25.

³³ *Legality of the Threat or Use of Nuclear Weapons*, Written Statement of the Government of the United States of America, at 42–46 (20 June 1995).

incorrectly interprets the *lex specialis* test because it applies it at the level of entire legal regimes rather than at the level of individual legal concepts and provisions. That position, we argue, takes the Court's *lex specialis* language out of context, is inconsistent with the leading study conducted on *lex specialis* for the International Law Commission, and is even contrary to the United States' own reasoning in its written submission to the Court in the *Nuclear Weapons* Advisory Opinion. Second, we argue that, in order to perpetuate this initial error, the United States must ignore or reject the conclusions of numerous authoritative international bodies, including the International Law Commission, subsequent jurisprudence of the International Court of Justice, the conclusions of the Human Rights Committee, and the work of the Commission on Human Rights, all of which have found that humanitarian law and human rights law are complementary.

In order to understand why the concept of *lex specialis* applies to the relationship between individual norms within the human rights and humanitarian law regimes, rather than to the relationship between each regime taken as a whole, one must read the conclusion of the International Court of Justice in context and in its entirety. In the *Nuclear Weapons* Advisory Opinion, the Court stated that the arbitrary deprivation of life in armed conflict 'falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities'.³⁴ The United States position appears to be that this statement affirms the notion that the humanitarian law regime completely displaces the human rights law regime in the context of armed conflict. This is a misreading of the ICJ's statement on *lex specialis* because it takes that statement out of context and disregards the rest of the paragraph within which it is couched. Taken in full, that paragraph of *Nuclear Weapons* says:

The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.³⁵

Thus, the Court asserts in its opening sentence the overriding principle that in fact the Covenant does continue to apply during armed conflict and specifically reiterates that 'the right not arbitrarily to be deprived of one's life applies also in hostilities'. The Court then makes clear that its statement on *lex specialis* applies at the level of interpreting individual human rights law provisions, such as the prohibition on the arbitrary deprivation of life. The United States has read the *lex specialis* test to apply so that the entire

³⁴ See *supra* note 32 and accompanying text.

³⁵ *Nuclear Weapons*, *supra* note 32, at 240, para. 25.

legal regime of international humanitarian law replaces the entire regime of human rights law during armed conflict, a position not justified by the text of the Advisory Opinion.

Indeed in its written pleadings to the Court in the *Nuclear Weapons* Advisory Opinion the United States Government advanced this narrower interpretation of the *lex specialis* test.³⁶ Rather than argue for a wholesale replacement of human rights law by humanitarian law, the written submission argued for a *lex specialis* rule which applies at the level of individual provisions, specifically with regard to the meaning of 'arbitrary deprivation of life' in Article 6 of the covenant.³⁷ This is exactly the application of the *lex specialis* test that the Court adopted in the Advisory Opinion.

In his exhaustive study on the function and scope of the *lex specialis* rule carried out for the International Law Commission in the context of his report on the 'fragmentation of international law', Martti Koskenniemi put forth a similar analysis. Referring to the passage from the *Nuclear Weapons* Advisory Opinion, he observed:

Even as [the *lex specialis* test] works so as to justify recourse to an exception, what is being set aside does not vanish altogether. The Court was careful to point out that human rights law continued to apply within armed conflict. The exception – humanitarian law – only affected one (albeit important) aspect of it, namely the relative assessment of 'arbitrariness'. The use of the *lex specialis* test did not intend to suggest that human rights were abolished in war. It did not function in a formal or absolute way but as an aspect of the pragmatics of the Court's reasoning.³⁸

The Court has subsequently elaborated on its position in a manner consistent with this interpretation. In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court wrote:

[T]he protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.³⁹

The Court stated this principle of complementarity and the *lex specialis* test in the same paragraph, with the clear implication that the complementarity principle continues

³⁶ *Nuclear Weapons* Advisory Opinion, Written submission of the United States, *supra* note 33, at 42–46.

³⁷ *Ibid.*, at 44 ('[T]he prohibition in the International Covenant on Civil and Political Rights against arbitrarily depriving someone of his or her life was clearly understood by its drafters to exclude the lawful taking of human life. During the negotiation of the text which became article 6, various delegations indicated a preference for including an explicit statement of the circumstances under which the taking of life would not be deemed a violation of the general obligation to protect life, including *inter alia* killings ... which are lawfully committed by the military in time of war.')

³⁸ Study on the 'Function and Scope of the *lex specialis* rule and the question of "self-contained regimes": Preliminary report by Mr. Martti Koskenniemi, Chairman of the Study Group, International Law Commission, Study Group on Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law, UN Doc. ILC(LVI)/SG/FIL/CRD.1 and Add.1, para. 76.

³⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports (2004), para. 106 (emphasis added).

to operate alongside the *lex specialis* test.⁴⁰ The Court reiterated the above passage on complementarity in the *Congo v. Uganda* case⁴¹ in which it found separate violations of international humanitarian law and human rights law, thus demonstrating conclusively that international humanitarian law does not wholly replace human rights law during an armed conflict.⁴² The significance of this latest judgment should be emphasized on two levels. First, the Court has now adopted its theory of complementarity in a binding contentious case rather than solely in an advisory opinion. Second, the separate violations of humanitarian law and human rights law appear not only in the Court's reasoning, but are also carried forth to the *dispositif* of the judgment,⁴³ i.e. the binding part of the judgment which is specifically voted upon by judges and enjoys *res judicata* effect.⁴⁴

The views of the International Court of Justice do not stand alone. The position that international humanitarian law operates to the exclusion of human rights law during an armed conflict is also incompatible with the findings of numerous other authoritative bodies, including the International Law Commission, the UN Human Rights Committee, the UN Commission on Human Rights, the European Court of Human Rights, the African Commission on Human and Peoples' Rights, the Inter-American Commission on Human Rights, the UN Security Council, the UN General Assembly, and the International Committee of the Red Cross. We turn now to briefly review the findings of these bodies, to the extent that they relate directly to the assertion put forward by the government of the United States.

First, the current United States position is contrary to the approach adopted by the International Law Commission, which has recently addressed the applicability of human rights law during armed conflict in its work on the effect of armed conflict on treaties. In that context, the applicability of human rights law in armed conflict was separately endorsed by governments,⁴⁵ the Special Rapporteur on the topic,⁴⁶ and the

⁴⁰ *Ibid.*, at para. 106.

⁴¹ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ Reports (2005), para. 216.

⁴² *Ibid.*, at paras 216–20, 345(3).

⁴³ *Ibid.*, at para. 345(3).

