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	OIC-00	OIG-00	NIMA-00	PA-00	PER-00	GIWI-00	PRS-00
	P-00	ISNE-00	DOHS-00	SP-00	IRM-00	SSO-00	SS-00
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SUBJECT: HAITHAM AL-YEMENI-Log number 26-2005

1. Mission received the following communication from Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, regarding the death of Haitham al-Yemeni. This communication has been forwarded to IO/SHA via e-mail. It is number 26 on the Geneva 2005 Communications Log.

2. Begin text of letter:

Excellency,
I have the honour to address you in my capacity as Special Rapporteur on extrajudicial, summary, or arbitrary executions pursuant to Commission on Human Rights Resolution 2004/371 and General Assembly Resolution 60/251.

This communication is in response to your correspondence of 4 May 2006, which replied to my earlier communication of 26 August 2005 requesting information regarding the alleged killing of Haitham al-Yemeni on the Pakistan-Afghanistan border on or around 10 May 2005 by a missile fired by an unmanned aerial drone operated by the US Central Intelligence Agency. Your 4 May 2006 correspondence took the position that your government is in a continuing state of international aimed conflict with Al Qaida, stated that "Al Qaeda terrorists who continue to plot attacks against the United States may be lawful subjects of armed attacks in appropriate circumstances", and implied that Haitham al-Yemeni was targeted on that basis. While I greatly appreciate your Government's willingness to engage in a dialogue on this issue, I regret that your

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correspondence of 4 May 2006 provides a partial response to only the first of the four questions posed in my communication, namely, that you consider international humanitarian law applicable to the incident in question.

Your letter also stated that the communication concerning Haitham al-Yemeni exceeded my mandate as Special Rapporteur on extrajudicial, summary or arbitrary executions because: (1) international humanitarian law is applicable to that armed conflict and operates to the exclusion of human rights law; (2) issues governed by international humanitarian law do not fall within the terms of reference of the Commission on Human Rights ("Commission"), and thus by extension, of its successor, the Human Rights Council ("Council"); (3) the examination of questions related to alleged violations of international humanitarian law is not included in the mandate of the Special Rapporteur for extrajudicial, summary, or arbitrary executions; and (4) States may determine for themselves whether an individual incident is covered by the mandate of the Special Rapporteur.

If these positions were to be accepted, they would present a significant challenge not only to the work of this mandate but, more importantly, to a significant amount of the activities undertaken by the Human Rights Council. In brief, one of the consequences would be to disable the Council in relation to a large number of situations involving armed conflicts in which it has been actively involved over the past decade and more. In view of the potentially dramatic implications of the position put forward by your Excellency's Government it is essential that they be subject to very careful scrutiny. That is the purpose of the present communication.

International human rights law and international humanitarian law are complementary, not mutually exclusive

Your position is that, as a general matter, international humanitarian law operates to the exclusion of international human rights law in times of armed conflict. I respectfully submit that the relationship between the two bodies of law in times of armed conflict is significantly more complex than this characterization would suggest. In its Nuclear Weapons Advisory Opinion, the International Court of Justice concluded that the test of what is 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", a position your Government had advocated in its written pleadings to the Court. Thus, even under the *lex specialis* principle, and even if my mandate were specifically limited to human rights law (which, as I will explain below, it is not), I would be not only permitted but required to examine international humanitarian law as a necessary prerequisite to

interpreting human rights law.

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The Court has since consistency added another important layer to this analysis, as exemplified in its most recent case (Congo v. Uganda):

The 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.

The Court stated this principle of complementarity and the lex

specialis principle in the same paragraph, with the clear implication that the complementarity principle continues to operate alongside the lex specialis principle. In Congo v. Uganda it reiterated the complementarity principle and then 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. This is consistent with the conclusion of the Human Blights Committee 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." Thus, under current international law, human rights law is applied alongside international humanitarian law during armed conflict, and the interpretation of human rights law requires examination of international humanitarian law. In contrast, it is noteworthy that in support of its assertion of the exclusivity of international humanitarian law the United States' Government offers no authority to support its position. It also clearly and directly contradicts earlier positions taken by the United States.

