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The Unmanned Killer Machine: The Proliferation of Armed Drones Technology, Strikes and Effects on International Humanitarian and Human Rights Laws

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Abstract- With the advancement of technology, the shape and nature of warfare has changed. In recent times, there has been the proliferation of armed drones technology and its usage. From when drones were made operational in the Balkans war, they have been used particularly by the US in places like Afghanistan, Yemen, Somalia and Iraq and controlled by the CIA. With these rapid development and proliferations, machines are starting to take the place of humans in the battlefield. The proliferation and usage of these armed drones poses challenges to the principles of international humanitarian and human rights laws especially when they are operated by non- military personnel like the CIA, the parameters of their detention and prosecution. This paper therefore analyses the effects that the proliferation and usage of armed drones has on the basic principles of international humanitarian and human rights law and concludes that the ability of armed drones to carry out targeted killings without exercising effective control over territory and without having the individual in custody, threatens or presents dangers to the protection of life which is not only a concept of humanity but a human rights violation and posit also that innocent civilians can be killed and indeed have being killed in the process of their usage thence threatening the concept of distinction and proportionality which are some of the cardinal principles of 1HL and thence recommends that there should be the regulation in the manufacture, possession and usage of these weapons.

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THEUNMANNEDKILLERMACHINETHEPROLIFERATIONOFARMEDDRONESTECHNOLOGYSTRIKESANDEFFECTSONINTERNATIONALHUMANITARIANANDHUMANRIGHTSLAWS

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The Unmanned Killer Machine: The Proliferation of Armed Drones Technology, Strikes and Effects on International Humanitarian and Human Rights Laws

Ibrahim Abdullahi

Abstract- With the advancement of technology, the shape and nature of warfare has changed. In recent times, there has been the proliferation of armed drones technology and its usage. From when drones were made operational in the Balkans war, they have been used particularly by the US in places like Afghanistan, Yemen, Somalia and Iraq and controlled by the CIA. With these rapid development and proliferations, machines are starting to take the place of humans in the battlefield. The proliferation and usage of these armed drones poses challenges to the principles of international humanitarian and human rights laws especially when they are operated by non- military personnel like the CIA, the parameters of their detention and prosecution. This paper therefore analyses the effects that the proliferation and usage of armed drones has on the basic principles of international humanitarian and human rights law and concludes that the ability of armed drones to carry out targeted killings without exercising effective control over territory and without having the individual in custody, threatens or presents dangers to the protection of life which is not only a concept of humanity but a human rights violation and posit also that innocent civilians can be killed and indeed have being killed in the process of their usage thence threatening the concept of distinction and proportionality which are some of the cardinal principles of 1HL and thence recommends that there should be the regulation in the manufacture, possession and usage of these weapons.

I. Introduction

With the development of technology, the nature of warfare has changed rapidly. The invention of the aeroplane not only opened up the possibility of eliminating distances between continents, countries and people for the purposes of facilitating trade and discovery, but equally has distanced combatants several distances away from each other.

The first aerial bombardment was reported to have taken place on the 1st of November 1991 during the Italo – Turkish war in Tripolitania[1]. On the 5th of October, 1914, a French aircraft shutdown its German counterpart on the first aerial duel in history. Bombing techniques are now been improved upon through the combination of new technologies and in the decades that followed later, torrents of incendiary bombs destroyed whole cities of Guernica, Coventry, Dresden and Tokyo. The bombing of Hiroshima and Nagasaki ushered in the nuclear era which almost led to the collapse of humanity.

The development of new methods of warfare has led to the development of armed drones. Now, armed drones piloted at a distance of thousands of kilometres are dropping their arsenals on Afghanistan, Pakistan, Somalia, Yemen and Iraq. As it is often said, science has now gathered knowledge faster than society gathers wisdom[2]. The usage of armed drones has led to the ability to commit acts of warfare without mobilizing conscripts, occupying territories and conducting vast land operations as was the case during the major wars of the twentieth century. The use of armed drones piloted a distance of thousands of kilometres makes it possible to reach an enemy who cannot fight back. The principle of distinction which requires participants in an armed conflict to differentiate themselves from civilian and which demands a distinction between lawful target and civilians stands at the core of IHL, so also is the principle of proportionality and humanity. But all these principles stands threatened through the use of armed drones in armed conflicts.

Over the years, the use of armed drones or unmanned aircraft for military and counter terrorism purposes has seen explosive growth[3]. In 2010 alone, the United States President, Barrack Obama's administration authorized more than twice as many armed drones strike in North West Pakistan than it did in 2009[4]. By early 2012, the Pentagon was said to have 7,500 drones under its control representing about one

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[1] Lindquist S, 'Une historie du bombardment "(A History of Bombing), La Decouverte, Paris, 2012, P.14

[2] Asimov I, and Shulman J.A, *Science and Nature Quotations,* Blue Cliff Edition, Weidenfield, Nicholson, New York, 1988, p.281.

[3] Us Department of Defence, *"US Unnamed System integrated Road Map"* (Fiscal years 2009 – 2034), Washington D.C 2009, p.2.

[4] Bergen Peter, and Tiedemann Katherrine, "Hidden War, there were more drone strikes and far' fewer civilians killed" In: New American Foundation, 22nd December 2010, available at http://newamerica.net/node/41927.

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third of all US military aircraft[5]. In the conflicts in Vietnam in 1960, Bosnia and Herzegovina and Kosovo in the 1990's, drones were deployed on a significant scale by the United States of America for surveillance and reconnaissance purposes in the armed conflicts in these states. In 2012, the Syrian regime used drones to identify the location of rebel forces and equally for targeted killings of suspected terrorist especially in cross border operations[6].

