

# INTERVIEW

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## The Challenges of Responding to Extrajudicial Executions: Interview with Philip Alston

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### Abstract

In our continuing series of reflections by human rights practitioners on their work, Philip Alston reflects here on his six-year term as UN Special Rapporteur on extrajudicial, summary or arbitrary executions, completed in July 2010. In the interview, Professor Alston addresses some of the methodological challenges faced by UN Special Procedures in their work – and in particular, highlights the need for greater context-specific analysis in reporting. He also speaks about some of the key themes that feature prominently in many of his country visit reports – including impunity, corruption, witness protection, police accountability, targeted killings, and election-related violence and killings.

*Keywords:* extrajudicial executions; fact-finding; impunity; police accountability; targeted killings; UN Special Procedures

In our continuing series of reflections by human rights practitioners on their work (including reflections by United Nations (UN) Special Rapporteurs), we publish here the text of a recent conversation with Philip Alston. (For the first of these reflections by UN Special Rapporteurs published in these pages, see [Nowak, 2009](#).) In July 2010, Professor Alston completed his six-year term as UN Special Rapporteur on extrajudicial, summary or arbitrary executions. He was formerly the Chairperson of the UN Committee on Economic, Social and Cultural Rights, and Special Adviser to the UN High Commissioner for Human Rights. Philip Alston is the John Norton Pomeroy Professor of Law and the Co-Director of the Center for Human Rights and Global Justice at the New York University School of Law. Brian Phillips spoke with Professor Alston in his office in New York in March 2010, and then in July 2010 continued the discussion with him to explore more recent developments in his work. — The Editors.

JHRP: In your July 2009 report to the UN General Assembly, you indicated a need within the UN human rights system for a wide-ranging study on ‘the nature, purpose and objectives of fact-finding’ (UN, General Assembly, 2009). What gave rise to that particular concern?

PA: The starting point is that the term fact-finding does not actually have any clearly defined or agreed meaning. It is a phrase that was originally used in times when few would have questioned the ability of an informed and trusted interlocutor to find ‘the truth’. The assumption that there was an objective and knowable truth in any given situation was then combined with an attempt to convince concerned governments that the relevant investigator would be doing no more than merely finding facts. It was designed to reassure them that any intervention in matters of policy or politics would be minimal, and that the investigator would be fulfilling a fairly prosaic and basic function. Apart from the fact that our post-modernist sensibilities tell us that the role is inevitably much more complex in a variety of ways, the phrase also does a poor job of capturing the nature of the tasks that actors such as Special Rapporteurs actually engage in today. In the first place, at a literal level, most of them actually discover very few ‘facts’ which are not already known. They will generally process the material in ways which add real value and will be well placed to evaluate for themselves the reliability of the information, but they will not be the ones to find the facts in the first place. This is because of the relatively short period of time for which they are in the relevant country, their limited acquaintance with the way things work on the ground in an unfamiliar environment, and their constrained access to both places and individuals who are crucial to developing an original understanding of key facts. In an ideal situation, they are presented with large amounts of information, often conflicting in important ways, and their role is to sort through it and determine what appears to be the most credible interpretation as to what happened. Thus, although most Special Rapporteurs generally end up making use of facts presented to them by others, they nonetheless make a critical contribution in terms of validating or invalidating particular versions of the facts and pulling together a narrative which helps to explain and put the facts into a broader context.

But this is a literal quibble with the use of the term. A far more important issue is that Special Rapporteurs are generally doing much more than finding facts. Their role is actually part of a much broader process. In some contexts, it might be the prospect of a visit by a ‘fact-finder’ that will encourage and empower local actors to assemble relevant information. Such a prospect also puts governments on notice, both that they need to do their utmost to ascertain the facts for their own purposes, and perhaps that they need to try to cover up, distort or rewrite the record before an outside investigator moves in. Thus, international fact-finders can act as catalysts without actively doing much themselves in relation to the specific situation.

Then there comes the question of what ‘fact-finders’ do once they enter a particular situation. My sense is that many of them don’t give enough thought to the different roles they are going to play and how they are going to play them. There is an assumption that there is a sort of standard template and that they are applying that template in their own way. In fact there isn’t a template, despite the efforts of various non-governmental groups over the years to come up with guidelines for human rights fact-finding.<sup>1</sup> Different fact-finders will attach different weights to the importance of, for example, first-hand witness interviews, visits on location, forensic and other technical examinations, and the involvement of particular types of expertise ranging from a familiarity with armaments, through scientific and technological expertise, to anthropological or sociological knowledge of how to frame interviews and interpret results. It is telling that a great many fact-finding reports do not contain any section dealing in any detail with the methodology of gathering the information and preparing it for use in the report. In the case of Special Rapporteurs this might be because it is assumed that their Manual of Procedures lays out a *de facto* methodology or out of a desire to avoid a methodological debate with states which would conveniently distract from the substance of the report.

