MEKELLE UNIVERSITY

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PROTECTION OF CIVILIANS DURING DRONES STRIKE vs. THE RESPONSIBILITY UNDER THE RULES OF IHL

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ABSTRACT

This is a research aimed to address whether International humanitarian law is compatible to protect civilians during drones strike. Due to advancement of technology, modern means of warfare are in use therefore this paper will assess how IHL govern civilian harm because of drones strike. In addition to this the paper is intended to assess how IHL impose responsibility on those parties who are in violation of the rights of civilian. The Doctrinal research method is used, so that, relevant legal provisions, books, journals etc. are used.

ACRONYMS

AP I: Additional Protocol One

AP II:Additional Protocol Two

Art.: Article

CIA: Central Intelligence Agency

GA: General Assembly

ICRC: International Committee of the Red Cross

IHL: International Humanitarian Law

ILC: International Law Commission

UAVs: Unmanned Aerial Vehicles

UK: united Kingdom

UN: United Nation

US: United States

WWII: world war second

CHAPTER ONE

1. Introduction

International humanitarian law form a major part of public international law and comprises the rule which in times of armed conflict, seek to protect people who are not or no longer taking part in the hostilities and to restrict the methods and means of warfare employed[1]. Shortly it is international treaty or customary rule which is specifically intended to resolve matters of humanitarian concern arising directly from armed conflict whether of an international or non-international nature. For humanitarian reasons those rules restrict the right of the parties to a conflict to use the methods and means of warfare of their choice and protect people and property affected or liable to be affected by the conflict.

More specifically international humanitarian law provide the protection of civilians and civilian population in armed conflict. It is the corn stone of international humanitarian law with strict rule defining the obligations and duties of parties to a conflict towards civilians[2].

Even though such protection are provided, theviolation of civilians right are still continued by different parties, more specifically in recent decades states use different modern technology during war fare, and drones are one among them so the researcher tries to see such issue that are related with violation the rights of civiliansby using drones as a means of warfare.

[1]International Committee of the Red Cross, International Humanitarian Law, October 2002.
[2]Id.

1.1Back ground of the study

When the Second World War broke out, civilians were not provided with effective protection under any convention or treaty. The First World War was already made clear that the few provisions on civilians in the 1907 Hague regulations were inadequate for their protection. This prompted the international committee of Red Cross to propose a project dealing with the fate of civilians and servicemen at the same time. Yet, against the back drop of the League of Nations engaged in the quest for eternal peace, the power considered that the creation of a convention dealing with the status of civilians in war time would be in appropriate, consequently, the diplomatic conference of 1929 discussed the treatment of service men only. A draft of the ‘’civilian convention ‘’ was nonetheless adopted in 1954 on the occasion of the international conference of the Red Cross in Tokyo[3].

However, the out brake of the Second World War prevented the convening of a diplomatic conference and these frustrated the conclusion of an international convention. In particular, civilians in occupied territory were left without adequate protection and faced horrendous practices during the Second World War, crowds of civilians being deported to far away camps where they went through incredible suffering and where many among them meet with a ghastly death. The nightmare of many the Second World War should become the birth of the Geneva Convention as we know and apply them until today. The diplomatic conference held at Geneva in 1949 results three revised conventions and the long awaited Geneva Convention four relative to the protection of civilian’s persons in time of war[4].

The 1949 Geneva Convention have revolutionised contemporary international humanitarian law, particularly as regard the treatment of civilians. In addition, the fourth Geneva convention clearly elaborated the law of occupation, while the 1907 Hague regulations were intended to regulate relations between states, and hence focused on the rights and duties a state acquired by occupying an enemy territory during war[5].The fourth Geneva Convention was concerned with the rights of individual and puts the emphasis on the protections of civilians in the hands of an enemy power. Although the Fourth Geneva convention provide protection to civilians, in recent decades because of the advancement of technology other means and methods of warfare are used, by which this means and methods of warfare have

[3] Belligerent occupation and the fourth Geneva convention;www.books,open.edition.org/94,last visited on October 29, 2016.
[4] Id.
[5] Id.

great impact on the rights of civilians and drones are one among them .for better understanding let me say something about drones.

Unmanned aerial vehicles (UAVs), also known as drones, are aircraft either controlled by 'pilots' from the ground or increasingly, autonomously following a pre-programmed mission.[6] The use of drones as a means of warfare traces back to World War II and beyond, becoming increasingly significant in the course of the second half of the 20th century.While initial generations of military drones were used primarily for aerial surveillance, their functions gradually expanded to areas such as search and rescue, communications systems relay, suppression of hostile air defence, and direct attacks against selected targets. In the course of the last decade, the use of armed drones has increased exponentially and also the suffering of civilians also increased simultaneously.

1.2 Statement of the problem

The fourth Geneva Convention provides protection to civilians. Under its general provisions it provides, the contracting parties for the convention must respect and to ensure respect for the convention in all circumstance.[7]By which it impose not merely respect but also ensure respect for it.

Although international humanitarian law provides protection to civilians, in recent decades armed conflict has blighted the lives of millions of civilians' serious violations of international humanitarian law in many armed conflict[8]. Cities have never been immune from war fare ,but over the last century, armed conflicts have increasingly come to be fought in population centres ,thereby, exposing civilians to greater risk of death ,injury and displacement .This trend is only likely to continue with increasing urbanization .It is compounded by the fact that belligerent ,and non-state armed groups in particular ,often avoid facing their enemy in the open intermingling instead with the civilian population re-explosive weapons in populated area.

In recent years because of the advancement technology the use of drones and other unmanned robots in warfare and other situations of violence has increased exponentially, and States

[6] What are drones?-drones war UK, https://dronewars.net/aboutdrone/last visited on October 29, 2016.
[7] Geneva Convention Four relative to the protection of civilian persons in time of war, UN, 12 August 1949, article1.
[8]International Legal Protection of Human right in armed conflict; United Nations Human Rights office of High right Commissioner, New York and Geneva 2011.

continue to invest significantly into increasing the operational autonomy of such systems. While most unmanned robots are unarmed and fulfil functions that do not give rise to particular legal concerns, the use of weaponized robots, including armed drones, has important legal and policy implications[9]. Given that such unmanned weapon systems involve the application of armed force, so it has direct connection with international humanitarian law. When the use of drones interferes with the territorial sovereignty of other States, it may also raise issues of legality under the UN Charter. Although the legal principles resulting from these normative frameworks are universally recognized, their precise application and interpretation with regard to the use of armed drones gives rise to a number of controversies. Some of these controversies relate to the lawfulness of robotic weapons technology as such, whereas others relate to the circumstances and manner in which such technology is being used in current State practice. The resulting uncertainty as to the applicable legal standards, in conjunction with the rapid development and proliferation of drone and robotic technology and the perceived lack of transparency and accountability in current policies, has the potential of polarizing the international community, undermining the rule of law and, ultimately, of destabilizing the international security environment as a whole.

Based on this facts the main focus of the research problem which will be discussed by the researcher is going to be, who will be responsible for the violation of the right of civilians because of drones attack vs. principle of distinction , the compatibility of Geneva convention four to govern and/or impose responsibility on parties who violate the rights of civilians by using drones, in other words because, the convention doesn't say anything about drones attack how we are going to govern violation of the rights of civilians, and finally what are the liabilities especially criminal liabilities in violation of the rights of civilians .because the issue at hand needs a universal solution and respect for the convention to stop violation of the right of innocent civilians.

1.3Objective of the study

1.3.1General objective of the study

The general objective of the study is to assess the role of International humanitarian law in protection of the rights of civilians.

[9]Dr, Nils Mezzer, Human rights implications of the usage of drones and unmanned robots in warfare, May 2013, page7.

1.3.2 Specific objectives

- To evaluate the compatibility of Geneva Convention four in dealing with issues that are related with the violation of the rights of civilians by drones attack.
- To identify who is responsible for the violation of the rights of civilians during drones attack.
- To identify liabilities, especially criminal liabilities on those persons who violate the rights of civilians.

