

2013

The Humanitarian Problem with Drones

Frédéric Mégret
McGill University

Follow this and additional works at: <https://dc.law.utah.edu/ulr>



Part of the [Military, War, and Peace Commons](#)

Recommended Citation

2013 ULR 1283 (2013)

This Article is brought to you for free and open access by Utah Law Digital Commons. It has been accepted for inclusion in Utah Law Review by an authorized editor of Utah Law Digital Commons. For more information, please contact valeri.craigle@law.utah.edu.

THE HUMANITARIAN PROBLEM WITH DRONES

Frédéric Mégret*

Abstract

One of the difficulties with the debate on drones is that it has become a sort of lightning rod for all kinds of anxieties about the use of force in today's world. Drones are, often problematically, the emblematic weapon for a range of other phenomena, and unsurprisingly, attract much polemic. The challenge, therefore, is to find the specific problem with drones as a technology in armed conflict that could not be dealt with better by invoking a larger genus of problems. To do this, this Article outlines ways in which drones have been seen as problematic, which this Article argues are either not specifically humanitarian or are really dealing with something else such as what the legal framework applicable to the War on Terror should be. Separating these very important debates from the humanitarian questions about drones is crucial to making conceptual headway. This Article then examines whether drones have any specific or inherent characteristics that other weapons lack and addresses whether one such characteristic is a drone's ability to cause unwarranted harm to civilians. It seeks to explain how, regardless of the answer to that complicated question, drones are much more likely to be perceived as inflicting excessive damage due to their highly discriminatory potential but also, crucially, the way in which they maximize the safety of the drone operator. Drones' unique ability to ensure the absolute safety of the operator not only maximizes States' ability to minimize collateral harm, as has already been observed elsewhere, but also has the potential to fundamentally alter the laws of war's tolerance for collateral harm, which it is argued was always based on the assumption of a tradeoff between harm to the attacker and to "enemy civilians"—a tradeoff that has now been rendered moot. Moreover the one-sidedness of drone warfare in many cases goes to the heart of the humanitarian compact in that it makes one side to a conflict entirely vulnerable to the other. The Article then attempts to contextualize the drone problem within a larger history of exogenous technological shock to international humanitarian law. It finishes with a reflection on how anomalous drone warfare is, and in particular whether it manifests a radical novelty or reconnects with old themes already evident in colonial warfare. Overall, the Article is interested in determining not so much whether drone use may or may not be "legal," than more broadly, how it impacts some of the moral underpinnings of the laws of war.

I. INTRODUCTION

This Article begins with a puzzle: drone attacks seem to elicit very strong reactions, yet from a humanitarian point of view, they might seem relatively innocuous as weapons—or at least not markedly more nefarious than a range of other weapons that seem largely tolerated. In fact, drones might seem to be the epitome of modern, surgical, and humanitarian weapons considering their ability to hover above very specific enemy targets, their ability to get far closer than manned aircrafts, and their high precision engagement capability. So why the strong reaction? How can we make sense of the indignation? Is it based on a misapprehension that civilian casualties are always wrong, or does it denote some so far inchoate moral or juridical intuition that needs to be better formulated? This is not to suggest that the reaction is necessarily wrong—it is, after all, genuine, and there are sound reasons to at least listen to our moral intuitions—but instead to suggest that it is not quite clear why well-intentioned humanitarians have a problem with drones. In an effort to move beyond the gut reaction to some uses of drones, this Article proposes a theory of what is problematic with drones from a humanitarian point of view that seeks to reformulate some of the indignation that drones provoke from within an understanding of the historical role of the laws of war.

This Article will only deal with drones that are piloted by humans, and will not deal with the issue of robotization.¹ The issue of robotization is alive in the humanitarian debate but it is quite different, broader, and probably more complex than the issue of drones alone. Drones do raise interesting issues in and of themselves. This Article defines drones as unmanned aerial vehicles (UAVs), particularly those with the ability to deliver lethal force. Drones have become a central instrument in armed conflict, and an increasing number of States and even nonstate actors have deployed them in some way or other—although Western armies clearly have a significant technological advance in that respect.