Scientific development calls for alarm as scientific developments are leading to larger and faster drones as prototype hummingbird drones were invented in 2011 which can fly at 11 miles per hour and perch on a windowsill[7]. Armed drones have thus come to stay[8].

The basic object of this paper therefore is to look at the proliferation of armed drones technology, strikes and their interplay with the general principles of international humanitarian and human rights laws and concludes with recommendations.

a) What are drones?

There is no definition provided for drones in neither the Geneva Conventions nor the Additional Protocols or any other instrument applicable to international humanitarian law as it relates to drones. However, according to the US Federal Legislations adopted in 2012, the term drones were referred to as unmanned aircraft. Unmanned aircraft was defined as:

> *"An aircraft that is operated without the possibility of direct human intervention from within or on the aircraft"[9].*

According to the Oxford English Dictionary, a drone was defined as:

> *"A remote-controlled pilotless aircraft or missile".*

The etymology being the old English word for a male bee. In Palestine, the drones which make a buzzing noise were nicknamed *Machay* (wasps) by the Pashtu's[10].

b) Proliferation of Armed Drones

The term proliferation may mean different thing to different people depending on the context with which one is using it. To the Biologist, it is the process of an individual organism growing organically from a single to a more complex level[11]. To the legal minds and the sociologist, it may mean, a rapid increase in the number especially a rapid increase in the number of deadly weapons[12]. It may also mean a process of becoming larger or longer or more numerous or more important[13]. However, the context in which the term proliferation of armed drones is used is in relation to the rapid increase in the number of armed drones in existence.

According to the press release from the office of the High Commissioner for Human Rights of 2nd June, 2010, over 40 states posses drone technology[14]. By early 2012, the pentagon was said to have 7,500 drones under its control, representing about one-third of all US military aircraft[15]. A similar piloted percentage of drones to piloted aircraft are expected within twenty years in the British Royal Air Force (RAF)[16]. General Schwartz N.A of the US Air Force Chief of Staff was reported to have deemed it conceivable that drone pilots in the Air Force would outnumber those in cockpits in the forceable future, although he predicted that the US Air Force would have traditional pilots for at least thirty more years[17]. The use of Unmanned Aerial Vehicles (UAV's) by police forces in connection with traditional law enforcement within a states border has also been steadily growing though at a slower pace[18]. In the US, increase powers has been given to local police forces across the USA to use their own armed drones[19].

c) The Debate

The development of modern technology which enables increasing distance to be put between weapons users and the legal force they project by enabling those who control lethal force not to be physically present when they are deployed but rather to activate it while

[5] Hennigan W. J, *"New Drones has pilot anywhere, so who's accountable?"* In Los Angeles Times, 26th January 2012 aailable at http://www/atimes.com/business/la – fi – aato – drone – 20120126,0,740306 story.

[6] *"Syrian forces used drone in attacks in rebel city"* In ABC News, 12th June 2012, Also available at http//www.abc.net.au/new/2012 – 0612/52 – killed -in – Syria – as – troops – point rebels – strongholds/4064990.

[7] Elizabeth Bumiller and Thom Shanker, *"War evolves with drone, some tiny as bugs"* In: New Yale Times of 19th June 2011. Available at http//www. nytimes.com/2011/06/20/ world /20 drones. Html? Page water = 1 &r=1&ref-unnamed aerial vehicles.

[8] *Ibid.*

[9] See section 331(8), FAF Modernization and Reform Act of 2012, signed into law by the U.S President on the 14th February 2012.

[10] See Meyer J, "*The Predator War"*, In New Yorker, 21st October 2009, available at http://www.newyoker.com/reporting/2009/10/26/091026 Fa - Fact - mayer.

[11] See "Proliferation", a free online dictionary at http://www.the free dictionary. Com, P.2 accessed on 25/10/2014.

[12] *Ibid.*

[13] *Ibid.*

[14] See Press Release, office of the High Commissioner for Human Rights (OHCHR), UN Expert Citizens *"Illegal Targeted Killing Policies and calls on the U.S to halt CIA Drone Killings"* (June 2nd 2010), available at http://www.ohchr.org/en/news events/pages/Display News. aspx? News ID=10194 & Lang ID=E.

[15] See Hennigan W.J. (etal) *op cit.*

[16] See Hopkins N, *"Afghan Civilians killed by RAF Drone"*, In the Guardian, 5th July 2011, available at http://www.guardian. co-uk/uk/2011/July/05/afghanistan –raf – drone –civilian – deaths, accessed on 14/10/2014.

[17] See Elizabeth Bumiller *Op cit.*

[18] *"Groups concerned over arming of domestic drones"*, In CBSDC, Washington DC, 23rd May 2012, available at http://washington. Cbslocal. Com /2012/05/23/groups –concerned – over – arming – of – domestic/drones. Accessed on 15/10/2014.

[19] See the US Federal Aviation Authority Modernization and Reform Act 2012.

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sitting behind computers in distance places thus staying out of the line of fire, has sparked out considerable debate as to the challenges which it poses to both international humanitarian and human rights laws. Some of the arguments for the use of armed drones are as follows:

1. That since drones have long reach, it avoids exposing troops directly to enemy fire[20].
2. Above all, that because of the weapons precision, the payload needed to destroy the military objective can be reduced and the harm to civilians and their properties minimized[21].
3. That keeping the operation of drones far from the battlefield in a similar environment significantly reduces the exposure to stress and fear and this decreases errors due to emotional factor[22].