1.4 Research Question

1. Who will be responsible for the violation of the rights of civilians during drones attack?

2. How international humanitarian law entertain cases, when different parties violate the right of civilians by using drones?

1.5 Significance of the study

This paper will be conducted for this expected significance:-

- ✓ To create knowledge to those who are interested in international humanitarian law in general and civilian's protection in particular.
- ✓ To provide information for those who are interest in doing research in this specific area.

1.6 Scope of the study

This paper is all about protection of civilians under the rules of international humanitarian law in general and protection of civilians during drones attack in particular .Based on this, the scope of the study will be limited to on issues that are related with the protection of civilians during drones attack and who will be responsible for the violations, plus the criminal liabilities arising from breach of the rule.

1.7 Methodology

The research approach is fully doctrinal which involves analysis of statuary provisions and cases. The method of the analysis is also qualitative in which laws and principles are used as a means of analysis. The paper is conducted based on different source. The researcher has used conventions, international customs, case reports and other related laws as a primary

source. And also the researcher used text books, commentaries, research dissertations, journals, online sources.

CHAPTER TWO

Conceptual and Theoretical understanding of protection of civilian during drones strike

2.1 Protection of civilians in general

2.1.1 Who is Civilian?

The most common meaning for civilian population is someone who is not in the military. As to black's law dictionary the term civilian is defined as a person not serving in the military[10]. It can also refer to any object that is not military in origin e.g., "civilian clothes" or "civilian life." The meaning of civilian as a non-military person is a relatively new one, dating from the early 19th century[11].In general, a civilian is "a person who is not a member of the military or of a police or fire fighting force",[12] which means it refers to non-military law enforcement officers as civilians since they are employees rather than enlisted personnel, and also in order to distinguish itself from military police. In military and law enforcement slang, the term *"Civies"* or "*Civvies"* are often used to refer civilian population or civilian clothing[13].

Under the laws of war , a civilian is one not being a member of the armed services and does not take a direct part of hostilities in times of armed conflict. The term "civilian" is slightly different from a non-combatant under the laws of war, because some non-combatants are not civilians (for example, military chaplains attached to the belligerent armed forces or neutral military personnel). Under international law, civilians in the territories of a Party to an armed conflict are entitled to certain privileges under the customary laws of war and international treaties such as the Fourth Geneva Convention. The privileges that they enjoy under international law depends on whether the conflict is an internal one (a civil war) or an international one[14].

[10] Bryan A. Gaker, Black's law dictionary, eighth edition, February 2004.
[11]Vocaubuary.com dictionary, https://www.vocabulary.com/dictionary/civilian.last visited November 17, 2016.
[12] Id.
[13] Id.
[14] Merriam, www.merriam-webster.com/dictionary/civilian, last visited November 17, 2016.

2.1.1.1The legal status of civilians under the rules of IHL

As provided under customary international law Civilians are persons who are not members of armed forces. The civilian population comprises all persons who are civilians[15].

State practice establishes this rule as a norm of customary international law applicable in international armed conflicts. It also applies to non-international armed conflicts although practice is ambiguous as to whether members of armed opposition groups are considered members of armed forces or civilians.

When we see International armed conflicts the definition of civilians as persons who are not members of the armed forces is set forth in Article 50 of Additional Protocol I, to which no reservations have been made. It is also contained in numerous military manuals. It is reflected in reported practice. This practice includes that of States not, or not at the time, party to AP I. No official contrary practice was found. Some practice adds the condition that civilians are persons who do not participate in hostilities[16].As provided under rule 6 this additional requirement merely reinforces the rule that a civilian who participates directly in hostilities loses protection against attack. However, such a civilian does not thereby become a combatant entitled to prisoner-of-war status and, upon capture, may be tried under national law for the mere participation in the conflict, subject to fair trial guarantees[17]. The other issue which is stipulated under additional protocol I is related to Non-international armed conflicts, the definition that "any person who is not a member of armed forces is considered to be a civilian" and that "the civilian population comprises all persons who are civilians" was included in the draft of AP II[18].

The first part of this definition were to read that A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1),(2),(3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a

[15]Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law rules, 2009, volume I, page 17.

[16] Id.

[17]Customary IHL -Rule 106 conditions for prisoners-of-war status.

[18] Article 13, Additional Protocol II to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims on Non-International Armed Conflicts signed on 12 December 1977 - Entry into Force 7 December 1978.

civilian, that person shall be considered to be a civilian"[19]. As a result, from this definition one can understand that it does not contain a definition of civilians or the civilian population rather it simply exclude those who are not consider to be civilian. The same is true for the Fourth Geneva Convention of 1949, while it is exclusively devoted to the protection of the civilian population; it contains no definition of civilian[20]. Under Article 4 of the same Convention, persons protected by the convention are those who, at a given moment and in any manner whatsoever, find themselves in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not national's[21].The same is true for non-international armed conflict by which, as provided under Article 3 it indicates that during non-international armed conflicts the persons who enjoy protection against the various forms of violence and infringement mentioned are 'persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria'[22]. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there are no survivors[23]. Equally, Additional Protocol II provides that those civilians who do unlawfully participate in hostilities shall lose their protected status as civilians. Article 13(3) provides: 'Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.

Art3 applies to non-international conflicts only, and will be the only Article applicable to them until such time as a special agreement between the Parties has brought into force between them all or part of the other provisions of the Convention. This Article, which is common to all four Geneva Conventions, marks a new step forward in the unceasing development of the idea on which the Red Cross is based. Born on the battlefield, the Red Cross called into being the first Geneva Convention to protect wounded and sick military personnel. Extending its solicitude little by little to other categories of war victims, in logical application of its fundamental principle, it pointed the way, first to the revision of the original

[19]Protocol additional to the Geneva conventions of 12 august 1949, and relating to the protection of victims of international armed conflicts (protocol I), of 8 June, 1977, art 50.
[20]Avril McDonald, the challenges to international humanitarian law and the principles of distinction and protection from the increased participation of civilians in hostilities, April 2004, page7.

[21] Geneva Convention four, supra note 7,art 4
[22] Id ,art 3
[23]Avril ,supra note 20 ,page7

convention, and then to the extension of legal protection in turn to prisoners of war and civilians[24].

To put in other words, the first attempt in international humanitarian law to identify who are civilians came in 1977 with Article 50 of Additional Protocol I[25]. Article 50(1) avoids giving any definition of civilians and instead defines civilians in the negative[26]: civilians are all persons who are not combatants. Paragraph 1 provides that civilians are persons *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; (2) members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the four conditions of combatancy. The aforementioned combatants qualify for prisoner of war status upon capture[27]. Thus, civilian is a residual category: whoever is not a combatant shall be deemed to be a civilian. But, In case of doubt whether a person is a civilian, that person shall be considered to be a civilian'[28].

2.1.2 Principle of distinction: General over view

The principle of distinction is one of the foundation stones upon which the edifice of international humanitarian law rests[29].As provided under customary IHL the parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians[30]. 'BY which Military commanders are obligated to distinguish between civilian objects and military objectives and to direct their operations against military objectives.

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.' In other words, no

[24] Jean S. Pictet Commentary on the Geneva Convention four relative to the protection of civilian persons in time of war, 1958, page 34.
[25]Avril, supra note 20, page 8.

[26]Id.
[27]Id.
[28] API, supra note 19, art 50(1).
[29]Avril, supra note 20, page 4.
[30] Customary IHL- Practice Relating to Rule 1, The Principle of Distinction between Civilians and Combatants.

military necessity justifies direct attacks on civilians or civilian objects. Respect for the principle is what makes it possible for humanitarian law to fulfil its aim of protecting the civilian population from the consequences of armed conflict. The ability of combatants to plan and conduct their operations and defend the state, as well as the capacity of a state or the international community to hold them accountable for failure, is significantly dependent upon the clarity and relevance of the distinction principle[31].