The Commission on Human Rights, the body specifically charged with oversight of my mandate (until its replacement by the Human Rights Council earlier this year), has also clearly endorsed the complementarity of human rights law and international humanitarian law. In Resolution 2005/34 on extrajudicial, summary, or arbitrary executions, the Commission explicitly "[acknowledged] that international human rights law and international humanitarian law are complementary and not mutually exclusive", Similarly, 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

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special attention [including] violations of the right to life during armed conflict". 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.

Finally, the International Law Commission 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, the Special Rapporteur on the topic, and the Legal Office of the United Nations Secretariat. It should be noted in particular that the applicability of human rights law during armed conflict received the direct support and approval of the US Government.

The Commission on Human Rights could and did consider international humanitarian law within its terms of reference

Your assertion that the Commission on Human Rights lacked the competence to address issues arising under the law of armed conflict is deeply concerning, both because of a complete lack of support for the proposition and because of the radical consequences that would flow from removing many of the worst situations in the world today from the purview of the Council. In the decades since the Commission was established as a subsidiary body of the Economic and Social Council ("ECOSOC"), the Commission has consistently included international humanitarian law within its terms of reference, and this approach has been endorsed by ECOSOC. The resolutions discussed below provide illustrative examples:

In Resolution 1992/S-1/1, on the situation of human rights in the territory of the former Yugoslavia, adopted by the Commission at its first special session in 1992, the Commission "call[ed] upon all parties... to ensure full respect for humanitarian law" 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". Significantly, in Decision 1992/305, ECOSOC explicitly "endorsed resolution 1992/S-1/1 of 14 August 1992, adopted by the Commission on Human Rights at its first special session."

In Resolution 1994/72, on the situation of human rights in the territory of the former Yugoslavia, the Commission "[c]ondemn[ed] categorically all violations of human rights and international humanitarian law by all sides". 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". Taking note of this resolution, the ECOSOC "approved [t]he Commission's request that the Special Rapporteur continue to submit periodic reports on the implementation of Commission resolution 1994/72" 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" Again, rather than denounce the Commission for exceeding its mandate in Resolution 1994/72, 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 the Situation of 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". It also "[c]all[ed] upon the Government of Rwanda to ... take measures to put an end to all violations of... international humanitarian law by all persons within its jurisdiction or under its control". ECOSOC, in special session, explicitly "endorsed resolution S-3/1 of 25 May 1994, adopted by the Commission on Human Rights".

In Resolution 1996/68, the Commission "calle[d] 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". 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.

As these examples make clear, during the life of the Commission, ECOSOC clearly and repeatedly accepted that international humanitarian law formed part of its terms of reference. Similarly, in establishing the Council in replacement of the Commission, the General Assembly in no way undertook to narrow its competence.

The mandate of the Special Rapporteur for extrajudicial, summary, or arbitrary executions includes examination of alleged violations of inter national humanitarian law

With regard to your position that the mandate of the Special Rapporteur for extrajudicial, summary, or arbitrary executions does not include the competence to review alleged violations of international humanitarian law, I would note that the mandate as

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stated in the resolutions creating the Special Rapporteur for extrajudicial, summary, or arbitrary executions 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. 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.

Your correspondence stated 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." This position, however, does not accurately reflect the consultative process within which the legal framework supporting the mandate has been developed. While the Special Rapporteur alone cannot, and has not, determined the contours of the legal framework within which the mandate is to be implemented, neither may any single government do so. This power is held by the Council and was previously held by the Commission, which reviewed and accepted the interpretations provided by successive mandate-holders. The cases below provide illustrative examples:

In the very first report under the mandate in 1983, Mr. 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". In that section, after discussing 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 'wilful killings' are to be considered 'grave breaches' of the Geneva Conventions, that is, war crimes subject to universality of jurisdiction. The report was accepted in its entirety by the Commission.

