



Armed drones: Heightened risks require greater scrutiny and accountability

Submission to the Senate Foreign Affairs, Defence and Trade Committee inquiry into ADF's use of unmanned air, maritime and land platforms

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1. Summary

- 1.1 The Human Rights Law Centre (**HRLC**) welcomes the opportunity to make this submission to the Foreign Affairs, Defence and Trade References Committee's (**Committee**) inquiry on the "potential use by the Australian Defence Force of unmanned air, maritime and land platforms, with particular reference to:
- ... (d) challenges, opportunities and risks associated with their deployment; and
 - (e) domestic and international legal, ethical and policy considerations..."
- 1.2 This submission focuses on the international law issues arising from the use of unmanned aerial vehicles used as weapons platforms (**drones**). Although Australia may want to capitalise on some of the opportunities that drone technologies present, such as surveillance, weaponised drones open up a Pandora's box of legal and ethical considerations.
- 1.3 The use of drones is not per se illegal under international law.¹ However, like all State use of force, the use of drones is subject to the rule of law, in particular international humanitarian law and international human rights law. Both of these systems of law require the protection of human life. The right to life requires that lethal force only be used where strictly necessary and proportionate, whilst the humanitarian law strives to protect the life of civilians in armed conflict.
- 1.4 Significant studies have been undertaken by two United Nations mandates to develop States' legal and accountability standards in relation to drones, namely the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson (**SR on Counter Terrorism**) and the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns (**SR on Extrajudicial Killing**).
- 1.5 In short, these two experts have explained that:
- (a) all States needs to **comply with international law** when using, or involved in the use of, drones;
 - (b) the targeted killing of individuals by drones will be **lawful only in very limited circumstances**;

¹ Christof Heyns, *Extrajudicial, summary or arbitrary executions*, UN GAOR, 68th sess, Agenda Item 69(b) on the provisional agenda, UN Doc A/68/382 (13 September 2013) [13].

- (c) use or involvement with drones should be **transparent** so that there is accountability to the people and international community;
- (d) where there have been, or appear to have been, civilian casualties that were not anticipated when a drone attack was planned, a **prompt, independent and impartial fact-finding inquiry** should be conducted and a public and detailed explanation of the results provided; and
- (e) victims of a violation of international law caused by drones should be provided with an **effective remedy**.

1.6 Unfortunately, drones have increasingly been used secretly to conduct targeted killing without any proper oversight or accountability. Some sources estimate that since 2009 as many as 2,500 people have been killed by covert US drone strikes outside of traditional armed conflict, in Pakistan, Yemen and Somalia.² There is great uncertainty as to whether some or all of these attacks were done in conformity with international law and could constitute extrajudicial killing or war crimes.³ There is also great concern that these attacks are disproportionately and unlawfully killing civilians, including children.⁴

1.7 The deployment of drones in secret, without transparency and accountability, undermines the rule of law and, according to the United Nations Special Rapporteur Extrajudicial Killing, may also threaten international security.⁵ The proliferation and increasing accessibility of drones means they are likely to form part of the arsenal of an increasing number of State and non-State actors.

1.8 If Australia wants to pursue its own military armed drone program, far greater levels of transparency and rigorous safeguards are absolutely essential.

² Jack Serle, 'Almost 2,500 now killed by covert US drone strikes since Obama inauguration six years ago: The Bureau's report for January 2015', *The Bureau of Investigative Journalism* (online), 2 February 2015 <<http://www.thebureauinvestigates.com/2015/02/02/almost-2500-killed-covert-us-drone-strikes-obama-inauguration/>>.

³ Christof Heyns, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN HRCOR, 25th sess, Agenda Item 3, UN Doc A/HRC/26/36 (1 April 2014) [21].

⁴ Jack Serle, 'Almost 2,500 now killed by covert US drone strikes since Obama inauguration six years ago: The Bureau's report for January 2015', *The Bureau of Investigative Journalism* (online), 2 February 2015 <<http://www.thebureauinvestigates.com/2015/02/02/almost-2500-killed-covert-us-drone-strikes-obama-inauguration/>>. See also the investigation conducted by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, A/HRC/25/59.

