

**THE ROLE OF PUBLIC CONSCIENCE IN THE ABSENCE OF SPECIFIC REGULATION FOR DRONE USE IN ARMED CONFLICT\***

**Abstract**

It is true that when specific regulation exist it is much easier to hold operators of any weapon during Armed Conflict accountable. However, in an ever evolving world, new technologies emerge that may or may not have been contemplated by existing laws as per its use, its control or management. Under International Humanitarian Law, bodies of rules exist be it treaty laws, special regulation that ensure that warfare do not denigrate to complete annihilation. It was in furtherance of that purpose that Marten clause was introduced to the preamble of 1899 Hague regulation II –Laws and Customs of War on Land, for instances where the law falls short. There are differing angles to what it entails, but for the purpose of this work, Marten Clause provides that because International treaties cannot be all encompassing, states cannot use that as a justification for a wrongful action. The Marten clause as set out in 1977 Additional Protocol II recalls that in cases not covered by the law in force, the human persons remain under the protection of the principles of humanity and dictates of public conscience. This aim of the work is therefore to analyse what this dictate of public conscience means and how it's applies during hostilities to the extent of playing whatever role in regulating drone use in armed conflict. The research employs the doctrinal research methodology as it relies mostly on books, published articles and research works. It recommends at the end for the need to integrate and make room for public conscience for a more nuanced rules regulating warfare and drone employment by encouraging reliance on public conscience for areas where the law is silent.

**Keywords:** Role of Public Conscience, Regulation, Drone Use, Armed Conflict.

**1. Introduction: Is Public Conscience same as Public Opinion?**

Public conscience has been explained to mean public opinion, or *vox populi*.<sup>1</sup> Whilst this explanation does not say much, it is simple and straight forward. Suffice it therefore, to say that dictates of Public conscience on this premise means, demands derived from public opinion. 'Opinion' in the literal sense of the word is a very loose word to compare the weight attached to the word 'conscience' as used in Humanitarian Law text. Loose in the sense that opinion can be had without much introspection, without fact or knowledge. There is the understanding that polling data and experts views provide evidence of public opinion.<sup>2</sup> While informative, polls, by themselves, are not sufficient measures of the public conscience in part because the responses from them can be influenced by the nature of the questions asked and do not necessarily reflect moral consideration of the poll taker, whereas the statements and actions of experts, who have often deliberated at length on the question in issue, reflect a more in-depth understanding. Their specific expertise may range from religion to technology to law, but they share a deep knowledge of the topic. The views they voice can thus shed light on the moral norms embraced by the informed public.

The Dictionary defines 'opinion' as a view or judgment formed about something, not necessarily based on fact or knowledge as opposed to 'conscience' which is defined as a person's moral sense of right and wrong viewed as acting as a guide to one's behavior. The use of the term 'conscience' from this view becomes instrumental to the purpose of interpretation of the provision of the preamble to 1899 Hague Convention and Article 1 of 1977 Additional Protocol II. Angeline Lewis agree with this for she states after quoting the clause in her work, 'Conflating Conscience and legality in International Law: implications for the future' - that 'for the purpose of her article the keywords are 'requirements of public conscience', although it is also useful to observe as background the moral imperative underpinning of the clause evident in the parties thinking it right to include it'.<sup>3</sup> Michel Veuthey defined Conscience as awareness (we would today use the word 'consciousness'). It is the individual sense of what is right or wrong. It is a sense of moral awareness which could be understood as the will of God expressed in man's judgments, an inherited intuitive sense that has evolved in the history of the human race, and a set of values derived from religion, the education, the training and the experience of the individual. Conscience, informed by acculturation and instruction, is generally understood to give intuitively, judgments on the moral quality of single action.<sup>4</sup>Public Conscience therefore means public sense of what is right or wrong. To use Michel Veuthey's words 'Public Conscience extends beyond the individual's moral sense. It refers to values that are shared within a community, be it a family, a tribe, a nation, a religious or professional group, a reign (Africa, Latin America, North America, Western Europe, Eastern Europe, North Africa and the Near East, Oceania, South East, Asia, etc) or a group of nations (industrialized or developing).'<sup>5</sup>

**2. Evolution of requirements Public Conscience to Dictates of Public Conscience**

The history of Public Conscience can be traced to the preamble of 1899 Hague Regulation II. The Preamble contained the text-

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\*By Nwamaka Adaora IGUH, PhD, Reader and Head, Department of Private and Property Law, Faculty of Law, Nnamdi Azikiwe University, Awka Anambra State, Nigeria, Email: zinachidi2014@gmail.com;

\* Florence Chinenye AKUBUILO, LLB, BL, LLM, Email: Fakubuilofa@gmail.com;

\*Obiageli Chinwe NNABUGWU, MSc, Department of Entrepreneurship, Nnamdi Azikiwe University, Awka, Anambra State, Nigeria, Email: oc.nnabugwu@unizik.edu.ng;

\*Chinedu A. ONAH, LLM, Lecturer, Department of Commercial and Property Law, Faculty of Law, Nnamdi Azikiwe University, Awka, Anambra State, Nigeria, ac.onah@unizik.edu.ng; and

\*Chidera Laura IGUH, LLB, Email: iguh.chidera@yahoo.com

<sup>1</sup>Tetsuya Toyoda, influence of Public opinion on international Law in the Nineteenth Century, *Alberta Law Review* vol 46 (4) 2000

<sup>2</sup>Peter Asaro, *jus nascendi*, Robotic weapon andMarten Clause pp 374-375; see also V.V Pustogarov, 'The Marten Clause in International Law, *Journal of the history of international law* pp 132-133.

