

**USE OF DRONES AND PRIVATE MILITARY COMPANIES IN
MODERN WARFARE: EFFECT ON INTERNATIONAL
HUMANITARIAN LAW**

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Abstract

This paper examines how the use of unmanned aerial vehicles or drones and private military companies (PMCs) render the provisions of international humanitarian law (IHL) irrelevant. IHL is the product of a series of international treaties codifying the laws of armed conflict. At the heart of the IHL are four principles regulating the areas of targeting, detention and treatment of persons. This paper argues that the use of modern military technology has changed the nature, characteristics and location of the battlefield in the 21st century. It concludes with an emphasis on changing the existing IHL to reduce human sufferings and regulate the conduct of modern warfare.

I. Introduction

International humanitarian law (IHL) or the laws of war is one of the principal branches of the public international law. IHL has originated from a series of international treaties comprising various rules and principles in order to limit the effects of war on people and property and to protect particularly vulnerable persons. This law gives some legal boundaries to regulate war. The major function of the international humanitarian law is to create a balance between concerns for humanity and military necessity. In ancient times, there were different rules to regulate the conflict between nations. We find some rules of war in different religious text books and in the writings of some scholars and philosophers. Later on, these ancient rules that regulate the conduct of warfare have evolved as customary rules. Humanitarian law is the product of customary international law.¹ Modern humanitarian law has been drafted and adopted in The Hague and in Geneva. The main bases of this law are the Hague law and Geneva law. The Hague Conventions of 1899 and 1907 contain Hague law which

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1 Asser Institute, "What Is International Humanitarian Law?" (http://www.asser.nl/default.aspx?site_id=9&level1=13336&level2=13374&level3=13476)

discusses the permissible means and methods of war. The Four Geneva Conventions of 1949 and the three Additional Protocols to the Geneva Conventions are known as the Geneva law which aims to protect the victims during an armed conflict.²

There are four different principles of IHL which regulate the areas of targeting, detention and treatment of persons.³ According to the principle of distinction, all parties to the conflict must make a distinction between civilians and combatants.⁴ The principle of proportionality puts some limitations upon the use of means and methods of warfare. The main aim of this principle is to protect the civilians from unexpected sufferings.⁵ Thirdly, the principle of military necessity authorizes the armed forces to use all the weapons which are permitted under IHL and which are essential to fight against the opponent. Lastly, according to the principles of humanity, unnecessary suffering is prohibited and the weapons which cause unnecessary suffering are also forbidden.⁶ This paper argues that the nature of modern warfare goes against these principles and also violates other principles of humanitarian law.

Modern warfare includes those concepts, methods and technologies which are used during the war. Technological developments have changed different terms of the international humanitarian law and also changed the nature, characteristics and location of the battlefield in the 21st century. Now the unmanned aerial vehicles or drones, robots and robotic devices are increasingly used for the conduct of warfare, a task which would previously involve only traditional foot soldiers and vehicles.⁷ It is the contention of this paper that the modern laws of war are challenged due to the growing use of private military contractors and technologically advanced weapons such as drones. Evidence can be found during

2 J. Rehman, *International Human Rights Law*, 2nd edition, Pearson Education Limited, 2010, p. 786.

3 Laurie R. Blank, "After 'Top Gun': How Drone Strikes Impact the Law of War", *Journal of International Law*, Vol. 33, 2011-2012, pp. 657-681.

4 Art 48 of the Additional Protocol to the Geneva Conventions of 1977 (subsequently referred to as AP I), "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."

5 Art 51(5)(b) of AP I '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' as an indiscriminate attack and therefore prohibited.'

6 Art 35(2) of AP I 'prohibiting the use of weapons and methods of warfare that cause "superfluous injury or unnecessary suffering".'

7 Kas, '*Applying International Humanitarian Law in a New Technological Age*', 2012 (http://www.kas.de/2012/17/01_israel/en/publications/29923/)

the U.S.-led wars in Afghanistan and Iraq, which have allowed the U.S. and coalition forces to test new military concepts and technologies in the battlefields.⁸ The paper concludes with a discussion on the need to reform the outdated international humanitarian law.

II. Methodology

This research follows a qualitative research methodology which includes primary and secondary sources to establish its arguments and suggestions. It follows international conventions and regulations as primary sources, depending mostly on background resources or literature commonly known as secondary resources. Here secondary resources include textbooks, legal journals, legal encyclopedias, conference papers, study reports, manuals and online resources, as they provide a broad overview of the legal provisions and their explanations, comparisons and commentaries. I also narrate some practical case studies of drone warfare and private military companies from Afghanistan, Iraq and Yemen. In this regard I consider different reports from national and international organizations dealing with the issue of drone strikes and operations of private military companies.