The Hague Regulations do not as such specify that a distinction must be made between civilians and combatants, but Article 25, which prohibits "the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended", is based on this principle[32]. The Additional Protocols of 1977 reaffirmed and elaborated on these principles, in particular that of distinction: ''the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives"[33].It is also stipulated under art 51(2) and 52(2) of the same protocol.

For the purpose of Non-international armed conflicts Article 13(2) of Additional Protocol II prohibits making the civilian population as such, as well as individual civilians, the object of attack. Under the Statute of the International Criminal Court, "intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities" constitutes a war crime in non-international armed conflicts.

Generally the principle of distinction requires parties to a conflict to distinguish between civilian and combatant and between civilian object and military objectives and to direct their operation only against to combatant and military objectives. By which during military operation any attack must be directed at a lawful military target. In international armed conflict lawful military target are military objectives, combatant unless they are hors de combat. In case of non-international armed conflict lawful military target are military objectives, armed force of state unless they are hors de combat, members of an organized armed group, any other person including civilians for such time as they directly participate in hostilities[34].

[31]Avril supra note 20, page 5.
[32] Id.
[33] API, supra note 19, art 50.
[34]Avril supra note 20, page 5.

2.1.3 Protection

War is a contention between states that is fought by their armed force. The civilian population who take no part in hostility must be spared and protected[35].Today, all parties to armed conflicts are bound by the rules of international humanitarian law (IHL) to take a broad range of measures to protect civilians from the effects of military operations.

Let us discuss the issue of civilian protection in detail, the general principle that the civilian population shall be immune from the effects of the hostilities is above all based on customary law; it meets a fundamental requirement of humanity and civilization, and was accepted by legal opinion and state practice long before being confirmed in treaties. Its development can, however, be most easily followed through the various stages of its codification[36].

The main legal bases underlying this rule are Articles 25 to 28 of the Hague Regulations. By which art 25 says that the attack or bombardment, by whatever means, of towns, villages, dwellings or buildings which are undefended is prohibited[37]. Article 26, provides that officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities. Art. 27, on the other hand, states that in sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art science, or charitable purpose, historical monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purpose. Finally, Art 28 provides that the pillage of town or place even when taken by assaults is prohibited.

Something very important about all these provisions is that, as codification of customary law, they are binding on all members of the international community whether or not they are parties to the Hague Convention (IV) of 18 October 1907[38].As to the case of bombardment by

[35] Francois Bugnoion, The International Committee of the Red Cross and the protection of war victims,(5th edition, .2007), page 717.
[36] Id.
[37] Id.
[38]Bereket Bashura Alaro& Demelash Shiferaw , International Humanitarian Law (IHL) Teaching Material, (unpublished) 2009, Prepared under the Sponsor ship of the Justice and Legal System Research Institute page 103.

naval forces, the principle that civilian population immune from attack is enshrined in Articles 1 and 2 the Hague Convention (IX). Article 1 provides: the bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden. Article 2, on the other hand, states: "military works, military or naval establishments, depots of arms or war materiel, workshops or plants which could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbour, are not, however, included in this prohibition. The commander of a naval force may destroy them with artillery, after a summons followed by a reasonable time of waiting, if all other means are impossibility and when the local authorities have not themselves destroyed them with in the time fixed. He incurs no responsibility for any unavoidable damage which may be caused by a bombardment under such circumstances[39]''.

The 1949 Geneva Conventions and the 1977 Additional Protocols constitute the core of the legal framework regulating behaviour in war, including for the protection of civilians and other persons that do not take part in hostilities[40]. as provided under article 48, in order to ensure protection of the civilian population and civilian object the parties to the conflict shall at all-time distinguish between the civilian population and combatants and between object and military objectives and accordingly shall direct their operation only against military objectives .Art 51 and 52 also specifically provide the protection of civilian population. In addition to this additional protocol II also stipulate the protection of civilian population it reads as follow the civilian population and individual population shall enjoy general protection against the dangers arising from military operation[41].

Although significantly less detailed than the rules applicable to international armed conflicts, Common Article 3 to the Geneva Conventions and Additional Protocol II establish rules for non-international – i.e. internal – armed conflicts, imposing obligations on states and non-state armed groups alike. Moreover, most of the fundamental rules pertaining to the protection of civilians are considered to be customary humanitarian law in both international and internal armed conflicts, and binding on all states, whether signatories or not to the relevant treaty, as well as non-state armed groups[42].

[39]Francois, supra note 35, page 720-722.
[40] Id.
[41] APII, supra note 18, art 13.
[42] Francois, supra note 35, page 731.

2.2 DRONES

2.2.1 Drones in general: meaning and historical over view

Meaning

Drone can be defined as an aircraft that is operated without the possibility of direct human intervention from, within, or on the aircraft"[43]. Simply it is Specific type of unmanned robot, also called unmanned aerial vehicles .The flight of drones may operate with various degrees of autonomy: either under remote control by a human operator, or fully or intermittently autonomously, by on board computers[44].

Historical over view

The idea of using a remotely-controlled, pilotless aerial vehicle emerged more than fifty years ago. However, th6e operational concept behind weaponized drones changed significantly over the years[45].

The use of drones as a means of warfare traces back to World War II and beyond, becoming increasingly significant in the course of the second half of the 20thcentury.While initial generations of military drones were used primarily for aerial surveillance, their functions gradually expanded to areas such as search and rescue, communications systems relay, suppression of hostile air defence, and direct attacks against selected targets[46]. The first remotely piloted drone used as a weapon was the German FX-1400 or "Fritz", which consisted of a 2,300 pound bomb, dropped from an airplane and steered by a pilot in the "mother ship." After the war, little development occurred in drone technology and most remotely piloted vehicles were used for target practice. The U.S. military's first major expenditures on UAVs began after the Vietnam War, when the Air Force used small, long range, experimental drones called Fireflies in conducting reconnaissance over Southeast Asia. However, ensuing programs quickly ran over budget and the government deemed small propeller-powered drones too expensive to pursue on a larger scale. The Israeli Air Force's

[43] Donna A. Dulo, What is a Drone? Issues of the Law, (2015), page7.
[44] Id.
[45]Andrew Callam, *Drone Wars: Armed Unmanned Aerial Vehicles, International Affair revie*w.Volume XVIII, No. 3: Winter 2010 page46.http//www.iar-gwu.org/node/144 visited on 29 October, 2009.
[46]Dr, Nils Mezzer, supra note 9, page7.

use of their weaponized drone, the Pioneer, in the 1982 war in Lebanon reinvigorated American interest in armed UAVs. Impressed with the Pioneer, the Navy purchased several and the Reagan Administration began increasing UAV procurement and research in 1987[47].

In the course of the last decade, the use of armed drones has increased exponentially the main justification is, With the growing asymmetry of conflicts in the post-Cold War world, States are increasingly confronted with loosely organized, transnationally operating armed groups lacking the capability to directly and effectively respond to conventional military operations, including aerial surveillance and attacks. In asymmetric confrontations with such "low-tech" enemies, advantages in terms of weight, cost and risk reduction mean that armed drones are quickly becoming the weapon of choice, particularly in permissive airspace outside the territorial control of the operating State. As a consequence, approximately 50 States currently either possess drones or are in the process of developing or acquiring them for purposes of reconnaissance, intelligence-gathering and targeting, thus illustrating a trend towards the worldwide proliferation and acceptance of this technology. While some States, such as Israel, the United Kingdom, Australia and Germany are already known to have conducted or contributed to armed drone attacks others including Russia, Turkey, China, India, Iran, and France, are reported either to have or to be seeking to acquire drones capable of being armed with laser-guided missiles[48].

2.2.2 The Legality of use of drones as a means of warfare

The use of drones in armed conflicts has increased significantly in recent years, raising humanitarian, legal and other concerns. In order to know whether the use of drones as a means of war fare is legal or not it is crucial to ask the following questions:

First are armed drones lawful?

Under international humanitarian law drones are not expressly prohibited, nor are they considered to be inherently indiscriminate or perfidious, or simply Drones, by themselves, are not illegal. In this respect, they are no different from weapons launched from manned aircraft such as helicopters or other combat aircraft[49].