<sup>3</sup>Angeline Lewis, Conflating conscience and legality of international law: implication for the future (2019) 40 (2)*Adelaide law review* p 449

<sup>4</sup>Michel Veuthey, 'public conscience in International Humanitarian Law Today' [www.researchgate.net/publication/293315516\\_Public\\_conscience\\_in\\_international\\_humanitarian\\_action](http://www.researchgate.net/publication/293315516_Public_conscience_in_international_humanitarian_action) accessed on the 5th September, 2023

<sup>5</sup>op cit 608

until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of International Law as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.

The clause was drafted by Friedrich F. Von Martens a diplomat and jurist serving under the Russian Empire. The clause was drafted by him as a Russian Delegate to the Hague peace conferences of 1899. In 1870-1871, the Franco- Prussian war was underway- a war between Second French Empire and North German Confederation led by the Kingdom of Prussia. The need arose for the clause when there was a confusion on the status of non- combatants who took up arms against the forces. At the Hague Peace Conference, a debate ensued on who is a combatant, and who may be classified as persons belonging to the privileged class of warriors who are bound by and benefit from the laws of war as rooted in the codes of chivalry of the middle age (*jus militaire*). On both sides of the war were the German group leads by kingdom of Prussia and on the other side, the French. The Prussians who had killed tons on *franc-tiers*<sup>6</sup> argued that it is important that all patriotic fervors of a country inhabitants or citizens are to be channeled towards joining the National army. They argued that wars should be fought by the armed forces as service in a nation's army is not only National but a humane duty and that the more war is conducted on both sides by regular and disciplined troops the less humanity will suffer. The French argued that there should be recognition for the right of citizen who participate to repel an invader. They championed not only the traditional *levé en masse*<sup>7</sup> but also the authority of citizens to repel invading power. The result of the Hague deliberations was a limited compromise in which the Hague Regulations provided belligerent status to armies, and to militia that meet the four criteria: being under responsible command, having a fixed distinctive emblem recognizable at a distance, carrying arms openly and conducting their operations in accordance with the laws and customs of war. In deference to the less dominant military powers, there was also provision of belligerent status to inhabitants of a territory which was not occupied, 'who on the approach of the enemy, spontaneously take up arms to resist...without having time to organize themselves. Martennot fully satisfied with the resolution of the issue then promulgated the clause that took after his name.

### 3. Modern Use of Marten Clause

Since it was first adopted in 1899, Marten Clause has been applied more broadly with the intent to reduce the impact of hostilities; numerous instruments of international Humanitarian Law have incorporated the provision. The clause under the Geneva Convention 1 relegated the clause to the denunciation clause, to ensure that party that denounced the Convention is bound by the rules of International Humanitarian Law and Customary Law. From preamble of 1899 Hague Convention, the phrase, 'requirement of Public Conscience' reappeared in the preamble to the 1907 Hague Convention (IV) on Respecting the Laws and Customs of War on Land as the 'dictates of public conscience.' A modern version of that clause is to be found in Article 1, paragraph 2, of Additional Protocol I of 1977, which reads as follows: 'In cases not covered by this Protocol or by other International agreements, civilians and combatants remain under the protection and authority of the principles of International law derived from established customs, from the principles of humanity and from the dictates of public conscience'. The clause was incorporated in the General principles and scope of Application of Additional Protocol and the reason is clear- first it is not possible for any codification to be complete at any given moment; thus, the Marten Clause prevents the assumption that anything which is not explicitly prohibited by the relevant treaties is therefore prohibited and secondly it should be seen as a dynamic factor proclaiming the applicability of the principles mentioned regardless of subsequent developments of types of situation or technology<sup>8</sup>.

