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Human Rights Council, 27 March 2007

**Statement by Professor Philip Alston, Special Rapporteur on extrajudicial,
summary or arbitrary executions**

Mr President, distinguished delegates,

To the extent that this Council is able to engage constructively and critically with the real world of gross and persistent human rights violations, it is because of the system of Special Procedures. There is immense room for improving the system and for overcoming the complacency that sometimes prevails. But there is also considerable room for undermining the system, as illustrated so clearly by too many of the purported 'reforms' that have been suggested in recent months. If the Special Procedures system is undermined, the credibility of this Council will be destroyed. The choice is in the hands of the membership of the Council.

Mr President, country missions are often seen as the *raison d'être* of the rapporteur system. This is a mistake. Missions are important and can achieve a great deal. But the role of a special rapporteur is a year-round one and the challenge is to devise means of ensuring that adequate attention is given to countries that do not cooperate, to countries which cannot be visited because of the lack of resources, and to incidents that are of concern but do not *per se* warrant a mission. In my view the necessary elements of an effective thematic mandate include the following:

- (1) Turning the communications procedure into a meaningful dialogue rather than a paper chase. This involves, in particular, avoidance of *pro forma*, or formulaic, approaches. It also requires that meaningful conclusions be drawn by the rapporteur;
- (2) Reports should not hesitate to address the situation in countries which refuse to cooperate; a system that penalizes only those who cooperate is fundamentally misconceived;
- (3) Missions should not be seen as isolated undertakings. A mission should be the start, rather than the end, of a process. Systematic follow-up is crucial in this regard; and
- (4) Assisting in the development of jurisprudence must be seen as one of the major roles of a rapporteur.

In line with this understanding, the report that I am presenting consists of: analyses of some key legal concepts, several mission reports, and the highlighting of issues arising in certain countries which I have not yet been able to visit. In addition, the communications addendum – which in the past seems to have been received as a bureaucratic formality of little interest – contains a large number of evaluative conclusions covering situations in a great many States.

Thematic concerns

The validity of my mandate in armed conflicts

In recent years it has been argued, primarily by the United States, that the Special Rapporteur on extrajudicial executions, and by extension, the UN Human Rights Council, have no legitimate role to play when individuals are intentionally killed, so long as it is claimed that the actions were part of the 'war on terror'. In response to my request to the US Government for clarification of the targeted killing of individuals on the Pakistan-Afghanistan border in May 2005 the Government replied that international human rights law did not apply to the incident; that the laws that did apply could not be addressed by the Special Rapporteur or, implicitly, by the Human Rights Council; and that each State could determine for itself whether any particular incident could be addressed by the Council.

Delegates will find in the communications addendum to my report a detailed and carefully argued refutation of this approach. My analysis notes that the proposed interpretation would overturn the policy established and consistently followed over the past quarter of a century since the Commission on Human Rights first established this mandate in 1982. In many of the relevant cases which have arisen since then the United States was strongly supportive of the approach. Yet when its own actions are questioned on the basis of the same principles, it chooses to enunciate a new doctrine which would eliminate all scrutiny of such measures undertaken in the 'war on terror'.

The death penalty

The question of the death penalty is an issue that divides the membership of the Council along unusually visible fault lines. Some Member States have abolished capital punishment, and many of these strongly believe that other States should do likewise. Other Member States continue to employ capital punishment and believe that doing so furthers important policy priorities.

In the face of these strong disagreements, it is easy to forget that there is an area of substantial consensus among States in relation to the norms that apply when the death penalty is used. The most important instruments containing these norms are the *International Covenant on Civil and Political Rights* and the *Safeguards guaranteeing protection of the rights of those facing the death penalty*. The mandate of the Special Rapporteur plays an important role with respect to the death penalty precisely because the mandate is neither an abolitionist nor a retentionist one. Instead, the mandate is to engages States in dialogue concerning the application of norms regulating the death penalty where it legally exists.

Some norms are absolutely clear, such as the prohibition on sentencing juvenile offenders to death. Others are more complex, including those concerning due process rights in the various phases that precede execution, including the investigation, trial, sentencing, appeals, and petitions for clemency. I receive many allegations each year concerning instances in which procedural violations would make execution unacceptable. Some of these are rarely contested in principle. Other violations continue to draw controversy, at least from a few vocal quarters, despite the fact that the relevant norms are reflected in the ICCPR and have assumed customary law status. I refer in particular to the

requirements that the death sentence may only be imposed for the 'most serious crimes', and that the mandatory imposition of the death penalty is prohibited.

