



THE POSITION OF INTERNATIONAL HUMANITARIAN LAW ON THE USE OF COMBAT DRONES IN ARMED CONFLICT*

Abstract

This article highlights the provisions of the law that drone operators or parties to armed conflict are required to take, in ensuring that combat drones when deployed in armed conflict are done/used in compliance with the rules of International Humanitarian Law. Ordinarily, the law of Armed Conflict is a prohibitive law and States or a High Contracting party to armed conflict is required to strictly comply with the prohibitions that are well spelt out in the rules. In fact, in war or hostilities that are armed conflict, all decisions on actions, tactics of war and weapons employable, are to be made subject to the laws in existence. But like every other prohibitive law, there may be one or two instances that the laws did not specifically prohibit the use of a weapon. It has been argued in response that prohibition need not be express made. In other words, what can serve as a prohibition, could come from interpretation of the intents of the laws or germane or notorious and core principles of that law, which captures in essence the spirit and intention of the law in view, in this case the Laws of Armed Conflict. This article looks at the use of combat drones in armed conflict and the position of international humanitarian law about its use, with the aim to examine the prohibition, if any and if none, the article looks at the interpretation of the laws which wholly boils down to compliance with some major principles of IHL, restricting it to the principles of proportionality and precaution. Research method used is strictly doctrinal from books and statutes etc. At the end recommendations for a protocol is made.

Keywords: Armed Conflict, Combat Drones,

1. Introduction

Combat drones are unmanned aerial vehicles which serve as weapons system and weapon platform. According to the Manual on International Law applicable to Missile Warfare prepared by the Harvard Program on Humanitarian Policy and Conflict Research, a weapon is “a means of warfare that is capable of causing injury or death of persons or damage or destruction of object.¹ According to this definition, Combat drone can be considered weapons systems because they can cause injury or death to persons and destruction to objects. The same Manual, defined unmanned Aerial Vehicle otherwise known as drones, as an unmanned military aircraft of any size which carries and launches a weapon or which can use on-board technology to direct and launch a weapon to a target.² This definition limits the various unmanned Aerial vehicle or drone technologies in the world currently to just platforms, when it can be more. For instance, the Kamikaze (suicide) drone. This type of drone is a weapon system in which the munitions loiters around the target area for some time and attacks only once a target is located. They are disposable and destroyed when they attack a target, unlike the traditional military drones that return after releasing missiles- hence they are called suicide drones.³ For this purpose, it is acceptable to refer to drones as both weapon and a weapon system. Weapon system and weapon platform used during armed conflict are regulated subjects. They are regulated under the preferred terms of means and methods of warfare. This regulation is a basic rule

*Nwamaka Adaora Iguh PhD, Associate Professor of Laws, HOD Public and Private Law, Faculty of Law, Nnamdi Azikiwe University, Awka, Anambra State.

Florence Chinenye Akubuilu, LLM Student at the Nnamdi Azikiwe University, Awka, Anambra State

¹ Cambridge, “HPCR: Manual on International Law applicable to Air and Missile Warfare: produced by the program on Humanitarian Policy and Conflict Research at Harvard University” <https://assets.cambridge.org/978110770/34198/frontmatter/97811734198-frontmatter.pdf> accessed on 15 December, 2022

² HPCR Manual, rule 1

³ CNN, “Kamikaze drones are the latest threat for Ukraine. Here’s what we know” <https://amp.cnn.com/cnn/2022/10/17/europe/kamikaze-drones-explained-update-intl/index.html> accessed on 15th January, 2023



provided for under IHL. The rule is that ‘in any armed conflict, the right of the parties to the conflict (power of the belligerent) to choose means and methods of warfare is not unlimited.⁴ Similarly, Hague convention⁵ has similar provision and states in clear terms that the means of injuring an opponent is regulated. The convention states to wit that “the right of belligerent to adopt means of injuring the enemy is not unlimited. To these extents, it is safe to say that certain weapons are not permitted for use in armed conflict.

Combat drone by the mere consideration of been weapons systems and weapon platform with the capacity to cause injury or death to human and destruction to objects, falls within employable means of warfare within the contemplation of the Additional protocol and Hague convention except where prohibited.

