

MYKOLAS ROMERIS UNIVERSITY
FACULTY OF LAW
INSTITUTE OF INTERNATIONAL AND EUROPEAN UNION LAW

ANDRIUS VENCKŪNAS
Joint International Law Master programme

**Aspects of legality of unmanned combat aerial vehicles under
international humanitarian law**
Master thesis

Supervisor:
Prof. Dr. J. Žilinskas

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Abbreviations

AP – Additional Protocol

CIA – Central Intelligence Agency

CCF – Continuous Combat Function

DoD – US Department of Defense

DPH – Direct Participation in Hostilities

GC – Geneva Convention

IAC – International Armed Conflict

ICJ – International Court of Justice

ICRC – The International Committee of the Red Cross

ICTY – International Criminal Tribunal for the Former Yugoslavia

ISR – Intelligence, Surveillance and Reconnaissance

IHL – International Humanitarian Law

IHL – International Human Rights Law

NIAC – Non-international Armed Conflict

POW – Prisoner of War

UAV – Unmanned Aerial Vehicle

UCAV – Unmanned Combat Aerial Vehicle

US – United States of America

Introduction

Through the 20th and 21st centuries, the nature of war has changed dramatically. In recent years a wide array of new technologies has entered the modern battlefield. Unmanned aerial vehicles are one of the most renowned examples. They are increasingly being used by many countries in the world. Changing nature of warfare incited concerns about how to increase the degree to which rules and principles of international humanitarian law are respected.

The use of Unmanned Aerial Vehicles (hereinafter drones) for the purpose of surveillance or reconnaissance is well recognized. Therefore drones were used in many different places of globe and for different reasons: from Gulf War to Kosovo and Syria. However, arming of drones only occurred after 9/11. By then, terrorism has not only emerged on the international arena as phenomenon, but also as a threat to the world's peace and security. Drones were considered as one of the most reliable measures countering terrorism. Therefore, development and subsequent resort to unmanned combat aerial vehicles significantly picked up speed.

However, the employment of this type of weaponry initiated a major shift in contemporary conduct of hostilities and military affairs, removing humans from the actual battlefield more and more. Military technology has been advancing rapidly over the last decades with states or private corporations inventing weapons more accurate and precise or with more firepower than previous generations. Much public debate has centered on the legality of unmanned aerial vehicles and the consequences they inflict. Questions such as how do drones fit into the existing international legal framework, under what conditions can they be deployed, how drones attacks are carried out were, and still are, raised.

Statement of a problem

When using unmanned combat aerial vehicles (UCAVs) or 'drones' (these terms with the equal meaning will be further used interchangeably), operators who sit hundreds or thousands of kilometers away from the actual battlefield are capable of carrying out surveillance for long periods and attacking static or moving targets with a payload attached to them and a relatively high degree of precision. These technological and military capabilities, along with the fact that pilot lives are not at risk, make this new technology particularly attractive to military and security forces. Despite its military and technological advantages, unmanned combat aerial vehicles – otherwise known as drones – have emerged as a major source of debate in international humanitarian law. Concerns that have been raised refer to the legality issues surrounding drones. However, the legality issue is multifaceted. Firstly, it refers to the status of UCAVs. But the main thrust of criticism focus on the problem of drones' use – targeted killings

they carry out, to be specific. Scholars, human rights activists on one hand and governments of states on the other, have reached different conclusions on the legality of targeted killings by drones. The fact that there is no joint agreement as to the applicable law under which the targeted killings by drones should be assessed is complicating the matter. One criticism cast on drones is that they cause excessive civilian casualties and unnecessary suffering and therefore violates norms governing conduct of hostilities. Such a criticism, however, is not unique to drone warfare – any weapon, indiscriminately employed, can cause unacceptable levels of collateral damage. As Philip Alston – then United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions – noted “*a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles. The critical legal question is the same for each weapon: whether its specific use complies with IHL*”¹. Other point of criticism refers to the status of drone operators themselves. Questions have been asked whether deviation from regular practice when members of state armed forces are in charge of drone strikes are legitimate and to what extent. This relates to the concern about CIA personnel conducting operations by drones in foreign battlefields.

The Hague and Geneva Conventions, comprising international humanitarian law (hereinafter IHL), provides the foundational legal framework applicable to evaluation of the lawfulness of drones. Yet, it has constantly been challenged by the continuously advancing weaponry. International humanitarian law is a compromise between military necessity and humanitarian considerations, but when it comes to new developments, legal uncertainty is sometimes worrying. New technologies, UCAVs including, do not change existing law, but rather must comply with it in its employment. Those involved in armed conflict situation, especially those taking part in actual combat, are in need of precise regulation or at least interpretation of international humanitarian and international human rights law (hereinafter – IHRL) to determine which conduct is lawful and which is not, and to know their rights, duties and responsibilities. There are still many uncertainties surrounding UCAV technology and its operations. Misunderstanding or misinterpretation of the applicable law, to the significant extent, contributes to creating this uncertainty. Schmitt contends that there is little reason for heightened concern as to their use. On the contrary, the use of drones may actually, in certain cases, enhance the protection to which various persons and objectives are entitled to under IHL².

Other bodies of law significantly question legality of UCAVs and their operations - human rights law, domestic law, use of force (*jus ad bellum*), etc. Thesis will confine analysis merely to the role of humanitarian law in answering questions related to the conduct of

¹ Phillip Alston. Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Study on Targeted Killings // UN General Assembly, Doc. A/HRC/14/24/Add.6, 28 May 2010, paragraph 79

² Michael N. Schmitt. Drone Attacks under the Jus ad Bellum And Jus in Bello: Clearing the ‘Fog of Law’, p. 9

hostilities. Taking into account that material related to the topic sometimes lack objectivity, this thesis will greatly emphasize analysis and determination of legality of UCAVs from a purely legal perspective disassociating from political and moral evaluations. Only pertinent practical examples will be invoked in thesis in order to strengthen the analysis.

Object of thesis

Object of this thesis is a legality of unmanned combat aerial vehicles as such and its usage within the framework of international humanitarian law.

Subject of thesis

Subject of thesis is the law governing armed conflicts – international humanitarian law, jurisprudence of both national and international courts and practice of states.

Aim of thesis

Thesis seeks to evaluate three-fold legality of unmanned combat aerial vehicles as such, legality of their use in other states and responsibility of operators.

In order to reach the aim the following **tasks** are accomplished:

- 1) to provide definition and historical overview about the technology of unmanned aerial vehicles
- 2) to determine status of unmanned combat aerial vehicles and applicable law for the legality of use of UCAVs
- 3) to analyze whether UCAVs in their employment adheres to the principles governing conduct of hostilities
- 4) to investigate into question how non-military personnel give rise to difficulties as to the status of UCAV operators
- 5) to evaluate states' practice using UCAVs

The defending statement

Drone is no different from other means and methods of warfare. It is the use of drone that triggers the question of legality: whether the drone is employed in compliance with IHL or not.

Methodology of thesis

In order to achieve the aim of this paper, these methods are used:

- 1) Historical method is used by analyzing historical development of unmanned aerial vehicles until today.
- 2) Comparative method is applied to delineate differences between UAVs themselves as well as between UAV and other weapons, means and methods. This method is also used in order to analyze changes in legal rules and effects of these changes in implementation.
- 3) Teleological method is used by explaining purposes and essence of normative and customary documents of international humanitarian law, principles of both international and national law.
- 4) Critical analysis method is invoked by identifying and ascertaining flaws of state practice and legal regulation.
- 5) Analytical method is invoked by assessing the content of legal rules and principles, analyzing how it is put into practice. This method is likewise used to make generalizations and draw conclusions.

Structure of thesis

Thesis is divided into several parts, namely, introduction, four substantial parts, each being divided into smaller ones, bibliography, conclusions and the summary.

The first part of thesis commences with brief presentation of unmanned aerial vehicles with the advent of as well as the technology of drones itself. First part likewise defines the unmanned aerial vehicles, level of autonomy and determines reasons of increased popularity of this technology.

Second part of thesis present analysis of status of unmanned aerial vehicles under international humanitarian law. This part follows up with analyzing the legality of UCAVs as such suitability of UCAV with legal norms and principles of international humanitarian law while assessing the legality of new weapons, means and methods.

Third part of thesis focuses on the way how UCAVs are deployed and used within the framework of IHL and analyzes whether UCAVs, during their use, breaches fundamental rules and principles or not. First, applicable law and related problems are designated. Following, principles in conduct of hostilities – distinction, proportionality, necessity, and precaution – are carefully analyzed through the lens of UCAVs usage. States practice is invoked to better depict implementation of IHL in reality.

Fourth, and the last, part of thesis base its analysis on third aspect of legality of UCAVs, namely – its operators. After short introduction about drone operators it turns towards examining the surrounding problems of the issue.

1. Understanding UAVs: development, definition and characteristics

1.1. The emergence of UAV technology and its modern application

Unmanned aerial vehicles are not a unique technology – they were often deployed throughout history. Evolution of pilotless aerial aircrafts indicates that they were born out of war and were basically used in war. Even since the first manifestation of this idea into a reality, these have been weapons of war. The military practice of using drones in war is not new. It traces all the way back to the 19th century when contemporary Austrian empire tried to conquer Italy, in particular the city of Venice by using unmanned balloons to remotely fly over the city and bombard it³. The first aircrafts of pilotless nature were built soon after World War I has ended. On September 12, 1916, the Hewitt-Sperry Automatic Airplane, otherwise known as the "flying bomb" made its first flight demonstrating the concept of an unmanned aircraft⁴. The U.S. military first began researching and using unmanned aerial vehicles in 1917⁵. Anticipating the military advantage to be gained from it, the army of the United States hired scientists to build an 'aerial torpedo' which in turn resulted in the Kettering Bug - the earliest predecessor to present day cruise missiles⁶. But it never has been exposed to the battlefield and their impact to the warfare was rather minimal.

During the interwar period, the British and American governments continued to show interest in developing pilotless target aircraft and kept experimenting with radio controlled aircraft⁷. Queen Bee, radio-controlled plane was one of the prominent examples by that time, being manufactures by British⁸. The first attempt to produce drones on a large scale took place in 1930s, by a British national, Reginald Denny, who moved to the United States and created an initial, low-cost remote control aircraft⁹. He started a company "Radioplane Company" and after 10 years of experimenting and successful demonstration to the US Army signed a contract under which manufacturing of remotely piloted airplanes with the purpose of targeting anti-aircraft weapons has begun. Throughout the Second World War, Denny's company produced and sold nearly fifteen thousand drones – or „Dennymites“– to the United States army¹⁰. But it wasn't

³ RPAV: Remote Piloted Aerial Vehicles. Aviation and Aeromodelling-Interdependent Evolutions and Histories

⁴ Lee Pearson. Developing the Flying Bomb // Encyclopedia of World Aircraft (2004): History.navy. Naval Air Systems Command, 4 September 2004 [<http://www.history.navy.mil/download/ww1-10.pdf>]

⁵ Amy Roberts. By the numbers: drones // CNN News, May 23, 2013

⁶ http://www.daviddarling.info/encyclopedia/K/Kettering_Bug.html

⁷ Captain L. S. Howeth. History of Communications-Electronics in the United States Navy // United States, Government Printing Office, Washington: 1963, p. 479

⁸ The Queen of Bees // Light Aviation Journal, June 2012

⁹ CTIE: Reginald Denny (1891-1967), The "Dennyplane" // RPAV: Remote Piloted Aerial Vehicles. Aviation and Aeromodelling-Interdependent Evolutions and Histories, 04 July 2003

¹⁰ *Ibid.*

until the outbreak of the Second World War that unmanned aircrafts would be produced on a mass scale.

After World War II unmanned aerial aircrafts were increasingly employed. The success of drones as targets led to their use for other missions. Desire for pilotless flying drones was born from fears of human pilots being captured or shot down while conducting intelligence missions over hostile territories. In around 1950s, unmanned vehicles were deployed for surveillance and espionage¹¹. Unmanned flying vehicles, too, proved to be successful for aerospace reconnaissance, decoy and target reconnaissance purposes. During 1960s and 1970s the army of the United States successfully spied and collected vital information on North Vietnam, Communist China, and North Korea. Human security risks and geopolitical strategic interest being on the scale, the United States conceded that unmanned aircraft is sophisticated enough to conduct its missions without being noticed by the enemy. By the time, they were not yet used for combat purposes – with the small exception of Israel¹² – because of the opposition of military commanders and the fear of technological uncertainty. Unmanned combat aerial vehicles (UCAV) have not come into popularity until the 1980s¹³.

At the end of 20th century, the digital revolution radically changed the unmanned vehicles and their use. It stimulated progress in computing processing power, sensor technology and satellite communications. Perhaps most noteworthy, it began the transition from strictly flying reconnaissance vehicles to fully militarized drones. All these improvements were indispensable for the major evolution in the independence and employability of the unmanned vehicles¹⁴. Moreover, attacks of September 2001 in the United States significantly impacted the proliferation of drones as a key counterinsurgency tool¹⁵. Since then, usage of drones for strikes was a leading and most prominent measure to diminish terrorist network capabilities or deter them from planning, abetting and conducting future assaults.

The first known case in modern times of use of the drone by the United States was in Afghanistan in November 2001. Hellfire missile was launched in order to kill then Al-Qaeda leader Mohamed Atef¹⁶. Since then, drones have been widely employed in both conventional military operations, such as those in Iraq¹⁷, and in a counter-terrorism or counter-insurgency

¹¹ M. Arjomandi. Classification of unmanned aerial vehicles // University of Adelaide, Australia, 2006, p. 5– 6

¹² During the 1980s, the Israeli air force successfully used UAVs to detect, and draw fire from, Syrian anti-aircraft batteries, allowing manned jets to then remove the threat. The very first drone pioneered by Israel dates back in 1970, first making widespread use of them to monitor troop movements in its 1982 invasion of Lebanon.

¹³ Brendan Gogarty, I. Robinson, Unmanned Vehicles: A (Rebooted) History, Background and Current State of the Art // Journal of Law, Information and Science, Vol. 21(2), 2011-2012, p. 5

¹⁴ *Ibid.*

¹⁵ Rob Blackhurst. The air force men who fly drones in Afghanistan by remote control // Telegraph News

¹⁶ Khaled Dawoud. Obituary: Mohammed Atef // The Guardian News, 19 November 2001

¹⁷ US admits using drones over Iraq // BBC, October 25 2002

mode, as in Yemen¹⁸ and Somalia¹⁹. The United States deployed armed unmanned vehicles in Libya, during the Libyan Revolution in 2011.

Nowadays drones no longer perform only intelligence, surveillance, and reconnaissance (ISR) missions, although this still remains their predominant function²⁰. The range of activities in which unarmed drones may be used is considerably wide. They can be even used for very simple daily tasks such as assessing building damage and monitoring crops or livestock²¹. Drones are helpful in serving a range of civilian purposes – to help detect fires and gather vitally important information for relief personnel working in areas affected by natural disasters as was the case in Japan in 2011²², providing assistance during search and rescue operations²³. Australia is known as a proper example in using drones for governmental purposes, in particular contributing to effective border control²⁴. Moreover, the United Kingdom Government established drone program under which UAVs are planned to alleviate human police officers in detaining suspects, monitor protestors, collect information about acts of vandalism, littering²⁵ or ensuring crowd's security²⁶.

It is believed that about 40 countries now have drone technology, and nations seeking to arm drones with missiles include Israel, Russia, Turkey, China, India, Iran, Britain and France²⁷. Interesting fact is that also non-state groups, for example Hezbollah, are interested in purchasing UAVs²⁸. The world's biggest international body – the United Nations – has likewise taken part in using drones. Previously, during 2011 presidential election in Democratic Republic of Congo, Belgium by the United Nations was asked to send four UAVs to ensure the security²⁹. Other examples include the European-led mission in Chad or Lebanon with France's and Ireland's contribution as well³⁰. In March 2013 the UN Security Council authorized the use of the very first unarmed drones on a trial basis in east Congo under the aegis of MONUSCO

¹⁸ Assassination by remote control // The Economist, November 5, 2002.

¹⁹ Mary E. O'Connell. 'Remarks: The resort to drones under international law' // Denver Journal of International Law and Policy 585, 2010-2011, p. 587 – 588.