My systematic research into the 'most serious crimes' provision yields several important conclusions:

- (1) The scope for interpretation implicit in the phrase was always acknowledged and the assumption was that the concept would be clarified in light of the jurisprudence of bodies such as the Human Rights Committee and by evolving practice.
- (2) Determination of whether a particular offence falls among the most serious crimes requires the interpretation and application of international law, and is not a matter to be determined solely by individual states. If it were otherwise, the limitation would have no meaning.
- (3) A large number of specific offences have been authoritatively found to fall outside the scope of the "most serious crimes" for which the death penalty may be imposed.
- (4) In particular, the death penalty can only be imposed in cases where it can be shown that there was an intention to kill which resulted in the loss of life.

In terms of the mandatory death sentence the report reaches the following conclusions:

- (1) Even when a crime is among the "most serious" and, thus, a legislature may legitimately make it subject to the death penalty, there will be persons convicted of such a crime who could not be sentenced to death by a judge without violating other human rights norms.
- (2) The experience of numerous judicial and quasi-judicial bodies has demonstrated that mandatory death sentences are inherently over-inclusive, in that they inevitably and necessarily result in some individuals being sentenced to death for whom death would be a disproportionate and unjust punishment.
- (3) In order to prevent cruel, inhuman or degrading punishment and the arbitrary deprivation of life, judges must always be permitted to decide not to impose a death sentence.

These conclusions are strongly reinforced by findings from a large number of courts, ranging from the Privy Council to the Constitutional Court of Uganda, among many others. Progress in achieving compliance with the requirement that death sentences be imposed only for the "most serious crimes" has been more halting, but I am optimistic that progress will be made through constructive dialogue and good faith efforts by States to review the consistency of existing legislation with this norm.

Specific country situations

I am reporting today in relation to recent missions to The Philippines and Guatemala. I have been invited to visit Guinea and am optimistic that this mission will take place within the next few weeks. I also hope that various outstanding requests to conduct

missions to a range of countries, including India, Kenya, Pakistan, Russia, Thailand, and the United States of America, are being seriously considered

Iran

The Islamic Republic of Iran has issued a “standing invitation” to the special procedures but has repeatedly failed to respond to my requests that dates for a visit be set, despite an oral exchange during the third session of the Council, several high-level meetings and an extensive correspondence. In my annual report to the Commission and the Council in 2006 (E/CN.4/2006/53 and addenda) I drew particular attention to this situation. Between August 2004 and March 2006 I sent 12 communications, involving nine boys and six girls who had been sentenced to death in Iran for crimes committed when they were under 18. Three girls were sentenced for murder and three others for “acts contrary to chastity”. Four boys were sentenced for murder, one for drug trafficking, three for abduction and rape, and one for attempted hijacking. According to the available information, four juvenile offenders have been executed and two acquitted. Five other death sentences are ‘on hold’ and one is under review. The status of the remaining three cases is unclear.

The information received is clearly credible and there is every reason to believe that the Iranian judiciary is freely ignoring the prohibition on the juvenile death penalty. This constitutes a clear violation of Iran’s obligations under the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights. There is no other country in the world in relation to which I regularly receive allegations of this type. This is not surprising, since the juvenile death penalty has been specifically abolished in virtually every other country. If the Council is to take seriously its responsibilities in relation to extrajudicial executions, it will respond appropriately to this wholly unacceptable situation

Guatemala

I visited Guatemala in August 2006 and met with Government officials including the President and with members of civil society. I appreciate the full cooperation that I received.

I concluded that allegations that personnel working for a particular division of the national police force are engaged in social cleansing — wherein police officers systematically murder criminal suspects, gang members and other ‘undesirables’ — are highly credible. This has subsequently been demonstrated in a very public fashion by the recent murders of three congressmen from El Salvador by Guatemalan police officers. This has led to a growing scandal and provided powerful evidence of the existence of a death squad within the police. The international community needs to act so as to ensure that this situation is addressed systematically, including through the prosecution of those responsible and the prompt implementation of Guatemala’s December 2006 agreement with the United Nations to establish the International Commission against Impunity in Guatemala (CICIG).

This scandal should not, however, lead us to overlook more structural problems. Guatemala has a single-digit conviction rate for murder. The implication is obvious and

disturbing: Guatemala is a good place to commit a murder, because you will almost certainly get away with it.

Some of the reasons for this impunity relate to corruption — including the kind of organized corruption that is currently being revealed to the public — and some of the reasons relate to poor institutional design. My report discusses these problems at some length. In particular the division of responsibility between the police and the Ministerio Público is counter-productive and unworkable. It results predictably in no single group taking responsibility for failures to investigate, for incompetent investigations, and for an inability to prosecute. In short, it aids and abets impunity.