2. Combat Drone Used in Armed Conflict

An example of Combat drones used in armed conflict in the past as weapon platform is the “Predator.” The Predator is a military unmanned aerial vehicle (UAV) capable of being remotely controlled or of autonomous flight operations. In other words, no one flies on the predator, and it often flies under the control of an autopilots, most of its functions occur at the hands of pilot, sensor operator, and mission intelligence coordinator in the ground control station.⁶ Otherwise known as the man in loop⁷.

2.1. Predator Drones

Predator drone was deployed in Bosnia Armed Conflict in 1995,⁸ in support of NATO, UN and US Operations. The Predator drone when secretly deployed to Bosnia in 1995 was designed to loiter over targets for twenty-four hours and could fly as far as five hundred miles from their home base in Albania at an altitude of us to twenty-five thousand feet.⁹ The RQ-1 was designed for surveillance and reconnaissance mission. The designation was changed to MQ-1 in 2002 which is armed with AGM-114 Hellfire missiles, the MQ-1 is a multi-role platform used for armed reconnaissance and interdiction- the action of intercepting and preventing the movement of a prohibited commodity or person.¹⁰ A typical predator system configuration includes four aircraft, one ground control system and Trojan spirit II Data distribution terminal. The video signals received in the ground control station¹¹ are passed to the Trojan Spirit van for worldwide intelligence distribution or directly to

⁴ Additional Protocol to Geneva Convention 1 of 12 August, 1949 and Relating to the protection of Victims of International Armed Conflict of June 8, 1977 article 35 (1)

⁵ Hague Convention IV with respect to the laws and customs of war on land and (with annexed regulation) regulation 22.

⁶ Rodger Conner, “the Predator, a drone that transformed military combat”<https://aiandspace.si.edu/stories/editorial/predator-drone-transformed-military-combat> published March9, 2015 accessed on 4th December, 2022

⁷ Jelena Pejic, “Extraterritorial targeting by means of armed drones: some legal implications” International Review of Red Cross (2015)<https://www.icrc.org/en/document/jelena-pejic-extraterritorial-targeting-means-armed-drones-some-legal-implications> accessed on November 7, 2021 at 4pm

⁸ Bosnian war took place in Bosnia and Herzegovina between 1992 and 1995

⁹ Steve Coll, Ghost wars: the secret history of the C.I.A, Afghanistan and Bin Laden, from the Soviet Invasion to September 10, 2001 (penguin books:

¹⁰ Michael W. Lewis, “drones and the boundaries of the battlefield”<https://www.researchgate.net/profile/michael-lewis-31/publication/228152141-Drones-and-the-boundaries-of-the-battlefield/links/of3175330393239fa3000000/Drones-and-the-boundaries-of-the-battlefield.pdf> published June 2012

¹¹ A UAV ground station is built into a single 9.1m trailer, containing pilot and payload operator consoles, three Boeing data exploitation and mission planning consoles and two synthetic aperture workstations together with satellites and line-of-sight ground data terminals.



operational users via a commercial global broadcast system. So far, there are Predator B Sky warrior, MQ-9 Reaper hunter/killer UAV¹² and MQ-1/9 Predator payload details¹³ and MQ-9A Block 5 configuration¹⁴

2.2. Kamikaze Drone

An example of Combat drone as a weapon system is the Kamikaze drone. Kamikaze drone have been deployed in Ukraine and Russian war.¹⁵The Kamikaze drone are also called suicide drone. They are a type of aerial weapon system referred to as loitering munitions because they are capable of waiting for some time in an area identified as a potential target and only strike once an enemy asset is identified.¹⁶ They are small, portable and can be easily launched, but their main advantage is that they are hard to detect and can be fired from a distance.¹⁷The name “Kamikaze” refers to the fact that drones are disposable. They are designed to crash into a target and explode, detonating their warhead and destroying the drone in the process.¹⁸ According to Kyiv post, kamikaze drones are a weapon of asymmetric warfare. They win even if they are shot down. The drone takes off and has already (effectively) completed its task because it causes the expenditure of an expensive missiles which has no replacement.¹⁹

2.3. Capacities

The use of drone in armed conflict has advantages. The operational advantage that drones provide is the greater and improved ways to gather intelligence which minimizes the number of human lives placed at risk. Drones are relatively cheaper than modern combat aircraft.²⁰ However, the biggest advantage is their very long endurance, over 30 hours for predator B and 20 hours for predator C (Avenger).²¹ This gives drone the capacity to carry out extensive surveillance without urgent need to refuel as is with the case of modern aircraft.