⁵ Christof Heyns, A/68/382 at [97].

- 1.9 There are credible reports that Australia is already involved in US drone strikes through its joint facility at Pine Gap, without any proper acknowledgement by the Australian government or any oversight of the role of Australian officials in activities that could constitute war crimes. Australia needs to explain the nature and extent of its involvement in the US drone strike program, the legal basis for its involvement, and the accountability and oversight mechanisms in place for Australian officials that may be involved.
- 1.10 Given Australia's seeming involvement in the US's covert and deadly drone program through Pine Gap, the public should be concerned by any Australian Government ambition to have its own armed drones. If the Government cannot come clean about its role in the US drone program, the prospect of it pursuing its own drone program is deeply troubling.
- 1.11 The HRLC is also concerned that no proper investigation has taken place in relation to the deaths of two Australian men reportedly killed by a US drone strike in Yemen in November 2013. Australia needs to apply the principles of transparency and accountability set out by the special rapporteurs to ensure a prompt, independent, impartial, effective and transparent investigation is undertaken into the circumstances surrounding their deaths.

Recommendations:

1. That the Australian government immediately provide the public with information about its role in the US government's program of targeted killing using drones.
2. That the Australian government not procure armed drones unless it has a system of transparency and accountability for their use that is consistent with Australia's legal obligations, including under international human rights law and international humanitarian law.
3. Australia should ensure, as promptly as possible, that an independent, impartial, effective and transparent investigation is undertaken of the circumstances surrounding the deaths of two Australians by US drone strikes.

2. Compliance with international law

2.1 Need to comply with international law

2.1.1 Australia is bound by international human rights law (**IHRL**) and international humanitarian law (**IHL**) when Australia engages in counter terrorism or national security activities,⁶ including when it uses or participates in the use of drones.⁷ In fact, international law has developed as a means of balancing security concerns with the need to protect the right to life.⁸

2.1.2 Ensuring that drone use is consistent with international law isn't just a matter of legal obligation, it's also in Australia's interest that drones are used according to law. Drones are now cheaper than most military engines. They are attractive for their accessibility and stealth and are expected to become more sophisticated and available in more compact form.⁹ They are therefore increasingly likely to be used by more and more State and non-State actors.¹⁰ It is critical that a rules-based order for the use of drones is established and followed.

⁶ The United Nations General Assembly adopted by resolution The United Nations Global Counter-Terrorism Strategy (**Strategy**) in 2006. In section IV of the Strategy, States resolve to "reaffirm that States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law": *Resolution adopted by the General Assembly on 8 September 2006*, GA Res 60/288, UN GAOR, 60th sess, Agenda Items 46 and 120, UN Doc A/RES/60/288 (20 September 2006), section IV, at [2].

⁷ On 28 March 2014, the United Nations Human Rights Council adopted by vote a resolution which urges "all States to ensure that any measures employed to counter terrorism, including the use of remotely piloted aircraft or armed drones, comply with their obligations under international law, including the Charter of the United Nations, international human rights law and international humanitarian law, in particular the principles of precaution, distinction and proportionality...": *Ensuring use of remotely piloted aircraft or armed drones in counter-terrorism and military operations in accordance with international law, including international human rights and humanitarian law*, HRC Res 25/22, UN HRCOR, 25th sess, Agenda Item 3, UN Doc A/HRC/25/22 (15 April 2014), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/136/24/PDF/G1413624.pdf?OpenElement> (accessed 3 February 2015). The resolution builds on the resolution adopted by the United Nations General Assembly on the protection of human rights and fundamental freedoms while countering terrorism: A/RES/68/178, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/178 (accessed 30 January 2015). See also United Nations Office of the High Commissioner for Human Rights, *Armed drones: calls for greater transparency and accountability*, 20 October 2014, available at <http://www.ohchr.org/EN/NewsEvents/Pages/ArmedDrones.aspx> (accessed 27 January 2015).

