"Intersections between Migration, Racism, and Business and Human Rights"

Submission by Franciscans International

In response to call from the Special Rapporteur on contemporary forms of racism, xenophobia and related intolerance on:
Race, Borders, and Digital Technologies

GENEVA
37-39 Rue de Vermont | P.O. Box 104
CH-1211 Geneva 20
SWITZERLAND

Tel: +41 22 779 40 10
Email: geneva@franciscansinternational.org
Web: www.franciscansinternational.org

Introduction

1. States frequently use the pretext of internal security to push forth policies and practices that militarize their borders, often with the implicit intention and real impact of discriminating against individuals based on race, religion or national origin. In doing so, States often violate the human rights of migrants and even those of their own citizens. For example, the Committee on the Elimination of Racial Discrimination has called on States, in relation to their obligations under the treaty to:

> "Ensure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin;" and
>
> "Ensure that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping;"[1]

2. Beyond domestic policies, States have seemingly sought to cooperate on and learn from one another in relation to methods of repression of migrants and of the defenders of their rights, rather than in relation to good practices addressing the root causes of the movement of peoples, protecting individuals en route, and ensuring that their State obligations are upheld, including as related to the principle of non-refoulement. In that regard, businesses have played a key role in not only supporting State measures that are grounded in discrimination, but in reinforcing the notion that migrants and others that are perceived to be foreign require a dehumanized and militarized response.

3. This submission provides examples of how States have dealt with the issue of migration through using technologies that seek to monitor, surveil, and ultimately obstruct the entry of migrants into their territory. Accordingly, the use of such technologies should be considered, and are indeed a part of, a broader system of infrastructure and other methods, such as border patrols, that violate State obligations in regards to discrimination.[2] It also notes cases where citizens can be targeted through the use of the same technologies.

4. The submission further highlights how businesses profit from and contribute to repressive State policies, and fail to uphold their responsibility to respect human rights,

[1] Committee on the Elimination of Racial Discrimination, General Recommendation 30, Discrimination against Non-citizens (Sixty-fourth session, 2004), U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004).
[2] This notably includes often documented cases of excessive use of force against migrants. See for example: Concluding observations on the combined seventh to ninth periodic reports of United States of America, Committee on the Elimination of Racial Discrimination, 29 August 2014, paras. 17-18.

as established under international law[3] including by the UN Guiding Principles on Business and Human Rights (UNGP). Technologies produced by Elbit Systems and related contracts with the United States, the European Union, and the Philippines are used to exemplify how such products violate the rights of migrants and others perceived as foreign.

Background on Elbit Systems

5. Elbit Systems, an Israel-based company, describes itself as a developer and supplier of "a broad portfolio of airborne, land and naval systems and products for defense, homeland security and commercial applications."[4] It gained initial notoriety for its supply of drones to the Israeli government, as well as for electronic surveillance equipment used by Israel on the Wall in the Occupied Palestinian Territory (OPT). The former UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 and a UN Fact-Finding Mission have underscored how Elbit specifically, and surveillance equipment more generally, have facilitated and contributed to violations of international law in the OPT. [5] Elbit has marketed this "extensive operational experience" in its sales to other States.[6]

The EU and Migrants Crossing the Mediterranean

6. The European Union has continued to prioritize the management of migration issues, including by nearly quadrupling its previous budget for the "management of external borders" for the upcoming six-year period, increasing spending from €5.6 million for 2014-2020 to €21.3 for the period of 2021 -2027.[7] As part of these efforts, media reports suggest that drones will play a key role in surveilling the Mediterranean Sea, so that the EU can monitor the area "without being pulled into rescue missions that deliver

[3] See for example: General Comment No.24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, E/C.12/GC/24, para. 14.
[4] Elbit Systems, Corporate Overview, https://elbitsystems.com/about-us-introduction/
[5] Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, 19 September 2012, A/67/379, paras. 64-65, https://unispal.un.org/DPA/DPR/unispal.nsf/0/4B2DE5243EBCE35685257AA200487927; Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem, 7 February 2013, A/HRC/22/63.
[6] See for example where Elbit's CEO stated "More and more customers worldwide have come to the conclusion that Elbit Systems' UAS are the ultimate solution for their operational needs, following years of extensive operational experience accumulated in service with the Israeli Defense Forces (IDF) […]," Elbit to Supply UAS to European Customer, Defense Daily, 6/5/2012, https://www.defensedaily.com/elbit-to-supply-uas-to-european-customer-2/uncategorized/,
[7] EU Budget for the Future, European Commission, https://ec.europa.eu/commission/sites/beta-political/files/budget-may2018-securing-external-borders_en.pdf

migrants to European shores."[8] The drones are, in part, alleged to be used to notify the Libyan coastguard to intercept the boats, and return individuals to Libya,[9] where migrants may be subject to torture and other ill treatment.[10] Frontex and the European Maritime Safety Agency (EMSA) reportedly entered into three contracts, totaling over $115 million, with Elbit and another manufacturer of drones.[11]

