

# Implementation of Unmanned Aerial Vehicle (Drone) as War Equipment In Terms Of Proportionality Principle in International Humanitarian Law

<sup>1</sup>Yudha Sunarta Suir, SH, <sup>2</sup>Prof. Dr. Zainul Daulay, SH., MH, <sup>3</sup>Dr. Syofirman Syofyan, SH., MH

<sup>1</sup>Master Of Law Student, <sup>2</sup>Master Of Law Lecture, <sup>3</sup>Master Of Law Lecture

Faculty Of Law, Andalas University, Padang West Sumatera, Indonesia

Email : <sup>1</sup>yudhasunartasuir@gmail.com

**Abstract:** *Ambiguity in the regulation of drones as a war equipment can be utilized by the State to carry out attacks against other countries under the pretext of counter terrorism. As America uses this understanding to attack Afghanistan and Pakistan. One of the principles that can maintain sovereignty over improper use of drones is to apply the obligation of the proportionality principle, so in situations of war or non-war it should not be a differentiator in applying this principle. Humanitarian law provides a balance of every principle contained in the conventions and rules of international law. The existence of these principles and principles is to maintain international stability. Then this research will explain how the use of drones according to international humanitarian law and analyze article 51 contained in the additional protocol.*

**Key Words:** *Drone, Proportionality Principle, War Equipment.*

## 1. INTRODUCTION:

International humanitarian law is not intended to prohibit war, because war from the point of view of international humanitarian law is a necessity and an unavoidable reality. According to Mohammed Bejaoui that international humanitarian law is to humanize war. International humanitarian law tries to regulate that a war can be carried out by paying more attention to the principles of humanity. International humanitarian law is based on several main principles, namely the principle of humanity, military necessity, and the principle of distinction.[1] In the application of these principles carried out in a balanced manner.[2] The implementation of the principles of humanitarian law must be proportional. The principle of proportionality must be applied in the laws of war to avoid civilian casualties.[3]

The principle of proportionality prohibits the use of any type or level of force in excess of what is needed to achieve military objectives. Proportionality compares the military profits obtained with civilian losses suffered. Proportionality requires a balance between anticipated military, concrete and direct superiority by attacking legitimate military targets and estimated or unintentional civilian losses. The point is that the comparison of civilian losses is not greater than the military gains. In this principle of balance, justification of excessive incidental loss is prohibited and violates the principles of humanitarian law.[4]

Violations of international humanitarian law still occur frequently. But the perpetrators continue to try to justify that their actions are not a violation and they have the right to act according to international law.[5] This is an interesting discussion that deserves further study. Therefore, the authors are interested in examining more comprehensively about the Use of Unmanned Aerial Vehicle (Drone) as a War Equipment in terms of Proportionality Principle in International Humanitarian Law.

### 1.1. CONCEPTUAL FRAMEWORK:

#### A. International Humanitarian Law (IHL)

Humanitarian law does not focus on a legality in which armed conflict occurs, but according to the Geneva Conventions of 1949 along with the two Additional Protocols of 1977, namely providing legal protection for people who do not, or who no longer, participate directly in hostilities (injured victims, victims sick, shipwrecked, person detained in connection with armed conflict, and civilians) and limiting the effects of violence in battle to achieve war objectives.[6] This law is contained in the Geneva Conventions. There are at least two conditions related to International Humanitarian Law, namely; *Jus ad bellum* (law on the use of force) and *jus ad bello* (law in war). *Jus ad bellum* rotates to the rules set out in the UN Statute or regulations that authorize a country in taking acts of violence.[7] Meanwhile, *Jus ad bello* is a form of application of a number of regulations that were carried out during the war.

#### B. The Principle of Proportionality

The principle of proportionality is intended that war or use of weapons does not cause casualties, damage and excessive suffering that is not related to military objectives (the unnecessary suffering principles). Especially in this case excessive and unnecessary physical damage to non-military and non-combatant objects. To determine whether an

unnecessary suffering arises or not in a war, especially in this case against civil and non-combatant facilities, we can associate it with the concept of Military Necessity which determines that a military action is feasible or not.

