

INTERNATIONAL HUMANITARIAN LAW (IHL) AND THE USE OF UNMANNED AERIAL VEHICLES (UAVs) (DRONES) AS A MEANS OF WARFARE AGAINST ARMED GROUPS IN AFRICA

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Introduction

In January 2013, the UN announced that it would deploy Unmanned Aerial Vehicles (UAVs) for surveillance in the Kivu provinces of eastern Democratic Republic of Congo (DRC) to improve awareness and promote deterrence to those who move around with bad intentions in that area.¹ The UAVs would

1 Herve Ladsous, Under Secretary General, Department of Peacekeeping Operations, Press Conference, 6 February 2013.

be for surveillance purposes only and the information gathered would be fed to UN force commanders.² The UN's announcement came at the heels of the continued instability in the Great Lakes Region (GLR), especially the raise of new insurgencies in eastern DRC. When the deployment was first mooted, some regional governments such as that of Rwanda opposed it, arguing that "Africa should not become a laboratory for intelligence devices from overseas."³ It added that "it is vital to know before deploying drones, what the implications would be for individual countries' sovereignties."⁴ However, later on, President Paul Kagame addressed a press conference in Kigali and intimated that "if the UN thinks the drones will help achieve peace, then let them [deploy them]."⁵ Elsewhere, first, the USA government has deployed drones in Niger as a measure of fighting Islamist militants in West Africa that are linked to the group *Al-Qaeda* in the Islamic Margreb (AQIM).⁶ Secondly, the CIA, USA Air Force and American security contractors are operating air bases in East Africa as well as the Seychelles.⁷ Thirdly, the USA has built a constellation of bases in the Horn of Africa⁸ from which it operates as many as twelve UAVs at a time.

The use of UAVs on the African continent first came to prominence in November 2002, when the USA's Central Intelligence Agency (CIA) launched armed UAVs from Djibouti to eliminate a suspected 'lieutenant' in *Al-Qaeda* along with five other persons in Yemen.⁹ Later, armed UAVs have been deployed in Ethiopia as part of the fight against Islamist militants in Somalia.¹⁰ In fact, as part of a US\$45 million military aid package to Burundi and Uganda, the USA in 2011 provided

2 *ibid*.

3 News24, 'Rwanda opposes use of drones in DRC', 9 January 2013 at <http://www.news24.com/africa/news/Rwanda-opposes-use-of-drones-DRC-20130...> (accessed 25 March 2013).

4 *ibid*.

5 SAPA-AP, 'No issue with US drones in DRC: Kagame', 21 January 2013 at <http://www.iol.co.za/news/africa/no-issue-with-us-drones-in-drc-kagame-1.1455627> (accessed 25 March 2013).

6 VOA News, 'Officials: US to Deploy Unarmed Drones to Niger', 22 February 2013 at <http://www.voanews.com/content/officials-us-to-deploy-unarmed-drones-to-niger/1609245.html> (accessed 20 March 2013).

7 David Axe, 'Hidden history: America's secret drone war in Africa', *Wired*, 13 August 2012.

8 Julian E. Barnes, 'US expands drone flights to take aim at East Africa', *The Wall Street Journal*, 21 September 2011.

9 Monika Hlavkova, *International Law and the Use of Drones: Summary of the International Law Discussion Group Meeting*, Chatam House, 21 October 2010. The main suspect who was targeted was called Qaed Senyan al-Harithi, allegedly the mastermind behind the bombing of the USA navy ship *USS Cole*.