⁸ Christof Heyns, A/68/382 at [21].

⁹ Christof Heyns, A/68/382 at [14].

¹⁰ Christof Heyns, *Extrajudicial, summary or arbitrary executions*, UN GAOR, 69th sess, Agenda Item 69(b) of the provisional agenda, UN Doc A/69/265 (6 August 2014) [78].

2.2 The requirement to protect civilians and to protect life

2.2.1 For a drone strike to be lawful, it must satisfy the requirements of all applicable international legal regimes.¹¹ There is a significant debate about whether IHL applies to drone strikes conducted outside the traditional theatres of war. For the purpose of this submission we consider States' obligations under both IHL and IHRL, without making an assessment of which applies.

(a) The Right to Life in International Human Rights Law

2.2.2 IHRL protects the right to life, prohibits arbitrary killing and requires that force be used as a matter of last resort.¹² The use of deadly force can be lawful only if it is strictly necessary and proportionate, aimed at preventing an immediate threat to life and there is no other means of preventing the threat from materializing.¹³ It follows that lethal drone attacks will rarely be lawful outside the confines of armed conflict because "only in the most exceptional of circumstances would it be permissible under IHRL for killing to be the sole or primary objective of an operation".¹⁴

(b) Protection of civilians in armed conflict

2.2.3 In a situation of armed conflict, the prohibition on arbitrary killing continues to apply, but the question whether a killing is arbitrary is determined by applying the rules of international humanitarian law (IHL).¹⁵ Adopting a list of pre-identified individual military targets is not necessarily unlawful under IHL, provided it is based upon reliable intelligence¹⁶ and the targets selected are members of a State's armed forces, have a continuous combat function or directly participate in hostilities.¹⁷ The principle of proportionality applies, prohibiting "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".¹⁸ Avoiding excessive losses requires taking "all

¹¹ Christof Heyns, A/68/382 at [24].

¹² Christof Heyns, A/68/382 at [21], [32].

¹³ Ben Emmerson, *Promotion and protection of human rights and fundamental freedoms while countering terrorism*, UN GAOR, 68th sess, Agenda Item 69(b) of the provisional agenda, UN Doc A/68/389 (18 September 2013) [60].

¹⁴ Ben Emmerson, A/68/389 at [60].

¹⁵ Christof Heyns, A/68/382 at [40].

¹⁶ Ben Emmerson, A/68/389 at [24].

¹⁷ See further Christof Heyns, A/68/382 at [66]-[74].

¹⁸ Christof Heyns, A/68/382 at [75].

feasible precautions to prevent or minimize incidental loss of civilian lives and information-gathering relating to possible civilian casualties and military gains”.¹⁹

2.3 The requirement of transparency

3.2.1 Secrecy undermines the rule of law and may even threaten international security.²⁰

Transparency enhances public scrutiny, contributes to accountability, and “promotes the central objectives of humanitarian law, namely increasing compliance with the principles of distinction, proportionality and precaution, and deterring the commission of future violations”.²¹

3.2.2 The Special Rapporteurs have provided guidance on the matters about which a state must be transparent. They have found:

- (a) any State using lethal force is under a duty to account for civilian casualties;²²
- (b) as a first step, States must disclose the criteria they adopt for direct participation in hostilities,²³ and the precautions incorporated in such criteria.²⁴ This disclosure “is critical to achieving transparency as to the forms of conduct that may expose a civilian to the threat of deadly force”;²⁵
- (c) States should also disclose the authority responsible for approving the targets of a drone strike;²⁶
- (d) such information should be placed in institutions that are able to disclose it to the public, as public access is essential for legal and political accountability;²⁷ and
- (e) States should disclose data regarding the persons killed through their use of drones,²⁸ including the number of civilian casualties, together with details of the evaluation

¹⁹ Christof Heyns, A/68/382 at [76].