The principle of proportionality has also been codified in Protocol 1 of the Geneva Convention Article 51 paragraph 5 letter (b) explained that in the context of protection against non-combatants, prohibited attacks include all types of attacks that: "... which may be expected to cause incidental loss of civilian life ... which would be excessive in relation to the concrete and direct military advantage anticipated".[8] From this article, we can see that military necessity has been violated and unnecessary sufferings occur which is contrary to the principle of proportionality if the military superiority achieved is not proportional to the victims and the damage caused, especially in this case against civilian objects.

If an attack on a civilian object is carried out, then the attack must be in accordance with the principle of proportionality which outlines that the attack was not carried out excessively and haphazardly and balanced with military superiority obtained. If the attack violates or can violate the provisions of Article 51 of Protocol I of the Geneva Conventions

### C. The Principle of Discrimination (Distinctions Principle)

Distinction principle clearly distinguishes between combatants and non-combatants. Between facilities used for civilian purposes and facilities used for military purposes. Who may be the object of violence and who must be protected, according to their respective definitions set out in the Conventions of the Humanitarian Law and other Protocols governing the same thing. In the explanation of the International Red Cross (ICRC) of the 1949 Geneva Convention Concerning the Protection of Civilians During the War in article 4 paragraph 4.[9] The definition of combatants themselves has been regulated in Article 4 of the Geneva Conventions of 1949 which states that a person can be categorized as a combatant and bound to law and combat habits (lawful combatant).[10]

## 1.2. THEORITICAL FRAMEWORK:

### A. State Sovereignty Theory

Sovereignty is the highest authority in a country where there is no interference from other countries in a sovereign state. Regarding the sovereignty of the state Jean Bodin who lived in the sixteenth century revealed that sovereignty is the highest power in a country to determine the law in that country and its nature: single, original, eternal, and cannot be divided.[11] The state is said to be sovereign because of the nature and nature of the country, if it is said that the state is sovereign because it has a separate power.[12] The state has the highest authority, meaning that the state has the right of monopoly power, which is a characteristic of the organization of society today that does not justify a person or individual taking his own actions if he is harmed.[13]

According to Hans Kelsen, the state is an organization created in the structure of national legal regulations that shape it.[14] According to Hobbes is also one of the pioneers of state sovereignty theory. Hobbes sees sovereignty as the "right" to be able to govern others.[15] The basis of that right or authority is a natural law that requires humans to carry out what they promise. According to Hugo Grotius, a lawyer and statesman explained that all humans have the same nature, therefore all humans are always related to each other. Then there will be a tendency to form a shared life called the community, which is based on nature having the same rights.[16] The country has the executive right to form the law, but because the ruler is sovereign, he is not bound by the law he made.

There are two factors that need to be considered in terms of finding new meaning about state sovereignty in the international legal system of the transporter. First, the development and dissemination of human values (spreading of humanity values) and their implementation by countries, international organizations, individuals, and other Non-State Actors throughout the world. Secondly, there is an increasingly widespread and intensive process of globalization and economic liberalization and international trade in various regions of the world.[17]

### B. Erga Omnes Obligations

The fundamental rules of international law in their development are often referred to as *jus cogens* (preemptory norms of general international law) which, besides being powerful, also have the highest level of hierarchical position among other norms and principles. As a consequence, the *jus cogens* norm is considered as an absolute norm that must not be circumvented and must be obeyed.[18] The legal consequence of *jus cogens* is the emergence of the concept of *erga omnes obligations*, which is a matter of state accountability. The obligations of each country (*erga omnes obligations*) for *jus cogens* are legal obligations which cannot be avoided, so based on this concept, violations of *jus cogens* are considered to constitute violations not only for countries directly affected, but also violations for all members of the international community.[19] the consequences of *erga omnes obligations* need to be applied to universal jurisdiction over them. Thus, war crimes are categorized as international ones in the form of violations of rules relating to basic human rights, give rise to binding legal obligations in international law and have legal implications of *erga omnes obligations* (the obligation of all countries to obey and enforce them).[20]

