

IMPLEMENTATION OF DISTINCTION PRINCIPLE CONCERNING THE USE OF ARMED DRONES BY UNITED STATES OF AMERICA

Rauzatul Jannah, Sophia Listriani

Faculty of Law, Universitas Syiah Kuala, Indonesia
Jalan Lingkar Kampus, Desa Rukoh
e-mail: rauzatuljannah66297@gmail.com

ABSTRACT

This study analyzes the legal problem regarding implementing the distinction principle related to drones as military weapons by the United States of America (USA) based on international humanitarian law. The method used in this research is normative legal research. The results show that implementing the distinction principle when the United States of America uses drones as military weapons is not correctly implemented, as international humanitarian law requires. It can be seen from the number of civilian casualties who fell during drone attacks and the destruction of civilian objects. So the USA has been violated the distinction principle of international humanitarian law, so legal liability must be pursued under the international justice system. Also, other states have to follow the principle when using to conform to international requirements, commit to solid criteria for disclosure, monitoring, and accountability, and release regular updates on drone strikes and casualties.

Keywords: Distinction principle; International Humanitarian Law; Drones as military Weapon; United States of America

INTRODUCTION

Any military weapons during armed conflict must comply with international humanitarian law. Article 35 Additional Protocol I Geneva in 1977 imposed a ban on military personnel using materials and/or bullets or real methods of war to cause unnecessary injury or suffering. The development of information technology encourages every state defense agency to modernize war equipment. One of the latest developments in war technology is Unmanned Aircraft Systems, often referred to as drones. An unmanned aerial vehicle (Drone) is a powered aerial vehicle that can fly independently or be driven remotely, does not convey a human operator, uses aerodynamic power to provide lift, can be dumped or recovered, and can carry non-lethal or a lethal payload (US Department of Defense, 2019).

In a military context, drones are often said to have revolutionized warfare, leading the way to military transformation. The experts also pointed out the trend to take advantage of the latest technology. Drones have innovative promise for airpower and a high potential for increased safety for military personnel and civilians. (Lațici, 2019) Drones can discern details as acceptable as

individuals face thousands of kilometers away, letting operators distinguish between civilians and combatants far more effectively than other weapons systems. (Sehrawat, 2017).

The use of drones must conform to international humanitarian law's general principles. One of the principles is distinction principles stated in article 48 of Additional Protocol I 1977. Therefore, requiring armed conflict parties to conduct their operation solely for military purposes should differentiate between civilians and soldiers and between military and civilian objects.

In the event of Pakistan's invasion by the United States, several attacks launched by drones caused many casualties regardless of whether they were combatants or non-combatants and the damage caused by the missiles caused massive losses. Lindsey Graham is a staunch supporter of drone use, publicly citing numbers exceeding various independent estimates of the toll; about 4,700 people, including some civilians, were killed in a series of bomb attacks in the United States secret war drones (Kristiant, 2012). Graham has a low count, and she does not include the US military's drone strikes in Iraq and Afghanistan, based on the background of her remarks (Ackerman, 2013).

Since 2017 at least 194 drones have been used in Somalia by US AFRICOM. They asserted that the victims only come from al-Shabab fighters. The US military raid, Amnestius said, killed three local farmers after excavating an irrigation canal in the early hours of November 12, 2017, near the village of Darussalam. In the report, there were 14 people murdered and seven wounded. (Amnesty International, 2020).

As a consequence of pressure and assertion for openness and accountability from the US Congress and several organizations, including Amnesty International, Since April 2019, AFRICOM has admitted to killing five Somalis in three consecutive airstrikes. However, neither the United States nor the Somali government has provided any form of justice or reparation to any of the victims' families (Amnesty International, 2020).

During armed conflict, the indiscriminate use of harmful high-tech equipment is prohibited (ICRC, 2020). Additional protocol I 1977 Article 51 paragraph 2 states civilians have the right to be endowed with general protection, such as the right to be protected from the repercussions of military activities, the right to be free from attack, and the prohibition of actions or threats of violence and terror among civilians. In addition, the rule of international law must be carried out in all occurrences (art. 51 para 2).

RESEARCH METHODS

The research method used in this study is normative legal research stipulates a systematic exposition by comparing the existing rules with international conventions and customs. Normative

legal research is a kind of legal research that uses library research to get data, cite, and analyze data related to the research object. Because of the nature of this study, both primary and secondary data were analyzed qualitatively. In this instance, the author establishes the context or meaning of the applicable legislation, which is then used as a guide for resolving the legal issues at hand.