III. Literature Review

There is a growing body of literature on the modern laws of war and their relevance in contemporary era.⁹ Most studies on the laws of war or IHL highlight the evolution of such laws and their aim to restrict the methods and means of warfare employed. These laws were created by different specialized treaties such as the Hague and Geneva Conventions, UN Charter and the customary international law. In essence, IHL is the product of the 19th and 20th centuries. About 150 years ago, the four fundamental principles of IHL were first codified in the 1868 St. Petersburg Declaration and the 1863 Lieber Code. Later, the Hague and Geneva Conventions of 1864, 1899, 1907, 1929 and 1949 developed different rules and concepts of IHL.¹⁰ A close look at the provisions of these laws indicates that IHL is now a substantive as well as a legal right which is undeniable and recognized by the International community. However, confusions arise about the effectiveness and relevance of these principles during the most recent wars.

8 J. Rehman, *International Human Rights Law*, 2nd edition, Pearson Education Limited, 2010, pp. 906-918.

9 *Ibid.*

10 Kas, 'Applying International Humanitarian Law in a New Technological Age', 2012 (http://www.kas.de/2012/17/01_israel/en/publications/29923/)

The United Nations Special Rapporteur on Extrajudicial, Arbitrary or Summary Executions has been very vocal on the issue of humanitarian laws and their relevance in modern warfare. According to the Rapporteur, “a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles. The critical legal question is the same for each weapon: whether its specific use complies with IHL.”¹¹ The question of drone strikes and their compliance with IHL comes to fore for a few reasons. First, since the U.S.-led war on terrorism began, there is a growing record of drone strikes in Afghanistan, Iraq, Yemen, and other parts of the world. Second, these strikes are remotely controlled and carried out by the U.S. defense and intelligence personnel. Since the missiles fired from the drones do not involve a soldier in the battlefield, a legal vacuum appears to emerge the extent to which drone strikes can be termed illegal in IHL. For the UN Special Rapporteur, such doubts should not arise as drone strikes are not different from other forms of weapons used by soldiers. Interestingly, legal opinions offered by pro-administration experts reject the views of the Special Rapporteur, and assert the legality of the drone strikes. For them, “drone attack is conducted consistently with law of war principles, with great care taken to adhere to these principles in both planning and execution.”¹²

Another debate concerns that use of private military contractors (PMCs). PMCs are usually privately owned firms deployed by a state during internal and external conflicts.¹³ There is no clarity in the status of the PMC in the International Humanitarian Law. Their status depends on their activities. With such lack of clarity, it is difficult to control the employees of the PMC by the laws of armed conflict. Sometimes their activities render the international humanitarian law irrelevant.

Critics of the drone strikes and use of PMCs suggest the need for reforming existing IHL. This paper supports the reformist perspective. It argues that international humanitarian law is violated for a variety of reasons such as insufficient means to enforce them, uncertainty as to their application in some

11 Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, Human Rights Commission, 79, U.N. Doc. A/HRC/14/24/Add.6, 2010.

12 Ryan J. Vogel, “Drone Warfare and the Law of Armed Conflict”, *Denver Journal of International Law and Policy*, Vol. 39, 2010-2011, pp. 101-114.

13 Mathew Kincade III, “The Private Military Company Complex in Central and Southern Africa: The Problematic Application of International Humanitarian Law”, *Washington University Global Studies Law Review*, Vol. 12, 2013, pp. 205.

circumstances, an unwillingness to respect the rules and lack of awareness about IHL among combatants, civilians and other people. Others reject such view and argue that present IHL principles are adequate to govern the drone and other technologically advanced weapons and regulate the misgivings by the PMCs. The Obama Administration claims that under IHL, it is not prohibited to use the technologically advanced weapons unless it is contrary with the applicable laws of war.¹⁴ But, the argument is that these rules are not followed fairly and consistently.

This paper considers the position that the international humanitarian law may no longer be relevant today due to the devastating use of technologically advanced weapons. Right to life is a non – derogative rights, no one has the authority to violate this fundamental human rights not even in war time. But drone strikes and private military companies are violating this right by killing the innocent civilians. Even, there is no accountability for killing innocent civilians which are against the rule of law. Some specific reformation of present humanitarian law will undoubtedly bring radical changes in the battlefield. Otherwise the ineffectiveness and irrelevancy of this law will definitely destroy the human world.

