

Statement by Ben Emmerson, UN Special Rapporteur on Counter-Terrorism and Human Rights concerning the launch of an inquiry into the civilian impact, and human rights implications of the use of drones and other forms of targeted killing for the purpose of counter-terrorism and counter-insurgency

The Special Rapporteur today issued the following statement at a press conference in London:

In June of last year, at the Human Rights Council in Geneva, a group of States, including two permanent members of the Security Council, as well as Pakistan and a number of other concerned States, made a joint statement asking me to carry out an investigation, within the framework of this mandate, into the use of drones in the context of counter-terrorism operations.

I issued a statement shortly afterwards to the effect that those States using this technology, and those States on whose territory it is used, are under an international law obligation to establish effective independent and impartial investigations into any drone attack in which it is plausibly alleged that civilian casualties were sustained. I also indicated that if those States did not take steps to establish sufficiently robust and impartial investigations it may, in the final resort, be necessary for the UN to conduct investigations into individual drone strikes.

The Inquiry that I am launching today is a direct response to the requests made to me by States at the Human Rights Council last June, as well as to the increasing international concern surrounding the issue of remote targeted killing through the use of UAVs. The exponential rise in the use of drone technology in a variety of military and non-military contexts represents a real challenge to the framework of established international law and it is both right as a matter of principle, and inevitable as a matter of political reality, that the international community should now be focussing attention on the standards applicable to this technological development, particularly its deployment in counter-terrorism and counter-insurgency initiatives, and attempt to reach a consensus on the legality of its use, and the standards and safeguards which should apply to it.

The plain fact is that this technology is here to stay, and its use in theatres of conflict is a reality with which the world must contend. It is therefore imperative that appropriate legal and operational structures are urgently put in place to regulate its use in a manner that complies with the requirements of international law, including international human rights law, international humanitarian law (or the law of war as it used to be called), and international refugee law.

At present there are at least three main legal theories vying for primacy of place on this question. There are those who contend that outside situations of recognised international armed conflict, the applicable framework is international human rights law, under which it is unlawful to engage in any form of targeted killing. The standards set out in

Covenant on Civil and Political Rights, and particularly the provisions of Article 6 which protects the right to life, permit the use of lethal force only where it is strictly necessary as a matter of immediate self-defence. Under this analysis States wishing to take action against suspected terrorists located outside a recognised situation of international armed conflict must first try to effect an arrest, and may use lethal force only if the person they are seeking resists arrest and it proves strictly necessary to use firearms.

At the other end of the spectrum the analysis that has been promoted by international lawyers in the United States, and by John Brennan, President Obama's nominee to head the CIA, to the effect that Western democracies are engaged in a global war against a stateless enemy, without geographical boundaries to the theatre of conflict, and without limit of time. This analysis is heavily disputed by most States, and by the majority of international lawyers outside the United States of America.

A third way of analysing the issue is to ask whether a terrorist organisation is engaging in an internal (or non-international) armed conflict with a particular government such as the governments of Pakistan, Yemen and Somalia; and then to ask whether and in what circumstances it is lawful for a third State to become engaged as a party to an internal armed conflict in support of the government forces. It is clear that as a matter of international law such engagement may be lawful if it takes place at the express request of the government of the State concerned. It is much less clear whether it can be lawful for an outside State such as the US to use military force without the express consent of the State concerned. International lawyers disagree on

whether tacit consent or acquiescence is sufficient; on whether the deployment of remote targeting technology in such circumstances amounts to a violation of the sovereignty of the State on whose territory it is used; and on whether it may nonetheless be lawful if the State concerned is either unwilling or unable to tackle the terrorist threat posed by an insurgent group operating on its territory.

The absence of consensus on these very fundamental questions of international law is the focus of intense debate at the United Nations at the moment, and will form the subject of a series of high-level discussions and negotiations between States and experts over the coming year, aimed at bridging these very different points of view. The reality here is that the world is facing a new technological development which is not easily accommodated within the existing legal frameworks, and none of the analyses that have been floated is entirely satisfactory or comprehensive. And they may differ in their application in different theatres of conflict. The legal situation in Afghanistan for instance, where there is a recognised international armed conflict is very different from that in the Federally Administered Tribal Areas of Pakistan, which in turn is very different from Yemen or the State of Palestine. And even within a country like Yemen, there may be parts of the country in which some would take the view that there is an internal armed conflict taking place, whilst in other parts of the country this is clearly not the case.

Given the relative ease with which this technology can be deployed, and given its relatively low cost (both in economic terms, and in terms of risk to the lives of service personnel of the States deploying the technology) the issue now has to be confronted squarely by the international

community. And by that I don't just mean a tacit or express deal done between governments behind closed doors. I mean also that efforts must be made to achieve some consensus among the citizens those governments represent. After all, the States deploying this technology for military use are mostly democratic States.

