

## THE PRINCIPLE OF MILITARY NECESSITY AND USE OF DRONE IN ARMED CONFLICT\*

**Abstract**

*Military Necessity is the notion used to justify the recourse to violence within the rules of International Humanitarian Law. According to Dowey, Military Necessity is an urgent need, admitting of no delay, for the taking by a commander, of measures which are indispensable for forcing as quickly as possible the complete surrender of the enemy by means of regulated violence, which are not forbidden by the laws and customs of war.<sup>1</sup>In other words, any measure taken or violence that is not justified by Military Necessity is prohibited by the Laws of Armed Conflict. The confusion that many legal research work face is understanding how any destruction not forbidden by the law of armed conflict can be accessed and upheld as having being justified by Military Necessity. There seem to be a misconception or misrepresentation that comes with understanding the extent of what Military Necessity entails. This article therefore, mirrors the several definitions or existing references accorded to Military Necessity with the intent to first establish a clear understanding of the concept, then it proceeds to micro-analyze how Drone Combat, employed as a measure in war for the purpose of achieving success in war functions within the ambit of military necessity and finally, the objective of the article is to explore and draws public attention to how military necessity in the face of silence in the rules of International Humanitarian Law on drone use and control empowers military commanders to do horrendous damage using armed drones under the guise of military necessity. It concludes by suggesting better ways to use drone in armed conflict.*

**Keywords:** Principle of Military Necessity, Use of Drones, Armed Conflict, International Humanitarian Law

**1. Introduction**

Military necessity is one of the most fundamental yet most misunderstood and misrepresented principles of International Law of Armed Conflict.<sup>2</sup> To understand military necessity is to unravel the term ‘*what is militarily necessary in war?*’ - An expression believed to have evolved to what is today referred to as ‘Military necessity.’ Evolution of Military necessity referred to in the preceding line may or may not be different from that which was briefly acknowledged by David Luban in his work, ‘Military necessity and the cultures of Military Law,’ as he gave little or no details to the evolution he referred to in his work other than that military necessity has evolved.<sup>3</sup> But the essential point, we take away from his reference is that what is known as military necessity today has come a long way and there has been so many views on what it means which makes it quite complex to grasp and it is absolute necessary to find a clear explanation that clarifies any ambiguity to reader. This is why we agree with Max Huber that ‘there is no branch of law in which complete clarity is more essential than in that of the laws of war, for in this field allegations of violation of the law are particularly difficult to settle by means of juridical and peaceful procedure. This is because practical and psychological conditions in wartime are opposed to an impartial and swift appraisal of the facts.’<sup>4</sup> Military necessity has been proffered both to justify horrendous abuses during armed conflicts and to impose impractical and dangerous restrictions on those who fight.<sup>5</sup> It is for this reason that the concept of military need clear elucidation so as not to overstretch the discussion into similar but divergent terrains.<sup>6</sup>

**2. What is Military Necessity?**

Several scholars have taken shots at explaining or arriving at a precise definition of the term, while others have taken to describing it; for instance the International Committee of Red Cross in attempting to explain Military Necessity refers to it in this manner, ‘military necessity permits measures which are actually necessary to accomplish a legitimate military purpose and are not otherwise prohibited by International Humanitarian Law. David Luban on explaining Military Necessity noted, ‘the concept has evolved over time, and different formulation vary dramatically on key issues: whether military necessity is a legal concept or not, on the contrary, it is an extra-legal fact that sets the boundary on the legal regulation of warfare; whether necessity means what the literal language suggest-something unavoidable if war is to be waged successfully- or merely whatever the military finds convenient; and, above all, whether judgments of military necessity must take civilian interests into account. To answer these thought provoking issues, Luban noted, ‘In war, the notion of right and wrong, justice and injustice have... no place. Where there is no common power, there is no law, no justice. Military necessity is not a legal concept. On the other hand, nothing prevents States from writing rules of warfare and agreeing to enforce them either directly or through the indirect mechanism of reciprocity. The resulting laws of war are positive, not natural law because states write them on a Hobbesian legal blank slate. And military necessity represents the limits of rational regulation- Jomini’s ‘inexorable necessities’ that states cannot expect each other to forgo. Military necessity therefore lies outside the law.’<sup>7</sup> According to Finn, military

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<sup>1</sup>W Dowey, ‘The Law of War and Military Necessity’. *The American Journal of International Law*, [1953] 47 (2) pp 251-262. Retrieved from <<https://www.jstor.org/stables/2194822/>> accessed on December 6, 2022