²⁰ Peter Maurer. The use of armed drones must comply with laws, Interview

²¹ Jasmine Henriques. Unmanned Aerial Vehicles (UAV): Drones for Military and Civilian Use // Centre for Research and Globalisation, 2014 [<http://www.globalresearch.ca/unmanned-aerial-vehicles-uav-drones-for-military-and-civilian-use/5374666>]

²² Saira Syed. Drone Markets Target Asia for Growth // BBC News, 16 February 2012

²³ Peter Maurer. The use of armed drones must comply with laws // Resource Centre of the International Committee of Red Cross, Interview, 2013

²⁴ Ari Sharp. Unmanned aircraft could soon patrol borders // The Age, 6 April 2010

²⁵ David Hambling. Future Police: Meet the UK's Armed Robot Drones // Wired News, 10 February 2010

²⁶ Stephen Graham, Olympics 2012 Security: Welcome to Lockdown London // The Guardian News, March 2012

²⁷ Phillip Alston. Study on targeted killings, paragraph 85

²⁸ I. Kershner. Israel Shoots Down Drone Possibly Sent by Hezbollah // The New York Times News, 04-25-2013

²⁹ The UN's Use of Unmanned Aerial Vehicles in the Democratic Republic of the Congo: U.S. Support and Potential Foreign Policy Advantages // Report by Better World Campaign, 2013

³⁰ Report by Better World Campaign

peacekeeping mission³¹ with a role to protect of UN peacekeeping forces and Congolese civilians³².

Drones' role in military context is increasingly and continuously expanding. Only a small number of countries currently possess armed UAVs. Israel and the United States and the pioneers of an employment of modern combat UAVs³³. For example, UAVs make up more than 40 per cent of U.S. Department of Defense aircraft fleet³⁴. Reportedly, UK has conducted attacks using drones³⁵. It is alongside asserted that China, Iran and Italy have introduced, or be planning to introduce, armed UAVs into service.

Combat drones – orUCAVs – are being used for military purposes and engages into fulfilling military functions. Armed unmanned vehicles can both be used for offense and defense objectives³⁶. Drones with military purpose (combat drones) carry a range of explosive ordnance, including bombs and missiles. The ordnance combines the blast, fragmentation, penetration and incendiary effects to injure or kill people and damage or destroy objects.

As it was already declared, armed unmanned vehicles are intensively deployed in the counter-terrorism operations. For example, armed drones conduct strikes against members of Al-Qaeda, Taliban and other terrorist organizations or insurgency groups. But there are also other reasons why drones and especially combat ones are on the peak of popularity between states. Drones have many features that make them more attractable than other vehicles. First feature is that drones excel other aerial vehicles in terms of its costs. In other words, drones are cheaper to operate than helicopters. O'Connell asserts "drones are 30 times less than [the cost of] a fighter jet"³⁷. In terms of plain human considerations, drones possess an obvious strength being capable of operating for 24 hours and never getting hungry, tired or disobeying orders. Gogarty, for instance, suggests that popularity of drones was determined by increased commercial access to know-how of technology, meaning that much of the technology used in the construction of UAVs is available on the open market³⁸.

UAVs represent not only flexible and cheap instrument, but a multifunction and efficient means of combat, as such. Countries that employ combat drones diminish the risk losing human lives.UCAVs may "reach places ground troops would have great difficulty

³¹ UN uses drones in Eastern Congo // Global Policy Forum, 5 December 2013

³² UN launches unmanned surveillance aircraft to better protect civilians in vast DR Congo // United Nations News Centre, 3 December 2013

³³ Edward Wong, Hacking U.S. Secrets, China Pushes for Drones // New York Times, 20 September 2013

³⁴ Rob Blackhurst. The air force men who fly drones in Afghanistan by remote control // Telegraph News

³⁵ Indeed, the United Kingdom has been conducting lethal Reaper drone strikes in Afghanistan for some time. The Guardian News [<http://www.theguardian.com/world/2013/apr/25/uk-controlling-drones-afghanistan-britain>]

³⁶ Mary E. O'Connell. 'Remarks: The resort to drones under international law' // Denver Journal of International Law and Policy 585, 2010-2011, p. 587 – 588.

³⁷ M. E. O'Connell. Unlawful killing with combat drones a case study of Pakistan, 2004-2009 // Notre Dame Law School Legal Studies, 2010

³⁸ Gogarty, Robinson, p. 7

reaching”³⁹. Drones are controlled by a crew which consists of a drone pilot and a payload operator who are supported by a team of signals and imagery intelligence analysts⁴⁰. These people may be located hundreds or thousands of kilometers away from the intended target, allowing to be physically absent from the place where the UAV is deployed. Mountainous, rugged landscapes, extremely susceptible for booby-traps and guerilla tactics in Afghanistan or Pakistan creates a hotbed for Al-Qaeda militants to engulf their opponents into a treacherous battlefield⁴¹. In conditions like these, it is very dangerous to employ ground troops or even manned aerial vehicles and therefore, drones serve as a perfect measure to cope up with such difficulties. Drones are considered to be ‘force multipliers’ of their capacity to soldiers and other operatives on the ground, in cooperation with them, to monitor and supplement operation of the latter. This provides soldiers and other operatives with a capability to have a much wider view of the battlefield or to inspect possible threats⁴². By virtue of both sophisticated sensors and an increased ability to stay airborne for extended periods, they can track suspected vehicles and human at night and through clouds. “*The real advantage, <...> that the Predator brings, armed or unarmed, is the fact that it's persistent. It's over the target area for long periods of time*”⁴³. Intelligence information collected and the videotaped footage about the movements of a suspect to commanders on the ground allows illuminating targets for possible attacks⁴⁴. Verification of the nature of a target before striking it diminishes the likelihood of mistaken attacks as well as assessments of the likely collateral damage to civilians and civilian objects. Such feature has been lauded by military commanders⁴⁵.

One of the preferred strategies used by terrorists is to mingle with civilians as a shield thinking that this will cause confusion and discourage opponents from launching drone attack. As deterrence to this, precision-guided weapons that are attached to a drone increase the accuracy of strikes and subsequently help operators to minimize collateral damage⁴⁶. Therefore, as K. Anderson asserts, drones can be as a step towards more humanitarian warfare where the collated damage is minimized and precision is ensured⁴⁷.

³⁹ M. E. O’Connell. Unlawful killing with combat drones a case study of Pakistan, 2004-2009

⁴⁰ Nathalie Weizmann. Remotely Piloted Aircraft and International Law // The International Committee of the Red Cross, 2013, p. 34

⁴¹ *Ibid*

⁴² Gogarty, Robinson, p. 6

⁴³ Eric Schmitt. Threats and responses: The Battlefield, U.S. Would Use Drones To Attack Iraqi Targets // New York Times, 6 November 2002

⁴⁴ Weizmann. Remotely Piloted Aircraft and International Law, p. 34

⁴⁵ Sarah Kreps, Micah Zenko. The drone invasion has been greatly exaggerated // Foreign Policy, March 2014

⁴⁶ *Ibid*.

⁴⁷ Kenneth Anderson. Targeted Killing in U.S. Strategy and Law // Brookings Institution, Georgetown University Law Centre, 2009.

1.2. Definition of unmanned aerial vehicle

The universally accepted definition of unmanned aerial vehicle does not exist in legal literature bearing in mind it is a relatively new term. Despite this, unmanned aerial vehicles possess certain features which can depict a definition. Unmanned aerial vehicles use an acronym UAV. According to the most popular understanding, unmanned aerial vehicle “*does not carry a human operator, uses aerodynamic forces to provide vehicle lift, can fly autonomously or be piloted remotely, can be expendable or recoverable, and can carry a lethal or nonlethal payload*”⁴⁸. It has to be noted that drones which are employed and extensively used for military purposes in the literature are named as unmanned combat aerial vehicles (UCAVs). Referring to the provided definition of UAV, it was mentioned that drones may carry a lethal or non-lethal payload. Thus respectively, drones are categorized in armed (combat) and unarmed drones. This is the most popular and meaningful classification of drones. UAVs likewise differ from ballistic or semi-ballistic vehicles, cruise missiles and artillery projectiles⁴⁹. Manual on International Law Applicable to Air and Missile Warfare (hereinafter – HPCR Manual) also differentiates between combat and non-combat UAVs. The former is considered as “*unmanned aircraft of any size which does not carry a weapon and which cannot control a weapon*”⁵⁰. HPCR Manual, on the other side, defined UCAV as “*an unmanned aerial military aircraft of any size which carries and launches a weapon, or which can use on-board technology to direct such a weapon to a target*”⁵¹. According to the military and associated terms dictionary issued by the U.S. Department of Defense⁵², definition of UAV almost concur. Each and every of these segments of definitions provided arguably overlap. At the same time, it is evident that UAVs main feature is absence of pilot in the aircraft⁵³.

Though, UAV is also known as remotely piloted aircraft (RPA) due to their prominent characteristic of being controlled from a distance. The acronym UAV in some cases has even been expanded to UAVS which stands for Unmanned Aircraft Vehicle System, having in mind that drones comprise the entire system: ground base from which it is launched, operators sitting in the owner state of a drone and access to the satellite networks in order to transfer data⁵⁴. The International Committee of the Red Cross has also called a military drone as a remote

⁴⁸ The Free Dictionary [<http://www.thefreedictionary.com/Unmanned+Aerial+Vehicle>]

⁴⁹ Office of the Secretary of Defense of the United States of America, Unmanned Aircraft Systems Roadmap 2005-2030, 4 August 2005, p. 1

⁵⁰ HPCR Manual, rule 1 (d)

⁵¹ HPCR Manual, rule 1 (ee)

⁵² Thereby an unmanned aerial vehicle ‘does not carry a human operator [but] flies autonomously or piloted remotely and can carry a lethal or non-lethal payload’.

⁵³ Petra Ochmannová. Unmanned Aerial Vehicles and Law of Armed Conflict Implications // Czech Yearbook of Public & Private International Law, Vol. 2, 2011

⁵⁴ Gogarty and Robinson, Unmanned Vehicles: A (Rebooted) History, p. 2

controlled weapon system⁵⁵. However, term UAV is widely used and became part of the modern lexicon.

Therefore a huge variety of terms exist addressing UAVs: ‘RPAs’, ‘UAVS’, ‘UCAVs’ and ‘drones’ as it most commonly known. Paper analyzes and focuses on military drones and the question of their legality within the purview of the international humanitarian law. Term ‘UCAV’ is the most accurate for this purpose therefore it will be mainly and constantly used throughout the paper. Term ‘drone’, when used, will refer to the UCAV, since it has the same meaning.

1.3. Level of autonomy

If looked into the term UAV, it is, however, the level of autonomy granted for unmanned vehicle is not entirely clear. This question is very relevant having in mind the fact that current development of drones is not limited to those controlled by a human only as more and more autonomy is being conferred to drones.

UAVs are categorized into fully autonomous and semi-autonomous. UAV term may include both types. Regardless, differences between them shall be taken into account. Perhaps the most important distinguishing feature is the degree to which an UAV can operate without human control and direction. A semi-autonomous vehicle is different from a fully autonomous⁵⁶. For a semi-autonomous UAV to function, it needs to be initially employed and subsequently controlled by a human operator. Human operator still monitors the actions of the unmanned vehicle. Even though a drone is operated from a distance of thousands of miles, a controller in the final phase makes a final decision concerning certain actions – for example, whether to launch an attack or to refrain from it (so-called ‘human veto’⁵⁷), etc. Yet, on routinely conducted functions such as navigation or monitoring operations, semi-autonomous UAV faces no difficulties to operate in individual manner⁵⁸. On the contrary, fully autonomous systems (automated sentry guns, anti-vehicle landmines) are the ones that are “*able to function in a self-contained and independent manner although its employment may initially be deployed or directed by a human operator*”⁵⁹. Such systems are alternatively dubbed ‘self-governing’⁶⁰. According to the code they are set to follow, these systems independently will identify and place a fire onto a specific type of target without intervention of a human being. Self-autonomous

⁵⁵ International Humanitarian Law and the challenges of contemporary armed conflicts, Report prepared in the 31st International Conference Of The Red Cross And Red Crescent // Geneva, ICRC, 2011, p. 39

⁵⁶ Petra Ochmannová, p. 145

⁵⁷ John Keller. The time has come for military ground robots // Military & Aerospace Electronics, 20(6), 2010.

⁵⁸ *Ibid.*

⁵⁹ International Humanitarian Law and the challenges of contemporary armed conflicts, p. 39

⁶⁰ United States Department of Defense, Autonomy in Weapon Systems, Directive 3000.09, November 2, 2012

vehicle can accept new information and react accordingly. This system, though, is deemed to be sensitive. The main reason is a strong link between the intelligence of the system and the autonomy with which it can operate⁶¹.

In reality the differences between fully autonomous and semi-autonomous are blurred. The distinction of semi-autonomous and autonomous depends, among others, on the frequency of the interaction of the operator, the tolerance of the vehicle for environmental uncertainty and its level of assertiveness⁶².

As it was mentioned above, the issue of increasing level of autonomy of drones is a question of growing importance because it raises challenges to the law of armed conflicts. In this paper, lethal – or ‘combat’ – drones will be in the forefront of analysis, therefore it is meaningful to establish to which extent they are autonomous. Due to the increasing level of independence, UCAVs in general are often referred to ‘autonomous vehicles’. Indeed, modern drones may function without direct human intervention by virtue of technology platforms and artificial intelligence⁶³. However, modern UCAVs are all controlled to one degree or another. It should be noted that no military drone, as of now, is capable to operate independently to full extent. Therefore, UCAVs are rather semi-autonomous vehicles than fully autonomous⁶⁴.

2. Legality of unmanned aerial vehicles as such

In this section, by examining the principles and rules of IHL, main question whether the combat drone *per se* is legal under international humanitarian law will be answered. While discussing use of UAV as a weapon, the following questions might be raised. Are these weapons, regardless of their use, illegal? Are there conventions or treaties that ban or limit certain armed combat unmanned vehicles? How about the payload that these weapons carry? All these questions raise specific legal concerns. Henderson suggests that the rise of drones highlight interesting legal issue concerning to the drones themselves to which comparatively little attention has been paid⁶⁵. Before starting a discussion regards their legality, the legal status of drones within the existing international legal framework needs to be determined. The question whether the IHL is applicable and whether review has to be exercised for armed unmanned

⁶¹ Gogarty, Robinson, p. 5

⁶² W. C. Marra and S. K. McNeil, Understanding ‘the loop’: Regulating the next generation of war machines // Harvard Journal of Law & Public Policy 1139, 2013, p. 1144.

⁶³ Gogarty, Robinson, p. 5

⁶⁴ *Ibid.*

⁶⁵ Ian Henderson. International Law Concerning the Status and Marking of Remotely Piloted Aircraft // Denver Journal of International Law and Policy, Vol. 39, No. 4, 2011, p. 1

vehicles will be analyzed. Second subsection is dedicated to analysis on material scope of review of new weapons, means and methods of warfare.

2.1. Legal status of Unmanned Combat Aerial Vehicle

Currently, numbers of drones originally intended for intelligence gathering and surveillance are equipped with missiles and capable of engaging into target execution. For example, the drone Predator is armed with two laser-guided AGM-114 Hellfire missiles⁶⁶ and the MQ-9 Reaper possess a suite of four Hellfire missiles⁶⁷. Therefore it is of significant importance to distinguish between vehicles itself and the payload it carries because they accordingly inflict different consequences.

According to the Manual on International Law applicable to air and missile warfare, UAVs fly self-propelled and unmanned, with the primary role to use lethal force and destroy targets chosen prior to their launch⁶⁸. In this case, one may do a reasonable comparison to a weapon, such as a missile. But a purpose of a combat drone is redeployment. It is not designed to be only used once, contrary to the missiles. NATO drew a line of distinction saying that *“ballistic or semi-ballistic vehicles, cruise missiles, and artillery projectiles are not considered unmanned aerial vehicles”*⁶⁹. This, in opinion of Boothby, indicates a distinction between the missile itself and UCAV as a carrier or platform for a certain type of weapon⁷⁰.

The legal status of UCAVs is brought into question by the 1988 Intermediate-range Nuclear Force Treaty⁷¹ agreed upon by the United States and the Soviet Union, which prohibits launching ground-launched cruise missiles. In case a ground-launched UCAV would be developed so as not to be expected to return to base, it could be considered a cruise missile and therefore prohibited by this treaty. But as of now, currently projected UCAVs have flight profiles that preclude them from being characterized as cruise missiles⁷². Military commanders, agreeably, point out that UCAVs as such are actually aircrafts and not missiles, due to their design, flight profiles and recoverability⁷³. But if the UCAV itself is a carrier of a missile, the UCAV itself has to fall into another category.