IV. Drone Warfare and its Effect on IHL

Drones are unmanned aircrafts run by external operators using a remote control technology. This vehicle is known as unmanned aerial vehicle (UAV). According to the U.S. Department of Defense, “an unmanned aerial vehicle is a powered, aerial vehicle which does not carry a human operator, uses aerodynamic forces to provide vehicle lift, can fly autonomously or be piloted remotely, can be expendable or recoverable, and can carry a lethal or non lethal payload.”¹⁵ The term ‘drone’ is not specially mentioned under the principles of international humanitarian law. According to Philip Alston, United Nations Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, “My concern is that these drones, these Predators, are being operated in a framework which may well violate international humanitarian law and international human rights law.”¹⁶

A close look at the history of the drone strikes gives clear ideas about why such drone strikes raise legal concerns. The United States uses two types of combat

14 Vogel, “Drone Warfare and the Law of Armed Conflict”, pp. 101-137.

15 Joint Chiefs of Staff, Joint Pub. 1-02, Department of Defense, Dictionary of Military and Associated Terms, 571, (2009).

16 BBC News, “US Warned on Deadly Drone Attacks,” 2009<

drones such as MQ-1 or Predator and the MQ-9 or Reaper. At first the Predator was used for observation but later on it was used to carry two Hellfire missiles. The MQ-9 or Reaper is created to use it as a vehicle weapons. This drone can carry up to fourteen Hellfire missiles and 500- pound bombs.¹⁷ At present the United States has more unmanned than manned aerial vehicles in its weapon store. In modern world, not only the USA but also other states and non – state actors have the drones. The United Kingdom, France, Russia, Turkey, India, China, Hezbollah, Israel, and Iran have drones and some of them also supply drones to the other countries.

In 2010, a report published by the United Press International (UPI) noted that more than 42 states bought drones from Israel.¹⁸ The United States of America introduced drone attack in Afghanistan in November 2001. Later, the US forces introduced drone strikes in Yemen on 3 November 2002, in Pakistan in June 2004, and in Somalia in late 2006. As the data show, drones have become weapons of choice in the fight against terrorism, particularly with respect to targeted killings of suspected terrorists.

Drone warfare has become a well-known feature of the U.S.-led war on terrorism. Under the administration of President Obama, drone strikes have increased significantly. Drone strikes violate the modern laws of war. This is evident in the ways the four principles of IHL are affected by the drone strikes. Data and analysis on the drone strikes and their compliance with the four principles are presented below.

Drone strikes and the principles of Distinction. It is the responsibility of the parties to the conflict, to identify the civilian population and combatants and make a difference between them and their activities.¹⁹ Different articles define the term combatant and military objectives. Under Article 52 of the Additional Protocol I to Geneva Conventions, military objectives include those objectives that are contributing to the military action and destruction of that objectives bring military advantages for the parties.²⁰ One of the purposes of the international humanitarian law is to protect the civilians from military operations. To comply with the principle of distinction, the target of the drone should be the combatants or military objectives and not the civilians. There are two requirements to

17 Mary Ellen O’Connell, “Remarks: The Resort to Drones Under International Law”, *Denver Journal of International Law and Policy*, Vol. 39, 2010-2011, pp.585- 588.

18 United Press International, “Iran Muscles into the UAV battlefield,” 2010.

19 Art 48 of AP I.

20 Art 52 of AP I.

establish the principle of distinction. These are: (a) to make a distinction between civilian and military targets; and (b) to avoid indiscriminate attack.

Drone's failure to make distinction between civilians and military targets. The powerful states that are using drones make an argument that drones are capable to make distinction between combatants and civilians. Because of its high qualities, it observes a potential target from altitudes as high as 50,000 feet, where drones are neither seen nor heard. It is also argued on behalf of the United States that suspected criminals and terrorists use protected persons and objects as shield.²¹ It is the responsibility of the concern states to ensure that they target the combatants and military objectives. If they target the civilians, before that they must be satisfied that the civilians lost their status of the protected person.²²

Under Article 51(3) of Additional Protocol II, "a civilian loses his protected status when they take a direct part in the hostilities." The international Committee of Red Cross did a research and study on this issue. Under the ICRC report, "to be targetable as a combatant, a person must perform a 'continuous combat function.'"²³ But the United States disagrees with this concept by saying that if any individual take merely part of hostilities, they must lose their protected status. By giving such kind of worthless arguments, US policymakers justify their drones operation. For targeted killing of the suspected criminals and terrorists, the United States and the United Kingdom use drones as a weapon of choice in Afghanistan, Pakistan, Yemen and Somalia. The United States uses drone outside the traditional battlefield. Most of the times, individuals are targeted by the drones in their homes, market places and in different urban centers. Civilians who are doing religious or other non – combat functions of the terrorist's groups also become the target of the drone strikes.²⁴

There are some public debates on the issue of whether drone strikes are making the perfect target and whether the majority of the drone strikes victims are combatants or not. The civilians who are often the victims of drone strikes get less importance. Drone strikes have strong impact upon the life and socio-economic status of the civilians. The impact of the drone strikes includes killings and injuries, destroying property and mental pressure upon the civilians.²⁵

21 Vogel, "Drone Warfare and the Law of Armed Conflict", *Denver Journal of International Law and Policy*, Vol. 39, 2010-2011, pp. 101-116.

