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Regulating the use of Armed Drones in International Humanitarian Law

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ABSTRACT

Nations worldwide are quickly adapting to newer technologies aimed at modern warfare. The armed Unmanned Aerial Vehicle or 'drone' is one of them. The scope of modern-day usage of drones has extended from its traditional roles of intelligence gathering, surveillance and reconnaissance¹ to target monitoring and carrying out precision strikes. Some of the most recent examples of state militaries leveraging their armed drone capacities include the drone strikes in the Israeli- Palestinian conflict, the Armenia- Azerbaijan War 2, the ongoing Russia-Ukraine War 3 etc. With the growing use of any modern technology in warfare comes the urgency of formulating laws to regulate its use such that it is ethical and in line with International Laws. The regulation of armed drones can be a challenge to policymakers because of the fundamental ethical questions it poses in both wartime and peacetime: Firstly, who can or cannot be targeted in a drone attack during times of conflict? What is a conflict? If drones are unmanned, who is liable for any war crimes committed by means of the drone? And are our existing frameworks capable of addressing future developments in the field of modern drone warfare? This paper attempts to answer these questions while throwing light on additional recommendations that could be implemented to create a robust legal framework capable of tackling the humanitarian implications of technological warfare.

Keywords: *Drones, armed drones, drone warfare, International Humanitarian Law, Unmanned Aerial Vehicles, technological warfare.*

I. INTRODUCTION

Unmanned Aerial Vehicles (UAVs), commonly known as drones have witnessed a widespread surge in production and usage across the world. The growing popularity of this emerging technology can be attributed to its simplicity of design, cost-effectiveness and the versatility it depicts in terms of usage across various sectors. Today, drones are being produced and procured at mass scales by both private individuals and national and international governments. The application of drones can be witnessed in the fields of military & defence, surveillance, agriculture, photography & filmography, disaster management, weather forecasting, law

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enforcement, rescue operations, deliveries and geographical mapping.⁴

In the Indian context, there is seen a huge push from the side of the Central government with respect to the production of drones and the development of new technologies. The Government had rolled out the liberalised Drone Rules in 2021.⁵ The emergence of drone technology in India and an expansion of consumer markets are of particular focus as part of the government's mission of 'Atmanirbhar Bharat' or Self-reliant India. Most notably, India in 2021, had executed the distribution of covid-19 vaccines to the remote areas of Manipur, Nagaland and Andamans and Nicobar Islands via drones.⁶ Drones are also being used extensively for precision agriculture, which includes targeted administration of fertilizers and pesticides, dispersal of seed over a wider surface area, effective detection of crop anomalies etc. India's drone sector is projected to grow to a value of about 120-150 billion by 2026 and is expected to provide a much needed boost to the employment rate.⁷

II. ARMED DRONES AND DRONE WARFARE

The term 'armed drones' mainly refers to an armed unmanned aerial vehicle (UAV), which in its simplest sense is a drone with weapons attached to it. Another term UCAV is used to describe Unmanned Combat Aerial Vehicles, which are drones with internally engineered combat capabilities. From a military perspective, drones have traditionally been used for intelligence, surveillance, and reconnaissance. However, the series of technological developments in the drone sector have broadened the scope and extent to which militaries are adopting drones globally. Today US, Israel and China are among the top global players as far as military-armed drones are concerned although several private individuals and non-state actors have also been getting their hands on the technology.

Major drone strikes can be traced back to US's target operations in Pakistan and Afghanistan. The military advantage of using armed drones may well be observed in the Armenia- Azerbaijan war where Azerbaijan emerged victorious². More recently the use of armoured, most notably the Kamikaze drones, was alleged in the ongoing Russia- Ukraine War.³ Drone warfare is also seeing a rise in Syria and Gaza, where drone 'swarms' were spotted⁸. Armed drones enjoy an increasing preference in modern warfare mainly because the fact that they are easier to penetrate in less accessible locations and facilitate execution of military operations with minimal casualties on the operator's side. Moreover, the logistics are more convenient and the attacks are more precise. This is complemented by greatly reduced political risks.

Private drone attacks by non-state actors have also recently been sending shock waves around the globe: the assassination attempt on Iraqi Prime Minister Mustafa al-Kadhimi in 2021⁹ and

the drone attack on Saudi Arabia's oil facilities by Yemen's Houthi rebels¹⁰ are clear examples. From an Indian perspective, drones have mainly been used by India's enemy neighbour Pakistan to drop bombs and deliver weapons and narcotics¹¹. At present, India is making efforts to combat the growing threat from the highly advanced drone technologies of its neighbouring state China.

III. LEGAL IMPLICATIONS AND DILEMMAS

There exists no legal framework at present whatsoever, that declares drones either armed or unarmed, to be illegal nor is their use restricted for military or civilian use in any sense. This is not to say that existing laws under the International Humanitarian Law are not applicable to weapons attached to these drones. For example, the release of chemical weapons is a crime under International law therefore the similar consequences would be applicable to states engaging in chemical weapon attacks by means of armed drones, although military drones are not illegal under Article 8 of the Rome Statute.¹²

A broad topic that has perplexed the stakeholders involved along with numerous critics, is whether or not the use of armed drones is or can ever be in alignment with the norms laid under the International Humanitarian Law (hereafter mentioned as IHL). Drone strikes have time and again been subject to criticism for resulting in unnecessary harm to uninvolved civilians. Further, there is a certain intensity of psychological impact felt by the inhabitants in or around the area being targeted.¹³

The constant hovering of drones or swarms of drones for the collection of information and detection of targets causes emotional and psychological distress to subjects, and this has been well-documented. Others argue that the use of armed drones in modern warfare in fact upholds the provisions of the IHL.¹⁴ They attribute this to the fact that drones are extremely precise in the detection and striking of the target; this minimizes the risk of indiscriminate killings in the civilian population and rules out the violation of IHL to a considerable extent.