⁶⁶ United States Air Force, Factsheet - MQ-1B Predator, 20 July 2010

⁶⁷ United States Air Force, Factsheet - MQ-9 Reaper, 18 August 2010

⁶⁸ HPCR Manual, rule 1(z).

⁶⁹ Basic terminological document NATO APP6, 2010

⁷⁰ Bill Boothby. *The Law Relating to Unmanned Aerial Vehicles, Unmanned Combat Air Vehicles and Intelligence Gathering from the Air // Humanitäre Informationsschriften*, 2011, p. 82

⁷¹ Treaty Between The United States Of America And The Union Of Soviet Socialist Republics On The Elimination Of Their Intermediate-Range And Shorter-Range Missiles, signed in Washington 1987, ratified and entered into force in 1988

⁷² Anthony J. Lazarski. ‘Legal Implications of the Uninhabited Combat Aerial Vehicle’ // *Aerospace Power Journal*, 2002

⁷³ Ian Henderson, p. 2-3

UCAVs are subject to a controlled landing and takeoffs as well as multiple deployments and thus share indisputable similarities to aircrafts. Chicago Convention determines that aircrafts used in military services are considered state aircrafts, despite the fact that they carry weapons⁷⁴. No further requirements are specified in the Chicago Convention for an aircraft to have the status of a state aircraft. Aircraft, pursuant to HPCR Manual, is “*any vehicle – whether manned or unmanned – that can derive support in the atmosphere from the reactions of the air*”⁷⁵. Furthermore, state aircraft is means “*any aircraft owned or used by a State serving exclusively non-commercial government functions*”⁷⁶.

It is of big importance to determine, whether a drone is a state aircraft or a civilian one. Article 3 of the Chicago Convention expresses somewhat ambiguous legal position. However, Henderson contends that “*whether an aircraft is, for the purposes of the Chicago Convention, a state or civil aircraft, it is the usage of the aircraft in question [that] is the determining criterion*”⁷⁷.

It is said that merely the ability to deploy weapons does not qualify for military aircraft. HPCR Manual states that the following conditions has to be fulfilled, in order a UCAV to be deemed as military aircraft: “*operated by the armed forces of a State; bearing the military markings of that State; commanded by a member of the armed forces; and controlled, manned or pre-programmed by a crew subject to regular armed forces discipline*”⁷⁸. These criteria are somewhat reminiscent of criteria for obtaining combatant status. Whether they actually launch a weapon or are unarmed does not change their status as military aircraft.

Of course, many different situations may occur, involving technical peculiarities of a drone or pertinent circumstances in a battlefield what in turn could change the characteristic and accordingly a status of a UCAV. But in general, UCAVs should be considered military state aircrafts⁷⁹. In cases of doubt, assessment of the status of UCAVs should be carried on a case-by-case basis.

Contrary to the popular thinking that drones are weapons, drones are not weapons themselves. Weapons are a possible addition to drones. UAV as a platform for the specific weapon does not raise legal issues with respect to the legality, because “*combat drones do not cause specific outcome of a weapon’s action themselves*”⁸⁰. Hence, armament attached to UCAV and the way how it is used triggers an issue of legality.

⁷⁴ Article 3(b), Chicago Convention on International Civil Aviation // Chicago, 7 December 1944

⁷⁵ HPCR Manual, rule 1(d)

⁷⁶ HPCR Manual, rule 1 (cc)

⁷⁷ Ian Henderson, p. 3

⁷⁸ HPCR Manual, rule 1(x)

⁷⁹ Ian Henderson, p. 4

⁸⁰ Sebastian Wuschka. The Use of Combat Drones in Current Conflicts – A Legal Issue or a Political Problem? // Goettingen Journal of International Law, Vol. 3, 2011, p. 895

To sum up, UCAVs itself are, by no means, treated illegal vehicle under the international humanitarian law. With reference to the HPCR Manual and Chicago Convention, UCAVs are considered carriers of a lethal payload amounting to a state military aircraft, but not a weapon. However, a type of payload they carry, which is literally a weapon, and the way it is used may inflict illegality.

2.2. Assessment of weapon, means and methods of warfare

If we talk about UCAV in its entirety, or in other words, without separating vehicle from its armament, then discussion slightly changes. Additional Protocol I states that rights of parties of the conflict to choose ‘means or methods’ of warfare is not unlimited⁸¹. This rule is considered as one of the most significant limitation that modern law of armed conflicts comprises⁸². But what exactly qualifies for ‘means and methods’? Commentary to Additional Protocol I says that weapons, means and methods of warfare include weapons in the widest sense possible, as well as the way in which they are used⁸³. HPCR Manual asserts that a weapon is “*a means of warfare used in combat operations, <...> that is capable of causing injury <...> or damage to, or destruction of, objects*”⁸⁴. Under international law, UCAVs have been defined as a ‘mean’ of combat as any other instrument capable of conducting attacks and causing injuries or damaging objects⁸⁵.

However, premature general conclusions as to the compliance of a drone with international humanitarian law should be cautiously made. Drones may not always be used by its common or originally intended manner⁸⁶. But when new weapons are about to be acquired by party to the conflict, they face limitations as required by Article 36 of AP I - review the legality of new weapons.

The obligation to review new weapons, means and methods of warfare is enshrined in Article 36 of the Protocol I which stipulates that “*in the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party*”. It recognizes that the longstanding rules of IHL apply

⁸¹ Additional Protocol I, Article 35

⁸² Commentary to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of Victims of International Armed Conflicts (Protocol I), paragraph 1382

⁸³ Commentary to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), paragraph 1402

⁸⁴ HPCR Manual, rule 1 (ff)

⁸⁵ Petra Ochmannova. Unmanned Aerial Vehicles and Law of Armed Conflict Implications // Czech Yearbook of Public & Private International Law, Vol.2, 2011, p. 149

⁸⁶ Ochmannova, p. 149

to new weapons and to the use of new technological developments in warfare. This has been acknowledged by the International Committee of the Red Cross, but concerns were raised about sufficient scope of pre-existing legal rules applying to new technology due to its' specific characteristics as well as with regard to the foreseeable humanitarian impact it may have⁸⁷.

Every state should ensure that new weapons it develops or acquires are used in accordance with obligations of international humanitarian law. The main intent is to make states dissuade them from acquiring weapons likely to conflict with international weapon law obligations⁸⁸. Lawand suggests that Article 36 impose restrictions on such weapons, by determining their lawfulness before they are developed, acquired or otherwise incorporated into a state's arsenal. This can be of particular importance for emerging technologies, such as unmanned vehicles⁸⁹.

No specific procedures how the review shall be carried out are prescribed or even suggested by the Article. It is left to states own discretion to establish internal review procedures. Despite this obligation by the treaty law, there is still only a regrettably small group of states who have actually adopted mechanisms or procedures to conduct legal reviews of weapons⁹⁰.

Lastly, states are also free to choose at what stage to execute legal review. According to Article 36 of AP I, the assessment can be made at the stage of study, development, acquisition or adoption. Although it bears preference to do so at an early, pre-acquisition stage in order to save valuable time and resources. Through different stages of the development and even after the weapon has "entered service", changes to the weapon or the laws applicable can occur, imposing a new review⁹¹. In practical terms, state producing drones for its own use or for export should review the weapons at the stage of design and technological development or if a state purchase unmanned vehicle from another state, it has to conduct a legal review before signing the commercial agreement. Disclosure or access to records concerning the review of its weapons is relied on each state's decision because of considerations of national security⁹².

A Guide to the Legal Review of New Weapons, Means and Methods of Warfare⁹³ is dedicated to assist States in establishing or improving procedures to determine the legality of new weapons, means and methods of warfare. It provides detailed information and criteria that helps to implement the above-mentioned Article 36 of the Additional Protocol I practically.

⁸⁷ International Humanitarian Law and the challenges of contemporary armed conflicts, p. 36

⁸⁸ Commentary on Protocol I in the Commentary on the Additional Protocols of 8 June 1977, para 1469

⁸⁹ Kathleen Lawand. A guide to the legal review of new weapons, means and methods of warfare: Measures to implement article 36 of the Additional Protocol I of 1977 // International Committee of the Red Cross, 2006, p. 4.

⁹⁰ William Boothby. Weapons and the Law of Armed Conflict, p. 341

⁹¹ I. Daoust, R. Coupland, R. Ishoey. New Wars, New Weapons? The Obligation of States to Assess the Legality of Means and Methods of Warfare // International Review of the Red Cross, 2002, p. 345-348.

⁹² K. Lawand, p. 19

⁹³ A Guide to the Legal Review of New Weapons, Means and Methods of Warfare, Measures to Implement Article 36 of Additional Protocol I of 1977 // International Committee of the Red Cross, 2006, p. 11

Guide suggests rules that are applied to the unmanned weapons during the legal review must be determined. The obligation set out in the Article 36 should encompass only states that are party to the Additional Protocol I, although, requirement to review the legality of all new weapons arguably applies to all states, regardless of whether or not they are party to the protocol, because provision forbidding to use illegal weapons, means and methods of warfare is of customary nature⁹⁴. Phrasing “*by any other rule of international law applicable to the High Contracting Party*” in the Article 36 implicates that both the relevant general principles of international humanitarian law and international rules prohibiting the use of specific weapons, means and methods of warfare are applied during the weapon review. However, the reviewing authority must only apply the legislation, which it is bound by, through a treaty or on the basis of customary international law. Thus, it has to be established whether there are specific treaties that prohibit or restrict certain types of unmanned weapons. Then, if there is no specific prohibition or restriction is found under treaty or customary law, examination whether the employment of unmanned weapons is in accordance with the general rules, applicable to all weapons, means and methods of warfare and the normal or expected (foreseeable) methods by which it is to be used in light of the general prohibitions or restrictions provided by treaties and by customary international law applying to all weapons, means and methods of warfare. Application of these rules are typically determined at field on a case-by-case basis, taking into consideration the conflict environment in which they are operating at the time and the weapons, means and methods of warfare at their disposal⁹⁵.

Hereby, emphasis shall be placed on one highly important distinction before we embark on analysis of legal rules. A weapon or means of warfare cannot be assessed in isolation from the ‘method of warfare’ by which it is to be used. It follows that the legality of a weapon depends not merely on its design or intended purpose, but also on the manner in which it is expected to be used on the battlefield⁹⁶. Since it is closely interrelated, criteria employed when conducting a legal review of weapons are however different from the criteria used when deciding whether or not to engage in an attack. The latter will be thoroughly analyzed in the third section of this thesis with regard the legality of use of UAVs under international humanitarian law.

General prohibitions or restrictions on weapons, means and methods, provided by treaties and customary international law include the prohibition to employ weapons, projectiles and materials and methods of warfare of a nature that “*cause superfluous injury or unnecessary suffering*”⁹⁷. It also prohibits employing a weapon, method or means of warfare, which intends or

⁹⁴ Rules 70-71: Database Customary International Humanitarian Law

⁹⁵ Legal Review Guide, p. 15

⁹⁶ Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare, 2010, p. 43-44

⁹⁷ Additional Protocol I, Article 35 paragraph 2

may be expected to “*cause widespread, long-term and severe damage to the natural environment*”⁹⁸. Possible prohibitions might also involve the use of biological⁹⁹ and chemical¹⁰⁰ weapons. Among others, these rules are the most relevant in the context of unmanned combat vehicles, because they all are considered customary international law and thus applicable to all states.

A level of inflicted suffering and injury is inevitable in a conflict. However, the level of suffering and injury cannot exceed the level necessary to achieve a military objective¹⁰¹. The qualitative and the quantitative aspect of the level of the inflicted suffering and injury need to be analyzed. For the qualitative aspect, one has to take into account the nature of the suffering itself. The quantitative component relates to the scale of the suffering¹⁰². Then the question arises whether armed unmanned systems, by their nature can cause such suffering. Arguably, it is difficult to answer these questions due to the various controversies that surround drone employment. But by its nature and with technical equipment, UCAVs does not intend to cause superfluous injury or unnecessary suffering¹⁰³. They are, on the contrary, intentionally designed to minimize unnecessary suffering to both military actors and civilians¹⁰⁴.

Prohibition to use weapons that would destroy or could have disastrous effects on the environment applies to both deliberate and reasonably foreseeable damage. Additional Protocol I concern the damage to the intrinsic value of the environment damage caused to the natural environment in relation to human health¹⁰⁵. Threshold of damage necessary to declare them ‘widespread, severe and long-term’ is very high. Moreover, these provisions have not been defined, what results in an imprecise and uncertain threshold. These requirements are cumulative and are difficult to meet¹⁰⁶. There is no data, as of now, that would recognize the damage inflicted to the natural environment by drones. But again, they are not primarily designed with an aim to cause such damage therefore it is not controversial to state that drones are not breaching this prohibition¹⁰⁷.

When conducting a review of a new weapon, and no other applicable legislation can be found, additional consideration to be factored into the assessment is the so-called

⁹⁸ Additional Protocol I, Article 35 paragraph 3

⁹⁹ Rule 73: Biological Weapons, Database Customary International Humanitarian Law // The International Committee of the Red Cross, 2010

¹⁰⁰ Rules 74-76: Chemical Weapons, Database Customary International Humanitarian Law

¹⁰¹ Kathleen Lawand. A guide to the legal review of new weapons, means and methods of warfare: Measures to implement article 36 of the Additional Protocol I of 1977

¹⁰² Kathleen Lawand. A guide to the legal review of new weapons, means and methods of warfare: Measures to implement article 36 of the Additional Protocol I of 1977

¹⁰³ Ochmannova, p. 149

¹⁰⁴ *Ibid.*

¹⁰⁵ Additional Protocol I. Article 35, Article 55.

¹⁰⁶ Commentary to the Protocol Additional I, p. paragraph 1418

¹⁰⁷ Ochmannova, p. 149

‘Martens clause’ or the ‘public conscience dictate’¹⁰⁸. This customary principle has been reiterated by the International Court of Justice in the Legality of the Threat or Use of Nuclear Weapons case, highlighting its importance especially for the rapidly changing military technology that often falls outside of the current legal framework¹⁰⁹. Although being rather abstract and open to various interpretations, the clause has been assessed as a source of obligation based on humanitarian consideration, one that it restricts the conduct of hostilities in a general way and to which all parties in the conflict should be obliged. Despite its ambiguity the clause has, according to Cassese, responded to “*a deeply felt and widespread demand in the international community: that the requirements of humanity and the pressure of public opinion be duly taken into account when regulating armed conflict*”¹¹⁰. The wording of the clause refers to a moral foundation. Different authors posts different opinions about significance of a ‘Martens clause’: from denying approach or recognizing its minimal significance¹¹¹, to authors treating this clause as a very important one. Nonetheless, one can question its actual relevance because presumably the Geneva as well as the Hague Law builds a sufficient legal framework. But arguably, Martens Clause contributes as a moral imperative rather than a foundation of concrete and precise regulations¹¹².

2.3. Additional considerations of weapon review

During a review of a weapon, besides the legal framework, different kinds of scientific factors and empirical data should be taken into account¹¹³. Between elements weighed are: the technical description of the weapon, technical performance of the weapon, health-related considerations and environmental considerations. Boothby summarizes the essence of these rules in five criteria in a nutshell: 1) the weapon cannot through its normal or intended use cause superfluous injury or unnecessary suffering; 2) the weapon cannot through its normal or intended use cause widespread, long-term and severe damage to the natural environment; 3) the weapon cannot be through its nature be indiscriminate; 4) there cannot be any specific customary or treaty rules prohibiting the weapon; 5) possible future developments in the law of armed conflict that may be expected to affect the weapon in review¹¹⁴. For the technical part, it has been already discussed about in the previous chapter. As regards health-related considerations, following are important to weigh in determining whether the weapon in question can be expected to cause

¹⁰⁸ Additional Protocol, Article 1(2)

¹⁰⁹ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion // ICJ, 1996, paragraph 84

¹¹⁰ A. Cassese. The Martens Clause: Half a Load of Simply Pie in the Sky? // European Journal of International Law, 2000, p. 188

¹¹¹ William Boothby, p. 149

¹¹² A. Cassese, p. 212

¹¹³ Legal Review Guide, p. 17

¹¹⁴ William Boothby, p. 341

superfluous injury or unnecessary suffering: wounds, mortality, possible disability or disfigurement, long-term effects on physical or psychological health, field mortality and possible treatment. The environmental aspect entails researching the effects in both short and long term on the natural environment, their reversibility, their impact on the civilian situation and whether the weapon is intended to have such effects or else, what the chances are of these effects occurring¹¹⁵. Term ‘empirical data’ refers to a connotation of a data being suitable individually for each assessment therefore it is hard to generalize. However, this should be made on case-by-case basis. According to the U.S. government, it deemed armed UAVs fully compliant with the law of armed conflicts and other international agreements¹¹⁶.