Moreover, this Article is only interested in the *humanitarian* problem raised by drones. “Humanitarian” in this Article means those concerns born from the

* © 2013 Frédéric Mégret. Associate Professor, Faculty of Law, McGill University Canada Research Chair in the Law of Human Rights and Legal Pluralism, Centre for Human Rights and Legal Pluralism.

¹ This has now become a vast, separate field that raises immense questions that are far beyond the limited scope of this Article. See generally RONALD C. ARKIN, GOVERNING LETHAL BEHAVIOR IN AUTONOMOUS ROBOTS (2009); W.J. SMUDA ET AL., U.S. ARMY, ROBOTS AT WAR—EXPERIENCES IN IRAQ AND AFGHANISTAN (2004), available at <http://www.dtic.mil/dtic/tr/fulltext/u2/a432400.pdf>; Colln Allen et al., *Robots at War*, 33 WILSON Q. 6 (2009); Christian Caryl, *Predators and Robots at War*, 58 N.Y. REV. BOOKS 55 (2011) (reviewing MATT J. MARTIN & CHALES W. SASSER, PREDATOR: THE REMOTE-CONTROL AIR WAR OVER IRAQ AND AFGHANISTAN: A PILOT’S STORY (2010)); P.W. SINGER, WIRED FOR WAR: THE ROBOTICS REVOLUTION AND CONFLICT IN THE TWENTY-FIRST CENTURY (2009); Noel Sharkey, *Saying “No!” to Lethal Autonomous Targeting*, 9 J. MIL. ETHICS 369 (2010); Robert Sparrow, *Killer Robots*, 24 J. APPLIED PHIL. 62 (2007).

application of the laws of war—or international humanitarian law—about the particular lethality of drones in armed conflict, most notably how the lethality of drones affects non-combatants including, first and foremost, civilians. Of course, this definition presumes that (i) international humanitarian law is indeed the applicable framework because there is an armed conflict and the use of a drone occurs as part of that armed conflict, (ii) issues of modalities of the use of force can be distinguished from issues of resort to force, and (iii) the uses of drones are not so radically new as to demand a paradigm shift away from international humanitarian law. This Article will return to how these assumptions can be challenged. It is sufficient at this stage to accept that they hold true at least some of the time. The Article therefore asks the reader to imagine cases where drones are being used in an armed conflict between identified participants. In addition, unless otherwise indicated, this Article will focus on the law of international armed conflict, leaving aside non-international armed conflicts, because it is the most developed, and therefore most useful when thinking about how drones might change the nature of warfare. It is important to note that the issue of the *humanitarian* significance of drones in armed conflict is not necessarily the one that has attracted the most attention,² and may indeed not be the most controversial,³ although that certainly does not vitiate its importance. This Article