⁴⁴ See Statute of the International Court of Justice, Articles 56, 59, 25 June 1945, 33 UNTS 993 (clarifying that the 'judgment' shall contain 'reasons' but that only the 'decision' will have binding effect between the parties); *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment No. 11, 1927, PCIJ, Series A, No. 13, at 24, dissenting opinion of Judge Anzilotti ('It is certain that the binding effect attaches only to the operative part of the judgment and not to the statement of reasons. The grounds of a judgment are simply logical arguments, the aim of which is to lead up to the formulation of what the law is in the case in question.').

⁴⁵ *Official Records of the General Assembly, 60th sess., Supp. No. 10 (A/60/10)*, para. 172 ('The view was expressed [by governments] that the category of treaties in subparagraph (d) [human rights treaties] was one in which there probably was a good basis for continuity [during armed conflict], subject to the admonition of the International Court of Justice, in the *Nuclear Weapons* Advisory Opinion, that such rights were to be applied in accordance with the law of armed conflict.').

⁴⁶ Second report on the effects of armed conflicts on treaties by Mr. Ian Brownlie, Special Rapporteur, ILC, 58th sess., UN Doc. A/CN.4/570, paras 30, 41, Draft Art. 7(2)(d) (16 June 2006).

Legal Office of the United Nations Secretariat.⁴⁷ In 2007, the Special Rapporteur of the ILC introduced a new draft Article 6 *bis*, entitled 'The law applicable in armed conflict', stating that '[t]he application of ... treaties concerning human rights ... continues in time of armed conflict, but their application is determined by reference to the applicable *lex specialis*, namely, the law applicable in armed conflict.'⁴⁸ In introducing that draft article, the Special Rapporteur noted that its drafting was specifically motivated to respond to comments made by the United States on the prior set of draft articles in the Sixth Committee of the General Assembly.⁴⁹ In those comments, the United States stated explicitly that 'certain human rights and environmental principles did not cease to apply in time of armed conflict'.⁵⁰

The broad interpretation of the *lex specialis* rule, such that humanitarian law operates to the exclusion of human rights law, is also inconsistent with the conclusions of both the Human Rights Committee and the Commission on Human Rights. Concerning the former, the Committee stated in General Comment 29 that '[t]he Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation'⁵¹ and in General Comment 31 that '[w]hile, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive'.⁵² The Commission on Human Rights, the body specifically charged with oversight of the mandate of the Special Rapporteur (until its replacement by the Human Rights Council in 2006),⁵³ has also clearly endorsed the complementarity of human rights law and international humanitarian law. For example, in Resolution 2005/34 on extrajudicial, summary, or arbitrary executions, the Commission explicitly '[a]cknowledg[ed]... that international human rights law and international humanitarian law are complementary and not mutually

⁴⁷ The effect of armed conflict on treaties: an examination of practice and doctrine: Memorandum by the Secretariat, UN Doc. A/CN.4/550, para. 32 ('[I]t is well-established that non-derogable provisions of human rights treaties apply during armed conflict.').

⁴⁸ Third report on the effects of armed conflicts on treaties, by Mr Ian Brownlie, Special Rapporteur, UN Doc. A/CN.4/578 (1 March 2007), para. 29 (emphasis added). The working-group recommended that draft Article 6 *bis* be deleted and that the subject-matter be reflected in the commentaries, possibly to draft Article 7. Report of the Working-Group, Effects of Armed Conflicts on Treaties, ILC, 59th sess., UN Doc. A/CN.4/L, however, 718, p. 4 (24 July 2007). The fact that it recommended that the material appear in the commentaries, however, makes clear that it views the legal principles themselves as correct. It appears that the move was motivated, rather, out of a feeling that the article was 'strictly speaking, redundant'. See Report of the International Law Commission at its 59th sess., UN Doc. A/62/10, at 165, para. 299.

⁴⁹ *Ibid.*, at p. 11, para. 30, n. 58.

⁵⁰ UNGA, Sixth Cmt., summary record of the 20th mtg., 3 Nov. 2005, statement of the United States, UN Doc. A/C.6/60/SR.20, at 6, para. 33 (29 Nov. 2005).

⁵¹ Human Rights Committee, General Comment No. 29 (2001) on derogations during a state of emergency, UN Doc. CCPR/C/21/Rev.1/Add.11, para. 3 (24 July 2001).

⁵² Human Rights Committee, General Comment No. 31 (2004) on the nature of the general legal obligation imposed on states parties to the Covenant (Art. 2), UN Doc. CCPR/C/21/Rev.1/Add.13, para. 11 (26 May 2004).

⁵³ See *infra* Section 3C.

exclusive'.⁵⁴ In Resolution 2005/63 on protection of the human rights of civilians in armed conflicts, the Commission '[e]mphasize[d] that conduct that violates international humanitarian law, including grave breaches of the Geneva Conventions, of 12 August 1949, or of the Protocol Additional thereto of 8 June 1977 relating to the Protection of Victims of International Armed Conflicts (Protocol I), may also constitute a gross violation of human rights'.⁵⁵

Various international tribunals have also concluded not only that human rights law applies during armed conflict but have even taken the step of applying human rights law directly in their analyses of specific conflicts. First, in two cases in 2005, the European Court of Human Rights directly applied the European Convention on Human Rights to the armed conflict in Chechnya.⁵⁶ This approach is consistent with state practice. Although the European Convention – in contrast to the International Covenant on Civil and Political Rights – allows derogation from the right to life during armed conflicts, no state has ever availed itself of this derogation. Russia, Turkey and the United Kingdom have all defended their conduct in internal armed conflicts by reference to the Convention itself.⁵⁷ The African Commission on Human and Peoples' Rights has directly applied the African Charter on Human and Peoples' Rights to human rights violations in the internal armed conflict in Chad.⁵⁸ The Inter-American Commission on Human Rights directly applied the American Convention on Human Rights to the armed conflict in El Salvador.⁵⁹ It also concluded in a different case that 'human rights treaties apply both in peacetime, and during situations of armed conflict'.⁶⁰

Finally, the recent study on customary international humanitarian law produced under the auspices of the International Committee of the Red Cross concluded that '[t]here is extensive State practice to the effect that human rights law must be applied during armed conflicts'.⁶¹ It noted that beginning with General Assembly Resolution 2625 in 1970,⁶² it has become common practice for resolutions of the General Assembly, the Security Council, and the Commission on Human Rights to condemn human rights

⁵⁴ Resolution 2005/34 on extrajudicial, summary, or arbitrary executions, preamble (19 April 2005).

⁵⁵ Resolution 2005/63 on protection of the human rights of civilians in armed conflicts (20 April 2005).

⁵⁶ *Isayeva, Yusupova and Bazayeva v. Russia*, ECtHR, App. Nos 57947-49/00 (24 Feb. 2005); *Isayeva v. Russia*, ECtHR, App. No. 57950/00 (24 Feb. 2005). For a detailed treatment, see Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya', 16 *EJIL* (2005) 741.