To conclude, every state is under the legal obligation to assure that new weapons it develops or acquires are used in accordance with obligations of international humanitarian law. Such obligation stems from Article 36 of Additional Protocol I. Invoking the wide approach used for a term ‘weapon, means and methods’, UCAV falls into the scope of a term ‘mean’. States have a leeway in deciding to what extent and at which stage to conduct an assessment of legality of UAV. Besides legal framework, empirical data is also taken into consideration during the assessment. A Guide to the Legal Review of Weapons, Means and Methods details legal framework by which this article can be implemented. After examination of legal rules applicable to the review of unmanned combat vehicles, it is certain that by nature and current armament, drones do not represent prohibited ‘mean of warfare’ because they are not designed to violate neither prohibitions set out by treaty or customary law, nor general rules, applicable to all weapons, means and methods. Different payload, on the opposite, might inflict or at least pose a risk to violate these rules.

3. The legality of the use of Unmanned Combat Aerial Vehicles

The legality of a weapon as such cannot be separated from how the weapon is used. It refers to the ‘method’ rather than a ‘mean’. In other words, distinction must be made to the criteria employed when conducting a legal review of weapons and the criteria used when deciding how and to engage in an attack¹¹⁷. The way how UCAVs are used is the subject-matter of a following section. Applicable legal rules for determining the question of the legality of UCAV usage will be analyzed afterwards.

¹¹⁵ Legal Review Guide, p. 18

¹¹⁶ Andrew Callam. Drone Wars: Armed Unmanned Aerial Vehicles // International Affairs Review: The Elliott School of International Affairs at George Washington University, Vol. 18(3), Winter 2010

¹¹⁷ William Boothby, p. 149

3.1. Targeted killing as the method to useUCAVs

Targeted killings are the most common way of how drones are used. The use of drones and targeted killing are often identified and merged with each other, as drones often engage in operations that could be qualified as targeted killings and are by far the most well-known and illustrious example of what targeted killings are¹¹⁸. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions¹¹⁹ is the most comprehensive document analyzing targeting killings including both legal issues and general information such as definition and state practices. This report describes the publicly available information about new targeted killing policies and identifies areas in which legal frameworks have been clearly violated or expanded, where legal issues are unclear¹²⁰. It is also widely known as a Study on Targeted Killings. In many cases it will be resorted to analyzing targeted killings.

The phenomenon of targeted killing is not new. Targeted killings have been used throughout history but the use of drones is relatively new. It had a vital role in foreign politics as long as kingdoms, empires and states have been at war. During the cold war secret agents were frequently used to kill specific threatening leaders or important persons. The rise of militant terrorist groups such as IRA on Northern Ireland, ETA in the Basque province in Spain or Baader-Meinhof in West Germany led to the development of shady policies that was surrounded by vague legality that gave the police force the right to shoot arbitrarily at “terrorists”¹²¹. During World War II, American aviators tracked and shot down the airplane carrying the architect of the Japanese attack on Pearl Harbor, who was also the leader of enemy forces in the Battle of Midway. Harold H. Koh, Legal Adviser for U.S. Department of State, in his speech told that “this was a lawful operation then, and would be if conducted today”¹²².

There is no official definition of targeted killings in international law. The term ‘targeted killing’ has been initially started to be used in 2000 when ‘Israel made public a policy of ‘targeted killings’ of alleged terrorists in the Occupied Palestinian Territories’. Targeted killings were subsequently performed in 2002 by Russian armed forces against “rebel warlord” Omar Ibn al Khattab in Chechnya and in Dubai in operation carried out by Israeli Mossad intelligence agents against Hamas leader Mahmoud al-Mahboubh, which was allegedly suffocated with a pillow¹²³. The term later began to be used to describe U.S.’s drone strikes in countries like Afghanistan, Pakistan, Iraq, Yemen and Somalia. Alston’s report helps us by providing the

¹¹⁸ Nils Meltzer. Targeted killing in international law // New York, Oxford University Press, 2008, p. 9

¹¹⁹ Alston. Study on targeted killings, paragraph 8

¹²⁰ *Ibid*, paragraphs 3-6

¹²¹ Nils Meltzer. Targeted killing in international law, p. 9

¹²² Harold H. Koh speech, Legal Adviser for U.S. Department of State at the annual meeting of the American Society of International Law, 2010

¹²³ N. Meltzer. Targeted killing in international law, p. 9

possible targeted killing's definition which reflects characteristics and elements of this method. Accordingly, a targeted killing "*is the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator*". In a targeted killing, the specific goal of the operation is to use lethal force with any sort of weapon. In order for an attack to amount to a targeted killing, it is needed that lethal force would be intentionally deliberately used, with a degree of pre-meditation, against an individual or individuals specifically identified in advance by the perpetrator. As a practical consideration, the United States is conducting two types of strikes with their unmanned aerial vehicles: 'personality strikes' and 'signature strikes'. The first one constitutes the targeting of named allegedly high-value leaders of Al-Qaeda network and its affiliates. The second one is based on a 'pattern of life' analysis. Such an analysis consists of groups of individuals, who bear certain signatures or defining characteristics associated with terrorist activity, for instance, who are determined in one way or another to support al-Qaeda, based on the observed 'patterns of suspicious behavior' from multiple intelligence sources. However, identities of persons who are subject to such analysis are not always known. Signature strike, for instance, is an attack against training camps and suspicious compounds, based on patterns of activity, such as packing a vehicle with explosives¹²⁴. Targeted killings must be aimed at an individually selected person and shall not be included in operations targeting collective or unspecified targets.

Intent to kill the targeted person must exist, it cannot happen through an accident or caused by reckless behavior with lethal weapons. The option to kill must be based on a decision in advance to kill and shall not be the result of a sudden impulse. The element of deliberation requires the killings to be the main purpose of the operation, not just a way to achieve other goals¹²⁵. Targeted killing thus differs from unintentional or accidental killings, without a conscious choice. It also distinguishes them from law enforcement operations. For example, it may be legal for law enforcement officers to shoot to kill a suspect bomber based on the imminence of the threat, rather than on a pure aim of operation to eliminate a suspect. The targeted person cannot, during the moment of the killing, be held in custody of those they are targeted by. The targets must be a subject of international law, normally states are the subjects of international law but it also includes non-state actors.

Targeted killing has sometimes been unreasonably mixed up with terms such as 'extrajudicial execution' or 'assassination', which are deemed to be illegal. The discussion on what constitutes 'assassination' and whether it is akin to a targeted killing has always involves

¹²⁴ David Ignatius. The price of becoming addicted to drones // Opinion, Washington Post, 22 September 2011

¹²⁵ N. Meltzer. Targeted killings in international law, p. 4

opponents and proponents, sparking passionate debates until today¹²⁶. Some scholars have equated targeted killings to assassinations. However, this is strongly contested by the legal scholars from the USA and Israel. The debate in American legal doctrine has deemed assassination illegal by definition. The key question in the debate is what sort of conduct falls within the scope of assassination. In contemporary USA legal doctrine¹²⁷, assassination in peacetime comprises “*the killing of selected individuals that is both politically motivated and illegal*”, reflecting to the political implications rather than to human rights or laws of warfare. At the same time, prevailing American military doctrine speaks of assassination as “*the treacherous killing of a selected individual belonging to the adversary*”¹²⁸. Yet, the debate on what constitutes assassination is not entirely complete.

The means and methods of killing vary. Targeted killing may be a sniper fire, shooting at close range, missiles from helicopters, gunships, drones, the use of car bombs or poison. Within the scope of this paper, targeted killings committed by drones (UCAVs) are only relevant. The method of targeted killings by drones is more accepted today and is used more frequently as a means for counter-terrorism to kill selected individuals in so called ‘surgical warfare’¹²⁹ in order to make these organizations more fragile. The USA, Israel and Russia, in their targeted killing policies, confirmed that terrorist networks are the main point of focus and aim of these programs¹³⁰. As an example, the USA, alongside targeting policy, adopted a resolution that authorizes the President to “*use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 <...> in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons*”¹³¹.

Targeted killings by drones are being carried out in regular combat zones (Afghanistan, Iraq) and in areas where there is no presence of military forces (Yemen, Somalia, “Area A” – a part of the West Bank). It has to be noted that for the sake of establishment of a legal framework applicable to targeted killings, the question whether drones are employed within the armed conflict or not is very important. Referring to the Study on Targeted killings, targeted killings may take place in times of peace as well as armed conflict¹³². This makes targeted

¹²⁶ N. Meltzer, Targeted killings in international law, p. 46.

¹²⁷ W.H. Parks. Memorandum EO and Assassination 12333, p. 2

¹²⁸ *Ibid.*

¹²⁹ N. Meltzer. Targeted killing in international law, p. 9

¹³⁰ Phillip Alston. Study on targeted killings, p. 5-9

¹³¹ Joint Resolution ‘Authorization for Use of Military Force (18 September 2001)’ // Public Law 107-40, 2001

¹³² P. Alston. Study on targeted killings, paragraph 28.

killings subject to international humanitarian law and international human rights law which share common key humanitarian principles applicable in times of peace and war.

3.2. Determining the applicable law for targeted killings

Determination of the legality of drone targeted killings demand the identification of the applicable sources of law. Establishment of the relevant legal framework is critical due to the fact that it shows the context upon which legal rules and principles the drone strikes will be determined. According to the Alston's report, "*whether or not a specific targeted killing is legal depends on the context in which it is conducted: whether in armed conflict, outside armed conflict, or in relation to the inter-state use of force*". Scholars also undoubtedly confirm that drone operations are governed by three international law regimes¹³³.

Law applicable to the use of inter-state force – *jus ad bellum* – in the context of targeted killings conducted in the territory of other States raise sovereignty concerns. *Jus ad bellum* literally determines the issue whether the State, by conducting a targeted killing and therefore using force in another sovereign state's territory with which it is not in armed conflict. According to Article 2(4) of the UN Charter¹³⁴, States are forbidden to use force in the territory of another State. However, two exemptions to this rule exist. Targeted killing (or use of force in general) conducted by one State in the territory of a second State does not violate the second State's sovereignty if either the second State provides a consent. Alternatively, targeting State has a right under international law to use force in self-defence under Article 51 of the UN Charter¹³⁵. Self-defence itself is also subject to two conditions: the second State is responsible for armed attack against the first State, or the second State is unwilling or unable to stop armed attacks against the first State launched from its territory¹³⁶. It mainly refers to the counterterrorism against which drones are currently being employed. Currently it has been a matter of debate whether Article 51 permits States to use force against non-state actors and at what extent attacks by a non-state actor would constitute an "armed attack" under Article 51, turning the green light for invoking the right to self-defence. Consent has to be legally authorized, meaning that a consenting State provides consent for targeting practices within its territory insofar as the killing is conducted in compliance with international humanitarian or international human rights law¹³⁷. The same requirement applies to the self-defence as well. But

¹³³ Michael N. Schmitt. Narrowing the International Law Divide: The Drone Debate Matures // The Yale Journal of International Law Online, Vol. 39, p. 3

¹³⁴ Charter of the United Nations // San Francisco, United States, signed on 26 June 1945

¹³⁵ "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security"

¹³⁶ P. Alston. Study on targeted killings, paragraph 35.

¹³⁷ Phillip Alston. Study on targeted killings, p. 11

not everybody is of the same attitude. Some U.S scholars and commentators advocate a “robust” form of self-defence which means that after the self-defence is invoked to conduct targeted killing, it is not constrained by other legal frameworks – IHL or IHRL¹³⁸. Such stance to permit the violation of IHL on self-defence grounds totally abandons and diminishes the essence of international humanitarian law and human rights law. It is also said to disregard differences between the law of inter-state force and the law applicable to the conduct of hostilities: “*whether the use of force is legal is a question that usually arises at the start of an armed conflict, while the law applicable to the conduct of that armed conflict applies throughout it*”¹³⁹. In a nutshell, two steps exist in determining the legality of drones strikes: at first, even though a targeted killings (in general) committed by a drones are justified on the grounds of self-defence or a consent granted (*jus ad bellum*), secondly such operation targeting specific individual is subject to the question whether it is legal or not (*jus in bello*). Outside of armed conflict, UAVs must be used in compliance with the relevant rules of international human rights law (‘law enforcement’ model)¹⁴⁰.

The question of whether the specific killing of the particular individual(s) is legal is governed by *jus in bello*. The legality of a specific killing depends on whether it meets the requirements of the international humanitarian and human rights law (in the context of armed conflict) or human rights law alone (in time of peace)¹⁴¹. The *jus in bello*, or international humanitarian law, applies only in the event of an armed conflict, whether international or non-international (‘armed conflict’ model). It is a body of law that seeks, for humanitarian reasons, to limit the effects of armed conflict¹⁴². The great majority of IHL rules on the conduct of hostilities are customary in nature and applicable regardless of conflict classification. In particular, international humanitarian law addresses who may be attacked and sets forth the legal requirements and restrictions as to collateral damage that civilians and civilian objects might suffer¹⁴³.

It has to be noted that IHRL is deemed to apply at all times (*lex generalis*), while applicability of IHL is only triggered by the occurrence of armed conflict (*lex specialis*)¹⁴⁴. UN Study on Targeted killings asserts that in the context of armed conflict both IHL and IHRL apply and reiterates a statement enshrined in the Advisory Opinion of Legality of the Threat or Use of

¹³⁸ Heeyong Daniel Jang. The Lawfulness of and Case for Combat Drones in The Fight Against Terrorism // National Security Law Journal, Vol. 2(1), 2013, p. 3

¹³⁹ Phillip Alston. Study on targeted killings, p. 14

¹⁴⁰ Phillip Alston. Study on targeted killings, p. 10-11

¹⁴¹ *Ibid.*

¹⁴² Weizmann. Remotely Piloted Aircraft and International Law, p. 35

¹⁴³ *Ibid.*

¹⁴⁴ Legality of the Threat or Use of Nuclear Weapon, Advisory Opinion // ICJ, para 25, quoted in Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions

Nuclear Weapons in the case of International Court of Justice that if IHL is silent about the rule or the rule is unclear and its meaning cannot be ascertained from the guidance offered by IHL principles, it shall be invoked from human rights law¹⁴⁵. Thus, human rights law overlap and coexist with international humanitarian law because they share the same aim – to protect the lives, health and dignity of persons. Human rights community has also agreed that IHRL applies alongside IHL¹⁴⁶. Though, they have different scope of application. Under IHRL, “arbitrary” deprivation of life is prohibited¹⁴⁷. Any use of lethal force must be unavoidable to protect an individual’s life or to preclude grievous bodily injury. Under human rights law model, targeted killings are likely never to be lawful, because it is never permissible for killing to be the sole objective of an operation¹⁴⁸. However, in case of armed conflict, while IHRL applies together with IHL, the arbitrariness of a lethal attack under that law is judged by reference to IHL law¹⁴⁹. In other words, if a drone strike occurs in a situation where armed conflict exists, the protection afforded to the right to life is commonly interpreted in accordance with the rules of international humanitarian law.

To conclude, it is very important to determine whether, and what type of, armed conflict exist assessing the use of UCAV in terms of its legality. Different legal frameworks applicable to drone strikes create different restrictions or scope of action for these strikes. Serving the purpose of thesis, only the law applicable to the conduct of hostilities – *jus in bello* – together with, in contentious cases, the international human rights law will be the subject of this thesis, assuming that the use of a drone has been already justified under the grounds of *jus ad bellum*. Difficulties and disputes surrounding use of drones from the international humanitarian law perspective as well as peculiarities of the modern battlefield will be touched upon and analyzed insofar as it relates the topic.

3.2.1. Problems related to the determination of armed conflict

Humanitarian law comprised of Hague Regulations, Geneva Conventions and Additional Protocols, identifies two kinds of armed conflict: international armed conflict and non-international armed conflict. Consequently, a different set of rules applies in these situations. Classification of armed conflict is primarily based on parties involved and the geography of the battlefield.