FINDING AND ANALYSIS

1) The Arrangement of the Distinction Principle When Armed Conflict Occurred Based on International Humanitarian Law

International humanitarian law's principal purpose is to protect war victims while also regulating hostile behavior by finding a balance between military and humanitarian interests. The essence of international humanitarian law is the distinction between soldiers and civilians, the principle of carrying out armed conflict on behalf of conflict parties, and civilians suspected of not precisely participating in dispute must be secured. Only combatants and military objects may engage in war and be targeted. Many scholars argue that the distinction principle is essential in humanitarian law (Jerry, 2015).

International rules established by international treaties or customs give a boundary of the parties' rights to a conflict in using methods of fighting and protecting people and objects that could potentially be affected by the war (Jacques, 2012, p.5). Customary international law is defined as "a general practice accepted as law" or, in another influential formulation, "a general and consistent practice of states followed by them out of a sense of legal obligation." Aside from treaties, customary international law is the primary source of war laws (Luban, 2013).

The Fourth Geneva Convention of 1949 explains how combatants must behave towards civilians, and they are prohibited from engaging in acts of hostility towards civilians. This Convention applies throughout the international armed conflict and when a party's territory is occupied in part or entirely. The Convention is equipped by customary law and The First Additional Protocol to resolve international armed conflict cases (Danial, 2013). The Second Additional Protocol prohibits attacking the civilian population and individual civilians (art 13 para 2). The Convention on Certain Conventional Weapons, Amended Protocol II, also prohibits directing attacks against civilians (art. 3 para. 7). According to the Ottawa Convention on the Prohibition of Anti-Personnel Landmines states, a distinction must be made between combatants and civilians. Deliberately directing assaults against individual civilians or the civilian population who are not directly participating in hostilities is a war crime (ICC Statute, art. 8 para 2).

Additional Protocol I Article 51 para. 3 states, "*civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.*" The protection afforded by this Section refers to the prohibition contained in Article 51(1), (2), and (4) through (8), which state civilians should be protected from the dangers arising from military operations, imposing prohibitions on parties to the conflict on conducting indiscriminate attacks, civilians should not be the object of the attack, and prohibit using civilians to immunize sites or military installations. Whether a country ratifies or does not ratify, these provisions in international humanitarian law are international customs that must be obeyed by countries (Istanto, 1992, p. 182).

Apart from civilians, civilian objects must also be protected. In summary, civilian objects are all objects that are not military targets. This rule is based on Article 52, paragraph (1) of Additional Protocol I. Meanwhile, Article 52 paragraph (2) stipulates that a military object is an object which due to its nature, location, and purpose or use, which if controlled, neutralized, or destroyed either partially or entirely, in a specific situation and time, will be able to provide definite military advantages and make an effective contribution to the military operations (Arlina, 1999, p. 83).

The obligation to protect civilians, known as passive precautions or precautions against the effects of attacks, applies to attackers and defenders (Jensen, 2016). Parties should remove civilians and civilian objects from the vicinity of military objectives during armed conflict, avoid placing military objectives in or near densely populated areas and take any other necessary precautions to protect civilians and civilian property from the dangers that military operations pose. If Hostilities occur in urban areas, they are inherently difficult to manage, particularly civilian protection. Furthermore, states should take precautionary measures to reduce casualties in armed conflict as follows. First, both parties should provide an effective and advance warning to the civilian population via leaflets, posters, and other means. Broadcast warnings, for example, in areas where targeted killings may occur (Hague Regulations art. 26, Additional Protocol art. 57). The notices should be as precise as possible (Alston, 2010).

Secondly, even though they already provide any such warning, it does not absolve the duty to distinguish between civilians and lawful targets. Whether freely or due to limited options, it does not bear on a civilian's legal protections if they choose to stay. Warnings are required for the protection of civilians, but civilians are not required to heed them (Alston, Hunt, Kälin, & Kothari, 2006). Next, it is completely banned to employ citizens as "shields" during the conflict. If one side illegally uses civilians as shields, the other side must ensure that to get a military advantage; the attacks should not kill more civilians than the targeted fighter (Alston, Hunt, Kälin, & Kothari, 2006).

Article 51 Additional Protocol I emphasizes existing customary law prohibiting attacks against civilians. The Hague Regulations do not specify that a distinction between combatants and civilians should be made. Article 25 states, "*The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.*" This principle is also an international customary law that binds all countries (Henckaerts and Beck, 2005, p.4).

