

THE LEGITIMACY OF UNMANNED AERIAL VEHICLE USAGE IN INTERNATIONAL HUMANITARIAN LAW

L.Ya Esti Pratiwi¹

¹Faculty of Law Universitas Muhammadiyah Surabaya, Indonesia

E-mail Corespondent: l.ya.esty.pratiwi@um-surabaya.ac.id

Abstract

The use of drones as a weapon in the battlefield has raised various issues, especially concerning the protection of civilian populations and compliance with the principles of IHL (International Humanitarian Law). Although there are no specific international regulations governing the use of drones, flexible principles of IHL can be applied. However, the use of drones for armed attacks has raised questions about the legality and state responsibility for their impact. In the context of the United States, the use of drones has raised concerns regarding violations of IHL and international law. Protecting civilians under IHL and distinguishing between military and non-military targets are primary concerns in assessing the use of drones as weapons. Furthermore, the need for stricter international regulations and state accountability in the use of drones is also highlighted in this article. Thus, this article presents an in-depth analysis of the legal challenges and implications of drone use in wartime situations, as well as emphasizing the need for a clear regulatory framework within the context of international law.

Keywords: *Civilian population, Legality and accountability of states, International law*

I. INTRODUCTION

The advancing science and technology lead to shifts in values and regulations in warfare. Conventional warfare operates within established rules that have become customary in the international community. However, with technological advancements in weaponry, there is potential for changes in values and regulations in warfare. This also results in changes in the protection of civilian populations during conflict. Unmanned Aerial Vehicles (Drones) are one such advancement used by nations as weaponry in warfare. However, the use of drones often raises various issues not previously addressed in conventional laws of war. Regulations governing the use of drones become crucial as they can have significant impacts on the protection of civilian populations.

Drones were first used by the military during the era of World War I as a means of training, primarily for anti-aircraft exercises. As they evolved, drones began to be employed as guided missiles during World War II. Subsequently, in the Vietnam War and the conflicts in Bosnia, drones were utilized for intelligence-gathering activities to collect information from enemy forces. In 1999, during the Kosovo conflict, the idea emerged to arm drones with weapons, transforming their function, which at the time was primarily focused on information gathering (Benjamin Medea, 2012).

The use of drones for military purposes began to be used massively by the United States since the 9/11 attacks, in the fight against terrorists. In 2002, the CIA, the American intelligence agency, first used the Predator drone, targeting Osama Bin Laden in the province of Paktia,

Afghanistan. However, the previous use of drones in counterterrorism efforts has the potential to become a weapon of mass destruction if their use is not regulated within international law.

According to KGPH. Haryomataram (Haryomataram, 2005), the main purpose of humanitarian law is to provide protection and assistance to those who are victims of war, whether they are actively involved in hostilities or not. It can be concluded that humanitarian law does not prohibit war in essence, but regulates it. In this regard, humanitarian law regulates the means and methods of warfare, as well as the protection of war victims (Andrey Sudjatmoko, 2014).

International humanitarian law encompasses several principles including the principle of military necessity, chivalry principle, and principle of distinction. Under the principle of distinction, a warring state is obliged to identify the objects to be attacked. The state must determine whether the object to be attacked is a military object or a civilian object. Additionally, the state is obligated to identify the subjects to be attacked, which are divided into Combatants, Non-Combatants, and Civilians. When using drones, a warring state must respect this principle of distinction. However, in practice, the use of drones often leads to violations of the principle of distinction. Moreover, it is very difficult to identify both the objects and subjects of attack when attacks are conducted using drones.

