

Check against Delivery.



Remarks of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism at the International Expert Group Meeting on the Protection of Vulnerable Targets and Unmanned Aircraft Systems

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Introduction

1. Excellencies, Ladies and Gentlemen. I wish to acknowledge the support of the Kingdom of Qatar to this event. Affirm the deep cooperation between my mandate and UNOCT, and particularly acknowledge the leadership of USG Voronkov and his far-reaching thinking about counter-terrorism challenges around the world. Thank you for the invitation to participate in this important meeting. The use of drones worldwide, whether within the context of domestic law enforcement and counter-terrorism or used extraterritorially in armed conflict or otherwise, remains a matter of substantial legal controversy, and of great import to the mandate I hold.
2. Drone technology is proliferating at remarkable speed. Last year, the UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions reported that at least 102 countries have acquired an active drone inventory, and around 40 possess, or are in the process of procuring, armed drones.¹

¹ UN Special Rapporteur on Extrajudicial, Summary, and Arbitrary Executions, 'Use of Armed Drones for Targeted Killings,' UN Doc. A/HRC/44/38 (15 August 2020) ('SR 2020 Report'), [7].

3. I make three key points today:

- 3.1. **First, that the use of drones domestically in law enforcement contexts, including the protection of critical infrastructure,** must fully comply with States' obligations under international human rights law, including respect for the rights to life, privacy, freedom of expression, and freedom of association;
- 3.2. **Second, that the obligations to safeguard human rights entail very practical implications at the stages of purchase, planning and execution of drone operations including those with the goal of protecting civilian infrastructure,** and in investigating any alleged violations after the fact; and
- 3.3. **Third, that States need to be mindful of the serious human rights concerns that attach to the onward transfer of drone technology to States** which do not possess the requisite respect for human rights practice and have been evidenced to engage in serious human rights violations, specifically in the context of counter-terrorism. **Here I also highlight the need for requisite legal protections for data collection, use, storage, transfer, and the protection of privacy.**

Application of International Human Rights Law

4. Turning to the first point, I start by making clear that the use of drones in law enforcement contexts will **always** be subject to States' international human rights obligations. That is the case even if the State asserts that their counter-terrorism or law enforcement efforts, while within their own territory, are occurring within the context of armed conflict. **The fundamental protections of international human rights law are not displaced by circumstances of armed conflict or by any national security threat.** While additional international legal rules, such as international humanitarian law, may apply, States are always also bound by their human rights obligations. That much is clear from the decision of the International Court of Justice in its Advisory Opinion on the *Legality of the Threat of Use of Nuclear Weapons*, which clarified that the protection of international human rights law **'does not cease in times of war, except by operation of Article 4 of the [ICCPR] whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision.'**²

² *Legality of the Threat of Use of Nuclear Weapons*, ICJ Rep 1996 (I), p66, [25]. Cited with approval by the ICJ again in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Rep 2004, p136, [102]-[111].

5. **The focus of this meeting is on the use by law enforcement of unmanned aircraft systems to protect vulnerable targets and critical infrastructure from threats. An important point is the definition of such infrastructure under domestic law, noting that many of these infrastructure (e.g. hospitals, schools, government buildings, airports) are absolutely essential to the delivery and practice of human rights, particularly the fundamental human rights essential to survival and thriving for persons in any society. I underscore the concerns about the deep securitization and militarization of these spaces, and the concerns that follow from reframing these spaces so essential to ordinary human life as militarized spaces.** As these deployments are domestic, States are exercising jurisdiction in the classic sense,³ and so owe the full and thus under their jurisdiction. There are a range of rights implicated by the use of these technologies, particularly:

- 5.1. The right to life,⁴ to the extent that armed drone technologies are used, or drones are used to support broader law enforcement strategies underpinned by the use of force;
- 5.2. The right to privacy,⁵ insofar as drone technologies are used for surveillance; and
- 5.3. The freedoms of expression⁶ and association,⁷ which are indirectly affected by the kind of widespread and remote surveillance that drone technology enables.
- 5.4. The rights to access and meaningfully exercise fundamental economic and social rights, including the right to health and education.

Particular Obligations Arising from the Right to Life

6. **The right to life is implicated both where drones are armed and where unarmed drones are used to support use of force on the ground by law enforcement agencies.** Surveillance drones are readily and cheaply armed, and drone manufacturers are reportedly actively marketing models armed

³ While human rights obligations are generally considered to extend extraterritorially, particularly in respect of the right to life, the jurisdiction of international human rights law is ‘primarily’ territorial. See: *Al-Skeini v United Kingdom* [2011] ECHR 1093; (2011) 53 EHRR 18 (GC) (*‘Al-Skeini’*) at [109].

⁴ ICCPR, Article 6. See also: European Convention, Article 2; American Convention, Article 4; and African Charter, Article 4.