[47] Id.
[48] Id.
[49]The use of armed drones must comply with laws;
https://www.icrc.org/eng/resources/.../interview/20last visited on (November 19, 2016).

What does the law say about drones?

Drones are not specifically mentioned in weapon treaties or other legal instruments of international humanitarian law. However, the use of any weapon system, including armed drones, in armed conflict situations is clearly subject to the rules of international humanitarian law[50]**.** Which means they do not qualify as banned military instruments under regulations of armed conflict nor under Article 8 of the Rome Statute[51],meaning, drones are not that much susceptible to cause indiscriminate harm or unnecessary suffering. However, lawful action of drones rests upon customary principles such as military necessity and proportionality, with due regard for protection of civilians and civilian objects[52].In other words among other things that, when using drones, parties to a conflict must always distinguish between combatants and civilians and between military objectives and civilian objects[53]. They must take all feasible precautions in order to spare the civilian population and infrastructure, and they must suspend or cancel an attack if the expected incidental harm or damage to civilians or civilian objects would be excessive in relation to the concrete and direct military advantage anticipated[54]. Similarly, drones can in no way be used to carry prohibited weapons such as chemical or biological agents[55]. On the other hand, from the perspective of international humanitarian law, any weapon that makes it possible to carry out more precise attacks, and helps avoid or minimize incidental loss of civilian life, injury to civilians, or damage to civilian objects, should be given preference over weapons that do not. Whether the use of armed drones does indeed offer these advantages will depend on the specific circumstances. This issue is the subject of on-going debate due, among other things, to lack of information on the effects of most drone strikes[56].

Is this to say that the use of drones is lawful in all situations?

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[50] Id.

[51]Rome Statute of the International Criminal Court,July1,2002
Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

[52] Rachel Alberstadt, *Drones under International Law*, open journal of political science, Vol. 4 (September 2014), page 223.

[53] Id.

[54] The use of armed drones, supra note 49.

[55]Id.

[56]Id.

The answer depends on which body of law applies in each particular case, and therefore which rules have to be followed. It is crucial that each situation be considered on its own merits. The question of whether a particular situation amounts to armed conflicts, and therefore requires the application of the rules of war, can be a source of disagreement, including between the ICRC and some States. The boundaries between various types of situations of violence have become increasingly blurred. The geographic scope of application of international humanitarian law has become a matter of debate. The ICRC takes a case-by-case approach in determining which body of law is applicable to which situation of violence and, consequently, which rules have to be followed. These rules determine the lawfulness of the use of drones in a given context[57]. Even though ICRC takes case by case approach, by any means the corner stone principle of IHL should have to be respected. For instance, as provided under article 51(4). Indiscriminate attacks are prohibited. Indiscriminate attacks are: a) those which are not directed at a specific military objective; b) those which employ a method or means of combat which cannot be directed at a specific military objective; or c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction. From this article we can understand that, whether the weapon in use is mentioned or not it must not create indiscriminate attack and cause civilians harm.

Generally use of drones as a means of war fare is not prohibited. However in using of such weapon state must comply with the rules of international humanitarian law.

[57]Id.

CHAPTER THREE

GENERAL RESPONSIBILITY

3.1 State responsibility for the violations of international human rights law and international humanitarian law

State responsibility for violations of international human and humanitarian law has long been a foundation of international law. State responsibility stems from the principle of *pacta sunt servanda,* which means that every treaty in force is binding upon the parties to it and must be performed by them in good faith[58].Even beyond treaty obligations, the International Law Commission's draft articles on State responsibility recall the general principle of international law that the breach of a State's international obligation constitutes an international wrongful act, which entails the international responsibility of that State[59].In this context, it is useful to recall that a State is responsible for violations of international human rights and humanitarian law in the context of armed conflict if the violations are attributable to it, such as:

- Violations committed by its organs, including its armed forces;
- Violations committed by persons or entities empowered to exercise elements of governmental authority;
- Violations committed by persons or groups acting in fact on its instructions, or under its direction or control;
- Violations committed by private persons or groups which it acknowledges and adopts as its own conduct[60].

A State may also be responsible for lack of due diligence if it has failed to prevent or punish violations of international human rights and humanitarian law committed by private actors[61].

Both international jurisprudence and regional jurisprudence have established that a finding of State responsibility for violations of international human rights and humanitarian law should lead to the adoption by the State of measures to repair the damage it may have caused and to

[58] Vienna Convention on the law of Treaties, UN. No 18232, (23 May.1969), art. 26.
(Came into force on 27 January 1980, i.e., on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession with the Secretary-General of the United Nations, in accordance with article 84 (1).
[59] International legal protection of human rights in armed conflict ,UN.2011,page 72
[60]Yearbook of the International Law Commission, (2001), vol. II, page. 26.
[61]Vienna, supra note 57, art. 26.

prevent future violations. Such measures range from paying reparations to the victims and their families, and giving assurances of non-repetition, to the adoption of legal mechanisms to prevent future abuses. While the obligation of the State to pay reparation for a violation of international humanitarian law is uncontroversial, the entitlement of the individual victim to claim such reparation based on international humanitarian law has been rejected by several domestic courts[62].

In addition to this ,It should be noted that, under international law, the fact that an individual is found guilty of gross abuses of international human rights and humanitarian law does not exonerate the State from international responsibility and vice versa[63].

3.2 Individual responsibility for the violations of international human rights law and humanitarian law

Many violations of international human rights and humanitarian law may be considered criminal under domestic law. When certain conditions are met, some of these violations can also be qualified as crimes under international law, with additional legal consequences for States and individuals. Unlike "simple" violations of international human rights and humanitarian law, international crimes may in particular be prosecuted not only domestically but also internationally. Genocide, crimes against humanity and war crimes, for instance, may be tried by an international criminal tribunal[64].

3.2.1 Violations of International human rights and humanitarian law as international crimes under International criminal law

I. Definitions of international crimes

Certain gross or serious violations of international human rights and humanitarian law have been considered of such gravity by the international community that they have been regulated under international criminal law, establishing individual criminal responsibility for such acts. Individual criminal responsibility is fundamental to ensuring accountability for violations of international human rights and humanitarian law. The Nuremberg International Military Tribunal famously noted that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the

[62] International legal protection, Supra note 58, page.73.
[63] Id.
[64] Id.

provisions of international law be enforced"[65]. Since the 1990s the international community has intensified efforts to create adequate mechanisms through which individuals can be brought to justice for serious violations of international human rights and humanitarian law. The Rome Statute of the International Criminal Court provides the most complete and updated definition of relevant international crimes, the components of which are primarily violations of international human rights and humanitarian law[66].

- Genocide: article 6 states: "for the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group";

- War crimes: article 8 states that "war crimes" means: (a) Grave breaches of the Geneva Conventions of 12 August 1949; (b) Other serious violations of the laws and customs applicable in international armed conflict; and (c) In the case of an armed conflict not of an international character, serious violations of common article 3 and other serious violations of the laws and customs applicable in such a conflict.

- Crimes against humanity: A number of crimes against humanity are included under article 7 some of them are: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; etc.

Yet, even if certain human rights violations are not covered in specific treaties, perpetrators may be brought to justice if the violations correspond to genocide, crimes against humanity or war crimes in those cases where the International Criminal Court can exercise jurisdiction,

[65] Id.
[66] Rome Statute in the ,"Report of the Preparatory Commission for the International Criminal Court" .2000

or under domestic law, which sometimes allows for its extraterritorial application to certain serious violations of international human rights law.

II. The extent of individual criminal responsibility

The Rome Statute provides the most recent codification of individual responsibility for international crimes. Article 25.3 indicates that "in accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court" and then lists a series of criminal behaviour, such as committing the crime, ordering or instigating it .According to article 25(3) (f) of the Rome Statute, "a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose." Here are some of the most important principles in individual criminal responsibility:

- Everyone has a duty to disobey a manifestly unlawful order. Orders to commit genocide or crimes against humanity are manifestly unlawful;
- Individuals are criminally responsible for the international crimes they commit;
- Commanders and other superiors are criminally responsible for international crimes committed pursuant to their orders and, beyond that, under the principle of command responsibility discussed in the next subsection;
- Individuals shall be criminally responsible and liable for punishment for an international crime if the material elements of the crime are committed with intent and knowledge[67].