²⁰ Christof Heyns, A/68/382 at [97]. See also Nils Melzer, *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare*, European Parliament, Directorate General for External Policies, Policy Department Study (Brussels, 2013) and Advisory Committee on Issues of Public International Law, “Main conclusions of advice on armed drones” (The Hague, 2013), p 33.

²¹ Ben Emmerson, A/68/389 at [44].

²² Ben Emmerson, A/68/389 at [45].

²³ Ben Emmerson, A/68/389 at [71].

²⁴ Christof Heyns, A/68/382 at [98].

²⁵ Ben Emmerson, A/68/389 at [71].

²⁶ Christof Heyns, A/68/382 at [98].

²⁷ Christof Heyns, A/68/382 at [96].

²⁸ Christof Heyns, A/68/382 at [99].

methodology used.²⁹ Victims of drone attacks, and society at large, have a right to access information relating to allegations of human rights violations and their investigation.³⁰ Disclosure of the details of casualties inflicted by drone strikes is essential to ensure justice and reparation for victims and their families.³¹

2.4 Need for prompt, independent and impartial inquiry

3.3.1 International law requires that where there have been, or appear to have been, civilian casualties that were not anticipated when an attack was planned, a preliminary inquiry must take place.³² This requirement is triggered whenever there is plausible evidence to suggest civilian loss of life,³³ whether partial or circumstantial, and whether sourced from a governmental organisation or otherwise.³⁴ Such an investigation must meet the fundamental IHRL standards of independence, impartiality, promptness, effectiveness and transparency, taking into account the circumstances of the conflict.³⁵

3. The “accountability vacuum” in current drone use

3.1 Secrecy is a real problem in drone use overseas

3.1.1 In 2010, Philip Alston, then Special Rapporteur on extrajudicial, summary or arbitrary executions, lamented that no State had disclosed the full legal basis for targeted killings, nor the procedural and other safeguards in place to ensure that killings are lawful and justified,

²⁹ See Ben Emmerson, A/68/389 at [80], where the SR on Counter Terrorism urges the United States to disclose this information.

³⁰ Christof Heyns, A/68/382 at [100].

³¹ Christof Heyns, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN HRCOR, 20th sess, Agenda Item 3, UN Doc A/HRC/20/22/Add.3 [82].

³² Ben Emmerson, A/68/389 at [42]; and see the Public Commission to Examine the Maritime Incident of 31 May 2010 (Tukel Commission), published in February 2013.

³³ Ben Emmerson, A/68/389 at [42]; and see the Public Commission to Examine the Maritime Incident of 31 May 2010 (Tukel Commission), published in February 2013, at [75-76].

³⁴ Ben Emmerson, A/68/389 at [42].

³⁵ Ben Emmerson, A/68/389 at [45]. See also A/HRC/25/L.32 at [2].

and the accountability mechanisms that ensure wrongful killings are investigated, prosecuted and punished.³⁶

3.1.2 Little has changed in the past five years.

3.1.3 In 2013, the SR on Counter Terrorism said that the “single greatest obstacle to an evaluation of the civilian impact of drone strikes is lack of transparency, which makes it extremely difficult to assess claims of precision targeting objectively”.³⁷

3.1.4 As the United Nations High Commissioner for Human Rights recently pointed out, “the current lack of transparency creates an accountability vacuum and affects the ability of victims to seek redress.”³⁸ A lack of disclosure gives States “a virtual and impermissible license to kill”.³⁹

3.1.5 In the US, the involvement of the CIA has led to unjustifiable secrecy, with the SR on Counter Terrorism observing in his interim report, “even the existence of the CIA programme in Pakistan remains technically classified”⁴⁰ despite the President and Secretary of State publicly acknowledging drone operations in Pakistan. The SR on Counter Terrorism has criticised the US for failing to reveal its data on the number of civilian casualties caused by remotely piloted aircraft, or any information on its method for evaluating the number. The Special Rapporteur “does not accept that considerations of national security justify withholding statistical and basic methodological data of this kind”.⁴¹

3.1.6 In the United Kingdom, the Royal Air Force is accountable to Parliament through the Ministry of Defence, which allows for some transparency.⁴² The Ministry does not, however, comment publicly on the use of remotely piloted aircraft in connection with special operations.⁴³ Under some of its operating procedures, every remotely piloted aircraft weapons discharge is internally reviewed and a mission report, including video footage and communications reports, prepared and reviewed.⁴⁴ Where there is an indication of civilian casualties, the incident is

³⁶ Philip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN HRCOR, 14th sess, Agenda Item 3, UN Doc A/HRC/14/24/Add.6 [87].