⁵ ICCPR, Article 17. See also: European Convention, Article 8; and American Convention, Article 11.

⁶ ICCPR, Article 19. See also: European Convention, Article 10; American Convention, Article 13; and African Charter, Article 9.

⁷ ICCPR, Article 22. See also: European Convention, Article 11; American Convention, Article 16; and African Charter, Article 10.

with tasers, tear gas, and pepper spray to law enforcement agencies in the United States, South Africa, France, and India.⁸ For example, North Dakota has become the first jurisdiction in the United States to authorize taser-enabled armed drones for policing purposes, and the direction of travel towards greater armed capacities for domestic drone technology appears clear.

7. But even before armed drones for domestic law enforcement become common place, **the use of surveillance drones supports the use of force on the ground by law enforcement.** As a result, drone operations give rise to concerns regarding compliance with the right to life.

8. The obligation on States to safeguard the right to life imposes particular duties. The Human Rights Committee notes that every State:

*'has an obligation to respect and ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control.'*⁹

9. This understanding of the protection to the right to life means that where States seek to advance their use of unmanned aerial systems in domestic counter-terrorism contexts, the full obligations of the state to protect the right to life of persons who may be targeted by such technologies apply.

10. The obligation to safeguard the right to life is manifold. **In addition to ensuring that rights are not violated when operations endangering life are executed, States have additional specific obligations.**

10.1. First, States have an obligation, **in planning operations which may endanger the right to life, to ensure that they consider whether the particular action is necessary and proportionate to the intended objectives;** and

10.2. Second, States have a **duty to conduct an investigation of any alleged breaches of the right to life committed by their agents or technologies that operate to take or harm life.**

⁸ See: C Enemark, 'Armed Drones and Ethical Policing: Risk, Perception, and the Tele-Present Officer,' (2021) 40(2) *Criminal Justice Ethics* 124.

⁹ UN Human Rights Committee, *General Comment No 36*, UN Doc. CCPR/C/GC/36 (30 October 2018) ('General Comment 36'), [63].

11. As to planning, the European Court of Human Rights in *McCann v United Kingdom* (a case regarding a lethal counter-terrorism operation against IRA members in Gibraltar) held that, deprivations of life must be subject to *‘the most careful scrutiny, particularly where deliberate lethal force is used, taken into consideration not only the actions of the agents of the State who actually administer the force but also all surrounding circumstances including such matters as the planning and control of the actions under examination.’*¹⁰ The factors which need to be taken into account when planning are noted by the Human Rights Committee in General Comment 36 as follows:

*‘[the action] must be strictly necessary in view of the threat posed ...; it must represent a method of last resort after other alternatives have been exhausted or deemed inadequate; the amount of force applied cannot exceed the amount strictly needed for responding to the threat; the force applied must be carefully directed – only against the attacker; the threat responded to must involve imminent death or serious injury. The use of potentially lethal force for law enforcement purposes is an extreme measure, which should be resorted to only when strictly necessary in order to protect life or prevent serious injury from an imminent threat.’*¹¹

12. States must, therefore, ensure that their intelligence, law-enforcement and military agencies carry out rigorous analysis prior to arriving at any decision about the use of drones which may have targeting capacity in a domestic context. General plans and general orders to target identified significant individuals will not suffice without a direct link between the targets and imminent threats to others.

13. As to investigation, the duty is well-recognized in international law, including by the Human Rights Committee (in its General Comment No 31),¹² the Inter-American Court (in the *Montero-Aranguren v Venezuela* case),¹³ and the African Commission on Human and Peoples’ Rights (in its General Comment No 3).¹⁴ The key features of this obligation of investigation recognized at international law have been set out in

¹⁰ *McCann v United Kingdom* [1995] ECHR 31; (1996) 21 EHRR 97 (GC), [150].

¹¹ General Comment 36, [12].

¹² Human Rights Committee, *General Comment No 31*, UN Doc. CCPR/C/21/Rev.1/Add.13, [15] and [18].

¹³ *Montero Aranguren et al (Detention Center of Catania) v Venezuela*, Judgment of 5 July 2006, IACtHR (Ser.C) no. 150, [66].