⁵⁷ Abresch, *supra* note 56, at 745.

⁵⁸ African Commission on Human and Peoples' Rights, *Civil Liberties Organisation v. Chad* (74/92), Decision, 11 Oct. 1995, § 22 (discussed in J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol. II, Part 2, at 2098, § 940).

⁵⁹ Henckaerts and Doswald-Beck, *supra* note 58, at 314, n. 77 (citing Inter-American Commission on Human Rights, Case 6724 (El Salvador), Resolution, 5 March 1985, §§ 1–2; Case 10.190 (El Salvador), Resolution, 4 Feb. 1992, preamble and § 1; case 10.284 (El Salvador), Resolution, 4 Feb. 1992, § 1).

⁶⁰ *Juan Carlos Abella v. Argentina*, Inter-American Commission on Human Rights, Case 11/137, Doc. OEA/Ser. L/V/II.98, para. 158 (13 April 1998).

⁶¹ Henckaerts and Doswald-Beck, *supra* note 58, at 303.

⁶² GA Res. 2675 (XXV), 9 Dec. 1970.

violations taking place during armed conflicts. The ICRC study specifically cites resolutions condemning human rights violations during armed conflicts in Afghanistan, Iraq, Sudan, Russia, the former Yugoslavia and Uganda.⁶³ One could also include Resolution 1592 concerning the armed conflict in the Democratic Republic of Congo.⁶⁴

This position has also been adopted by the UN Commission on Human Rights in relation to the mandate of the Special Rapporteur on extrajudicial, summary or arbitrary executions. In Resolution 2002/36, the Commission '[e]xpress[ed] grave concern over the continued occurrence of violations of the right to life highlighted in the report of the Special Rapporteur as deserving special attention [including] violations of the right to life during armed conflict'.⁶⁵ It would be inexplicable for the Commission to explicitly endorse this aspect of the report if it considered human rights law inapplicable during armed conflict or believed such violations were beyond the mandate.

Thus, under existing international law – as interpreted by the International Court of Justice, the International Law Commission, the Human Rights Committee, the Commission on Human Rights, the European Court of Human Rights, the Inter-American Commission on Human Rights, the African Commission on Human and Peoples' Rights, the Security Council, the General Assembly, and the International Committee of the Red Cross – human rights law is applied alongside international humanitarian law during armed conflict. The United States' position, in contrast, is noteworthy in that the United States offers no legal authority in support of its exclusionist thesis. It would presumably be hard pressed to do this without at least contradicting the positions that it has taken clearly and unequivocally in a variety of contexts outside the current framework of the Human Rights Council where its own conduct is potentially being impugned.

B The Mandates of the Human Rights Council and its Special Procedures are not Limited to International Human Rights Law

The position espoused by the United States indicates that not only the Special Rapporteur but also the Commission on Human Rights and its successor the Human Rights Council lack the competence to examine issues of international humanitarian law. Thus the letter of 4 May 2006 to the Special Rapporteur concerning Haitham al-Yemeni concluded:

For the foregoing reasons, the Commission *and* the Special Rapporteur lack competence to address issues of this nature arising under the law of armed conflict.⁶⁶

⁶³ Henckaerts and Doswald-Beck, *supra* note 58, at 303 (citing GA Res. 52/145, 12 Dec. 1997 (condemning human rights violations in Afghanistan armed conflict); Comm. Hum. Rts., Res. 1992/60, 3 Mar. 1992 (Iraq); Comm. Hum. Rts., Res. 1996/73, 23 April 1996 (Sudan); Comm. Hum. Rts., Res. 2000/58, 25 April 2000 (Russia); SC Res. 1019, 9 Nov. 1995 (former Yugoslavia); SC Res. 1034, 21 Dec. 1995 (former Yugoslavia); GA Res. 50/193, 22 Dec. 1995 (former Yugoslavia); Comm. Hum. Rts., Res. 1996/71, 23 April 1996 (former Yugoslavia); Comm. Hum. Rts., Res. 1998/75, 22 April 1998 (Uganda)).

⁶⁴ Resolution 1592 on the situation concerning the Democratic Republic of Congo (30 March 2005), fifth preambular paragraph.

⁶⁵ Comm. Hum. Rts., Res. 2002/34, para. 13(a) (22 April 2002).

⁶⁶ Letter dated 4 May 2006, *supra* note 22, at p. 4 (emphasis added).

This assertion is of far-reaching significance inasmuch as it would imply that many of the worst conflict situations in the world today fall outside the purview of the Council. In the analysis that follows we examine the competence of the Commission, and now the Council, to consider international humanitarian law and then review the competence of the Special Rapporteur in that regard.

The Commission on Human Rights was established in 1946 and for at least the last 20 years of its existence regularly treated international humanitarian law as lying within its remit, and this approach was supported by its parent body, which provides its mandate, the Economic and Social Council (ECOSOC). Thus, for example, in Resolution 1992/S-1/1, on human rights in the former Yugoslavia, the Commission ‘call[ed] upon all parties ... to ensure full respect for ... humanitarian law’⁶⁷ and ‘[r]emind[ed] all parties that they are bound to comply with their obligations under international humanitarian law, and in particular the third Geneva Convention relating to the treatment of prisoners of war and the fourth Geneva Convention relating to the protection of civilian persons in time of war, of 12 August 1949, and the Additional Protocols thereto of 1977’.⁶⁸ Subsequently, ECOSOC explicitly endorsed the Commission’s resolution.⁶⁹

Similarly, in Resolution 1994/72, on the same situation, the Commission ‘[c]ondemn[ed] categorically all violations of human rights and international humanitarian law by all sides’.⁷⁰ It then applied international humanitarian law to the situation and ‘denounce[d] continued deliberate and unlawful attacks and uses of military force against civilians and other protected persons ... non-combatants, ... [and] ... relief operations’.⁷¹ Taking note of this resolution, ECOSOC ‘approved ... [t]he Commission’s ... request that the Special Rapporteur ... continue to submit periodic reports ... on the implementation of Commission resolution 1994/72’.⁷² It also approved ‘[t]he Commission’s request to the Secretary-General to take steps to assist in obtaining the active cooperation of all United Nations bodies to implement Commission resolution 1994/72’.⁷³ Again, rather than denounce Resolution 1994/72 as it would if it believed the Commission was exceeding its mandate, ECOSOC provided continued funds for the Special Rapporteur to implement that resolution, and called upon all UN bodies to cooperate in its implementation.

In Resolution S-3/1 of 25 May 1994 on human rights in Rwanda, the Commission ‘[c]ondemn[ed] in the strongest terms all breaches of international humanitarian law ... in Rwanda, and call[ed] upon all the parties involved to cease immediately these breaches’.⁷⁴ It also ‘[c]all[ed] upon the Government of Rwanda to ... take measures to

⁶⁷ Comm. Hum. Rts., Res 1992/S-1/1, The situation of human rights in the territory of the former Yugoslavia, para. 1 (14 August 1992).