Drones provide opportunities for disproportionate attacks to be halted prior to weapon deployment. For manned aircraft, both the target identification and final proportionality decision are left in the hands of one or two crewmembers whose attention is divided between flying the aircraft and

¹² Has an operational ceiling of 15.240m, a maximum internal payload of 362.8kg (800lb) and external payload exceeding 1.360.7 kg. it can carry up to four Hellfire II anti-amour missiles and two laser-guided bombs (GBU-12 or EGBU-12) and 226.8 kg (500lb) bombs which have laser and GPS guidance

¹³ The surveillance and reconnaissance payload capacity is 204kg and the vehicle carries electro-optical and infrared cameras and a synthetic aperture radar... the Raytheon multi-spectral targeting system (MTS-A provides real-time imagery selectable between infrared and day TV as well as a laser designation capacity. It can employ two-laser –guided hellfire anti-amour missiles with MTS

¹⁴ The MQ-9A Block 5 can operate continuously for 27 hours at an altitude of up to 15.240m (50,000 ft) and speeds of approximately 444.48km/h (240kt). It can carry payloads weighing up to 1.746kg (3,850lb) including 136kg 3lb) of external stores. The block 5 configuration is designed to provide longer endurance and is equipped with full motion video and synthetic aperture radar/maritime radar/moving target indicator to provide continuous surveillance capacity.

¹⁵ On February, 24, 2022, Russia launched an undeclared war against Ukraine.

¹⁶ CNN, “kamikaze drones are the latest threat for Ukraine. Here’s what we know”<https://amp.cnn.com/cnn/2022/10/17/europe/kamikaze-drone-explained-update-intl/index.html> published on October 17, 2022 accessed on 2nd January, 2022.

¹⁷ ibid

¹⁸ ibid

¹⁹ Anna Nepli, “Kamikaze drones and how to fight them-expert opinion” <https://www.kyivpost.co/post493> published on October 20, 2022 accessed on 5th December, 2022.

²⁰ Michael W. Lewis, “drones and the boundaries of the battlefield”<https://www.researchgate.net/profile/michael-lewis-31/publication/228152141-Drones-and-the-boundaries-of-the-battlefield/links/of3175330393239fa3000000/Drones-and-the-boundaries-of-the-battlefield.pdf> (June 2012) accessed on December 7, 2022

²¹ <https://www.ga-asi.com/products/aircrafts/predator-b.php> accessed on December 7, 2022 at 1 pm



identifying targets, assessing the proportionality of the attack and accurately delivering the weapon²² while evading surface-to-air missiles and ground fire.²³

The case is different with drone, as targeting takes place following extensive surveillance of targets and proportionality review. The ground control station which is usually located at sea or land provides the facilities for human control of the UAVs, it is laden with Ground Control Stations (GCS) which are sets of ground-based hardware and software that allow UAV operators to communicate with and control a drone.²⁴ The video signals received in the ground control station²⁵ are passed to the Trojan Spirit van for worldwide intelligence distribution or directly to operational users via a commercial global broadcast system to enable JAG lawyers trained to access information available at the time of carrying out the attack to determine if the attack will cause incidental loss to civilian life, injury to civilians, damage to civilian objects or a combination thereof which will be excessive in relation to the concrete and direct military advantage anticipate.

3. Legal Framework for Use of Weapons in Armed Conflict

The Laws of Armed Conflict comes from both Customary International Law and Treaties. Customary International Law is based on a practice that nations have come to accept as legally required and it stand as established traditional rules that govern the conduct of military operations in armed conflict.

The Laws of Armed Conflict as stated is also from treaty laws that regulate the conduct of hostilities and treatment of victims of war, but only among consenting nations. One of such being the Geneva Convention, which aims to protect Civilians,²⁶ Prisoners of war,²⁷ the wounded, the sick on Land²⁸ and Shipwrecked on the sea²⁹, through the rules contained in the Four Geneva Conventions of 1949³⁰ and their three additional protocols.³¹ This humanitarian angle is what motivated the execution of

²² *ibid*

²³ Michael W. Lewis, “drones and the boundaries of the battlefield”<https://www.researchgate.net/profile/michael-lewis-31/publication/228152141-Drones-and-the-boundaries-of-the-battlefield/links/of3175330393239fa3000000/Drones-and-the-boundaries-of-the-battlefield.pdf> published June 2012

²⁴ Unmanned systems Technology, “UAV Ground Control Stations”<https://www.unmannedsystemstechnology.com/expo/ground-control-stations-gcs/> accessed on December 21, 2022

²⁵ A UAV ground station is built into a single 9.1m trailer, containing pilot and payload operator consoles, three Boeing data exploitation and mission planning consoles and two synthetic aperture workstations together with satellites and line-of-sight ground data terminals.