<sup>2</sup>Michael N Schmitt, ‘Military Necessity and Humanity in International Humanitarian Law: Preserving the delicate balance.’ *Virginia Journal of International Law* (2010) (50) (4) 796 <https://www.onlinelibrary.iihl.org/wp-content/uploads/2021/07/military-Necessity-Humanity-baance.pdf> accessed on 5th September, 2023

<sup>3</sup>David Luban, ‘Military Necessity and the Culture of Military Law’ *Leiden Journal of International Law* (2013) (26) 73 [https://www.usna.edu/Ethics/\\_files/documents/publications/Military%20Necessity%20published.pdf](https://www.usna.edu/Ethics/_files/documents/publications/Military%20Necessity%20published.pdf) accessed on 5th September, 2023.

<sup>4</sup>Josef L Kunz, ‘the Laws of War’ *the American Journal of International Law* (1956) (50) (2) <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/abs/laws-of-war/DD70EB3A071E16D6C53725465CD8EC7A> accessed on 6th September, 2023.

<sup>5</sup> (n1)

<sup>6</sup>Marco Pedrazzi, ‘the Principle of military necessity and humanity in light of International Human rights law’ in Robert Kolb, Gloria Gaggioli. and Pavle Kilibarda (eds) *Research handbook on Human Right and Humanitarian Law; further reflections and perspectives* (Edward Elgar Publishing Ltd, 2022) 495

<sup>7</sup> (n2)

necessity principle functions as an extra-legal value. He illustrates this by using this the definition of military necessity in Lieber Code and the Hostages Case which restrict parties of armed conflicts to only conduct acts, that '[...] are indispensable for securing the ends of the war [...]' and that demand the '[...] least possible expenditure of time, life, and money.' These limitations according to him, establishes a legal link that separates permissive and necessary violence from wanton violence that does not contribute to the military objectives of an acting party. The requirement of this legal link shows that a balancing process is part of the military necessity principle. On the one side stands the maxim that violence is the language of armed conflicts and violent methods and means of warfare are thus inevitable to reach objectives. On the other side, the principle attempts to minimize the level of violence and to maximize the protection for affected individuals. Thus, the military necessity principle constantly aims to invoke a comparison of the military and humanitarian advantages and disadvantages, which a certain act of armed conflict entails.<sup>8</sup>

Nobuo Hayashi<sup>9</sup> in describing Military Necessity argues his point by painting three scenarios which shows that military necessity must be treated with contextual awareness. The first scenario is what he termed 'strictly material sense of the term'. In a strictly material sense military necessity can differentiate competent war- making from incompetent war-making. In the sense that a soldier with dwindling supplies of ammunition or supplies must consider the material state of his condition in deciding how to employ the tools in his possession as he will deem necessary or not. The second scenario is that of norm-creation. In this context military necessity may furnish or fail to furnish, as the case may be- a reason for considering certain belligerent conduct legitimate. In the sense that any conduct considered as done under military necessity may evoke the deliberation and enactment of legally permissible conduct in war. The third scenario is that of positive law. In this context military necessity may carry a technical meaning and operate within clearly defined parameters. In the sense that what is military necessary will have to be spelt out within the body of rules. Military necessity simply put is a measure that is taken by a commander in pursuit of success in war and directed at a military purpose, by employing means that does not derogate from the rules of war except for those accepted by the laws as an exception to rules of war.