¹⁴⁵ Legality of the Threat or Use of Nuclear Weapon, Advisory Opinion // ICJ, para 24

¹⁴⁶ Christof Heyns, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions // United Nations General Assembly, 13 September 2013, Doc. A/68/382

¹⁴⁷ International Covenant on Civil and Political Rights // United Nations, entered into force on 23 March 1976, Article 3

¹⁴⁸ Phillip Alston. Study on targeted killings, p. 11

¹⁴⁹ Michael N. Schmitt. Narrowing the International Law Divide: The Drone Debate Matures, p. 7

Geneva Conventions of 1949 and Additional Protocol I for states party to it, as well as rules of customary IHL, is the main legal framework regulating the behavior of states involved in an IAC. Common Article 2 of the Geneva Conventions defines an international armed conflict as “*any armed conflict which may arise between two or more of the High Contracting Parties*”¹⁵⁰, even if the state of war is not recognized by one of them. This is a direct conflict between states not limited to the territory of one state. Although there are arguments that IAC can be between a state and non-state actor, in principle IAC involves two or more states. Duration, intensity or scale criteria are generally not considered to be constitutive elements for the existence of an IAC¹⁵¹.

However, the test for the existence of non-international armed conflict is not as easy and categorical. Common Article 3 of Geneva Conventions describes that “*armed conflict not of an international character occurring in the territory of one of the High Contracting Parties*”. Hence, NIAC is defined as an armed conflict ‘*not of an international character*’ occurring within the territory of a single state. It has even been suggested that NIACs are not really substantively regulated because applicability of the Additional Protocol II to the Geneva Conventions governing NIACs may also rely upon whether a State is party to it¹⁵². However, provisions of Article 3 and majority of AP II provisions bind all parties to the conflict because of their customary nature. Moreover, significant number of other customary IHL rules applies to NIAC. Customary IHL rules are of particular significance because they provide legal guidance for parties to all types of NIACs, including the NIACs with an extraterritorial element¹⁵³.

There might be various types of non-international armed conflicts. In the Tadic Case, the Court held that the hostilities amounting to NIAC need to take place between one or more armed groups and government forces or solely between armed groups¹⁵⁴. As for drone strikes, they mainly occur in the context of non-international armed conflict. Drones, where used in the context of armed conflict, are rather used where the respective parties are States and non-State armed groups, which potentially amounts to situations of non-international armed conflict¹⁵⁵. A key development has been an increase in NIACs with an extraterritorial element, due to which questions about the sufficiency of the current classification of armed conflicts have been raised. Some of NIACs, originating within the territory of a state between government armed forces and one or more organized armed groups, have been known to ‘spill over’ into

¹⁵⁰ Geneva Convention 1, Article 2

¹⁵¹ Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction // International Criminal Tribunal for the Former Yugoslavia, 2 October 1995, para 70

¹⁵² Additional Protocol II, Article 1(1)

¹⁵³ International Humanitarian Law and the challenges of contemporary armed conflicts, p. 12

¹⁵⁴ Prosecutor v. Tadic, International Criminal Tribunal of Yugoslavia, paragraph 70

¹⁵⁵ Heyns Report, paragraph 52

neighboring states. The United States justification on its drone operations in the context what appears to be called ‘global war on terror’ might be a good example about currently existing problem when establishing applicable law.

The United States considers itself being involved in a transnational non-international armed conflict against “*al Qaeda, the Taliban, and other associated forces*”¹⁵⁶. The United States defines the term ‘associated forces’ as applying to an organized armed group that has entered the fight alongside Al-Qaida and is a co-belligerent with Al-Qaida in the sense that it engages in hostilities against the United States or its coalition partners¹⁵⁷. But it was not indicated clearly whether the conflict was international or non-international. In *Al-Aulaqi v. Obama* case the USA government’s authority to carry out a targeted killing of a person having leadership role in al Qaeda in the Arabian Peninsula (AQAP) in Yemen has been challenged and held that the U.S. is in the non-international armed conflict with Al-Qaida and AQAP is “*either part of al-Qaeda, or is an associated force, or cobelligerent, of al-Qaeda*”¹⁵⁸. Thynne agreed that “*the armed conflict is occurring within and as a result of the war in Afghanistan, al-Qaeda and the US are parties to that armed conflict, with the conflict being a non-international armed conflict*”¹⁵⁹. But there is a significant ambiguity about whether the U.S. is engaged – beyond the conflict in Afghanistan – in a single armed conflict only against Al-Qaida or in multiple non-international armed conflicts against ‘associated forces’. The U.S and a number of scholars maintain that there is a non-international armed conflict between U.S and terrorist groups such as the Taliban and the Al Qaeda scattered all over the world. Thynne suggests that each act executed by any of ‘associated forces’ is linked to the next and connected to a particular territory where the main armed conflict against Al-Qaida occurs. It reflects the approach that does not appear to recognize any territorial limitation on the applicability of the targeting rules of international humanitarian law and focuses on the parties to the conflict instead. By this interpretation, IHL follows participants in a conflict wherever they go. Lubell likewise underlines that the light shall be shed upon the kind of activities a party to the conflict takes after relocating. If, for instance, associate member of the Taliban is part of the NIAC in Afghanistan, but relocates to Yemen, this does not turn green light for attacking such person. Only if the individuals or group are continuing to engage in the armed conflict from their new location, then operations taken against them could be considered to be part of the armed conflict¹⁶⁰.

¹⁵⁶ Harold Koh, The Obama Administration and International Law // Remarks at the Annual Meeting of the ASIL.

¹⁵⁷ Jeh Johnson. National security law, lawyers and lawyering in the Obama administration // Dean’s Lecture at Yale Law School, 2012

¹⁵⁸ *Al-Aulaqi v. Obama*, Opposition to Plaintiff’s Motion for Preliminary Injunction and Memorandum In Support of Defendant’s Motion to Dismiss, paragraph 32-34

¹⁵⁹ Kelisiana Thynne. Targeting the ‘Terrorist Enemy’: The Boundaries of and Armed Conflict against Transnational Terrorists // Australian International Law Journal, Vol. 16(1), 2009

¹⁶⁰ Noam Lubell. Extraterritorial Use of Force Against Non-State Actors // Oxford University Press, 2010

The reasons why the U.S is willing to apply ‘global war on terror’ on its drone operations are obvious. In an armed conflict, regulated by the IHL, drone operators have more leeway for targeting killings in a sense that it is licensed to kill combatants and civilians directly participating in the hostilities as long as he abides by rules of armed conflict. Human rights regulation is significantly stricter - lethal force may be used only if other means are ineffective, unavailable or without promise of achieving the intended result¹⁶¹.

Jurisprudence and legal writing distinguish different elements establishing the existence of NIAC: the parties involved must demonstrate a certain level of organization (organization criteria), and the violence must reach a certain level of intensity (intensity criteria). Ben Emmerson in his report for the United Nations asserted that some contend these criteria are territorial in character¹⁶². It is problematic to prove that the US is in a transnational non-international armed conflict against Al-Qaida, the Taliban and ‘other associated forces’ not solely because it is not entirely clear how these entities meet organizational and intensity criteria under the IHL of non-international armed conflict. Additional point of concern has been posed that when a State conducts drone strikes against non-State actors outside of established armed conflict in Afghanistan or Iraq, it shall be understood as the establishment of a new armed conflict where fighters can be potentially and legally targeted under the condition that those targeted have a connection to the same main organized armed group. However, the International Committee of the Red Cross disagrees that if the international humanitarian law would permit the targeting of persons directly participating in hostilities who are located in countries that are not in the non-international armed conflict, the whole world became a battlefield¹⁶³.

The question is raised whether these ‘associated forces’ possess the same integrated command structure that would justify considering them a single party involved in a global non-international armed conflict. Al-Qaeda and ‘other associated forces’ allegedly does not meet the organizational criterion anymore because its leadership and command structure appear to be loose or, if opposite, it degraded over time¹⁶⁴. Alston in his report agrees: “*the idea that [associated groups] are part of continuing hostilities that spread to new territories, <...> may be superficially appealing but such ‘associates’ cannot constitute a “party” as required by IHL*” and supplements that Al-Qaeda and entities with various degrees of ‘association’ with it are indeed known to have operated in numerous countries, but none of the countries agreed on being

¹⁶¹ Phillip Alston. Study on targeted killings, paragraph 32

¹⁶² Ben Emmerson. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism // United Nations General Assembly, 18 September 2013, Doc. A/68/389, paragraph 63

¹⁶³ Emmerson report, 2013, paragraph 64

¹⁶⁴ Heyns report, paragraph 65

in the armed conflict against al-Qaeda or its ‘associates’ in their territory¹⁶⁵. Lubell notes that characterization of al Qaeda as a party to the conflict is complicated by “*the fact that its description ranges from being a distinct group, to a network of groups, or even a network of networks, and in some cases ideology rather than an entity*”¹⁶⁶. Other school of thought argues that the focus should not be on ideological orientation withal Qaeda, but rather on coordinated activity. Determining whether a non-state armed group may be said to constitute a ‘party’ (organization criteria) for the purposes of Common Article 3 is actually difficult because of lack of clarity as to the precise facts or political unwillingness of states. Organization criterion is determined on case-by-case approach analyzing the command structure, the necessary logistic ability and other factors¹⁶⁷.

International courts have also asserted that in order a non-international armed conflict to exist, intensity criteria has to be fulfilled. In assessing this criterion, violation, duration, type of weapons, number of persons and types of forces partaking in the fighting and number of victims are taken into account. The armed violence should not be sporadic or isolated but protracted. ICTY, in its jurisprudence, contended that whenever there is *protracted* armed violence between the parties to the conflict, such conflict amounts to a NIAC¹⁶⁸. Even though one might contend that al-Qaeda or its ‘associated forces’ constitute a legitimate party to the conflict, it is thought that level of intensity and duration of attacks performed by these entities does not rise to the level of NIAC. It is due to the lapse of time since the attacks of September 11 in 2001 occurred and the infrequency of organized armed attacks on the United States ever since, the intensity criterion is no longer met¹⁶⁹. Agreeably, Lubell states that intensity threshold may not be met by short-term or periodical operations¹⁷⁰. The isolated terrorist attacks, regardless of how serious the consequences, do not amount to an armed conflict, only unless if carried out in a systematic way. Alston concludes that “*even when there have been terrorist attacks by al-Qaeda or other groups claiming affiliation with it, the duration and intensity of such attacks has not risen to the level of an armed conflict*”¹⁷¹. However, there is no way to arrive at the united position until the term ‘associated forces’ is given more parameters and clarification¹⁷². As well as the condition of organization, the intensity of the armed violence is an issue that is determined on a case-by-case basis.

¹⁶⁵ Phillip Alston. Study on targeted killings, p. 18

¹⁶⁶ Noam Lubell, p. 118

¹⁶⁷ International Humanitarian Law and the challenges of contemporary armed conflicts, p. 8

¹⁶⁸ Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction

// International Criminal Tribunal for the Former Yugoslavia, 2 October 1995

¹⁶⁹ Emmerson report, 2013, paragraph 68

¹⁷⁰ Noam Lubell, p. 105

¹⁷¹ Phillip Alston. Study on targeted killings, p. 18

¹⁷² Noam Lubell, p. 105

Having less or sometimes even no consensus on the issue, a case-by-case approach by virtue of the objective criteria dependent on the facts on the ground legally analyzing and classifying the various situations of drone strikes that have occurred in efforts to combat terrorism should be applied. In turn, some situations may be classified as an international armed conflict, others a non-international armed conflict, while various acts of terrorism taking place in the world may be outside any armed conflict¹⁷³. Yet, should the conflict fail to qualify as a NIAC, restrictive IHRL standards would govern such attacks.

To conclude, classification of armed conflicts is of the utmost importance for the use of armed unmanned vehicles during conflicts, since it determines the applicable law. When a conflict is classified as an international armed conflict, the 1907 Hague Regulations, the Geneva Conventions, the First Protocol to the Geneva Conventions and the most rules of customary international law apply. If the conflict is considered a non-international armed conflict, the rules of Common article 3 of the Geneva Conventions, the Second Protocol to the Geneva Conventions and a growing number of customary international rules have to be applied. Moreover, other conventions and international agreements will apply to one or both types of conflict. Within the current legal framework concerning classification of armed conflict, the ‘war on terror’ and other similar conflicts should be understood as separate conflicts, for which a case-by-case approach has to be adopted in order to determine the applicable type of conflict.

3.3. Who may be targeted?

Once it has been established that an armed conflict exists, the next question is who may be targeted. Legality of drone targeted killings is assessed under IHL principles which are developed both in IAC and NIAC. With respect to targeted killings in the context of armed conflict, the question who qualifies as a lawful target is not clearly answered. It has to be also noted that when determining ‘who may be targeted’, the question when and where person may be targeted are also included¹⁷⁴. This directly refers to the principle of distinction.

The principle of distinction is one of the most important concepts of the law of armed conflict. The principle of distinction was expressed as early as 1868 in the St. Petersburg Declaration in the following words: *„That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy“*¹⁷⁵. The significance of this principle has been confirmed by the International Court of Justice in its

¹⁷³ International Humanitarian Law and the challenges of contemporary armed conflicts, p. 10

¹⁷⁴ Phillip Alston. Study on targeted killings, p. 19

¹⁷⁵ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Reprinted in A. Roberts and R. Guelff // Documents on the Laws of War, 2nd ed. Oxford, 1989, p. 30-31.

*Nuclear Weapons Advisory Opinion*¹⁷⁶ case, suggesting that the principle of distinction between combatants and non-combatants (civilians) is one of the prime principles of international humanitarian law, and that “these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law”. Moreover, the principle of distinction has been stipulated and reiterated multiple times in the international instruments governing the laws of war: The Hague Regulations, Geneva Conventions and the Additional Protocols to the Geneva Conventions.

Basically, the principle of distinction means that in order to ensure protection for civilians, parties to the conflict are obliged to distinguish at all times between the civilians and combatants. Furthermore, the principle of distinction implies that distinction should be made between the objects of civilian property and military establishments. These provisions require military establishments and objects to be located away from civilian populations or in civilian-dense areas in an attempt to “immunize” them from attack¹⁷⁷. In other words, any operation has to be directed only against military objectives. Fenrick has once stated: “*Military commanders are obligated to distinguish between civilian objects and military objectives and to direct their operations against military objectives*”¹⁷⁸. International humanitarian law effectively protects civilians from being objects of attack in war only if and when they can be identified by the enemy as non-combatants¹⁷⁹.

1949 Convention relative to the Protection of Civilian Persons in Time of War – or IV Geneva Convention – is exclusively devoted to the protection of the civilian population. Though, it contains no definition of civilian. The first attempt in international humanitarian law to identify who are civilians came in 1977 with Article 50 of Additional Protocol I which should be read together with Article 4(A) of the Third Geneva Convention and Article 43 of the AP I. It says: „*any Person not belonging to the armed forces is considered as a civilian*”. Same applies in case of doubt as to his status. Thus, civilians are defined in the negative form: civilians are all persons who are not combatants. Paragraph 1 provides that civilians are persons who do not fall into the category of people enlisted in Article 4 of Third Geneva Convention, namely - who are not:

(1) members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces;

¹⁷⁶ Legality of the Threat or Use of Nuclear Weapons, paragraph 79

¹⁷⁷ AP I Article 48.

¹⁷⁸ William J. Fenrick. *The Law Applicable to Targeting and Proportionality after Operation Allied Force: A View from the Outside* // *Yearbook of International Humanitarian Law*, 2003, p. 53.

¹⁷⁹ Yoram Dinstein. *The conduct of hostilities under the law of international armed conflict* // Cambridge: Cambridge University Press, 2004. P. 29

(2) members of other militias and members of armed groups, including those of organized resistance movements, belonging to a party to the conflict and operating in or outside their own territory, fulfill the four conditions of acquiring combatant status¹⁸⁰.

Protection against being targeted during military operations applies not only to single civilians. Pursuant to the 51 of Additional Protocol I, civilian population at large also enjoys the immunity from being a target¹⁸¹. Civilian property is also involved into the scope of principle of distinction. Article 52 of Additional Protocol I explains that civilian property is anything which is not a military objective: by its nature, location, purpose or use does not effectively contribute to military action and whose total or partial destruction, capture or neutralization would not offer a definite military advantage in the circumstances ruling at the time. In case of doubt, a property which is normally assigned to civilian use should be considered as civilian and must not be attacked.