7. Concerns over the EU's use of drones produced by Elbit have been raised, including at the European Parliament.[12] In October 2019, a Parliamentarian noted the contract between the EMSA and Elbit for Hermes 900 drones, and asked, "What guarantees can it provide that EMSA and other EU agencies will not continue to cooperate with companies and institutions involved in serious human rights violations?"[13] In its response in February 2020, the European Commission, asserted that Elbit was not a party to the contract, but rather a sub-contractor to the party (Centro de Engenharia e Desenvolvimento, a Portuguese company), that the contract was a result of a usual tender process, and that the drones were used strictly for "civil surveillance missions."[14] Elbit reported that the contract began in June 2019.[15]

8. In May 2020, OHCHR raised its concern over failures "to assist and coordinated pushbacks of migrant boats" as well as allegations regarding States implementing policies and practices which impede search and rescue efforts by NGOs in the Mediterranean.[16] OHCHR called for a "moratorium on all interceptions and returns to Libya" of migrants and asylum-seekers crossing the Mediterranean, and for States to fulfill their obligations under international law.

[8] Once migrants on Mediterranean were saved by naval patrols. Now they have to watch as drones flyover, The Guardian, 4 August 2019, https://www.theguardian.com/world/2019/aug/04/drones-replace-patrol-ships-mediterranean-fears-more-migrant-deaths-eu
[9] EU using Israel drones to track migrant boats in the Med, MEMO, 19 August 2019, https://www.middleeastmonitor.com/20190819-eu-using-israel-drones-to-track-migrant-boats-in-the-med/
[10] Libya: Renewal of migration deal confirms Italy's complicity in torture of migrants and refugees, Amnesty International 30 January 2020, https://www.amnesty.org/en/latest/news/2020/01/libya-renewal-of-migration-deal-confirms-italys-complicity-in-torture-of-migrants-and-refugees/
[11] https://www.middleeastmonitor.com/20190819-eu-using-israel-drones-to-track-migrant-boats-in-the-med/
[12] In November 2018 for example, a question was raised in regards to monitoring the Mediterranean by use of drones, including those produced by Elbit. *See*: Subject: Long-distance drones for monitoring the Mediterranean, Parliamentary Questions, European Parliament, 30 November 2018, https://www.europarl.europa.eu/doceo/document/E-8-2018-006072_EN.html
[13] Subject: Relationship of EMSA and other EU agencies with companies violating human rights, Parliamentary Questions,
European Parliament, 12 October 2019, https://www.europarl.europa.eu/doceo/document/E-9-2019-003257_EN.html
[14] Answer given by Ms Vălean on behalf of the European Commission, 18 February 2020, https://www.europarl.europa.eu/doceo/document/E-9-2019-003257-ASW_EN.pdf
[15] Elbit Commences EU Maritime UAS Patrol Service, 24 June 2019, https://www.unmannedsystemstechnology.com/2019/06/elbit-commences-eu-maritime-uas-patrol-service/
[16] Press briefing note on Migrant rescues in the Mediterranean, OHCHR, 8 May 2020, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25875&LangID=E

US - Mexico Border

9. Although discourse surrounding the US – Mexico border and the construction of a wall by the United States undoubtedly increased during the campaign and subsequent presidency of Donald Trump, the militarization of the area began well before his election. The 2006 "Secure Border Initiative" (SBInet) sought to develop a system of surveillance that ranged from watch-towers to patrols; at the time, an Elbit subsidiary, Kollsman, Inc., won a contract to supply its technologies as part of the program.[17] Through its wholly-owned subsidiary Elbit Systems of America, Elbit continued to play a significant role in developing the security infrastructure at the border. In 2019, the company reported that it had contracts from Customs and Border Protection (CBP) that covered "a total of approximately 200 miles of the Arizona-Mexico border."[18]