10 See BBC News Africa, 'US flies drones from Ethiopia to fight Somali militants', 28 October 2011 at <http://www.bbc.co.uk/news/world-africa-15488804> (accessed 29 March 2013).

four drones to the two countries, to help them fight Islamic militants in Somalia.¹¹ A total of 3 to 9 UAVs strikes against Somalia have been launched by the USA between the year 2007 and January 2013.¹² The strikes resulted in the killing of between 58 and 70 persons of whom between 11 and 57 were civilians.¹³

The UN has since 2008, been mooted the deployment of drones¹⁴ to help the peacekeeping operation in eastern DRC.¹⁵ In 2008, then head of the United Nations Mission in Congo (MONUC), Alan Doss had asked the UN Security Council (UN SC) for helicopters, *drones* and other items to improve real time intelligence gathering.¹⁶ However, the request was never met. In February 2012, the Under-Secretary General for Peacekeeping Operations, Herve Ladsous reported that "in order to fill some capability gaps, [the DPKO] was conducting a feasibility study for the use of simple UAVs in the United Nations Mission in South Sudan (UNMISS), with the consent of the host authorities, for area surveillance and reconnaissance."¹⁷

The current move to deploy the UAVs in eastern DRC has been occasioned by the raise of the M23 rebels, who beginning in April 2012, began taking large swathes of territory in the area. Rwanda and Uganda have been accused of helping the rebels logistically and politically. Thus the UAVs are supposed to monitor the common borders between eastern DRC, Rwanda and Uganda.

When used in situations of armed conflict (whether international or non-international), UAVs raise serious issues in IHL. This paper discusses the implications of the use of UAVs against non-state armed groups (NSAGs) in Africa, especially the implications on the IHL principles of distinction, proportionality and prohibitions of perfidy among others. The use of UAVs against NSAGs presupposes that there is an armed conflict between the groups and those deploying the UAVs. But the question is: Does an armed conflict, triggering the application of *jus in bello* requirements exist between the NSAGs and the states deploying the UAVs? It is only if this question is answered in the affirmative that the use of armed UAVs raises IHL issues.

11 BBC News Africa, 'Uganda and Burundi to get US drones to fight Islamists', 28 June 2011 at <http://www.cbcc.co.uk/news/world-africa-13946702...> (accessed 25 March 2013).

12 See Chris Wood and Jack Serle, 'Drone warfare: US covert actions in Pakistan, Yemen and Somalia', *Global Research*, 3 February 2013 at <http://www.globalresearch.ca/us-covert-actions-in-pakistan-yemen-and-somalia-2/5321552> (accessed 29 March 2013).

13 *Ibid.*

14 In this paper we use the term UAVs.

15 News24, 'Rwanda opposes use of drones.'

16 *Ibid.*

17 Remarks of Mr. Herve Ladsous, *Under-Secretary General for Peacekeeping Operations to the Special Committee on Peacekeeping Operations*, 21 February 2012, p. 7.

UAVs as an instrument of warfare

When humans first launched themselves into the air to attack their enemies, they used balloons.¹⁸ The latest development in the area of airborne attacks takes the human operator out of the air. UAVs were probably invented during or right after the Second World War (WWII) and were ready for use in the 1950s.¹⁹ Nevertheless, the UAVs have garnered great attention in recent conflicts.²⁰ UAVs are a means of decreasing the risk to one's own forces and of reaching even the most remote locations.²¹ UAVs which are usually operated from hundreds of miles away from their actual operative location can remain in the air for around twenty hours and provide live video (including infrared and synthetic aperture radar).²² Initially designed for surveillance purposes, the combat models currently used (MQ-1 Predator and the MQ-9 Reaper) may be equipped with 100-pound Hellfire missiles and, in the case of the Reaper, even with 500-pound bombs.²³ Thus, UAVs have evolved from being used solely for reconnaissance purposes to becoming the "weapon of choice" for counterterrorism targeting operations, including outside of traditional combat theatres.²⁴ Currently the decision to launch an attack remains with the 'pilot', who reportedly has to go through up to seventeen steps of approval before being allowed to fire a missile.²⁵ But, as it has been observed, new challenges could arise if more automated programs are introduced, potentially no longer requiring a human being to make the decision.²⁶

18 Mary Ellen O'Connell, 'The International Law of Drones', in *The American Society of International Law Insights*, vol. 14(36), 12 November 2010.