### **3. Juxtaposition of Luban and Hayashi Inference**

The major issue raised in the above definition is the inference that Military necessity is not a legal concept as posited by David Luban and the inference by Hayashi that Military Necessity can be seen from a norm-creation context and from a positive law context. The question that arises is that, if military necessity is not a legal concept, how can it be seen within positive law context. As earlier stated, Positive law are laws made by State and laid down as accepted means of conduct. Military necessity as a non legal concept exists outside the law and influence law enactment, how so? for instance some acts carried out in past wars were done under the traction of military necessity and after much consideration, these acts have become legitimized and accepted through norm-creation and have now been made laws or outlawed through enactment of positive law. The enactment of these acts as positive law does not bring military necessity to an end. The state of a given situation or material reality will give rise to new conducts arguably done because of military necessity. This is what it means to say that military necessity therefore lies outside the law. In addition to this and I quote Hayashi, 'the fact that notions such as necessity and military necessity influence the process of norm creation does not mean that they lose relevance once a particular legal rule has been validly posited. On the contrary, they may be assigned specific roles in the rule's application to fact'. These roles will entail military necessity coming in as an exception to principal rule; to justify an otherwise unlawful act; and may excuse the offender for his unlawful act i.e. reducing his blameworthiness. At this juncture it is imperative to note that military necessity may act as an exception but can never function as a justification for wrongful act. The history of what is today termed Military Necessity clearly shows that it was once considered as a justification for unlawful acts but overruled by international community- in Germany, a proverb existed for this thinking, back then referred to- 'Kriegsraison geht vor Kriegsmanier' – meaning that 'the necessity in war overrules the manner of warfare'. The reference to the Kriegsraison doctrine allowed the violation of laws of war for retaliation, situations of extreme necessity and moreover for the sake of mere momentary military advantages. The Kriegsraison doctrine created a backdoor to circumvent the laws of war. Once opened, the backdoor leads to a limitless area of warfare by serving as justification for all interferences with all laws of war.<sup>10</sup> The formal rejection of Kriegsraison in IHL was confirmed by the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts<sup>70</sup>. Art. 35 I AP I states that '[i]n any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.' The rule establishes that acts of armed conflict in IACs are subject to absolute limitations. Or to fall back on the words of the Commentary on the AP I: the Kriegsraison doctrine '[...] is totally incompatible with the wording of Article 35 (I) and with the very existence of the Protocol.'<sup>11</sup> Most of the current national military manuals emphasize the denegation of the Kriegsraison doctrine in IHL. For example, the version of the UK states that '[n]ecessity cannot be used to justify actions prohibited by law.' The manual thus shows that military measures are not legally unlimited to achieve objects in armed conflicts. The United States of America ('US') accept positive IHL prohibitions as the absolute limitation for militarily required operations and infer a general rejection of the Kriegsraison doctrine. In contrast to its predecessors, the modern German armed forces similarly recognize the restriction of methods and means of warfare by IHL and that military considerations cannot justify all deviations. In conclusion, IHL – formed by customs and treaties over the last 150 years – established an absolute inviolability for minimum restrictions of acts of armed conflict. This can be interpreted as the formal rejection of the foundations of the Kriegsraison doctrine by law.<sup>12</sup>

<sup>8</sup>Finn- Valentin Kolitsch,, 'the resurrection of Kriegsraison? The military necessity principle and essence of international humanitarian law.' (LLM Thesis submitted to Lund University, 2022). 33

<sup>9</sup>Nobuo Hayashi, 'Requirements of Military Necessity in International Humanitarian Law and International Criminal Law' *Boston University International Law Journal*(2010) (28) (39) 43-55 <https://www.bu.edu/law/journals-archive/international/documents/39-140.pdf> accessed on 6th September, 2023

<sup>10</sup>Finn- Valentin Kolitsch,, 'the resurrection of Kriegsraison? The military necessity principle and essence of international humanitarian law.' (LLM Thesis submitted to Lund University, 2022).

<sup>11</sup>Claud Pilloud, Jean De Preux, Yves Sandoz and Bruno Zimmermann, '*commentary on additional protocol 1 of 8 June 1977 to the Geneva Convention of 12 August 1949*' (Martinus Nijhoff: Netherlands 1987) 391 at line 1386