### 4. Judicial Analysis of the Term, 'Dictates of Marten Clause/Public Conscience'

The International Court of Justice in 1996 in determining series of issues raised in the Legality of the Threat or Use of Nuclear Weapon considered this group of issues- Principles and the rules of international humanitarian law-prohibition of methods and means of warfare precluding any distinction between civilian and military targets or resulting in unnecessary suffering to combatants-Marten Clause-Principle of neutrality – applicability of these principles and rules to nuclear weapon- conclusion. Holding at 78 the International Court of Justice stated that 'the Court would likewise refer, in relation to these principles, the Marten Clause, which was first included in The Hague Convention II with respect to the Laws and Customs of War on Land 1899 and which has proved to be an effective means of addressing the rapid evolution of military technology'. The Court did not give any special attention to the term dictates of public conscience as an integral part of the clause.<sup>9</sup>

However in the dissenting opinion of some judges such as Judge Shahabuddeen, he made an attempt to explaining 'dictates of public conscience' by analyzing Marten Clause. He discountenanced the argument that Marten Clause is only applicable when there is in existence a separate rule of Customary International Law prohibiting the use of certain weapon. The court noted that the clause came at the end of preambular passage as set out in 1899 Convention as follows:

According to the view of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, so far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants. It has not, however been found possible at present to concert regulations covering all the circumstances which arise in practice.

On the other hand, the High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders.

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the regulations adopted by them, the inhabitants and the belligerents remain

<sup>6</sup>An outgrowth of rifle shooting club or unofficial military societies formed in the east of France during the war.

<sup>7</sup>A French term used for a policy of national mass conscription in the face of an invasion

<sup>8</sup> ICRC, 'Commentary of 1987 on Protocol Additional to the Geneva Convention of August 12, 1949 and relating to the protection of victims of international armed conflict (Protocol I); Article 1, General Principles and Scope of Application

<sup>9</sup><https://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf> accessed on 6<sup>th</sup> September 2023

under the protection and the rule of the principles of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience.<sup>10</sup>

The judge further opined that these statements support an impression that the Marten Clause was intended to fill gaps left by conventional International Law. However, as the word 'remain' shows, the provision implied that there, were already in existence certain principles of the law of nations which operated to provide practical protection not being available under conventional texts. In view of the implication of that word, the clause could by interpretation cannot be confined to principles of laws of nations waiting, uncertainly, to be born in the future and secondly the clause in effect, provides authority for treating the principles of Humanity and dictates of Public Conscience as source of International Law- see the provision of Article 1 of 1977 additional Protocol- where principles of International law is said to be derived from principles of humanity and dictates of public conscience.<sup>11</sup> According to the judge, the Marten Clause provided its own self-sufficient and conclusive authority for the proposition that there were already in existence principles of international Law under which considerations of humanity could themselves exert legal force to govern military conduct in cases in which no relevant rule was provided by conventional law. Accordingly, it was not necessary to locate elsewhere the independent existence of such principles of international Law; as the source of the principles lay in the clause itself.<sup>12</sup> In this dissenting opinion, the judge considered how Public opinion as a source of International law becomes applicable as it is not possible for it to translate into a normative prohibition unless this was possible through Marten Clause. As existing International law in the form of martens clause, the judge opined that the clause has already established the necessary legal norm for the application of public conscience. Therefore, the court does not have to find whether there is an *opinio juris*. Its task is that of evaluating a standard embodied in an existing principle by way of making a finding as to what it is that the principles of humanity and the dictates of public conscience requires of military conduct in a given situation. This standard being one set by public conscience, a number of pertinent matters in public domain maybe taken judicial notice of, but not through the means of going on a roving expedition but by confining itself to sources that speak with authority like the General assembly resolutions. An example as cited by the judge is that the court may look at another source of evidence of the state of public conscience on the question of the acceptability of the use of Nuclear Weapon. It may interpret the NPT to mean that the public conscience as demonstrated in the positions taken by all parties to the treaty considers that the use of nuclear weapon would involve grave risks, and that these risks would make such use unacceptable in all circumstance.<sup>13</sup> To Judge Weeramantry, Marten Clause and many subsequent formulations of humanitarian principles recognize the need that strongly held public sentiments in relation to humanitarian conduct be reflected in the law. The judge referenced the availability of Public opinion in relation to the use of nuclear weapon to state that 'on this issue the conscience of the global community has spoken and spoken often, in the most unmistakable term. Resolutions of the General Assembly over the years are not the only evidence of this. Vast numbers of the general public in practically every country, organized professional bodies of a multinational character and many other groupings across the world have proclaimed time and again their conviction that the public conscience dictates the non-use of nuclear weapons.<sup>14</sup> General Assembly Resolutions on the matter are numerous. To cite just one of them, Resolution 1653 (XVI) of 1961<sup>15</sup> declared that 'the use of nuclear weapon and thermo-nuclear weapon is contrary to the spirit, letter and aims of the United Nations and as such, a direct violation of the charter of the United Nations.<sup>16</sup>

### **5. Source of Public Conscience on Drone Use in Armed Conflict**

From material available and the dictum excerpted above, it is clear that the court can take Judicial Notice of pertinent facts in public domain through relying on sources of authority like General Assembly resolution. In relation to Drone use in armed conflict, we have General Assembly Resolution:

