

# Protecting Human Rights from Military Technologies

Digital Rights Alliance

Submission to the Human Rights Council Advisory Committee

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# 1 Introduction

1. This submission has been jointly prepared by the national human rights institution (NHRI) staff members responsible for technology and digital rights within the NHRI Digital Rights Alliance (Alliance).
2. Established in March 2022, the Alliance is a global network of NHRIs from 24 countries,<sup>1</sup> which aim to consolidate the role of NHRIs in the digital age to better protect and promote digital rights and freedoms.
3. The Alliance is committed to addressing the challenges of digitalisation on human rights.<sup>2</sup>
4. The Alliance welcomes the opportunity to make this submission to the Human Rights Council Advisory Committee (Committee) in response to its [Call for Input](#) and to contribute to the discussion of new and emerging technologies in the military domain (NTMD) from a broader international human rights and international law perspective.
5. This submission was principally prepared by the Australian Human Rights Commission and the Danish Institute for Human Rights (DIHR), with input and consultation from all other members.

## 1.1 Summary

6. This submission focuses on lethal autonomous weapon systems (LAWS). The Alliance calls for a full ban of LAWS where the technology is incompatible with international human rights law, international humanitarian law and international law, because LAWS:
  - may be used in civilian contexts (outside of conflict zones) such as policing and border control
  - create a responsibility gap that would deprive the victims of mass human rights violations any remedy and reparation.

# 2 Definitions

## 2.1 LAWS

1. LAWS can be understood as weapons that independently select and attack targets.<sup>3</sup> LAWS include unmanned aerial vehicles, unmanned surface vessels, unmanned underwater vessels and unmanned ground vehicles (amongst others).<sup>4</sup>

2. With the militarisation of civilian security, it is expected that LAWS are not only deployed in battlefields – but also in policing, border control or prison security.
3. Most LAWS, in their current form, are not truly a fully autonomous weapons system – as there is usually ‘some form of human intervention, even if only to activate it’.<sup>5</sup>

## **2.2 Weapons system**

4. A weapon system is ‘[a] combination of one or more weapons with all related equipment, materials, services, personnel, and means of delivery and deployment (if applicable) required for self-sufficiency’.<sup>6</sup>

## **3 Question 1**

5. International law requires that States utilising LAWS and other NTMD abide by international obligations. This is a critical component of this submission. If such technologies are developed and deployed in a regulatory vacuum, there are risks of misuse.
6. However, it is worth noting that international human rights law is most effective when States comply with such obligations. As it the case with nuclear weapons, there is always the possibility of nations developing and deploying LAWS in disregard of international law.
7. It is also a possibility that NTMD could fall into the hands of terrorist groups or non-state actors who may disregard international human rights law. The issue of proliferation must always be a concern when considering NTMD.

### **3.1 *Jus ad bellum* and *jus in bellum***

8. At all stages when considering NTMD, States are required to comply with international human rights law principles. Although much attention is paid to technical compliance with the *jus in bellum* notions of distinction and proportionality – other principles must not be forgotten. The principle of necessity requires compliance as well. Compliance should be observed during both planning and execution.
9. LAWS need to be considered in the context of broader international human rights law, beyond *jus in bellum* in isolation. Narrowing discussion of LAWS to just *jus in bellum* principles, may set a lowered bar for legality under international human rights law.

10. International human rights obligations must be upheld by States not only when deploying LAWS, but also when deciding to fund the development or procurement of NTMD in association private corporations.

### 3.2 Additional legal frameworks

11. LAWS will also have applications outside of formal armed conflict. With the increasing militarisation of borders and policing, autonomous weaponry may be integrated into these spaces. In such situations, LAWS must comply with international human rights law, refugee law, tort law,<sup>7</sup> and corporate criminal and civil liability laws.

12. Given the wide possible use of LAWS, the *International Covenant of Civil and Political Rights*, *Convention against Torture*, *Convention on the Rights of Children* and the *Rome Statute* may also be relevant.

13. The use of LAWS will also be contrary to the 'Martens Clause' on principles of humanity.<sup>8</sup>

14. With increasing adoption of business obligations to protect and promote human rights, several *soft law* instruments are relevant, including (but not limited to):

- [Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law](#).
- [Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power](#).
- [Responsibility of States for Internationally Wrongful Acts](#).
- [Updated Set of principles for the protection and promotion of human rights through action to combat impunity](#).

