

AN ESSAY AND COMMENT ON OREN GROSS', "THE NEW WAY
OF WAR: IS THERE A DUTY TO USE DRONES?"

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Professor Oren Gross has written a remarkably strong article in defense of the use of drones in the current national security challenge.¹ This article is to be published just after the Obama administration has revealed that two hostages of the al-Qaeda terrorist group have been inadvertently killed in CIA-led drone strikes.² The victims are Mr. Lo Porto, an Italian national, and Mr. Weinstein, a U.S. national. These tragedies have made headline news and, at least, implicitly raise important questions about the strategy and tactics for fighting terrorism and the morality and basic ethics of the strategic use of drones to eliminate terrorist operatives. Professor Gross has written an important defense of the U.S. drone strategy. His paper provides much clarification on important questions regarding law and morality. The essential thrust of his paper is that the use of the drone replaces the earlier technology connected with pinpoint bombing of enemy targets. There is a vast difference between the two. No matter how much effort is put into the pinpoint bombing strategy, such use of force has extensive spatial consequences and additionally, will reproduce casualties as an incident of such application. These casualties will inherently include a significant number of non-combatant civilians. Against this background, the surveillance capabilities and the pinpoint delivery system of lethal force radically minimizes collateral damage. What does this mean for the use *jus in Bello*?³ The traditional principles of the use for *jus in Bello* or the Law of Armed Conflict (LOAC) are easy to state yet difficult to apply.

The first condition imposed by the use *in Bello* is the principle of military necessity. Thus, the use of the drone strike in a situation of armed conflict must meet the criteria that it is necessary for the conduct and application of lawful force.⁴ Second is the principle of proportionality—that the volume of force must be proportional to the nature of the threat posed by the enemy. Third is the principle of humanity or

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

2. Polly Mosendz, *Obama Takes Responsibility for Mission That Killed Hostages, American in Al-Qaeda*, NEWSWEEK (Apr. 23, 2015), <http://www.newsweek.com/white-house-two-hostages-held-al-qaeda-accidentally-killed-counterterrorism-324317>.

3. *Jus in bello* is "the set of laws that come into effect once a war has begun." See Karma Nabulsi, *Jus ad Bellum / Jus in Bello*, CRIMES OF WAR, <http://www.crimesofwar.org/a-z-guide/jus-ad-bellum-jus-in-bello>.

4. See Laurie R. Blank, *After 'Top Gun': How Drone Strikes Impact the Law of War*, 33 U. PA. J. INT' L 675 (2012).

humanitarianism. This principle requires an understanding of necessity and proportionality in terms of the prospect of non-combatative casualties. The law of armed conflict requires that a distinction be made between combatants and civilians and every effort should be made to insulate civilians from the destructive consequences of the use of force in armed conflict. From this perspective, Gross sees a justification for the use of drones as a no-brainer. In short, the drone—with its specialized surveillance and delivery system features—gives new meaning to the principle of pinpoint targeting. It clearly meets the test of proportionality. Additionally, since it is pinpoint and targeted at the specific terrorist operators, the collateral damage, with regard to civilian casualties, meets the test of respect for humanitarian principles far more effectively than earlier technical developments in weapon systems. Indeed, so confident is Gross of his defense of the drone weapon systems that he in fact claims that the law of war compels the use of drones because it represents a technology that clearly meets the requirements of proportionality and humanitarianism.

The article's usefulness extends beyond the laws of war and provides the reader with an insightful overview of the technical development and multiple uses of drone technology. Thus he has brought to the attention of non-experts important insights into the near-revolutionary development in technological capability associated with the drone issue. The deeper point here is that technological developments in weapon systems have tended in history to be more lethal and exponentially destructive. In the context of nuclear weapons, Albert Einstein suggested that the creative fruits of science should serve to benefit rather than curse mankind. What is significant about the drones is that it is a technology that essentially reduces the degree of destructiveness when used in armed conflict. It does not eliminate collateral damage but instead radically reduces it.