10. Elbit has provided "Integrated Fixed Towers" systems at the border, under contracts for $145 million and an additional $26 million, awarded in March 2014[19] and June 2019[20] respectively. The latter contract reportedly included building 10 towers on the Tohono O'odham reservation.[21] Although the presence of towers on the reservation was previously deliberated on and delayed for years, tribal leaders eventually consented to the agreement in part to prevent more intrusive measures.[22] Members of the nation have noted the adverse impacts of the constant surveillance on their communities, alongside other concerns linked to the construction of the towers.[23]

11. As the use of technology at the border has increased, the impacts of a 'virtual' wall are similar to those imposed by physical structures, and ultimately disregard the rights of migrants. For example, the US policy of "Prevention through Deterrence," instituted in the 1990s, which sought to deter migrants from entering the US by driving them to take more difficult and dangerous routes, was recognized by US authorities as not only failing to deter individuals from crossing, but also increasing the number of deaths of

[17] Israeli technology to keep US borders safe, Israel 21c, 15 October 2006, https://www.israel21c.org/israeli-technology-to-keep-us-borders-safe/
[18] Elbit Systems U.S. Subsidiary Awarded Additional $26 Million Contract to Provide Integrated Fixed Towers System in Arizona, Press Release, 26 June 2019, http://ir.elbitsystems.com/news-releases/news-release-details/elbit-systems-us-subsidiary-awarded-additional-26-million
[19] Elbit Systems wins $145m US contract, Globes, 2 March 2014, https://en.globes.co.il/en/article-elbit-systems-wins-145m-us-contract-1000920987
[20] *Supra* at note 18.
[21] The U.S. Border Patrol and an Israeli Military Contractor are Putting a Native American Reservation Under "Peristent Surveillance", The Intercept, 25 August 2019, https://theintercept.com/2019/08/25/border-patrol-israel-elbit-surveillance/
[22] Many of the community reportedly are worried "that instead of reducing the Border Patrol's presence, which has grown in their lifetimes, compromising on the virtual wall will lead to more surveillance and physical barriers." Arizona tribe refuses Trump's wall, but agrees to let Border Patrol build virtual barrier, Los Angeles Times, 9 May 2019, https://www.latimes.com/nation/la-na-arizona-tribe-border-patrol-trump-wall-20190509-htmlstory.html
[23] *Supra* at note 21.

migrants.[24] Such outcomes have continued to be linked to the use of surveillance technologies. One study found that the Secure Border Initiative caused migrants to take more arduous routes "outside the visual range of the SBInet system… increasing peoples' vulnerability to injury, isolation, dehydration, hyperthermia and exhaustion."[25] The Committee on the Elimination of Racial Discrimination has more broadly noted its concern over the "ever more precarious journeys being taken by asylum seekers, refugees and migrants in search of safety and dignity resulting in unnecessary deaths and suffering."[26]

12. Surveillance and ensuing harassment of human rights defenders, including lawyers and journalists, working on issues related to migration at the US- Mexico border has also been reported.[27]

The Philippines

13. The Philippines is composed of thousands of islands, and has increasingly used drones to patrol its coasts and for other security measures.

14. In June 2019, it was reported that the Philippines Army was considering a deal of US $180 million with Elbit System Ltd, for supplying various types of unmanned aerial vehicles (UAVs) for "intelligence gathering, patrols, and border defense missions." [28] Elbit and the Philippines first entered into a contract together in June 2014, for the supply of armored personnel carriers, and has continued to enter into contracts since then.[29] This has included the procurement of UAVs in 2017 and 2018. [30]