But the most shocking reason for the impunity for killing that reigns supreme in Guatemala is the deliberate failure to allocate to the criminal justice system the resources that are required to protect ordinary people from murder, rape, and other infringements of their human rights. The criminal justice system is, in short, funded at a level which seems to be designed to ensure its ineffectiveness. This is illustrated by comparing the resources available in Guatemala to those available in comparable countries. For example, Guatemala has, even after accounting for the difference in population, far fewer police officers, criminal investigators, prosecutors and judges than El Salvador.

Guatemala is not an exceptionally poor country, and it could readily afford a criminal justice system on par with that provided in other Central American countries. Guatemala's per capita gross domestic product is roughly equal to that of El Salvador, twice that of Honduras, and nearly three times that of Nicaragua.

The reason the executive branch of the Guatemalan State has so little money to spend on the criminal justice system is that the Congress resists the imposition of all but the most perfunctory taxes. To put this in perspective, as a percentage of GDP, Guatemala's total tax revenue in 2005 was 9.6 per cent of GDP. By regional comparison, its percentage tax revenue is lower than that of Belize, Costa Rica, El Salvador, Honduras, or Nicaragua, and radically lower than that of the countries of South America.

It is precisely because Guatemala could so readily afford a far better criminal justice system that it is impossible to fully distinguish the issue of resources from the issue of political will. The lack of resources is due to a lack of political will: rather than funding a high-quality criminal justice system, Congress has decided to impose very low levels of taxation and, thus, to starve the criminal justice system and other parts of Government.

The explanation is not hard to find. Privatized law and order provides the protection the elites need. Insecurity for the majority of the population may not be a bad thing for those elites. One result is that there are at least 100,000 private security guards in Guatemala, more than five times the number of police. Moreover, most of the private guards are effectively unregulated and are thus laws unto themselves. The lack of political will to establish a functioning criminal justice system in part reflects a sense that the State has very limited responsibilities to society, and that it is wholly appropriate for even security and justice to be private rather than public goods. There is a sense that the State has fulfilled its responsibilities so long as it protects the borders and refrains from killing innocent people. This understanding of State responsibility is incompatible with the content of that concept under international law. The State has a legal responsibility to protect the human rights of its people.

Guatemala must accept that it has the responsibility to ensure the security of its people, not through a short-sighted and counter-productive reliance on the military, but through the funding and development of a normal, civilian criminal justice system. Guatemala may be a developing country, but it is not so poor that the international community or the people of Guatemala should allow that to be an excuse for letting murderers run rampant.

The Philippines

I visited the Philippines in February 2007. Again I met with a wide range of Government officials, including the President, and with many members of civil society. The Government was fully cooperative.

When I completed my visit to the Philippines, I commented that the military “remains in a state of almost total denial . . . of its need to respond effectively and authentically to the significant number of killings which have been convincingly attributed to them.” I added that the President “needs to persuade the military that its reputation and effectiveness will be considerably enhanced, rather than undermined, by acknowledging the facts and taking genuine steps to investigate.”

One month later, I have little reason for optimism. The impact of my visit, although I have not yet completed my final report, has been deeply schizophrenic. On the one hand, the President has taken a range of positive initiatives, many of which I list in my preliminary note to the Council. On the other hand, the military and many key officials have buried their collective heads in the sand and announced that business will continue as usual.

To give a colorful and somewhat amusing example, the Defense Secretary said last week that “Alston won't pay attention. He is blind, mute, and deaf. We can't do anything about that.” He was apparently upset that I still do not accept the military's line that the leftist activists are being systematically killed as part of continuing communist purges of their own supporters. The Chief of Staff of the armed forces has been less eloquent but equally dismissive. Part of me appreciates the substitution of frank insults for the usual diplomatic platitudes, but anyone reading between the lines will receive a far more disturbing message: Those government officials who must act decisively if the killings are to end, still refuse to accept that there is even a problem.

Until my final report is available I do not wish to dwell at length today on the steps that I believe are required. I want to address instead the issues that were most prominent in my statement to the press before leaving the Philippines.

I arrived in the Philippines with an open mind. I was aware that the killings were being used by some of the affected groups in what was seen by others as a propaganda campaign. But the existence of a propaganda dimension in accusations that the military is extrajudicially executing leftist activists does not, in itself, destroy the credibility of the information and allegations. I proposed, instead, the need to apply several tests of credibility.