These principles apply to the different types of crimes ranging from grave breaches of the Geneva Conventions and violations of the laws or customs of war and of common article 3, to crimes against humanity and genocide for which individual responsibility arises for any person who planned, instigated, ordered, committed or otherwise aided and abetted in their planning, preparation or execution[68]. This standard is confirmed by the Statutes of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda and, subsequently, by the Rome Statute. The question also arises of whether individuals should be affiliated to a State entity in order to be criminally responsible for serious violations of international human rights and humanitarian law. Individual responsibility with regard to violations of international human rights and humanitarian law amounting to international crimes can be determined on the basis of international criminal

[67] International legal protection, Supra note 58, page.78.
[68] Id.

law[69]. For example, the Convention on the Prevention and Punishment of the Crime of Genocide stipulates that “persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals” (art. IV). The Statutes of the above-mentioned International Criminal Tribunals and the Rome Statute reaffirm this[70].

III. Command responsibility

While the general principle for imposing individual criminal responsibility for violations of international humanitarian law requires a direct participation, international criminal law recognizes the importance of leaders and commanders in ensuring that individuals under their command do not engage in any type of criminal behaviour leading to gross violations of international human rights law or international humanitarian law[71].In this respect, article 86(2) of Protocol I indicates that a breach of the obligations under the Conventions by a subordinate does not absolve the superiors from their own responsibility of supervision and control. Yet, for command responsibility to be applicable, it is necessary that the superior knew or had reason to know that violations were being committed or were about to be committed. In that case, the superior is under the obligation to adopt all necessary measures to prevent such violations or punish the perpetrators if they do occur.

Before we are going to discuss former Yugoslavian case in light of command responsibility let me give you little information about the case ,the case is summarized as follow, Bosnian Serb militias drove hundreds of thousands of non-Serb civilians from their homes, committing tens of thousands of acts of murder, rape and torture, in a systematic policy of "ethnic cleansing." Most observers believe most war crimes committed by the Bosnian Serbs from 1992 until the end of the war in 1995 were a vital part of the political and military strategy of Bosnian Serb leaders. Because of this The U.N. Security Council established The International Criminal Tribunal for the Former Yugoslavia on May 25, 1993 (Resolution 808) for prosecution of war crimes. The suspect, Dusan Tadic, was found guilty on May 7, 1997[72].

Based on such facts The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia analysed the different components of the notion of command

[69] Id.
[70] Id.
[71] Id.
[72]Margaret MikyungLee, Raphael Perl Steven Woehrel, Bosnia War Crimes: The International Criminal Tribunal for the Former Yugoslavia and U.S. Policy. April 23, 1998

responsibility. It recalled that a commander's de jure power creates a presumption of effective control. It also discussed the scope of the "had reason to know" standard and indicated that the commander's responsibility would be engaged if he failed to act despite having sufficiently alarming information about possible violations. The Appeals Chamber indicated that "while a superior's knowledge of and failure to punish his subordinates' past offences is insufficient, in itself, to conclude that the superior knew that similar future offences would be committed by the same group of insubordinates, this may, nevertheless constitute sufficiently alarming information to justify further inquiry". Thus, it interpreted the "reason to know" standard as requiring an assessment of whether a superior had sufficiently alarming information that would have alerted him to the risk that crimes might be committed by his subordinates[73].

In another case, the Tribunal's Trial Chamber made it clear that the determination of a causal link between a commander's failure to act and his subordinate's crimes is unnecessary to a finding of superior responsibility. It recalled that "if a causal link were required this would change the basis of command responsibility for failure to prevent or punish to the extent that it would practically require involvement on the part of the commander in the crime his subordinates committed"[74].

Concerning the superior's "duty to prevent" established in article 87(2) of Protocol I, the Appeals Chamber indicated that the general duty of commanders to take the necessary and reasonable measures was well rooted in customary international law and stemmed from their position of authority. It stated that the "'necessary' measures are the measures appropriate for the superior to discharge his obligation and 'reasonable' measures are those reasonably falling within the material powers of the superior." Thus, the standard is whether the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator[75].

[73] *Prosecutor v Hadžihasanovic´& Kubura,* case no. IT-01-47-A, Judgement of 22 April 2008.
[74] *Prosecutor v Sefer Halilovic´, case no. IT-01-48-T,* Judgement of 16 November 2005.
[75] Id.

CHAPTER FOUR

PROTECTION OF CIVILIANS DURING DRONES STRIKE vs. THE RESPONSIBILITY UNDER THE RULES OF IHL

4.1 The legal framework of international humanitarianlaw to protect civilians from Drones strike

International humanitarian law requires, first, that in the acquisition or adoption of any weapons system, states must assess whether its use would be contrary to international humanitarian law[76]. This principle is one of the most important grounds for IHL. Therefore even though drones are not specifically mentioned in weapon treaties or other legal instruments of international humanitarian law they are clearly subjected to international humanitarian law.

Under Additional Protocol I to the 1949 Geneva Conventions, applicable to international armed conflict, civilians and other persons that do not take part in hostilities may not be targeted and states are legally obliged to attack only 'objects which by their nature, location, purpose or use make an effective contribution to military action.' In other words parties to the conflict must distinguish civilians with combatants, this general principle is also applicable to states who use drones as a means of war fare , And even if a target is defined as a legitimate military one, Article 51 (5) (b) of Protocol 1, it may be drones or not, prohibits attacks towards 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.' Precautions must be taken to avoid attacks that breach these provisions. Which means states, in using of drones, must take all feasible precautions in order to spare the civilian population and infrastructure, and they must suspend or cancel an attack if the expected incidental harm or damage to civilians or civilian objects would be excessive in relation to the concrete and direct military advantage anticipated. Similarly, drones can in no way be used to carry prohibited weapons such as chemical or biological agents.

In addition to this as provided under art 13 of additional protocol II the civilian population and individual population shall enjoy general protection against the dangers arising from military operation.

[76] The Security Impact of Drones: Challenges and Opportunities for the UK, Birmingham policy Commission, the Report (October, 2014) page 46.

Generally International humanitarian law further requires that, in armed conflict, states must ensure that the use of any weapons comply with the law with regard to targeting.in addition to international humanitarian law, the law full action of drones rests up on customary principles, such as military necessity , proportionality, distinction and unnecessary suffering. Those principles of international humanitarian law are analysed as follows:

I. Military Necessity

Military Necessity first mentioned and defined in Art. 14 of the 1863 Lieber Code, 'permits a belligerent, subject to the laws of war, to apply any amount and kind of force to complete submission of the enemy with the least possible expenditure of time, life and money. Destruction as an end in itself is a violation of international law[77]. It is nowadays recognised as customary law. However, the principle remains the most lawless of legal doctrines, meaning that the principle of military necessity is highly influenced by two of the three other core principles, unnecessary suffering and proportionality.

It is difficult to look at the principle in isolation. Thus, it is likely that a specific drone attack does not comply with the principle of military necessity if it also does not comply with the principles of unnecessary suffering and proportionality. No specifically drone-related problems arise from the principle of military necessity itself.

II. Unnecessary Suffering

The principle of unnecessary suffering is customary law codified in Art. 35. (2) of Additional Protocol I to the Geneva Conventions: It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. Examples of weapons that are regarded as causing unnecessary suffering are explosive bullets, poison and poisoned weapons, asphyxiating gases or glass-filled projectiles.[78] Drones, however, are usually equipped with ordinary missiles. Since a weapon is not banned on the ground of superfluous injury or unnecessary suffering merely because it causes great or even horrendous suffering, there is no doubt that drone's do not fall into the category of weapons that cause unnecessary suffering.