⁶⁸ *Ibid.*, at para. 9.

⁶⁹ ECOSOC Decision 1992/305 (18 Aug. 1992).

⁷⁰ Comm. Hum. Rts., Res. 1994/72, Situation of human rights in the territory of the former Yugoslavia: violation of human rights in Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro), para. 4 (9 Mar. 1994).

⁷¹ *Ibid.*, at para. 7.

⁷² ECOSOC Res. 1994/262 (22 July 1994).

⁷³ *Ibid.*

⁷⁴ Comm. Hum. Rts., Res. S-3/1, The situation of human rights in Rwanda, para. 1 (25 May 1994).

put an end to all violations of ... international humanitarian law by all persons within its jurisdiction or under its control'.⁷⁵ Again, ECOSOC explicitly endorsed this.⁷⁶

In Resolution 1996/68, the Commission 'call[ed] upon the Government of Israel, the occupying Power of territories in southern Lebanon and West Bekaa, to comply with the Geneva Conventions of 1949, in particular the Geneva Convention relative to the Protection of Civilian Persons in Time of War'.⁷⁷ ECOSOC then 'approve[d] the Commission's requests to the Secretary-General ... [t]o bring the resolution to the attention of the Government of Israel and to invite it to provide information concerning the extent of its implementation thereof'.⁷⁸

As these examples make clear, during the life of the Commission, ECOSOC repeatedly and unequivocally endorsed the proposition that both the legal regime of international humanitarian law and the phenomenon of armed conflict fell within its competence. It must be conceded that in establishing the new Human Rights Council to replace the Commission, the General Assembly did not include any specific language confirming this competence.⁷⁹ While the United States might argue that this omission indicated a wish to step away from, or even reject, previous practice, such a conclusion would need to be supported by some evidence from the relevant debates. Since the issue was never broached, it is more reasonable to assume that the assumption was not questioned by any delegation and that it was simply assumed that the Council would, in this respect as in most others, maintain the practice followed by the Commission.

C The Mandate of the Special Rapporteur is Not Limited to International Human Rights Law

While the previous section of this article sought to demonstrate that the Commission and the Council have consistently asserted the right to consider the implementation of international humanitarian law as well as of human rights law, the question still remains as to whether the mandate of the Special Rapporteur on extrajudicial, summary or arbitrary executions also extends to both bodies of law. The United States' position does not contain a systematic or well developed line of reasoning spelling out clearly the grounds on which it opposes such a mandate. Nevertheless, there would seem to be at least three major assumptions underpinning the government's position. The first is that institutions which make up the international human rights machinery are restricted in their focus to the application of human rights law, presumably of both a treaty and customary nature. The second is that any such assumption cannot be displaced or overcome by consistent state practice to the contrary. And a third element is that the development of a consistent practice by the Special Rapporteur of considering international humanitarian law cannot under any circumstances cure the failure of the original mandate accorded by the Commission on Human Rights to

⁷⁵ *Ibid.*

⁷⁶ ECOSOC Decision 1994/223 (6 June 1994).

⁷⁷ Comm. Hum. Rts., Res. 1996/68, Human rights situation in southern Lebanon and West Bekaa, para. 3 (23 April 1996).

⁷⁸ ECOSOC Decision 1996/274 (23 July 1996).

⁷⁹ GA Res. 60/251 (3 April 2006).

make explicit reference to that body of law. To a certain extent these elements are all intertwined but we shall nonetheless endeavour to examine them in sequence.

The first element then is that the institutions which make up the international human rights machinery are restricted in their focus to the application of human rights law. Thus, for example, if hypothetically the various treaties constituting the international human rights legal regime did not in fact apply during armed conflict, then the special procedures and their parent body would lack the competence to respond to those situations. Such an analysis, however, is not straightforward even in relation to a body which is established explicitly for the purpose of monitoring a specific treaty. Thus, the Human Rights Committee's direct competence is expressly limited to claims of 'violation by [a] State Party of any of the rights set forth in' the International Covenant on Civil and Political Rights.⁸⁰ But even in that case, this does not exclude the Committee from taking account of a state's obligations under other instruments, including those relating to international humanitarian law, in interpreting its obligations under the Covenant.⁸¹ This is also true of the regional human rights courts, although the range of treaties over which they have jurisdiction varies significantly from court to court. The European Court of Human Rights only has jurisdiction over complaints arising under the European Convention on Human Rights and its protocols, whereas the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights both have wider jurisdictions.⁸² The conclusion to be drawn from the consistent practice of all of these bodies, consistent with Section 3A above, is that even when an institution does not have jurisdiction over a given body of law, it may still take that law into account in its work in some circumstances. This understanding is illustrated in the 1998 statement by the American Commission on Human Rights which observed that it 'must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its resolution of ... claims alleging violations of the American Convention in combat situations'.⁸³

With respect to such bodies as the Commission on Human Rights and the Human Rights Council, however, the argument is even less complex. Neither was established as a judicial or quasi-judicial body designed to hear and pass judgment on complaints arising under any particular legal instrument. Instead, each was established to further the UN Charter's general commitment to 'promoting and encouraging respect for human rights' through a range of activities.⁸⁴ This mandate is both logically and

⁸⁰ Optional Protocol to the International Covenant on Civil and Political Rights, Art. 1.

⁸¹ General Comment 29, *supra* note 51, para. 10 ('Although it is not the function of the Human Rights Committee to review the conduct of a State party under other treaties, in exercising its functions under the Covenant the Committee has the competence to take a State party's other international obligations into account when it considers whether the Covenant allows the State party to derogate from specific provisions of the Covenant.').

⁸² See generally D. Shelton, *Regional Protection of Human Rights* (2008).

⁸³ *Abella v. Argentina*, *supra* note 60 at para. 161.

⁸⁴ UN Charter, Art. 1(3). This commitment was referenced in the resolution establishing the Human Rights Council (GA Res. 60/251 (3 Apr. 2006), preamble. The resolution establishing the Commission on Human Rights references a related provision, UN Charter, Art. 62(2), which gives ECOSOC a mandate to 'make recommendations for the purpose of promoting respect for, and observance of, human rights' (ECOSOC Res. 1/5 (16 Feb. 1946), section A, para. 1).

historically prior to the question of what treaty obligations states have with respect to human rights. Indeed, the principal international human rights treaties, especially the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, were drafted by the Commission in its early years.⁸⁵ The Commission subsequently made frequent reference to these instruments, but it never treated them as self-limitations on its competence in the way that an institution might treat its regulations or by-laws. Thus, for example, in the 1980s when a working group of the Commission drafted the Convention on the Rights of the Child it included an article prohibiting the conscription or recruitment of child soldiers and their participation in conflict, prohibitions which clearly apply during times of armed conflict.⁸⁶ The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, of 2000, further expanded this protection.⁸⁷ Thus, the Commission – and now the Council – has always worked to fulfil its mandate by exercising a broad, Charter-based *droit de regard* over human rights abuses regardless of whether they violated the treaty obligations of any particular state.⁸⁸ One of the most important means by which the Council has exercised its *droit de regard* is by establishing special procedures in relation to country and thematic mandates.