Some Arguments against armed drones' technology include:

1. That drones often require very precise intelligence which is difficult to gather at a distance[23].
2. That the greater physical distance between the operation, location and target increases more distance between the parties to the conflict and this affects the moral judgment of the drone operators and exacerbates the crime-inducing phenomenon of dehumanization of the enemy in time of war[24].
3. That far removed from the human consequences of their actions, this generation of fighters cannot value the right to life[25].
4. That the use of drones piloted at a distance of thousands of kilometres makes it possible to reach an enemy who cannot fight back and then the enemy often decides to compensate for such powerlessness by deliberately attacking civilians[26].
5. That drones could make use of force on the territory of non- belligerent states less problematic by making force protection issues moot, thereby eliminating traditional disincentives for attacking the enemy outside of the combat zone, thus creating the impression that the battlefield is global[27].

Notwithstanding the above arguments, the International Committee of the Red Cross (ICRC) have emphasized that the deployment of such systems raises a range of fundamental legal ethical and societal issues, which need to be considered before such systems of technology are developed and deployed[28].

As for the Special Rapporteur on extrajudicial summary or arbitrary executions of the United Nations General Assembly, they have expressed the view that unmanned Aerial vehicles or armed drones engaged in targeted killings raises concern for the protection of life under both the framework of international human rights law as well as under international humanitarian law and sees the right to life as a supreme and non-derogable right both under treaty and customary international law[29].

d) Armed Drones within the context of International Humanitarian Law

Public International Law can be described as being composed of two layers: first is the traditional layer consisting of the law regulating co-existence and cooperation between members of the international society essentially the states; and the second is a new layer consisting of the law of the community of six billion human beings. Although, international humanitarian law came into being as part of the traditional layer i.e. as a law regulating belligerent inter-states relations, it has today become nearly irrelevant unless understood within the second layer namely as a law protecting war victims against states and all others who wage war[30].

The principles of the law of armed conflict also known as the law of war or international humanitarian law (1HL), are simple to summarise for soldiers. Many militaries today carry pocket sized code of conduct that list the fundamentals; fight only enemy combatants and destroy only military objectives; collected and care for the wounded, whether friend or foe, do not attack or harm enemy personnel who surrender; do not kill, torture or abuse prisoners of war, treat all civilians humanely; do not engage in rape or looting[31]. In the majority cases, adherence to these sorts of simple and ostensible obvious rules will guide a military commander and his subordinates towards a form of warfare that

[20] See Bernard V, *"Editorial: Science cannot be placed above its consequences"*, International Review of the Red Cross, Volume 94 Number 886, 2012, P. 461.
[21] *Ibid.*
[22] *Ibid* at pp 461 – 462.
[23] *Ibid* at pp 461.
[24] *Ibid* at pp 462.
[25] Philip Alston and Hina Shamsi., *"A Killer above the law"*, In the Guardian, 2nd August 2010.
[26] See Bernard V, *"Editorial: Science cannot be placed above its consequences", op cit* at p. 460.
[27] *Ibid* at pp 460 – 461.
[28] ICRC, *"International Humanitarian Law and the challenges of contemporary Armed Conflicts"*, Report of the 31st International Conference of the Red Cross and Red Crescent, ICRC, Geneva, October 2011, p.39, available at http://www. Icrc. Org/eng/assets/files/red – cross – crescent – movement/31st – international – conference – ihl – challenges – report – 11 – 5 – 1 -2 – en. pdf (last visited on 10th November 2014).
[29] See Christof H, "Report of the Special Rapporteur on extra judicial, summary or arbitrary executions; Human Rights Council, Un /DOC . A/HRC/23/47 of 9th April 2013, p.7. See equally, Art. 68 the International Covenant on Civil and Political Rights, enshrining the right to life and Art. 4 (2) on its non – derogability.
[30] Sassoli M, *"State Responsibility for violation of International Humanitarian Law"* ICRC Vol. 84, 2002, p. 401.
[31] This statement of rules is an excerpt from the South African National Defence Force's Code of Conduct for uniformed member of the South African Defence Force, adopted on the 15th February 2000, available at http://www. Dcc. mal. za/code of conduct /files/english.htm. (Last visited on the 28th October 2014).

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respects the fundamental tenets of the law of armed conflicts, humanity, military necessity, distinction, proportionality, precaution and the preventions of unnecessary sufferings.

Unquestionably, these rules which form the core legal component of modern soldiers or military training will serve as a useful humanitarian starting point for any conceivable military operations. Nevertheless, today's troops are assigned roles that range from riot control to domestic counter insurgency to more traditional international armed conflict, and they are expected and indeed required to grasp the legal nuances associated with the sliding scale of conflicts. Failure to do so may have drastic consequences for the implicated troops. International humanitarian law thus seeks to regulate the conduct of armed conflicts or the use of force with the consequent view of protecting those who are no longer taking part in hostilities.

The most authoritative definition of an armed conflict is contained in the International Criminal Tribunal for Yugoslavia (ICTY) Appeal Chambers decision on jurisdiction in the TADIC case[32] to the effect that:

> *"An armed conflict exists wherever there is a resort of armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within the state..."*

In contemporary armed conflicts, armed drones have nearly moved away from the horizon into the realm of the known[33]. The report of the United Nations General Assembly on extrajudicial, summary or arbitrary executions[34] does not see drones as illegal weapons[35]. There however seems not to be consensus on how to apply the rules of international law that regulate the use of force to drones inspite of their proliferation and the established technology. Whether the view of the United Nations is correct can be seen in the light of balancing the use of these drones with the principles of international humanitarian law as follows:

i. *Armed Drones and the Principle of Distinction*

The principle distinction was originally and conventionally articulated within the preamble to the St. Petersburg Declaration of 1868[36]. A recent codified expression of this norm is found within Additional Protocol 1 to the General Convention[37]. The said Additional Protocol 1 provides thus:

> *"In order to ensure respect for and protection of the civilian population and civilian objects, the parties to the conflict shall at all times distinguish between civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives"*[88].