19 *Ibid.*

20 Michael N. Schmitt, Precision attack and International Humanitarian Law, *International Review of the Red Cross*, vol. 87(859), 2005, p. 447.

21 Robin Geiss and Michael Siegrist, Has Armed Conflict in Afghanistan affected the Rules on the Conduct of Hostilities? *International Review of the Red Cross*, vol. 93(881), 2011, p. 44.

22 Schmitt, 'Precision attack and International Humanitarian Law', p. 448.

23 See generally O'Connell, 'The International Law of Drones'.

24 Centre for Civilians in Conflict, *The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions*, New York: Columbia Law School, 2012, p. 7 at http://civiliansinconflict.org/uploads/files/publications/The_Civilian_Impact_of_Drones_w_cover.pdf (accessed 1 April 2013).

25 See Christopher Drew, 'Drones are weapon of choice in fighting Qaeda', *New York Times*, 16 March 2009.

26 Geiss and Siegrist, 'Has Armed Conflict in Afghanistan affected the Rules', p. 44. See also Peter W. Singer, in the Loop? Armed Robots and the Future of War, Brookings, 28 January 2009 at http://www.brookings.edu/articles/2009/0128_robots_singer.aspx (accessed 30 March 2013) (observing that current drone computer programs merely advise human operators on the decision to launch an attack. In future, drone computers may be programmed to launch attacks on the basis of pre-set parameters without the need for a human being to make the real time decision).

UAVs may provide the ability to conduct aerial surveillance and to gather 'pattern of life' information that would allow their human operators to distinguish between peaceful civilians and those engaged in direct hostilities.²⁷ Advanced surveillance capability enhances the ability of a state's forces to undertake precautions in attack.²⁸ Proponents of the UAVs argue that they have greater surveillance capability and afford greater precision than other weapons, thus better preventing collateral civilian casualties and injuries. However, the greater concern with the UAVs is that first, because they make it easier to kill without risk to a state's forces, policy makers and commanders are tempted to interpret the legal limitations on who can be killed, and under what circumstances, too expansively.²⁹ Secondly, because operators are based thousands of miles away from the battlefield, and undertake operations entirely through computer screens and remote audio feed, there is a risk of developing a "Play-station" mentality to killing.³⁰

Warfare using UAVs intersects (or has the potential to interact) with international humanitarian law in four key areas: the prohibition of indiscriminate attacks; the principle of proportionality; and the requirement to take precautions in attack.³¹ The UAVs that have been deployed on the African continent have so far largely been for surveillance purposes save for the attacks that have been launched in Somalia. However, there is a potential that in future, the UAVs may be used to take out targets, especially of NSAGs in different parts of Africa where they have been deployed. This paper discusses the different IHL principles (as identified above), the use of UAVs to attack non-state armed targets in Africa will rise. It has been argued that if drones are used to carry out attacks, they must comply with the pertinent rules of IHL.³² Some have even suggested that UAVs are prohibited weapons under IHL because they cause, or have the effect of causing, necessarily indiscriminate killings of civilians, such as those in the vicinity of a targeted person(s).³³

27 United Nations General Assembly (UN GA), *Report of the Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions, Phillip Alston*, Human Rights Council 14th Session, A/HRC/14/24/Add. 6, 28 May 2010, p. 24.

28 *ibid.* p. 25.

29 *ibid.* p. 24.

30 *ibid.* p. 25; Geiss and Siegrist, 'Has Armed Conflict in Afghanistan affected the Rules', p. 45.