It is notable that, while the special procedures have invariably drawn on international law both to determine what issues and incidents will be of the most interest to the Commission and Council and to most effectively urge states to end abuses, the special procedures have also drawn on numerous non-binding normative instruments adopted by the Commission and other organs for the same purposes. Indeed, the Commission's resolutions establishing the mandates of special procedures have routinely laid out *droits de regard* that exceed the scope of legal obligations even for those states that have ratified all relevant treaties. There was, for example, relatively

⁸⁵ Alston, 'The Commission on Human Rights', in P. Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal* (1992) 126.

⁸⁶ Convention on the Rights of the Child, Art. 38. It also contains a provision to the effect that 'States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child', thus exemplifying the complementarity between the two regimes. *Ibid.*, at Art 38(1).

⁸⁷ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, GA Res. 54/263 (2000), entered into force on 12 February 2002.

⁸⁸ As one of us wrote over 15 years ago:

The *droit de regard* which entitles the United Nations to respond to gross violations of human rights in a wide variety of ways has been firmly established in customary international law. ...

... [I]t is appropriate to ask whether the range of norms which can appropriately be the subject of the scrutiny or [*droit de regard*] is limited in some way – to customary norms, for example. In our view its scope is comprehensive and embraces all of the dimensions of international human rights law. It thus takes full account of customary norms, norms based on authentic interpretation, and general principles and extends also to soft law norms.

Simma and Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, General Principles', *12 Australian Year Book of International Law* (1992) 82, at 99.

little explicit international law regarding the rights of internally displaced persons, but this did not prevent the Commission, with the strong support of the United States, from establishing a mandate which has held states to account. More important in the present context is the fact that the normative framework that has evolved with the acquiescence of the United States and the other members of the Commission is by no means confined to human rights norms, but draws significantly upon refugee law and international humanitarian law.⁸⁹ This greater breadth as compared to treaty bodies is a virtue of the system, which has permitted the Commission and Council to respond to abuses and protect victims even when they are not effectively covered by international human rights law. This is especially helpful if a state's disregard for human rights is reflected not only in its abuses but also in its decision not to ratify important instruments. In addition, the space between the Commission and Council's *droits de regard* and the legal obligations of states has proven to be a fertile zone for normative development, pushing forward that aspect of the Commission and Council's mandates and even resulting in the drafting of new normative instruments.

In particular relation to the mandate of the Special Rapporteur on extrajudicial, summary, or arbitrary executions, we note that the mandate as defined in the resolution creating the post is 'to examine ... questions related to summary or arbitrary executions', without reference to the specific legal framework within which that mandate is to be implemented.⁹⁰ The mandate thus has been defined in terms of a phenomenon – extrajudicial, summary or arbitrary executions – that was of concern to the Commission and now to the Council, rather than by reference to a particular legal regime.

A recent review by the Special Rapporteur of the organic evolution of his mandate illustrates the extent to which this evolution has been driven primarily by factors such as demands by states to address specific situations or phenomena which were not envisaged explicitly in the original resolution, by the need to respond to new forms of violations, and by increasing public demands for effective responses in specific contexts.⁹¹ It has also been affected by the development of new techniques and expectations within the overall human rights regime. This includes the process of expanding the reach of bodies dealing with human rights norms to include also norms of international humanitarian law. This process has been a gradual but inexorable one since the World Conference on Human Rights held in Teheran in 1968. It is not feasible within the present context to undertake a broad-brush review of this development.⁹² Instead it must suffice to consider below some of the specific ways in which this broader

⁸⁹ See generally S. Bagshaw, *Developing a Normative Framework for the Protection of Internally Displaced Persons* (2005); and C. Phuong, *The International Protection of Internally Displaced Persons* (2004).

⁹⁰ Comm. Hum. Rts., Res. 1982/29, para. 2; ECOSOC Res. 1982/35, para. 2.

⁹¹ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/62/265 (16 Aug. 2007), paras 22–54.

⁹² For further examples involving other mandate-holders acting during armed conflict with the subsequent approval of the relevant political organs including the Commission on Human Rights and the General Assembly, see the Working paper on the relationship between human rights law and international humanitarian

evolution specifically affected the mandate of the Special Rapporteur on extrajudicial executions. As the Special Rapporteur concluded in his 2007 review of the overall process of task expansion:

The result is a process of organic evolution which ensures that mandates are not frozen in time and thus unable to respond to new and changing circumstances. This evolution is fully reported in the annual reports of the mandate-holders and those reports are the subject of debate and constant feedback among the various stakeholders. At the end of the day, the Commission or the Council signals its acquiescence in the developments through its response to the reports, traditionally in the form of resolutions. In the vast majority of cases the developments reported are explicitly endorsed by the parent body noting or approving the report and often also requesting the mandate-holder to further develop or strengthen certain measures.⁹³

This brings us to the third element in the US position which is that the development of a consistent practice of taking account of international humanitarian law in the work of the Special Rapporteur cannot under any circumstances cure the failure of the original mandate accorded by the Commission on Human Rights to make explicit reference to that body of law. This assumption was expressed in the following terms by the United States in its comments of 4 May 2006:

[W]hile the Special Rapporteur may have reported on cases outside of his mandate, this does not give the Special Rapporteur the competence to address such issues.⁹⁴

Expressed in terms of domestic law one might express the same sentiment by noting that a consistent pattern of *ultra vires* acts does not cure the original defect. But such a domestic analogy does not work when applied to international law. An integral part of the international legal framework is its dynamic nature and the indispensable role played by state practice in the formation of customary rules including those concerning the development of institutional competences and broader normative evolution.⁹⁵ The United States is correct insofar as its goal is to emphasize that the Special Rapporteur alone cannot determine the contours of the legal framework within which the mandate is to be implemented. Nor, of course, can any single government do so. This power is held by the Council and was previously held by the Commission, which reviewed and accepted, discouraged or rejected, the interpretations proposed by

law by F. Hampson and I. Salama, UN Doc. E/CN.4/Sub.2/2005/14 (2005), para. 64 (concluding that '[t]he reports of those holding country mandates in situations of conflict and General Assembly resolutions referring to those mandates have routinely referred to both human rights law and the law of armed conflict', and referring, *inter alia*, to the Report of the Special Rapporteur (Mr. Felix Ermacora) on the Situation of Human Rights in Afghanistan, UN Doc. A/49/650 (1994); Report of the Independent Expert on the situation of human rights in Afghanistan, Mr. Cherif Bassiouni, UN Doc. E/CN.4/2005/122 (2005); and the Report of the Independent Expert on the question of the protection of human rights and fundamental freedoms while countering terrorism (Mr. Robert K. Goldman), UN Doc. E/CN.4/2005/103 (2005)). Similarly, the Working Paper notes that the Working Group on Arbitrary Detention acts with respect to situations of armed conflict and applied international humanitarian law in its consideration of detentions in Guantánamo Bay. *Ibid.*, para. 66 (citing Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/2003/8 (2002), paras. 61–64).

