

Curse of Flying Death and Dilemma of Law: Challenges of International Humanitarian Law before Drone Attacks

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Abstract - Usage of new technology in warfare has bamboozled the existing customs and etiquettes in battlefield. Especially the innovation of Drone as a lethal weapon in the battle field has created much complexities in International Humanitarian Law. The greater problem of Drones is that it unlike other weapons or mass destructive methods, entirely Drones do not possess the military features. With regard to the current legal implications Drones have not been regarded as a prohibited weapon by any international treaty or customary law. Neither Drone have been prohibited by the Article 8 of Rome statute as they do not exhibit any banned qualities such as causing indiscriminate harms or unnecessary sufferings. In fact Article 36 of Additional Protocol 1 of Geneva Convention states a new weapon could be acquired, if it is not prohibited by the protocol. This legal ambiguity has created a heavy loophole in the black letter law to legitimize this deadly weapon. As a matter of fact number of issues regarding the nature of belligerents, whether Drone has ability to distinguish a military target from civilian arise and this paper's main objective is to trace those legal lacunas in International Humanitarian Law regarding the usage of Drones in war. Methodology of the research will be based on a doctrinal approach and Geneva conventions, ICRC document, 1 additional protocol shall be used as the primary document along with other available literature. The remedy that can be taken within International Humanitarian Law against Drones will be further discussed in this paper and it will enlighten the reader about the present challenge in IHL on Drones and the routine that has created this problem.

Key Words : Drones, Belligerents, Civilians, International Humanitarian Law

The use of deadly weapons to annihilate the enemy in the battlefield has been existing since the time of immemorial and such weaponry made severe impacts on world community over regulating restrictions to sustain harmony on earth. The whole notion of International Humanitarian law is based on rules and regulations of warfare. But it is a fact beyond dispute that changing technologies, naval innovations of 21st century have demonized the conventional nature of warfare and which has created many dilemmas to International Humanitarian Law. Undoubtedly the influx of Drones in warfare has aroused new questions

for us. In the long evolution of Drone aircrafts which dates back to 19th Century U.S Civil War era, the real idea of using Drones in warfare as a lethal weapon was conceived in the U.S during post Vietnamese war period, Especially after 9/11 incident Drone attacks became one of the main methods used by the U.S force in Afghanistan to target Al-Qaida carders. According to the recent reports of the Bureau of Investigative journalism, up to 3.900 people have been killed in 422 Drones strikes, where the Drones are controlled by the Central Intelligence Agency (CIA)¹. The situation has been worst in regions like Yemen and Syria since most of the Drone attacks killings have not exposed to the outside world from these territories.

It is important to look at the legal implications laid down by International Humanitarian Law in such a context. Regarding the laws on Drones attacks, law has left a tremendous ambiguity and it is worthy to point out that all Drones are actually armed and used to fight. There are many instances that Drones have used for non military targets like gathering information etc. With regard to the current law that Drones are not a weapon perform that is not specifically prohibited by any international treaty or by customary law, neither Drones have been prohibited by the Article 8 of Rome Statute as they do not exhibit banned qualities such as causing indiscriminate harm or unnecessary sufferings. According to Article 36 of the Additional Protocol 1 of the Geneva Convention, a new weapon could be acquired if at all it is not prohibited by the protocol. Ostensibly this legal loophole increases the understanding of Drones as a weapon which the usage will amount to a war crime.

As a matter of fact there are various pure technical types of legal issues spring the use of Drones in warfare. Are Drones aircraft operators' unprivileged belligerents? Article 43 of Additional Protocol 1 has stated " Wearing Uniform or carrying of Arms openly " as one of essential conditions for combatants, in that sense a CIA operative who controls a Drone Aircraft from Swat Valley or Kabul will not be fallen under combatant category. Secondly Usage of Drones has created practical difficulties with the "distinctions". Additional Protocol 1 of the 1977 states that 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 the civil population and combatants and between civilian objects and military objectives also accordingly shall direct their operations only against military objectives. Even in the International Court of Justice, the Court had discussed these safeguards regarding humanitarian principles in Nuclear Weapons Advisory Opinion². In the respective opinion Court cited the principle of distinction as a cardinal rule of International Humanitarian Law. The usage of Drones has caused superfluous injury as well as indiscriminate attack by slaughtering many civilians who were not a part of the conflict. In many of the military operations parties had relied on Drones as a best option for targeted killings. In an instances at Pakistan, a Drone targeted to kill 41 terrorists but tragically ended with a toll of 1, 1142.