² Although this has arguably begun to change, the literature on the humanitarian implications of drones is relatively small compared to its broader association with the war on terror, or implications for the *jus ad bellum*. The following pieces are broadly interested in the same type of inquiry as this Article: Jack M. Beard, *Law and War in the Virtual Era*, 103 AM. J. INT'L L. 409 (2009); Laurie R. Blank, *After "Top Gun": How Drone Strikes Impact the Law of War*, 33 U. PA. J. INT'L L. 675 (2012); Aaron M. Drake, *Current U.S. Air Force Drone Operations and Their Conduct in Compliance with International Humanitarian Law—An Overview*, 39 DENV. J. INT'L L. & POL'Y. 629 (2011); Hyder Gulam & Simon Lee, *Uninhabited Combat Aerial Vehicles and the Law of Armed Conflict*, 3 AUSTL. ARMY J. 123 (2006); Meredith Hagger & Tim McCormack, *Regulating the Use of Unmanned Combat Vehicles: Are General Principles of International Humanitarian Law Sufficient?*, J.L. INFO. & SCI., 2011/2012, at 74; Chris Jenks, *Law from Above: Unmanned Aerial Systems, Use of Force, and the Law of Armed Conflict*, 85 N.D. L. REV. 649 (2009); Michael N. Schmitt, *Unmanned Combat Aircraft Systems and International Humanitarian Law: Simplifying the Oft Benighted Debate*, 30 B.U. INT'L L.J. 595 (2012); Naureen Shah, Human Rights Inst., Columbia Univ., Introductory Remarks to Targeting with Drone Technology: Humanitarian Law Implications (Mar. 25, 2011), in 105 AM. SOC'Y INT'L L. PROC. 233, 233–35, 244–45 (2011); Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT'L L. & POL'Y 101 (2010); John J. Klein, *The Problematic Nexus: Where Unmanned Combat Air Vehicles and the Law of Armed Conflict Meet*, CHRONOS. ONLINE J. (July 22, 2003), <http://www.airpower.maxwell.af.mil/airchronic/es/cc/klein.html>.

³ Hagger & McCormack, *supra* note 2, at 75 (“[T]he principal focus of concern is not generally on military utilisation of the technology in the theatre of combat operations. Rather, of much greater concern are covert targeted killing programs which currently appear to operate beyond the law with a complete absence of transparency and accountability.”).

has therefore deliberately chosen to deal not with what is wrong with the actual use of drones in a variety of settings, but instead discusses the peculiar intersection of drone warfare with the body of law designed to regulate warfare.

The debate on drones has become a sort of lightning rod for all kinds of anxieties about the use of force in today's world: the so-called War on Terror, virtualization of war, robotization of war, privatization of war, the executivization of war, and so on.⁴ Drones are, often problematically, the emblematic weapon for a range of such phenomena and so, unsurprisingly, they attract much polemic. Because all of these issues are often blended together, some confusion arises. The challenge, thus, is to find what is problematic *specifically* with drones as a technology in armed conflict that could not be dealt with better by invoking a larger genus of problems. Part II begins the Article by outlining a series of ways in which drones have been seen as problematic, which it argues are either not specifically humanitarian or are something else entirely—such as what the legal framework applicable to the war on terror should be. Separating these very important debates from the humanitarian questions that ought to be asked about drones as such is crucial if one is to make conceptual headway. Part III will then examine the issue of whether there is anything that is specific or inherent to drones that makes them unique from other weapons. Part IV addresses the question of whether that might be why drones cause unwarranted harm to civilians. Part V seeks to explain how, regardless of the answer to that complicated question, drones are much more likely to be perceived as inflicting excessive damage due to their highly discriminatory potential. It also seeks to explain the way in which drones maximize the safety of the drone operator. Part VI argues that this absolute safety of the operator, which is arguably what is most unique about drones, not only maximizes States' ability to minimize collateral harm but also has the potential to fundamentally alter what should be the laws of war's tolerance for collateral harm. Part VII attempts to contextualize the drone problem within a larger history of exogenous technological shock to international humanitarian law and how it has addressed them. Overall, the Article attempts to determine whether drone use may or may not be "legal," and more broadly how it impacts some of the moral underpinnings of the laws of war.

⁴ See, e.g., Allen et al., *supra* note 1, at 6 (noting the ethical risks of robots carrying lethal weapons); Sikander Ahmed Shah, *War on Terrorism: Self Defense, Operation Enduring Freedom, and the Legality of U.S. Drone Attacks in Pakistan*, 9 WASH. U. GLOBAL STUD. L. REV. 77 (2010) (addressing the legality of drones in a war on terrorism); Sharkey, *supra* note 1, at 370 (explaining the "ethical concerns about the application of armed robots in areas with mixed combatant and civilian populations"); Sparrow, *supra* note 1, at 62 (considering "the ethics of a decision to send artificially intelligent robots into war").