15. It is important that in considering the breadth of applicable international law and human rights law, the work of other international, regional and international groups should be considered, to avoid a fragmented approach to addressing NTMD.

## 4 Question 2

16. Article 1 of Protocol I to the Geneva Conventions calls on all States to take measures to ensure that international human rights law is given full effect. The development and deployment of LAWS requires careful consideration of international human rights law. Transparency on the development and capabilities of NTMD is fundamental for responsibility and accountability. It is

likely that an independent international governance board will be required to audit and ensure that algorithm-powered NTMD are compliant with international legal frameworks.

17. Article 36 of Protocol I to the Geneva Conventions places an obligation on States to carry out legal reviews of new weapons to ensure conflict is conducted in accordance with international law. However, article 36 contains no mechanism to ensure accountability of reviews.
18. NTMD are increasing at an exponential rate, with several emerging technologies being trialled in existing conflict zones.
19. There needs to be a strengthened investigatory and reporting measure on NTMD. Such a response should be independent of States, in the form of a new Special Rapporteur on New and Emerging Military Technologies in the Military Domain.

## 5 Question 4

20. As noted by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin, technologies are being 'misused worldwide to restrict and violate human rights'.<sup>9</sup>
21. The use of NTMD will violate non-derogable rights – because of a lack of oversight and impunity for those who utilise NTMD (as discussed below),<sup>10</sup> in addition to challenging fundamental notions of human rights.

### 5.1 Artificial intelligence

22. The use of artificial intelligence (AI) can have a catastrophic effect if it is deployed without appropriate regard for human rights.<sup>11</sup> The use of AI in military domains, such as national security, can greatly impact the right to privacy – and broader rights (discussed below).<sup>12</sup>
23. The Alliance has previously discussed the role of AI and human rights in its [input](#) to the United Nations Global Digital Compact.<sup>13</sup>
24. Where AI is utilised in NTMD, as opposed to in civilian applications, the risks to human rights and life are paramount.

### 5.2 Right to life

25. The use of many NTMD deprives a person of their right to life under international human rights law. As the Human Rights Committee noted in General Comment No. 36 (2019) this right is 'the supreme right from which no

derogation is permitted, even in situations of armed conflict or other public emergencies that threaten the life of the nation'.<sup>14</sup>

26. Countries are utilising LAWS in an unregulated environment to deprive individuals of their right to life. The most documented use of LAWS has been in the Libyan civil war and the Russia-Ukraine War.<sup>15</sup> The use of such technology in active conflict zones is greatly concerning.

### **5.3 Proportionality**

27. To ensure that the use of NTMD is done in accordance with international law, its use must be proportionate.<sup>16</sup> The perceived advantages must outweigh the harms.<sup>17</sup>

28. States are increasingly integrating algorithms into law enforcement and national security responses.<sup>18</sup> NTMD utilising AI directly impacts proportionately, as autonomous weapons do not have the moral capacity to understand the value of a human life.

29. United Nations Secretary-General, António Guterres, has declared that machines determining proportionality in life-or-death situations is 'politically unacceptable and morally repugnant'.<sup>19</sup>

30. Although humans are by no means perfect decision makers during conflict, they possess' compassion and intuition – qualities that algorithms can never possess.<sup>20</sup> This poses a unique problem in complying with international rules of war when utilising AI-driven NTMD.

### **5.4 Necessity**

31. The principle of necessity requires that there is no other means possible to eliminate a threat. Any force used must be the minimum amount that is reasonable in the circumstances.

32. It is a questionable whether LAWS will be able to comply with this requirement, not only in the context of conflict, but in policing or counterterrorism.

### **5.5 Discrimination**

33. NTMD, especially those utilising algorithms, may result in discrimination which can lead to tragedy.

34. Algorithmic bias is a phenomenon where an AI outcome results in discrimination.<sup>21</sup> When used in civilian contexts there are risks of unlawful discrimination.<sup>22</sup> However, when algorithmic bias occurs in NTMD, this can be a matter of life-or-death.