<sup>12</sup>(n10) 19

#### 4. Combat Drone as a Weapon and its Use in Armed Conflict

Combat Drones are unmanned Aerial Vehicles or Aircraft Systems which serve as weapon system and weapon platform. Combat drones are weapon system because they are capable of causing injury or death of persons or damage or destruction of objects<sup>13</sup>. They are weapon platforms because they carry and are designed to launch weapons by using on-board technology to direct and launch a weapon to a target.<sup>14</sup> In the past and quiet recently, Combat drones have been deployed in both categories, as weapon system and weapon platform in International Armed Conflict. For instance, the Kamikaze drone is a drone weapon system that has been deployed in Armed Conflict recently in the Russian and Ukraine War.<sup>15</sup> The Kamikaze drones often referred to as 'suicide drones'<sup>16</sup> are used to eliminate the enemy through self- destruction.<sup>17</sup> They are also a type of aerial weapon system referred to as loitering munitions, because they are capable of waiting for some time in an area identified as a potential target area and only strikes once an enemy asset is identified, selected or detected<sup>18</sup>. This type of drones is excellent for hidden targets which are hard to detect and come out only for a short duration. Such targets require instant and repulsive action. Therefore, Kamikaze's instant reaction to a selected target makes it a great offensive weapon.<sup>19</sup> There seem to be the misconceptions that drone are merely weapon platform majorly because it carries weapons to targets. This conception is alive in HPCR Manual, which adopted the definition of unmanned Combat Aerial vehicle as an unmanned Military aircraft of any size which carries and launches a weapon or which can use on-board technology to direct such a weapon to a target.<sup>20</sup> By this definition, drone are considered weapon platform alone and not weapons systems and the argument is that because drone confine with the definition adopted by the manual, drone does not need to be reviewed in the light of the prohibitions in the laws of IHL but any weapons it carries may be reviewed. Therefore, the drone does not raise legal issues with respect to superfluous injury or necessary suffering. However, Lord Bingham<sup>21</sup> had in the past designated drone as a weapon<sup>22</sup> and with the existence of Kamikaze drone; this argument has been put to rest. Kamikaze drone is an aerial weapon system category in which the munitions loiters around the target area for some time and attacks only once a target is located. These drones are disposable and destroyed when they attack a target, unlike the traditional military drone that return after releasing missiles- hence they are referred to as suicide drone. Drone as weapon system ie weapon itself is subject to restriction placed on means and method of warfare in article 35 and 35 of Additional protocol 1, and is regulated by the principles of International Humanitarian Law as required by Marten clause and judicial pronouncement in Nuclear opinion case. In the commentary of 1987 it was noted that in cases not covered by these protocols- article 1 (2)<sup>23</sup> and forth paragraph of the preamble to Protocol II<sup>24</sup> or any other International Agreement, Civilians and Combatants remain under the protection and authority of the Principles of International law derived from established custom, from the principle of Humanity and from the dictates of Public Conscience. The foregoing is what's known as 'the Marten Clause.'<sup>25</sup> The Marten Clause has been interpreted to mean that something which is not prohibited under International Law is not something which is permitted. It aims to offer some protection to individuals caught up in armed conflict even where there is no specific applicable rule of International Humanitarian Law. The Martens Clause, as set out in 1977 Additional Protocol II, recalls that in cases not covered by the law in force, the humans remain under the protection of the principles of Humanity and the dictates of the Public conscience. Also The ICJ in Nuclear Weapon Advisory Opinion, the court held that 'these principles of IHL apply to 'all forms of warfare and all kinds of weapons, those of the past, those of the present and those of the future.'<sup>26</sup> It is apt to put that military necessity which is a principle of International Humanitarian Law applies to drone as a weapon used in Armed Conflict.

#### 5. Does Drone Use Qualify as a Measure of Military Necessity?

It was Hilaire McCoubrey that said that for the purposes of Military necessity, 'necessity' connotes an immediate and overwhelming circumstance in military action, which renders strict [sic] compliance, upon rational analysis [sic] impractical rather than 'impossible'. He said this because he believed that military necessity can be relied on to deviate from the positive law. The law is however supreme and simply does not permit any deviation from the prescription of its norms on account of military necessity, save where such a possibility is expressly envisaged beforehand by way of exceptional clauses. This line of argument is seen in *Prosecutor v. Tihomir Blaskic*, 'An occupying power is prohibited from destroying movable and non-movable property except where such destruction is made absolutely necessary by military operations.' In the evidentiary comment of the judgment, it was noted that military necessity covers only measures that are lawful in accordance with the laws and customs of war. Consequently, a rule of the law of armed conflict cannot be derogated from, by invoking military necessity unless this possibility is explicitly provided for by the rule in question and the extent it is provided for.<sup>27</sup> The argument of Mc Coubrey does not change that the law does not permit any deviation from the description of its norms on account of military necessity, save where such a possibility is expressly envisaged beforehand by way of exceptional clause but gives credence to it, more so, his argument is just a dissenting opinion.

<sup>13</sup><https://assets.cambridge.org/978110770/34198/frontmatter/97811734198-frontmatter.pdf> accessed on December 15, 2022

<sup>14</sup> *ibid*

<sup>15</sup> On February 24, 2022, Russia launched an undeclared war against Ukraine

<sup>16</sup> Ivan Kottasovia, 'Kamikaze drones are the latest threat for Ukraine. Here's what we know' CNN [2022, October 17] retrieved from <https://amp.cnn.com/cnn/10/17/europe/kamikaze-drone-explained-update-intl/index.html>, accessed on January 2, 2022.