Jus in Bello distinguishes between acceptable and unacceptable behavior from war and the unjustified targeting of civilians. The International Court of Justice noted in its ruling stipulating that "...the snarling to the use of nuclear weapons and respect for the fundamental distinction principle" (Engeland, 2011, p. 61). *Jus in Bello* emerged as an independent standard of the motives for the war or its justice. The emergence of this standard brings a significant change in the laws of war because it forced each belligerent, expressly defined as a sovereign state, to follow and uphold the laws of war regardless of whether the essence or cause of the conflict was just or unjust (Kinsella, 2011, P. 11).

Customary law allowed for the targeted killing of civilians as long as they "directly participated in hostilities" and four cumulative conditions were met (Israel High Court of Justice, 2006). The conditions are as follows: (1) armed forces were responsible for verifying the target's identity and the factual basis for meeting the "direct participation" standard; (2) state forces could not kill the person if less lethal means were available, even if the target was legally and factually identified as legitimate by the government; (3) a retrospective and independent investigation into the "identification of the target and the circumstances of the attack" is required; (4) based on the International Humanitarian Law, any collateral harm caused to civilians must comply with the requirement of proportionality.

It is important to note, the actor, as well as those who authorized it, can be prosecuted for war crimes, regardless of who conducts it – intelligence personnel or State armed forces if a targeted killing violates IHL, for example, by targeting civilians who were not "directly participating in hostilities" (Alston, 2010).

The 1977 Additional Protocol I protect civilian objects and populations by requiring those who decide or plan an attack to verify the nature of what or whom they target necessitates high-quality technical resources. In other words, the better the reconnaissance means and methods, the more accurate the information relating to the potential target. Such a situation will also increase feasibility to ensure that the attack target is strictly military in nature (art. 57 para.2(a)).

2) Implementing the Distinction Principle When the United States of America Uses Drones as A Military Weapon.

"Law of War" consists of a set of restrictions by international law in which force necessary may be used to outdo the enemy and the principles governing the treatment of individuals during armed conflicts. However, the arrangement of tools during a war is not detailed (Mahfud, 2013). The principles of the use of weapons are stated extensively in Article 22 of the Hague Regulations. The article says that: "The right of belligerents to adopt means of injuring the enemy is limited." Apart from the Hague Regulations, there are still several agreements that expressly prohibit the use of certain weapons (Mahfud, 2013). International rules established by international treaties or customs give a boundary of the parties' rights to a conflict in using methods of fighting and protecting people and objects that could be affected by the war (Jacques, 2012, p.5).

As a safeguard against war victims, the parties must adhere to the Humanity, Proportionality, and Distinction principles in war. The distinction principle is essential to the combatants involved in armed conflict and the protection of the civil population (Danial, 2013). Therefore, according to most legal scholars, as long as they abide by that regulation, drone strikes are legal under *jus in Bello* (Rae, 2014). Drones can distinguish between civilians and combatants far more accurately than most other weapons systems because drones are equipped with modern imaging technologies that allow operators thousands of miles away to see details as acceptable as individual faces. Using drones to kill during warfare is not inherently illegal, just as using other planes is not prohibited. Drones are not weapons if they are not carrying any weapons, and most of the time, the weapons they have are generally legal (Rae, 2014).

There is little public disclosure on drone-assisted killings wrapped up in secrecy (Alston, 2010). The evidence suggests that violations of the international obligation also characterize drone operations to investigate and, where applicable, punish those responsible for violations of international humanitarian or human rights law, based on the findings of the previous Special Rapporteur (A/68/382) (Callmard, 2020). If a state employs intelligence agents for targeted killings and then evades the transparency and accountability requirements required by IHL, the State can be held liable for violating these requirements (Alston, 2010).

In terms of their responsibility to comply with international humanitarian law, drone operators are no different from those governed under the norms of international humanitarian law, such as any other pilot of manned aircraft (helicopters or other combat aircraft) (ICRC, 2013).

Even though remote-controlled weapon system operators such as drones are far from the combat area, they nevertheless operate weapons systems, identify targets, and launch missiles. As a

result, drone operators and their chains of command, in general, work under responsible command; drone operators and their chains of command are accountable for what occurred under international humanitarian law (ICRC, 2013).

The United States launched an airstrike On October 8, 2015, against a hospital in Kunduz, Afghanistan. The attack killed ten patients, twelve Doctors Without Borders (*Medecins Sans Frontiere*¹) staff members and injured thirty-seven more people (Sterio, 2015). Under the Second Additional Protocol, medical personnel and hospitals cannot be attacked, even if the adversary receives medical care inside the facility (art. 9 para. 1). Only if the opponent uses hospitals to launch attacks do they lose their protection status (art. 11).

