

IN RESPONSE TO PROFESSOR OREN GROSS' "THE NEW WAY
OF WAR: IS THERE A DUTY TO USE DRONES?"

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For the past decade, drones—the remotely piloted aircraft the United States has used to launch missiles in conflicts and counterterrorism operations from Afghanistan to Libya and points in between—have taken center stage in a moral, legal, strategic, and political debate about the use of force against terrorists and insurgents. This debate has focused predominantly on the potential negative consequences of drones, such as the reduced accountability for the use of force,¹ the geography of conflict,² or civilian casualties,³ for example. In his thought-provoking and forward-looking article, *The New Way of War: Is There a Duty to Use Drones?*, Oren Gross flips this debate on its head and explores whether countries *must* use drones in the course of armed hostilities.⁴ In essence, rather than countering drones' detractors with arguments about the inherent legality of drones as a weapon and the ability of drones to fulfill the fundamental tenets of the law of armed conflict (LOAC),⁵ Gross inquires whether the very nature and precision of drones are such that states have a legal obligation to use them in conflict.

The idea of a duty to use drones—to maximize the protection of persons during armed conflict by mandating the most precise weapons platform available—offers an engaging opportunity to reconfigure or recalibrate the conversation about drones. It separates the legal issues surrounding drones from the moral, strategic and policy issues, which helps to push back against the conflation of law and policy that has

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1. See, e.g., Benjamin R. Farley, *Drones and Democracy: Missing Out on Accountability?*, 54 S. TEX. L. REV. 385 (2012); Rosa Brooks, *Drones and the International Rule of Law*, 28 J. ETHICS & INT'L AFF. 83 (2014).

2. See, e.g., Michael W. Lewis, *Drones and the Boundaries of the Battlefield*, 47 TEX. INT'L L. J. 293 (2012); Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the "Hot" Conflict Zone*, 161 U. PA. L. REV. 1165 (2013); Laurie R. Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat*, 39 GA. J. INT'L & COMP. L. 1 (2010).

3. See, e.g., International Human Rights and Conflict Resolution Clinic; Stanford Law School & Global Justice Clinic, NYU School of Law, *Living Under Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan* (2012).

4. Oren Gross, *The New Way of War: Is There a Duty to Use Drones?*, 67 FLA. L. REV. 1 (2015).

5. See, e.g., Laurie R. Blank, *After "Top Gun": How Drone Strikes Impact the Law of War*, 33 U. PA. J. INT'L L. 675 (2012); Michael N. Schmitt, *Drone Attacks Under the Jus ad Bellum and Jus in Bello: Clearing the 'Fog of Law,'* 13 Y.B. INT'L HUMANITARIAN L. 311 (2010) (noting that the use of drones may actually enhance the implementation of LOAC and the protections to which persons and objects are entitled under LOAC, and the *jus ad bellum* analysis does not depend on the use of drones rather than any other weapon).

plagued the discourse about drones for the past several years and hindered effective examinations of the specific legal issues that drones raise.⁶ Most importantly, Gross' elegant tapestry of history, technology and legal principles reminds us of the very purposes of LOAC: protecting civilians and mitigating suffering during armed conflict.

The promise of a duty to use drones is thus potentially great. Indeed, in any given tactical situation, one can imagine the benefits that precision, comprehensive information and extended surveillance can offer for exacting adherence to the law's fundamental precepts. At the same time, however, such a duty presents a range of consequences or new challenges to the implementation and enforcement of LOAC. For example: Why a duty for drones and not for any other weapon? Would this type of duty extend to new capabilities as they arise, and if so, based on what criteria? What would enforcement of such a duty look like—could a commander be criminally liable for the failure to use a drone, or could a state face state responsibility for not equipping its forces with drones?

Beyond the myriad questions about how a duty to use drones would work in practice, Gross' article raises a broader question about the effect of "instrumentalizing" the law; that is, placing the adherence to and implementation of the law in the hands of a specific weapon or instrument. Although LOAC imposes many obligations on states and other parties to armed conflict, any obligations with regard to the use of weapons take the form of prohibitions rather than positive duties.⁷ In the context of targeting, LOAC's positive duties focus on the actions and precautions that both attacking and defending parties must take to maximize protection for civilians and mitigate suffering as a result of military operations.⁸ Perhaps,

6. See generally Geoffrey S. Corn, *Self-defense Targeting: Blurring the Line between the Jus ad Bellum and the Jus in Bello*, 88 INT'L L. STUD. 57 (2012); Laurie R. Blank, *Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications*, 38 WM. MITCHELL L. REV. 1655 (2012).

7. For example, the law of armed conflict prohibits the use of weapons of a nature or calculated to cause unnecessary suffering, such as blinding laser weapons, expanding bullets, or poison gases. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 35(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I] ("It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.").