The law of armed conflict provides that only certain persons are legally entitled to take part in hostilities, and enjoy the rights and privileges that attach to such status. Those that are permitted to participate in hostilities are known as combatants and the rules governing combatant status are found in the Geneva Conventions of 1949 and Additional Protocol I¹⁸². Persons designated as combatants are permitted to participate in armed hostilities and are immune from criminal prosecution for their conduct if laws of armed conflict were obeyed. Combatants are also entitled, upon capture by enemy forces, to treatment as prisoners of war (POWs). However, although combatants are entitled to combatant immunity, they are also targetable by the adverse party at any time based upon their status as combatants. They remain targetable except they are rendered hors de combat by wounds or they surrender.

Principle of distinction has to be equally respected when targeted killings by drones are being conducted. It means that drone strikes should be limited only to combatants and military objectives. Although the protection of civilians is one of the main goals of international humanitarian law, unfortunately the statistics of war casualties' show that civilians happen to become almost a 'center' of military operations¹⁸³.

Legal analysis of drones' use begins by determining whether the target qualifies as a member of the armed forces (combatant), including organized armed groups, or an individual directly participating in the hostilities (unlawful combatant). In cases where drone strikes take

¹⁸⁰ Set out in Article 4 Geneva Convention Relative to the Treatment of Prisoners Of War (III): '1. To be commanded by a person responsible for his subordinates; 2. To have a fixed distinctive emblem recognizable at a distance; 3. To carry arms openly; and 4. To conduct their operations in accordance with the laws and customs of war.'

¹⁸¹ Article 51 paragraph 1: „*The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations*”

¹⁸² Geneva Convention I, II Article 13(1)-(2), Geneva Convention III Article 4, Additional Protocol I Article 43-44.

¹⁸³ Ochmannova, p. 151

place in the international armed conflict, members of the armed forces of a party to the conflict can be lawfully targeted at any time, as they constitute legitimate military objectives. Likewise, enjoying immunity conferred upon them by international humanitarian law, civilians may not be made the object of a drone attack. The goal of law IHL is to “*ensure in every feasible manner that international armed conflicts be waged solely among the combatants of the belligerent Parties. Lawful combatants can attack enemy combatants <...> causing death, injury and destruction. In contrast, civilians are not allowed to participate actively in the fighting: if they do, they lose their status as civilians*”¹⁸⁴.

However, conventional humanitarian law governing non-international armed conflict does not acknowledge the term ‘combatant’. Common Article 3 and Protocol II acknowledge but do not authorize participation in armed conflict. Nevertheless, the principle of distinction is valid in non-international armed conflict because of its customary nature. Only the divide between combatant/civilian, especially among non-state persons engaged in NIAC, is not clear¹⁸⁵. Civilian may obtain a status of combatant by its own decision – by engaging into hostilities. Basically speaking, “*a civilian may convert himself into a combatant. In the same vein, a combatant may retire and become a civilian. But a person cannot (and is not allowed to) be both a combatant and a civilian at the same time, nor can he constantly shift from one status to other*”¹⁸⁶. However, the core principle of international humanitarian law promulgates that any civilian should refrain from participation in hostilities since it creates a situation of illegality. Unfortunately, due to the improvement of weaponry and the fact that most targets of targeted killings by drones are non-state actors, dividing line between combatants and civilians is apparently blurring.

There is an exception to the absolute rule of civilian protection. Article 51 paragraph 3 of the Additional Protocol I establishes conditionality of the principle of protection: “*Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities*”¹⁸⁷. Civilians who engage in temporary or sporadic conduct may only be targeted ‘unless and for such time’ they were engaged in the hostile conduct. Then civilians lose protection from targeting for the duration of their participation. There is nonetheless a substantial debate about what conduct amounts to the ‘direct participation’ and how long does it last, since the definition have been known not to exist. A significant reference point in the debate on these issues is the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities and in the Israeli Supreme Court case of Public Committee Against

¹⁸⁴ Dinstein, p. 27

¹⁸⁵ Alston. Study on targeted killings, paragraph 58.

¹⁸⁶ Dinstein, p. 28

¹⁸⁷ Additional Protocol I Article 51(3), Additional Protocol II Article 13(3)

Torture in Israel versus Government of Israel, alternatively called as the Targeted Killings case. As regards the Interpretive Guidance does not claim to be new law, but to “*reflect the ICRC’s institutional position as to how existing [humanitarian law] should be interpreted*”¹⁸⁸. According to the Interpretive Guidance, participation commences upon physical deployment with an aim to carry out certain attack and finishes upon physical separation from the operation. Participation also includes both the preparatory and execution phase of the specific act¹⁸⁹. As the U.S. is not a state party to AP II, the mere application of Common Article 3 and customary law alongside one another, provides a minimum of protection for those involved in the conflict¹⁹⁰.

Targeted Killings case, in an effort to identify persons who could be categorized as taking direct part in hostilities, said that they could be persons collecting intelligence on the armed forces, transporting unlawful combatants to or from the place, where hostilities are occurring, persons who operate weapons that unlawful combatants use, or supervise their operation, or provide service to them as well as persons acting as voluntary human shields as taking direct part in hostilities¹⁹¹. As reflected in the Interpretive Guidance, the ICRC’s position is that for an act to constitute direct participation in hostilities, it must satisfy the following criteria: (1) the harm likely to result from the adverse act, either by impacting the military operations or capacity of the opposing party or by causing the loss of life or property of protected civilian persons or objects, must reach a certain threshold (*threshold of harm*); (2) there must be a direct causal link between the act and the harm likely to result either from that act (*direct causation*); and (3) the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (*belligerent nexus*)¹⁹². ‘Adverse acts’ include not only the infliction of death and injury and physical or functional damage to military objectives, but also armed or unarmed activities restricting or disturbing deployments or logistics. The Guidance characterizes direct causation as harm that is brought about in ‘one causal step’. Causation is critical because the consequence would not have occurred, if the act had not taken place¹⁹³. The Guidance interprets ‘direct’ participation as including individual conduct that causes harm only in conjunction with other acts. The decisive question here is the degree of integration of the act into a concrete and coordinated tactical operation that directly causes harm¹⁹⁴. But it was acknowledged that the determination as to

¹⁸⁸ DPH Guidance, p. 69

¹⁸⁹ Nils Melzer. Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law // International Review of the Red Cross, 2009, p. 67

¹⁹⁰ Wuschka, p. 902

¹⁹¹ Public Committee against Torture in Israel v. Government of Israel [Targeted Killings case] // High Court of Justice 769/02, Judgment of 13 December 2006, paragraph 31, 35, 36

¹⁹² DPH Guidance, p. 52-53

¹⁹³ Weizmann. Remotely Piloted Aircraft and International Law, p. 37

¹⁹⁴ DPH Guidance, p. 54-57

whether a particular act has a belligerent nexus can be difficult in practice as there will be many grey areas¹⁹⁵. As ‘indirect participation’ and therefore those acts which do not cross three-fold test for direct participation includes: publication of propaganda, recruitment, financing of terrorism, hiding weapons, helping fighters to escape capture and supplying fighters with food or logistical support. Alston criticizes the Interpretative Guidance for being too narrow telling that criteria for determination of ‘direct participation’ exclude including political support for an organized armed group. He also reasonably argues that terrorism, even though inflict harm, but falls under the law enforcement paradigm (attracting human rights legal framework rather than international humanitarian), if does not meet above mentioned criteria¹⁹⁶. Agreeably, Schmitt contends that assistance, although it takes place over more than one single step, may have substantial and direct casual effect¹⁹⁷. Such problematic becomes important having in mind that the great majority of drone strikes are carried out while countering terrorism. Other scholars, on the contrary, held the term ‘participation in hostilities’ in Interpretative Guidance being too broad because it diminishes civilian protection during armed conflict.

Another criticism of the Interpretive Guidance is that a definition of direct participation creates a situation of ‘revolving door’, giving individuals the ability to participate in attacks and then quickly regain protection from attack. According to the Guidance, this does not give rise to a malfunction of IHL. Rather, it is a deliberate safeguard to ensure innocent civilians are protected from mistaken attack¹⁹⁸. Herein, debate includes another contested issue – namely, who may be targeted on the basis of ‘continuous combatant function’¹⁹⁹. In the Targeted Killings, court held that persons who actively engages in a ‘chain of hostilities’ as an active member of a terrorist organization, while being a member, remain targetable even through the short rest periods between such acts. Such rest intervals would not amount to termination of active participation and therefore would not retrieve civilian immunity during these intervals²⁰⁰. Such people would fall into the category of individuals with a ‘continuous combatant function’ which has been established by Interpretative Guidance. Interpretative Guidance proposes the approach upon which not specific actions of individual, but ‘membership’ in an organized armed group, would deprive civilian of his immunity. People belonging to an organized group would be targetable for so long as their membership in the group lasts. Members of non-state party armed forces shall likewise to be considered as belonging to an organized armed group. Belonging to an

¹⁹⁵ DPH Guidance, p. 57-59

¹⁹⁶ Alston. Study on targeted killings, paragraph 64

¹⁹⁷ Michael N. Schmitt, The Interpretive Guidance on the Notion of Direct Participation in Hostilities: a critical analysis // Harvard National Security Journal, Vol. 1, 2010, p. 30

¹⁹⁸ DPH Guidance, p. 70

¹⁹⁹ Alston. Study on targeted killings, paragraph 58.

²⁰⁰ Targeted Killings case, paragraph 38-40

organized group occurs from the moment a person begins to perform a de facto continuous combat function and lasts until they cease such function. Cessation does not have to be explicitly announced, conclusive behavior suffice (e.g. physical distancing from the armed group and reintegration into civilian life). Determination as to whether a person has joined or left a group must be made in good faith taking into account all available circumstances²⁰¹. Yet, it gives rise to the risk of erroneous targeting of someone who, for example, may have disengaged from their function what in turn may contribute to inflict unnecessary civilian casualties or superfluous injuries. But in essence, a drone strike carried out against an individual with a continuous combat function in an organized non-state party armed group with which the attacking State is engaged in a non-international armed conflict will be consistent with the principle of distinction in international humanitarian law. But it should be emphasized that targeting person merely on the basis of a member being opposing party is not sufficient. A person must be at least a member of the armed forces of that group²⁰².

‘Continuous combat function’ approach has been criticized telling that also “*raises the risk of erroneous targeting of someone who <...> may have disengaged from their function*”²⁰³. Identification of individuals is difficult practically due to the fact drone attacks might be launched in time-sensitive circumstances. It thus hard to tell if an individual engaged in hostilities in the past and if so – did he engage periodically or sporadically²⁰⁴.

The legality of the drone strikes depend on the determination of the status of these non-state groups against which drones are employed. In case of the United States, such groups are Al-Qaeda, the Taliban and ‘associated forces’. Intelligence-gathering and extensive surveillance play an increasing role in determination of a status of such or similar non-state armed groups. But misleading intelligence or other difficulties as to establishing the identity of the person can lead to civilians being targeted mistakenly.

At the given moment, United States appears to identify at least two categories of person who may be targeted by drone strikes operations. The first is what is known as the ‘high-value target’²⁰⁵. List includes individuals identified by intelligence as senior leaders of Al-Qaida or an ‘associated force’, who would thus be deemed to have a continuous combat function. A second category consists ‘signature strikes’, in which a group or individual is identified as a potential target on the basis of their behavior, a ‘pattern of life’ activity. Identities, functions and importance of the individuals involved in this group are in advance established in national

²⁰¹ DPH Guidance, p. 72-73

²⁰² Heyns report, paragraph 68

²⁰³ Alston. Study on targeted killings, p. 65-66

²⁰⁴ Michael N. Schmitt, The Interpretive Guidance on the Notion of Direct Participation in Hostilities: a critical analysis, p. 22-24

²⁰⁵ Amir Mir. Drones hunted down only 20 high value targets // Today’s Newspaper, January 04, 2011

military documents. This kind of targeting allegedly violates the principle of distinction because it does not take into account considerations of ‘direct participation of hostilities’ or ‘continuous combat function’. On the opposite side, UCAVs enable the party to examine belligerent’s movements and patterns of conduct to ascertain legitimate targets and minimize civilian casualty²⁰⁶. Standards set by Interpretative Guidance exclude individuals who may currently be targeted in U.S. drone strikes, but who only function as ‘political and religious leaders’ or ‘financial contributors, informants, collaborators and other service providers’²⁰⁷. Having in mind the limitations in intelligence collection and reliance on the quality of the information provided by UAV devices, targets may be mistakenly identified as having military significance or status, posing particular challenges for complying with the fundamental IHL rule of distinction.²⁰⁸

It is up to the countries to set out rules of engagement as a basis for military operations and implementation of IHL rules and principles, including principle of distinction. In the context of drone warfare fighting non-state armed groups it is equally essential. Moreover, increased civilian involvement in military operations and rise of loosely organized armed groups gives rise to confusion and uncertainty as to compliance with principle of distinction. Therefore, Israel’s High Court agreed that decision on whether a civilian could be targeted for taking direct part in hostilities should be made on a case-by-case basis²⁰⁹.

3.4. How one may be targeted?

After determining who may be targeted and if made sure that a target is a military person, another essential issue needful of careful consideration is the question of how one may be targeted. Drone strike cannot be carried out in a free manner, disobeying rules and principles of international humanitarian law. Drone strike always, before targeting, shall adhere to principles and be conducted in accordance with these principle in order to be deemed lawful.

3.4.1. Principle of proportionality

It is obligatory to consider what will be the effect of a drone strike on civilians and civilian objects so as to ascertain proportionality. Principle is fundamental during the process of decision making whether to target or not. The principle of proportionality is also part of customary international law²¹⁰. The principle of proportionality protects those civilians who are not directly targeted but nevertheless may suffer from the damages inflicted by the force used. According to this principle, it is prohibited to carry out an attack which may be expected to cause

²⁰⁶ H. D. Jang, p. 25

²⁰⁷ N. Melzer. Targeted Killings in International Law, p. 320-321

²⁰⁸ Weizmann. Remotely Piloted Aircraft and International Law, p. 39

²⁰⁹ Targeted Killings case, p. 39-40

²¹⁰ Rule 14: Database Customary International Humanitarian Law

*“incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”*²¹¹. Proportionality principle suggests a balancing test between lawful collateral damage and anticipated military benefits. Although proportionality principle is not explicitly mentioned as such in Additional Protocol I, it is clearly incorporated and may be also implicitly inferred from other provisions about distinction and precautions. This shows how much proportionality principle is interrelated with other key principles of humanitarian law – military necessity and the principle of distinction. In essence, total avoidance of damage to the civilian population is the ideal standard combatant should seek at all times, but practically it is not always feasible²¹². Reasonable incidental injury accompanying combat drones is acceptable if the target poses a sufficient, not necessarily imminent, threat²¹³. Proportionality principle prohibits the use of weapons or methods of warfare which are indiscriminate in nature and cause disproportionate casualties. Therefore, under very strict and limited conditions, proportionality permits causing collateral damage. The risk to civilians may be aggravated where drone strikes are carried out far away from areas of actual combat operations, especially in densely populated areas, and unsuspecting civilians may suddenly find themselves in the line of fire²¹⁴.

Well known fact that the terrorists are mostly located within the civilian population or uses them as a shield protecting them for an attack. Human shielding is prohibited by international humanitarian law²¹⁵. Drone strikes in such circumstances might result in the killing or injuring of a large number of civilians which will amount to an indiscriminate and disproportionate attack. Most often, on the battlefield it is inevitable to have some civilian casualties. But in the line with the principle of proportionality, such casualties must not be disproportionate for them to be acceptable and considered as fulfilling military goal. When assessing proportionality in the context of drone strikes, the weapon used is irrelevant. Whether the expected civilian casualties or damage were excessive relative to the military gain the attacker reasonably anticipated from the strike is only important²¹⁶. Great amount of drones can be susceptible to think that military advantage is not outweighed. The military advantage is a subjective determination based on evaluation of the target with the information available at that time. Article 52 of Additional Protocol I provides a definition of military objective being them those *“which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances*

²¹¹ Article 52(5)(b), 57(2)(a)(iii) and 57(2)(b) Additional Protocol I

²¹² Ochmannova, p. 152

²¹³ Commentary On HPCR Manual, p. 33

²¹⁴ Heyns report, paragraph 75

²¹⁵ Geneva Convention III Article 23(1), Geneva Convention IV Article 28, Additional Protocol I Article 51(7)

²¹⁶ Michael N. Schmitt. Drone Attacks under the Jus ad Bellum And Jus in Bello: Clearing the ‘Fog of Law’, p. 322

ruing at the time, offers a definite military advantage". But there is disagreement among scholars on how to interpret the military advantage. Several scholars state that the proportionality of the individual attacks needs to be weighed against the specific military objective that can be achieved during that individual attack. Others argue that the anticipated military advantage needs to be considered for the entire military campaign²¹⁷. However, the United States maintain that the strikes directed at the leaders of the terrorists are militarily necessary since they accrue military advantage²¹⁸. Likewise, the assessment of 'proportionality' varies in every case, depending on various factors such as the value of the target, the location of the attack, the timing of the attack, the number of anticipated civilian casualties and the amount of damage anticipated to civilian objects. Foreseeable risks and potential mistakes must be also taken into account. Taking these requirements into account the decision to attack is eventually made by the person in charge.