In order to understand the applicability of IHL (also known as the Law of Armed Conflict or LOAC) in the use of drones, it is first and foremost important to ascertain whether or not the drone(s) has/have been used during an armed conflict. IHL stands applicable only in conflicts that involve the role of armed weapons to some degree. These conflicts must necessarily involve the use of 'lethal force' in order to qualify as an armed conflict and therefore come under the ambit of the International Humanitarian Law. In case of a violation of any of the provisions of the IHL and therefore a commission of a war crime, article 8 (1) of the Rome Statute may be referred¹² to: "The Court shall have jurisdiction in respect of war crimes in particular when

committed as part of a plan or policy or as part of a large-scale commission of such crimes”. Further, armed conflicts are classified under the IHL as either International Armed Conflicts (IAC) or Non International Armed Conflict (NIAC). While IAC involves an armed conflict between two nations, NIAC involves an armed conflict between a State and a non- state actor which may include terrorist or rebel groups.

An important question that arises when drone warfare is talked about is that of liability. Drones are by nature, unmanned. This means that it has no human crew or pilot within the vehicle. In fact, a key reason for the increase in adoption of drone technologies is this very fact that they are very small and can hence be operated in areas that would otherwise be considered hard to reach by humans; moreover, a drone can conveniently be used for carrying out extra- territorial attacks with a person operating it from a remote location hundreds or even thousands of kilometres away from the site of the attack. Since drones are unmanned and are even automated to a certain extent, the question of liability stands relevant. A good starting point for answering this question would be Article 28 of the Rome Statute¹² under which criminal responsibility for any war crimes committed is placed on the military commander who had ordered either the direct committing of the crime or to perform acts that eventually resulted in the crime. In the case of drone operators in NIAC, domestic laws would apply and the prosecution would be ordered accordingly.

The next most logical issues to address are: who can be legally targeted with drones under the IHL and where? The same shall be answered below.

Every armed conflict, whether IAC or NIAC, involves two main parties which are the combatants and the civilians. Any individual directly or indirectly involved in the carrying out of the conflict and “taking part in hostilities” is a combatant while the remaining are civilians. According to the IHL, “civilian population as such, as well as individual civilians, shall not be the object of attack.”^{15 16} This rule applies under all circumstances and in case of any confusion with respect to whether an individual is a combatant or a civilian, he/she must be considered a civilian. Distinguishing between combatants and civilians has been getting increasingly challenging due to the changing dynamics in the population of conflict areas: often times some ‘civilians’ are partially involved with the combatants in the facilitation of hostilities. Such patterns are more commonly observed in NIACs. It would be interesting to note that over the past few years a term ‘unlawful combatants’ has been used by countries like the US, Russia and Israel to refer to civilians who are also partaking in hostilities. Some academics argue that this term has been coined in order to facilitate and justify targeted killings through drone strikes. In her 2014 paper, Rachel Alberstadt¹⁷ opines that such a distinction is unnecessary since “there

already exist compatible designations allowing States to target civilians under certain circumstances without unnecessarily enlarging the scope of lawful targets.” Distinguishing between combatants and civilians can be challenging however ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities which was issued in 2009 can be a good starting point.

In the attempt of distinguishing between combatant and civilian, a distinction must also be made between civilian objects, which include civilian homes & property, and military objects, which include military zones and bases. At the time of an armed conflict, the attacking state must refrain from attacking civilian objects at all times, according to IHL.

Another important consideration to make by the State or the non- state actor carrying out the drone strike would be the proportionality of the attack. Although subjective, it is generally agreed that the military advantage sought to be gained by performing an attack should not be far outweighed by the damage to civilian life and property caused as a result of it.

In terms of the areas where IHL is effective, it may be deduced that IHL is applicable throughout the entirety of the territory of the participating states, including its high seas, inland water bodies and exclusive economic zone.¹⁸

IV. CLOSING REMARKS

Major gaps in the legal framework where drones are concerned can effectively be addressed only on the joint consensus of major stakeholders. The first necessity in this regard would be to adequately define the term armed drone. This definition must be an all-encompassing one that includes semi-automated UAVs and UCAVs and must be capable of highlighting the degree of autonomy of these weapons. There is a pressing need for all major international organisations and States to together take up the responsibility of then building on this definition to and work out the extent to which the utility of armed drones can be reasonably permissible under normal circumstances. In his essay titled *Post-Human Humanitarian Law: The Law Of War In The Age Of Robotic Weapons*¹⁹, author Vik Kanwar stresses on the necessity of global legal norms to catch up with the rapidly developing technologies. The essay further suggests that mutually agreed upon inter-governmental treaties pertaining to the limiting of armed drone production and restrictions on its acceptable usage can pose as a workable solution to this conundrum. Optimistic authors like Ronal Arkins²⁰ have taken a step further and written about the possibility of technologies such as that of armed drones to be engineered to conform with the IHL and “programmed with artificial conscience”. Until these recommendations are implemented though, states and independent organizations must keep a watchful eye on the

rapid developments in armoured drone technology since the primary understanding of this technology is key to formulating legal regulations around it. “Technology will be a key driver of future wars”²¹ and it is therefore imperative that global humanitarian laws are amended and modified continually, to be able to effectively serve their purpose of upholding ethical principles and safeguarding human lives in times of conflict.

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