Where there is, unfortunately, a template it is within the broader community of human rights fact-finders which now tends to adopt or imitate a more or less standard Human Rights Watch-type approach to reporting on human rights situations. For all its undoubted sophistication, that type of approach carries with it rather specific assumptions as to methodology, the range of issues to be addressed, the type of recommendations that are appropriate, and the target audiences for the reports. In my view, much of the civil society fact-finding carried out today at both the national and international levels would benefit from a more selective and discerning approach. One result would be less duplication and a greater diversity of contributions to the understanding of a given situation or set of issues.

In terms of the work of Special Rapporteurs, it is doubtful that the Human Rights Watch model is readily transferable to governmental or international expert-based mechanisms. Moreover, the Special Procedures system, under which the Special Rapporteurs operate, now encompasses some 38 different mandates, many of which have very different and very particular needs in terms of fact-finding. Even the country-specific mandates, which have now dwindled to just eight, cover very different types of situation. The challenges of fact-finding and analysis are quite different in say North Korea, Haiti, or the Occupied Palestinian Territories.

A deeper reflection on the methodologies used by Special Procedures mandate-holders has been provoked in recent years by the adoption by states,

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1 See, for example, [International Bar Association and Raoul Wallenberg Institute \(2009\)](#) and [Franck \(1981\)](#).

acting in the framework of the Human Rights Council, of a Code of Conduct for mandate-holders. The purpose of the Code is stated to be the enhancement of the system's effectiveness 'by defining the standards of ethical behaviour and professional conduct' that mandate-holders should observe in their work (UN, Human Rights Council, 2007a: Article 1). While its application has been controversial because of a perception that many states have sought to use it to intimidate or restrain mandate-holders, the aspect that should really have been the subject of sustained debate, but has not been, concerns the assumptions laid out in the Code as to the nature of the fact-finding in which mandate-holders can engage. The Code can reasonably be seen as an attempt, 'through the back door', to come up with a uniform framework for the activities of all Special Rapporteurs, despite the specificities of their mandates. It is not surprising, however, that states came up with such an initiative, since the mandate-holders have been notably reluctant to do so for themselves. The Manual of Procedures that they began to draft in 1998 remained confidential, even from states, until the end of 2005. Other actors have also been reticent to engage in meaningful reflection on the appropriate guidelines or general parameters which might govern the work of Special Rapporteurs. Thus while the literature contains at least some analysis of how non-governmental organizations (NGOs) ought to go about fact-finding, there has to date been no equivalent for procedures established by intergovernmental bodies. It may be that it is assumed that they have complete freedom to do whatever they wish and can therefore write their own rules each time. At one level, it would be correct to assume that there is a strong element of 'ad-hocery' involved in such exercises. But, at another level, the reality is that even the rather heterogeneous international commissions of inquiry and other fact-finding exercises that are being set up these days tend to operate on the basis of a certain number of assumptions. But they are not spelled out. So I think there is a serious need to reflect on what we mean by fact-finding, not to regulate it, but to understand it better with a view to being able to do it better. I must emphasize, however, that I don't see such reflection as leading to a set of rules for international fact-finding. Situations and needs vary so much that no such rules could deal adequately with the range of challenges that arise.

JHRP: One of the very striking features of a number of your recent country visit reports is the emphasis you place on the need for greater context-specific analysis in the reporting done by UN Special Procedures and indeed by other human rights practitioners. This is especially apparent in the work you have been doing to address highly complex issues such as witchcraft, vigilantism and blood feuds in the context of your brief as Special Rapporteur.<sup>2</sup> Why have you given this concern such prominence in your work?

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2 See, for example, UN, Human Rights Council (2007b, 2009b, 2010b). See also the extended discussions of the killing of witches in UN, Human Rights Council (2009a); and of vigilante killings and mob justice in UN, General Assembly (2009).

PA: This question actually relates quite closely to the previous one. In particular, it relates to the role(s) that a Special Rapporteur seeks to play. It is possible to assume that the overriding role is to expose the facts and to let the relevant policy-making communities reflect on how they will deal with or respond to such exposés. It might also be assumed that, once certain shortcomings have been exposed, certain remedies should follow automatically. But for me the reality is always more complex. I think it is preferable to avoid formulaic analyses which are not really adapted to the specific conditions of a given country. There is obviously a potential tension in advocating such an approach because Special Procedures mandate-holders purport to be applying universal norms. In that spirit, we are understandably keen to say: ‘I don’t care whether this is Canada or Zambia; they are governed by the same norms and therefore the same rules must apply’. But in reality, my assumption is that things are actually always more complex than that. Of course, in broad outline, the norms are universal. But this does not mean that we should be unaware of the way in which they are understood and applied in a given context. By the same token, I am not suggesting that we need to adopt a cultural relativist approach by which we would turn a blind eye to instances of torture, racism, or sexism which their proponents seek to justify as culturally rooted.