This principle obliges the belligerents to distinguish at all times between non-combatants and combatants as well as between civilian's property and military objectives[39]. Consequently, military operation may only be directed against military objectives. There is therefore a duty of care, which is imposed upon those who plan military operations. Thus, in planning an attack, everything feasible must be done to verify that the objective to be attacked is neither civilian nor a civilian object but in fact a legitimate military objective. This is an obligation of means but not an obligation of results. If there is doubt that a civilian object is being used to make an effective contribution to military action, it must be presumed not to be used and must not be attacked[40]. Even though in practical terms this is often not the case.

The Corollary to the principle of distinction is that attacks must not be indiscriminate. An indiscriminate attack is defined as being one which:

(a) Is not directed at a specific military objective or,
(b) Employs a method or means of combat which cannot be directed at a specific military objective; or
(c) Employs a method or means of combat, the effects of which cannot be limited as required by Additional Protocol [41].

[32] ICTY, Prosecutor Vs Dusko Tadic, Appeal Chambers decision of 2nd October 1995.
[33] See United Nations General Assembly, "Extrajudicial, Summary or Arbitrary Execution", note by the Secretary General of 12th August 2013, p.7.
[34] *Ibid.*
[35] *Ibid.* This view must however be distinguished with its views with lethal autonomous robots. See Report Note 3 supra.
[36] Precisely on the 11th of December 1868, following a meeting convened by Tzar Alexander II intended to attenuate as much as possible the calamities of war.
[37] See Art. 48 of AP 1, 1977.
[38] *Ibid.*
[39] It is interesting to state however the following comments of the United States Department of Defence Report to congress on the conduct of the Persian Gulf War, Appendix on the Rule of the law of war (Hereinafter referred to an "the Gulf War Report") reprinted at 311 LM 612 (1992), that Article 48 AP 1 states that attacks means: acts of violence, against an adverse party whether in offence of defence. The use of the word attack is however etymologically inconsistent with its customary use. The word "attack" historically has referred to and today refers to offensive operations only. The language of Articles 48 and 49(1) except for the European use of the word "attack", is generally regarded a codification of the customary practice of notions and therefore not binding on all.
[40] See Article 52 AP 1. When the Gulf War report was issued, this disposition was criticized as not reflecting customary international law as it shifts the burden for determining the precise use of an object from the part controlling that object (and therefore as possession of the facts as to its use) to the party lacking such control of war in demanding a degree of certainty of an attacker that seldom exists in combat.
[41] See Rogers A. P. V, *Law on the Battle Field* (Manchester University Press, Manchester, New York) 1996, p.8. Similarly, taking direct part in hostilities must be more narrowly construed than making a contribution to the efforts and it would not include taking part in arms production or military engineering works or military transport.

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Furthermore, civilian and civilians' objects may not be object of reprisals[42]. The failure to make a distinction during attack would render the attack unlawful and constitute evidence of war crimes. States must therefore take all practical or practicable possible precautions in the choice of means and methods of attack with a view to avoiding and in any event to minimizing, incidental loss to civilian life, injury to civilians and damage to civilian objects[43].

The precautionary duties imposed on a person who controls an armed drone are the same as those imposed on the pilot of a manned aircraft. This does not reduce their duties because of the absence of a person from their cockpit.

The proliferation and use of armed drones present a challenge to the principle of distinction relating to who operates them which is a critical issue under IHL. The question has always been as to whether the CIA drone operators are civilians directly participating in hostilities (DPH)? to make them legitimate targets and whether there is any way they might acquire combatant status? Thus the control of armed drones by non-military personnel has created another distinction problem even though their development was arguably to comply with the requirements of destruction under IHL. IHL is quite silent on the right to strike back at them, the parameters, of their detention and prosecution in the domestic sphere. The question has always be whether the civilian involvement in armed drone operation is a potential violation of principle of distinction and if permission can be given to civilian involvement on the operation of armed drones?

The UN Special Rapporteur on extra judicial, summary or arbitrary execution, Philip Alston has noted the CIA involvement in drone warfare thus:

> *"Intelligence personnel do not have immunity from prosecution under domestic law for their conduct. They are thus unlike state armed forces which would generally be immune from prosecution for the same conduct... Thus, CIA personnel could be prosecuted for murder under domestic law of any country in which they conduct targeted drones killings and could also be prosecuted for violations of applicable US law"[44].*

In the past there have been the prosecution before military commissions of the offence of murder in violation of the laws of war[45] which narrows down the options regarding CIA drone operators. By the said prosecution, it is both a violation of domestic law as well as IHL violation. If this is understood to be the position, then, United States is under an obligation to prosecute CIA drones operators that have used lethal force if those operators are civilians engaged in direct participation in hostilities[46]. The act of the CIA drone operations may equally amount to grave breaches of the laws of war. The US has not deemed it fit to punish drone operators but this does not preclude their prosecution in foreign courts though both Italy[47] and Spain[48] have attempt this with no success[49].