22 *Ibid*, p. 118.

23 *Ibid*, p. 119.

24 *Ibid*, p. 122.

25 Stanford Law School & N Y U School of Law, "Living Under Drones - Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan. 2012 (<http://livingunderdrones.org/2012/11/08>).

There are several cases of U.S. drone strikes which have violated the principle of distinction.²⁶ It was reported by the Bureau of Investigative Journalism (TBIJ) that drone strikes killed 2,562-3,325 people in Pakistan, of whom 474-881 were civilians, including 176 children and injured an additional 1,228-1,362 individual; from June 2004 through mid-September 2012.²⁷ On March 17, 2011, a US drone strike targeted a large gathering place, near a bus depot in the town of Datta Khel, North Waziristan, Pakistan. US officials claimed that they killed only suspected terrorists. But the evidence of the other sources is contradictory with the statement of the US official. Attorneys, nine witnesses, survivors, victims and family members of that attack were interviewed by the Pakistani military and by the Associated Press. According to their report, 42 were killed and most of them were civilians. Immediately after the strike, Pakistani military chief General Ashfaq Parvez Kayani said: "It is highly regrettable that a jirga of peaceful citizens, including elders of the area, was carelessly and callously targeted with complete disregard to human life."²⁸

Different international organizations are working on this issue. Amnesty international and Human rights watch have investigated many of the attacks by taking interviews of the victims who are alive and other witnesses. Amnesty international reported that in July 2012, 18 laborers were killed by drone attack in North Waziristan when they were waiting for their dinner. This organization claimed that none of them had been involved in militancy and only the membership of any banned group does not authorize any one to kill them.²⁹ The United States is thus violating the international human rights law by unlawfully taking the life of the civilian though they are not connected with war. As per different international laws, it is a war crime or extrajudicial executions.

Israel also uses drone to attack the Palestinian territories for years. Israel did at least 18 air strikes in Palestine during 2012 and these air strikes also include drone strikes. Human Rights Watch investigated several drone strikes in Israel and released a report. In Israel, civilians and civilian objects, such as houses and

26 ICRC, "The use of armed drones must comply with laws," 2013. <http://www.icrc.org/eng/resources/documents/interview/2013/05-10-drone-weapons-ihl.htm>

27 The Bureau of Investigative Journalism, "Covert War on Terror," 2012. <http://www.thebureauinvestigates.com/category/projects/drones/> (last visited Sept. 12, 2012).

28 Stanford Law School & N Y U School of Law, "Living Under Drones - Death, Injury, and Trauma to Civilians From US Drone Practices in Pakistan," 2012. (<http://livingunderdrones.org/2012/11/08>)

29 The Guardian, "US drone strikes could be classed as war crimes", 2013. <http://www.theguardian.com/world/2013/oct/22/amnesty-us-officials-war-crimes-drones>

farm groves, are attacked by Israeli missiles and a bomb without any apparent military objectives. It was reported by the Human Rights Watch that on 19 November 2012, three men were attacked by the Israeli drone strikes while they were carrying tomatoes in a truck, and a science teacher was killed and his 3 year old son was seriously wounded by this attack.³⁰

Indiscriminate attack by drones. Two types of weapons are prohibited under the law of armed conflict. These weapons are indiscriminate weapons which cause unnecessary suffering. According to Article 51(4) of Additional Protocol I, 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.³¹

Indiscriminate weapons are those which attack the military objectives, civilians and civilian objectives without distinction and its effects are unlimited and against the principle of international humanitarian law. The ICRC study on customary international humanitarian law states that “the use of weapons which are by nature indiscriminate is prohibited.”³²

After analyzing different reports of drone attacks, it is found that a drone is incapable of targeting only military objectives and of making a distinction between civilian and military.³³ The drone itself is a lawful weapon under the humanitarian law but it has been used in an indiscriminate way which is against the principles of humanitarian law. Some argue that a drone is inherently an indiscriminate weapon because it causes multiple civilian fatalities.³⁴ The targeted killing and drone strike policy violate the rights of the protected civilians and which are against the principles of International Humanitarian Law and the rule of law and other international legal protection.

30 Human Rights Watch, “*Israel: Gaza Air strikes Violated Laws of War, 2013*” (<http://www.hrw.org/news/2013/02/12/israel-gaza-airstrikes-violated-laws-war>)

31 Aaron M. Drake, “Current U.S. Air Force Drone Operations and Their Conduct in Compliance with International Humanitarian Law – an Overview”, *Denver Journal of International Law and Policy*, Vol. 39, 2010-2011, pp. 629, 653, 655.

32 Aaron M. Drake, *Op. cit.*, pp. 629, 653, 655.

33 A.S.M. Ali Ashraf, “U.S. Drone Strikes in Pakistan: Increasing Trends, Questionable Legitimacy, and the Issue of Tacit Cooperation,” *Pakistan Journal of International Relations*, Vol. 1, No. 2, 2010, pp. 1-46.