35. Facial recognition technologies (FRT) utilise AI and pattern recognition, and are often unreliable. Several FRT products have already been found to perform better for those with light skinned and masculine appearances, while failing to recognise feminine appearances, people of colour or people with disability.<sup>23</sup>
36. Several NTMD already utilise FRT which may result in the wrong people being targeted – disproportionately impacting marginalised people. This issue is compounded when NTMD are deployed in policing in areas where vulnerable, and at risk, groups live.

## **5.6 Universality and inalienability**

37. Human rights are universal. They are not provided by any State and are inherent to all – regardless of personal characteristic or circumstance. Universality is the cornerstone of international human rights law. This is a principle which was introduced under the Universal Declaration of Human Rights (UDHR) in 1948 and has been recognised across human rights conventions, declarations and resolutions.<sup>24</sup>
38. Human rights are also inalienable and cannot be taken away, except in specific situations and according to due process.<sup>25</sup> As noted throughout this submission, it is often difficult for NTMD to adhere to international human rights and humanitarian law or for it to apply to due process.
39. It is likely that NTMD, especially those utilising AI, will challenge principles of universality and inalienability. These are two principles which must remain at the forefront of all human rights discussions of NTMD.

## **5.7 Accountability**

40. Access to justice and reparations are well established principles in international law.<sup>26</sup>
41. A Nuremberg Tribunal judgment has previously stated ‘crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes, can the provisions of international law be enforced’.<sup>27</sup>
42. Ensuring a framework of accountability to ensure perpetrators are held responsible, and victims’ rights are upheld, is crucial to rule of law and to ensure deterrence. However due to issues explored below, accountability is challenged by the use of LAWS.

## 6 Question 6

43. Although there are many strategies to protect the right to equality and non-discrimination in the design and deployment of NTMD, a principal safeguard should be the inclusion of an ‘informed human in the loop’. This is especially important where NTMD utilises data sets and algorithms. There should always be an individual who has oversight of the design, deployment and use of NTMD.
44. While a human in the loop may improve accountability and fairness, they must be educated on the risks of discrimination in NTMD.<sup>28</sup> Individuals who have oversight of NTMD (especially NTMD that make decisions or utilise AI) need significant training on the flaws of data sets, algorithms and AI tools. They must also be encouraged to scrutinise AI-outcomes, especially where such outcomes can result in the deprivation of life.
45. However an ‘informed human in the loop’ in isolation is insufficient, there must be additional safeguards in place, and consideration given to whether the specific functions of a NTMD should even be automated.<sup>29</sup>

## 7 Question 17

### 7.1 Australian Human Rights Commission

46. On 07 June 2023, Human Rights Commissioner, Lorraine Finlay, participated in RightsCon Costa Rica. Commissioner Finlay delivered the speech [‘Stopping Killer Robots – Prohibiting the use of Lethal Autonomous Weapon Systems’](#). The speech called for urgent legislation to effectively regulate LAWS and limit their misuse. The speech summarised the key issues around LAWS, including technical inaccuracies of FRT and its possible implications in rising domestic terrorism and broader arms races. The Commission continues to advocate for LAWS regulation.
47. The Australian Human Rights Commission has also examined the use of neurotechnologies in military spheres as part of its upcoming Background Report on Neurotechnology and Human Rights.
48. The Australian Human Rights Commission has prepared its own submission to this inquiry.

### 7.2 Danish Institute of Human Rights

49. The DIHR has been working on the broader impact of new technologies on digital and human rights. DIHR is the Chair of the [NHRIs Alliance for Digital](#)

[Rights](#) and have produced a number of reports and publications on accountability of business and states in relation to new technologies, democracy and human rights. DIHR's work can be found [online](#).