In essence, we have to be context-aware such that the analysis and certainly any meaningful recommendations have to then be tailored to the situation in the particular country. If you don’t do that, then reports are likely to be formulaic, which might play well at the international level, but will achieve much less than hoped for at the national level. They will resonate very little with civil society, let alone with the broader public, in the country concerned. And governments are not readily going to see reason to change the ways in which they have been operating unless the analysis addresses the real concerns that they have. Of course, one response is that governments are simply looking for reasons to justify the status quo and that’s why they will ignore recommendations for change. But by the same token, if you look at the work of Abdullahi Ahmed An-Na’im and a range of other sophisticated observers of the sociology of human rights impact, you get a very clear sense of the need to relate what you’re doing to the world view and the preoccupations of those to whom you are addressing your recommendations.

Linked to this is the more prosaic challenge of ensuring that the recommendations made are carefully tailored to the situation within a given country. Thus a Special Rapporteur needs to look carefully at the nature of abuses, the causes of abuses, the relevant institutions and actors – and thus the necessary reforms are different in each country. There are naturally some similarities from one country to the next, and much can also be learned from a comparative perspective. But to propose reforms that are actually useful in a particular time and place, you have to understand, in depth, the causes of abuse and the context in which they take place. Pro forma recommendations

are rarely useful. In one country, the witness protection programme may be failing because it has no funding. In another, it may be because witnesses don't trust the police protecting them.

JHRP: As an example of good practice in terms of context-specific analysis, you have cited the work that has been done by the UN Verification Mission in Guatemala (MINUGUA) on the issue of lynchings in that country as a particularly commendable approach (UN, Human Rights Council, 2007b). What makes the MINUGUA study of lynchings so instructive in this regard?

PA: First of all, you have the much more sophisticated social science approach that MINUGUA adopted – based more on careful marshalling of the empirical evidence, followed by some attempt to put it into sociological context.<sup>3</sup> Those attributes are not all that common in human rights fact-finding literature. Secondly, I think we are often not prepared or not disposed to looking at the dysfunctionality of the system as it operates. So when you take these lynchings, one can see them as a simple exercise in lawlessness, a certain return to barbarous traditions and something that should simply be stamped out. Or you can see them as a rational community response to a failure of the justice system to address serious problems perceived by the community. And in the absence of any action by state or other authorities, citizens see themselves as having no option but to take things into their own hands. The way in which you are going to approach it and the sort of prescriptions you are going to make for overcoming it will differ greatly according to which of those approaches you are going to take. And I think too often the human rights approach – narrowly – is simply to say: 'This is unacceptable, this is bad, and it's got to stop'. All of which may be true, but it doesn't actually get us very far. I've picked up that theme in a number of my reports, for example, with regard to the whole issue of witchcraft and the thousands of individuals who are brutally killed each year around the world on the basis of some alleged acts of witchcraft, as well as in more recent work on vigilantes. It's the same sort of theme – we need to tackle the deeper causes in order to find lasting solutions.

JHRP: More generally, does all of this perhaps suggest that when seeking to understand issues like violence perpetrated by non-state actors, human rights practitioners need to be more alert to thinking and research outside

3 Professor Alston added: 'When I visited Guatemala in 2005, I noted that there was a persistent problem of lynchings in certain areas, but that the incidence had dropped in recent years. While various explanations were offered, a 2002 MINUGUA study had tracked lynchings over time, analysed where they occurred, against whom they were committed and their motivations. It found that they were predominantly due to the "incomplete transition from the period of armed confrontation", in which the counter-insurgency movement had disrupted indigenous justice systems. When the war formally ended, the criminal justice system was not sufficiently developed and this left a "power vacuum". Specific reforms were then identified on the basis of the analysis. These included a particular focus on indigenous justice systems and proposals for adapting certain criminal justice procedures to the needs of rural communities.'

their own field? Should we be paying more attention to the work of anthropologists and sociologists, for example? In short, do you think that human rights practitioners ought to be doing more reading outside their own discipline?

PA: Yes, I think that's right, but I wouldn't limit it to non-state actor violence. I think that human rights practitioners and scholars have long been too reluctant to make use of the insights that are available from disciplines apart from law. There often seems to be an assumption that law holds all the answers and that bringing in other disciplines might just complicate matters. But if one looks at a treaty like the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) it is obvious that the solutions that are required in order to combat such discrimination go far beyond the adoption of legislation or litigation. Anthropologists like Sally Engle Merry and Mark Goodale have done superb empirical work to help us to understand how human rights norms are translated down to the grass roots and to get a better idea of the sort of techniques that work in different types of societies (Merry, 2006; Goodale, 2009; Goodale and Merry (eds), 2007).