II. THE VARIEGATED NATURE OF THE DRONE DEBATE

A. *Nonhumanitarian Issues Raised by Drones*

The international legal regime on the use of force covers both issues of *jus ad bellum* (the right to go to war) and *jus in bello* (the way war ought to be waged). Only the latter addresses specifically humanitarian issues, but it is unclear whether those humanitarian issues have been at the forefront of the concerns about drones. This section will outline several ways in which the debate on drones often does not focus specifically on humanitarian problems, in an effort to set the stage for the next section.

Drones have become the emblematic weapon of the so-called War on Terror and what are, in the minds of many international and human rights lawyers, some of its excesses.⁵ In that respect, the drone debate has merely replicated, in condensed form, some of the debates that have agitated international lawyers for the better part of the last decade, with little in the way of an outcome. Among those is the notion that the war against terror is waged anywhere in the world where “terrorist targets” exist, even if that means in some cases intruding on the sovereignty of foreign States.⁶ This, however, points to a *jus ad bellum* problem in the sense that drones arguably provide a way to conduct a form of limited and clandestine warfare in violation of international law that would not be possible with conventional troops. Drone warfare may qualify as a form of aggression in some cases. Be that as it may, this is an altogether different issue than the humanitarian one that this Article is interested in, and not necessarily the one that drone opponents are most incensed about.⁷ The fact that drones are used in violation of the *jus ad bellum* does not tell us whether they are used in violation of the *jus in bello*.

Another series of more domestic and constitutional concerns about drones also fails to capture any sense of their humanitarian specificity.⁸ For example, the idea that drones allow governments to conduct war without the sort of legislative

⁵ See Bruce Cronin, *Reckless Endangerment Warfare: Civilian Casualties and the Collateral Damage Exception in International Humanitarian Law*, 50 J. PEACE RES. 175, 182 (2013); John Prados, *The Continuing Quandary of Covert Operations*, 5 J. NAT'L SEC. L. & POL'Y 359, 372 (2012).

⁶ See Daniel Brunstetter & Megan Braun, *The Implications of Drones on the Just War Tradition*, 25 ETHICS & INT'L AFF. 337, 346–47 (2011); Mary Ellen O'Connell, *Remarks: The Resort to Drones Under International Law*, 39 DENV. J. INT'L L. & POL'Y 585, 592–93 (2011).

⁷ Although in practice and theory the two mix, it is often clear that public opinions are more incensed by civilian casualties in Waziristan, for example, than by violations of Pakistani sovereignty.

⁸ See Jamie L. Kleidman, *The Constitutionality of the Predator Drone Program*, 4 VIENNA ONLINE J. ON INT'L CONST. L. 359 (2010) (analyzing whether the drone program is constitutional without considering humanitarian arguments).

scrutiny that might come with the use of conventional forces,⁹ that they represent a highly abnormal form of executive overreach,¹⁰ that they displace the operation of the judiciary,¹¹ and are otherwise damaging to democracy¹² are all interesting points, but these ideas are not a part of a humanitarian argument.¹³ The same is true of the critique of drones as used “outside the military chain of command,”¹⁴ for example by intelligence agencies.¹⁵ This is undeniably a problem and it should be a reason to question the circumventing of the military and normal democratic scrutiny, but there is nothing that says that drones are more likely to be used in non-humanitarian ways merely because actors other than the army operate them. A similar argument can be made in relation to the critique that drone manipulation is at times outsourced to private companies.¹⁶ In that case the dispute is with privatization of lethal force in general not with privatization of drones in particular, which is then only a facet of a much broader problem. All of these arguments made in the drone context, in short, are not about drones per se, but about the way drones have become emblematic of some deeper problem that is better tackled as such. An

⁹ See John Patera, *War Powers Resolution in the Age of Drone Warfare: How Drone Technology Has Dramatically Reduced the Resolution's Effectiveness as a Curb on Executive Power*, 33 *HAMLIN J. PUB. L. & POL'Y* 387, 404–05 (2012).