In 2002, the United States conducted an attack on Afghanistan using drones in an attempt to capture Osama Bin Laden. Several days later, journalists on the ground began reporting that drones were actually targeting civilian individuals carrying scrap metal. This news raised public concerns regarding the policy of drone usage in America. However, drones continued to be employed by the United States in the battlefield. A think tank, the Stimson Center, in Washington, reported in the middle of this year that the use of drones in the field actually posed a threat to stability in the war zones. One human rights watchdog organization, Amnesty International, even stated that the US drone usage was outside of legal and humanitarian boundaries. On its website, Amnesty International mentioned, "International law permits the use of lethal weapons but within very narrow limits. (Amnesty International) calls on the US government to adhere to applicable international law."

Responsibility for the use of Drones that do not comply with the rules of IHL. The rules of IHL regarding military aircraft apply to Drones: The Hague Conventions and Additional Protocol of 1977, International Customary Law in the field of IHL, including in the draft RAW (Rules of Air Warfare) The Hague 1922-1923 formulated by the Committee of Legal Experts. For example, drones may not be dropped into heavily populated areas just like the rules for military aircraft (The Hague Convention IV) RAW regulates the use of wireless equipment including aircraft. It can also be used to limit the use of drones. However, RAW has not yet become a convention. But its rules have been used by states in the practice of warfare, thus binding based on customary international law. The principle of distinction related to aerial combat is relevant to drones.

II. PROBLEM FORMULATION

Based on the previous introduction, this research examines the following legal issues:

1. The validity of drone usage in wartime situations based on international law?
2. Regulation of state accountability for damages caused by the use of drones in wartime situations?

III. RESEARCH METHODS

The problem-solving approach utilized in this research is the normative approach, which is a legal research method where the author studies and examines issues that arise within the international community.

IV. RESULTS AND DISCUSSIONS

1. The legitimacy of drone usage in wartime situations based on International Law provisions

The unmanned aerial vehicle, more commonly known as drones, are unmanned aircraft with remote control specifically designed for military purposes. These aircraft fall into the category of the most modern combat aircraft, equipped with automatic autopilot configuration, various sensors, and programmed for routine maneuvers according to preset settings (Taylor, A. J. P.). Basically, various types of drones are divided into two main categories: drones specifically programmed for reconnaissance and surveillance, and drones armed with missiles or bombs. These unmanned combat aerial vehicles have the added value of not placing pilots in high-risk situations. The configuration of the use of these unmanned aircraft is aerodynamic, tactical, and provides economic advantages.

The use of drones can be directed towards activities that are not intended for use as weapons (non-lethal purpose) and used as weapons (lethal purpose). Examples of non-lethal purpose include surveillance, gathering information, and transporting humanitarian aid. For instance, America employs drones to monitor its border with Mexico (Loc Cit, Benjamin Medea, hlm 15). When equipped with rockets or missiles, drones are utilized as weapons.

The development of weapons used in warfare, conflicts, and for national defense and international security remains within the regulatory framework of Article 36 of Additional Protocol I to the 1949 Geneva Conventions. This article aims to ensure that the development of armaments used by both states and international organizations respects, safeguards, and does not exceed the boundaries of the principles of international law that already exist (Agenda. 2012). The development of weapons used in warfare, conflicts, and for national defense and international security is governed by the regulatory framework outlined in Article 36 of Additional Protocol I to the 1949 Geneva Conventions. This article is designed to ensure that the development of armaments, whether by states or international organizations, adheres to, protects, and does not surpass the boundaries set by existing principles of international law (Afhseen John Radsan, 2011).

The use of drones in wartime is one of the new challenges in international humanitarian law. International humanitarian law recognizes several principles, including the principle of military necessity, the principle of chivalry, and the principle of humanity. Every action taken during wartime must be based on these principles and principles in international humanitarian law. In international humanitarian law, there are several principles that have been recognized as customary international law. One of the principles recognized as customary international law is the principle of distinction. The principle of distinction requires a state to distinguish between military and civilian personnel as well as military and civilian objects.