34 *Ibid.*

Drone strikes and the principle of Proportionality. The main consideration of the principle of proportionality is how the civilians and civilian objects are affected by an armed attack during a war. Articles 51.5(b) and 57.2(a) (iii) of Additional Protocol I deal with this principle. This principle puts some definite restrictions upon those attacks which have possibility to cause excessive incidental loss of civilian life, injury to civilians, and damage to civilian objects. Under these Articles, all the states must refrain from launching such kind of attacks. Any violations of this principle constitutes war crime under the Statute of the International Criminal Court.³⁵ The principle of proportionality is incorporated in different international treaties and it is a recognized concept of the customary international humanitarian law.³⁶ The US Army Field Manual on Counterinsurgency literally follows the laws of war but there is no practical implementation. Ryan J Vogel notes that:

attacks that result in civilian casualties do not by themselves constitutes war crimes, but reckless attacks that result in civilian deaths or destruction, or attacks that knowingly take civilian lives clearly in excess of what is necessary for accomplishing the military objective could violate the principle of proportionality and constitute war crimes.³⁷

In most of the cases drone strikes violate the principles of proportionality. In 2013, the Human Rights Watch reported that Israeli drone strikes killed a 79-year-old man and his 14-year-old granddaughter in their family's olive grove in Abasan and a 28-year-old woman carrying a blanket in the yard of her home in the town of Khuza'a.³⁸ Attacking and killing those civilians is not necessary for accomplishing the military objective.

Drone strikes and the principles of military necessity and humanity. Article 52 of the AP I states that only military objectives will be targeted. It is also prohibited to destroy or seizure the enemy's property unless that are necessary for the war. USA argued that drone strikes are necessary to find and identify targeted persons and reach into the place where the ground forces cannot enter. In modern times, civilian and civilian objects become the target of the attack, in order to destroy any country completely. Drone strikes make that target easy by its modern technology and explosive missiles.

35 Michael N. Schmitt, "Precision attack and international humanitarian law", *International Review of the Red Cross*, Vol. 87, 2005, pp. 445-456, available at (http://www.icrc.org/eng/assets/files/other/irrc_859_schmitt.pdf).

36 Aaron M. Drake', *Op. cit.*

37 Ryan J. Vogel, "Drone Warfare and the Law of Armed Conflict", *Denver Journal of International Law and Policy*, Vol. 39, 2010-2011, pp. 101- 125.

38 Human Rights Watch, *Op. cit.*, 2013.

There are numerous cases in which the United States conducted drone strikes in the same place for multiple times and that are known as ‘double tap.’ These secondary strikes killed those rescuers who came to rescue and help the injured victims.³⁹ It was reported by the Amnesty International that, some incidents where drone strikes violate the principle of military necessity and the principles of Humanity. Drone strikes killed Mmana Bibi (68 years old) while she was picking okra outside her home in North Waziristan with her grandchildren. Few minutes later, her family members who were giving treatment to her, were injured by a second strikes.⁴⁰

International humanitarian law is closely connected with human rights law. The dignity of the human beings is the main basis of these laws. The final principle of the international humanitarian law is the principle of humanity. The Hague and Geneva Conventions also discuss this principle. Under Article 22 of the Hague IV Convention, ‘the right of belligerents to adopt means of injuring the enemy is not unlimited.’ Article 23 of this Convention also puts some limitations upon using those weapons which cause unnecessary sufferings. In addition, the principle of humanity is also mentioned under Article 35 of the Additional Protocol I. This principle prevents the conflicting parties from causing superfluous injury or unnecessary sufferings though the attack complies with other principles. Drone is technologically advanced and it can survey the ground before and during a strike. In spite of these benefits, there is no opportunity for the target to surrender. Moreover, drone strikes are conducted by surprise and without warning. Drone strikes are violating the law of war by conducting attacks without giving any kind of warning. It creates mental pressure upon the innocent civilians. They fear to come out and don’t let their children to go to school. It turns the society into a horrible place where the enjoyment and practicing of human rights are totally impossible.

V. Private Military Companies and their Effect on IHL

In addition to the growing reliance of drone strikes, the United States and some of its coalition members have increasingly employed private military companies during the war on terrorism. PMCs provide combat capabilities and varying level

39 Stanford Law School & N Y U School of Law, “Living Under Drones - Death, Injury, and Trauma to Civilians From US Drone Practices in Pakistan,” 2012. (<http://livingunderdrones.org/2012/11/08>)

40 The Guardian, “US drone strikes could be classed as war crimes”, 2013. <http://www.theguardian.com/world/2013/oct/22/amnesty-us-officials-war-crimes-drones>

of security services to a contracted country. These companies are working in Algeria, Angola, Croatia, Ethiopia, Ghana, Indonesia, Ivory Coast, Rwanda, Uganda, Zambia, and many other countries to provide support to the government and rebel groups.⁴¹ When any armed conflict arises, it has become a common practice among the conflicting parties to hire military companies. The United States has a contract with 310 private military companies to protect American and Iraqi officials, installations, convoys and other entities in Iraq since 2003.