States have obligation to choose weapons with greater precision or lesser explosive force when targets are located in civilian areas²¹⁹. It is known that drones are equipped with armament of increased precision so they are even better than most of the traditional weaponry. Moreover, visual information transmitted from combat drones ensures the possibility to conduct reliable and systematic cost-benefit analysis to satisfy the proportionality test²²⁰. Traditionally, unsteadiness of surrounding conditions, along with imprecision, impaired the accuracy of drone strikes. But still, unlike other conventional weapons used in air warfare, UCAVs allow to properly assess proportionality, taking into account real-time changes and the projected civilian injury with much accuracy²²¹. Yet, the precision and accuracy of drone strikes heavily relies on the intelligence (given to him by ground informants) carried out by a human being. But the intelligence gathered might be faulty. It is wrongful to think that because they are computerized and are not prone to mistakes. Additionally, states often have no other means available to attack members of non-state actors than unmanned vehicles²²². Although the ratio of civilian deaths per militant killed by UCAVs varies in different sources, the number is evidently more proportionate than attacks using vast majority of conventional arms²²³.

Principle of proportionality is difficult to assess to make general assumptions of principle in practice, since it is very case-related in the sense that the scope of military advantage

²¹⁷ Andreas Laursen. NATO, the War over Kosovo, and the ICTY Investigation // American University International Law Review 17, 2002, p.795

²¹⁸ H. Koh. The Obama Administration and International Law // Remarks at the Annual Meeting of the ASIL.

²¹⁹ Commentary on the HPCR manual on international law applicable to air and missile warfare // Program on Humanitarian Policy and Conflict Research, Harvard University, 2010

²²⁰ H. D. Jang, p. 15

²²¹ H. D. Jang, p. 15

²²² UN Special Rapporteur on Extrajudicial Executions Handbook, 2010

²²³ H. D. Jang, p. 15

or proportionality has no consensus. Whether they actually cause excessive collateral damage or not depends also on decision made by the person in charge. Proportionality test is quite complex to apply in practice. Even though some suggest that drones ensures the proper implementation of this principle, it is hard to establish a position on the precise influence of the use of armed unmanned vehicles.

3.4.2. Principle of military necessity

Principle of military necessity, along with principle of distinction and principle of proportionality, is the driving force of military campaigns. Military necessity in times of war is a lawful justification for combatants to conduct lethal operations. Essence of the principle of humanity is reflected in the AP I: *“In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military of advantage”*²²⁴. Only military targets, as opposed to civilian or neutral buildings, can lawfully be targeted for a perceived military gain. It is not easy to determine when an object becomes a lawful target, but the belligerent must act in good faith and *“take into account all available information”*²²⁵. Military necessity determines the degree and the type of force which can be used in relation to a military advantage. In other words, only certain amount of force only can be used or certain actions only can be taken. Violation of IHL will only occur if inflicted harm is greater than that unavoidable to achieve the military objective²²⁶. In addition, the force used must be *‘consistent with the principle of humanity’*²²⁷. Necessity principle comprises obliges to make sure, before striking, that, and if, a civilian site has been converted into a military one. It also depends on the information available at the moment of decision. *“In case of doubt as to whether an object which is ordinarily dedicated to civilian purposes is being used for military purposes, it may only be attacked if, based on all the information reasonably available to the commander at the time, there are reasonable grounds to believe that it has become and remains a military objective”*²²⁸, butUCAVs can spot and respond to such subtle and versatile information²²⁹.

UAVs as a tool used by the parties are not violating the principle of military necessity. Conversely, use of unmanned vehicles seems often justified by the principle of military necessity because of their sophisticated equipment and capability to stay airborne until

²²⁴ Additional Protocol I, Article 52(2)

²²⁵ H. D. Jang, p. 19

²²⁶ Dinstein, p. 19

²²⁷ Additional Protocol I Article 1(2), Geneva Convention III Article 142, Geneva Convention IV Article 158.

²²⁸ Commentary on the HPCR Manual, p. 87

²²⁹ H. D. Jang, p. 19

visual identification is ensured before the target is hit²³⁰. Yet, UAVs are criticized. Criticism focus on the fear that lethalUCAV strikes may be used instead of a more humane option, such as capture or detention and on the question of what is military advantage²³¹. Practical considerations as to whether a target shall be captured rather than killed byUCAVs raise some significant challenges. For example, it is hardly imaginable howUCAV, flying over hostile territory, could accept surrender from combatant who just laid down his arms²³² or remove such person from the battlefield. When determining the military advantage of unmanned vehicles in the current contemporary war with non-state actors, it should be done critically. One may assert that drone targeting is militarily necessary because it offers certain military advantage by killing terrorist leaders and therefore neutralizing terrorist attacks or diminish terroristic network. But if targeting terrorist leaders causes big amount of casualties, it is doubtful that reasonable military necessity is reached. O'Connell agrees that targeting high-level terrorists is counterproductive, since it only incites the resentment due to the sizeable numbers of casualties and it does not really weaken the terrorist organisation as the targeted leaders are easily and quickly recruited²³³.

Commentary on the HPCR Manual is in favour ofUCAVs technological advantages: "*such assessments by remote operators may be more reliable than those of aircrews on the scene facing enemy defences and other distractions*"²³⁴. Moreover, targets and accidental bystanders do not notice these vehicles, mainly for the reason that UAVs reach high altitude²³⁵. As regards the assessment of the principle of military necessity, case-by-case approach is suggested.

3.4.3. Principle of precaution

When the target is a lawful target under the international humanitarian law, drone strike can still be conducted discriminately. Therefore, all reasonable precautions must be taken to spare the civilian population and avoid damage to civilian objects²³⁶. This obligation requires parties to the conflict to do everything feasible and use all information that is effective and reasonably available and possible to make the determination about whether a person is a lawful target or not. Variety of precautionary measures is quite high. It can include target selection and verification, choice of means and methods of warfare, assessment of the effects of an attack, warning in advance, cancel or suspend attacks upon change of circumstances and all other

²³⁰ Commentary on the HPCR Manual, p. 55

²³¹ K. DeYoung, J. Warrick. Under Obama, More Targeted Killings than Captures in Counterterrorism Efforts // Washington Post, 2010

²³² Additional Protocol I, Article 41

²³³ M. E. O'Connell, Remarks: The resort to drones under international law

²³⁴ Commentary on the HPCR Manual on international law applicable to air and missile warfare, rule 39, para 3

²³⁵ M. E. O'Connell, Remarks: The resort to drones under international law

²³⁶ Additional Protocol I, Article 57.

feasible precautions²³⁷. The term ‘feasible’ shall be highlighted in determining precautionary measures. Feasible steps are those which ‘are practicable or practically possible, taking into account all circumstances prevailing at the time, including humanitarian and military considerations’. Attackers are not obliged to exhaust all possible means to verify the target, but must use those that make sense in military terms²³⁸. The environment of the target must also be included in the assessment and assessed in good faith. Target itself, before engaging into attack, must be verified to be a military target. If too many civilians gathered in certain targetable area then attacker must refrain from attacking²³⁹. Furthermore, precaution taken as to the robust verification of the target is only side of the coin. When all feasible measures were invoked and target was certainly clarified, the use of weapons and tactics for that target should be such as to be designed to minimize civilian collateral damage and not excessive to the anticipated military advantage. Precaution also detects that an attacker assess the choices of weapon at its disposal²⁴⁰. Therefore, if use of a drone, because it is a relatively precise targeting system and longer window of opportunity within which to strike, would likely result in less collateral damage than use of other systems, drones should be employed. In case of doubt, additional information must be obtained before an attack is launched.

In practice, the current use of unmanned vehicles tries to meet the precautionary requirements. The HPCR Manual and its commentary refers to the application of the precautionary principle to UCAV deployment as well as to the advantage UCAV/UAV-technology may offer in this regard: “UAVs can be a useful asset in complying with the obligation to take feasible precautions in attack <...> hence, if available and when their use is feasible, UAVs ought to be employed in order to enhance reliability of collateral damage estimates”²⁴¹. Besides, UAVs are equipped with camera and communication system. UAVs are able to perform targeting more precisely because they have a greater capacity for extended surveillance. This contributes to the fulfillment of precautionary principle by the much clearer verification of targets²⁴². If a drone is reasonably available to provide imagery of a target and such imagery would enhance the UAVs ability to ensure that the target qualifies as a military objective, then the use of a drone would be required as a matter of law²⁴³. Precaution demands utmost thoroughness when gathering information about targets. During drone attacks, other assets reasonably available to verify a target must be resorted to if doing so would measurably

²³⁷ Chapter 5 ‘Precautions in Attack’, Database Customary International Humanitarian Law

²³⁸ Michael N. Schmitt. Drone Attacks under the Jus ad Bellum And Jus in Bello: Clearing the ‘Fog of Law’, p. 9

²³⁹ *Ibid.*, p. 9

²⁴⁰ Additional Protocol I, 57(2)(a)

²⁴¹ Commentary on the HPCR manual on international law applicable to air and missile warfare, rule 39, para 2

²⁴² H. D. Jang, p. 20

²⁴³ Michael N. Schmitt. Drone Attacks under the Jus ad Bellum And Jus in Bello: Clearing the ‘Fog of Law’, p. 9

improve verification of the target. In fact, nearby ground military forces (if such troops are deployed in or close to the battlefield) can help in monitoring the target upon the initial information collected by a drone. But it might not always happen. With a view to these capabilities held by UAVs, individuals may be targeted at the time when there are no civilians in the vicinity²⁴⁴. On the other hand, when taking these precautions, one risks losing the actual target. Majority of the attacks with UCAVs are conducted by surprise and without warning. In cases when a targeted individual might flee or take cover upon providing warning to civilians who might be affected, the warning does not to be necessarily issued. In addition, a target's sudden appearance may make it necessary to strike within a very short time. In such instances, the need for a rapid reaction will affect the feasibility of certain precautions²⁴⁵.

The technological advances of UCAVs may enhance compliance with the regulations and facilitate the implementation of precautionary measures. If use of a drone, because it is a relatively precise weapon system and its loiter capability often affords a longer window of opportunity within which to strike, would likely result in less collateral damage than use of other systems (such as a manned aircraft, artillery or ground attack), and if such drone use is militarily feasible, the drone must be employed as a matter of law. But if this is put in practice it still depends on the people in command of the mission and the UCAV. To conclude, assessment whether UAVs are employed in compliance with the principle of precaution shall be performed on case-by-case basis.

To conclude, it would be hard to conclude that the use of drones could never satisfy the requirements and principles of *jus in bello*²⁴⁶. Arguably, UCAVs bears technological and military advantages in helping to ensure principles of distinction, proportionality, military necessity and precautionary. UCAVs possess equipment allowing them to make sure that the target is truly a military one, that a strike will not exceed reasonable amount of civilian casualties (or in best scenario – zero casualties) to gain military aim, that a target has been notified before a strike. But it is not always so. Due to the encumbering nature of battlefield UCAVs are employed in, most of the times they are fighting against non-state parties with loose organizational structure and tricky tactics, for example hiding among civilian population. This results in mistakenly conducted strikes, excessive casualties and superfluous injuries. Moreover, some legal notion, such as 'military advantage', 'feasible measures' do not always bring entire clarity. They are rather dependent on the information available at the moment of an attack. It is the subject-matter of military commanders who are responsible for making decision. In such

²⁴⁴ Weizmann. *Remotely Piloted Aircraft and International Law*, p. 40

²⁴⁵ Weizmann. *Remotely Piloted Aircraft and International Law*, p. 40

²⁴⁶ Sterio. *The United States' use of drones in the war on terror: the (il)legality of targeted killings under international law* // *Case Western Reserve Journal of International Law*, Vol. 45, Fall 2012, p. 211

varying situations, it is recommended, and what looks like the wisest model of thinking, case-by-case approach such be sustained in assessing *jus in bello* principles.

4. Status and responsibility ofUCAV operators

Third aspect of drones' legality is a status of those people who conduct targeting, namely – drone operators. This aspect reflects one of the most remarkable features of warfare by drones. CurrentlyUCAVs are not only deployed by military personal. Significant confusion has surrounded the issue of the status of non-military personnel operating drones, especially intelligence personnel and civilian contractors²⁴⁷. Contractors should be understood as those individuals or employees of an organization, under contract with a government. Other contentious issue refers to the question how and for whom the criminal responsibility shall be asserted in case a war crime has been committed in drone operation²⁴⁸. Normally, every singleUCAV is operated by two or three chains of persons. One person is a pilot who actually flies the drone throughout the mission. Another one is responsible for a control of UAV's sensors and weapons. A ground control station is only needed for launch and recovery²⁴⁹. This exclusive situation calls into existence question of responsibility. The fact that persons operating remote control weapons are distant from an actual battlefield is of no relevance for the establishment of responsibility because a human operator is still responsible for activation, direction and fire of the weapon UAV and its payload. Accordingly, the responsibility for respecting IHL, including the suspension of an attack if IHL rules cannot be respected, clearly belongs to the individual and the relevant party to an armed conflict²⁵⁰. The following discussion assumes that drone operations are being conducted in the context of armed conflict.

The status of the operator is not problematic in legal sense as long as that person is a part of military personnel (in both IAC and NIAC) because members of state armed forces are familiarized with laws of war, wear uniforms, possess chain of command and accordingly can ensure the compliance with international humanitarian law²⁵¹.

²⁴⁷ Michael N. Schmitt. Drone Attacks under the Jus ad Bellum And Jus in Bello: Clearing the 'Fog of Law', p. 324

²⁴⁸ Targeting Operations with Drone Technology: Humanitarian Law Implications // Background Note for the American Society of International Law Annual Meeting, Human Rights Institute, Columbia Law School, March 25, 2011, p. 29

²⁴⁹ Micah Zenko. Transferring CIA Drone Strikes to the Pentagon // Council on Foreign Relations, Policy Innovation Memorandum No. 31, April 2013

²⁵⁰ International Humanitarian Law and the challenges of contemporary armed conflicts, p. 36

²⁵¹ Targeting Operations with Drone Technology: Humanitarian Law Implications, p. 28

It is known that the United States employs UCAVs in Yemen and Somalia with the assistance of intelligence officers from the Central Intelligence Agency (CIA)²⁵². The CIA, according to the public information, controls UAVs from its headquarters in the state of Virginia, in coordination with pilots near hidden airfields in Afghanistan and Pakistan who handle takeoffs and landings²⁵³. But it has not been publicly regarded whether the U.S. government regards the CIA personnel as members of the armed forces or civilians directly participating in hostilities²⁵⁴. Humanitarian law defines the armed forces of a party to a conflict as consisting of “*all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party*”²⁵⁵.