A broader example concerns the need to understand how, when and why human rights norms and treaties actually have a practical impact upon state behaviour. Political scientists like Beth Simmons (2009) and sociologists like Ryan Goodman and Derek Jinks (see, for example, Goodman and Jinks, 2004, 2005) have produced studies which have very important implications for how human rights practitioners should craft their strategies. While it is true that many such works use sophisticated social science frameworks and unfamiliar terminology, it is a great pity that more practitioners do not make the necessary effort to understand it and draw the valuable practical lessons that can be learned from their analyses. Given the very mixed track record of human rights advocacy in most situations, there is a greater need for practitioners to start asking why it is that they have an impact in some states and not in others; why it is that in a given state under some circumstances there is an impact and under others there is not? And simplistic explanations, such as that 'one particular political party was opposed and another was not', or 'societal assumptions changed', or that societies inexorably become more human rights conscious as they develop, are usually not very adequate for explaining why there is a positive impact in some situations but not in others. I think if we are really going to have a more effective human rights regime which seeks to bring about the deep structural change which is implicit in the whole notion – then we have to pay much more attention to understanding those dynamics of change.

JHRP: How might that sort of approach help us to deal with situations where we struggle against what might be described as a culture of impunity? I am thinking here of a country like Kenya, for example, where in your mission report you underline the prevalence of impunity for human rights violations on a quite staggering scale (UN, Human Rights Council, 2009c).

Are there ways in which human rights practitioners might better understand why such a culture of impunity flourishes and proves so resistant to change?

PA: That is a good but very tough question, and one with which I have spent a lot of time grappling. In Kenya, I ended up making strong recommendations which included the firing of the Police Commissioner and the resignation of the Attorney General which are steps that I hadn't called for in relation to other countries. There were two reasons that led me to conclude that such an approach was warranted. The first was the extent of the impunity that public officials enjoyed. Many Kenyans, perhaps hundreds, were killed by death squads operating within the police force, and no one was taking any action. Similarly, no senior official was successfully prosecuted for egregious cases involving killings, torture, and corruption. The second reason was that two particular individuals had come to embody the culture of impunity that made all this possible. It did not seem that broad statements about the need to tackle impunity in the abstract were going to bring any response. Instead, both the Kenyan government and the public needed to be reminded that the problem had a human face. The Police Commissioner had comprehensively denied that there were any extrajudicial executions going on and had claimed never to have heard of the death squad which leaked information showed he was very closely in touch with. For his part, Amos Wako, the Attorney General, was not only a former human rights activist but was the first UN Special Rapporteur on extrajudicial executions. But in his 19 years in power, under various governments, he had assiduously failed to prosecute effectively any senior government officials despite rampant corruption in the country and a clearly documented history of major human rights violations against a wide range of groups and individuals. A couple of months after my report was issued, the Police Commissioner was moved to a different job, which was progress of a sort. The Attorney General remains in office, but has since been subject of a US government order banning him from travelling to the United States.

But your question goes well beyond the need to expose specific individuals whose activities lie at the heart of impunity, and I don't have any easy answers when it comes to what measures can be taken in chronic situations of impunity. When the police are ineffectual in dealing with crime and are themselves a major part of the problem, when the government law officers don't prosecute their own friends, and when the courts are both inefficient and corrupt (which is a situation that prevails in a surprising number of countries), it is very hard to work out where an intervention might be most effective. At the end of the day, there is probably no substitute for trying to reform the entire system, but by the same token one always has to begin somewhere. The answer to that question will depend very much on the specific circumstances in the country concerned and on personalities who might be honest enough to design effective strategies and politically strong enough to implement them.

In a situation like Kenya, there is deep disillusionment with authority in general and considerable scepticism about the possibilities of reform. Of course education and awareness-raising are important, so that people will feel themselves empowered and will start to make demands upon their public officials for real and enduring change. But it is also a situation in which the international community might have a particular role to play in breaking through a cycle of impunity and corruption.

JHRP: Doesn't this question also bring us fairly quickly to the issue of endemic corruption in such societies – and the need for human rights practitioners to be thinking much more deeply about how we can work effectively in that kind of context?

PA: That's absolutely right. I think certainly in most of the relatively chronic situations where I have been involved as Special Rapporteur, corruption has been a major background element. In places like Nigeria and Guatemala, certainly in Kenya, as well as in the Democratic Republic of the Congo – all of these countries face pretty significant and perhaps even traumatic challenges in terms of corruption. It means that the system is essentially rotten at most levels. The police are often corrupt, which means that they spend much of their time extorting money from the public, sometimes in return for not prosecuting wrongdoers, often for agreeing not to arrest or prosecute innocent people. They can also arrange to clean crime scenes to get rid of evidence, to plant evidence on innocent individuals, to lose or damage evidence, or simply not to carry out a serious investigation. Prosecution services are generally understaffed and under-resourced, and they too are often available to the highest bidder. Once the courts get involved, corrupt judges can let people off, or find them guilty of much lesser offences, or simply delay trials for long enough that the case lapses, either in law or in practice. Even when the police and the prosecution have made a good faith effort to put together a strong case, a determined judge can continue to send a dossier back for further information, or simply bring down a decision that flies in the face of clear evidence. Police will then use such abuses to justify their own decisions to take the law into their own hands by extrajudicially executing those they believe to be guilty, rather than charging them. From there on you go all the way up to the ministers being corrupt and being able to overturn or prevent investigations.