First, is it only NGOs from one part of the political spectrum who are making these allegations? The answer is clearly 'no'. Human rights groups in the Philippines range across the entire spectrum in terms of their political sympathies, but I met no groups who

challenged the basic fact that large numbers of extrajudicial executions are taking place, even if they disagreed on precise figures.

Second, how compelling is the actual information presented? I found there was considerable variation ranging from submissions which were entirely credible and contextually aware all the way down to some which struck me as superficial and dubious. But the great majority is closer to the top of that spectrum than to the bottom.

Third, has the information proved credible under 'cross-examination'. My colleagues and I heard a large number of cases in depth and we probed the stories presented to us in order to ascertain their accuracy and the broader context.

I would repeat today that, based on my fact-finding, there is no reasonable doubt that the military is responsible for a significant number of the killings. Subsequent evidence points to the continuing nature of that practice.

Notwithstanding the evidence I very carefully gathered, many Government officials insisted that large numbers of leftist activists were turning up dead because they were victims of internal purges within the Communist Party of the Philippines (CPP) and its associated rebel movement, the New People's Army (NPA). Indeed, this theory was relentlessly pushed on me.

Is there any evidence for this theory that might shake one's certainty regarding the evidence for the military's responsibility. There is not. I repeatedly sought from the military evidence to support these contentions. But the evidence presented by the military is strikingly unconvincing.

First, the CPP/NPA/NDF publicly claims responsibility for some killings. Sometimes the victims have been current or former members. This is true, as anyone can validate by reading the CPP/NPA/NDF's publications online.

Second, the CPP/NPA/NDF have conducted large scale internal purges of members suspected of being government informants. But this happened roughly 20 years ago.

Third, I was provided a list of 1,227 names, dates, and places of individuals alleged to have been killed by the CPP or NPA. Despite numerous requests for any substantiating documentation of any of these cases, virtually none was provided. A list of unsubstantiated assertions is, needless to say, nearly useless.

Fourth, I was provided with a document captured from the rebels in May 2006 describing an "Operation Bushfire" in which they would purge their own members and make it look as if the military was responsible. In the absence of strong supporting evidence, which I requested, this document bears all the hallmarks of a fabrication and cannot be taken as evidence of anything other than disinformation.

I should be absolutely clear. There is no doubt, based on evidence provided to me by civil society, that the NPA kills people. These killings are reprehensible and to be condemned. However, there is absolutely no evidence that the recent surge in killings of leftist activists is due to a communist purge. On the contrary, strong and consistent evidence leads to the conclusion that a significant number of these killings are due to the actions of the military.

My preliminary note to the Council makes a handful of recommendations. My final report will make many more. But I would stress that these recommendations will make little difference unless there is a fundamental change of heart on the part of the military or the emergence of civilian resolve to compel the military to change its ways. Then, and only then, will it be possible to make real progress in ending the killings.

Sri Lanka

Since I visited Sri Lanka in late 2005, there has been a radical escalation of hostilities. This has been characterized in part by combat between Government and Liberation Tigers of Tamil Eelam (LTTE) combatants. But the information that I receive indicates that the conflict also continues to involve extrajudicial executions and disappearances directed at civilians and others no longer involved in combat. The return of disappearances on a large scale – the so-called “white van” syndrome – should be especially disturbing to anyone with even a cursory familiarity with Sri Lanka’s recent history.

The Government has, unfortunately, responded to this pattern of human rights violations primarily with a public relations campaign designed to head off international scrutiny. While there have been some positive initiatives, including the establishment of a commission of inquiry accompanied by an independent international group of eminent persons, these cannot plausibly respond to the abuses occurring on a daily and escalating basis.

Commissions of inquiry are, at their best, less than nimble and less than capable of addressing constantly evolving situations. And no one seriously believes that any national initiative will be able to meaningfully address abuses committed by the LTTE even if it were to end — and this remains but a hope — violations committed by Government forces.

Indeed, it is worth reiterating the conclusion reached by Sri Lanka’s own National Human Rights Commission — reached, I might add, when that body’s independence from the executive remained assured. The HRC stated, “It is the Commission’s belief that no national or regional human rights entity will be able to effectively monitor and implement human rights standards in the north and the east. No organisation or individual enjoys that kind of universal authority and legitimacy.” While the HRC entertained the possibility that with sufficient “international aid and assistance” it might be able to make some difference, its message was clear and has only become more firmly validated as time has passed.

I feel compelled to reiterate the recommendation I made to the General Assembly in October. The United Nation should establish a full-fledged international human rights monitoring mission in Sri Lanka. A failure to take some international measures will amount to yet another instance of standing by while a human rights disaster escalates and the five digit tolls of deaths and disappearances of the not so distant past return.