While the US are prompt at making use of the notion of unlawful combatants, it is argued that the CIA drone attacks produces America's own unlawful combatants or unprivileged belligerents. This view was succinctly put forward by Gary Solis where he opined thus:

> *"Those CIA agents are, unlike their military counterparts but like the fighters they target, unlawful combatants. No less than their insurgent targets, they are fighters without uniforms or insignia, directly participating in hostilities, employing armed force contrary to the laws and customs of war. Even if they are sitting in Langley, the CIA pilots are civilians violating the requirement of distinction, a core concept of armed conflict, as they directly participate in hostilities... It makes no difference that CIA civilians are employed by, or in the service of the US government or its armed forces. They are civilians, they wear no distinguishing uniform or sign, and if they impute target data or pilot armed drones in the combat zone, they directly participate in hostilities which means they maybe lawfully targeted... Moreover, CIA civilian personnel who repeatedly and directly participate in hostilities may have what recent guidance from the International Committee of the Red Cross terms "a continuous combat function". That status, the ICRC guidance says, makes them legitimate targets whenever and wherever they may be found, including Langley"[50]*

The CIA drone operation would however qualify as unprivileged belligerents if it is shown that the drone operators are members of a paramilitary group or armed law enforcement agency that have been incorporated into the US armed forces. Article 43(3) of Additional

[42] See AP 1, Art. 51, Para 6, Art. 52 Para 1, Art. 53 Para C, Art. 54 Para 4, Art. 55, Para 2 and Art. 56 Para 4.

[43] See Art. 57(2) (a) (ii).

[44] See Alston, *"Study on targeted Killings"*, Human Rights Council, Un. Doc. A/HRC/14/24/Add.6 (May 28, 2010) at p. 71.

[45] Australian David Hicks, the first person sentenced by the revised military commissions, was initially charged with attempted murder in violation of the laws of war. See Changing Documents in the case of David Mathew Hicks, March 1, 2007, also available at http://www/d .defence.gov/news/d2007030/hicks.pdf.

[46] See Ar. 129-131 GC II and Ar. 146 – 148 GC IV.

[47] See Italian bid to induct US Soldier, CNN (June 19, 2006), also available at http://articles.cnn.com/2006-06-19/world/iraq.italy-1-italian - intelligence-agent-nicola-calipari-soldier?-s=pm:WORLD.

[48] Micheal Stung, "Spain Prosecutors Appeal indictment of US Soldier in Iraq Death of a Journalist, JURIST (May 19th 2007), also available at http://www.jurist.org/paperchase/2007/05/spain-prosecutors-appeal-indictment-of.php (Lat visited on 15th November 2014).

[49] A successful indictment could only be effective where both states share extra diction agreements with an indicting states.

[50] Gary Solis, *"CIA Drone attacks Produces America's own unlawful Combatants"*, WASH POST, 12th March, 2010, A17.

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Protocol 1[51] which deals with combatants and prisoners of war status states as follows:

> "Whenever a party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces, it shall so notify the other parties to the conflict".

Such incorporation exist where there is a chain of command and evidence of being trained in the laws of war and whether the chain of command enforces the laws of war. Evidence abound to show that the CIA drones operators began to receive law of war training within the few months following the terrorist attacks of September 11, 2001[52]. Less clarity however exists to show how the CIA's chain of command enforces the laws of war. If they do enforce the laws of war, they are combatants entitled to the combatant's privilege but also liable to be targeted at all times. If the chain of command does not enforce the law, the CIA drone operators remain unprivileged belligerents who could face domestic criminal prosecution in places like Yemen and Pakistan and they would remain targetable at all times as continuous combat functionaries rather than as combatants.

In Pakistan, a three month investigation including eye witness reports has found evidence that at least 50 civilians were killed in follow up strikes when they had gone to help victims. More than 20 civilians have also been attacked in deliberate strikes on funerals and mourners[53]. In March 2012, Noor Kharis father, Malik Daud Khan was killed in a drone strike in Pakistan in 2011 while presiding over a peaceful council of tribal elders[54]. In 2009, the Pentagon roster approved terrorist targets containing 387 names which were further expanded to include some fifty Afghan drug lords suspected of giving money to help finance the Taliban's[55]. In Afghanistan, individuals engaged in the cultivation, distribution and sale of narcotics were targeted with armed drone strikes even though not directly participating in hostilities in Afghanistan[56].

ii. *Armed Drones and the Principle of Proportionality*

The principle of proportionality limits the effects of attack by attempting to establish a balance between the military interest and the humanitarian interests. In planning and executing military operations, military planners must take all feasible and reasonable precautions in the choice and methods of attacks in order or at least to minimize incidental loss of civilian life, injury to civilians and damages to civilian objects.[57] This includes:

(i) Collecting information about the target;
(ii) Analyzing the information to determine whether the target is a lawful target for attack at the time of the attack;
(iii) Appreciating the potential incidental effects of the weapon and taking feasible precaution to minimize those effects;
(iv) Assessing the "proportionality" of any expected incidental effects against the anticipated military advantage of the overall attack (not just the particular attacks of the individual weapons);[58]
(v) Firing, releasing or otherwise using the weapons such that its effects are directed against the desired target;
(vi) Monitoring the situation and cancelling or suspending the attack if the incidental effects are disproportionate.[59]

The above simply means that should it became apparent that the object to be attacked is not a legitimate military objective, that the attack maybe expected to cause incidental loss of civilian life or damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and military advantage anticipated, the attack must then be cancelled.

Assessing the proportionality of an attack is even more important and often even more difficult. Despite the fact that international humanitarian law pursues the overall aim of limiting civilian casualties and damages as far as possible, it does not really prescribe

[51] Protocol Additional to the Geneva Convention of 12th August 1949 and relating to the protection of victims of International Armed Conflicts. Though the United States has not ratified Protocol 1, it recognises much of Protocol 1 as descriptive of customary international law. For example, a statement issued by the Obama's White House in 2011 announced the intention of the administration to accept the applicability of Article 75 of Protocol 1. See Press Release, White House Office of the Press Secretary, facts sheets, new actions on Guantanamo and Detainee Policy, 7th March 2011 also available at http://www. Whitehouse.gov/the press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy.