In my first country mission as Special Rapporteur, I concluded that in Nigeria there was a vicious circle of injustice. At every point, the corruption of one body is reinforcing the corruption of the next. And the perennial question is: where do you interrupt that circle, because each actor is influencing the others? Again, there isn't an easy, straightforward answer. International rule of law programmes, such as those promoted by agencies like the World Bank, sometimes seem to assume that if you clean up the top courts, a magical trickle-down effect will follow. But as I have said, if the police are not investigating or not being even-handed, if the Attorney

General is not prosecuting systematically or is politically motivated, the right cases will not even get to the courts – even assuming that you are able to clean those up in isolation. It is a very difficult challenge. And human rights groups have tended to fire off their endless list of recommendations – ‘Here are the one hundred reforms that you should undertake’ – without taking adequate account of the fact that unless something is done about corruption there is no hope that any of those reforms are going to be taken up, or the few that are taken up will be taken up for the wrong reasons. For example, in Kenya in 2002, the Kenyan Constitutional Review Commission, led by Yash Ghai, commissioned a report by an Advisory Panel of Eminent Commonwealth Experts on how to deal with a notoriously corrupt judiciary. The Panel concluded that radical reforms were needed, including the dismissal of many judges found to have been guilty of misconduct. But instead of doing the job effectively, the government entrusted it to certain individuals who proceeded to leave in place some of the most corrupt judges and to settle scores by getting rid of a number of other judges. So nominally you had a human rights inspired, anti-corruption exercise. But in reality, it was actually close to being a cover for an even more corrupt, non-cleansing of the judiciary.

JHRP: The global human rights community was shocked by the murder of two Kenyan human rights defenders working on the issue of police death squads who had spoken with you during your February 2009 mission to the country – just two weeks after the conclusion of your visit. Have there been any further developments regarding investigation of these killings?

PA: No, and none were expected given the circumstances. This case represents a compelling indictment of the system and shows clearly how it has operated in the past. The circumstances under which those two individuals were killed pointed very clearly towards the police as the culprits. One would have needed to get pretty strong evidence in order to reach any conclusion other than that the police were responsible for the killing. All the information made available to me at the time pointed clearly in that direction. As soon as the killing occurred I suggested that the police themselves would not be able to investigate the killings effectively and called for international involvement. A very short time later the American Embassy in Kenya offered the services of the Federal Bureau of Investigation. The Kenyan police immediately rejected this offer, saying in effect that they would carry out the investigation themselves and were already close to discovering exactly what happened. A significant amount of time passed and, when it came, the police response was a classic. The police revealed a dossier which indicted – who do you think? – the two people who had been killed. In other words they announced that after carrying out a thorough investigation they had concluded that the two persons who had been assassinated had, in the past, been involved in criminal activity, as demonstrated by an allegation that the car they were driving might have been stolen. So there

was no focus at all on who actually killed them, or why. But instead the police resorted to their time-honoured technique of trying to blacken the reputations of the two persons concerned – on the assumption that if they could be painted as criminals, then their assassination or their killing would have been more or less justified in any event. And so there has been no movement at all in terms of identifying the killers. The situation remains that two individuals whose main offence seems to have been to have spoken to a Special Rapporteur were then targeted and killed in an operation that bore all the hallmarks of a police operation.

JHRP: In your May 2009 report to the UN Human Rights Council, you very openly criticized the Council's insufficient regard for the protection of individuals who assist Special Rapporteurs in their work on the ground – and called for the Council to 'remedy this gap in its procedures' (UN, Human Rights Council, 2009a). What sort of response has there been to your criticism?

PA: This is not a new issue. The UN Working Group on Arbitrary Detention has long taken up cases where human rights defenders have been arbitrarily detained – including in some cases for speaking with members of the Group itself. In my own case, there are now several countries in which activists who have met with me have been killed subsequent to my having met with them in the country. The most recent was a case in the Democratic Republic of the Congo, but at least in that instance a concerted public campaign (in which I also took an active part) compelled a serious investigation followed by arrests of police officers involved.

But although such allegations have historically surfaced fairly regularly, there has not been any sustained response. I think there really should be. In my 2009 report I reproduced excerpts from a press conference where the media Spokesperson for the UN Secretary-General was asked what he was doing about the fact that individuals who had spoken to UN representatives were being targeted as a result (UN, Department of Public Information, 2009). It's a rather distressing exchange where the Spokesperson first says 'that's a matter for the Human Rights Council', as though the Council is itself operational, which, of course, it's not in this sense. The Spokesperson then goes on to concede that the Council 'does not have its own security services', treating that as the end of the matter. In effect, the answer is: 'Well, it's a pity but there's nothing *we* can do about this'. So the bottom line is that the UN can have a major human rights programme which facilitates the entry of Special Rapporteurs and the like into countries to conduct investigations; inherently vulnerable people are then encouraged to come forward and provide information which can give substance and first-hand authenticity to the UN's reports; but if something happens to any of those people as a result of their cooperation the UN simply says that there is nothing much they can do about it. That's a proposition that I think is not sustainable. Individual Special Rapporteurs can do as I did, and make strong protests to

the government, but that provides little assurance in the face of a ruthless government's determination to retaliate. In one country in which I made such a *démarche*, the UN Resident Coordinator made it clear that he wanted nothing to do with the matter since it might upset his cordial relations with the government.