III. Principle of Proportionality

[77]Lise Kanner, *The efficacy and legality of drones in modern Warfare*, Bond University Student Law Review Volume 4 , Issue 1 Article 4 ,(2016)page 13.
[78] Id.

The Oxford English Dictionary defines “proportional” as an adjective describing something as “corresponding in size or amount to something else”[79]. Thus an object can be described as proportional only when the two items are compared and an appropriate balance is struck between them based on an identified value. The essence of IHL Proportionality is the relationship or ratio between two discreet values. IHL proportionality balances two different concepts military advantage and civilian harm. It is prospective in nature; so an attacker is obligated to estimate and compare military advantage and civilian harm at the time the attack is contemplated. IHL proportionality is rooted in humanitarianism[80]. An attack is proportionate when the expected civilian harm is not excessive in relation to the expected value of the attack.

To have deep information let us go through the provisions of international humanitarian law and customary international law that stipulate principle of proportionality. To begin with its origin the principle of proportionality is state practice and therefore customary international law. Because of this it is applicable in both international and non-international armed conflicts.

When we see customary international law as provided under Rule 14 it prohibit use of force which may be excessive comparing to the military advantage and civilian harm. Rule 14 reads as follow, ‘Launching an attack which may be expected to cause 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, is prohibited’[81].In addition to customary international law it is also codified in the additional protocols. As provide under Art. 51(5) (b) of Additional Protocol I, and repeated in Art. 57. Even though the terminology of the principle of proportionality is kept vague[82]. For example, Art. 51 (5)(b) of Additional Protocol I describes the following as indiscriminate: an attack which may be expected to cause 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. While this at least describes which

[79]OXFORDDICTIONARIES.COM, Proportionality Definition, http://www.oxforddictionaries.com/definition/english/proportional.Last visited on December 10, 2016.
[80] David Akerson, *Applying Jus in Bello Proportionality to Drone Warfare*, Oregon review of international law, vol.16 (2014), page 184.
[81]Jean-Marie Henckaerts, supra note 15, page46.
[82]Lise Kanner, supra note 75, page 13.

circumstances can be considered to assess the proportionality of an attack, the more important question of what would constitute 'excessive', remains.

IV. Principle of distinction

Before we are going to discuss principle of distinction first we have to distinguish the law full targets, because it is very important to check whether civilian's right is violated or not. Therefore now our focus will be on the categories of people that might, or might not, be legal targets for a lethal drone strike. Principally among these groupings are: lawful combatants, civilians .Each category is treated differently under the law, and creates its own set of unique challenges for the current drone strike policy.

Lawful combatants are unquestionably legal targets under IHL, and can be targeted by drone or any other lawful weapon system. lawful combatant is a legal term of art that includes only those individuals meeting the specific criteria of the Geneva and Hague Conventions, to wit: Militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil 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[83]. Furthermore, the lawful combatant must be participating in an armed conflict, which must be an international or non-international conflict. This essentially limits IHL armed conflicts to international or non-international conflicts, which generally includes civil war. For the definition of civilian's you can refer chapter two[84]. Based on this if we can differentiate the law full target from unlawful targets it is easy to discuss the principle of distinction.

The principle that combatants and other actors in armed conflicts have to distinguish themselves from the civilian population is recognised in Articles 48, 51(2) and 52(2) of Additional Protocol I (for international armed conflicts) and similarly in Article 13(2) of Additional Protocol II (for non-international armed conflicts). Furthermore, the principle of distinction is state practice and constitutes customary international law. It is therefore

[83] Commander Mark R. Vlaun, DRONE WARS: The legal framework for remote warfare, United States, 2012, page 12.
[84] Id.

applicable in every armed conflict, regardless whether international or not. The obligation resulting from this for the use of drones is clear. Drones need to be distinguishable from civilian aerial machines. Additionally, drones cannot be used to target civilians or civilian objects. Finally, even though the general principle states that drones need to be operated by combatants who distinguish themselves from the civilian population, a lot of controversies are raised when civilians control or operate drones, let us discuss this issue in detail.

A. Principle of distinction vs. drones: The legality of drones when they are controlled by civilians

The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians[85]. If this is so it is important to ask who is a combatant. A combatant is a person who takes a direct part in the hostilities of an armed conflict. If a combatant follows the law of war, then he or she is considered a privileged combatant and upon capture, he or she will qualify as a prisoner of war[86]. "Combatant" status exists only in international armed conflict .Accordingly, in a non-international armed conflict the relevant distinction is between members of the armed forces and civilians. 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. Here is the problem by which drones are controlled by non-military personnel, because of this they crate distinction problem which means the person who is in charge of controlling drones are not combatant or not qualify the status of combatants in other words they are civilians. The good example which needs to be rise here is the case of CIA .Whether the government regards the CIA as members of the armed forces or civilians directly participating in hostilities is unknown. 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". Some experts have contended that CIA personnel, as employees of a civilian agency, cannot be considered members of the armed forces. The ICRC Interpretive Guidance suggests that, for

[85] Customary IHL, supra note 30, rule1.
[86] The Third Geneva Convention relative to the treatment of prisoners of war, Geneva, 12 August 1949,art 4.

purposes of the principle of distinction, whether CIA personnel are armed forces is a matter of domestic law. Hypothetically, the U.S. government could incorporate the CIA into its armed forces, but there is no indication that it has done so[87]. Based on this CIA drone operators may be violating IHL. Their potential violation is not related to the fact that they do not wear uniforms but rather is related to the organization to which they belong. By flying drones they are directly participating in hostilities, which the United States has interpreted to be a war crime if they are considered to be civilians. The only way for these operators to comply with the laws of war is for them to be considered combatants, and combatant status can only be conferred by the organization for which one fights. An organization that educates its members in the laws of war and then enforces those laws can confer combatant status on its members. While it is clear that the CIA drone operators have been educated in the laws of war, the enforcement mechanisms for noncompliance with these laws is not, until it becomes clear that drone operators are subject to internal discipline for violating the laws of war, their legal status will remain questionable[88].

Another consideration is that Additional Protocol I, which governs international armed conflict, requires a party to "notify" other parties to the conflict if it "incorporates a paramilitary or armed law enforcement agency into its armed forces"[89]. However, this provision is not regarded as customary law, which would apply to non-international armed conflict. Moreover, notification is a legal obligation, not a constitutive element of incorporation into armed forces. Nonetheless, it is notable that state practice supports formal, open incorporation of paramilitary or armed law enforcement agencies, rather than secret incorporation. Thus, as Schmitt has emphasized, "non-incorporated paramilitary and law enforcement agencies are civilian in nature for the purposes of humanitarian law[90]." If they are not members of the armed forces, CIA personnel could be considered civilians directly participating in hostilities. Indeed, a wide spectrum of commentators regards them as such, although their analyses vary. Many legal consequences would follow, which the U.S. government might be loath to recognize. As civilians directly participating in hostilities, CIA personnel would not be immune from prosecution under domestic law for their conduct, in the U.S. or any other country. CIA personnel, like members of the armed forces, can be

[87]Michaelw Lewis and Emily craw Ford, *drones and distinction: how IHL encouraged the rise of drones*, Georgetown Journal of International law, vol. 44, (2013) page1165.
[88] Id.
[89] Id.
[90] Id.

prosecuted for war crimes if they fail to abide by the laws of war, including those applicable to international armed conflicts. Individuals liable for war crimes include “the author, as well as those who authorized.

4.2 Who will be responsible for the violation of the rights of civilian during drones strike?

The ability of drones to operate without human oversight gives rise to the responsibility problem. And thus because robots have no moral agency as a result cannot be held responsible in any recognizable way if they cause deprivation of life that would normally require accountability if humans had made the decisions. If this is so, in employing these weapons routinely, some of them will inevitably violate international humanitarian law." Therefore, when this happens, "people want to see someone held accountable. Who, then, is to bear the responsibility?, is the crucial question. Individual and state responsibility is fundamental to ensure accountability for violations of international human rights and international humanitarian law therefore from now on wards we are going to discuss the responsible bodies when there is violation of the rights of civilians during drone strike.