²⁶ The Geneva Convention IV Relative to the Protection of Civilians Persons in Time of War 12 August, 1949

²⁷ The Geneva Convention III Relative to the Treatment of Prisoners of War 12 August, 1949 And Five Annex

²⁸ Geneva Convention I for The Amelioration of the Conditions of the Wounded, And The Sick in The Armed Forces in The Field 12 August, 1949.

²⁹ The Geneva Convention II for The Amelioration of the Suffering of Armies On the Sea, The Wounded, The Sick and The Ship Wrecked of 12 August, 1949.

³⁰ Of 12 August 1949.

³¹ Additional Protocol I to the Geneva Convention of 12 August, 1949 and Relating to the Protection of Victims of International Armed Conflict. Of 8 June 1977; Additional Protocol II To The Geneva Convention Of 12 August 1949 And Relating To The Protocol To The Protection Of Victims of Non-International Armed Conflict; Additional Protocol III to the Geneva Conventions of 12 August, 1949 and Relating to the Adoptive Of Additional On Distinctive Emblems of 8 December, 2005



Geneva Conventions 1864³² by Henry Dunant³³ from his experience of the aftermath of the Battle of Solferino.³⁴ Therefore, a cursory look at the content of the Geneva Convention which is more concerned with aiding victims of war, which is different from the content of Hague Convention 1899³⁵ and 1907,³⁶ and the additional protocol 1 to Geneva Convention which deals strictly with conducts and conventional weapons of war permissible during hostilities. There are other pivotal treaties that are executed to regulate what action, weapons are permissible in hostilities, with the aim of not impeding the effective waging of war but to limit the absurdity encountered in war. A clear example is the 1868 St Petersburg Declaration.³⁷ The declaration aim was to fix technical limits at which the necessities of war ought to yield to the requirements of humanity. In furtherance of this, the undersigned declared as follows:

- i That the progress of civilization should have the effect of alleviating as much as possible the calamities of war.
- ii That the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy
- iii That for this purpose it is sufficient to disable the greatest possible number of men
- iv That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable
- v That the employment of such arms would therefore, be contrary to the laws of humanity and such munitions during wars only among the co-signatory European and Eurasian nations. It notably leaves out instances of war with non-signatory nations. Conflicts with undeveloped nations, military operations in their own colonies and possessions.

Weapons deployment during armed conflict termed means of warfare are regulated by Additional protocol I to the Geneva Convention Relating to the Protection of Victims of International Law, where it is stipulated that in any Armed conflict, the right of the parties to the conflict to choose methods or means of warfare is not unlimited³⁸. The protocol also prohibits the use of weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering;³⁹ under the same protocol, it is prohibited to employ methods or means of

³² The first Geneva Convention for the Amelioration of the condition of the wounded in Armies in the field. It defined the basis on which rest the rules of international law for the protection of the victims of armed conflict.

³³ A Swiss merchant, born Jean-Henri Dunant. In 1859 he witnessed the aftermath of the battle of Solferino in Italy and recorded about it in his book *The Memory of Solferino* which inspired the creation of Red Cross in 1863. The 1864 Geneva Convention was based on Dunant's idea for an independent organization to care for wounded soldiers.

³⁴ This was the decisive clash of the war of Italian unification (second Italian war of Independence); the suffering of the wounded left without care. The war took place near the villages of Solferino and San Martino, Italy, south of Lake Garda between Milan and Verona. The confrontation was between the Austrians, on the one side, and the French and Piedmonts forces, who opposed their advance.

³⁵ The first Hague Convention that came from the proposal on 24 August, 1898 by Russian Tsar Nicholas II, consists of three main treaties and three additional declarations.