It's also clear that the UN cannot go entirely in the opposite direction and provide an ironclad guarantee to witnesses. The UN simply can't ensure the physical protection of individuals from the actions of the state authorities. A further complication is that if there were strong assurances of protection in place, there would sometimes be individuals who would seek a meeting with a Special Rapporteur solely for the purpose of triggering such protection. That sort of pull factor also has to be taken into account in designing an appropriate regime. I am not suggesting that there is an easy way forward. But the depressing reality is that the UN Human Rights Council has not yet addressed the issue, despite having been alerted to it. I proposed the establishment of a working group which might then empower the President of the Council to take action in urgent situations. Nothing has been done, although my understanding is that the UN High Commissioner for Human Rights, who is strongly concerned about the issue, is now in the process of preparing a report which I hope will compel the Council to take the issue seriously. But I can't say that I'm optimistic. I think it remains in the 'too hard' basket. But I really do believe that that approach is unconscionable.

JHRP: Are there examples of protection programmes elsewhere that perhaps point a way forward here?

PA: There are witness protection programmes that operate effectively within some countries, but in general these are limited to protecting persons who are involved in some way in the domestic criminal justice system and would not apply to witnesses who had spoken to UN office-holders. At the international level, the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, and other such mechanisms, have more or less developed witness protection programmes, but again these offer little assistance to those who deal with Special Rapporteurs. In principle, my view is that we should be considering some equivalent project which would apply to individuals even though they were not involved in criminal trials *per se*. Considerable thought would need to be given to designing a mechanism which would be affordable, not provide perverse incentives either to governments or witnesses, and would be able to respond promptly and effectively. No one expects it to be an easy matter. At present, there are two *de facto* mechanisms which play an important role, but they are not at all adequate for dealing with the problem as a whole. The first is a programme run by (usually Western) embassies in some of these countries which will enable a temporary visa to be granted to human rights defenders who are shown to be at severe risk. Those programmes remain somewhat under the radar screen because they are not appreciated by the host country,

and the governments themselves don't really want to advertise that they are helping to spirit out the most endangered activists, as it were. The second mechanism consists of forms of assistance offered by some enlightened international NGOs which, because of the dangers to which activists and witnesses are exposed, provide limited but invaluable funding to enable individuals to have a cooling off period by going to a neighbouring country or some other country for a few months.

But neither of these back-up mechanisms are well institutionalized – it depends very much on the country in which one is working, whether the relevant NGOs are there, the attitude of the individual ambassador, and so on. Another support mechanism which has also emerged in recent years is the Scholars at Risk Program, run out of New York University by Rob Quinn and his colleagues. This is developing very effectively in some university-based programmes where scholars who are at significant risk in their home country are able to seek refuge in a foreign university for six months or a year or two. But again, these programmes are inevitably uneven in their coverage and there are all too little efforts made by the human rights community, let alone governments, to try to support them in a more systematic way.

JHRP: You recently presented a substantial report to the UN Human Rights Council on police oversight mechanisms – a study arising out of the overwhelming evidence presented in your work as Special Rapporteur that 'one of the most important causes of continued police killing is impunity for past killings' (UN, Human Rights Council, 2010c). What are some of the concerns you have addressed in that report?

PA: My report to the Council provided a systematic study of external oversight mechanisms designed to enhance police accountability. In many of the countries that I have visited as Special Rapporteur I have encountered the paradox that the police are heavily relied upon to bring a solution to overcome human rights violations, but those very same police are often corrupt and may even be making a major direct contribution to the violations themselves. In such situations it doesn't help much to rattle off a string of recommendations as to initiatives that the police might undertake to address the violations, unless one also tackles the deeper problem of police reform.

Police accountability involves both internal and external mechanisms. None of the 'remedies' is straightforward, and we should not be under the misapprehension that there is any universally valid recipe. But there are some best practices that emerge from certain countries where the authorities have managed to establish arrangements which will enhance and promote internal accountability. But they raise a lot of issues about how independent should some sort of review body be. It's very easy for a human rights defender to say: 'Well, of course you've got to be independent from the police – they can't be policing themselves'. But it's not so easy. Unless you've got people who understand the policing system and people who are respected by the police and others, the mechanism is most unlikely to have the desired

impact. There is a fine balance between getting the understanding and empathy that an insider brings, alongside the accountability and probing that comes with an outsider perspective. My report looks at the different precedents that exist and suggests ways in which states might try to enhance their accountability arrangements. In some ways this builds on very important work which I think has been underpublicized and not given its due – carried out by the Commonwealth Human Rights Initiative – where they have actually done a number of very good studies on the challenges of police accountability both in general and in particular countries ([Commonwealth Human Rights Initiative, 2005](#)). But I don't think their research and insights have been taken up in any effective way in intergovernmental forums or fed into the mainstream of human rights discussions. The main question is how to secure the independence of the police from political manipulation while ensuring effective accountability which does not undermine morale and does not unduly restrain their ability to carry out legitimate policing activities – but really does ensure that they respect human rights in their work.