<sup>17</sup> <https://blog.flykit.app/kamilaze-the-suicide-drone/amp/> accessed on January 7, 2023.

<sup>18</sup> *ibid*

<sup>19</sup> *ibid*

<sup>20</sup> <https://assets.cambridge.org/978110770/34198/frontmatter/97811734198-frontmatter.pdf> accessed on December 15, 2022

<sup>21</sup> <https://www.oneindia.com/2009/07/06/nowbritains-former-top-judge-terms-drone-attscksinhuman.html> accessed on 7th September, 2023

<sup>22</sup> The independent quoted Lord Bingham as saying that 'are there, for example, and this goes to conflict, not post-conflict situations, weapons that out to be outlawed? From time to time in the history of international law various weapons have been thought to be so cruel as to be beyond the pale of human tolerance. I think cluster bombs and landmines are the most recent examples'

<sup>23</sup> Protocol Additional to Geneva Convention of 12 August 1949 Relating to the Protection of Victims of International Armed Conflict of 12 Dec 1977

<sup>24</sup> Protocol Additional to Geneva Convention of 12 August 1949 Relating to the Protection of Victims of Non- International Armed Conflict of 12 Dec 1977

<sup>25</sup> The clause took the name from a Declaration read by Professor Von Martens, the Russian delegate at the Hague Conference 1899. It was introduced after delegates at the Peace Conference failed to agree on the issue of the Status of Civilians who took up arms against an occupying force.

<sup>26</sup> Para 86.

<sup>27</sup> Case No IT-95-14-T, Judgment (TC), 3 March 2000, Para 157;

However, where there are no positive laws on a subject, military necessity is free flowing, existing at the material reality context-allowing for what a reasonable soldier in war considers necessary or not in a heat of battle. For instance since positive law prohibits harming civilians during war except for cases of incidental harm/ collateral damage, no unnecessary killing of civilian during an attack as a whole would qualify as military necessary for success in war- as no derogation is allowed. Articles 46, 47 and 50 of the Hague Regulation<sup>28</sup> make no such exception to its enforcement. The right of the innocent population therein set forth must be respected even if military necessity decree otherwise. Also, according to commentary to protocol 1, provide that ‘Consequently a rule of the law of armed conflict cannot be derogated from by invoking military necessity unless this possibility is explicitly provided for by the rule in question. Conversely, when the law of armed conflict does not provide for any prohibition, the Parties to the conflict are in principle free within the constraints of customary law and general principles.’<sup>29</sup>

International Humanitarian Law has provided a host of objects that are not to be destroyed in war and because military necessity permits of measure that do not violate the rules of war, and which are lawful according modern law and usages of war; the provisions on protected objects cannot be derogated on the ground of military necessity. In *Prosecutor v. Pavle Struger*,<sup>30</sup> The Chamber was of the view that military necessity may be usefully defined for present purposes with reference to the widely acknowledged definition of military objectives in Article 52 of Additional Protocol I<sup>31</sup> as ‘those objects which by their nature, location, purpose for use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstance ruling at the time, offers a definite military advantage.’ Whether a military advantage can be achieved must be decided, as the Trial Chamber in the Galic Case held, from the perspective of the ‘person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action. In other words, each case must be determined on its facts. Recalling its earlier finding that there were no military objectives in the old town on 6 December 1991 the chamber, it is of the view that the question of proportionality in determining military necessity does not arise on the facts of this case.’ What International Humanitarian Law does provide for is attacks on military objects and objectives. The rationale is that such attack comes with military advantage. Military object and objectives are those objects which by their nature, location, purpose or use: (a) make an effective contribution to military action, and (b) whose total or partial destruction, capture or neutralization, in the circumstance ruling at the time, offers a definite military advantage. The implication of this is that any such destruction on military object and military objectives will be considered military necessity and be acceptable.