[52] Ambassador Henry Crumpton, Former Deputy Chief Operation, CIA Counter Terrorism Centre, keynote address at the Texas International Law Journal Symposium: "*The Air and Missile Warfare Manual: A Critical Analysis"*, 10th February 2011.

[53] Chris Wood and Christian Lamb, *"Obama Terror Drones, CIA tactics in Pakistan includes targeting rescuers and Funerals"* In: Bureau of investigative journalism, 4th February 2012. Also available at http://www. the bureau investigate.am/2012/02/04/obama-terror-drone-cia-tactics-in-pakistan-include-targetting-rescurer-and-funerals.

[54] See GCHQ, *"Staff could be at risk of prosecution for war crimes",* In: Gloucester Echo, 13th March 2012, also available at http://www.this is Gloucestershire.co.uk/GCHR-staff-risk-prosecution-war-crimes/story-15505 982-detail/story.html.

[55] Jane Mayer, *"The Predator War"* In: the New Yorker, 26th October 2009, available at http://www. newyorker.com/reporting/2009/10/26/091026 Fa-Fact-mayer.

[56] See *"The 2010 study on targeted Killings"*, available at http://www. 2ohcr-org/English/bodies/hrcouncil/docs/14session/A.HRC.14.24Ad6.pdf.

[57] See Additional Protocol 1, Art 57 (2) (ii) and Art 57 (4).

[58] See for example, Australian Declaration of understanding to the effect that military advantage in Articles 51 and 57 of AP1, mean "the advantage anticipated from attack considered as a while and not for isolated or particular parts of the attack" – Reprinted in Adam Roberts and Richard Guelff, *Document on the Laws of War*, 3rd Edn, Oxford University Press, 2000, p. 500.

[59] See Article 57 (2) (b) of AP1.

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any absolute limit in relation to "collateral damage". Thus, a very considerable military advantage could potentially justify significant civilian damages and even casualties that are extensive as opposed to excessive collateral damage.[60] The details of the proportionality principle and its application in practice could still be worked out more completely then they have been today. The question may then be asked, what are the relative values to be assigned to the military advantage gained and the injury to run combatants or damage to civilian objects? What do you include or exclude in totalling your sums? And what is the standard of measurement in time or space?[61]

International humanitarian law answers to these questions are rather in the abstract. While a military commander deciding upon an attack must determine the relative value given to the military advantage against that attributed to the anticipated damage on the civilian side, normative guidance regarding the margin of discretion in the identification of the military advantage and its relative value is rather frail. As a corollary to the debate of the military advantage is the question of how far is direct civilian damages resulting from an attack are to be taken into consideration.

The spectrum of opinion is not closed but wide. Moderate position excludes the consideration of indirect civilian damages but try to sketch out where to draw the link between indirect damages that maybe considered and those that should not.[62] The wordings of Article 51 paragraph 5(b) and Article 57 paragraph 2(1) of Additional Protocol I would seem to suggest that the concept of anticipated civilian casualties and damages is to be interpreted at least as broadly as the notion of the military advantage, otherwise the proportionality assessment would be distorted from the outset in favour of military consideration. Moreover, these two articles require explicitly that the anticipated military advantage be concrete and direct, where no such limiting qualifies were added to the expected incidental civilian damages, the word 'incidental' is certainly broader than the objectives 'concrete and direct'. Similarly, it would seem that the conception of what maybe expected (incidental loss of civilian life, injury to civilian, damage to civilian object or a combination thereof) from an attack is broaden than what is actually anticipated (military advantage). Thus, in line with the fundamental tenet that the civilian population enjoys general protection in general, foreseeable long-term repercussions on civilian population are to be taken into consideration or account in the context of the proportionality assessment.[63]

There are three manners in which the principles of proportionality are often violated. These are:

(i) A lack of full knowledge as to what is being hit notwithstanding the availability of surveillance equipment;
(ii) The inability to surgically craft the amount of force been applied to the target; and
(iii) The inability to ensure that weapons, strikes, precisely at the point targeted.

The principle of proportionality of course raises some practical problems. These problems arise from the fact that different states have different assessment of what is proportionate. For example in March, 2011, in Afghanistan, difference occur when a UK Royal Air Force drone killed four Afghanistan civilians and injured four others in an attack against insurgent leader in the Helmand Province, the first confirmed operation in which a UK Reaper aircraft had been responsible for the death of civilians.[64] In this particular scenario, the UK Reaper was programmed to destroy two pick- up trucks but ended up killing four Afghan civilians and a further two Afghan civilians were injured but nonetheless the UK held that the UK Reaper crews action had been in accordance with procedures and UK rules of engagement.[65]

Similarly in June, 2009, the CIA killed Khwaz Wali Mehsud, a Pakistani Taliban Commander. The initial plan was to use his body as bail to target Baitullah Mehsud, who was expected to attend Khwaz Walis Mehsud's funeral. Up to 5,000 people attended the funeral, including not only Taliban fighters but many civilians. US armed drones were used to conduct yet another strike killing up to eighty-three people. Forty five of the dead were reportedly civilians, amongst which were ten children and four tribal leaders. Such an attack raised the very sensitive question about respect for the prohibition on indiscriminate attacks and proportionality. The CIA conducted sixteen missile strikes which resulted in 321 deaths before they could manage to kill Baitullah Mehsud.[66]

[60] The ICRC commentary has however rejected this argument because very high civilian losses and damages would be contrary to the fundamental rules of the Protocol. See Sandoz Y, Swinerski C, and Zimmer Mann B, (edn), *Commentary on the Additional Protocols of 8th June, 1977 to the Geneva Convention of 12th August, 1949,* Martinus Njihoff, Geneva, 1987, Para 180.