#### **UN GA Resolution 68/178<sup>17</sup>; UN GA A/68/382<sup>18</sup> and UN GA A/ 68/389<sup>19</sup>**

The UNGA highlights the importance of rights for trial for all human beings. It urges States, while countering terrorism to 6(b) to take all steps necessary to ensure that persons deprived of liberty, regardless of the place of arrest or detention, benefit from the guarantees to which they are entitled under International Law... 6(s) to ensure that any measure taken or means employed to counter terrorism, including the use of remotely piloted aircraft, comply with their obligation under international law, including the Charter of the United Nations, Human Rights Law and International Humanitarian Law, in particular the principles of humanity and proportionality.<sup>20</sup> Also takes note with appreciation of the report of the special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism<sup>21</sup> which refers, inter alia, to the use of remotely piloted aircraft, and notes the recommendation, including on the urgent and imperative need to seek agreement among member states on legal questions pertaining to remotely piloted aircraft operations. The resolution also

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<sup>10</sup><https://www.icj-cij.org/sites/default/files/cases-related/95/095-19960708-ADV-01-11EN.pdf>> accessed on 6<sup>th</sup> September, 2023.

<sup>11</sup> *ibid*

<sup>12</sup> *ibid*

<sup>13</sup> *ibid*

<sup>14</sup><https://www.icj-cij.org/sites/default/files/case-related/95/095-19960708-ADV-01-12-EN.pdf>> accessed on 6<sup>th</sup> September, 2023.

<sup>15</sup>United Nations General Assembly Resolution on Declaration on the prohibition of the use of Nuclear and Thermo- nuclear weapons adopted on 24<sup>th</sup> November, 1961 at the 1063<sup>rd</sup> plenary meeting

<sup>16</sup><https://www.worldlii.org/int/other/UNGA/1961/57.pdf> accessed on 7<sup>th</sup> September, 2023

<sup>17</sup>United Nations General Assembly Resolution on Protection of Human Rights and Fundamental freedoms while countering terrorism adopted on 18<sup>th</sup> December, 2013.

<sup>18</sup><https://www.justsecurity.org/wp-content/uploads/2013/10/UN-Special-Rapporteur-Extrajudicial-Christof-Hejns-Report-Drones.pdf>> accessed on 9<sup>th</sup> November, 2023

<sup>19</sup>[https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a\\_68\\_389.pdf](https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_68_389.pdf)> accessed on 8<sup>th</sup> day of November, 2023

<sup>20</sup><https://undocs.org/Home/Mobile?FinalSymbol=A%2FRES%2F68%2F178&Language=E&DeviceType=Mobile&LangRequested=False> accessed on 8<sup>th</sup> September, 2023

<sup>21</sup>Petra M.Szonyegi, How to reconcile Prosecution of terrorist suspects with International Law <https://www1.odu.edu/content/dam/odu/offices/mun/2017/2017-ib-terrorism.pdf> accessed on 8<sup>th</sup> September, 2023

expresses serious concern at the occurrence of violation of Human Rights and fundamental freedoms, as well as of International Refugee and Humanitarian Law, committed in the context of countering terrorism. This brings up multiple questions that should be considered when addressing this issue. Is the use of unmanned Aerial Vehicles efficient? Is bombing cities and buildings thought to have terrorists actors in them right? Even if there is a high chance that this will lead to the death of innocent humans?

**UNGA A/68/382: Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions**

At paragraph 13: There was noted the broad agreement that drones are not illegal weapons, as to compare with lethal autonomous robots. There is, however, a notable lack of consensus on how to apply the rules of international law that regulate the use of force to drones, the fact that drones are now an established technology notwithstanding. It is the aim of the Special Rapporteur in the present report to contribute to clarifying the application of those rules and to reiterate their authority, from the perspective of protection of the right to life

**UNGA A/68/389: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism**

At paragraph 21 the report noted that with the assistance of a team of researchers, the Special Rapporteur has identified 33 sample remotely piloted aircraft strikes that appear to have resulted in civilian casualties. While the fact that civilians have been killed or injured does not necessarily point to a violation of international humanitarian law, it undoubtedly raises issues of accountability and transparency. Where possible, the Special Rapporteur's team has assembled direct evidence on individual strikes.

**6. Positions of Countries/Region/ICRC on Drone Use**

One other source to ascertain Public conscience is the opinion of States on an issue. Judge Shahabuddeen in his dissent in ICJ, Nuclear Weapon opinion case noted that Public Conscience cannot just translates themselves into a normative prohibition and in his view neither can it be done through the court essaying to transform public opinion into law as that would lead to government by judges' which as Judge Gros rightly observed, 'no State would easily accept'<sup>22</sup> Judge Shahabuddeen further opined that 'Existing International Law in the form of Marten Clause, has already established the necessary legal norm. The Court does not have to find whether there is an *Opinio juris*. Its task is that of evaluating a standard embodied in an existing principle by way of making a finding as to what it is that 'the principles of humanity... the dictates of public conscience' requires of military conduct in a given situation. In the last analysis the answer will depend on what are the views of States themselves; but so far as the martens clause is concerned, the views of States are relevant only for their value in indicating the State of the public conscience, not for the purpose of determining whether an *opinio juris* exists as to the legality of the use of a particular weapon.'<sup>23</sup>