⁹³ Report of the Special Rapporteur, *supra* note 91, at para. 53.

⁹⁴ Letter dated 4 May 2006, *supra* note 22, at p. 4.

⁹⁵ See *supra* note 30 and accompanying text.

successive mandate-holders. The cases below provide illustrative examples in relation to the mandate on extrajudicial executions.

In 1983, in the very first report under the mandate, S. Amos Wako observed that summary and arbitrary executions frequently occur during armed conflicts and that, therefore, international humanitarian law formed an important element of the mandate's legal framework. With that in mind, he included a substantive section on 'Killings in war, armed conflict, and states of emergency' under the heading 'International legal standards'.⁹⁶ In that section, after discussing the application of human rights law in accordance with the relevant derogation rules, he notes that '[t]he Geneva Conventions of 12 August 1949 are also relevant. ... Each of the Geneva Conventions clearly prohibits murder and other acts of violence against protected persons. They explicitly provide that "willful killings" are to be considered "grave breaches" of the Geneva Conventions, that is, war crimes subject to universality of jurisdiction.'⁹⁷ The report was accepted by the Commission.⁹⁸

In January 1992 the same Special Rapporteur published an annex to his annual report entitled 'List of Instruments and other Standards which Constitute the Legal Framework of the Mandate of the Special Rapporteur'.⁹⁹ The Geneva Conventions appear as item three of that 14-point list. This report was accepted in its entirety by the Commission.¹⁰⁰ Moreover, the Commission explicitly 'welcome[d] his recommendations with a view to eliminating extrajudicial, summary, or arbitrary executions'.¹⁰¹ These recommendations contained recommendations on extrajudicial executions during armed conflict.¹⁰² If the Commission did not accept that international humanitarian law formed part of the legal framework within which the mandate is to be implemented, it is difficult to understand why the Commission would explicitly endorse recommendations of the Special Rapporteur as to extrajudicial executions in armed conflict.

In December 1992, Bacre Waly Ndiaye in his first report as Special Rapporteur included a section on 'Violations of the right to life during armed conflicts' under the heading 'Legal framework within which the mandate of the Special Rapporteur is implemented'.¹⁰³ That section stated that:

[t]he Special Rapporteur receives many allegations concerning extrajudicial, summary or arbitrary executions during armed conflicts. In considering and acting on such cases, the Special Rapporteur takes into account the Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 1977. Of particular relevance are common article 3 of the 1949 Conventions, which protects the right to life of members of the civilian population as well as combatants who are injured or have laid down their arms, and article 51 of Additional Protocol I and

⁹⁶ Report by Mr. S. Amos Wako, Comm. Hum. Rts., 39th sess., UN Doc. E/CN.4/1983/16, paras. 29–39 (31 Jan. 1983).

⁹⁷ *Ibid.*, at paras 33–34.

⁹⁸ Comm. Hum. Rts., Res. 1983/36, para. 3 (8 Mar. 1983).

⁹⁹ Report by Mr. S. Amos Wako, Comm. Hum. Rts., 48th sess., UN Doc. E/CN.4/1992/30, p. 176 (31 Jan. 1992).

¹⁰⁰ Comm. Hum. Rts., Res. 1992/72, para. 3 (5 March 1992).

¹⁰¹ *Ibid.*

¹⁰² Report by Mr. S. Amos Wako, *supra* note 99, paras. 649(f) and 651(b).

¹⁰³ Report by R. Bacre Waly Ndiaye, Comm. Hum. Rts., 49th sess., UN Doc. E/CN.4/1993/46, paras. 60–61 (23 Dec. 1992).

article 13 of Additional Protocol II concerning the protection of the civilian population against the dangers arising from military operations.¹⁰⁴

This report was accepted in its entirety by the Commission.¹⁰⁵

In January 1995, a joint report on Colombia was issued by two Special Rapporteurs. One was Bacre Waly Ndiaye, who was the Special Rapporteur on extrajudicial, summary or arbitrary executions at that time, and the other was the Special Rapporteur on Torture, Nigel Rodley. The report contained systematic references to violations of humanitarian law and implied that insurgent groups violated humanitarian law by engaging in practices such as the assassination of informers and girlfriends of members of the armed forces, as well as the abduction of hostages for ransom.¹⁰⁶ Similarly, in his report on a visit to Burundi in July 1995, Special Rapporteur Ndiaye qualified the conflict there as a 'low intensity civil war'.¹⁰⁷ Conflict qualification is unquestionably an element of the practice of humanitarian law, not human rights law. The Commission in Resolution 1996/74 welcomed not only this report as a whole but specifically the 'methods of work' adopted by Ndiaye in his report.¹⁰⁸ In her first report as Special Rapporteur in 1999, Asma Jahangir adopted the legal framework elaborated by Ndiaye.¹⁰⁹ This report was accepted in its entirety by the Commission in its Resolution 1999/35 on extrajudicial, summary, or arbitrary executions.¹¹⁰

In the first report of Philip Alston as Special Rapporteur on extrajudicial, summary or arbitrary executions in 2005, concerning The United States' responses to communications regarding the alleged extrajudicial killings in Yemen and Iraq discussed

¹⁰⁴ *Ibid.*, para. 60. Mr. Ndiaye repeatedly stated this interpretation in his report to the Commission each subsequent year. See Report by Mr. Bacre Waly Ndiaye, Comm. Hum. Rts., 50th sess., UN Doc. E/CN.4/1994/7, para. 10(l) (7 Dec. 1993); Report by Mr. Bacre Waly Ndiaye, Comm. Hum. Rts., 51st sess., UN Doc. E/CN.4/1995/61, para. 7(d), paras. 394-96 (14 Dec. 1994); Report by Mr. Bacre Waly Ndiaye, Comm. Hum. Rts., 52nd sess., UN Doc. E/CN.4/1996/4, para. 10(f), paras. 587-89 (25 Jan. 1996); Report by Bacre Waly Ndiaye, Comm. Hum. Rts., 53rd sess., UN Doc. E/CN.4/1997/60, paras. 38-41 (24 Dec. 1996); Report of Mr. Bacre Waly Ndiaye, Comm. Hum. Rts., 54th sess., UN Doc. E/CN.4/1998/68, paras. 42-43 and 126-127 (23 Dec. 1997).