Confusion arises about the status of the employees of the PMCs. This confusion has arisen after two incidents that occurred in Iraq in 2004. In Fallujah, four employees of the 'Black Water' (private military company) were unlawfully executed. After that incident, US used devastating power and force in that city. The second incident is that the employees of the PMC brutally tortured the detainees at Abu Ghraib prison.⁴² Sometimes they take part in hostilities with uncertain regularity. Normally, a question arises about the role of these actors during the time of armed conflict. The main aim of the international humanitarian law is to control the conflicting parties from violating human rights. All the state or non-state actors, who are within the territory of armed conflict's state, are directly under the rules and obligations of the international humanitarian law.⁴³

Seven Iraqis were killed in Baghdad by the private military companies. It was addressed as a criminal activity by the Prime Minister of Iraq. On the other hand, PMC claimed that they did this as a right of self defense and to protect the lives of their client. In addition, they are addressed as mercenaries by the United Nations. Sometimes they are called unlawful combatants.⁴⁴ Generally, PMCs give three types of services: a) direct and tactical military assistance; b) strategic advice and training; and c) logistics, maintenance and intelligence services to the armed forces.⁴⁵ Sometimes the employees of the PMC act as a mercenary,

41 Amol Mehra, "Bridging Accountability Gaps-The Proliferation of Private Military and Security Companies and Ensuring Accountability for Human Rights Violations," *McGeorge Global Business & Development Law Journal*, Vol. 22, 2009-2010, pp. 323-324.

42 Lindsey Cameron, "International Humanitarian Law and the Regulation of Private Military Companies", 2000 (<http://www.baselgovernance.org/fileadmin/docs/pdfs/Nonstate/Cameron.pdf>).

43 *Ibid.*

44 Shawn McCormack, "Private Security Contractors in Iraq violates Laws of War", *Suffolk Transnational Law Review*, Vol.31, 2007-2008, p. 75.

45 Lindsey Cameron, "Private Military Companies: their status under International Humanitarian law and its impact on their regulation", *International Review of the Red Cross*, Vol. 88, 2006, pp. 573-576.

sometimes as a combatant and sometimes as a civilian. Their status depends on their activities and is determined on a case – by- case basis by the international humanitarian law.

PMCs as mercenaries. Some of the PMC employees fall under the Article 47 of the Protocol I and the Mercenary Convention. Article 47 deals with six conditions to be treated as a mercenary. These conditions are: a) recruitment for fighting in an armed conflict; b) taking direct part in hostilities; c) taking part in hostilities for personal gain; d) to be a national of third party who is not a party to the conflict; f) not a member of the armed forces of the conflicting parties; and g) not to be sent by the third parties not connected with armed conflict.⁴⁶ A number of employees of PMC provided protection services for the leaders of the Coalition Provisional Authority in Iraq from 2003. Hiring employees as a bodyguard to defend someone fulfils the first and second conditions of Article 47 of the Additional Protocol I. Here to defend means to engage in defensive combat not the offensive attack. However, evidence shows that some private military contractors were taking direct part in hostilities.

Moreover, employees who worked as a bodyguard earned up to \$ 2,000 a day which is higher than a US private earns in a month. They worked for personal gain. A South African Former Special Forces Fighter was hired as bodyguard. It is clear that they are not national of the conflicting parties. It is also prudent that they are not member of the armed forces of the conflicting parties and South Africa did not send them voluntarily.⁴⁷ So, few of the employees fulfill the conditions as specified in Article 47 of the Additional Protocol to be treated as a mercenary. But most of the employees are not within the definition of mercenary. They were hired to do defensive combat not the offensive attack. Under the international humanitarian law, mercenaries, have no right to be a combatant or a prisoner of war status. But they have right to a fair trial and adequate conditions of detention.

After analyzing various case studies documented by open source media, we find that sometimes the PMCs are engaged in a combat with uncertain regularity. A State Department convoy was attacked in Al-Nisour Square of Baghdad on 16 September 2007. The private security contractors fired into the streets by their

⁴⁶ Art 47 of AP I.