State opinions that are viable enough to attract the necessary weight may be accessed through reports of Rapporteur. United Nations General Resolution 68/178 recognizes in paragraph17 the need to appreciate the role of Special Rapporteur in respect of protection of Human Right when armed aircraft is used during counter terrorism attacks. In pursuance to the above, it is pertinent to outline the roles of Special Rapporteur in order to properly appreciate how state opinions can be accessed from their report. A Special Rapporteur in the course of their duty engages in: (i) Country visit to meet with government officials, civil society and international organizations and traveling to various parts of the country, particularly rural and per-urban areas to meet the population and observe the subject in issue that could serve as an example for other countries,<sup>24</sup> (ii) To present thematic reports and findings of the official country visits to the Human Rights Council and General Assembly, and engage with States.<sup>25</sup>

It is easy to find opinion of States from investigation carried on by special rapporteur on certain field. Their reports are presented back to the General Assembly, an arm of the Court at Hague Ben Emmerson was the UN Special Rapporteur on Human Rights and Counter Terrorism from 2011-2017. In March 2014, he issued a statement at the 25<sup>th</sup> session of the Human Rights Council. He noted that his inquires was possible with exemplary levels of cooperation with United States, United Kingdom and Pakistan; that in order to do a thorough job, it meant a visit to Pakistan to collect valuable data on civilian who had lost their lives. He noted in his statement that for 'over the past 14 months he has been examining the evidence relating to 37 individual strikes in various parts of the world in which it is alleged that civilian were killed or injured. The threshold test he adopted for including a strike in his report was the test laid down in his interim report for requiring an independent, impartial and transparent investigation. That he decided to include a strike in this list only if there was an allegation emanating from an apparently reliable source, or from multiple independent sources, that civilians had been killed, seriously injured or had their lives put at immediate risk in an operation in which remotely piloted aircraft or drone are alleged to be involved; that he looked for indicia of reliability in the sources available to him, and only included a strike if there was sufficient information as to the location, date and approximate time of the incident. European Parliament Resolution on use of armed drones<sup>26</sup>is also a source of Public Conscience. The Resolution reached, had regards to the reports on the use of armed drones produced by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions of 28 May, 2010 and etc. The resolution called for:

2. Calls on the High Representatives for Foreign Affairs and Security Policy, the member states and council to:
  - a Include armed drones in relevant European and International disarmament and arms control regime.
  - b Ban the development, production and use of fully autonomous weapons which enable strikes to be carried out without human intervention.

<sup>22</sup>ICJ Report 1984p. 385; Delimitation of the Maritime Boundary in the Gulf of Maine Area.

<sup>23</sup>[https://www.ohchr.org/sites/default/files/Documents/issues/Water/10anniversary/Being\\_a\\_Special\\_Rapporteur.pdf](https://www.ohchr.org/sites/default/files/Documents/issues/Water/10anniversary/Being_a_Special_Rapporteur.pdf) accessed on 9<sup>th</sup> September, 2023

<sup>24</sup>*ibid*

<sup>25</sup>*ibid*

<sup>26</sup>RC-B7-0201/2014

3. Urges the council to adopt an EU common position on the use of armed drones
4. Calls on EU to promote greater transparency and accountability on the part of third countries in the use of armed drones with regard to the legal basis for their use and to operational responsibility, to allow for juridical review of drone strikes and to ensure that victims of unlawful drone strikes have effective access to remedies.

As evident in the Resolution there is evidence that States are not too eager on the use of drone without regulation.

### **7. Practicability of Public Conscience asserting its normative prohibition during Armed Conflict**

As much as violations of the rules of war can be treated in court; permitting atrocities only to wait for when the issue of violation gets to court does a lot of damages, that whatever punishment is meted out following the aftermath, cannot be compared to successful prevention of the violation in the first instance. The challenge with dealing with prevention of atrocities which source is based on public conscience is enormous or troubled<sup>27</sup>. We have looked at the sources of public conscience and it is clear that such cannot be easily assessed in the heat of battle. Meron agrees to this when he stated that public conscience shapes the conduct of parties to a conflict and promotes the development of law... 'but he also expressed germane concern that 'while the Marten Clause has made itself felt by government, international conferences and the media he was far less confident that it has had any influence on the battlefield, especially in bloody internal conflict. The closest we have on conscience is Individual Conscience particularly under International Criminal Law. Lewis opined that the effect of measuring public conscience externally against different professional values of the judiciary and military command at Nuremberg was to use the Individual Professional Conscience in effect as an element of the public conscience, not as a defence but instead to reinforce criminality by characterizing what the defendants should have known on this standard to be wrong as evidence of their criminal responsibility. It is safe to argue that conscience can be applied without been transferred into a positive law. Lewis offered a critique of the attempts by international lawyers to give legal form to conscience as she examined the difficulties of interpretation that have resulted from attempts to apply it. She concluded that notwithstanding the tendency to adopt legalistic conceptions of conscience in the materials she examined, incorporating conscience into the law offers the international community the legal scope to demand individual consideration of right and justice in the exercise of lawful powers such as taking lives in armed conflict, provided it is a form of individual conscience that is taken into account and not merely a collective, legalized version of conscience more generally.