¹⁰⁵ Comm. Hum. Rts., Res. 1993/71, para. 4 (10 Mar. 1993) ('[T]aking note with appreciation of the report of the Special Rapporteur and welcom[ing] his recommendations with a view to eliminating extrajudicial, summary or arbitrary executions').

¹⁰⁶ Joint report of the Special Rapporteur on the question of torture, Mr. Nigel S. Rodley, and the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Bacre Waly Ndiaye, mission to Colombia, Comm. Hum. Rts., 51st sess., UN Doc. E/CN.4/1995/111, para. 57 (Jan. 16, 1995).

¹⁰⁷ Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission resolution 1995/73, mission to Burundi, Comm. Hum. Rts., 52nd sess., UN Doc. E/CN.4/1996/4/Add.1 (July 24 1995).

¹⁰⁸ Resolution 1996/74 on extrajudicial, summary, or arbitrary executions (23 April 1996).

¹⁰⁹ Report of Ms. Asma Jahangir, Comm. Hum. Rts., 55th sess., UN Doc. E/CN.4/1999/39, para. 7 (6 Jan. 1999). Ms. Jahangir repeatedly stated this interpretation in each subsequent year. See Report of Ms. Asma Jahangir, Comm. Hum. Rts., 56th sess., UN Doc. E/CN.4/2000/3, paras. 6(f), 30, and 103-105 (25 Jan. 2000); Report of Ms. Asma Jahangir, Comm. Hum. Rts., 57th sess., UN Doc. E/CN.4/2001/9, paras. 7(b) and 51-53 (11 Jan. 2001); Report of Ms. Asma Jahangir, Comm. Hum. Rts., 58th sess., UN Doc. E/CN.4/2002/74, paras. 8(b) and 66-71 (9 Jan. 2002); Report of Ms. Asma Jahangir, Comm. Hum. Rts., 59th sess., UN Doc. E/CN.4/2003/3, paras. 8(b) and 35-44 (13 Jan. 2003); Report of Ms. Asma Jahangir, Comm. Hum. Rts., 60th sess., UN Doc. E/CN.4/2004/7, paras. 27-29 (22 Dec. 2003).

¹¹⁰ Comm. Hum. Rts., Res. 1999/35, para. 8 (26 April 1999).

above, he stated that '[t]hese responses raise a number of matters which warrant clarification. The first concerns the place of humanitarian law within the Special Rapporteur's mandate. The fact is that it falls squarely within the mandate.'¹¹¹ The Commission accepted this report in its Resolution 2005/34 on extrajudicial, summary, or arbitrary executions.¹¹² That resolution also explicitly '[a]cknowledg[ed] ... that international human rights law and international humanitarian law are complementary and not mutually exclusive'.¹¹³ This endorsement of the Special Rapporteur's approach under the mandate is unequivocal.

Indeed, the consultative and iterative process by which the mandate has been elaborated and refined has been going on for 25 years, frequently in relation to situations of armed conflict, without a single objection by the United States until 2003. In particular, it raised no objections to the legal framework outlined by Amos Wako and repeated by his various successors over many years and in many reports. Even after the Special Rapporteur raised the issue explicitly in his 2005 report, in a direct challenge to The United States' position, the United States opted not to engage in public discussion, nor, as a member of the Commission, did it call for a rewording of this resolution so as to challenge the conclusions of the annual report. Instead, it made a number of substantive interventions in the debate on the resolution, but none concerning this language.¹¹⁴ In the vote on the resolution, the United States chose to abstain.¹¹⁵ After two decades of silence in the face of an unbroken line of Special Rapporteurs explicitly addressing issues of humanitarian law and situations involving armed conflicts, it is difficult to think what could lie behind the sudden change of heart other than the fact that the United States saw things differently once its own practices were called into question. It is notable, moreover, that other states have not rushed to support the newly asserted position.

4 Conclusion

The principal implications of the position adopted since 2003 by the United States on the scope of international human rights law and of the Council's mandate are twofold. The first relates to the accountability of the United States itself while the second concerns the consequences for the international system of accountability as a whole.

¹¹¹ UN Doc. E/CN.4/2005/7, *supra* note 23, para. 45.

¹¹² Resolution 2005/34 on extrajudicial, summary, or arbitrary executions, para. 12 (19 April 2005).

¹¹³ *Ibid.*, preamble.

¹¹⁴ Commission des droits de l'homme, *Compte rendu analytique de la 56e séance* (19 April 2005) UN Doc. E/CN.4/2005/SR.56, para. 88–89 (2006).

¹¹⁵ *Comm. Hum. Rts.*, UN Doc. E/CN.4/2005/135, p. 136 (2005). Under the principle of acquiescence in international law, such 'tacit recognition manifested by unilateral conduct ... may [be] interpret[ed] as consent.' *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, ICJ Reports (1984), 246, at 305, para. 130. See also *Temple of Preah Vihear*, ICJ Reports (1962) 6, at 23 (finding that because Thailand did not object to maps provided by France delimitating the border at issue, they 'thereby must be held to have acquiesced'); D. W. Bowett, 'Estoppel Before International Tribunals and its Relation to Acquiescence', *BYbIL* (1957) 176, at 201.

In terms of the former, much has already been written about the extent to which the United States has adopted a series of policy approaches, reinforced by legal interpretations, which seem designed to provide it with maximum flexibility and minimum accountability to enable it to prosecute the 'war on terror'. Rather than repeating those analyses here, it must suffice to note that at the same time as the United States has argued that it is not accountable to the Human Rights Council in relation to these issues, it has also moved to restrict or reject accountability in other contexts and fora. These include its assertion that the 'war on terror' is an armed conflict within the meaning of Common Article 3 of the Geneva Conventions, that the concept of 'cessation of hostilities' can be defined in an almost entirely open-ended manner, and that treaties such as the International Covenant on Civil and Political Rights can be interpreted so as to avoid responsibility for extraterritorial actions in places such as Guantánamo Bay. Most important for present purposes is its view that armed conflicts of an international scope between a state and a non-state actor such as al Qaeda are not covered by the rules of humanitarian law.¹¹⁶ The result is that the claim of non-accountability to the Human Rights Council is then perfectly paralleled by claims as to non-accountability to the other potential mechanisms that might challenge United States actions, thus creating a convenient legal accountability vacuum.