In the List (Hostage trial) case, US, Military Tribunal at Nuremberg,<sup>32</sup> the Court held that military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money. In general, it sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operation. It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the conflicts of war; it allows the capturing of armed enemies and others of peculiar danger, but it does not permit the killing of innocent inhabitants for the purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and overcoming of the enemy forces. It is lawful to destroy railways, lines of communication or any other property that might be utilized by the enemy. Private homes and churches even may be destroyed if necessary for military operations. It does not admit of wanton devastation of a district or the willful infliction of suffering upon its inhabitants for the sake of suffering alone’. The understanding espoused by the List case is that subject to the laws of war [avoiding attacks on civilians and all other object protected under the Rules of International Humanitarian Law] the belligerent can apply any amount and kind of force to compel submission of the enemy. The issue with this type of reasoning is that in the absence of any regulation limiting the use of certain weapons to carry out any attack, it may be applied without restraint. One good example is the nuclear weapon use. This type of weapon applied in any amount or force unchecked can be counterproductive, hence its use has by special regulation been outlawed. The Treaty on the prohibition of Nuclear Weapon (TPNW)<sup>33</sup> is one of the special regulations limiting use of nuclear weapon by virtue of article 23 (e) of Hague Regulation which allows special regulations to forbid the employment of arms, projectiles or material calculated to cause unnecessary suffering, the TPNW prevents the use of nuclear weapon in any amount in war even if its use can compel the complete submission of the enemy with the least possible expenditure of time, life and money.

Is Drone as a weapon of warfare different from measures that are referred to when military necessity is discussed? From the literature considered not much is said about weapons being considered as a measure under military necessity. The Lieber Code aids with giving us insight, this is because The concept of military necessity proper, emerged for the first time in General Orders No. 100, the ‘Lieber Code,’ (‘Code’) promulgated by President Lincoln on April 23, 1863- the seminal document of international humanitarian law.<sup>34</sup> Lieber codes defines to a large extent what military necessity permits, articles 14, 16 and 17 gives an insight to what measures entail. Article 16 provides that Military necessity does not admit of cruelty - that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult. Article 17: War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy. From Lieber code, we see that means of warfare such as poison and even starvation are considered as part of measure. In fact, article 17 specifically speaks of arms and other tactics employed with the intention to gain succeed in war. Drones as weapon system and platform therefore qualify as

<sup>28</sup>Convention (II) with respect to laws and custom of war on land and it’s annex: The regulations concerning the laws and customs of war on land, 29 July, 1899.

<sup>29</sup>(n12) 393

<sup>30</sup>Case No. IT-01-42-T, Judgment (TC), 31 January 2005 Para 295

<sup>31</sup>(n22)

<sup>32</sup> UNWCC, LRTWC, Volume VIII, p. 66-67, 69:

<sup>33</sup>The 2017 treaty is the first legally binding international agreement to comprehensively prohibit nuclear weapons with the ultimate goal being their total elimination. The treaty was carefully crated to reinforce, complement, and build on the 1968 Non-Proliferation Treaty (NPT)

<sup>34</sup>Scott Horton, ‘Kriegsraison or military necessity? The Bush Administration’s Wilhelmine attitude towards the conduct of war.’ *Fordham International Law Journal* (2006) (30) (3) pp [https://ir.lawyer.firdham.edu/cgi/view\\_content.cgi? article 2053& context=IHL](https://ir.lawyer.firdham.edu/cgi/view_content.cgi? article 2053& context=IHL)

measures which are and form part of action that a military commander may take to ensure the quick and fast surrendering of the enemy. It is proposed here that, within the meaning of military necessity, a measure cannot be considered required for a particular military purpose unless it satisfies the following criteria:

- (i) That the measure was materially relevant to the attainment of the military purpose;
- (ii) That, of those materially relevant measures that were reasonably available, the one taken was the least injurious; and
- (iii) That the injury that the measure would cause was not disproportionate to the gain that it would achieve.

It may happen that even the least injurious of those reasonably available and materially relevant measures causes or is expected to cause disproportionate injury. Where this is the case, military necessity may leave the belligerent with no alternative but to modify the military purpose or abandon its pursuit altogether.<sup>35</sup> There is no gain saying that the above fall nicely under reasons advocated for justifying drone employment in wars. Drone is designed to kill less people but to kill them in unnecessary manner nonetheless; but since it meets the requirement above, military necessity permits its use.