Ultimately, both the spatial and the humanitarian elements of collateral damage are significantly diminished when using the drone technology. It is in this sense that Gross makes an important point that there may be an obligation to deploy and use the drone technologies, rather than other imprecise methods of interdiction. In this sense, an important point has been made that in the larger context of moral sensibility the drone improves military performance while minimizing collateral damage and thus it has become a weapon of choice in the War on Terror.

However, there are some aspects of Gross' article that could bear some amplification and these issues include the context of the War on Terror, the problem of drone strikes in other sovereign states, and the problems drones pose when it is recognized that the drone strikes appear to have the quality of an extra-judicial execution, or a political assassination. This suggests that there needs to be explicit and strong justification for the use of drones in a way that overcomes these concerns. I'll start with the War on Terror.

I. THE WAR ON TERROR

Technically speaking, the War on Terror is not a war in the strictly legal sense. The traditional war is of armed conflict between nation-states. This form of conflict is increasingly rare. After the Second World War, the nature of armed conflict with international implications began to change. A predominant form of armed conflict was characterized by the use of armed force to eliminate colonial rule. The methods used by the anti-colonialists were essentially guerilla warfare. Effectively this meant high-intensity conflict, but largely internal to the colonial state. There is a difference between a guerilla fighter and a terrorist. The guerilla fights but wants to live. The terrorist has given up on life; the terrorist does not care whether he lives or dies.⁵ This makes protecting against the terrorist more difficult.

During the Algerian War of Independence, the guerilla movement demonstrated that it could adopt terrorist methods. There, it was asserted that terrorism is the weapon of the weak. Since that time, armed struggle has taken a slow mutation from guerilla-inspired precepts of fighting for self-determination and terrorist organizations that specialize in terror for the sake of targeting a status quo they do not like and or inventing a religious impulse to justify terrorist attacks on anything or anybody whose conduct they deem to be a religious offense. A notorious illustration of this resulted from the publication of Salman Rushdie's book *The Satanic Verses*.⁶ The book was a satire and it offended the Iranian clerical class, which issued a Fatwa for his elimination.

The tragic events of 9/11 are an indicator that global terrorism is a real security threat to the United States and other members of the community of sovereign states. The lethality of the terrorist attacks on the US led the Bush administration to acknowledge that the US was in a state of war, in a functional sense, against a major international terrorist operation: al-Qaeda. What was important is that the War on Terror was a radically different kind of war-like engagement for the United States. The terrorist entity operated with great secrecy; it was an entity with no obvious elements of responsibility, or accountability and it represented a minimal level of transparency. Terrorist operators infused themselves into civilian communities to make themselves indistinguishable from non-combatant society members. The most dangerous threat posed by terrorist groups was the unpredictability of the "who, when, where and how" terrorist strikes would occur. Conventional approaches to armed conflict did not seem to work effectively in this context. It was quickly determined that the most important need required by the US security establishment was enhanced, upgraded, and more effective intelligence.

5. Robert A. Pape, *The Strategic Logic Of Suicide Terrorism*, 97 AM. POL. SCI. REV. 343 (2003).

6. SALMAN RUSHDIE, *THE SATANIC VERSES* (Viking Penguin 1989).

The primary battlefield in the War on Terror remains therefore, the intelligence battlefield. However, the intelligence community in general is not an open book, it thrives not on transparency but on secrecy. This presents a concern in a rule-of-law democracy. In our legal and political culture, the leaders are to be politically accountable for the conduct of war to the extent that the use of drones is dictated by their technological capacity and the definition of intelligence needs. The conduct of the War on Terror using drones and intelligence operatives still leaves a great deal that is unexplained. It bears reminding that the intelligence emphasis is largely dictated by the unpredictability and prospective lethality of terrorist operations. It is not clear to me that Gross has brought these issues out as effectively as I think he should have.

We now move to specific issues, starting with the problem of using drones within the borders of other sovereign states.

II. DRONES AND THE ISSUE OF SOVEREIGNTY

Pakistan, a U.S. ally, has protested the use of drone attacks inside Pakistani territory. The protest is more or less based on the charge that these attacks violate the sovereignty of Pakistan. So far as I understand it, according to the U.S., if a sovereign state is not capable of controlling and regulating a terrorist presence in its borders and those terrorists are in the business of attacking that state's own allies, then those allies may take such measures as to reasonably interdict the problem of terrorist attacks against them. In my view, the Pakistan claim to sovereignty is weakened by this argument and it is made weaker still by supplemental arguments.