8. LOAC sets forth comprehensive rules for the use of force in armed conflict, based on the principles of distinction, proportionality and precautions. The principle of distinction, one of the "cardinal principles" of LOAC, requires that parties to a conflict distinguish between those who are fighting and those who are not and to direct attacks solely at the former. The principle of proportionality requires that parties refrain from attacks in which the "expected . . . incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, . . . would be excessive in relation to the concrete and direct military advantage anticipated." AP I, *supra* note 7, art 51(5) (b). Last, LOAC mandates that all parties take certain precautionary measures to protect civilians. Precautions are, understandably, a critical component of the law's efforts to protect civilians and are of particular importance in densely populated areas or areas where civilians are at

it seems, adding another positive duty would not change the nature and implementation of LOAC or the contribution it makes to military operations.

However, the idea of a duty to use drones (or any other specific weapon or weapons platform) raises significant questions about whether adherence to and maximization of LOAC should rely on directives regarding the “what” rather than the “how”. Operationally, LOAC’s targeting rules and principles form a methodology for the lawful and effective conduct of hostilities during armed conflict—for assessing lawfulness in advance through careful consideration of the nature of the target or military objective, the military advantage and likelihood of civilian casualties, and the precautions necessary to minimize such civilian harm. Requiring commanders to use specific weapons potentially moves LOAC compliance from a methodology towards a more technocratic instrument-based system, which could change the essence of LOAC as a paradigm and a process rather than just a set of rules.⁹

Interestingly, drones actually highlight the role of LOAC as a process or methodology because of the manner in which drones enhance, or at least potentially enhance, each step in that process: Long-term surveillance capabilities heighten the ability to comply with distinction in identifying targets; the same capabilities allow for pattern of life assessments and selection of time and place of strikes so as to minimize harm to civilians; and the marriage of precision munitions and surveillance capabilities enhances the ability to take appropriate precautionary measures. One should query, therefore, whether a duty to use drones could simultaneously undermine that role for process and methodology by removing the functional purpose of the process from the equation. A duty to use drones, or any other particular weapon, means a change from interpreting the law to encourage¹⁰ a certain weapon or method of warfare to actually mandating that weapon or method. If commanders no longer have to determine how best to adhere to LOAC through the choice of means and methods of warfare and other precautionary steps—because they have already been told that they must use a drone—the force and effect of LOAC’s process could be diminished. In effect, an obligation to use a

risk from the consequences of military operations. For this reason, even if a target is legitimate under the laws of war, failure to take precautions can make an attack on that target unlawful. *Id.* at art. 57(2).

9. See e.g. Geoffrey S. Corn, *War, Law, and the Oft Overlooked Value as a Precautionary Measure*, 42 PEPPERDINE L. REV. 419, 425 (2014) (emphasizing the process of operational and tactical LOAC implementation, which “involves both training and preparing combatants for implementing their LOAC obligations, and the process used for targeting decision-making.”).

10. It is possible that in certain circumstances, LOAC will operate to require the use of a specific weapon if, for example, the only way to attack a target lawfully (in light of the obligations of proportionality and precautions) is with precision-guided munitions or other specific means of warfare.

particular weapon may well weaken the law's precepts and principles by placing its faith in a tool rather than in those principles and in the reasoned and experienced judgment of those trained to conduct lawful and effective military operations.¹¹ The impact of a duty to use drones would therefore be substantial for training in LOAC, for decision-making, and for the provision of legal advice. For the latter two areas, a duty to use drones substitutes a rule or obligation for a process, as highlighted above, with any attendant consequences and challenges for both implementation and accountability. The most significant and long-term questions about a duty to use drones arise in the context of training, however, because such a duty introduces the possibility of the duty slowly but inexorably chipping away at the need for comprehensive and effective training in the process of LOAC implementation.

These broader and more systemic questions about the impact of a duty to use drones on the long-term dissemination, implementation, and enforcement of LOAC do not detract from the extraordinary capabilities of drones to enable and contribute to enhanced LOAC compliance in launching attacks in the course of armed conflict. As Gross explains in convincing and thorough detail, drones offer unmatched possibilities for the discriminating identification of targets, protection of civilians, and minimization of incidental harm—goals that lie at the heart of LOAC. At the same time, however, Gross' thoughtful exploration of whether and how a duty to use drones could work provides an excellent opportunity to reconsider the role that LOAC plays as a methodology, beyond a set of rules and obligations, for the execution of military operations.

11. In many situations, assessment of LOAC compliance rests on the notion of the reasonable commander, understood as "the reasonable man in the law of war . . . based upon the experience of military men in dealing with basic military problems." William V. O'Brien, *The Conduct of Just and Limited War*, in CONTEMPORARY MORAL PROBLEMS: WAR, TERRORISM, AND TORTURE 21, 28 (James E. White, ed., 4th ed. 2009).