4.2.1State responsibility

One of the principal areas ensuring accountability for the treaty and customary rules of public international law is the concept of state responsibility. Cassese defines state responsibility as designating ‘the legal consequences of the internationally wrongful act of a State.’[91]At least in theory, state accountability has the potential to correct problems that are related to use of drones as a means of war fare. As an initial matter, the concept of state responsibility is well established in international law. The International Law Commission (ILC)articulated the rule behind this concept in its Articles on the Responsibility of States for Internationally Wrongful Acts (Responsibility Articles), which provide that "every internationally wrongful act of a State entails the international responsibility of that State."" A state engages in an "internationally wrongful action" when an act or omission "(a) is attributable to

[91]ChristofHeyns, ‘Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions’, UN, G.A. April 9, 2013, Page 14.

the State under international law; and (b) constitutes a breach of an international obligation of the State"[92].

An action is attributable to a state when it is conducted by an organ of the state, which almost certainly includes the military as well as intelligence agencies. Therefore, assuming that drones operate under the authority of these institutions, their actions would be attributable to the state .Furthermore, since conduct constitutes a breach of an international obligation of a State when it violates "a clearly-defined treaty obligation or an unequivocally recognized norm of customary law," a state could be culpable under the Responsibility Articles if its drones violates established norms of International Humanitarian Law .From a legal standpoint, then, state responsibility is a viable option, at least in the abstract. Normatively, moreover, it is preferable to commander, designer, or manufacturer liability. First, the primary purpose of the Responsibility Articles to increase compliance with international obligations applies in the context of automatic weapon crimes[93]. If states realize that they will be held accountable for the war crimes of their drones, they have an incentive, first, to weigh the potential liability costs against the benefits of using drones at all and, second, to make sure the weapons they do use are consistently unlikely to violate international law. The prospect of liability would draw attention to the fact that the widespread, frequent use of drones would almost certainly result in at least some violations of international law[94]. Should states choose to use drones in spite of these risks, liability would give them a reason at the purchase and deployment stages to ensure that their drones will comply with international law, because the states themselves would internalize all the costs of crimes committed by their weapons rather than having the cost spread among all buyers via producer strict liability[95]. Specifically, the state could incentivize the manufacturers and designers to produce safe drones by setting standards for an acceptable purchase. At the same time, it could limit commanders' discretion in the deployment of these weapons through policy measures. Thus, because the state could both require better design and manufacture and limit commander discretion, it is in the best position to guard against international automatic weapon crimes throughout the entire process.

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[92]Hammond, Daniel N. "*Autonomous Weapons and the Problem of State Accountability,"* Chicago Journal of International Law: Vol. 15, No. 2, (2015), Article 8.
[93]Id.
[94]HUMAN RIGHTS WATCH, LOSING HUMANITY: the case against killer robots 3 (2012), availableathttp://www.hrw.org/sites/default/files/reports/arms last visited on December 20, 2016.
[95]Hammond Daniel N, supra note 90, page 670.

As such, it makes the most sense for the state to bear the liability risk. After all, it would be the state that makes the overarching decision to utilize drones in the first place. Given the risks inherent in employing such weapons, this choice renders the state more culpable in a moral sense than the producers, who merely respond to a demand created by the state, and the commanders, who merely carry out the policy decision the state made. By exerting control over both the purchase and deployment phases of drones use, the state becomes the actor best suited to internalize the costs of its decision-making and, therefore, the most blameworthy.

4.2.2 Individual responsibility

To get around this problem, scholars have chiefly identified two individuals who might be held accountable for drone's violations: the commanding officer and the designer or manufacturer." As will be seen, however, critics have rightly identified a number of flaws with each of these options on Commanding-officer liability.

4.2.2.1 Commanding officer liability

The first option is the commanding officer who authorizes the deployment of a drone. Traditionally, criminal responsibility would first be assigned within military ranks. Command responsibility should be considered as a possible solution for accountability for drone's violations[96]. by which under the principle of "command responsibility," a commander is responsible for a subordinate's crimes if there is: "(1) a senior-subordinate relationship; (2) actual or constructive notice of the impending crime; and (3)failure to take measures to prevent it[97]. The point of this doctrine is to encourage superiors to more effectively control and monitor the conduct of subordinates and thereby deter harmful behaviour.

Some drones defenders argue that, this general principle could apply to violations as well. They strongly argue that if a commander knows or should have known that deployed drones will violate international law, he will be held accountable for the crime. Indeed, the U.S. Department of Defence has already provided that "persons who authorize the use of, direct use of, or operate autonomous weapon systems must do so with appropriate care and in

[96]Christof, supra note 89, page 14.
[97] API, supra note 19, art 87.

accordance with the law of war, applicable treaties ,weapon system safety rules, and applicable rules of engagement[98].

Such liability would encourage the commander to exert more control over the drones, deploying it only in ways that minimize risks. This doctrine applies well for commanders who deploy a weapon knowing that such deployment creates a grave risk of an international crime. If an officer deploys a weapon knowing that a malfunction has disrupted its ability to distinguish between citizens and combatants, for example, it would make sense to hold him liable under a theory of command responsibility.

The other issue that need to be raised here is, to what extent the commander should bear responsibly or in general the scope of command responsibility, by which, as to the traditional understanding of command responsibility, a commander can be held accountable for an autonomous human subordinate, and holding a commander accountable for an autonomous robot subordinate may appear analogous. Moreover, traditional command responsibility is only implicated when the commander "knew or should have known that the individual planned to commit a crime yet he or she failed to take action to prevent it or did not punish the perpetrator after the fact. "It will be important to establish, inter alia, whether military commanders will be in a position to understand the complex programming of drones sufficiently well to warrant criminal liability[99].

In addition to this it is not clear ,however, that commanders will consistently know of these types of risks, especially because they themselves will presumably not have programmed or designed the weapon[100]. Where they do not recognize until after deployment that drones poses a risk, moreover, they would not be able to reprogram it to prevent the violation. As systems become more autonomous, their actions in the field and the risks they create will grow even more difficult to predict, limiting the applicability of traditional command responsibility. To hold a commander responsible for drone's action that he could neither control nor foresee would thus go beyond the traditional scope of command responsibility. It would also cut against ethical notions about criminal liability. If commanders are not held strictly liable for their subordinates' actions, it seems" unfair to

[98] Id.
[99]Christof, supra note 89, page 14.
[100] Kenneth Anderson & Matthew Waxman, Law and Ethics for Autonomous Weapon Systems: Why a Ban Won't Work and How the Laws of War Can, Hoover Institute (4th edition, 2013), page57.

impose liability on commanders for their fully autonomous weapons, "as these weapons will exercise a similar degree of autonomy.

4.2.2.2Designer or manufacturer liability

Another option is to hold the designer or manufacturer strictly liable when their drone violates international law." It has been proposed that, at least civil damages should be assigned to the designer and the manufacturers, by utilizing a scheme similar to strict product liability[101]. This option would treat any drones crime as a legal accident, and manufacturers would be required to pay for any damages caused and to compensate victims or their families. This, the argument goes, would encourage manufacturers to make drones as safe as possible. As the weapon is presumably not meant to commit such violations, placing the blame on the entity that designed or manufactured it has some intuitive appeal,

But drones opponents have identified a couple of problems with a strict liability approach. First, in the defence context, weapons manufacturers are rarely held accountable for design defects, especially when they notify the purchasers that the drones may attack the wrong target. Second, this option would require the individual victims to initiate lawsuits against corporate manufacturers of robots[102]. Victims who are often impoverished and geographically displaced are unlikely to sue these companies, which are likely to possess much greater resources. In addition to these problems, strict liability for drone's producers suffers from yet another, more problematic flaw that critics have overlooked. Specifically, holding these companies strictly liable would not necessarily incentivize them to produce weapons that are more likely to comply with international law. Instead, producers could simply charge higher prices for drones to offset the liability risks, thus passing their increased liability costs on to the state consumers. After all, it is likely that only those states with large defence budgets will be able to afford these weapons in the first place, rendering the demand for drones fairly inelastic. Relatively slight increases in price to compensate for the liability risks are therefore not likely to deter purchases. It follows that; once producers have created a weapon that states are willing to buy the prospect of liability would not necessarily incentivize them to make their product safer. The state buyers, meanwhile, would never internalize the cost of those war crimes committed by their own drones because the increased price of the weapons would spread that cost among all buyers. Consequently, no single buyer