¹⁴ African Commission on Human and Peoples’ Rights, *General Comment No 3*, Adopted during 57th Ordinary Session (November 2015) (‘African Commission General Comment 3’), [2] and [15].

authoritative form in the revised version of the Minnesota Protocol on the Investigation of Potentially Unlawful Death:¹⁵

- 13.1. First, **the investigation must be prompt.** Persons who become aware of a potential violation of the right to life are required to report to their superiors quickly;¹⁶
- 13.2. Second, the **investigation must be both effective and thorough.** In this regard, the Minnesota Protocol concludes that investigations *‘must, at a minimum, take all reasonable steps to: (a) identify the victim(s); (b) recover and preserve all material probative of the cause of death, the identity of the perpetrator(s) and the circumstances surrounding the death; (c) identify the possible witnesses and obtain their evidence in relation to the death and the circumstances surrounding the death; (d) determine the cause, manner, place and time of death, and all the surrounding circumstances ...; and (e) determine who was involved in the death and their individual responsibility for the death;’*¹⁷
- 13.3. **Third, investigations and the persons conducting them must also ‘be, and must be seen to be, independent of undue influence’**¹⁸ and investigators *‘must be impartial and must act at all times without bias. They must analyse all evidence objectively. They must consider and appropriately pursue exculpatory as well as inculpatory evidence;’*¹⁹ and
- 13.4. **Finally, international law requires that investigations of rights violations be transparent, ‘including through openness to the scrutiny of the general public and of victims’ families.’**²⁰

Dispersal of Technology

14. Turning now to the third issue I identified earlier – namely, the proliferation of drone technology.

¹⁵ United Nations Office of the High Commissioner for Human Rights, ‘The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions’ (2017) (‘Minnesota Protocol’).

¹⁶ Minnesota Protocol, [23]. See also: *Anzualdo Castro v Peru*, Judgment of 22 September 2009, IACtHR (Ser.C) no. 202 (2009), [134].

¹⁷ Minnesota Protocol, [25].

¹⁸ Minnesota Protocol, [28].

¹⁹ Minnesota Protocol, [31].

²⁰ Minnesota Protocol, [32]. See also: African Commission General Comment 3, [7].

15. **The mandate is conscious that States carry out joint law enforcement operations and that agencies share information and expertise with counterparts for legitimate law enforcement objectives.** But a significant concern of my mandate is the process by which States collaborate and provide technical advice and capacity building worldwide, including through the transfer of military and dual-use technology such as drones and ultimately armed drones.²¹ **Experience suggests that transfer of technologies, initially surveillance drones, inexorably leads to a chain of use ultimately to armed drones.**
16. **States and of course United Nations entities** must ensure, in keeping with their obligations under international law and international human rights law, that they do not, whether **intentionally or through failures of due diligence, facilitate the unlawful use by other States of armed drone technology.** These concerns are particularly acute given that States routinely justify armed drone strikes on the basis of domestically-defined counter-terrorist objectives, while, as this mandate has consistently expressed, there is no consistency in national definitions of ‘terrorism,’ and States frequently use the fight against it as cover for activities serving political domestic agendas inconsistent with their international law obligations.²² The vagueness of domestic legislation addressing terrorism and extremism, and the problematic latitude it affords States to conduct unlawful operations, has persistently been criticized by human rights courts.²³
17. **Further, once sophisticated drone technology is shared widely worldwide, States face considerable challenges in seeking to control its spread to non-State actors.** As the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has noted, *‘[a]t least 20 armed non-State actors have reportedly obtained armed and unarmed drone systems.’*²⁴ For example, in 2017, in Mosul, there were no less than 82 armed drone strikes against Iraqi, Kurdish, United States, and French forces.²⁵

²¹ This will be the subject of a forthcoming report to the General Assembly on the Human Rights Dimensions of Technical Assistance and Capacity Building in the Counter-Terrorism and Countering/Preventing Violent Extremism Arenas (forthcoming, October 2021). See:

https://www.ohchr.org/EN/Issues/Terrorism/Pages/HR_Technical_Assistance_Capacity_Building.aspx

²² See, for instance: A/HRC/31/65, [21], [24], and [27]; A/HRC/37/52, [33], [36], and [66]; and A/HRC/40/52, [34]-[35].

²³ See, for instance: *Big Brother Watch v United Kingdom* [2021] ECHR 439 and *OOO Flavus and ors v Russia* [2020] ECHR 463.

²⁴ SR 2020 Report, [9]. *Including the Libyan National Army, Harakat Tahrir al-Sham, the Palestinian Islamic Jihad, Venezuelan military defectors, PKK, Maute Group, Jalisco New Generation Cartel, the Houthis and ISIL* See also: ‘Non-State Actors with Drone Capabilities,’ *New America*, available at: <https://www.newamerica.org/international-security/reports/world-drones/non-state-actors-with-drone-capabilities/>

²⁵ SR 2020 Report, [9].

The proliferation in drone technology in the law enforcement and counter-terrorism context raises significant concerns from a human rights perspective. As their deployment of drone technology holds the potential for direct and indirect violations of fundamental rights, including the right to life, **States should closely scrutinize the justification and necessity of drone operations, whether at the stages of planning, execution, or subsequent investigation.** At the same time, States need to be mindful that, even as they collaborate with other States on law enforcement objectives, they will need to ensure that transfer and proliferation of drone technology is consistent with human rights protection.

Thank you for keeping this fundamental issue to the fore of your conversations today.