³⁷ Ben Emmerson, A/68/389 at [41].

³⁸ See the United Nations High Commissioner for Human Rights address to the Security Council on 18 August 2013; and see Ben Emmerson, A/68/389 at [41].

³⁹ Philip Alston, A/HRC/14/24/Add.6 at [88].

⁴⁰ Ben Emmerson, A/68/389 at [46].

⁴¹ Ben Emmerson, A/68/389 at [47].

⁴² Ben Emmerson, A/68/389 at [49].

⁴³ Ben Emmerson, A/68/389 at [49].

⁴⁴ Ben Emmerson, A/68/389 at [49].

referred to a body whose personnel are independent of the chain of command involved in the strike.⁴⁵

3.1.7 In Israel, the Supreme Court has issued guidance on the circumstances in which the State could lawfully engage in preventative strikes against persons involved in terror attacks.⁴⁶ At the time of the SR on Counter Terrorism's interim report, Israel had not publicly acknowledged or explained the role played by drones in its counter terrorism operations in Gaza.⁴⁷

3.1.8 Despite the ongoing calls by the United Nations and other bodies,⁴⁸ and various promises by governments,⁴⁹ there continues to be a lack of transparency surrounding drone use.

4.1 At the same time there has been a huge increase in the deaths caused by armed drones, without proper assessment as to whether these deaths were in violation of international law.

4.2 Some sources estimate that since 2009 as many as 2,500 people have been killed by covert US drone strikes outside of traditional armed conflict, in Pakistan, Yemen and Somalia.⁵⁰ There is great uncertainty as to whether some or all of these attacks were done in conformity with international law and could constitute extrajudicial killing or war crimes.⁵¹ There is also great concern that these attacks are disproportionately and unlawfully killing civilians, including children.⁵²

⁴⁵ Ben Emmerson, A/68/389 at [49].

⁴⁶ Israel High Court of Justice, *The Public Committee against Torture in Israel and LAW – Palestinian Society for the Protection of Human Rights and the Environment v The Government of Israel and others*, HCJ 769/02, judgment of 14 December 2006, at [2].

⁴⁷ Ben Emmerson, A/68/389 at [50].

⁴⁸ See, for example, the statement of the High Commissioner for Human Rights to the Security Council on the protection of civilians on the anniversary of the Baghdad bombing, 19 August 2013, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13642&LangID=E> (accessed 2 February 2015) and the statement by UN High Commissioner for Human Rights Navi Pillay at the 23rd session of the Human Rights Council, Geneva, 27 May 2013, available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13358&LangID=E> (accessed 2 February 2015); A/HRC/27/NGO/2, p 3.

⁴⁹ See, for example, Ben Emmerson, A/68/389 at [48].

⁵⁰ The Bureau of Investigative Journalism, *Monthly Updates on the Covert War*, 2 February 2015, available at <http://www.thebureauinvestigates.com/2015/02/02/almost-2500-killed-covert-us-drone-strikes-obama-inauguration/>.

⁵¹ Christof Heyns, A/HRC/26/36 at [21].

⁵² The Bureau of Investigative Journalism, *Monthly Updates on the Covert War*, 2 February 2015, available at <http://www.thebureauinvestigates.com/2015/02/02/almost-2500-killed-covert-us-drone-strikes-obama-inauguration/>. See also the investigation conducted by Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, A/HRC/25/59.