Equally problematic are the consequences of the United States' position for the international human rights regime as a whole. Precisely because experience demonstrates that 'a very high proportion of summary or arbitrary executions occur in situations of armed conflict',¹¹⁷ the reinterpretation of the mandate of the Special Rapporteur would drastically limit his capacity to provide any protection to individuals in such situations and entirely eliminate his capacity to hold states to account for extrajudicial executions committed in the context of armed conflicts. To the extent that the United States' position would also deny the Special Rapporteur the opportunity to determine whether a particular incident did in fact take place in the context of an armed conflict, it would additionally enable all governments to avoid scrutiny of killings merely by asserting that they occurred within the context of an armed conflict.

The scale of these negative consequences is best illustrated by considering some examples of situations of armed conflict in which the mandate has in the past been able to make a contribution:

- During the Rwandan civil war in 1993, the Special Rapporteur conducted a mission to Rwanda to document extrajudicial executions taking place there.¹¹⁸ The report of his mission is widely recognized as having sounded the alarm bells of the impending genocide in that country.¹¹⁹

¹¹⁶ For a systematic and incisive analysis of each of these arguments see Satterthwaite, 'Rendered Meaningless: Extraordinary Rendition and the Rule of Law', 75 *The Geo. W'ton L. Rev.* (2007) 1333.

¹¹⁷ Report of the Special Rapporteur, Mr. S. Amos Wako, Comm. Hum. Rts., 42d sess., UN Doc. E/CN.4/1986/21, para. 150 (7 Feb. 1986).

¹¹⁸ Report by Mr. B.W. Ndiaye, Special Rapporteur, on his mission to Rwanda from 8 to 17 April 1993, UN Doc. E/CN.4/1994/7/Add.1 (11 August 1993).

¹¹⁹ See Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda (15 Dec. 1999) (enclosure of S/1999/1257 (16 Dec. 1999)), at 6–7.

- During the armed conflict between India and Pakistan in 1999, the Special Rapporteur transmitted to the Government of India 13 allegations of violations of the right to life.¹²⁰ She sent 16 allegations to Pakistan.¹²¹
- During the armed conflict between Ethiopia and Eritrea from 1998–2000, the Special Rapporteur sent 12 individual allegations regarding extrajudicial executions in Ethiopia in 1998 and one regarding an alleged extrajudicial execution in 2000.¹²²
- In response to alleged extrajudicial executions during the civil war in the Democratic Republic of the Congo, the Special Rapporteur conducted a mission to that country in June 2002. Her report provided crucial information concerning the massacre of civilians in Kisangani by the Rassemblement Congolais pour la Démocratie-Goma on 14 May 2002.¹²³
- Finally, international humanitarian law also applies to situations of occupation.¹²⁴ In this regard, the Special Rapporteur has intervened in many cases of alleged targeted killings by Israel in the Occupied Palestinian Territories, including a total of 38 such interventions in 2005 alone.¹²⁵ Following the targeted killing of spiritual leader Sheikh Ahmed Yassin by an Israeli helicopter strike in 2004, the Special Rapporteur sent a communication which elicited a detailed and illuminating response from Israel.¹²⁶

It follows from the position advocated by the United States Government that the Special Rapporteur on extrajudicial, summary or arbitrary executions was abusing his or her mandate in addressing each of these situations. It also follows that the Special Rapporteur should cease to consider any allegations of violations received from victims of the conflicts in the Darfur region of Sudan, in Sri Lanka, and in a great many other situations in which widespread and grave abuses of human rights have been reported.

If the United States position is to garner credibility it needs to be asserted in relation to situations beyond those concerning the actions of the United States itself. It is therefore particularly noteworthy that the United States has already started down

¹²⁰ *Ibid.*, para. 225.

¹²¹ *Ibid.*, para. 348.

¹²² UN Doc. E/CN.4/1999/39/Add.1, UN Doc. E/CN.4/2001/9/Add.1, para. 77 (6 January 1999); para. 178 (17 Jan. 2001).

¹²³ Report of the Special Rapporteur, Ms. Asma Jahangir, submitted pursuant to Commission on Human Rights resolution 2002/36, Addendum, Mission to the Democratic Republic of the Congo, UN Doc. E/CN.4/2003/3/Add.3 (4 Nov. 2002).

¹²⁴ Geneva Conventions of 1949, Common Article 2; Hague Regulations of 1907, Arts. 42–56; Fourth Geneva Convention, Arts. 27–34 and 47–78.

¹²⁵ Report of the Special Rapporteur, Philip Alston, Extrajudicial, Summary or Arbitrary Executions, Addendum, UN Doc. E/CN.4/2006/53/Add.1, at 125–136 (27 March 2006).

¹²⁶ Philip Alston, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum, Summary of cases transmitted to Governments and replies received, UN Doc. E/CN.4/2005/7/Add.1, paras. 357–358 (17 March 2005).

this road. Thus in the Human Rights Council dialogue following the submission of a joint report on a mission to Israel and Lebanon by four mandate holders, including the Special Rapporteur on extrajudicial, summary, or arbitrary executions,¹²⁷ the United States made the following remarks:

The United States is disappointed that these mandate-holders took it upon themselves to pronounce on complex questions of international humanitarian law. Under the relevant Council resolutions, we find no basis for the mandate-holders to address the conduct of actual military operations or render opinions on whether the parties to the armed conflict have met their obligations under the law of war. The result is unfortunate, as the Report applies international humanitarian rights law [sic] in areas governed by the law of armed conflict and offers opinions on the law of armed conflict that are in some cases dubious and that, in any event, fall outside their mandate.¹²⁸

At the end of the day there are several different factors which will determine the sustainability of the position adopted by the United States in relation to the competence of the UN Human Rights Council and its Special Rapporteur on extrajudicial, summary or arbitrary executions in order to avoid scrutiny of some of its actions in pursuit of the 'war on terror'. The first is the response of other states within the framework of the Human Rights Council. While various states will be tempted for their own policy reasons to support the United States' position, it seems unlikely that any large coalition will emerge to support that approach. The reason is that any states joining such a coalition would not only be gaining more freedom from accountability for themselves but also removing what few constraints currently exist to temper the political and legal options of the United States in its global actions. The second factor is that the United States itself which itself might come to see that its own interests are best served if multilateral institutions such as the United Nations are able to hold other nations to account for human rights violations committed in the context of armed conflicts.

¹²⁷ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt; the Representative of the Secretary-General on human rights of internally displaced persons, Walter Kälin; and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, Mission to Lebanon and Israel, UN. Doc. A/HRC/2/7 (2 Oct. 2006).

¹²⁸ Interactive dialogue at the second session of the Human Rights Council concerning the joint report on the mission to Lebanon and Israel, statement of H. E. Mr. Warren W. Tichenor, United States of America (October 2006), available at http://www.extrajudicialexecutions.org/reports/dialogues/hrc_second_session_4_Oct/ (last accessed 7 January 2008).