#### **6. Drone Regulation *vis-a-vis* the Principle of Military Necessity**

The use of Combat Drone be it Predator or Kamikaze Drone during Armed Conflict as it stands is employed without any specific laws regulating its use. The only rule that remotely has any regulatory power over drone use is the general prohibition placed on means and methods of warfare in Article 35 of Additional Protocol 1 which states that 'in any armed conflict, the right of the parties to the conflict to choose methods or means of warfare is not unlimited.'<sup>36</sup> Secondly, The ICJ in Nuclear Weapon Advisory Opinion held that the principles of IHL apply to 'all forms of warfare and all kinds of weapons, those of the past, those of the present and those of the future.'<sup>37</sup> Military Necessity as a principle of International Humanitarian Law applies to drone use as far as armed conflict is concerned. Regulating Drone use by relying on extant framework in the face of military necessity is an issue. The careful analysis of the concept of military necessity as a principle of International Humanitarian Law shows that it is not a principle that regulates use of any weapon, drones inclusive. It is more or less interested in how to win wars as opposed to other principles of IHL that promote humanity in war and embodies the spirit of promoting sanctity in war as posited by founding father of International Humanitarian Law. It is no longer news that Kamikaze Drone explodes on impact, detonating its warhead, killing its target- a very good measure that achieves success in war, yet the aim of International Humanitarian Law is to unarm the enemy and in doing so to reduce the effect of suffering in war. It therefore can be said that in wars fought with drones that targeting combatants with the aim of killing them on ground especially when they are in no way operating drones to fight back, does nothing to weaken the military forces of the enemy but to annihilate them but this violate any positive law. Using drones on combatants, who pose no threat to a drone operator, aid operators to take advantage of military necessity to kill, destroy military objects that do not necessarily contribute to their win. The extant regime does not request for any test of proportionality for attacks on combatants that are sitting ducks for drones' operators to be attacked and killed merely because they are classified as lawful targets.<sup>38</sup> This sort of targeted killings and deaths goes against the Principle of humanity, the very core of International Humanitarian Law and therefore cannot be absolved as there should be Restraints on the Use of Force.

As earlier noted, the right to use weapons in war is not unlimited. The principle of Military necessity is also linked with unnecessary suffering and superfluous injury which limits the use of any weapon. This is so because it is the corresponding suffering or injury from the measure taken out of necessities to win a war that will determine whether an action will be permissible or not. Therefore, when combat drone is required as a measure of military necessity to carry out precision-targeted attack which may solidify wins, it is important that there are limits. Under this principle of military necessity if its use can cause unnecessary suffering or superfluous injury far above the anticipated military advantage, it would not be acceptable. What nature of suffering or injury does drone effect? Kamikaze drone for instance are self destructive. It is understood that Kamikaze drone detonates and crashes into the target which leads to an explosion. The issue here is that this explosion on the target paints a picture that the target would be severally injured or killed. Injury to a lawful target can in this case be unnecessary considering that, drone attack is not a target on target; booths on booth campaign, in the context of the overall aim being to un-arm the opponent. Put differently, since the drone operator is not in harm's way, it is quite horrendous to out rightly kill a combatant when he poses no threat. Ordinarily, Combatants or lawful targets are not necessarily the focus of protection afforded under the rules of International Humanitarian Law, but where the attacker is not necessarily in harm's way from the target, the death becomes needless.<sup>39</sup>

Explosion would ordinarily result in the death of a target who did not pose a threat, and whose death is not indispensable for the purpose of securing the ends of war, by using drone. Unnecessary killing or superfluous injuries are likely aftermath of combat drone, as per the impact of whatever weapon carried in the drone payload. For instance, in an unrelated incident; in 2018, the US government decided to attack five Yemeni men through drone attack. They drone launched a missile that ripped through an SUV, near the village of Al Uqla, and tossed the car into the air. Three of the men were killed instantly. Another died days later in a local hospital. The only survivor was Adel Al Manthari, whose body was ravaged. His entire left side was burned. His right hip was fractured and his left hand sustained catastrophic injuries to its blood vessels, nerves and tendon. Despite multiple surgeries and nine month of medical treatment after the strike, he was permanently disabled. The severe burns left his skin vulnerable to infection, and his body has regularly been covered in bed sores due to his limited mobility.<sup>40</sup> These and more severe injuries like deep cut, laceration, spinal cord injury are the kinds of injuries caused by drone strikes. It is no doubts that Combatants may be directly targeted during armed conflict but even when they are engaged in hostilities they are protected from unnecessary suffering and superfluous injury.<sup>41</sup>

<sup>35</sup>(n9) 69

<sup>36</sup>1977 AP1 to Geneva convention 1 of 12 August, 1949 and relating to the protection of victims of International Armed Conflict

<sup>37</sup>Para 86.