[24] Border Patrol failed to count hundreds of migrant deaths on US soil, CNN, 15 May 2018, https://www.cnn.com/2018/05/14/us/border-patrol-migrant-death-count-invs/index.html
[25] The Problem With a 'Smart' Border Wall, CityLab, 12 February 2019, https://www.citylab.com/equity/2019/02/smart-wall-border-surveillance-tech-security-deal-trump-data/582589/
[26] Annex II Statement on the occasion of the high-level plenary meeting on addressing large movements of refugees and migrants, http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=dtYoAzPhJ4NMy4Lu1TOebGmT4t5eYmf9pvggbwii9ktiLaLXLj6oVsVJr1G8IXHCvvYatj%2BxyXq8Cb%2FMUSuvuRO83IOnWdeh2UJizFIT8Ms%3D
[27] USA Authorities are misusing justice system to harass migrant human rights defenders, Amnesty International, 2 July 2019, https://www.amnesty.org/en/latest/news/2019/07/usa-authorities-misusing-justice-system-harass-migrant-human-rights-defenders/; Human Rights Watch Urges Congress to Investigate Border Incidents Involving Attorneys, Journalists, and Human Rights Defenders, 8 March 2019, https://www.hrw.org/news/2019/03/08/human-rights-watch-urges-congress-investigate-border-incidents-involving-attorneys
[28] Elbit nears $180m Philippines drone deal, Globes, 13 June 2019, https://en.globes.co.il/en/article-elbit-set-to-sign-philippines-drone-deal-1001289414
[29] Philippines Gets New Artillery Systems from Israel, The Diplomat, 14 June 2017, https://thediplomat.com/2017/06/philippines-gets-new-artillery-systems-from-israel/
[30] The Elbit Hermes 450 MALE UAS of the Philippine Air Force, Max Defense, http://maxdefense.blogspot.com/p/the-elbit-hermes-450-male-uas-of.html ; Philippines to buy SPYDER air defense missile system from Israel, The Jerusalem Post, 30 December 2018, https://www.jpost.com/israel-news/philippines-to-buy-spyder-air-defense-missile-system-from-israel-575825

15. In parallel to other situations, and as noted by the Commission on Human Rights (CHR) of the Philippines, Muslim and indigenous peoples have experienced marginalization by the Philippines government.[31] Over the decades, there have been on-going conflicts and tensions between government forces and separatist groups for the liberation of the Muslim-majority Bangsamoro in the southern part of the Philippines,[32] which more broadly affects the human rights situation in the region. The latest example was the Marawi City Crisis in 2017, where there was a conflict between the Philippine armed forces and the armed non-state ISIS-inspired Maute group, resulting in the displacement of 239,887 individuals from approximately 47,957 families.[33]

16. Franciscans International visited the area afterward, and spoke with some displaced individuals who underscored that they were generally targeted as Muslims by the State. One student stated, "Why are we being evicted from our houses? Why are we considered terrorists?"[34] The fighting in Marawi led to an increase in discrimination against Muslims throughout the Philippines, with some authorities even calling for Muslims to carry identification cards.[35]

17. While Elbit weaponry was already used in Mindanao,[36] it was reported that the battle in Marawi led the Philippines to seek to increase their capabilities for urban warfare, with Elbit being the likely provider of UAVs. [37] Several countries have refused to sell arms to the Philippines under the current leadership of President Duterte due to his human rights record; the President saw Israel as an alternative. For Israel and Israeli

[31] See: Inputs of the Commission of Human Rights of the Philippines's to the Human Rights Council's Advisory Committee Resolution 34/8 of the Human Rights Council on "Effects of terrorism on the enjoyment of human rights", 1 June 2018, https://www.ohchr.org/Documents/HRBodies/HRCouncil/AdvisoryCom/Terrorism/CHR_Philippines_2.pdf

[32] See Amnesty International Report, Battle of Marawi at https://www.amnesty.org/en/latest/news/2017/11/philippines-battle-of-marawi-leaves-trail-of-death-and-destruction/

[33] See: Commission on Human Rights of the Philippines Inputs to the Secretariat to the Human Rights Council Advisory Committee, https://www.ohchr.org/Documents/HRBodies/HRCouncil/AdvisoryCom/Terrorism/CHR_Philippines_1.pdf

[34] Philippines: The crisis in Marawi, Franciscans International, https://franciscansinternational.org/news/news/philippines-the-crisis-in-marawi/?no_cache=1&tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%5Baction%5D=detail

[35] Discrimination vs. Muslims deepens amid Marawi crisis —archbishop, GMA News Online 3 June 2017, https://www.gmanetwork.com/news/news/nation/613122/discrimination-vs-muslims-deepens-amid-marawi-crisis-archbishop/story/; Philippines Officials Propose 'Muslims Only' ID, Human Rights Watch, 5 July 2017, https://www.hrw.org/news/2017/07/05/philippine-officials-propose-muslims-only-id

[36] The Philippine Army is Buying Precision Artillery From Israel, 9 October 2018, https://21stcenturyasianarmsrace.com/2018/10/09/the-philippine-army-is-buying-precision-artillery-from-israel/