The individual conscience as an element of Public Conscience can assert itself during armed conflict, as a guide to the consideration of right and justice in the exercise of lawful power to take life in armed conflict. This requirement ensures that there is some form of elastic quality to IHL, in the sense that it allows military officers to absorb and expand IHL to issues well beyond the scope of the foreseeable. The ability of military officers to do this finds root in Martin Cook's argument and reflections on ethics in the military. He asked a vital question whether the rules of IHL are better seen as 'metaphorically a 'stop motion' photograph of an older, deeper and ever fluid ethical tradition.' The natural consequence of taking such a perspective is that there should be a central place in the education and training of military officers to equip them with independent ethical reasoning skills and resources,<sup>28</sup> overlaying the normal legal provisions that serve as constraints are professional ethical commitments and personal conscience. These latter restraints are often overlooked by positivist approaches, but should not be underestimated as a source of limitations on action in practice, because the law's dictates can be malleable in skilled hands, and the law itself can be indeterminate at the extremes.<sup>29</sup> The implication is that by this education and training, military officers should know to use their individual conscience to determine right and justice during armed conflict. While failure to use one's conscience may not be an offence since there is no law to that effect, it serves the purpose of expanding the law to bring more humanity in war and such gracefulness may yield fruit and even act as a defence in cases of an offence committed in war. See the Nazi Judges case;<sup>30</sup> in this case a charge was brought against five judges, four prosecutors and eight officials from the Reich Ministry of Justice. They were charged with war crimes, crimes against humanity during the war in Europe, conspiracy to commit such crimes between 1933 and 1945, and membership of certain organization declared criminal by the International Military Tribunal, contrary to Control Council law. In brief the charge was for- conscious participation in a nationwide government- organized system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of law by the authority of the ministry of justice, and through the instrumentality of the courts.

A judge, Franz Schlegelberger, relied heavily on defence of conscience which the court considered at great length. It was his case that, he tried his best to mitigate the worst impact of Nazi Laws, though as a matter of domestic law, judges were required to comply with the laws as written even when contrary to International Law. He further argued that he could not resign until he did in 1942 for if he had, a worse man would take his place. The judge rejected this defence and called it a 'poor excuse' as the 'prostitution of a judicial system for the accomplishment of criminal ends, involves an element of evil to the State which is not found in frank atrocities which do not sully judicial robes. The judges considered his later resignation 'too late' - and noted, 'We believe that he loathed the evil that he did, but he sold that intellect and that scholarship to Hitler for a mess of political pottage and for vain hope of personal security. The tribunal later sentenced him to life imprisonment.<sup>31</sup>

In High Commands case,<sup>32</sup> the place of allowing conscience in individual guilt assessment was assessed again. Von Lebb in his closing statement submitted that

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<sup>27</sup>(n) 2

<sup>28</sup>Martin L. Cook, 'Reductions on the Relationship between Law and Ethics (2019) 40 (2) *Adelaide Law Review* 485-487

<sup>29</sup>Dale Stephens and Matthew Stubbs, 'Law, War, Ethics and Conscience: An enduring Conundrum' (2019) 40(2) *Adelaide Law Review* [https://law.adelaide.edu.au/system/files/media/documents/2019-12/ALR\\_40%282%29\\_12\\_Stephens\\_Stubbs\\_Web.pdf](https://law.adelaide.edu.au/system/files/media/documents/2019-12/ALR_40%282%29_12_Stephens_Stubbs_Web.pdf) accessed on 7<sup>th</sup> September, 2023

<sup>30</sup>*United States v. Altstötter et al* (Judgment) (United States Military Tribunal, 3 TWC1, 4 December, 1947)

<sup>31</sup>*ibid* 1085

<sup>32</sup> *United States v Von Lebb et al* (judgment) (United States Military Tribunal, 12 TWC 1, 27 October, 1948)

Under the dictatorship of Hitler, we found ourselves faced with a development which was in contrast to our principle and nature... in regards to Hitler's instruction, which went against our humane and soldierly feeling; we were never merely his tools without will of our own. We did oppose his instructions as far as we deemed this to be possible or advisable, and we have toned their wording down and rendered them ineffective or mitigated them in practice.

Von Lebb was convicted for transmitting an order known as Barbarossa Jurisdiction Order while he was commander of Army Group North without opposition. The tribunal accounted for his conscience based explanation only in mitigation of sentence especially as there was no criminal order introduced in evidence which bears his signature or stamp of his approval.