In Pakistan in 2015, a missed strike killed 874 people. It was confirmed that 35% of the total number of victims who fell due to the attack were civilians, and 142 children were confirmed killed in the attack (Callmard, 2020). According to the department of defense, one civilian was killed in action in Iraq on March 13, 2020, after United States forces targeted Iranian-linked militias at Karbala airport. Karrar Sabbar, a twenty-three-year-old security guard, was killed in the attack. However, the United States has not acknowledged the reported deaths of two civilian police officers in the attack (Airwars, 2021).

In Afghanistan, Somalia, and Iraq, the Ministry of Defense reported that its troops killed 23 civilians and injured ten others. For 2017-2019, an additional 63 deaths and 22 injuries were reported, most of which occurred in Syria and Yemen. By contrast, the minimum public estimate of civilian casualties caused by US forces in five conflict countries by 2020 is 102 – nearly five times higher than the Department of Defense admits (Airwars 2021).

In Afghanistan 2019, provincial assembly member Ajmal Ummer reported that at least 40 civilians were injured in the attack, and 30 pine nut collectors were killed. Human Rights Director Daphne Eviatar said, "A US drone strike ostensibly targeting ISIS militants could instead result in the deaths of scores of farmers is unacceptable and demonstrates a shocking disregard for civilian life" (Saif, 2019).

The toll from the United States operation in Afghanistan, in particular, appears to have been overlooked by the government. While the department of defense reported only 20 deaths and five

¹ Médecins Sans Frontières is An international, independent medical humanitarian organization

The association is primarily composed of doctors and health-care workers, but it is also open to all other professions that may be useful in achieving its goals. Their goal was to establish an independent organization dedicated to providing emergency medicine assistance in a timely, effective, and impartial manner.

<https://www.google.com/aclk?sa=L&ai=DChcSEwjLvbvfjdDxAhVPt5YKHfYJCV0YABAAGgJ0bA&ae=2&sig=AOD64_0wO3m0yKvCPUTbHQ68OwRP6_xKAQ&q&adurl&ved=2ahUKEwj6_fjdDxAhUjxzgGHceGDRsQ0Qx6BAGCEAE> [accessed 30/06/2021]

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injuries from its actions in 2020, UNAMA², Afghanistan's respected United Nations agency, claims that international forces killed at least 89 civilians and injured 31 others. Most of those foreign troops were made up of United States personnel (Saif, 2019).

In Syria, three to six civilians were killed by US actions in 2020, primarily during counterterrorism raids against ISIS remnants. None of these were also conceded. According to Airwars' monitoring of local communities, between 7 and 13 civilians were likely killed by US actions in Somalia this year. The US military admitted injuring five civilians and causing one death in two incidents in early 2020 near Jilib (Human Rights Watch, 2020).

The ICTY Chamber states, "*Indiscriminate attacks, that is, attacks that hit civilians or civilian objects without distinction can qualify as direct attacks against civilian*" (Case *Prosecutor v Stanislav Galić*, 2003), which it agreed with previous Trial Chambers. Indiscriminate attacks could qualify as deliberate attacks against the civilian object or civilian population, mainly causing the massive damage to civilians that the attacker appears to the Chamber intended to target civilians (ICC, 2014).

The Trial Chamber also used the principle of indiscriminate attack relevant in international humanitarian law for attacks against civilians, implying that it could be considered on par with direct purpose, whereby any accidental (and unintentional) civilian harm must not exceed the actual military gains obtained from military attacks. It also added that "*Attacks even when aimed against legitimate military objectives, are unlawful if performed using indiscriminate means or methods of warfare, or in such a way as to cause unnecessary civilian damage*" (ICTY, *Prosecutor v Zoran Kupreškić*, 2000). However, the term is insufficiently accurate for attributing individual criminal liability. It encompasses a broad range of *mens rea*, ranging from overt (malicious) intent to kill civilians to callous disregard for civilian lives or a willful disregard for civilian lives (Wilt, 2019).

CONCLUSION

The distinction principle is basically to provide restrictions to combatants involved in armed conflict and protection for the civilian population. Article 51(3) states that civilians who are legitimate to be killed are only those who are directly involved in the conflict. Furthermore, article 50 (1), Additional Protocol I 1977 states, if there is uncertainty whether a person is a civilian or not, civilian status must be presumed. The implementation of the distinction principle when the United States of America uses drones as a military weapon is not correctly implemented, as required by international humanitarian law. This situation can be seen from the number of civilian casualties and the destruction

² UNAMA is a political mission that is directed and supported by the UN Department of Political Affairs (DPA). As a 'integrated' Mission, UNAMA's activities are divided into two categories: political affairs and development and humanitarian issues.
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of civilian objects during drone attacks. Hence, a legal proceeding should be taken under the international justice system.

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