<sup>38</sup> *Prosecutor v Pavle Struger supra*

<sup>39</sup>Florence Chinenye Akubuiilo, *Examining the lawfulness of combat drone use in international armed conflict under international humanitarian law* (LLM Thesis submitted to Faculty of Law, Nnamdi Azikiwe University, Awka, 2023)

<sup>40</sup><https://theintercept.com/2022/09/19/yemen-drone-survivor-civilian-compensation/> accessed on February 2, 2023

<sup>41</sup><https://www.diakonia.se/ihl/resources/international-humanitarian-law/who-is-protected-by-ihl/> on February 5, 2023

Although, the manufacturers of Kamikaze drone attest that kamikaze drones has Switchblade<sup>42</sup> that has a camera which shows target seconds before impact and it also has features that allows the operator to adjust blast radius<sup>43</sup> so it can kill the driver of a vehicle but not a passenger. It is imperative to consider that with Kamikaze drone, it way of hitting targets is to crash into it, detonating it warhead on impact. It is therefore a given that whomsoever is the target from the statement gets killed or seriously injured. These sorts of injuries are not too distinct to those that explosive projectiles under 400 Grammes weight caused before it was outlawed in 1868. It is on record that in 1863, Russian Military authorities invented a bullet which exploded on contact with hard substance and whose primary object was to blow up ammunition wagons and in 1867, the bullet was modified to explode on contact with a soft substance. This leads to the move by Russian government to ban it. It is therefore, a killer weapon and would inflict excessive injury and death, when the operator is not even closely within harm's way.

## **7. Conclusion and Recommendations**

Military necessity is governed by several constraints: an attack or action must be intended to help in the military defeat of the enemy; it must be an attack on a military objective, and the harm caused to civilians or civilian property must be proportional and not excessive in relation to the concrete and direct military advantage anticipated. Drones use in war when employed to help the military defeat the enemy, to attack military object, will then by military necessity be justified to bring any force that wins war. The absence of positive law protecting these objects from senseless slaughter and onslaught becomes an issue that military necessity cannot solve. Drones can therefore be allowed to be used on mortars but not humans, to knock off military trucks but not to blast combatants to death when they pose no risk or threat of death. The modern law of armed conflict supports the following maxim: if enemy combatant can be put out of action by injury, they should not be killed; and if they can be put by light injury, grave injury should be avoided. A debate on this issue has raged since the International Committee of Red Cross (ICRC) published its Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian law in 2009. In the report, the ICRC stated, 'the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances. And the ICRC invoked the famous statement of a former Vice President of the Organization, Jean Pictet, who had written, 'if we can put a soldier out of action by capturing him we should not wound him, if we can obtain the same result by wounding him, we must not kill him, if there are two means to achieve the same military advantage we must choose the one which causes the lesser evil'.<sup>44</sup>

The above study by ICRC which supports Restraint on the use of force faces challenges because it lacks the support of explicit treaty laws and lacks the support of state practices. It is clear that ICRC study however primarily relied on general principles of humanity, general principles of necessity and interpretation by inference.<sup>45</sup> Marten Clause provision also considered protection for combatants when it stated that 'in cases not covered by this Protocol or any other International agreement civilians and combatants remain under the protection and authority of Principles of IHL and dictates of public conscience. If there can be constraint for civilians considered *hors de combat*, then there can be restriction of use of force on combatant when drone attacks are involved. This is why it is important to provide Restraint on the use of force within the extant rules. Goodman puts it better when he wrote that it is important to locate RUF in the general structure of the legal regime. The most direct source of support for RUF can be traced back to the reconstitution of LOAC in 1868. At a meeting hosted by Russia in Saint Petersburg, an international military commission produced a declaration that generally achieved the first intentional agreement prohibiting the use of a particular weapon. The declaration preamble provides that the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy. According to the declaration, it is therefore perfectly legitimate to use military violence to overcome and incapacitate the enemy that is, to disable the greatest possible number of men: however, 'this object would be exceeded by the employment of arms which aggravates the suffering of disabled men.'<sup>46</sup>

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<sup>42</sup><https://www.everythingrf.com/community/what-is-> accessed on March 6,2023n.277)

<sup>43</sup> *ibid*

<sup>44</sup> Ryan Goodman, 'The Power to kill or capture Enemy Combatant' *EJIL* 24(3) 819-820 < doi:10.1093/ejil/cht048

<sup>45</sup> *Ibid*; 824

<sup>46</sup>*Ibid*;836