The use of drones in wartime often raises new issues regarding whether the use of drones in wartime is contrary to the principle of distinction as regulated in international humanitarian law. Based on the decision in the Katanga case (Katanga, ICC-01/04-01/07). The use of drone evidence in the form of aerial observation is permitted within the International Criminal Court,

thus legitimizing the use of drones for aerial surveillance. However, whether the use of drones equipped with missiles or rockets is permitted under international humanitarian law remains a question. One condition for an attack under international humanitarian law is that it must not be indiscriminate (widespread) and must not be targeted at civilian objects or populations (Nils Melzer, 2009). However, can it be ensured that attacks carried out using drones will not be indiscriminate? In attacks conducted by the United States, civilian objects and populations are often targeted. Identification based on behavioral patterns rather than specific individual identification is a violation of international humanitarian law.

The United States often justifies civilian casualties resulting from US drone operations as unavoidable consequences. However, for such casualties to be classified as unavoidable, the attack must be based on military necessity. If attacks by the United States are not based on military necessity, then the use of drones in warfare by the United States can be classified as a violation of the principle of distinction. According to Rubiyanto (Rubiyanto,2016), every military conflict that arises always results in more civilian casualties, hence there needs to be international pressure on militaries violating humanitarian law through political sanctions, economic sanctions, and military sanctions.

UN Security Council Resolution 1373 (2001) states that states may take necessary steps to combat acts of terrorism. This can lead to broad interpretations where a state might engage in repressive actions such as using drones to attack individuals on target lists, or it could be interpreted that individuals suspected of terrorism should be brought to trial, which would be more in line with the UN Charter's goal of avoiding the use of armed force in any form and respecting human rights and international humanitarian law.

The use of drones as weapons is carried out through three methods: providing air support for ground troops, conducting aerial patrols to search for suspicious activities, and carrying out targeted killings against suspected militants.

The operation of drones using the targeted killing method involves targeting individuals to be attacked by drones for the purpose of killing them. This contradicts the humanitarian principles upheld in international humanitarian law. The objective should be to weaken rather than kill. Efforts should first be made to capture the individual; if that's not possible, then injuring them should be attempted, and only if that's not feasible should killing be considered. The number of casualties in this regard should be minimized as much as possible.

The use of drones adheres to the targeted killing method, whereby the objective of a drone operation is to destroy a target. Moreover, targeted killing can be seen as depriving an individual of the right to defend themselves in a legitimate legal process because someone deemed guilty and targeted for a drone operation is not intended to be captured and tried. The process of determining guilt or innocence has been carried out by the government without going through a judicial process.

2. Government Regulations and Accountability in the Use of Drones During Wartime

If we look at the case of America, as one of the participants of the Geneva Convention and the Hague Convention, America is bound by the regulations of humanitarian law and is obliged to comply with all provisions within it. By conducting drone bombings targeting civilian objects, America has violated the principle of distinction. Additionally, the attacks carried out by America can be categorized as widespread and systematic. In the context of the use of drones during

wartime by America, it has violated the provisions of international humanitarian law, thus the concerned state must be held accountable for the unlawful actions taken.

Therefore, if we observe the use of drones in warfare conducted by America, it has violated international humanitarian law. In this regard, every action taken by the United States has fulfilled the elements of state responsibility. Furthermore, the absence of justifiable reasons to excuse the actions of the United States proves that it has no grounds to be exempt from its accountability. Hence, the United States should be obligated to undertake the restoration of damages caused by drone attacks conducted by it.

In principle, the use of weapons between states is prohibited under international law. Article 2(4) of the Charter of the United Nations (UN) states:

"all members of the United Nations shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of the United Nations."

In this article, the terminology "all members" is used, meaning that this rule is not only binding on member states. Based on the decision of the International Court of Justice (ICJ) in the case of Nicaragua vs. the United States, Article 2(4) is customary international law applied to all countries, not just member states. From Article 2(4) of the UN Charter, it can be seen that there is a clear prohibition against the use or even the threat of force that violates the territorial integrity or political freedom of a state, or other actions contrary to the purpose of the UN. Therefore, it can be seen that the UN does not intend for the use of armed force to coerce other countries, even in a lesser form, such as threats of violence.