JHRP: You likewise presented a much anticipated study of the issue of targeted killings to the UN Human Rights Council in May 2010 – where you highlight the ways in which the current policy and practice of the United States and other governments has had 'the very problematic effect of blurring and expanding the applicable legal frameworks' regarding such killings ([UN, Human Rights Council, 2010d](#)). What are some of the particularly challenging aspects of this issue that human rights practitioners need to be more aware of here?

PA: There is an instinctive assumption on the part of many human rights advocates that targeted killings must surely fall well outside the scope of what can be permitted by international law. They are correct in that we can say that a targeted killing, carried out in other than direct defence of human life, is the antithesis of respect for human rights. The very notion that you identify someone in advance and then proceed to devise means by which to take that person out is anathema. In peacetime, governments can't take people out unless the authorities follow the clear guidelines relating to the use of force. They have elements of both necessity (no other option is available in order to protect the life of others, including the relevant law enforcement officer) and proportionality (nothing short of lethal force would have achieved the objective of protecting life).

But a targeted killing is generally defined in very different terms, since the basic objective of the exercise is not to protect the lives of others and the principles of necessity and proportionality are not applied. Instead, the goal is to kill a pre-determined individual. Where such killings take place outside of an armed conflict situation, they are incompatible with the applicable international law and cannot be condoned. But the rules are different in the context of an armed conflict in which international humanitarian law may be invoked. An individual who is a combatant or is otherwise taking a direct

part in hostilities may, under certain circumstances, be a legitimate target. Problems arise particularly when states are not prepared to spell out exactly which framework they are using, or they seek to go back and forth without spelling out the relevant rules. The result is a tendency to expand significantly who may permissibly be targeted and under what conditions. This is also linked to a failure to disclose the safeguards in place to ensure that targeted killings are in fact legal and accurate, and to provide accountability mechanisms for violations. In certain situations, for example, the US government has effectively refused to disclose who has been killed, for what reason, and with what collateral consequences. This is particularly the case where the relevant operations are being carried out clandestinely by the Central Intelligence Agency (CIA) or by elite special forces. In such circumstances we have seen the displacement of clear legal standards by a vaguely defined licence to kill, and this creates major problems in terms of the necessary transparency and accountability.

There has been a telling contrast in this regard between such a situation and the approach followed in the past year or so by the United States (and the coalition more generally) in operations conducted by the US army in Afghanistan. In the latter context, clear rules of engagement have been adopted with the specific objective of minimizing civilian casualties. During his tenure in Afghanistan, US General Stanley McChrystal issued instructions that targeting is to be done with the greatest possible precision and that collateral damage in the form of civilian casualties should be minimized. In addition, there have been significant investigations of some incidents that are alleged to have violated those basic principles. This has resulted from a growing increase in sensitivity on the part of coalition officials to the negative consequences of civilian killings, not only in terms of the tragic loss of life involved, but also in terms of alienating the local community whose support is necessary in order to prevail in the battle for hearts and minds.

In contrast, in Pakistan in particular – where the situation on the ground is very different and it is hard to get ground troops into most of the areas – the United States has enthusiastically embraced the use of drones to carry out targeted killings. But this has not been accompanied by any information relating to the applicable rules of engagement, or indications that the CIA personnel and perhaps also private contractors who are involved have received training in international humanitarian law (IHL), or any suggestion that there are convincing procedures in place to monitor their decision-making or to investigate alleged violations of humanitarian law that might occur. So my contention has been a fairly simple one. I have not made any blanket assertion that the targeted killings taking place in Pakistan are necessarily in violation of international law. But I have sought to emphasize the problems that flow from the fact that the states concerned have not complied with the procedural requirements which would enable us to conclude one way or another that their actions are legal. And this in itself constitutes a

violation of international law because they are carrying out these operations in secrecy, without any transparency, and without any capacity to be able to account publicly or internationally for their conduct. While I am using Pakistan to illustrate the problem, it should be added that similar shortcomings also apply in other situations in which so-called special forces are operating in other areas under the same rules.