One of the biggest issues on Drones is whether it has potentiality to distinguish a military target from a civilian object. U.S defense analysts have heavily verified the military

¹ Milson RO, Killings by Drones: Legality under International Law, The Foundation for Law, Justice and Society, 2013,P 76

² I.C.J Reports 1996, p 226

technology Drones and they claim Drone would be an ideal equipment to reach the military target without making any civilian casualties because Drones are highly technical and systematic than conventional war equipments. But ironically recent history of Drones attacks has shown how Drone target killings have become fatal upon civilians rather than chasing its intended targets. Common logic of U.S on this ponderable situation is terrorists always mingle with civilians as a method to avoid Drones and it leads to increase the heavy casualties on civilians. But a question arises how a responsible state like the U.S can bring such an irrational defence against a non state actor which leads to a pathetic destruction of human lives and properties. While giving an interview to the British Institute of International and Comparative Law, Kord Bingley made a clear remark on Drones³. His Lordship states,

“From time to time in the annals of history of international law, various weapons have been thought to be so cruel as to be beyond the pale of human tolerance. I think, cluster bombs and land mines are the most recent examples. It may be, I am not expressing a view, that unmanned Drones that fall on a house full of civilians is a weapon that international community should decide not to be used”

On the other hand a lack of legal clarifications for Drone is another issue which impedes law to make further actions. According to the “Manuel on International Law applicable to air and missile warfare “ prepared by Harvard programme on Humanitarian policy conflict research “ A weapon is a means of warfare that is capable of causing injury or death of persons or the damage or destruction of objects. But Drones do not fall under this category because Drone is a mere flying object and it is not the Drone that has to be reviewed in the light of the prohibition, but any weapons it carries. Most of the time Drones which are used for mandatory operations possess high technological equipments to distinguish its targets, moreover the Drone operator has to assess the situation around the target to ensure that the attack is conducted discriminately. However from the legal perspective the development of such new technologies is also governed by treaty law. As an example Article 36 of Additional Protocol 1 clearly emphasizes states must determine whether the employment of new means of warfare would in some of all circumstance, be prohibited.

When it comes to targeted killings issue, Drones have its ruthlessness as a deadliest object which chases its target till the last ditch. Not only that in International Humanitarian Law even under Human Rights Law targeted killings are likely never to be lawful. Article 6 of ICCPR could be taken as a main legal justification for this assessment. It prohibits the use of lethal force without any legal reasons. It is evident factor most of the time U.S and Israeli military forces have used Drones to assassinate their targets and also some of those targeted persons are not direct combatants who directly take part in hostilities. For an instance more than 50% of Drone operations had targeted either Al Quida operatives or suspects in Afghanistan and Pakistan. But their targets have ultimately brought heavy casualties to civilians. One of cases has reported from West Bank in Israel where Israeli Drone had

³ Lewis MW, Targeting operations with Drone Technology, American Society of International Law, 2013, p 46

targeted a Hamas leader and it killed his two children and pregnant wife along with the Hamas leader⁴.

However U.S state department has declared that basic objective of using Drones is make an effective success in the war against terrorists like ISIS, in that case they do not represent a regular armed force and there for not considered to be combatants. If International Humanitarian Law applies in those cases , the crucial question, regardless whether targeted persons is a “Fighter” in a non international armed conflict, or a civilian in any form of conflict, is whether each targeted person was directly participating in the hostilities. But requirement for direct participation in hostilities are not verified by Geneva Conventions or Additional Protocols. This became a grave issue when Israeli official policy of targeted killings by using Drones was questioned before Israeli Supreme Court in 2006. Israel was not a party to Additional Protocol 1, so that Israeli Supreme Court adhered to functional approach. Under that approach Court evaluated the direct participation of civilians by examining whether those Drones targeting involved in civilian activities or combatant activities.