³⁶ The treaties, declarations, and final act of the second conference were signed on 18 October, 1907 consists of thirteen treaties and one declaration

³⁷ Executed on December 11, 1868, the declaration is called the 1868 St Petersburg declaration renouncing the use, in time of war, of explosive projectiles under 400 Grammes weight

³⁸ Additional Protocol I to Geneva Convention 1, of 12 August, 1949 and Relating to the Protection of Victims of International Armed Conflict of June 8, 1977, Art. 35(1)

³⁹ Additional Protocol I to Geneva Convention 1 of 12 August, 1949 and Relating to the Protection of Victims of International Armed Conflict of June 8, 1977, Art. 35(2)



warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.⁴⁰

There are also treaties banning and prohibiting the use of laser weapon, biological weapon, chemical weapon and anti-personnel landmines and treaties that restrict the use of anti-personnel land mines (for states not bound by the treaty banning their use outright, etc.). i.e. Convention on the Prohibition of Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1977), States must not under any circumstance use, develop, produce, stockpile or transfer anti-personnel mines, or help anyone else to do so. They must also destroy all existing stockpiles of anti-personnel mines and a fixed period, clear land where these devices have been laid.

Under the Convention on Cluster Munitions⁴¹ (2008) prohibits the use, production the use, production, stockpiling and transfer of cluster munitions⁴² (a bomb, shell, rocket or missile that releases a large number of small (explosive sub munitions). In addition to these prohibitions, states possessing cluster munitions are required to destroy their stockpiles of these weapons and to clear land contaminated by remnants of cluster munitions (unexploded cluster munitions and submunition from a past conflict). There are also specific obligations on providing assistance to victims of cluster munitions.⁴³

Under the Convention on prohibition or restrictions on the Use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects (CCW) of 1980, by protocol III the convention regulates the use of incendiary weapons or weapons that are primarily designed to set fire to objects or to burn persons through the actions of flame or heat, such as napalm bombs and flame throwers etc.⁴⁴

4. Drone Use Under International Humanitarian Law.

Since drone is not expressly prohibited under the rules of IHL, a prohibitive law. The legality of its use is subject to the basic legal principle governing the conduct of war. In the commentary of 1987⁴⁵ it was noted that in cases not covered by this protocol or any other international agreements, civilians and combatants remain under the protection and authority of the principles of International law derived from established custom, from the principle of humanity and from the dictates of public conscience.

For this reason, it is even provided under Article 36⁴⁶ that when using a new weapon or method, belligerent parties should review its legality under the LOAC. This position was further reiterated,

⁴⁰ Additional Protocol to Geneva Convention 1 of 12 August, 1949 and Relating to the Protection of Victims of International Armed Conflict of June 8, 1977, Article 35(3)

⁴¹ Cluster munitions means conventional munitions that is designed to dispense or release explosive submunition each weighing less than 20 kilograms, and include those explosive submunition.

⁴² Convention on cluster munitions (2008) Article 1(1)

⁴³ Convention on cluster munitions (2008) Article 5

⁴⁴ Convention on prohibition or restrictions on the Use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects (CCW) article 1(a) and (b)

⁴⁵ Introduction to the commentary on the Additional protocol I and II of 8 June 1977

⁴⁶ 1977 Additional Protocol I to the Geneva Convention of 12 August, 1949 and relating to the protection of Victims of Internet Armed Conflict., article 36 provides that, "in the study, development acquisition or adoption of a new weapon, means and methods of warfare, a High Contracting Party is under the obligation to determine whether it's employment would, in some or all circumstances be prohibited by this protocol or by any other rule of International Law applicable to the High Contracting Party.



by the ICJ in Nuclear weapon advisory opinion, when it held that these principles apply to “all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future.”⁴⁷The principles of International Humanitarian Law are the principles of military necessity, principle of proportionality; precaution and unnecessary suffering. This work is restricted to principle of proportionality, Military Necessity and Precaution.