## 2. LITERATURE REVIEW:

### A. Principles of Humanitarian Law

The Geneva Conventions and The Hague are the two main sources of international humanitarian law and all the assembled things contained and regulated by the convention. In addition to regulations which are principle that cannot be violated, there are also principles which are the source of the provisions of the convention. International humanitarian law has many legal principles contained in international humanitarian conventions, there are 3 main conventions, namely: *The principle of humanity, The principle of distinction and The principle of proportionality.*

This principle is the main provision in the professionalism of warfare carried out by the parties, with this principle it will be able to bring up the principle of balance in humanitarian law. The principle of proportionality provides conditions for proportional attacks on the use of weapons or means and methods of war. Some additions to the principles of international humanitarian law are the Principle of Prohibition of Causing Unnecessary Suffering and military necessity principle. The purpose of this principle is not to deny the right of the state to wage war or use the power of weapons to defend themselves (self defense), but to limit the use of weapons by a country in using the right to war to prevent excessive suffering and damage and that is not in accordance with military objectives.[21]

### B. The Differentiation Principle in the use of drones

The use of this principle is one of the very fundamental principles in international humanitarian law norms, because basically the application of drones in non-international conflict attacks is not as difficult as in international armed conflict. The use of drones as attackers has now been carried out by the United States and also in the case of Afghanistan in 2001-2002, also in the case of inter-weapon attacks on NATO countries, such as drone attacks on Iraq in 2003-2004.[22]

The above example is evidence that often drone attacks are carried out in non-international armed conflicts, reinforced by the case of the United States and Britain in Afghanistan, the United States in Pakistan, Somalia and Yemen.[23] The use of drones in each country has different functions, ranging from direct war equipment to as a backup in war equipment.

### C. Proportionality Concept in Humanitarian Law

International humanitarian law is one part of international law, the main sources and development of humanitarian law follows and is guided by international law as contained in article 38 paragraph 1 of the Statute of the International Court of Justice concerning the sources of international law. The existence of legal principles and principles is part of the essence of the modern legal system, which is a positive legal system based on the principles and principles of the romances that are implemented by international organizations.[24]

### D. Procedures and War Equipment According to Humanitarian Law

Humanitarian law was born in the dynamics of international affairs and was assembled with war, starting with the publication of a book called *Un Souvenir de Solferino* created by Henry Dunant. The book tells the author's experience at the war in Solferino (Northern Italy) in 1859 until the emergence of the Geneva Convention I in 1864, Geneva Convention II in 1899, Geneva Convention III 1929 and Geneva Convention IV in 1949.[25]

The international community tried to always hold meetings related to the regulation of war law, then in 1899 and 1907 international countries held a peace conference called the Hague Convention. The outcome of this peace meeting was the birth of 13 conventions, and specifically related to humanitarian law of weapons and methods of warfare is at convention IV, namely the law and customs of war and land, this covensi is known as the Hague Regulations. It is a general rule that every country in the world is not justified to use weapons blindly resulting in widespread and profound casualties. Because the state does not justify using unlimited weapons, international law imposes limitations on the state in applying its law, according to Malcom D. Evans that there are two restrictions, namely: First, regulation of general provisions relating to weapons that have been developed. Second, the international community which has accepted the existence of restrictions in the use of weapons of war.[26]

The use of tools, procedures, means and effects of war are stated in the Hague Convention and the Geneva Conventions, but in the case of normative regulation of customary law is also very often embraced by this convention, that much of the humanitarian convention comes from international customs such as the Declaration St. Petersburg in 1869, the Hague Declaration I in 1899 concerning the prohibition of the use of famine gas and the Hague Declaration II on bullets dum dum and the Hague Convention IV in 1899 along with the Annex on the regulation of customary laws on land war.[27]

This agreement is a special agreement to prohibit the use of certain weapons in war, the emergence of this regulation is the reason for the discovery of new weapons namely bullets with a category that does not respect humanitarian principles and is also a form of criminalization of customary law where the consequences of such attacks cause unnecessary losses.[28] One of the consequences of this declaration gave birth to a further agreement.