[61] See the Final Report to the prosecution by the committee established to renew the NATO bombing campaign against the Federal Republic of Yugoslavia, 8th June, 2000 PP 47 and & 55, available at http://www.icty.org/x/file/about/otp/otp-Report.nato, bombings.en.pdf last visited on the 22/10/2014.

[62] Henderson 1, *"The Commentary Law of Targeting: Military Objectives, particularly and precautions in attack under Additional Protocol 12"* Martins Njihoff, 2009, p. 208.

[63] Gerb R, (et al). *"Has the Armed Conflict in Afghanistan affected the rule on the Conduct of Hostilities?*, International Review of the Red Cross, Vol. 93, No. 881 of March, 2001, p. 31.

[64] See Nick Hopkins, *"Afghan Civilians killed by RAF Drone*", In the Guardian, 5th July, 2011, available at http://www.guardian.co.uk/uk/2011/jul/05/afghanistan-raf-drone-civiliandeaths.

[65] *Ibid.*

[66] See Jane Mayer, *"The Predator War", op cit.*

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iii. *Armed Drones and the Principle of Humanity*

The conventional origin of the principle of humanity can be found in the preamble to the St. Petersburg Declaration on explosives projectiles of 1868. The Declaration through its following preamble left a mark and also set forth the first principle of the law of war as follows:

> *"Considering that the only legitimate object to be accomplished during war is to weaken the military force of the enemy, that for the purpose, it is sufficient to disable the greatest possible number of men; that an object would be exceeded by the employment of arms which uselessly aggravate the suffering of disabled men, or render their death inevitable, that the employment of such arms would therefore be contrary to the laws of humanity"*[67]

Evidence of the importance of the above principle is the fact that it is also one of the seven fundamental principles of the Red Cross and Red Crescent movement.

The principle of humanity is based upon the desire to maintain dignity during military operations by respect of the human being. A great many rules of humanitarian law applicable in armed conflicts are so fundamental to the respect of the human person and elementary consideration of humanity. The goal of this principle to reduce and alleviate sufferings caused by war of armed conflicts. As Professor Schmitt cogently argues:

> *"Suffering is useless, it is militarily unnecessary and because it offers no direct and concrete military advantage, disproportionate"*[68]

One of the most important conventional expression of the principle is to be found in the text of the MARTENS CLAUSE, which first appeared within the preamble of the Hague Convention[69] as follows:

> *"Until a more complete code of the laws of war has been issued, the high contracting parties deem it expedient to declare that in case not included in the regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principle of the law of nations, as they result from there usages established among civilized people, from the laws of humanity and the dictates of the public conscience"*

The Marten Clause predates the general principle of public international law resulting from the steamship Lotus case.[70] The effect of the Martens Clause is two folded and limited to international agreement that deals with the law of armed conflicts; that where the law of armed conflict treaties are silent, customary international law governs the situation. Secondly, during the conduct of hostilities, what is not specifically prohibited is not necessarily permitted. Different versions of the Martens Clause appear throughout the corpus of the law of armed conflicts.[71] The most recent expression of this clause reads as follows:

> *"In cases not considered by this Protocol or by other international agreements, civilian and combatants remains under the protection and authority of the principle of international law derived from established customs, from the principles of humanity and from the dictates of public conscience"*[72]

Under international Human Right Law, the right to life is widely regarded as the "Supreme Right".[73] While its exact scope can be contested, there is however no serious challenge to the fundamental status of the right.[74] The right against the arbitrary deprivation of life has been described as a rule of customary international law as well as a general principle of international law, a rule of *jus cogens.*[75] It is further included in the United Nations Declaration of Human Rights,[76] largely regarded as setting out rules of general international law. The right to life is similarly regarded in the constitution of most legal system as a fundamental right[77] and unlawful killing is universally criminalized and certain violations of the right to life are considered to be war crimes or crimes against humanity.[78]

As a general rule, human rights treaties statutory deprivation of life must not be arbitrary.[79] The use of force is, in any event, a matter of last resort under International Human rights Law (IHRL). Any force must be necessary and proportionate and international force can only be used where strictly necessary to protect against an imminent threat to life. The contention is that standards of human rights law remains the same even in situations of approaching armed conflicts and should be applied in ways that are realistic in the circumstance.

[67] Quoted from Jean P, *"Development and Principles of International Humanitarian Law" op cit*, p. 50.
[68] See the US View of twenty first century war and its possible implication for the law of armed conflicts (1998) 19 Michigan Journal of International Law at p. 1080.
[69] Hague Convention IV of 1907.
[70] (1927) PCIJ Serial A No. 10. It laid down the rules of what is not specifically prohibited as permitted.
[71] See Geneva Convention 1, Art 63, Geneva Convention IV, Art 58, Additional Protocol 1, Art 1.
[72] Additional Protocol 1, Art 2.
[73] See General Comment No. 6, the Right to life 1982.
[74] United Nations: "*Extra Judicial, Summary or Arbitrary Executions, Report of Special Rapporteur*", 2013. p. 13.
[75] *Ibid.*
[76] Of 1948, Art 3.
[77] See section 33(1) of the Constitution of the Federal Republic of Nigeria 1999.
[78] See Prosecution Vs Mile Mrksc and Veselin Sljivanconin, case No. II-95-131-1A.
[79] See Art 6(1) ICCPR, Art 4(1) ACHR, Art 4 ACHPR, Art 51 IACHR. The ECHR gives an exhaustive list of permissible grounds in which lethal force maybe based. See Art 2.