4.1. Drone vis a vis the Principles of Proportionality; Precaution and Military Necessity.

The principle regulates attacks that aim to hit lawful targets but causes unintentional damage to civilian and property. The principle is captured in article 51 (5) (b) of AP 1 which provides that ‘an attack which may be expected to cause incidental loss of civilian life, injury to civilian, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated is accepted as indiscriminate and therefore prohibited. Other important regulations are article 57 (2) (a) (iii)⁴⁸ - those that plan or decide upon an attack shall refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilian, damage to civilian object, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. This provision regulates attack while at the planning stage and article 57(2) (b)⁴⁹ which regulates the execution stage provides that an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack 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. The principle of proportionality calculation requires ex-ante determination and not ex post because the principle is “prospective in nature” as an attacker is obligated to estimate and compare military advantage and civilian harm at the time the attack is contemplated⁵⁰

4.2. Categories of Lawful Targets

There are different categories of people who are lawful targets according to the LOAC. The first type is the combatants, who are lawful targets, because they are members of armed forces who have the right to engage in hostilities and when captured become prisoners of war.⁵¹ The next categories are civilians that directly participate in hostilities. They are lawful targets for the period for such period as they take a direct part in hostilities and if they are captured, they cannot be prisoners of war.⁵² The other categories are persons who are members of an organized armed group which is a belligerent party in an armed conflict. They are individual whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities.⁵³ This role requires lasting integration into an organized armed group acting as the armed forces of a non-state party to an armed conflict. They lose their protected status as long as they remain members.⁵⁴ Objects can be legitimate targets where they fulfill certain criteria for civil objects

⁴⁷ Legality of the threat or use of nuclear weapons (Advisory opinion) [1996] hereinafter “Nuclear Weapon”) ICJ Rep. Para 86.

⁴⁸ Additional protocol I

⁴⁹ Ibid

⁵⁰ Yunus Emre Gul, “Drone attacks and the principle of proportionality in the law of armed conflict” <https://www.deliverypdf.ssrn.com/delivery.php>

⁵¹ ibid

⁵² ibid

⁵³ ibid

⁵⁴ ibid



but can be dual where it serves as both civilians and military objective. What constitutes military objectives as defined by article 52(2)⁵⁵ and they are those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstance ruling at the time, offers a definite military advantage.

In targeting lawful targets, military commander on ground and drone operators are required by the principle of Proportionality to only launch attacks which on the basis of the information available to them from all the sources at the relevant time can compare the value of military advantage and Civilian harm. Drones have this distinct advantage on that point, since the pilot can observe details by high resolution cameras in order to check whether a target meets the criteria of lawful target e.g for. members of other militia or volunteer corps that they for instance openly carrying arms etc.⁵⁶ Predator drone like Predator Block 5 that has SAR⁵⁷ feature can carry out persistent surveillance for hours until a lawful target is confirmed as the Radar has a distinct advantage of being able to collect imagery regardless of weather.⁵⁸ The information from the imagery intercepted over persisted surveillance can be analyzed and accessed by JAG lawyers⁵⁹ and a reasonable military commander⁶⁰ (who according to NATO is most qualified to examine information available, on whether there could be an expected excessive civilian casualties to result from the attack⁶¹).

Another central aspect in article 51(5) (b) of AP1 is the meaning of “concrete and direct” military advantage. The ICRC commentary explains the wordings as “intended to show that the advantage concerned should be substantial and relatively close and that advantages which are hardly perceptible and those which appear only in the long term should be disregarded.⁶² The question of ensuring that the military advantage is such which is close, perceptible lies with the operators and commanders in the control room where it is easily to communicate with expert wherever they may with the aid of the Trojan data van.

4.3. Drone and the Question of Collateral Damage

In LOAC, Collateral damage indicates an “incidental loss of civilian life, injury to civilians and damage to civilian objects or other protected objects or a combination thereof, caused by an attack on a lawful target. It is also referred to as the incidental damage that unavoidably and unintentionally occurs on civilian people and property while conducting an attack against a legitimate object. It does not include inconvenience, irritation, stress, fear, or other intangible effects occurred on the civilian population⁶³

⁵⁵ 1977 Additional protocol 1 or ICRC Customary IHL study rule 8

⁵⁶ Geneva Convention III, Article 4 (a) (2)

⁵⁷ Synthetic Aperture Radar is a feature of drone that can create two-dimensional images or three-dimensional reconstruction of objects. SAR uses the motion of the radar antenna over a target region to provide finer spatial resolution or high resolution image independent of every kind of weather condition.