Another way public conscience can present in wartime is through the principle of precaution. The principle of precaution imposes obligation on the parties to armed conflict to take precautionary measures to protect civilians. Article 57 of Protocol 1<sup>33</sup> provides that 'in the conduct of military operations, constant care shall be taken to spare civilians...' The degree of care is not defined in the text. However, there is the unwritten code that to determine the issue of duty of care a reasonable man's test applies. A reasonable man's test is one that determines whether an appropriately trained professional, knowing what the officer knew at the time and following guidelines would have taken the same action as is in question. This area of International Humanitarian Law allows the military officer properly trained with sufficient intelligence to take ethic-related decision in war and to also allow his conscience guide him. These latter restraints are often overlooked by positivist approaches, but should not be underestimated as a source of limitations on action in practice, because the law's dictates can be malleable in skilled hands, and the law itself can be indeterminate at the extremes'.<sup>34</sup> What this means is that a skilled commander who is educated in right thinking guided by his intuition which has been chiseled through exposure to set of good values derived from religion, education, training and the experience can work the law better (malleable) and apply the law in unknown (indeterminate) area such as what brought the introduction of Marten clause in existence in the first place.

### 8. Public Conscience effect in Drone Use in Armed Conflict

Jelena Pejic in her article, extraterritorial targeting by means of drones: some legal implication,<sup>35</sup> addressed the issue of the lawfulness of drone use in armed conflict and she argued that, 'the real test of the lawfulness of drone use may thus be said to lie not in the features of the weapon platform itself-provided the targeting and firing process remains under human control-but in the willingness and ability of the persons commanding and operating drones extraterritorially to utilize them within the existing legal framework. The basis for this is further brought to bear considering everything that been said about equipping military officer through education, encouraging them to introspect and allow themselves the right to look beyond the written laws in taking decision on what's right and wrong considering every circumstance differently on a case by case measure and-not necessarily waiting, uncertainly, for laws to be born in the future a as Judge Shadhabudeen noted. One sure area that public opinion is loud about is the right to kill instantly a combatant or militia using drone whereas the person could be captured and tried.

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 out 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 two means to achieve the same military advantage we must choose the one which causes the lesser evil'.<sup>36</sup>

This 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>37</sup> And so also for public conscience, The increasing understanding of the importance of ethics and conscience as dimensions of compliance with IHL is well illustrated by two studies issued by the International Committee of the Red Cross ('ICRC'). In 2004, the ICRC, in *root of behavior in war report: ICRC* noted that '[W]e must focus our efforts on drawing attention to the legal nature of the standards that IHL lays down for the treatment of protected persons rather than to the moral obligations of weapons-bearers and other persons in a position to violate the law'.<sup>38</sup> However, in 2018, the ICRC reversed the 2004 stand to hold in the 2018 *Roots of behavior in war report that*, '[A]n exclusive focus on the law is not as effective at influencing behaviour as a combination of the law and the values underpinning it. ... The role of law is vital in setting standards, but encouraging individuals to internalize the values it represents through socialization is a more durable way of promoting restraint. A downward spiral of reciprocal IHL violations seems less likely to occur if norms of IHL are intrinsic to a combatant's honour'.<sup>39</sup> The chance in perspective clearly indicates the

<sup>33</sup>Protocol Additional to the Geneva Convention of 12 August, 1949 and relating to the Protection of the victims of International Armed Conflict (Protocol 1) 8 June, 1977.

<sup>34</sup>Dale Stephens and Matthew Stubbs, 'Law, War, Ethics and Conscience: An enduring Conundrum' (2019) 40(2) *Adelaide Law Review* [https://law.adelaide.edu.au/system/files/media/documents/2019-12/ALR\\_40%282%29\\_12\\_Stephens\\_Stubbs\\_Web.pdf](https://law.adelaide.edu.au/system/files/media/documents/2019-12/ALR_40%282%29_12_Stephens_Stubbs_Web.pdf) accessed on 7<sup>th</sup> September, 2023

<sup>35</sup><https://www.icrc.org/en/document/Jelena-pejic-extraterritorial-targeting-means-armed-drones-some-legal-implication> accessed on November 7, 2022.

<sup>36</sup>Ryan Goodman, 'the power to kill or capture enemy combatant' *EJIL* 24(3) 819-820 < doi:10.1093/ejil/cht048

<sup>37</sup>*ibid*; 824

<sup>38</sup>Jean-Jacques Frésard, International Committee of the Red Cross, *The Roots of behavior in War: A Survey of the Literature* (Report, October 2004). 112

<sup>39</sup>Fiona Terry and Brain McQuinn, International Committee of Red Cross. *The Roots of Restraint in War* (Report, December 2018)65

relevance of public conscience in ensuring compliance with IHL in the engagement of hostilities. The ICRC report referenced was conducted with the intention to challenge many pre-conceived ideas about the factors that influence the behaviour of combatants, the study examines the various strategies that the ICRC pursues, especially in the area of communication, to ensure that humanitarian law is better known, accepted and respected. Importantly, in this time of intense public debate about the behaviour of the military in contexts such as Iraq and Afghanistan, this study helps to define the future direction of preventive activities.<sup>40</sup> It is therefore agreed that if the test of determining the lawfulness of drone use as opined by Jelena Pejic lies in the willingness and ability of the persons commanding and operating drones extraterritorially to utilize them within the existing legal framework, then the work on ensuring compliance is to target the conscience of the operators; educating them to ensure that the law is malleable in their skilled hands and determinate in grey areas for the sole aim of preventive activities or humanitarian crises.