In Article 23, Extract From The Declaration Concerning The Prohibition of Using Bullets Which Expand or Flatten Easily in the Human Body (International Peace Conference The 4th Hague Conference and the regulation of land war in 1899). This article is the legal basis for the prohibition of the use of weapons in during war, this is because the specificity of this weapon can result in widespread and unnecessary casualties and losses, such as the use of poison weapons, weapons with a curved branch with deep levels of pain, projectiles containing broken glass, poison smears on the tip of weapons and bullet crossing, etc.[29] This does not make it impossible to use the whole weapon as a whole.

#### **E. International Conventions Governing the Prohibition of the Use of Certain War Weapons**

The 1980 Convention on the prohibition or restriction of the use of certain conventional weapons which were considered to cause excessive injury or could have an indiscriminate effect (the Conventional Weapons Convention / CCW), which included, the 1993 Convention on the prohibition and restriction of developing, manufacturing, the stockpiling and use of chemical weapons and about their destruction. 1995 protocol relating to laser weapons that can cause permanent blindness (Protoko IIV [new] for the 1980 Convention), 1996 revised protocol on prohibiting or limiting the use of landmines, booby traps and other tools (Protocol II [revised] for the 1980 Convention): [30]

- a. The convention on the prohibition on the use, storage and manufacture and transmission (transfer) of antipersonnel mines and on the destruction of the 2001 Amendment to Article I of the Conventional Weapons Convention (CCW).
- b. Dublin Convention 2009, Regarding Prohibition of Using Cluster Bombs / Cluster Bombs.

#### **F. Drones and international Humanitarian Law**

The use of drones in the concept before the war began is still a debate because this is still in the form of norms that sometimes not all countries realize the importance of setting this concept. it becomes even more controversial when direct expectations of conflict occur. One consideration in this regard is the large number of victims who have awakened the international community, even in the context of the form of weapons which are still being debated such as the use of cruise missiles or air bombings and the use of drones equipped with explosive weapons.[31]

Many factors are a consideration of the use of drones in terms of minimizing civilian casualties in conflict areas.[32] Although these reasons did not eliminate victims from the attack, they were able to notice and consider humanitarian aspects. The use of drones remains inseparable from the malfunction of the functioning system, as happened in Afghanistan that the drone attack in 2010 killed 23 civilians and injured 12 others. [33]

### **3. METHOD:**

This research is a normative legal research. Normative legal research is library law research. In this normative study use a Conceptual Approach. This approach moves from the views and doctrines that develop in the science of law.

### **4. ANALYSIS:**

#### **A. Implementation of the Principle of Proportionality in the Use of Unmanned Aerial Vehicle (UAV) in International Humanitarian Law**

The selection of targets in carrying out attack operations does not guarantee and determine the validity of attacks in the use of lethal weapons even though the object of attack is in the form of military objects that are legally permitted by international humanitarian law, violating the rules of proportionality are directional attacks and calculation of the correct distinction principle in accordance with additional protocol I 1977. Although this provision is not in line with article 3 of the Geneva Convention or the 1977 Additional Protocol, this rule is considered a customary law which applies not only to international armed disputes but also non-international. This is reinforced by the 14 studies of international humanitarian law.

The sentence "excessive" in article 14 above means as in paragraph 51 (5) of Additional Protocol I of 1977, the ICRC provides an interpretation of this text in the direction of an attack based on proportionality. The concept of understanding related to proportionality, in addition to the level of metril international law, there is also a dispute in understanding the meaning of proportionality. Even as close as other differences occur, such as Britain and America in providing a perspective of war proportionality. Like what happened in Afghanistan in March 2011 when a British Royal Air Force drone killed four Afghan civilians and injured two others in an attack on 'rebel leaders' in Helmand province, the first confirmed operation in which a British Reaper had been responsible for civilian death.[34]

Then in the application of drones by applying the principle of proportionality, it is necessary to pay attention to the regulation of human rights because the concept of human rights is inseparable from two basic concepts that are considered in the enforcement of human rights, namely the principle of need and proportionality, although the existence of these two concepts lies more in *jus ad bellum* and humanitarian law. In seeking justice and the truth of human rights

law, international humanitarian law and international criminal law constitute an interconnected unit in strengthening the principles of general international law.