⁵⁸ Aidash, “Synthetic Aperture Radar: the hero tool for remote sensing” <<https://www.aidash.com/synthetic-aperture-radar-the-hero-tool-for-remote-sensing/>> accessed on 5th December, 2022

⁵⁹ Judge Advocate General’s Corps –it defends the Army and its soldiers in all military matters and legal advice to senior army officials.

⁶⁰ According to NATO bombing report

⁶¹ NATO Bombing Report suggest determining it by the “reasonable military commander” criterion by arguing that “It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to non-combatants.

⁶² Commentary of 1987, precaution in attack, note 2209.

⁶³ The Judge Advocate General’s Legal Center and school, Operational Law Handbook (2015) 14



It is necessary that if an attacker cannot predict the collateral damage resulting from drone strike—i.e., causation,⁶⁴ it should be cancelled or suspended till having a reasonable certainty/foreseeability.⁶⁵ This is where the principle of precaution⁶⁶ shows its hand, thus where there is an attack against a lawful target, he would not bear any responsibility despite the fact that the attack resulted in excessive harm because of undetermined reason. Collateral damage shows its hand in situations where there is an attack on legitimate object and there is a reasonable expectation to gain military advantage by causing civilian damage, then collateral damage will come into scene as unintentional consequence of the strike which is not excessive in comparing with this advantage as long as the collateral damage was reasonably foreseeable.

Assessing reasonable expectation in drone strike as required, would be done by a reasonable Military commander working with drone operator but they are relying on information displaying on the camera to make the informed decisions. This decision can be affected adversely by the kind of limits the features of the drone possess. This is better captured by Craig Martin when he stated that “it may be that some features of combat drone that are most likely to make it compliant with IHL, may counter-intuitively facilitate the violation of International Law⁶⁷. Drones have been attacked for what’s called soda straw effect and play station effect.⁶⁸ This effect is due to viewing target areas through tight focus of the camera lens and thus missing important nearby activity. An example of the effect such has on the decisions made can be gleaned from the drone attack on Kabul Air strikes by the US military, whereby before the strike was launched, there was no evidence that a child was in the strike zone only for children to be killed. It is safe to say that some camera system featuring in a drone limits taking sufficient precaution, in other words it makes it difficult or it’s use fail to comply with “The obligation that requires that the attacker (drone operators and his teams) take all feasible precaution in the choice of means and method of warfare to minimize casualties”⁶⁹ -this aspect is an issue that principles of proportionality don’t solve. This is because without the necessary information needed to carry out proportionality review, combat drone with this feature cannot be said to have been adequately scrutinized to qualify as a weapon to be used in war. Akerson explains that “attacks subject to proportionality review can be broken down into two categories. The first type consists of attacks that are premeditated in nature, decided only after careful consideration of the circumstances. The second consists of attacks that given the circumstance, are conducted under exigent circumstance and thus without the same contemplative ability. The second type would include attacks required to eliminate an immediate and serious threat, for example when UAV operators identifies a suspected suicide bomber in or heading towards a civilian area. The drone strike in Kabul which resulted in the death of about seven children was defended with the second

⁶⁴ Emmanuel –Chiara Gillard, “Proportionality in the conduct of hostilities: the incidental harm side of the assessment”<https://www.chathamhouse.org/sites/default/files/publications/research/2018-12-10-proportionality-conduct-hostilities-incident-harm-gillard-final.pdf>

⁶⁵ The incidental harm which was reasonably foreseeable at the time the attack was launched on the basis of information that the attacker had or could reasonably be expected to have in the circumstance

⁶⁶ Additional protocol 1, article 57 (1) provides that in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian object.

⁶⁷ C Martin, A Means-methods paradox and the Legality of drone strikes in armed conflict” in MJ Boyle (edn) *Legal and ethical implication of drone warfare* (Taylor and Francis) 2018 81

⁶⁸ This concern is that the distance and detachment of operators who are killing by video feed in the afternoon and are home for BBQ with their families by evening may simply not have a sufficient appreciation for the moral nature of consequence of their action.

⁶⁹ Additional Protocol 1, article 57 (2) (a) (ii) that provides that with respect to attacks, the following precaution shall be taken, those who plan or decide upon an attack shall take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian object



type of attack. Air force L.T General Sami Said who carried out the independent review said in their defence, “that the drone strike must be considered in the context of the moment, as US Forces were under stress as they were flooded by information about threat to troops and civilians at the Airport just days after a deadly suicide bombing.