31 Schmitt, 'Precision attack and International Humanitarian Law', p. 454.

32 Geiss and Siegrist, 'Has Armed Conflict in Afghanistan affected the Rules', p. 45.

33 Murray Wardrop, 'Unmanned drones could be banned, says senior Judge', *The Telegraph*, 6 July 2009.

Applicable principles of IHL

The resort to UAVs must be compatible with the *jus ad bellum* (law on resort to force) and the way they are used must be based on *inter alia* IHL principles.³⁴ The central principle of the law on resort to force is Article 2(4) of the UN Charter, a general rule on the prohibition of the use of force in international relations.³⁵ Under the UN Charter, two exceptions exist under which force can be used legitimately: self defence under Article 51 if an armed attack occurs; and authorization by the Security Council pursuant to Chapter VII. Nevertheless, any claim to self defence must comply with the principles of necessity and proportionality. Necessity simply means that military force may only be used only when it is necessary to do so.³⁶ Proportionality on the other hand means that the attack must not be excessive in relation to the concrete and direct military advantage which the attack is expected to produce.³⁷

As I have observed *supra*, already the use of UAVs by the USA has resulted in casualties in Somalia. The USA's UAVs campaign is targeted almost exclusively at NSAGs, such as al-Qaeda or their regional affiliates including *al-Qaeda* in the Arabian Peninsula (AQAP), *al-Shabaab* and possibly in future *al-Qaeda* in the Islamic Maghreb (AQIM).³⁸ For issues of IHL to arise, two issues need to be resolved. First, is whether a situation of armed conflict exists between states (read the USA) and the NSAGs in Africa? Secondly, if the answer to the first issue is in the positive, then, what sort of IHL rules, are applicable to the situation?

Is there an armed conflict or not?

As it has been observed, the field of IHL has struggled with how to categorise armed conflict between Non-State Actors (NSAs) and traditional states.³⁹

34 Hlavkova, *International Law and the Use of Drones*.

35 It states: All member states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

36 Greg Travalio & John Alenburgh, "State Responsibility for Sponsorship of terrorist and Insurgent Groups: Terrorism, State Responsibility and the Use of Military Force", *Chicago Journal of International Law*, vol. 4, 2003, p. 113.

37 Christopher Greenwood, 'The Law of War (International Humanitarian Law)', in Malcolm D. Evans, *International Law* 2nd ed., Oxford: Oxford University Press, p. 791.

38 Jens David Ohlin, 'Is jus in Bello in crisis?' *Journal of International Criminal Justice* vol. 11, 2013, p. 29.

39 *ibid.* p. 44.

According to the official USA position, the country is engaged in an armed conflict with *al-Qaeda* and its associated forces, and the Congress has authorised the President to use all necessary and appropriate force against those entities.⁴⁰ As a consequence, the USA has argued that its operations against *al-Qaeda* and associated forces, is part of a non-international armed conflict. This position has been buttressed in the *Hamdan v. Rumsfeld* case where it was held that 'a conflict between a nation and a transnational NSA, occurring outside the nation's territory, is an armed conflict not of an international character because it is not a clash between nations.'⁴¹ Some analysts have observed that the USA's position has created "a global battlefield."⁴² More specifically, that the ever-increasing use of drones as both a means and method in the pursuit of the war on terror, has given rise to the notion that the entire planet is subject to the application of the laws of armed conflict and the consequences that flow from it.⁴³

The USA's position of operating a global battlefield has been contested by some scholars and governments.⁴⁴ To them, a conflict may exist in (or might have existed) in Afghanistan or Iraq by virtue of the armed conflict between the USA and the Taliban, or between the USA and Saddam Hussein's government. According to Greenwood,

To the extent that, in Afghanistan and Iraq, the USA was engaged in conflict with those states forces, there was an armed conflict to which IHL applied. But that does not mean that the USA has been/[is] engaged in an armed conflict with *al-Qaeda*... *al-Qaeda* has none of the attributes of statehood (territory, population, government) and is no more than an underground terrorist movement whose recourse to violence is criminal.⁴⁵

Greenwood's position is supported by other scholars who have observed that *al-Qaeda and its associated forces* are not the type of organisations that would be a party to a conflict.⁴⁶ Therefore, IHL would not be applicable to their activities and the use of drones against them would fall more under law enforcement. For

40 Department of Justice White Paper, *Lawfulness of a Lethal Operation Directed against a US citizen who is a Senior Operational Leader of al-Qaida or an Associated Force* (n-d).