¹⁰ John E. Owens & Mark Shephard, *From 9/11 to 2011: The 'War on Terror' and the Onward March of Executive Power?*, in *THE LEGACY OF THE CRASH* 221, 228–29 (Terrence Casey ed., 2011).

¹¹ See Carla Crandall, *Ready . . . Fire . . . Aim! A Case for Applying American Due Process Principles Before Engaging in Drone Strikes*, 24 *FLA. J. INT'L L.* 55, 58 (2012); Michael Epstein, *The Curious Case of Anwar al-Aulaqi: Is Targeting a Terrorist for Execution by Drone Strike a Due Process Violation When the Terrorist Is a United States Citizen?*, 19 *MICH. ST. J. INT'L L.* 723 (2011); Nat Hentoff, *British Courts to Decide U.S. Drones Do Murder?*, *CATO INST.* (Feb. 6, 2013), <http://www.cato.org/publications/commentary/british-courts-decide-us-drones-do-murder>; Nat Hentoff, *With Presidential Drones, Who Needs Judges?*, *CATO INST.* (Sept. 15, 2010), <http://www.cato.org/publications/commentary/presidential-drones-who-needs-judges>.

¹² Frank Sauer & Niklas Schörnig, *Killer Drones: The 'Silver Bullet' of Democratic Warfare?*, 43 *SEC. DIALOGUE* 363, 365, 371–75 (2012).

¹³ Except perhaps in the distant sense that armies are less likely to feel accountable under the *jus in bello* if there is no democratic exposure of some of the violations they commit, or perhaps in the very indirect sense that a democracy that wantonly violates the laws of war corrupts itself.

¹⁴ Navi Pillay, *US Drone Strikes 'Raise Questions'*, *BBC NEWS* (June 8, 2012, 4:28 ET), <http://www.bbc.co.uk/news/world-asia-18363003>.

¹⁵ Ian Henderson, *Civilian Intelligence Agencies and the Use of Armed Drones*, 13 *Y.B. INT'L HUMANITARIAN L.* 133, 133 (2011); Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009*, in *SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT* (Simon Bronitt ed., forthcoming), available at <http://ssrn.com/abstract=1501144>; Brian Glyn Williams, *The CIA's Covert Predator Drone War in Pakistan, 2004–2010: The History of an Assassination Campaign*, 33 *STUD. CONFLICT & TERRORISM* 871 (2010).

¹⁶ Jeremy Scahill, *The Secret War in Pakistan: U.S. Special Forces Enlist Blackwater's Help on Covert Operations*, *NATION*, Dec. 21, 2009, at 11.

important step in understanding the confusion surrounding drones is a realization that much of the uneasiness about drones is in fact uneasiness about things of which drones are only a small part.

B. The Legal Framework Issue

One issue that has proved a perennial distraction is the issue of the legal framework under which drone strikes operate.¹⁷ For better or for worse this has been linked to one of the biggest questions to bedevil international law in the last decade, namely what use of force norms apply to the War on Terror¹⁸—the background to most actual drone uses. This is to the point that many debates that purport to be about drones are actually about (i) which framework applies to the War on Terror, and (ii) how that “war” should be fought. Some of the larger questions raised in this context will inevitably have to be resolved even beyond the particular scenario of fighting Al-Qaeda—and its spinoffs—and extend to a variety of asymmetrical conflicts. There are essentially three big contenders to this issue, all problematic internally and in relation to each other: (i) the laws of war, (ii) international human rights law/law enforcement, and (iii) a more loosely defined international law of self-defense/national security. To make matters more complicated, these three do not all operate at the same level. The first is only interested in means. The second is potentially interested in both ends and means. And some would argue that the third is both a justification for the use of force and its own code as to how to inflict it.¹⁹ Finally, there may be an interest on the part of some actors in simultaneously invoking several of these frameworks depending on either changing circumstances or some instrumental justification.²⁰

Still, perhaps the most popular model to think about the War on Terror has been the laws of war. These can provide an interesting starting point. If the laws of war do apply to the war on terror, then all kinds of questions arise that are pertinent to drone use.²¹ Such questions include the difficulties of ascertaining who is a

¹⁷ Jenks, *supra* note 2, at 651–52.