In a book titled, *Drones and support for the use of force*<sup>41</sup> it was noted by Walsh and Schulzke that one long standing debate in research on public opinion and foreign policy is the degree to which support for the use of force declines when military casualties are incurred.<sup>42</sup> Influential works in this area conclude that in the public mind, the risk of losing soldiers is among the prominent and important costs of military engagement. Others though contend that casualties are less decisive, as citizens balance the cost of such casualties against goals of military action and the likelihood of battlefield success. By rendering their operators invulnerable to enemy fire, drones upset the casualty calculations that have influenced decisions relating to the use of military force and have structured the academic debate over how public opinion responds to the possibility of armed conflict. Pilot invulnerability raises an important problem. First, research on casualty aversion focuses on operations involving human casualties, leaving considerable uncertainty about how military casualties influence public opinion when it is possible for belligerent to fight without exposing soldiers to any danger. Testing the effect of casualty aversion is particularly important now that the availability of drone could potentially make risks to soldiers superfluous. To get proper public opinion on casualty aversion on account of drone use, the poll of persons giving their opinion must first understand Drone use. For the use of drone in warfare does not essentially entail the complete removal of human combatant. So the use of drone in no way reduces risk on human combatant and it is this understanding that must be instilled on persons partaking in opinion poll by the public as drone use must also be considered in the light of the sort of damages it cause human combatant who still much play a part in war. Finally, these individual opinions innate in drone operators or actors involved in armed conflict as knowledge of right and wrong is what transmutes to public conscience when taken as polls, or gathered through expert views, or during votes at the General Assembly of the United Nations and what is presented as data collected by ICRC or votes of parliament.

## **9. Conclusion and Recommendations**

Dale Stephens and Matthew Stubbs put it, 'where law ceases to run, ethics and conscience carry on.'<sup>43</sup> This point is nowhere better illustrated as captured in Marten Clause. Marten clause introduces ethics and conscience as supplements by being incorporated in the law. This is because the law alone cannot do what conscience can. The law can cause deterrence but will never influence behavior. Conscience developed by internalizing right values will not only influence behavior but will influence ones thought process in a way that it becomes an interpretive guide to ensuring that norms of International Humanitarian Law are followed even when not specifically provided for. This is in line with the thought of Judge Shahabuddeen that Marten Clause public conscience is an independent source of normative value, along with the principles of humanity and customary law. Its content is to be continuously ascertained in lightning of changing conditions, inclusive of changes in the means and method of warfare and the outlook and tolerance levels of international community. To ensure that the real intendment of the fathers of International Humanitarian Law continues to apply which aims at humanizing war; Public Conscience must take center stage in matters not covered specifically by law. The Natural Law theory gives support to this line of reasoning by pushing for the acknowledgement of rules that flows from human intuition, thereby making room for rules that flow from human reasoning and humanity. It is recommended that Public Conscience should not be relegated to the background especially in view of the continuous employment of weapon manned by humans in warfare. For as far as the dictates of public conscience is concerned its role in influencing the human behavior cannot be overstated. The General Assembly must continuously query any purportedly misuse of drone technology reported during hostilities; hearing from all states parties and experts on the way forward to ensure that even in the absence of control mechanisms that public conscience carries on by providing a guide to what should be permissible and what shouldn't rather than waiting, uncertainly for new rules to be born in the future.

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<sup>40</sup><https://www.icrc.org/en/publication/0853-roots-behaviour-war-understanding-and-preventing-ihl-violations> accessed on 8th November, 2023

<sup>41</sup> J I Walsh and Marcus Schulzke, *Drone and support for use of force* (University of Michigan Press, Michigan, 2018)

<sup>42</sup> *Ibid*;

<sup>43</sup> Dale Stephens and Matthew Stubbs, 'Law, War, Ethics and Conscience: An enduring Conundrum' (2019) 40(2) *Adelaide Law Review* [https://law.adelaide.edu.au/system/files/media/documents/2019-12/ALR\\_40%282%29\\_12\\_Stephens\\_Stubbs\\_Web.pdf](https://law.adelaide.edu.au/system/files/media/documents/2019-12/ALR_40%282%29_12_Stephens_Stubbs_Web.pdf) accessed on 7<sup>th</sup> September, 2023.