41 548 U.S. 557, 628-31 (2006).

42 See generally Noam Lubell and Nathan Derjko, 'A Global battlefield', *Journal of International Criminal Justice* vol. 11, 2013, pp. 65-88.

43 *ibid.* p. 67.

44 Ohlin, 'Is jus in Bello in crisis?' p. 30.

45 Greenwood, 'The Law of War', p. 787.

46 Ohlin, 'Is jus in Bello in crisis?' p. 31.

purposes of applying IHL to the conflict between the USA and *al-Qaeda and its associated forces*, the arising questions include: Is *al-Qaeda and its associated forces* sufficiently organised and hierarchical? Does it have a command structure? Is *al-Qaeda and its associated forces* capable of following the laws of war as Additional Protocol II requires? If these questions are answered in the negative, it follows that the justification of the use of UAVs against NSAGs cannot be sustained in IHL.

Nevertheless, a number of observations ought to be made. First, a distinction ought to be made between organizations with a command hierarchy and those with a linear hierarchy.⁴⁷ Although IHL arguably requires the former, there is nothing in codified IHL that requires the latter. Command structures can take many different geometric forms and nothing in the Geneva Conventions, and Additional Protocols I and II, requires the existence of a linear command structure analogous to the linear command structure of a traditional state.⁴⁸ What matters, is the existence of a functional command structure—a hierarchy of individuals who give and take orders and carry out violent operations in accordance with that command structure.

Secondly, on the issue of whether the NSAGs are capable of following IHL, apropos of *al-Qaeda*, there is some evidence that the group is capable of following the laws of war but has emphatically decided against it.⁴⁹ This is in accordance with matters of strategy and its *Weltanschauung* (world view/outlook) of a global jihad against supposed Western imperialism and unchecked secularism.⁵⁰

Some scholars have advanced a variant position from the one of the USA. It has been observed that a textual reading of Common Article 3 of the Geneva Conventions, which states that the protections enumerated in the provision, applies to conflicts 'not of an international character' but which occur 'in the territory of a High Contracting Party.'⁵¹ Apropos of this, one view that has emerged contends that the Geneva Conventions codify the rule that Non-International Armed Conflicts (NIACs) are defined in such a way as to be geographically contained in the territory of one nation, that anything that extends beyond the territory of one nation becomes an International Armed Conflict (IAC), so long as the conflict is between two states. Thus, conflicts

47 *ibid.* p.32.

48 *ibid.*

49 *ibid.*

50 *ibid.*

51 *ibid.* p. 30.

that extend beyond the territory of one state but whose parties are not state actors, fall in the hinterland between these two categories prompting numerous attempts at creating a new taxonomy of armed conflicts, including transnational armed conflicts or internationalised armed conflicts.⁵² But would the rules of NIAC or IAC apply to this category of armed conflicts? Stewart has argued that the dichotomy between NIAC and IAC does not make sense when it comes to transnational armed conflicts/internationalised armed conflicts.⁵³ He argues that a single law of armed conflict is needed to deal with such kind of conflicts. After all, if international law ... must gradually turn to the protection of human beings, it is only natural that the dichotomy [between NIAC and IAC] should gradually lose its weight.⁵⁴ What matter as regards legal regulation [is] not whether an armed conflict is international or internal, but simply whether an armed conflict exists *per se*.⁵⁵

If therefore it is concluded that there is an armed conflict between states and NSAGs in Africa, what IHL issues would arise when UAVs are deployed against them? To this I now turn. UAVs warfare has the potential to interact with IHL in a number of areas including: the principle of proportionality; the requirement to take precautions in attack; perfidy and other misuses of protected status; and the protection of humanitarian workers.