I should make it quite clear that these legal questions are not confined to the use of drones. As a matter of law, they apply to all use of armed force, including manned aircraft and missile strikes for the purpose of targeted killing. But it is the use of drones which has propelled this issue to the top of the international agenda because they can and have been used with such apparent ease and frequency to devastating effect, without putting the lives of pilots at risk. Given that the technology is routinely deployed against targets that are deeply embedded in civilian communities within the tribal areas of Pakistan and Yemen for example, concerns have been raised that there is an unacceptably high risk of civilian casualties.

The central objective of the present investigation is to look at the evidence that drone strikes and other forms of remote targeted killing have caused disproportionate civilian casualties in some instances, and to make recommendations concerning the duty of States to conduct thorough independent and impartial investigations into such allegations, with a view to securing accountability and reparation where things can be shown to have gone badly wrong with potentially grave consequences for civilians.

My mandate has received a large number of communication complaints relating to individual strikes, and my staff in Geneva has begun the process of looking into certain incidents. In order to formulate recommendations to the General Assembly on this issue, I have identified a small team of experts to assist me in identifying instances in which it is plausibly alleged that targeted killing operations of this nature have resulted in civilian casualties, and in conducting a critical examination of the available evidence. We propose to focus on 25 cases studies from Pakistan, Yemen, Somalia, Afghanistan and the State of Palestine and to examine the evidence in detail with a view to determining whether there is a plausible allegation of unlawful killing that should trigger the international law obligations to investigate, obligations which arise both under international human rights law, and under international humanitarian law.

This is not of course a substitute for effective official independent investigations by the States concerned. Nor do I anticipate that it will result in a dossier of evidence capable of leading directly to the attribution of legal - criminal or civil - liability. The purpose of the investigation is to assist me to put those plausible allegations to the relevant States for a response, and to report my findings to the General Assembly in the autumn of 2013, with a view to making recommendations for further action at UN level if that proves to be justified by the findings of my inquiry.

The Inquiry will be divided into three phases. The first phase, which is expected to conclude by the end of May, is the evidence-gathering phase. During this period my team will be working closely with lawyers, journalists and NGO's operating in the field, as well as with international

NGO's. I will also be consulting directly with the relevant States through my office in Geneva. I expect to conduct a number of country visits, including visits to Pakistan, Yemen and the Sahel.

The second phase, which will run from the end of May until the end of July is the consultation phase, during which I will seek the views and responses of the relevant States on the particular case studies that the Inquiry has focussed upon.

The third phase, from the end of July until the end of September, will be the evaluation phase, and the drafting of the final report. I expect to present my report, including my conclusions and recommendations, to the UN General Assembly in New York in October of this year.

I should make it clear that I approach this inquiry with an entirely open mind about the allegations that have been brought to my attention, and that I have not yet formed any view on the difficult legal questions which arise. The concern of my mandate is to establish the facts as reliably as possible, bearing in mind the significant practical obstacles that exist to the conduct of reliable evidence-gathering on the ground in Waziristan, Yemen, Afghanistan and Somalia.

The inquiry which will be co-ordinated through the office of the Special Rapporteur on Counter Terrorism and Human Rights in Geneva who will handle all engagement with Member States of the UN. In addition, I have a staff here in London to assist me in liaising with those who have already conducted or are now conducting investigations in the field. I can tell you that I have already received a substantial volume of relevant primary evidence in the form of statements, photographs and forensic material.

The inquiry team that will be assisting me is **Abdul-Ghani Al-Iryani**, a political analyst and development consultant in Yemen, who currently leads the Democratic Awakening Movement, a trans-partisan political advocacy movement that promotes democracy and the rule of law in Yemen: **Dr. Nat Cary**, a leading forensic pathologist with specialist expertise in the interpretation of disruptive injuries caused by explosions: **Imtiaz Gul**, Executive Director of the Islamabad-based independent Centre for Research and Security Studies; **Professor Sarah Knuckey** of NYU, co-author of the report “Living Under Drones”; **Lord Macdonald of River Glaven QC**, the former Director of Public Prosecutions for England and Wales; **Sir Geoffrey Nice QC**, former senior prosecutor at the International Criminal Tribunal for the Former Yugoslavia who prosecuted Slobodan Milosevic; **Captain Jason Wright**, a serving judge-advocate with the US military who is assisting the inquiry in his personal capacity; **Justice Shah Jehan Khan Yousafzai**, a former Senior Puisne Judge of the Peshawar High Court in Pakistan, and **Jasmine Zerini**, former Deputy Director for Afghanistan and South Asia in the French Ministry of Foreign Affairs. The legal counsel to the inquiry will be based in London. The inquiry team will be consulting with military forensic experts, targeting experts and NGO's and journalists from the UK, the US and Pakistan with a close knowledge of the regions and the issues.

I am also working closely with Forensic Architecture, and organisation that specialises in forensic modelling of military conflicts for the purposes of assessing their compatibility with international human rights and humanitarian law.

From my initial communications with relevant States I have grounds to be optimistic that the inquiry will receive good co-operation from the governments of Pakistan, Yemen, the United States and the United Kingdom.