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Even in periods of armed conflicts, IHRL continues to apply during the armed conflicts to complement IHL.[80]

The judgment of the International Court of Justice (ICJ) in the Construction of a Wall case,[81] the UN Human Right Committee, [82] the decision of the International Commission on Human Rights in the case of Coard & Ors Vs United States[83] and the decision of the European Court of Human Rights in the cases of Al-Skeini Vs United Kingdom,[84] Loizidou Vs Turkey,[85] Ilascu Vs Mildoca and Russia [86] and Al-Jedda Vs United Kingdom, [87] all illustrates that human rights treaty obligations can apply in principle to the conduct of a state outside its territory.

Armed drones have enabled states to carry out or perform targeted killings without exercising effective control over a territory and without having the individual in custody. Such cases of targeted killings are a violation of the right to life under the applicable treaties.

In the case of Armando Alejandra Jr, Carlos Costa, Mario Dela Penay Pablo Morales Vs Republica de Cuba,[88] the Inter American Commission concluded that the shooting down of two private US registered air planes by Cuban military aircraft in international space violates the right to life of the passengers.

The deliberate killing of targeted individual through extra territorial drone strikes does not only affect the person within the jurisdiction of the operation state but a violation of the principle of humanity.

II. Conclusion

Revolutionary technologies like armed drones are game changers not because they solve all problems but because they force new questions upon us that a generation earlier people did not imagine we would be asking ourselves or our respective organizations or nations imagining questions. Scientific and technological developments does not necessarily mean progress and the decisions to apply an invention for military purposes must give rise to an in-depth study on the impact of the use of the inventions, including the positive and negative consequences thereof. Likewise, each decision to produce, by ultimately another technological innovation for military ends involves a political and civil responsibility, one that is all the more important in that it has direct repercussions for human lives. States have an obligation to ensure that the use of new weapons and new means and methods of warfare is consistent with the rules of international humanitarian law. Civil society equally have an important role to play by reporting on the consequences of weapons and charting a debate about their legality and this will help to shape a real international "public conscience" as referred to in the Martens Clause to the effect that:

> *"In cases not covered by this Protocol, or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established, customs, from the principles of humanity and from the dictates of public conscience"*[89]

The International Court of justice (ICJ) has emphasized the importance of this clause in its Advisory Opinion on the legality of the threat or use of Nuclear Weapons[90] where the ICJ was of the opinion that the "continuing existence and applicability of the Martens Clause was not to be doubted.[91] The court similarly held that:

> *"... It had proved to be an effective means of addressing the rapid evolution of military technology..."*[92]

Article 36 of the 1977 Additional Protocol 1, obligates parties to respect and to ensure respect for international humanitarian law (IHL) whether or not it is a party to the Protocol, to conduct legal analysis of weapons before its deployment and usage. However all the states reportedly in possession of drones and drones technology have not made public their own analysis. The problem of who is criminally responsible in cases of unlawful strikes making use of armed drones remains largely unanswered. Non-state armed groups it is argued with time can procure drones technology or even hack into the operations of a state controlled drone and assume control, leading to unimagined nastier experiences judging by the history of weapons technology.

Armed drones have been used to carry out targeted killings without exercising effective control over a territory and without having the individual in custody which poses a danger to the protection of life which is not only a concept of humanity but a human rights violation. Innocent individuals in the process have been

[80] See legality of the Threat or use of Nuclear Weapon, Advisory Opinion (1996) ICJ Rep 226, Para 24-25; Legal consequence of the construction of a wall in the occupied Palestine Territory of 9th July, 2004, para 106.
[81] *Ibid.*
[82] Human Rights Committee, General Comment, 31, CCPR/C/21/REV.I/Add.13 2004.
[83] Case No. 10 .951, Report No. 109/00, /ACHR, 29th September, 1999, para 37.
[84] Application No. 55721/07 Grand Chamber Judgment, 7th July, 2011, P. 47-72, para 106 – 186.
[85] (1997) 23 EHRR 513.
[86] (2005) EHRR 46 para 312.
[87] Application No. 27021/08, of 7th July, 2011.
[88] Case No. 11, 589, Report No. 86/99, IACHR, 29th September, 1999, paras 23 – 25.
[89] Art 1(2) Additional Protocol 1. See also the preamble to the 1907 Hague Convention IV respecting the laws and customs of war on land and preamble to the 1899 Hague Convention II with respect to the laws and customs of war on land.
[90] See ICJ, Legality of the Threat or use of Nuclear Weapons, Advisory Opinion, 8th July, 1996, ICJ Reports (1996). P, 226.
[91] *Ibid,* Para 87.
[92] *Ibid*, Para 78.

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killed thus threatening the concept of distinction and proportionality which are some of the cardinal principles of international humanitarian law. Regulation in the manufacture, possession and usage of these weapons are hereby advocated. This can be done through:

(i) The various Human Rights Council calling on all states with drones and drones technology to declare and implement national moratoria on at least the testing, production, assembly, transfer, acquisition, deployment and use of armed drones, until such a time as an internationally agreed upon framework can be established.
(ii) Emphasizing the need for full transparency regarding all aspect of this development of drones system.
(iii) Seek for more international transparency from states regarding their internal weapons review process, including those under article 36 of the Additional Protocol 1 to the Geneva Conventions.
(iv) To developers of drone's technology, there is the need to establish a code or code of conduct, ethics and or practice defining responsible behaviour in accordance with IHL and IHRL.
(v) NGO's, civil society and human rights groups as well as the international committee of the Red Cross can assist in urging states to be transparent as possible in respect of their weapons review processes and consider the implications of armed drones for human rights, principles of international humanitarian law and for those in situations of armed conflicts and raise awareness about the issue.

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