The principle of proportionality

One of the central principles of the modern law of targeting demands that even military objectives may not be attacked if an attack is likely to cause civilian casualties or damage which is excessive in relation to the concrete and direct military advantage which the attack is expected to produce.⁵⁶ This is what is called the principle of proportionality, and is codified in Articles 51 (5) (b)⁵⁷

52 *ibid.*

53 See James G. Stewart, 'Towards a single definition of armed conflict in International Humanitarian Law', *International Review of the Red Cross* vol. 85(850), 2003, pp. 313-350.

54 *ibid.* p. 349.

55 L. Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, London, 2000, p. 51.

56 Greenwood, 'The Law of War', p. 791.

57 It states: 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.

and 57 (2) (a) (iii)⁵⁸ of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 (also called Additional Protocol I). The principle requires a commander to balance the likely civilian casualties (dead and injured) and damage to civilian property against the concrete and direct military advantage anticipated from an attack. The application of the principle imposes important duties on a commander who orders an attack. If it becomes apparent that the attack cannot be carried out without disproportionate civilian losses, then that attack must be cancelled or suspended.⁵⁹

From available evidence, the principle of proportionality seems to have been violated in UAVs attacks in places such as Afghanistan, Yemen and Pakistan. The figures available indicate that the majority of the casualties of UAVs attacks have been civilians. It is reported that by the end of January 2013, the USA's UAVs strikes in Pakistan and Yemen had killed between 475 and 891; and 72 and 178 civilians respectively.⁶⁰ Already, as I noted above, USA's UAVs strikes in Somalia have resulted in civilian casualties. Thus, there is a possibility that once the UAVs are used on the NSAGs in Africa, civilian casualties will become inevitable thus violating the principle of proportionality. In fact, a breach of the principle of proportionality is now a war crime under the Statute of the International Criminal Court (ICC).⁶¹

Precaution in attack

Precaution in attack, also known as the principle of distinction, is linked to the principle of proportionality. Article 57 (2) of Additional Protocol I sets forth the requirements that with respect to attacks, the following precautions shall be taken (a) those who plan or decide an attack shall: (i) do everything feasible to verify that the objectives to be attacked are neither civilian nor civilian objects and are not subject to special protection but are military objectives ... that it is not prohibited by the provisions of this Protocol to attack them; (ii) take all

58 It states that with respect to attacks, the following precautions shall be taken. [with] those who plan or decide upon an attack shall "refrain from deciding to launch any 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."

59 Greenwood, 'The Law of War', p. 793.

60 Wood and Seric, 'Drone warfare.'

61 Article 8 (2) (b) (iv), which states: intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians ... which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects; (iii) refrain from deciding to launch any 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; (...). The principle of distinction generally requires that the person launching an attack must take the necessary identification measures in good time in order to spare the population as far as possible. Everything feasible must be done to verify that the targets are fighters or civilians directly participating in hostilities.⁶² But as the examples I have cited above indicate, the use of UAVs has resulted in un-necessary civilian casualties including children. Moreover, when deployed against NSAGs, it is difficult to apply the principle of distinction because intelligence gathering on such groups is very difficult to carry out. Normally, such groups try as much as possible to blend in with the civilian population either before or after an attack.⁶³

The USA has developed two types of targeting: personality and signature strikes. Personality strike involves the targeting of an individual who has previously been identified and known militant. Under personality strike, the policy requires that before engagement, the UAV operator identify the target with a high level of certainty in reliance on "multiple sources, including imagery, cell phone intercepts and informants on the ground."⁶⁴ Signature strikes on the other hand involve targeting without knowing the precise identity of the individuals targeted. Instead the individuals match a pre-identified signature of behaviour that the USA links to militant activity or association. Signature strikes are controversial because they can result in a large number of individuals killed—in some cases civilians—because of their behaviour or affiliations.⁶⁵ In signature strikes, the identity of those targeted is unknown and confirming their identity post-strike is a significant challenge without personnel to investigate. Thus, in signature strikes the probability of civilian casualties is very high as examples from Pakistan have shown.⁶⁶ For example, on 17 March 2011, a signature strike was carried out by the USA on what was believed to be a heavily armed group, all