## 8 Question 27

50. Although international human rights and humanitarian law may have application to NTMD, it is questionable how well existing laws function. NTMD are often novel in both design and application, creating difficulties for the application of existing legal frameworks.
51. It has been an open question whether certain NTMD, such as LAWS, can ever meet the requirements of international human rights or humanitarian law.<sup>30</sup>
52. State and individual responsibility is a prerequisite to ensuring accountability for the violation of any international human rights and humanitarian law. Such individual responsibility is often not present in NTMD, especially those integrating AI, so ensuring accountability is difficult.
53. How then can international human rights and humanitarian law apply to ensure accountability if a technology is responsible for loss of, or harm to, life? This question of liability under international human rights and humanitarian law has been considered extensively with no definitive answer.<sup>31</sup>
54. For international human rights and humanitarian law to apply to many NTMD, especially those utilising AI, the Committee must consider where legal liability shall fall. This will involve considering a wide array of international human rights laws and frameworks. It is important that the responsibility of the private sector also be specifically addressed in response to blurring liability between States and private organisations.
55. Without an individual being held accountable for the actions of NTMD, it is questionable if international human rights and humanitarian law sufficiently protects human rights by ensuring accountability.

## Endnotes

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- <sup>1</sup> Members come from Australia, Belgium, Chile, Colombia, Denmark, Ethiopia, Finland, France, Georgia, Ireland, Kenya, Mongolia, New Zealand, Northern Ireland, Nigeria, Norway, Palestine, Peru, Portugal, Samoa, Slovakia, South Africa, Uganda and Zambia.
- <sup>2</sup> The Danish Institute for Human Rights, ‘*Strengthening Digital Rights Protection: National Human Rights Institutions Unite*’ (Webpage) <<https://www.humanrights.dk/result/strengthening-digital-rights-protection-national-human-rights-institutions-unite#:~:text=The%20NHRI%20Digital%20Rights%20Alliance%2C%20established%20in%20March%202022%2C%20comprises,of%20digitalisation%20on%20human%20rights>>.
- <sup>3</sup> International Committee of the Red Cross, ‘*Autonomous Weapons Systems: Technical, Military, Legal and Humanitarian Aspects*’ (Expert Meeting, 2014) 7.
- <sup>4</sup> Michael Klare, ‘*Assessing the Dangers: Emerging Military technologies and Nuclear (In)Stability, An Arms Control Association Report*’, (Report, February 2023) 12.
- <sup>5</sup> Qerim Qerimi, ‘Controlling Lethal Autonomous Weapons Systems: A Typology of the Positions of States’ (2023) 50 *Computer Law and Security Review* 1, 1.
- <sup>6</sup> Computer Science Resource Centre, ‘Weapons Systems’ (Webpage) <[https://csrc.nist.gov/glossary/term/weapons\\_system#:~:text=A%20'weapons%20system'%20is%20a,%20required%20for%20self%2D%20sufficiency](https://csrc.nist.gov/glossary/term/weapons_system#:~:text=A%20'weapons%20system'%20is%20a,%20required%20for%20self%2D%20sufficiency)>.
- <sup>7</sup> See generally Rebecca Crootof, ‘War Torts’ (2022) 97(4) *New York University Law Review* 1063.
- <sup>8</sup> Martens Clause stipulates that where situations are not covered by international humanitarian law conventions, neither combatants nor civilians find themselves completely deprived of protection. Instead the conduct of aggressors remains regulated by the principles of the law of nations as they result from the usages of international law, from the laws of humanity, and from the dictates of public conscience.
- <sup>9</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin, ‘*Human Rights Implications of the Development, Use and Transfer of New Technologies in the Context of Counter-terrorism and Countering and Preventing Violent Extremism*’ (A/HRC/52/39, 01 March 2023) 1.
- <sup>10</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin, ‘*Human Rights Implications of the Development, Use and Transfer of New Technologies in the Context of Counter-terrorism and Countering and Preventing Violent Extremism*’ (A/HRC/52/39, 01 March 2023) 1-2.
- <sup>11</sup> Report of the United Nations High Commissioner for Human Rights, ‘*The Right to Privacy in the Digital Age*’ (A/HRC/48/31, 15 September 2021) 2 [2].
- <sup>12</sup> Report of the United Nations High Commissioner for Human Rights, ‘*The Right to Privacy in the Digital Age*’ (A/HRC/48/31, 15 September 2021) 6 [24].
- <sup>13</sup> The Alliance’s contribution was submitted by the Danish Institute of Human Rights on behalf of Alliance members.
- <sup>14</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin, ‘*Human Rights Implications of the Development, Use and Transfer of New Technologies in the Context of Counter-terrorism and Countering and Preventing Violent Extremism*’ (A/HRC/52/39, 01 March 2023) 10 [30].
- <sup>15</sup> Maria Cramer, ‘A.I Drone May have Acted on its Own in Attacking Fighters, U.N Says’, *New York Times* (Online, 03 June 2021) <<https://www.nytimes.com/2021/06/03/world/africa/libya-drone.html>>; Robert Trager, ‘Killer Robots are Here - and we Need to Regulate Them’, *Foreign Policy* (Online, 11 May 2022) <<https://foreignpolicy.com/2022/05/11/killer-robots-lethal-autonomous-weapons-systems-ukraine-libya-regulation/>>.
- <sup>16</sup> Neil Davison, ‘*A Legal Perspective: Autonomous Weapon Systems under International Humanitarian Law*’ (UNODA Occasional Papers, No. 30, 2018) 7-8.
- <sup>17</sup> Human Rights Watch, ‘*Losing Humanity: The Case against Killer Robots*’ (Report, 2012) 25.
- <sup>18</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin, ‘*Human Rights Implications of the Development, Use and Transfer of New Technologies in the Context of Counter-terrorism and Countering and Preventing*

