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FUTURE OF INTERNATIONAL LAW SYMPOSIUM

A Future for International Humanitarian Law – Even With Automatic and Autonomous Weapons

DIETER FLECK — 28 July, 2014



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A response to **Robert Frau**

Dieter Fleck

The propositions by Robert Frau, which are based on his longstanding research on unmanned combat vehicles and autonomous weaponry, are twofold:

- It would be a mistake to conclude that in the conduct of military operations there is no longer a place for human actors

and considerations of humanity; on the contrary, the decisive role of responsible commanders and individual soldiers can be supported and facilitated, but never replaced by technological developments.

- That role is not exclusively based on a special set of rules, known as international humanitarian law; rather, a variety of norms of international law (including human rights), national law and best practice are at stake here.

Both propositions are correct and cannot be overemphasized. Yet it deserves and requires discussion how their implementation in the practice of States and non-State actors can be ensured and how consensus on the interpretation of pertinent principles and rules can be increased. More efforts are required to ensure the correct application of existing law to new means and methods of military operations.

The ‘secrecy’ around drones

There is still no clear position by States and international organizations (such as NATO) on the use of drones and its legal and policy limits in military operations. While some military powers have intensified the procurement of drones and their use in specific circumstances, the public, even within these States, is not sufficiently informed and discussions by political decision-makers including parliaments are still at the beginning. A distinction between combat drones and drones used for surveillance purposes is often missing in these discussions. Military requirements in anti-terrorist operations are not fully considered and sometimes not sufficiently described. The reluctance to address those requirements can hardly be explained by a need for secrecy, as the use of combat drones will become evident from results. Political and military decision-makers

should base their activities on a convincing evaluation of operational requirements and existing legal obligations, in order to meet the standards of collective and individual responsibility. They should make this evaluation more transparent, as any attempt to hide behind military secrets may soon prove counterproductive.

Going beyond international humanitarian law

Under Article 36 of Protocol I Additional to the Geneva Conventions (AP I), State Parties are obliged in their study, development, acquisition or adoption of new weapons, means or methods of warfare to determine whether their employment would, in some or all circumstances, be prohibited by any rule of international law. This obligation underlines that compliance with the special principles and provisions of international humanitarian law is not enough. States must base their assessment on all relevant branches of international law, including human rights law. Regrettably, there is no international cooperation on the implementation of Article 36 AP I; to the contrary, States seem to keep their findings more or less secret, sometimes not even disclosing the main arguments underlying their decision.

Concerns that drone pilots may act with a “Play Station mentality”, trigger-happy and cowardly, as explained by Robert Frau, rather than responsibly and task-oriented, are of minor importance in professional armed forces with well developed command and control procedures. It will be essential, however, to ensure that a drone pilot does not rely solely on technical support for target identification. He or she must remain active as the ‘human person in the loop’ and take responsible action to ensure the distinction between military objectives and civilian objects, to avoid that

incidental civilian damage will not be excessive in relation to the concrete and direct military advantage anticipated, and to see to it that an attack will be cancelled or suspended if these conditions which are absolutely indispensable under international humanitarian law are no longer met.

The limits and possibilities of international law

The law cannot prevent or undo technological developments; but it is the purpose of law to clarify the responsibilities of States and individuals in dealing with modern technology. Those engaged in developing, procuring or using drones should receive guidance by competent decision-makers, confirming or limiting their action in an appropriate manner. For multinational military operations such guidance should be jointly developed even if it is for the competent sending State to take the last decision.

Even if States are less than diligent in meeting their responsibility in this respect, civil society is challenged to act. In this context, two critical remarks on Robert Frau's argumentation are in place: First, the warnings by Human Rights Watch not to lose humanity should be taken for what they are: critical observations rather than factual conclusions that had turned out as a fallacy, as Robert Frau had suggested. Furthermore, the role of the *International Committee of the Red Cross (ICRC)* as a guardian of international humanitarian law adhering to the principles of humanity, impartiality, neutrality, independence, voluntary service, unity, and universality, should not be underestimated. Its 2009 Interpretive Guidance on direct participation in hostilities may not enjoy unanimous support (for a selection of criticism and a patient, comprehensive and fully convincing response see here), yet it has become a

standard-setting document international and national jurisprudence cannot ignore. Those criticizing its approach on restraints on the use of force in direct attacks have purposely misinterpreted the fact that the Interpretive Guidance, in its relevant Section IX, requires no more and no less than restraining the use of force to ‘what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances’. This is far from introducing an unrealistic ‘capture rather than kill’ principle into the conduct of hostilities, as alleged by some critical voices. It is nothing more and nothing less than a general rule of common sense no professional military commander is free to ignore even in armed conflict. As explained in the *Interpretive Guidance*, this general rule derives from the principles of military necessity and humanity ‘which underlie the entire normative framework of IHL’. It thus goes beyond matters of voluntary policy.

It stands to hope that level-headed legal contributions like those of Robert Frau will help to make these principles part of a broad consensus on rules regulating the use of drones in military operations.

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