[37] Israeli Contractors to Compete for Philippine Army APC Upgrade, Israel Defense, 30 April 2019, https://www.israeldefense.co.il/en/node/38328; Israel's Elbit sells over 1,000 mini-drones to Southeast Asian country, DefenseNews, 9 October 2019, https://www.defensenews.com/unmanned/2019/10/09/israels-elbit-sells-over-1000-mini-drones-to-southeast-asian-country/

manufacturers, South East Asia is more broadly viewed as an emerging market for their defense exports, where mutual political and other interests can be developed.[38]

Business Responsibilities

18. Under the UN Guiding Principles on Business and Human Rights (UNGPs), businesses have the responsibility to respect human rights, including by avoiding causing or contributing to adverse human rights impacts that arise as a result of their activities or their business relationships (Principle 13). Business should respect human rights irrespective of the domestic legislation and policies of the jurisdiction in which they are present.[39] While Elbit notes on its website that it is committed to social responsibility, it is unclear as to what steps the company takes to prevent or mitigate adverse impacts that are linked to their products or the contexts in which they operate. Instead, Elbit uses its relationship with the Israeli Ministry of Defense (its "biggest single customer"),[40] which has been linked to a variety of international law violations, as a selling point for its products- to be used in other environments including the US-Mexico border and the Philippines under Duterte, where human rights abuses are also rampant. Underpinning these sales is a broad discourse that uses security as a pretext for pushing forward racist and xenophobic policies of exclusion that often have severe impacts on human rights.

State Obligations

19. While States must enact policies in regards to border enforcement and administration, States must also ensure that the human rights of migrants and others are not violated, and must promote respect for human rights via the companies that it choses to contract with (UNGP 6).

20. In creating National Action Plans, the UN Working Group on Business and Human Rights encourages States to include human rights conditionality in public procurement,[41] which when examining business relationships, would include entities in a partner's value chain.[42] The Committee on Economic, Social and Cultural Rights further suggests that States "deny the awarding of public contracts to companies that have not provided information on the social or environmental impacts of their activities or that have not put in place measures to ensure that they act with due diligence to avoid or mitigate any

[38] The Military-Security Dimension of Israel Southeast-Asia Relationships, Middle East Institute, 7 January 2020, https://www.mei.edu/publications/military-security-dimension-israel-southeast-asia-relations
[39] "In addition, under international standards, business entities are expected to respect Covenant rights regardless of whether domestic laws exist or are fully enforced in practice."
General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, Para. 5
[40] Elbit Systems, WhoProfits, https://whoprofits.org/company/elbit-systems/
[41] Guidance on National Actions Plans on Business and Human Rights, UN Working Group on Business and Human Rights, November 2016, https://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf;
[42] Commentary to UNGP 13

negative impacts on the rights under the Covenant."[43] Accordingly, the EU cannot cite Elbit as being a sub-contractor, as provided for in the EU Parliament response, to forgo its duties under the UNGPs.

21. Rather the EU and individual States must consider the broader scope of a company's operations, and how contracts may not only lead to adverse impacts within their own territory, but the company's activities and relationships extraterritorially. This is underscored in General Comment 36, which notes States should take appropriate measures where activities- including those of corporations- have a "direct and reasonably foreseeable impact on the right to life of individuals."[44] Although not related to direct contracts, for example, in 2009, the Norwegian government excluded Elbit from its Pension Fund affirming that it did "not wish to fund companies that so directly contribute to violations of international humanitarian law."[45]

Conclusion

22. Unfortunately, and as highlighted by the examples in the submission, Norway's actions are uncommon. Instead, States are frequently using more intrusive technologies to monitor and enforce their border policies, largely with the aim of keeping migrants and other non-citizens out of their territory. These same technologies are also often used against citizens that suffer from historic discrimination, are more broadly perceived as foreign, or are viewed as supporting the rights of those targeted. In many cases, private actors highlight their 'expertise' in these situations, implicitly feeding off of racist and xenophobic discourse, and profiting from contexts that are ripe with human rights violations.

[43] General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, para. 50.
[44] General Comment No. 36, Article 6: right to life, 3 September 2019, para. 22
[45] Supplier of surveillance equipment for the separation barrier in the West Bank excluded from the Government Pension Fund – Global, Ministry of Finance, Norway, https://www.regjeringen.no/en/historical-archive/Stoltenbergs-2nd-Government/Ministry-of-Finance/Nyheter-og-pressemeldinger/pressemeldinger/2009/supplier-of-surveillance-equipment-for-t/id575444/