In January 1992 the Special Rapporteur, Mr. S. Amos Wako, published a special annex to his annual report entitled List of Instruments and other Standards which Constitute the Legal Framework of the Mandate of the Special Rapporteur. The Geneva Conventions appear as item three of that fourteen point list. This report was accepted in its entirety by the Commission. Moreover, the Commission explicitly "welcome[d] his recommendations with a view to eliminating extrajudicial, summary, or arbitrary executions". These recommendations contained recommendations on extrajudicial executions during armed conflict. If the Commission did not accept

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that international humanitarian law ~~UNCLASSIFIED~~ 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, Mr. 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". 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 article 13 of Additional Protocol II concerning the protection of the civilian population against the dangers arising from military operations." This report was accepted in its entirety by the Commission.

In the first report of Ms. Asma Jahangir as Special Rapporteur in 1999, she adopted the legal framework elaborated by Mr. Ndiaye. This report was accepted in its entirety by the Commission in its Resolution 1999/35 on extrajudicial, summary, or arbitrary executions. In my first report as Special Rapporteur in 2005, concerning your responses to my inquiries regarding alleged extrajudicial killings in Yemen and Iraq, in which your government maintained a similar legal position as in the present case, I 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". The Commission accepted this report in its Resolution 2005/34 on extrajudicial, summary, or arbitrary executions. That resolution also explicitly "[a]cknowledg[ed] that international human rights law and international humanitarian law are complementary and not mutually exclusive". This endorsement of the complementarity of human rights and international humanitarian law by the Commission - the body that determined my mandate - is unequivocal.

I note with respect that the United States did not object to Mr. Wako's characterization of the legal framework when first published, nor did the United States ever object to the inclusion of international humanitarian law instruments in the legal framework supporting the mandate until 2003, two decades after international

humanitarian law was first applied under the mandate. Even my comments in the 2005 report, which were in direct response to the United States' position on this question, received no objection from your Government. If your Government wished to take issue with my position on the mandate which I elaborated in the report, then as a member of the Commission your Government could have called for a rewording of this resolution so as to challenge my conclusions. Instead, the United States made a number of substantive interventions in the debate on the resolution, but none concerning this language. In the vote on the resolution, your Government chose to abstain.

It is abundantly clear that the United States did not, in fact, persuade the Commission to modify its long-standing interpretation of the mandate. It can also be added that, under the principle of good faith in international law, a State should not benefit from its own inconsistency. After twenty-three years of silence on the topic while an unbroken line of Special Rapporteurs submitted legal frameworks including international humanitarian law to the Commission for public debate, it would be difficult to accept that your Government could now avoid responding to an individual communication simply by objecting that international humanitarian law falls outside the mandate.

States may not unilaterally determine that a specific incident complied with international law and is therefore not covered by the mandate

Under the reinterpretation of the mandate suggested by your Government, States are given the power unilaterally - without any external scrutiny - to determine whether a specific incident is covered by the mandate of the Special Rapporteur. The response your letter gives regarding the killing of Haitham al-Yemeni provides a clear example of why this reinterpretation of the mandate would have unacceptable implications:

The United States respectfully submits 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. . . . [Enemy combatants may be attacked unless they have surrendered or are otherwise rendered hors de combat. Al Qaida terrorists who continue to ploy attacks against the United States may be lawful subjects of armed attack in appropriate circumstances.

This response suggests that the Special Rapporteur should automatically accept a State's unsubstantiated assertion that a particular individual was an "enemy combatant" attacked in "appropriate circumstances". According to this understanding, a Government may target and kill any individual without any detailed

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explanation to the international community by stating that he was an enemy combatant.

In essence, your Government's position has the effect of placing all actions taken in the "global war on terror" in a public accountability void, in which no public and transparent international monitoring body would exercise oversight. It is in the interest of all parties that no such void exists in international law. For this reason, the Special Rapporteur, in his capacity as an independent expert, would need to receive a full account of all incidents pertaining to his mandate, so that he may conduct an independent analysis of whether each incident falls within the scope of that mandate. That assessment cannot be left in the hands of each individual State. As I explained in my 2006 report:

The Special Rapporteur cannot determine whether a particular incident falls within his mandate without first examining its facts. When he receives information alleging a violation, he will often need to be informed by the State concerned of the evidentiary basis for its determination regarding any status or activity that may have justified the use of lethal force. Conclusory determinations that the deceased was a combatant or was taking part in hostilities when killed do not enable the Special Rapporteur to respond effectively to information and swiftly pursue the elimination of extrajudicial, summary or arbitrary executions.