### **B. The practice of applying proportionality principle**

International law, especially international humanitarian law, guarantees and safeguards each interest and measures the reasons for attacks carried out by parties in conflict, such as military interests, for those who carry out attacks and civilian losses which result from such attacks. Between military interests and civilian losses must be regulated and measured and conceptualized so that not one of these parts is implemented, this is one of the functions of international law in situations of armed conflict whether in a war or non-war situation.

So in safeguarding between achieving military interests and minimizing civilian harm is by reducing military interests. There are two ways to achieve this rule concept: [36]

- a) Every attack launched from the attackers must formulate the concept of attack by not making the attack absolute in achieving military interests, so when conflicting military interests with the consideration of civilian casualties, it must be to reduce the military interests to be achieved that avoid civilian casualties.
- b) Even if there is no transfer of attack and must have an impact on the civilian population, it is necessary to minimize the civilian who is the target of sacrifice. Also this can move the point of attack so as not to have a major impact on civilians who are around the object.

### **C. Application of the Principle of Proportionality Article 51 Additional Protocol I 1977 in Non-War Situations**

The meaning of war in humanitarian law is the norms and rules about war, each word has a different meaning. Like attack has a dualism meaning that is the attack in the concept of war and in the concept of non-war (peace). Attacks in internal situations launched by one party can be a defense for their country or carry out a concept of caution in monitoring other countries. Various countries of the world are always making progress on their countries including the advancement of military technology in order to maintain the peace of the State, including attacks or dangers that come from outside. The concept of spying is basically a subtle attack carried out by the State, even to conduct wiretapping under the pretext of spying is against the law of a State.

The concept of the distinction principle of international humanitarian law is able to provide effective protection for victims of armed conflict if the countries participating in the convention are committed that in armed conflict, the parties to the conflict must respect the principle of discrimination, the principle of proportionality and the principle of humanity in armed conflict simultaneously. International humanitarian law principle of distinction can not be implemented optimally in modern armed conflict since influenced the development of forms of conflict, which was only an international armed conflict then appeared non-international armed conflict. there are differences in norms between the Additional Protocols I and II of 1977 and the existence of different interpretations of objects and the difficulty of distinguishing between combatants and non-combatants in today's modern warfare.

Disregarding the principle of distinguishing international humanitarian law turned out to be one of the triggers for not optimally implementing the Convention intended to protect civilians from the consequences of war as stipulated in Article 14 of Geneva Convention IV. So, if examined, apart from the implementation side, even in terms of the concept of humanitarian law requires a renewal. This is influenced by several factors, such as differences in regulations, interpretations, norms, state obligations in international and non-international conflicts and the development of forms of armed conflict greatly affect the order of implementation, especially for those who are not involved and no longer involved in armed conflict, and protection of civilians.[37]

Carrying out attacks with the aim of not hurting civilians is basically the effective application of the anticipatory concept, and this design should have been formulated before carrying out attacks by the conflicting parties. this rule applies to countries for which the State is subject to international law. The types of attacks that are categorized as attacks can forget when the situation is peaceful or not peaceful, then the concept of this difference creates a different understanding and resolution in war.

So carrying out attacks on the grounds of resistance to terrorism cannot be justified by international law, especially carrying out attacks against innocent civilians, because terrorists are not subject to international law that is justified as objects of attack. This concept of applying proportionality in peaceful situations does not apply to the concept of proportionality in situations of war. The attack described in article 51 does not contain an explanation that this attack is to use this principle, this is because this principle applies only to situations where this rule governs the making of legal norms themselves, namely during wartime.

Article 51 desired by international humanitarian law is as a limitation of attacks carried out by the attacking parties so that they do not commit violations with international crimes. But the meaning contained in article 51 of this dabat explained that each State must behave proportionally in carrying out its military interests, because each interest must pay attention to aspects related to the question of law itself.