⁴⁷ Lindsey Cameron, “Private Military Companies: their status under International Humanitarian law and its impact on their regulation”, *International Review of the Red Cross*, Vol. 88, 2006, pp. 573-581.

company's helicopters which caused civilian casualties and injuries. They fired openly and 17 civilians were killed. The security firm Black Water claimed that they did this to save themselves. In October 2007, an oversight panel of the United States House of Representatives released a report indicating that Black Water employees had been involved in at least 196 firefights in Iraq since 2005, an average of 1.4 shootings per week. In 84% of those cases, the report stated, Black Water employees opened fire first, despite contract stipulations to make use of force only in self-defense.⁴⁸

PMCs and combatant status. There are three categories of persons who are entitled to the prisoner of war status as mentioned under Article 4 of the third Geneva Convention. The first category is the combatant. Combatants are those persons who are the members of the armed forces of the conflicting parties and members of the militias and volunteer corps are also part of the armed forces. To be a combatant, PMC employees need to be formally incorporated into the armed forces of the parties to the conflict. Article 43.1 of the Additional Protocol I and Article 4A (1) of the Third Geneva Convention discuss this issue.⁴⁹ Incorporation of any members into the armed forces of the state under these two Articles is an internal law of that state. Moreover, it is a matter of domestic law how the members will be incorporated in the armed forces. If any conflicting parties incorporate PMCs into their armed forces, it is their responsibility to inform the opposite parties.⁵⁰ Such incorporation of the members in armed forces should not be under unduly influence and forcibly. Under Article 51 of the 4th Geneva Convention it is prohibited to incorporate the protected persons into the armed forces forcibly. There is a strong allegation against UK and US that they violated this provision by hiring thousands of Iraqis by private military companies. If the employees of the PMC have combatant status, they have to follow all the principles of international humanitarian law. If they commit war crimes, they will be prosecuted by the recruiting states. Some legal proceedings are pending before the US court against Titan and CACI for abusing detainees at Abu Ghraib.

48 UN Working Group on the Use of Mercenaries, 'Impact on Human Rights of Private Military and Security Companies'. Activities''2008, (http://www.globalresearch.ca/2008/11/10_impact-on-human-rights-of-private-military-and-security-companies-activities)

49 Louise Doswald, "*Private Military Companies under international humanitarian law*", (https://lpa.princeton.edu/conferences/military07/restricted/doswald-beck_military07.pdf Beck).

50 Lindsey Cameron, "Private Military Companies: their status under International Humanitarian law and its impact on their regulation", *International Review of the Red Cross*, Vol. 88, 2006, pp. 573-583.

PMCs and civilian status. According to IHL, civilians are those who do not qualify as combatants. PMC employees, who are not conscripted into the armed forces of the conflicting parties, will be civilian. The term civilian is described under article 50 of the AP I.⁵¹ Some PMC employees may be classified as persons who are accompanying the armed forces. They are entitled to get the prisoner of war status in accordance with article 4 (A) of 3rd Geneva Convention. Employees are not combatants and they have no right to take direct part in hostilities. According to Article 43 (2) of the Additional Protocol I, “Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.”⁵² Though most of the employees of the PMC have civilian status, they are violating the international humanitarian law by taking direct part in hostilities. There is confusion about the term ‘direct participation’. Direct participation means those acts of war which cause actual harm to the personnel and equipment of the enemy armed forces.⁵³

Moreover, questions arise whether all the supports and logistics activities of the PMC constitute direct participation in hostilities or not. Under Article 4A (4) of the 3rd Geneva Convention, persons who are accompanying the armed forces by supplying food, shelter and other logistic support, have civilian status. Providing such supports by the employees does not mean to take direct part in hostilities. These supports are helpful to the overall war effort. For example: some kitchen staff who are employees of the private security company are recruited to give guard and to fight for protecting the military objectives. But it does not mean to engage in combat beyond personal self defense.⁵⁴ If the employees of the PMC are civilians, they will enjoy the status of protected person under the international humanitarian law. They will be protected from the target and attack unless they take direct part in hostilities. If they take direct part in hostilities, they will lose their protected status.⁵⁵

51 Art 50(1) of AP I , ‘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 civilian, that person shall be considered to be a civilian.’

52 Art 43 (2) of the AP I.

53 ICRC, ‘*Interpretive guidance on the notion of Direct participation in hostilities under the International Humanitarian Law*’,1975 (http://www.icrc.org/1975/04/04_eng/assets/files/other/icrc-002-0990.pdf)

54 Lindsey Cameron, “Private Military Companies: their status under International Humanitarian law and its impact on their regulation”, *International Review of the Red Cross*, Vol. 88, 2006, pp. 573-589, 593.