A State which receives a communication from the Special Rapporteur requesting information may, of course, express his opinion as to whether the given situation falls within the mandate, but it also has a duty to provide the requested information so that the Special Rapporteur can himself make this determination and communicate it to the Council. Any failure to do so is directly contrary to the repeated requests by the Commission to States to "cooperate with and assist the Special Rapporteur so that her or his mandate may be carried out effectively".

The reinterpretation of the mandate your Government is advocating would be detrimental to the effective protection of individuals

The reinterpretation of the mandate of the Special Rapporteur on extrajudicial, summary or arbitrary executions which your Government advocates would drastically limit the effectiveness of that mandate in protecting individuals. As has been noted, throughout the mandate's history, "a very high proportion of summary or arbitrary executions occur in situations of armed conflict." These include, to name but a few cases:

Rwanda - During the Rwandan civil war in 1993, Special Rapporteur Ndiaye conducted a mission to Rwanda to document extrajudicial executions taking place during that armed conflict. The report of

his mission is widely heralded for ~~UNCLASSIFIED~~ tolling the bells to the world of the impending genocide in that country.

India/Pakistan - During the armed conflict between India and Pakistan in 1999, the Special Rapporteur transmitted to the Government of India thirteen allegations of violations of the right to life. She sent sixteen allegations to Pakistan.

Ethiopia/Eritrea - During the armed conflict between Ethiopia and Eritrea from 1998-2000, the Special Rapporteur sent twelve individual allegations regarding extrajudicial executions in Ethiopia in 1998 and one regarding an alleged extrajudicial execution in 2000.

Democratic Republic of the Congo (DRC) - In response to alleged extrajudicial executions during the civil war in the DRC, Special Rapporteur Jahangir conducted a mission to the DRC in June 2002. Her report provided crucial information concerning the massacre of civilians in Kisangani by the Rassemblement Congolais pour la Democratie-Goma on 14 May 2002.

Israel/Occupied Palestinian Territories - international humanitarian law also applies to situations of occupation. In this regard, the Special Rapporteur has intervened in many cases of alleged targeted killings by Israel in the Occupied Palestinian Territories, a total of 38 such interventions in 2005 alone. 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 response from Israel.

The position of your Government appears to be that the Special Rapporteur on extrajudicial, summary or arbitrary executions was abusing his or her mandate in addressing each of these situations. Furthermore, the position of your Government appears to be that the Special Rapporteur should cease forthwith to consider any allegations of violations received from victims of the conflict in the Darfur region of Sudan, of the conflict in Sri Lanka, and of a great many other vitally important situations. I sincerely hope that I have misinterpreted the position adopted in the correspondence of your Government. If that is not the case I would nevertheless hope or that your Government might be prepared to reconsider its position in light of the compelling evidence offered above.

Conclusion and Request for Further Information

In light of these considerations, I respectfully request a reply to the four questions posed in my correspondence of 26 August 2005 with respect to the alleged killing of Haitham al-Yemeni on the Pakistan-Afghanistan border on or around 10 May 2005 by a missile

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fired by an un-manned aerial drone operated by the US Central Intelligence Agency. To reiterate, these questions are:

1. What rules of international law does your Excellency's Government consider to govern this incident? If your Excellency's Government considers the incident to have been governed by humanitarian law, please clarify which treaty instruments or customary norms are considered to apply.

2. What procedural safeguards, if any, were employed to ensure that this killing complied with international law?

2. On what basis was it decided to kill, rather than capture, Haitham al-Yemeni?

3. Did the government of Pakistan consent to the killing of Haitham al-Yemeni?

I make these observations and requests for information in the hope that they will prove helpful to your Government and other governments in ensuring compliance with international law prohibiting extrajudicial, summary, or arbitrary executions, and I look forward to further constructive dialogue with your Government on this issue in the future.

Please accept, Excellency, the assurances of my highest consideration.

Philip Alston
Special Rapporteur on extrajudicial, summary or arbitrary executions

End text of letter.

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