3.2 Concern about Pine Gap involvement

- 4.3 Credible allegations have been made that the joint Australian-American Pine Gap facility in the Northern Territory provides the US with location information used to track targets of US drone strikes.⁵³ Australian journalist Philip Dorling has reported that roughly half of the staff at Pine Gap are Australians, including the deputy chief of the facility.⁵⁴
- 4.4 The Australian Minister for Defence has said that Pine Gap operates with the “full knowledge and concurrence” of the Australian government.⁵⁵
- 4.5 But the Australian government has not disclosed the manner and extent to which Pine Gap is involved in drone strikes. Nor has it explained the legal basis for its involvement. Nor has it explained whether there is any oversight of the role of Australian officials in activities that could constitute war crimes.
- 4.6 To ensure accountability and oversight of Australia’s participation in drone strikes, Australia should apply the principles of transparency discussed at paragraphs 2.3 and 2.4 above to the Pine Gap facility.

3.3 No proper investigation of Australian deaths

- 4.7 Two Australians have been victims of drone strikes and their deaths have not yet been properly investigated.
- 4.8 On 16 April 2014, *The Australian* reported that two Australian men, Christopher Havard and Muslim bin John (a New Zealand dual citizen), were killed by a US drone strike in Hadramout in eastern Yemen on 19 November 2013.⁵⁶

⁵³ Philip Dorling, ‘Pine Gap drives US drone kills’, *The Age* (online), 21 July 2013 <<http://www.theage.com.au/national/pine-gap-drives-us-drone-kills-20130720-2qbsa.html>> (accessed 3 February 2015); Richard Tanter, ‘The US Military Presence in Australia: Asymmetrical Alliance Cooperation and its Alternatives’ (2013) 11(45) *The Asia-Pacific Journal*, available at <<http://japanfocus.org/-Richard-Tanter/4025>> (accessed 3 February 2015).

⁵⁴ Philip Dorling, ‘Australian outback station at forefront of US spying arsenal’, *The Age* (online), 26 July 2013 <<http://www.theage.com.au/it-pro/security-it/australian-outback-station-at-forefront-of-us-spying-arsenal-20130726-hv10h.html>> (accessed 3 February 2015).

⁵⁵ Minister for Defence Stephen Smith, ‘Ministerial Statement on Full Knowledge and Concurrence’ (26 June 2013), available at <<http://www.minister.defence.gov.au/2013/06/26/minister-for-defence-stephen-smith-ministerial-statement-on-full-knowledge-and-concurrence/>> (accessed 3 February 2015).

⁵⁶ Paul Maley, ‘Aussies killed in US drone strike in Yemen’, *The Australian* (Sydney), 16 April 2014, available at <<http://www.theaustralian.com.au/national-affairs/foreign-affairs/aussies-killed-in-us-drone-strike-in-yemen/story-fn59nm2j-1226885783804>> (accessed 3 February 2015).

- 4.9 The report states that US authorities notified Australian officials about the possibility that Australian citizens may have been “collateral damage” in the strike.
- 4.10 The Australian Department of Foreign Affairs and Trade said that the two men were killed during counter terrorism operations but refused to discuss the details of the deaths.
- 4.11 Similarly, the US embassy refused to comment on the incident but asserted that it “uses all lawful means at its disposal and works closely with foreign partners and allies to mitigate the threats we face”.⁵⁷
- 4.12 The Australian government says it had no advance warning of the strike.
- 4.13 In accordance with the transparency principles set out in sections 2.3 and 2.4 above, Australia should ensure, as promptly as possible, that an independent, impartial, effective and transparent investigation is undertaken of the circumstances surrounding the two deaths.
- 4.14 The results of the investigation should be made public, in as much detail as possible, and subject only to such redactions as are strictly necessary to meet legitimate national security concerns.

⁵⁷ Paul Maley, ‘Aussies killed in US drone strike in Yemen’, *The Australian* (Sydney), 16 April 2014, available at <<http://www.theaustralian.com.au/national-affairs/foreign-affairs/aussies-killed-in-us-drone-strike-in-yemen/story-fn59nm2j-1226885783804>> (accessed 3 February 2015).