55 ICRC, “*International humanitarian law and private military/security companies*” 2012 (http://www.icrc.org/2012/10/12_eng/resources/documents/faq/pmsc-faq-150908.htm)

During the Afghanistan and Iraq Wars, the U.S. and coalition forces employed private military companies to provide logistic and other supports. About 50,000 people were employed in Iraq by the PMC Kellong Brown & Koot (KBR). This firm would provide logistic support such as laundry, catering, sanitation and similar support and services to the armed forces. Some employees who have security experience work as a security guard and bodyguard to protect different reconstruction efforts and to give personal protection to the US Department of State Personnel.⁵⁶

However, there are strong allegations against the private military contractors were involved in activities which would violate the human rights and international humanitarian law. Such violation includes openly firing on civilians and killing them, the ill-treatment of detainees, destroying the property, sexual harassment and rape, human trafficking in the recruitment of third-country nationals and weapons proliferation.⁵⁷ After analyzing different incidents, it is found that some employees of the PMC fired on civilians indiscriminately. Between the periods of 2004 to 2005, they fired on civilian cars sixty- one times.⁵⁸ The PMCs have no legal responsibility to inform the recruiting states about these incidents. The State Department has a record about the number of shootings that are fired by the bodyguard. But such data are not easily accessible. The shooting rates of DynCorp and Black Water are unexpectedly higher and such data are also unavailable. Black Water Contractors killed eleven Iraqis and twenty four were wounded on 16 September, 2007. Moreover they killed 3 Iraqi guards of the Iraqi Media Network.⁵⁹ There is no exact report about death of the civilians, who were killed by the employees of the private military companies. These activities of the employees of the private military companies render the international humanitarian law irrelevant. In a nutshell, the growing use of PMC raises serious concerns about the relevance of modern laws of warfare.

VI. Conclusion

The foregoing discussion suggests that IHL faces different legal and practical challenges due to technological developments. Modern technology has changed

56 Shawn McCormack, "Private Security Contractors in Iraq violates Laws of War", *Suffolk Transnational Law Review*, Vol. 31, 2007-2008, p. 90.

57 Amnesty International USA, "Private Military and Security Companies", 2013 (<http://www.amnestyusa.org/2012/12/07our-work/issues/business-and-human-rights/private-military-and-security-companies>)

58 Shawn McCormack, "Private Security Contractors in Iraq violates Laws of War", *Suffolk Transnational Law Review*, Vol. 31, 2007-2008, p. 91.

59 *Ibid*, pp. 91, 92.

the nature, character and boundaries of the battlefield in the 21st century. It has also changed the concept of responsibilities of the conflicting parties and other parties who have relationship with this war. In light of the evidence presented in this paper, IHL is not adequate enough to govern the drone and other technologically advanced weapons and other new concepts and methods. This has raised the need for reforming IHL to govern the laws of war against new technologies and private firms.

There are concerns the CIA's drone operators are not properly trained up. They conduct drone strikes not within the framework of IHL. Drone strikes kill the civilians indiscriminately and operators are incapable to make distinction between the civilians and suspected terrorists. Moreover, there is no accountability for killing innocent civilians which are against the rule of law. Right to life is a non-derogative right, which is disrespected in U.S. drone strikes.

Another trend in modern warfare concerns the involvement of private military firms which also render the IHL irrelevant. They become the part of the world war business. This study finds that there is no clarity in the status of the PMCs in the IHL. Their status depends on their activities. With uncertain irregularities, it is difficult to control the employees of the PMC by the laws of armed conflict. In the IHL, there should be some legal categories and specific provisions where their activities would fall. Generally, individuals of the third world countries are recruited as a member of the PMC. They appear to have limited knowledge about the IHL and often they do not receive proper legal training. There should be mandatory provisions to train every member of the PMC about IHL and international human rights law. Such knowledge would help them not to commit war crimes. Under the doctrine of state responsibility, the states recruiting PMC employees will be responsible if the companies commit any war crimes or violate human rights. It is also the responsibility of the contracting states to warn the companies and train them under IHL law.

The International Court of Justice has given its advisory opinion in the *Legality of the Threat or Use of Nuclear Weapons* that "conflicting parties may not use weapons that are incapable of distinguishing between civilian and military targets."⁶⁰ International humanitarian law is violated because there is insufficient means to enforce them, and there is uncertainty as to their application in some

60 Laurie R. Blank, "After 'Top Gun': How Drone Strikes Impact the Law of War", *Journal of International Law*, Vol. 33, University of Pennsylvania, 2011-2012, pp.657-684.

circumstances. The advisory opinion added that IHL is often violated due to the unwillingness to respect the rules, and lack of awareness about IHL among combatants, civilians and other people. Now, the time has come to change the IHL. It is the urge of international community to reform IHL to prohibit those dreadful weapons, including the combat drones, and control the activities of the PMCs. The goals of such prohibition and control are to reduce unnecessary sufferings of civilians, and to ensure the accountability of all states using new weapons and methods of modern warfare. In the absence of such legal reforms, the PMCs would be more desperate to kill or injure innocent civilians, and technologically advanced weapons would become a killing machine in the hands of powerful states and terrorists.