62 Geiss and Siegrist, 'Has Armed Conflict in Afghanistan affected the Rules', p. 43.

63 cf. Schmitt, 'Precision attack and International Humanitarian Law', p. 463 (arguing that precision warfare [including use of UAVs] allows for better identification of targets, thus the resultant collateral damage and incidental injury is reduced).

64 See Greg Miller, 'CIA seeks new authority to expand Yemen drone campaign', *The Washington Post*, 18 April 2012.

65 Centre for Civilians in Conflict, *The Civilian Impact of Drones*, p. 8.

66 *ibid.* p. 34.

acting in a manner consistent with *al-Qaeda* linked-militants. The USA claimed that it had killed twenty militants. However, members of the community and Pakistan officials said the missiles had struck a meeting (*jirga*) held to resolve a mining dispute. The casualties included four Pakistan Taliban fighters, and thirty eight civilians and tribal police.

Perfidy and protected status

As it has been observed, precision warfare (including the use of UAVs) has created an asymmetry on the battlefield that is unprecedented.⁶⁷ By their very nature, NSAGs have very low weapons technology compared to states, which can deploy high-tech weapons including UAVs. As a result asymmetry in precision compels the NSAGs to respond asymmetrically. Increasingly, the weaker forces (NSAGs) are adopting tactics that exploit protection of civilians and civilian objects enjoy.⁶⁸ It should be recalled that, while regular combatants can be targeted at any time by virtue of their status, civilian fighters of a NSAG can only be targeted at the moment when they are directly participating in hostilities. One of the most common tactics used by elements of NSAGs is wearing civilian clothes to avoid being identified as an enemy combatant and attacked. In the context of IHL, discarding one's uniform is not a crime but those who do, lose their combatant status.⁶⁹ They consequently do not qualify as prisoners of war if captured and, because only combatants have the right to "directly participate" in hostilities, they lack immunity from prosecution under domestic law for acts committed while engaged in fighting.⁷⁰ The wearing of civilian clothes by the (NSAGs) complicates, as intended, an opponent's ability to distinguish them from the civilian population, thereby placing the latter at increased risk of mistaken attack. This situation has happened before, for example, insurgents in Iraq routinely feigned specially protected status to avoid being identified. As a consequence, this also raises the IHL prohibition of perfidy (deception).

67 Schmitt, 'Precision attack and International Humanitarian Law', p. 463.

68 *ibid.*

69 Under Article 4 (A) of the Geneva Convention relative to the Treatment of Prisoners of War (1949) (also called the Third Geneva Convention), combatant status is extended to (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 militia corps, including those of organised 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 militia or volunteer corps, including such organised resistance movements, fulfil the following conditions including ... (b) that of having a fixed distinctive sign recognised at a distance.

70 Schmitt, 'Precision attack and International Humanitarian Law', p. 464.

Article 37 (1) (c) of Additional Protocol I prohibits the perfidy act of “feigning of civilian, non-combatant status.”