The prohibition of the use of force (the use of armed force) as stated in Article 2(4) can be interpreted that whether the use of force is on a large scale, such as in war, or not, it still contradicts the provisions of this article. However, this article does not prohibit the use of political or economic pressure on other countries.

Article 2(4) also emphasizes that the threat of the use of force constitutes a violation of this provision. For example, in 1994, artillery and tanks belonging to Iraq were placed around the border of Iraq and Kuwait with positions aimed at Kuwait within shooting range along with ammunition ready to fire. This condition was declared by the United Kingdom as a threat to Kuwait and violated the provisions of Article 2(4) of the UN Charter (D. J. Harris, 2004).

The prohibition of the use of armed force among the member states of the UN is reaffirmed in the 1965 Declaration on The Inadmissibility of Intervention in The Domestic Affairs of States and The Protection of Their Independence and Sovereignty. This declaration states that the use of armed force for the purpose of intervention in another country is prohibited. Thus, it can be understood that within the framework of the UN, the use of armed force against a country is not acceptable and its usage is prohibited.

The right to self-defense is regulated in Article 51 of the UN Charter, which allows for its implementation either individually (individual self-defense) or collectively (collective self-defense). Self-defense is only permissible when a country experiences an armed attack and must defend itself from such an attack. In other words, the country must be attacked first. The use of armed force for self-defense can only be carried out until the UN Security Council takes over the situation to restore peace and international security in that area. Therefore, the use of armed force by a country for self-defense must be stopped as soon as the UN Security Council takes action in

that area. Any self-defense actions, whether individual or collective, must be reported to the UN Security Council as soon as they are carried out.

The US Secretary of State, Daniel Webster, stated in 1982 that self-defense is permitted when such action is immediate, significant, and there is no other choice, and there is no time to reconsider (Philip C. Jessup, 2012). This is based on the notion that when attacked, a country must act immediately to protect its interests and there is no time to seek approval from the international community.

The use of armed force is also possible if such action is authorized by the UN Security Council. Articles 43-50 of the UN Charter allow for such actions to be taken. Any UN member state may be requested by the UN Security Council to provide armed forces for use in an armed conflict with the aim of restoring peace and international security in that area. However, such actions must be carried out with authorization from the UN Security Council. A country is not permitted to use armed force against another country unilaterally.

In the context of Somalia, for instance, multinational forces are authorized by the UN Security Council to combat piracy *jure gentium* and armed robbery at sea occurring in Somali waters and offshore areas. This authority is granted based on UN Security Council Resolutions such as Article 7 of Resolution 1816 (2008) (United States, 2008), Article 10 of Resolution 1846 (2008), Article 6 of Resolution 1851 (2008), Article 7 of Resolution 1897 (2009), and Article 7 of Resolution 1950 (2010). These resolutions permit countries and regional and international organizations cooperating with the Transitional Federal Government (TFG) to conduct operations to address piracy *jure gentium* and armed robbery, including entering Somali territorial waters and taking action against such crimes, such as actions taken against piracy conducted on the high seas.

The use of armed force within a country's territory is also possible when the concerned state consents to it within its territory. This is based on the consideration that a state has sovereignty within the boundaries subject to its sovereignty. One example of the use of armed force in this context is the military intervention carried out by France in Mali to assist the Malian government in suppressing separatist movements in the country. France's intervention was done at the request of the Malian government conveyed through President Dioncounda Traore. The use of drones as weapons in armed conflicts should also be based on these three considerations. Therefore, in further discussions, an analysis will be attempted to determine whether the use of drones as weapons thus far has been in accordance with the considerations outlined above or not.