¹⁸ Adam Roberts, *Counter-terrorism, Armed Force and the Laws of War*, SURVIVAL, Spring 2002, at 7.

¹⁹ This is what is sometimes known as the robust approach to self-defense. See Harold Hongju Koh, Legal Advisor, U.S. Dep’t of State, Speech at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>.

²⁰ For a critique of that trend, see Laurie R. Blank, *Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications*, 38 WM. MITCHELL L. REV. 1655 (2012).

²¹ See, e.g., Robert P. Barnidge, Jr., *A Qualified Defense of American Drone Attacks in Northwest Pakistan Under International Humanitarian Law*, 30 B.U. INT’L L.J. 409, 413 (2012) (explaining that the technological advances in weaponry “raise practical questions regarding accessibility and control, as well as normative questions related to how and when the use of such weapons is acceptable, if ever”).

combatant and who is not in such a fluid type of armed conflict,²² as well as the potentially limitless geographical and temporal scope of that armed conflict.²³ In fact, under the guise of studying drones and the laws of war, much of the literature is, effectively, using drone policy as a way of interrogating some of the complexities associated with the waging of the war on terror.²⁴ If the laws of war do not apply to the war on terror—or do not apply in all cases where drones are used—two avenues open, depending on what is seen as the default regime internationally. At one end of the spectrum, many argue that international human rights/criminal law should be the applicable paradigm.²⁵ In that case, as Philip Alston, the UN Rapporteur on extrajudicial executions and the author of a widely influential report on the question quickly pointed out, one is in a situation where it will often be difficult to distinguish drone attacks from a particularly malign form of extraterritorial and extrajudicial use of lethal force, amounting perhaps even to an arbitrary execution in violation of the right to life.²⁶ At the other end of the spectrum there are those who would argue that the targeting of terrorists falls under a broad self-defense or national security regime that provides a fundamental legitimacy for striking with drones and essentially makes it possible to do away with the finer details of human rights or humanitarian law.²⁷

There is no doubt that the issue of the relevant legal framework is an important, even all-defining one. It is, in fact, perhaps the most important issue

²² Naureen Shah, Targeting Operations with Drone Technology: Humanitarian Law Implications 13–14 (March 25, 2011) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1832755; Vogel, *supra* note 2, at 116–18.

²³ 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); Michael W. Lewis, *Drones and the Boundaries of the Battlefield*, 47 TEX. INT'L L.J. 293, 299–301 (2011); Noam Lubell & Nathan Derejko, *A Global Battlefield? Drones and the Geographical Scope of Armed Conflict*, 11 J. INT'L CRIM. JUST. 65 (2013); Frédéric Mégret, *War and the Vanishing Battlefield*, 9 LOY. U. CHI. INT'L L. REV. 131 (2011); Mary Ellen O'Connell, *Combatants and the Combat Zone*, 43 U. RICH. L. REV. 845 (2008).

²⁴ See, e.g., O'Connell, *supra* note 23.

²⁵ See, e.g., O'Connell, *supra* note 15.

²⁶ Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, Human Rights Council, ¶¶ 32–33, 85, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) (pointing out that an “intentional, premeditated and deliberate killing . . . cannot be legal because, unlike in armed conflict, it is never permissible for killing to be the *sole objective* of an operation” and that “outside the context of an armed conflict, the use of drones for targeted killing is almost never likely to be legal”).