- Violent Extremism*' (A/HRC/52/39, 01 March 2023) 13 [38]; see also Report of the United Nations High Commissioner for Human Rights, *'The Right to Privacy in the Digital Age'* (A/HRC/48/31, 15 September 2021) 6 [22].
- <sup>19</sup> United Nations, *'Machines Capable of Taking Lives without Human Involvement Are Unacceptable, Secretary-General Tells Experts on Autonomous Weapons Systems'* (Press Release, United Nations, 25 March 2019) <<https://press.un.org/en/2019/sgsm19512.doc.htm>>.
- <sup>20</sup> Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, *'Report to the Human Rights Council'* (a/hrc/23/47, 09 April 2013) 10 [55].
- <sup>21</sup> Australian Human Rights Commission, *'Final Report'* (Report, 2021) 13.
- <sup>22</sup> Australian Human Rights Commission, *'Final Report'* (Report, 2021) 13.
- <sup>23</sup> See e.g. Joy Buolamwini and Timinit Guru, *'Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification'* (2018) 81 *Proceedings of Machine Learning Research* 1; KS Krishnapriya, Kushal Vangara, Michael C King, Vitor Albiero and Kevin Bowyer, *'Characterizing the Variability in Face Recognition Accuracy Relative to Race'* (Conference Paper, IEEE/CVF Conference on Computer Vision and Pattern Recognition Workshops, 2019); Inioluwa Deborah Raji and Joy Buolamwini, *'Actionable Auditing: Investigating the Impact of Publicly Naming Biased Performance Results of Commercial AI Products'* (Conference on Artificial Intelligence, Ethics, and Society, 2019).
- <sup>24</sup> United Nations, *'What are Human Rights?'* (Webpage) <<https://www.ohchr.org/en/what-are-human-rights>>.
- <sup>25</sup> United Nations, *'What are Human Rights?'* (Webpage) <<https://www.ohchr.org/en/what-are-human-rights>>.
- <sup>26</sup> See e.g. *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; Convention on the Crime of Genocide; UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.
- <sup>27</sup> International Military Tribunal, 14 November 1945 - 1 October 1946 (Nuremberg: International Military Tribunal, 1947) 223.
- <sup>28</sup> G. Bell et al., *'Rapid Response Information Report: Generative AI - language models (LLMs) and multimodal foundation models (MFMs)'* (Australian Council of Learned Academies, Report, 24 March 2023) 12.
- <sup>29</sup> Kobi Lein & Anja Kaspersen, *'Seven Myths of Using the Term "Human on the Loop": "Just What Do You Think You Are Doing, Dave?"'* (Webpage) <<https://www.carnegiecouncil.org/media/article/7-myths-of-using-the-term-human-on-the-loop>>.
- <sup>30</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin, *'Human Rights Implications of the Development, Use and Transfer of New Technologies in the Context of Counter-terrorism and Countering and Preventing Violent Extremism'* (A/HRC/52/39, 01 March 2023) 6 [31].
- <sup>31</sup> See e.g. Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, *'Report to the Human Rights Council'* (A/HRC/23/47, 09 April 2013) 14-15.