In the event of IAC, the only way for the CIA personnel (as a non-military personnel) to be considered combatants is to prove that they either can fulfill criteria for obtaining combatant status²⁵⁶. By virtue of Article 4 Geneva Convention III²⁵⁷, the personnel of CIA, even with a broad interpretation of the article, hardly meets the requirements of being either a lawful combatant (part of state armed forces), member of a militia or volunteer corps. Alternative way, applicable both in IACs and NIACs, is to belong to paramilitary group or ‘armed law enforcement agency’ that was involved in the armed forces of a state²⁵⁸. In other words, they need to comply with the laws of war and be members of a paramilitary group or ‘armed law enforcement agency’ that have been incorporated into the armed forces. Non-incorporated paramilitary and law enforcement agencies are civilian in nature for the purposes of international humanitarian law²⁵⁹. Incorporation does not depend on the wearing of uniforms or the carrying of arms openly having the fact that operator is far away from the actual place in which a drone is conducting its attack. Rather, it hinges upon whether the drone operators are part of a chain of command that requires the operators to be trained in the laws of war and whether that chain of command enforces the laws of war²⁶⁰. Concerns have been expressed

²⁵² Micah Zenko. Transferring CIA Drone Strikes to the Pentagon // Council on Foreign Relations, Policy Innovation Memorandum No. 31, April 2013

²⁵³ Heyns report, p. 7

²⁵⁴ Targeting Operations with Drone Technology: Humanitarian Law Implications, p. 28

²⁵⁵ Additional Protocol I, Article 43 (1)

²⁵⁶ Geneva Convention III, Article 4

²⁵⁷ Article 4: “Members of other militias and members of other volunteer corps, <...> belonging to a Party to the conflict and operating in or outside their own territory, <...> provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions: (a) That of being commanded by a person responsible for his subordinates; (b) That of having a fixed distinctive sign recognizable at a distance; (c) That of carrying arms openly; (d) That of conducting their operations in accordance with the laws and customs of war”

²⁵⁸ Additional Protocol I, Article 44(3)

²⁵⁹ Michael Schmitt, Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees // Chicago Journal of International Law, Vol. 5, 2005

²⁶⁰ Alston. Study on targeted killings, paragraph 73

whether the CIA, as a covert agency, can effectively establish a command and control structure with the necessary requirements of oversight, accountability and transparency for the regulation of combat functions in armed conflict²⁶¹. They neither have knowledge of the rules of laws of war and the rules of engagement, nor special training, special uniforms or other insignia for distinguishing themselves. For example, the U.S. DoD requires members of DoD components (armed forces including) to “*comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations*”²⁶², while in contrast, whether the CIA has directives, manuals and procedures reflecting humanitarian law principles is unknown. Some scholars even suggest that the CIA are free from constraints imposed by the laws of armed conflict while DoD “*is legally bound to execute its military operations in accordance with the laws of armed conflict, <...> the CIA, however, is under no similar requirement regarding international law*”²⁶³. But the assumption that CIA does not apply same standards as the military in the context of drone strikes is rejected by the majority of scholars.

Article 83 of AP I requires that parties include the study of the Geneva Conventions and Protocols in their programs of military instruction. Article 82 sets a requirement for legal advisers to be available to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces. For example, the U.S. military has a strong tradition of training its personnel on the laws of war and maintains highly experienced military lawyers who assist in cases when and how to IHL standards shall be applied, particularly in complex and uncertain situations. It is not known whether CIA personnel making these determinations are trained in the law of armed conflict with the same rigor, or able to access appropriately qualified legal advisers²⁶⁴. As far as known today, CIA personnel conducting drone strikes began receiving laws of war training, but it is not known whether CIA personnel are or able to access appropriately qualified legal advisers. Less clear is how the CIA’s chain of command enforces the laws of war, making violations more likely²⁶⁵. Therefore, operator from CIA personnel, in current circumstances, is unprivileged to conduct hostilities and control theUCAV (is unlawful combatant) and breaches IHL regulations²⁶⁶.

If CIA personnel have not been incorporated into state’s armed forces, they could be considered civilians directly participating in hostilities²⁶⁷. They may conduct targeted killings

²⁶¹ Targeting Operations with Drone Technology: Humanitarian Law Implications, p. 31

²⁶² *Ibid.*

²⁶³ Kathryn Stone. ‘All Necessary Means’ – Employing CIA Operatives in a Warfighting Roles Alongside Special Operations Forces // U.S. Army War College Strategic Research Project 16, 2003

²⁶⁴ Targeting Operations with Drone Technology: Humanitarian Law Implications, p. 35

²⁶⁵ Alston. Study on targeted killings, paragraph 72

²⁶⁶ M. E. O’Connell. Unlawful killing with combat drones a case study of Pakistan, 2004-2009, p. 8

²⁶⁷ Alston. Study on targeted killings, paragraph 71

but also be killed themselves as well as be charged with murder under the domestic law of any country in which they conduct targeted drone killings, because according to the Article 51 of Additional Protocol I, their rights associated with combatant status (special treatment as a prisoner of war) and immunity from prosecution for acts is forfeited upon such acts. In NIACs, their rights and responsibilities are defined by the common Article 3 and Additional Protocol II.

Less obvious are scenarios in which civilians are not controlling the UCAV, but conduct supporting work, for example, fuelling or maintaining it. Initially, the ICRC held an attitude that in such cases ‘single step causation’ approach, i.e. that the respective conduct leads “*in one causal step*” to the impairment, is valid²⁶⁸. Later on, this approach has been challenged referring to the fact that the contemporary reality of warfare involves a multitude of personnel and different personnel conduct different steps. It means single-step-approach may not effectively assess the nexus between conduct and the consequences in cases like this. Subsequently, approach has been expanded including all conduct that is ‘integral’ for causing the harm²⁶⁹. In reality, fuelling the UAV or taking other measures necessary for deployment or its maintenance, as they are preparatory and aim at causing the harm, would amount to a direct participation in hostilities²⁷⁰ with respective consequences of deprivation of civilian protection as well as exposition to a collateral damage and responsibility owing to the Article 51 of AP I.

Degree of involvement of each person is uncertain – be it a person operating UAV or a person merely responsible for the maintenance of UAV. Therefore, it has to be assessed on a case-by-case basis. It is important to note that the status of drone operators – civilian contractor, intelligence officer or member of state armed forces – has no bearing when targeting results in committing a war crime which is a violation of international humanitarian law. Then person who performs a drone strike as well as who authorizes it may be prosecuted for war crimes²⁷¹. Challenges arise as to the limited capacity of an operator to process a large volume of data, including contradictory data at a given time and the supervision of more than one such system at a time. Drone strikes are reliant on the information collected by the UAV itself or with the assistance of locals of a certain area²⁷². Moreover, operations performed by UCAVs often lack publicity (presumably due to the agency’s status). This leads to uncertainty if an operator is fully able to adhere to the relevant rules of IHL in those circumstances²⁷³.

²⁶⁸ DPH Guidance, paragraph 55

²⁶⁹ Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: a critical analysis*, p. 27

²⁷⁰ Dinstein, p. 371

²⁷¹ Phillip Alston. *Study on targeted killings*, paragraph 72

²⁷² Rob Blackhurst. *The air force men who fly drones in Afghanistan by remote control* // *Telegraph News*

²⁷³ *Targeting Operations with Drone Technology: Humanitarian Law Implications*

In conclusion, international humanitarian law sees no problem UCAVs to be employed by state armed forces or by any other military personnel of a state as long as they fulfill criteria obtaining status of a combatant. However, problem emerges if UCAVs are operated by non-military personnel, as it is in case of CIA led operations. They are either treated as unlawful combatants or civilians directly participating in hostilities. To avoid this, there are two ways: a non-military personnel has to be incorporated into state armed forces or combatant criteria (under Article 4 of GC III) has to be fulfilled. As of now, it is not clear about any of these options because operations performed by CIA personnel lack public information.

Conclusions

1. Hypothesis of the thesis – unmanned combat aerial vehicle (drone) as such is legal and its legality depends on its use – has been confirmed. However, drones' use is subject to conditionality. Since drone operations are mainly performed in covert or ambiguous manner and clear-cut answers cannot be provided, it is up to states to guarantee to what extent UCAVs' operations comply with IHL rules and principles.
2. Through analysis of Chicago Convention and HPCR Manual provisions, it is concluded that drone itself should not be considered as a weapon, but rather as a carrier of a weapon. UCAVs are subject to a controlled landing and takeoffs as well as redeployment what separates them from cruise missiles. Moreover, Article 3 of Chicago Convention stipulates that any aircraft used in military services is considered state aircraft, regardless that they carry weapons. The mere ability of UCAVs to deploy weapons does not qualify for military aircraft, but because they fulfill criteria enshrined in customary law and HPCR Manual, UCAVs shall be treated as state military aircrafts. In cases of doubt, assessment of the status of UCAVs should be carried on a case-by-case basis.
3. A payload (armament) attached to drone is a weapon and its use may result in illegality. UCAV should be seen entirely, not separating vehicle from its armament. According to the Commentary to Additional Protocol I and HPCR Manual, UCAV, in the widest sense, may be regarded as 'mean of warfare' as any other instrument capable of conducting attacks and causing injuries or damaging objects.
4. The way UCAVs are used – 'method of warfare' is subject to prohibitions and limitations set out in specific international treaties and longstanding rules of IHL. With the armament currently employed, it is not intended to breach neither rules of treaty or customary law, nor general rules, applicable to all weapons, means and methods.
5. Principle of distinction has to be equally respected in conducting targeted killings by drones. In case of IAC, drone strikes should be limited only to members of the armed forces of a party to the conflict (combatants) and military objectives. In NIAC, even though the term 'combatant' is not explicitly recognized, but principle of distinction is still valid because of its customary nature. Civilians who engage in temporary or sporadic conduct may only be targeted for the duration of their participation in the hostile conduct. Having in mind that the great majority of drone strikes are carried out while countering terrorism, it is not rational to avoid including into DPH category persons who provide recruitment or financial and political support for an organized armed group. Thesis

concludes that decision whether a civilian could be targeted for taking direct part in hostilities should be made on a case-by-case basis.

6. Individuals with 'continuous combat function' may also be lawfully targeted. CCF focuses on the membership in an organized armed group, rather than on actions of a person. Non-state party armed groups are included in the term. Such individuals with CCF are targetable for so long as their membership in the group lasts. Adherence to distinction principle in drone strikes depends on the determination of the status of these non-state groups. Limitations in intelligence collection and the quality of such information, UCAV may mistakenly target persons as having military significance or status, posing particular challenges for complying with the fundamental IHL rule of distinction. On the contrary, UCAVs are capable to examine individual's movements and patterns of conduct to ascertain legitimate targets and ensure the principle.
7. Thesis concludes that it is controversial to state that UCAVs could never satisfy the requirements and principles of *jus in bello*. Principles of proportionality, military necessity and precautionary are quite complex to apply in practice. However, due to the UCAV's technological capabilities, they are better at satisfying proportionality test, ensuring that the target is truly a military one, that a target has been notified before a strike. Implementation of these principles depends on the person in charge of UCAV operations. Therefore, assessment whether UCAVs are employed in compliance with the principles of *jus in bello* shall be performed on case-by-case basis.
8. The status of the UCAV's operators is not problematic in legal sense as long as they comprise a part of military personnel (both in IAC and NIAC) or, in the event of IAC only, satisfies criteria established in Article 4 of III Geneva Convention for acquiring combatant status. Yet, drones has been started to be operated by non-military personnel.
9. There is two ways for non-military personnel to be considered lawful operators: in the event of IAC, they may prove that they fulfill criteria for obtaining combatant status (Article 4 of Geneva Convention III). Alternative way, applicable both in IACs and NIACs, is to belong to paramilitary group or 'armed law enforcement agency' that was involved in the armed forces of a state (Article 44(3) of Additional Protocol I).
10. The personnel of CIA, under current circumstances and information that are publicly accessible, even with a broad interpretation of the Article 4 of GC III hardly meet the criteria obtaining combatant status. They neither have been incorporated into state's armed forces as paramilitary group or 'armed law enforcement agency'. In result, they are civilians directly participating in hostilities and may accordingly be targeted or charged with murder or war crimes.

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Summary

This thesis analyses the question of legality of unmanned combat aerial vehicles (drones) in accordance with international humanitarian law. Hypothesis is raised that drone is no different from other means and methods of warfare. In an effort to confirm or deny a hypothesis, thesis is divided into three-fold analysis: legality of UCAVs as such, legality of the use of UCAVs and the legality of UCAVs' operators are examined.

First part of thesis starts with historical overview of UCAVs, the reasons of their increasing attractiveness, definition and determination of level of autonomy. Second part of thesis embarks on the analysis whether UCAV as such is lawful under the international humanitarian law. Examining and comparing provisions of Chicago Convention and HPCR Manual, it is proven that drones are carriers of missile and should be considered state military aircrafts. In its entirety, drone is a 'mean' of warfare under IHL, but by nature it is not designed to cause excessive civilian casualties or superfluous suffering therefore and is not unlawful as such. However, the payload employed with UCAVs is a weapon and their use ('method') might render them illegal. This is a subject-matter of a third part of thesis. Hereby, the issue is divided in two parts: 'who may be targeted?' and 'how one may be targeted?', the former reflecting principle of distinction of IHL and the latter – principles of proportionality, military necessity and precaution. The content and scope of these principles are analyzed as well as their practical implementation in the context of UCAVs employment. Last – forth – part of thesis looks into question whether operators of UCAVs of non-military nature are lawful. Specific concerns about their status and ways to legalize it are examined.

In the final part, conclusions are drawn on the grounds of a research made. At the same time the hypothesis is found to be proven. Thesis concludes that it is not entirely true to state that drones do not satisfy principles of *jus in bello* and therefore are unlawful. UCAVs bear technological and military advantages in safeguarding these principles, but due to the encumbering nature of battlefield UCAVs are employed in and secrecy of operations, clear-cut answers cannot be provided. Moreover, sound implementation of these principles is also critically reliant on the information available about the target at the moment of strike. Therefore, case-by-case approach assessing these principles is suggested.

Santrauka

Šis magistro baigiamasis darbas analizuoja nepilotuojamų kovinių orlaivių (toliau – NKO) teisėtumą ir atitikimą tarptautinei humanitarinei teisei. Iškeliama hipotezė, kad nepilotuojamas kovinis orlaivis niekuo nesiskiria nuo kitų legalių kariavimo priemonių ir metodų, todėl yra teisėtas. Siekiant patvirtinti ar paneigti hipotezę, darbo tyrimas skiriamas į tris dalis: tiriamas paties nepilotuojamo kovinio orlaivio, kaip tokio, teisėtumas, nepilotuojamo kovinio orlaivio panaudojimo teisėtumas ir nepilotuojamų kovinių orlaivių valdytojų teisėtumas.

Darbas pradedamas NKO istorine apžvalga, jų gausėjančio naudojimo priešasčių ir autonomijos lygio aptarimu. Antroji darbo dalis analizuoja, ar NKO, kaip toks, yra teisėtas tarptautinės humanitarinės teisės prasme. Pasitelkiant ir lyginant Čikagos Konvencijos bei Tarptautinės teisės, taikytinos oro karui Vadovo nuostatas, įrodoma, kad NKO, kaip toks, yra kovinio užtaiso nešėjas ir turi būti laikomas kariniu valstybės orlaiviu. Visumoje, NKO yra teisėta kariavimo „priemonė“ tarptautinės humanitarinės teisės prasme, todėl kad jis nėra sukurtas specialiai sukelti per dideles civilių aukas ar nereikalingus sužalojimus. Tačiau kovinis užtaisas, kurį neša NKO ir tai, kaip jis yra panaudojamas („metodas“), gali paversti NKO neteisėta kovos priemone. Tai yra analizuojama trečiojoje darbo dalyje. Čia pat klausimas yra išskirstomas į dvi dalis: „į ką gali būti taikomasi?“ ir „kaip turi būti taikomasi?“, pirmajam reiškiant atitikimą atskyrimo principui, o pastarajam – proporcingumo, karinio būtinumo ir atsargumo principams. Ši darbo dalis taip pat analizuoja šių turinių turinį, apimtį bei jų praktinį įgyvendinimą panaudojant NKO. Paskutinė – ketvirtoji – darbo dalis tiria klausimą, ar ne karinės paskirties NKO valdytojai ar personalas gali būti laikomi teisėtais. Su jų statusu susiję klausimai ir galimi sprendimo būdai yra nagrinėjami šioje dalyje.

Darbo pabaigoje, remiantis atliktu tyrimu, formuluojamos išvados bei įrodoma, kad darbe iškelta hipotezė pasitvirtino. Taip pat darbo pabaigoje prieinama išvados, jog teigti, kad NKO neatitinka teisės karo sąlygomis (*jus in bello*) principų ir todėl yra neteisėti, nėra visiškai teisinga. NKO suteikia technologinį ir karinį pranašumą garantuojant šių principų laikymąsi, bet dėl išskylančių kliūčių kovos lauke ir NKO operacijų slaptumo, aiškūs atsakymai negali būti duoti. Be to, patikimas šių principų įgyvendinimas taip pat priklauso ir nuo turimos informacijos apie taikinį NKO atakos metu. Todėl šių principų laikymosi vertinimas turi būti atliekamas kiekvienu individualiu atveju.