The United States' response to my concerns has not gone beyond very general assertions that there is no wrongdoing involved. The first such claim was put forward by the US representative in the UN General Assembly in October 2009 in reply to my report. In that statement the Obama Administration largely reiterated the position previously expressed by the Bush Administration, which was that these assassinations take place in the context of a worldwide 'war on terror', and that these are in any event not matters which should concern the UN Human Rights Council or its Special Rapporteur (neither of which should have any role in relation to humanitarian law – although the United States has explicitly supported IHL-based action in relation to a wide range of other decisions in the past). The second occasion was a speech to the American Society of International Law by the State Department's Legal Adviser, Harold Koh, in which he restated the United States' commitment to abide by international law and assured his audience that, although no specific information could be provided, they could safely assume that the United States was indeed respecting that commitment. Unfortunately, despite Harold Koh's undoubted integrity and standing, such bland and unsubstantiated assurances can amount to very little in terms of satisfying the requirements of transparency and accountability contained in international law.

JHRP: Human rights researchers and campaigners who have worked for years on a variety of concerns relating to the so-called 'war on terror' are greatly disappointed by the growing realization that there will be little or no real accountability for the Bush Administration's disregard for certain basic principles of international human rights law. How should human rights practitioners be thinking and talking about this major setback in the struggle against impunity and its long-term consequences for our work?

PA: The approach of the Obama Administration has been quite understandable in terms of a political calculation that they would be better off not trying to hold Bush-era officials to account. But this can only be seen as a major setback in terms of the struggle against impunity. That setback has been compounded by the rather muted way in which the domestic human rights community as a whole has responded. Whether we like it or not, the United States sets a lot of precedents which other countries follow, and this precedent in terms of *de facto* impunity is a most unfortunate one. It is true that the US Attorney General has made various statements to the effect that crimes would not go unpunished, and so on, but the reality is that there has been no systematic accounting of the kind consistently

demanding by the United States and the international community in relation to other countries.

The challenge is to try to understand the general assumption that the United States does not need to engage in any such process. It is too easy to say simply that this is an example of American exceptionalism at work, and that the rules that apply to the rest of the world do not apply to the United States because of its military, economic and strategic power. A more challenging approach is to see it in terms of a rather more sophisticated form of exceptionalism based on the assumption, widely shared within the United States, that the US really is different, not because of its power, but because of its unique and all-encompassing commitment to the rule of law and to freedom. The assumption is that, because of these deeply held values and the fact that all American institutions are committed to upholding them, whatever is done in good faith to address problems such as the responsibility for torture, forced renditions, extrajudicial executions, and so on, will actually be adequate by definition. This comports with the rhetoric not just of many politicians but also of scholars and officials.

But viewed from the outside, the claim, or the assumption, is quite extraordinary and perhaps even delusional. Most governments view themselves as acting in the national interest and often as doing so in ways that comply with any reasonable interpretation of the rule of law. But the strong assumption of the international human rights regime, which the United States played a crucial historical role in crafting, is that accountability must always be ensured and can never be left merely to political accommodations. The history of dealing with such claims to impunity in relation to other countries is instructive. The UN itself originally countenanced that providing an amnesty might be appropriate in West Africa, but there was such an uproar in response that the Secretary-General subsequently made clear that such an approach could not be endorsed by the UN. In country after country in Latin America, attempts to provide amnesties or to take no action in response to grave violations in the past have been rejected by the courts and the people. And in Africa today, there are systematic efforts to ensure that impunity will not prevail, including in Kenya in relation to the massive post-election violence and in the Democratic Republic of the Congo in relation to various atrocities alleged to have been committed by members of the armed forces. In all of these situations, the international community has insisted that it is neither acceptable nor prudent to try to sweep past abuses under the carpet. It is strange then when so many domestic actors continue to assume that this is the most appropriate policy for the United States itself to pursue in relation to the many allegations of serious violations that exist.

JHRP: Another issue which you've spent much time researching and writing about during your tenure as Special Rapporteur is that of election-related violence and killings (UN, Human Rights Council, 2010a). What are some of the major points in your recent thematic report on the subject that

you'd like to see human rights practitioners concerned with this issue consider carefully?

PA: There has been a lot of scholarly work devoted to election-related violence but almost no attention given to the phenomenon of killing people during the various phases of the election cycle. It was a problem that I encountered fairly regularly, from the 1,100 plus civilians killed in Kenya in post-election violence, and the consistent killing of candidates and others in countries like Nigeria and the Philippines, through the killings of protesters following the 2009 Iranian elections. The issue comes up from time to time in human rights analyses but has very rarely been treated as a separate phenomenon warranting special attention. My report contains a lengthy survey of recent incidents around the world and concludes by suggesting that a regular survey should be produced by the UN. Among the most important recommendations are the need for states which regularly experience election-related killings to draw up a plan for dealing with the problem in the context of future elections, that impunity for such killings be ended, that the international community should play a more active role in responding to the problem, and that election monitors should expand their concerns so as to focus specifically on killings committed at different phases of the process.

For factual, legal, and policy research into issues related to unlawful killings around the world, see the Project on Extrajudicial Executions at the Center for Human Rights and Global Justice, New York University School of Law, <http://www.extrajudicialexecutions.org>.

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