The most critical justification which has been applied by the parties in favour of Drone attacks is that using Drones and targeted killing is a part of self defence. Especially U.S administration attempts to white wash Drone attacks with right of self-defence. U.S view on the justification of Drones has further stated the U.S is in armed conflict with global terrorism this legal justification is a position of devil and the deep blue sea. It is disputable whether, and in which areas of Afghanistan and Pakistan, international or non international armed conflict exists. However in order to fight against the terrorism, it seems that the scope of using Drones has already reached beyond the limits of conflict zones. As an example once U.S citizen and his son was killed in Yemen by predator Drone attack and victims were initially labeled as Al Qaida fighters but later found they were innocent. A legitimate question is these targeted killings fall under so called “ Self Defence”, however Drones strikes occurring outside these states territories cannot be seen as a part of self defence or a noble act against terrorism.

Concluding Remarks

Legal Adviser to ICRC Jelena Pejec states “The ambiguity on the term’s definition is not a question “especially” raised by the Drones but a general one, with such a complexity it is not the Drone that raises legal issues, it is the way Drones strikes can conducted” Lacuna of identifying Drones under IHL treaties could not be considered a mere simple factor.⁵ Especially the International Humanitarian Law regulations should be strengthen o limit Drone attacks on civilians and which must be on the basis of traditional IHL concepts like

⁴ “Jewish Blood revenge”, Daily Express, 12th September 2014

⁵ Pejic Jelena, Extraterritorial targeting by means of armed Drones; Some legal implications, International Review of Red Cross

distinction and proportionality. It is a fact that Drones are included high technical equipment to distinguish its targets but war crimes could result if these capabilities are misused Article 8 (2) A and (8) 2 B of Rome statute can be brought on Drone attacks under wilful killings. In general point of view the usage of Drones attacks becomes a breach of territorial sovereignty of a state under Article 2 (4) of UN Charter. The recent activities done by the U.S in Afghanistan and Pakistan boarder simply stands for that logic.

There is another less concerned area on Drones which has to be addressed. It is that the psychological impacts left by Drone Attacks in conflict zones. In reality people have been shuddered by Drone Phobia and that trepidation has left a strong psychological trauma among the people in those affected areas. Unlike other human involved warfare Drone is an automatic killing machine and such a machine cannot hear any ones plea.

Who will be liable to Drone strikes on civilians? This question has become the moot point of issue relating to Drones under International Humanitarian Law. Technically Drones are machines and they are controlled by the operatives who are not lively involved in the battle field. Indeed Drones operations function from far away from the real battlefield and such a scenario has made difficult logic to bring remedies under International Humanitarian Law. But this should not be a defence since Drones operations are thus no different than the pilots of aircrafts such as helicopters and those operators should be obliged to comply with international humanitarian law principles, which includes the principles of distinction and proportionality.

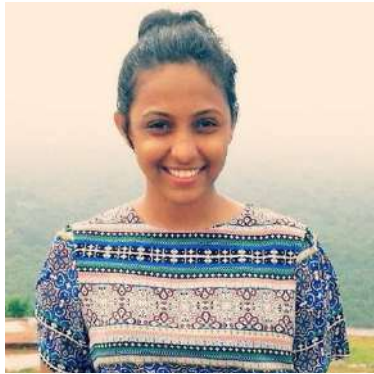
The territorial scope of armed conflict is another complex issue envisaged by International Humanitarian Law in respect of imposing legal mechanism over armed Drones. The individual specific references to “Territory” included in Geneva conventions and their additional protocols have thus recently given rise to difference on what has been termed the legal geography of war. Especially this situation occurs in a context of a non-belligerent state.

However these given factors have muddled up the normal understanding of International Humanitarian Law on means and methods of warfare, nevertheless strong legal implication on usage of Drones in armed conflict is mainly needed to prevent so many havocs. Above all greatest danger is the result of using Drones would be unimaginable if that technology meets the hands the non-state actors like terrorist groups. As the old adage goes “What good for the goose is good for the gander”. In that sense thus far Drones have used by states but the risk and danger would be doubled if non state parties get the control over this fatal equipment.



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