²⁷ For a critical discussion of that paradigm after 9/11, see Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, 105 AM. J. INT'L L. 244 (2011); see also Michael Byers, *Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change*, 11 J. POL. PHIL. 171 (2003); Sikander Ahmed Shah, *War on Terrorism: Self Defense, Operation Enduring Freedom, and the Legality of U.S. Drone Attacks in Pakistan*, 9 WASH. U. GLOBAL STUD. L. REV. 77 (2010).

confronting the international law of the use of force in this day and age. It is not the one that this Article is interested in, however, for at least three reasons. First, the debate effectively raises questions less about drones per se than about the particular legal paradigm under which these happen to be used and in particular whether the laws of war should apply.²⁸ There is of course no shortage of reasons why the laws of war might not apply to the war on terror, or at least to the entirety of that broad phenomenon as it was loosely defined in the wake of 9/11 by the Bush administration.²⁹ To sum up a very long and complicated debate, there has always been an argument that the war on terror is not an actual armed conflict in the sense understood by the laws of war (or indeed the *jus ad bellum*)³⁰ in that it targets groups and individuals that cannot be said to meaningfully engage in an “armed conflict” with the United States.³¹ Even if some individuals are engaged in such an armed conflict, there is a regrettable tendency of the war-on-terror paradigm being deployed to cover all kinds of situations in which individuals cannot be connected to an actual battlefield. But if one’s issue is with the war on terror’s global reach, then it is more coherent intellectually to discuss *that* (i.e., whether an actual war is going on) rather than what happens to be one of that war’s weapons of choice. There is a risk otherwise that one will confuse the tool and the policy, where clearly the policy is where the debate lies.

Second, once one has decided that the human rights or the self-defense/national security paradigms apply to drones, the issue of whether a drone attack is legal or not is, in many ways, fairly simple: it is clearly not legal in the former case and legal in the latter. A weapon that leaves very little chance of survival to the target is unlikely to pass the onerous test of human rights law that loss of life is only justifiable as a result of reasonable use of force in the pursuit of a lawful arrest; conversely it will easily pass the test under the self-defense/national security framework, which is relatively indifferent to means used on account of the significance of the goal and has long justified covert violent

²⁸ Andrew C. Orr, *Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law*, 44 CORNELL INT’L L.J. 729, 735 (2011).

²⁹ Derek Jinks, *The Applicability of the Geneva Conventions to the “Global War on Terrorism,”* 46 VA. J. INT’L L. 165, 169 (2005).

³⁰ Frédéric Mégret, ‘War’? *Legal Semantics and the Move to Violence*, 13 EUR. J. INT’L L. 361, 362–63 (2002).

³¹ There are several reasons why, despite their clear hostility to American interests, it is not clear that an armed conflict, as understood by the Geneva Conventions, has actually arisen. These include the fact that terrorists are not in a position to engage in a sustained level of hostilities with the United States (as opposed to striking U.S. interests at very irregular intervals), that their very inability and unwillingness to engage in actual warfare disqualifies the idea that one can be engaged in armed hostilities (as the term is normally understood) with them, and that the United States itself by its behavior—and here, surely, acts speak louder than words—has belied any notion that it is actually fighting a war (most notably by denying those captured as part of the war on terror, including in conditions very close to those of a battlefield, both prisoner-of-war status and the privilege of belligerency).

action. Only under a humanitarian framework do potentially more complex questions arise when weighing different and competing goals. Although most authors in fact see the problem with drones as emanating largely from situations outside the operation of international humanitarian law,³² this Article argues that even in uncontroversial situations of armed conflict some questions need to be addressed.