Neutrality of humanitarian workers

IHL protects humanitarian access to those in need and aid workers.⁷¹ However, there are a number of vexing questions: What is the impact of UAVs warfare on humanitarian work? If UAVs strikes target a particular region, what state, if any, has an obligation to ensure the population has access to relief operations? With whom do humanitarians interact to negotiate access? Does the targeting state have any obligations under IHL relevant to humanitarian assistance? As it has been observed, the use of the UAVs has already affected the work of aid workers.⁷² UAVs strikes have created environments of suspicion and paranoia, even witch-hunts against the humanitarian workers. Whilst in traditional military associations, humanitarian workers have been able to distance themselves from check-points, troops and convoys, how can they distance themselves from an [UAV] strike? After the killing of a senior *al-Shabaab* leader in Somalia in 2008 in a USA missile attack, attacks by armed groups on aid workers increased. The fact that foreign non-governmental organizations were operating in the same area where the strike had occurred was enough to put them at severe risk.⁷³ In Pakistan, the case Dr Shakil Afridi is very instructive. It is alleged that the polio vaccination activities in which Dr. Afridi was involved was actually a cover to gather intelligence on the whereabouts of Osama bin-Laden. After the killing of Bin-Laden in May 2011, a local Taliban commander in North Waziristan distributed pamphlets banning polio vaccinations, alleging that the campaign was a cover for USA spies.⁷⁴

Connected to this point, is the fact that humanitarian personnel have sometimes not been spared in air strikes (including those by UAVs). In 2012, an aid worker with the International Committee of the Red Cross (ICRC) died of shrapnel wounds after an air strike in southern Yemen.⁷⁵ Attempts to determine who

71 See for example, Geneva Convention for the amelioration of the condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, Article 9; Geneva Convention for the amelioration of the condition of the Wounded, Sick and Shipwrecked members of Armed Forces at Sea, 12 August 1949, Article 9.

72 Integrated Regional Information Networks (IRIN), ‘Africa: The view from the ground-How Drone strikes hamper aid’, 21 March 2013 at <http://allafrica.com/stories/201303210112.html?viewall=1> (accessed 22 March 2013).

73 *ibid.*

74 *ibid.*

75 *ibid.*

was responsible for the strike, hit a brick wall. Humanitarian workers and organisations do not formally interface with the Central Intelligence Agency (CIA) or certain parts of the Pentagon who control the UAVs program. Being unable to identify which agency carried out an operation could make it difficult for the public, policymakers and humanitarian workers to assign responsibility in the event of abuses or mistakes, particularly for civilians looking for an explanation or redress.⁷⁶ Moreover, for victims in particular, there is no one to recognize, apologize for, or explain their sorrow.⁷⁷ Thus, the use of armed UAVs against NSAGs in Africa will definitely impact on humanitarian work, as has happened elsewhere.

Conclusion

The use UAVs as a counter-insurgency/terrorism tool is becoming very prevalent in Africa. To-date, other than in Somalia, UAVs have been deployed mainly as a tool of surveillance and intelligence gathering on NSAGs. The most recent deployment of UAVs on the African continent has been undertaken by the USA in Niger. The UN has also for a long time been contemplating deploying UAVs to help its peacekeepers keep tabs on NSAGs operating in eastern DRC. As a result of the recent upheavals in eastern DRC where the neighbouring countries of Rwanda and Uganda were accused of aiding the rebels of M23, the UN Security Council agreed to deploy UAVs to monitor the border areas and the numerous NSAGs operating in the area. It should be noted, however, that these UAVs will not be armed, although nobody knows whether in future they will not be armed.

Nevertheless, elsewhere, the use of armed UAVs by the USA to target elements of NSAGs in Afghanistan, Somalia and Yemen has raised very serious issues of IHL. The USA's declaration that it is engaged in a non-international armed conflict with non-state armed groups has turned the definition of armed conflict in IHL on its head. Increasingly, the distinction between an IAC and NIAC has become blurred. But be that as it may, the use of armed UAVs to carry out attacks against NSAGs raises the issues of proportionality, distinction, precaution in attacks, and protection of humanitarian workers in IHL. The more the UAVs are deployed and used against the NSAGs, the more these issues will come to the fore.

76 Centre for Civilians in Conflict, *The Civilian Impact of Drones*, p. 14.

77 *ibid.* p. 24.