**5. CONCLUSION:**

- The application of proportionality principle in non-war situations is still debatebel related to limitations in the use of this principle. basically all the principles of international humanitarian law can only be applied to situations that have been mentioned by international conventions, such as international armed conflicts and non-international dispute conflicts as stated in the Geneva Conventions and The Hague Convention. But countries that are international legal entities have an obligation to maintain world peace by adopting rules of international law, even though there are still countries that do not adopt them, they must maintain state stability by respecting and respecting the rules of international law.
- The principle of proportionality in the case of the use of drones must refer to applicable international law. Although there are reasons for using drones under the pretext of defending themselves and anticipating attacks by opposing parties, it must be right not to cause unnecessary losses and widespread casualties. The existence of this principle is to minimize victims who should not have been involved in the armed conflict.

**6. SUGGESTION:**

- There must be requirements and rules for countries that enter the international community the obligation to apply the principle of proportionality in all forms of situations and conditions on the ground. Does this call in the form of rules with the formation of new norms or appeals by international organizations as a forum for maintaining world security. There must also be an affirmation in upholding the norm of principle of proportionality towards parties not directly involved in armed conflict. It is hoped in the future that the principle of proportionality in the application of non-war situations becomes jus cogens by all countries in the world.
- The legal vacuum contained in the rules of international law, especially international humanitarian law, it is necessary to formulate specifically and in detail related to the use of drones as a war equipment. Especially connected with proportionality principle of international humanitarian law. In addition to establishing rules by including norms of proportionality principles in international law, it is also necessary to harmonize the concept of proportionality by all countries so that there are no multiple interpretations in their application. Because without equality of interpretation there will be obstacles in putting this principle as the norm for international humanitarian law.

**REFERENCES:**

1. Sefriani, *Hukum interansional Suatu Pengantar*, Rajawali Pers : Jakarta, 2012, Page 363.
2. Joseph Kunz, *The Changing Law of National*, American Journal of International Law, Page 51.
3. Denny Ramdhany dkk, *Konteks dan perspektif Politik Terkait Hukum Humaniter Internasional Kontemporer*, Rajawali Pers : Jakarta, 2015, Page 218.
4. Keichiro Okimoto. 2012. The Cumulative Requirements of Jus Ad Bellum and Jus In Bello in the Context of Self-Defense. Chinese Journal of International Law. Page. 3.
5. Soehino, *Ilmu Negara*, Liberty: Yogyakarta, 1980, Page. 17.
6. Mochtar Kusumaatmadja, ETTY R. AGOES, *Pengantar Hukum Internasional*, Alumni: Bandung, 2004, Page. 16.
7. Hans Kelsen, *Teori Umum tentang Hukum dan Negara*, Nusamedia: Bandung, 2010, Page. 267.
8. Munir Fuady, *Dinamika Teori Hukum*, Ghalia Indonesia: Bogor, 2010, Page.10
9. H.M. Agus Santoso, *Hukum, Moral, & Keadilan Sebuah Kajian Filsafat Hukum*, Kencana Prenada Media Group: Jakarta, 2012, Page.38.
10. Sigit Riyanto, <https://ugm.ac.id/id/newsPdf/9075manifestasi.kedaulatan.negara.menghadirkan.kesejahteraan.dan.kebahagiaan> Manifestasi Kedaulatan Negara Menghadirkan Kesejahteraan dan Kebahagiaan, Page 2.
11. Yostina trihoni Nalesti Dewi, *Kejahatan perang dalam Hukum Internasional dan hukum nasional*. Rajawali Pers :Jakarta, 2013, Page 21.
12. Peter Malaczuk, Akhurst's: Modern Introduction to Internasional Law, Sevent revised edition, Routledge, London & New York, 1997, Page 58-59.
13. Michael Siegrist, 'Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?', dalam International Review of the Red Cross, Vol. 93, No. 881, Maret 2011, khususnya Page 13 dst
14. Evans, Malcom D, *International Law*, Published In The United State By Oxford University Press Inc, New York, 2003, Page 802
15. Aust, Anthony, *Handbook Of International Law*, Published In The United State By Cambrige University Press, New York, 2005, Page 255.
16. Sugeng Istanto, *Pelindungan Penduduk Sipil Dalam Perlawanan Rakyat Semesta Dan Hukum Internasional*, Andi Offset, Yogyakarta, 1992, Page 29
17. Supoyo, *Hukum Perang Udara Dalam Hukum Humaniter*, PT Gunung Agung, Jakarta, 1996, Page 21-22.