Admittedly, when military necessity⁷⁰ requires drone use for the advantage of a quick response to threat to troops, and yet the warhead or missiles detonated in that instance does not contain the destruction to the barest minimum of casualties, in this case for as many as ten civilian and seven children died, in an attempt to strike a lone suicide bomber within civilian setting.⁷¹ Any argument that the attack was necessary for expected military advantage or that these deaths are collateral damage to escape sanction, will fail. Why? Because military necessity only permits the destruction of life of armed enemies and other person whose destruction is incidentally unavoidable by the armed conflict of war. Moreover, it clearly shows that the principles of proportionality and Military necessity are not adequate to manage drone use in armed conflict. What is thought provoking in this is that once operator carries out discriminate attack, the revert back to stress or heat of battle or urgency to escape but these things are common sense, as they are easily adopted for combat in hostilities where boots are on ground, for the more precise the weapon systems that are at a country disposal the less justification there will be if any harm befalls a civilian⁷². It has been argued that although there no mathematical formula for proportionality review, and that it is text-book example where fifty people are killed for one combatant. This text book example is similar to what happened in Kabul, the operation violates the principle of military necessity because the attack cannot sanction the amount and kind of force employed by the commander, in this instance use of drone missiles, to compel the complete submission of the enemy over a lone suicide bomber when compared to the possible expenditure of time, life and money.⁷³ Therefore, these attacks are very indiscriminate and they are not unavoidable either.

In *Ryuichi Shimoda v The State*,⁷⁴ On December 7, 1963 the Japanese Court in considering the Atomic Bombing of Hiroshima and Nagasaki declined to rule on Legality of Nuclear Weapons in general but found that “the attacks upon Hiroshima and Nagasaki caused such severe and indiscriminate suffering that they did violate the most basic legal principle governing the conduct of war- which are the principles of distinction, proportionality and humanity. The court in fact ruled that the “Aerial bombardment must be regarded as indiscriminate, even if it were directed at military objectives only, in as much as it resulted in damage comparable to that caused by indiscriminate bombardment. Going by this decision, Kamikaze drone could easily become an indiscriminate weapon in some situation or not depending on circumstances of each case.

⁷⁰ Military necessity is an urgent need, admitting of no delay, for the taking by a commander, of measures which are indispensable for forcing as quickly as possible the complete surrender of the enemy by means of regulated violence, and which are not forbidden by the laws and customs of war.

⁷¹ Todd Lopez, “Investigation of August 29, Airstrike in Kabul to get its own Review”<https://www.defencse.gov/news/news-stories/article/article/2781249/investigation-of-aug-29-airstrike-in-kabul-to-get-its-own-review> (Sept. 20, 2021) accessed on 5th December 2022

⁷² Craig Martin

⁷³List (hostage trial) case, US Military Tribunal at Nuremburg, UNWCC, LRTWC, Vol VIII, P.66-67

⁷⁴ Japanese Annual of International law, no 8 1984), p.212



Excessive collateral damage is what is prohibited. Additional Protocol 1 therefore prohibits excessive damage⁷⁵ and makes flaunting of the rule a great breach.⁷⁶

5. Conclusion

Drone strike in armed conflict despite not been expressly regulated, is subject to the core principles of International Humanitarian Law especially the principles of proportionality, precaution and military necessity. The principle of distinction is not analyzed here because, the foremost justification for drone use is that it can distinguish between civilian objects and military objectives. However, the analysis shows that drone strike compliance with IHL, is complex and the lack of clarity in applying it to certain circumstance is dangerous.

6. Recommendations

The principles of International Humanitarian Law are vague and because there are specificities about anything, gauging compliance is a bit hard. With weapon like combat drone that is shoved down our throat for all the benefits, relying on a vague principle will not do justice to it. As drone strikes that are known to have caused civilian casualties carried out in violation of international law. The problem with knowing is the lack of clarity of the legal principles under which it is legal to deploy lethal force by drone.

This lack of clarity will be fixed by a protocol or convention.

⁷⁵ 1977 Additional Protocol 1, Article 51(5) (b) prohibits 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.

⁷⁶ 1977 Additional Protocol 1, Article 85 (3)(b) provides that launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in article 57 Para 2 (a)(iii) is a grave breach