It is widely acknowledged that Pakistan's border with Afghanistan has been a porous border. Terrorists have used this weakness and thus Pakistan territory has become a safe haven.⁷ From this refuge, they return to attack US and allied forces and Pakistan has been unable to prevent this.

The closest we come to a definition of sovereignty in the UN Charter is article 2.4.⁸ This article stresses that central to the issue of sovereignty is the territorial integrity and political independence of the state. The essential breach of Pakistan's territorial integrity has, in effect, come from the terrorist invasion of Pakistani territorial space. When the U.S. uses drones to remove the terrorist invaders, it is facilitating the restoration of the territorial integrity of its ally, Pakistan.

The terrorist presence in Pakistan not only creates a safe haven for the terrorist, but also resists any effort of that government to bring them under state control and state law. To the extent that they resist Pakistan's efforts to control and regulate them by law, they are also diminishing the political independence of the state of Pakistan. The drone strikes diminish terrorists

7. Rizwan Zeb, *Cross Border Terrorism Issues Plaguing Pakistan-Afghanistan Relations*. 4 THE CHINA AND EURASIA F. Q., no. 2, 2006.

8. U.N. Charter art. 2 para. 4.

control over Pakistani space and therefore enhances Pakistan's political independence. These further arguments, which note that Pakistan's claim that its sovereignty has been compromised, are directed at the wrong party. The argument for the defense of Pakistani sovereignty in this context is extremely weak.

III. TARGETING TERRORISTS WITH DRONE STRIKES

Two of the most important legal and moral issues here are that (1) drone strikes amount to extra-judicial executions, or (2) they amount to political assassinations. On their face, in a literal sense, a drone strike is a form of extra-judicial execution and a drone strike on its face would appear to look like a political assassination. Therefore, it would be important that the issue of the right to use drone strikes emerge with a justification that can trump these two assertions of concern. It seems to us that the best justification for the drone strikes, which target terrorist organizers and operatives, is that the War on Terror in reality is a variant on the normal understanding of war. However, the lethality of terrorism requires that a deeper understanding of self-defense be developed that is suited to the nature of the conflict and the threat it represents.

To avoid the implications that drone attacks are simply extra-judicial executions or political assassinations, it would seem to us that the intelligence predicate, which triggers the use of drones, must meet the standard of an anticipatory self-defense justification system. This means that the special circumstances of the War on Terror, for example, its unpredictability, lethality, and its infusion into general community social processes, means that the use of anticipatory self-defense must be "reasonable" in the context conditions of the conflict. This essentially means that intelligence itself must be able to assay a deeper and broader level of contextual description and analysis. For example, it might start with the identification of participators, in particular, the targets of the attack. There should be some evidence about the target as an instrument of terrorist activity and it would be useful to know something about the perspectives of the potential targets, such as the strength or weakness of their identification as terrorist, a sense of knowing what they really want, and—however distorted—what their expectations are with regard to the basis of power of the terrorists.

One base of power would be finding territorial sanctuary to reorganize, refit, and prepare for more action. The intelligence community should give us an appraisal of the temporal limits of the opportunity to eliminate the terrorist entity. Its analysis should also include an understanding of the level of the institutionalization of the community process where the terrorist gained safe haven, to determine how organized or anarchic these community processes are. Further, if there's evidence of an imminent attack or crisis, there should be indication that the only meaningful

response is lethal force. With regard to the outcomes and effects, there should be an appraisal of the reliability of intelligence, the lessons learned, the extent of collateral damage, particularly in light of the principles of humanitarianism and proportionality. The intelligence community and the government should have an in-place mechanism to provide some form of compensatory justice for innocent bystander casualties.

These factors should inform the decision makers of the reason for the use of drones in targeting attacks and reports might be produced for general governmental oversight that do not necessarily describe highly sensitive intelligence materials. Subject to these cautions, I suspect Mr. Gross has made a strong case for the use of drones.