3. Drone Usage Regulations

The use of drones as weapons is a consequence of the rapidly advancing technology of today. However, currently, there is no specific international regulation governing the use of drones, whether for military purposes or not. Nevertheless, international humanitarian law can flexibly apply to the development of highly advanced weapon technology, based on the provisions in Article 36 of Additional Protocol I of 1977, which states 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.”

Thus, it can be seen that international law encompasses all developments in weapon technology because, in the development of weapons or methods of warfare, states have an obligation to ensure that their development does not contravene international humanitarian law.

The legal obligations contained in Article 36 apply not only to parties to agreements but to all states developing weaponry and methods of warfare. However, the regulations in this Article do not specifically state how the legality of a weapon or method and the conduct of warfare should be determined. Furthermore, the rules in Article 36 only provide general provisions and do not specifically regulate particular technologies or methods of warfare.

The absence of specific legal rules governing the use of drones, especially concerning their use as weapons, may open up opportunities for violations of international humanitarian law when armed drones are used in armed conflicts. John Brennan, the Assistant to the President of the United States for Homeland Security and Counterterrorism, stated that there are at least 3 legal justifications for the use of drones as weapons:

1. The government obtained congressional authorization in 2001 for the use of all forms of force against terrorism.
2. In the absence of authorization from Congress, targeted killing through the use of drones is permitted as a form of national defense under Article II of the United States Constitution.
3. This is also allowed as a form of self-defense under International Law.

As explained above, congressional authority to the government has no time, place, and target limitations. When associated with the right of self-defense of the United States following the 9/11 attacks, this becomes an issue. In considering this matter, the opinion expressed by the Secretary of State of the United States, as outlined above, will be used, stating that an act of self-defense must be immediate, substantial, with no alternative, and there is no time to reconsider. First, the right of self-defense must be exercised immediately when the 9/11 attack occurs as a form of protection. Second, the urgency of the situation requires swift action. The reality is that, as a result of the 9/11 attacks, America has continued its counterterrorism operations from 2001 to the present, which are declared as self-defense against the attacks that occurred. Therefore, the justification for using drones as weapons for self-defense is not justified.

The implementation of targeted killing methods considered legitimate under the US Constitution must also be carried out without disregarding international humanitarian law, which requires that the use of weapons to kill be carried out as a last resort rather than the first, as has been practiced by the United States. The absence of rules regarding the use of drones blurs the line between war and peace. This is evident in the use of drones by the United States in the war against terror. While the use of drones as weapons is real, there has never been a declared war.

Heather Hurlburt stated that if we face a future without rules regarding drones on a local or national scale in the United States, then we are facing a future without any rules regarding drones at all (Benjamin Medea). This concern is based on the mandate of Article 36 of Additional Protocol I of 1977, which requires states to regulate the development of weapon technology and latest methods of warfare. In this regard, states currently using drone technology, especially those employing it as a weapon, must formulate specific rules regarding its use both for lethal and non-lethal purposes.

The formulation of legal rules regarding drone usage, particularly concerning its use as a weapon, is crucial today due to the current trend towards autonomous drones. This means that there's no longer a need for human control over drones, as they will operate autonomously according to the pre-programmed mission. Indeed, autonomous drones do not necessarily mean they cannot be operated in accordance with the principles of distinction in international humanitarian law, as target detection and identification will be carried out through sensors capable of distinguishing between military and non-military targets. However, relying on machines to

make this crucial distinction eliminates the human element in armed conflicts and poses the potential for fatal machine errors in armed conflicts.

V. CONCLUSION

The use of drones as weapons has been carried out without adequate legal regulations. Article 36 of Additional Protocol I of 1977 only contains general provisions regarding the development of weapon technology and methods of warfare but does not specifically regulate the use of drones.

The use of drones as weapons should be formulated within a specific legal framework. Therefore, countries currently utilizing drone technology should agree to establish such legal regulations to avoid legal gaps in regulating the use of drones, especially in armed conflicts. The formulation of these legal regulations should also consider international humanitarian law.

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