[101] Id.
[102]Hammond Daniel, supra note 90, page 665.

would have an incentive to minimize the risk of drone crimes. Because of this cost-spreading effect, states that use their drones rarely or carefully to minimize the risk of war crimes would subsidize states that use them with less regard for that risk-thus discouraging risk minimization by states. "A negligence approach to designer or manufacturer liability also has its flaws. While individual designers "lay the foundation" for drones actions, "the weapon would still be autonomous," so even the most careful designer "could not predict with complete certainty the decisions might eventually make in a complex battlefield scenario"[103]. Indeed, the entire concept of autonomy presupposes that drones will take actions other than those that its designers predicted or intended." As drones learn from their experiences and surroundings, their decisions would depend on much more than the original programming." Thus, because drones will be designed precisely for independent decision-making, finding the manufacturer negligent in any given case may prove impossible in practice. Furthermore the manufacturing of a drone will invariably involve a vast number of people, and no single person will be likely to understand the complex interactions between the constituent components of drones[104]. There are, thus, significant legal, ethical, and practical problems with each of the proposed options for individual accountability in the event of drone's crime.

From the very beginning IHL should have to stand on behalf of civilians, meaning, if there is any violation against the rights of such innocent civilians, IHL must convict those persons who are responsible for the act. Sometimes it may be difficult to specify exactly the person who committee civilian causality and the problem is more complicated with regard to drones. Even though the environment is not that much favourable still IHL (states party to the convention) are stronger than that of innocent civilians. Which means for example we can take the Security Council; this international body have the capacity to push state to stop violation and or to convict individual who violate the rights of civilians. Generally I strongly argue that IHL, in what so ever circumstances, must give priority to civilians.

4.3Criminal liability

Killings by armed drones may result in state responsibility under international law and individual liability under national and international criminal law. Under this topic our main concern is focusing on individual criminal responsibly. Thus individual responsibility should

[103] Id.
[104]Christof, supra note 89, page 14.

be attributed to the drone operator and/or his or her superiors for unlawful killings. In determining whether a drone strike may be within the reach of the Court, those responsible for the attack must have the material and mental elements of intent under the Rome Statute[105]. In which a criminal act in the Rome Statute consists of a material (objective) element and a mental (subjective) element. Objective elements concern conduct and result. The competent, court, whether it may be international or national, uses the principles of self-defence, proportionality, necessity and discrimination in determining whether the resulting harm is unlawful. The mental element consists of intellectual (knowledge) and moral (intent) sub elements. Existence of intent and knowledge can be inferred from relevant facts and circumstances. A person acts with intent when they mean to engage in the conduct. Furthermore, a person means to cause a specific consequence if he is aware that it will occur in the ordinary course of events. The Court is concerned with individual criminal responsibility. A person may be liable if they commit a crime alone, jointly with another or through another person. The Rome statute stipulates acts which incur criminal responsibility as provided under article 5, which reads as follows, the jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression. In addition to this as provided under sub article 2, The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations. Therefore if someone violates this international rule he may incur criminal responsibility.

As I mentioned earlier the mental and the material elements are very important to talk about criminal liability from the very beginning. However it may be difficult, concerning drones, to prove the mental element of the crime, particularly when operators are used as mere instruments to release missiles or bombs, but without having sufficient information on the status of the targeted persons. The view was expressed that in the absence of an adequate legal system for allocating and attributing responsibility for their use, fully autonomous

[105]Lailey Rezai, U.S. Drone Policy and the International Criminal Court, July 22, 2014 .page 3.

weapons systems could not be lawfully deployed[106]. Against this background, holding an individual accountable for the actions of a robot acting autonomously could be legally challenging under present circumstances. The doctrine of 'command responsibility' could serve to make accountable for violations a commander that recklessly deployed fully autonomous weapons; in other cases the requisite *mensrea* could be identified among individuals aiding and abetting a war crime or crimes against humanity. Generally, based on this argument even though Rome statute expressly provides the prohibited act which incur criminal responsibility, with regard to drones it is very difficult to make individual liable.

[106]Milena Costas Trascasas,EXPERTS MEETING ON ARMED DRONES AND ROBOTS UNDER INTERNATIONAL LAW. Divonne, France, 3–5 December 2013.

CHAPTER FIVE

Conclusion and Recommendation

5.1Conclusion

This paper has examined features of current means of war fare specifically unmanned Arial vehicle (drones). International humanitarian law under its provisions impose a duty on the state in acquisition or adoption of any weapon that, they must assess whether its use would be contrary to international humanitarian law, as a result of this in employing such weapon states should have to give grate concern to civilians in order to minimize harm towards those innocent civilians. In other words protection is a governing principle of IHL therefore whatever means are used states must comply with this principle.

The other issue is related to the principles that are provided under customary international law. For this discussion the researcher stick on those principles that are very important to the issue at hand .Based on this avoiding unnecessary suffering is one by which in using of drones state must not cause unnecessary suffering towards civilians. Next to principle avoiding unnecessary suffering we may find Principle of proportionality, under this principle an attack which may be executed to cause incidental loss of civilian life injury to civilians or the combination there of, which would be excessive in relation to the concert and direct military advantage anticipated is prohibited .The main concern of principle of proportionality is that the action taken must not be excessive.

Principle of distinction is very important principle for this paper. Thus principle of distinction is seen based on two perspectives, one during drones strike the person who is in control of such weapon must distinguish the lawful targets and civilians on the one hand and principle of distinction, on the other hand, when drones are in control or operated by civilians. Which means as to the first perspective, it is not that much complicated, states must distinguish the law full target in order to avoid or at least minimize civilian harm. However, when we come to the second perspective we may face difficulties and the difficulty may arise when drones are controlled by non-military personnel. This scenario makes adherence to the principle of distinction problematic. The good example is CIA, the CIA personnel are civilians but they are in control of the robots which is only open to combatants, by doing so they are violating international humanitarian law.

The last point this paper reviewed is about the issue of responsibility. Accordingly there may different actors who contribute for civilian causality. Among them states are the one that contribute a lot. States are in the first place to make the decision on the utilization of drones. Therefore they must internalize the cost of their decision making. There is also a mechanism to impose responsibility on individuals in which individual incur responsibility based on commanding officer or manufacturer or designer .In addition to this the mechanism to convict those individuals is through international criminal law and domestic law, pursuant the rules Rome Statute if the individuals violate those rules. For instance, if individuals commit crime of genocide, crime against humanity etc. criminal liability will arise. With regard to crime committed by drones, because of the complex nature of drones, such as being autonomous, it is very difficult to establish that all criminal elements are fulfilled.

5.2 Recommendation

Because of the dynamic nature of technologies the advancement of means of warfare also changed dramatically, because of this civilian causality is increased exponentially. Contrary to this when we see international humanitarian law it seems stagnant, the good example is, still means warfare are governed through analogically .Therefore the researcher strongly recommends that:

- Since the rules governing the use of drones is not comprehensive under the IHL, amendments to the rules regarding means of warfare may be needed to cover the use of drones.
- There may be a pressing need to establish principles of command responsibility in cases when drones are involved as a means of warfare.
- There may be a need to further formulation of the principles of IHL especially principle of distinction so that the use of drones, in light of those principle is explicitly subsumed.
- IHL should have to create a mechanism to convict those civilians who are in control of drones. Strengthening of its mechanism is needed, in order to make state accountable for the violation of the right of civilian during drones strike.

- It is important to put regulations regarding manufacturing of drones' .which means through strong regulation we can minimize the effect of harm which may be created as a result of defects in manufacturing.

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