Third, whilst drones will often be used outside the framework of an actual armed conflict despite the claims of the war on terror, there will also be plenty of opportunities for them to be used in such conflicts. For example, even if the war on terror is an unhelpful and misleading catchphrase, there will be cases where a drone-resorting State is (i) actually fighting a State that supports terrorism or a group supported by a State under the guise of fighting terrorism (e.g., the Taliban and Al-Qaeda in Afghanistan in 2001) or (ii) under the guise of fighting “global terrorism” the State is actually fighting several particular terrorist groups as part of a global noninternational armed conflict (Al-Qaeda in its various incarnations globally). Moreover, there will be cases where a drone strike is sufficiently tied to the pursuit of that armed conflict that it can be seen as part of the conflict and is occurring within a clear laws-of-war “hot zone.”³³ At any rate, it is entirely conceivable that drones will be used in conventional conflicts as well. Therefore, the readers of this Article are asked to imagine a straightforward situation in which drones are being used in actual armed conflict as understood in the laws of war. In a sense, showing that drones raise challenging questions of law and morality even in a fairly conventional armed-conflict setting, makes the debate even more interesting.

II. DRONES, SPECIFICITY, AND “INHERENCY”

If we are to study drones as something more than a symptom of something larger, two related inquiries seem required: (i) to find something that is specific to drones that other weapons systems do not have, and (ii) to find something that is inherent to drones that is arguably included in the very idea of drones regardless of the circumstances in which they are deployed.

³² See Mary Ellen O’Connell, *Seductive Drones: Learning from a Decade of Lethal Operations*, J.L. INFO. & SCI., 2011/2012, at 116, 122–33.

³³ On the broad debate of where the laws of war might actually be held to apply within the War on Terror, see Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675 (2004); Geoffrey S. Corn, *Geography of Armed Conflict: Why It Is a Mistake to Fish for the Red Herring*, 89 INT’L L. STUD. 254 (2013); Lubell & Derejko, *supra* note 23; Kenneth Anderson, *Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a ‘Legal Geography of War,’* FUTURE CHALLENGES NAT’L SEC. & L. (April 2011), http://media.hoover.org/sites/default/files/documents/FutureChallenges_Anderson.pdf; see also Jinks, *supra* note 29 (analyzing whether the rules of war under the Geneva Conventions should apply to certain forms of hostilities).

With regard to the question of specificity, it is quite clear that many characteristics of drones are also present in other weapons systems, and therefore would not seem to warrant, in and of themselves, the level of attention devoted to drones. What is true of drones in the context of the war on terror will often be true of a range of other means and methods of combat that might be deployed in that context.³⁴ For example, if the criticism is that drones can strike anywhere in the world—even assuming that statement to be true—then it makes for a relatively weak case for the normative peculiarity of drones. There are many weapons that can strike with ruthless efficiency in far-flung locations.³⁵ Similarly, the fact that drones strike deep behind enemy lines in areas that are beyond verification of casualties is hardly specific to drones and is not something that, from a humanitarian point of view, should render drones less legal.³⁶ Evidently drones share many characteristics with two closely related weapons systems—planes and missiles—having essentially fused the guidance ability of the former and the unmanned character of the latter.

The challenge, at any rate, is to find what it is that makes drones sufficiently different from other weapons that they raise *sui generis* issues—or at least a range of familiar issues in new ways. A fundamental critique of drones—if there is to be one—must be at least somewhat independent of the contexts in which drones are used and must instead reach for something that is inherent about them—that is, something that lies in their very nature. This Article is not interested in the separate and more ambitious question of whether drones are inherently unlawful under the laws of war. This would at any rate be a very ambitious claim to make. Drones seem to be neither inherently indiscriminate, at least in the sense of being “incapable of distinguishing between civilian and military targets,”³⁷ nor doomed to cause “unnecessary suffering”³⁸ any more than the various missiles and ammunition they use. Notwithstanding, there could still be aspects inherent to drones that were problematic from a laws-of-war point of view short of this form of radical illegality.

As we know from the history of the laws of war, it has often proved particularly problematic to think of any weapon—as opposed to methods of combat—as having anything *inherent* about it. After all, the International Court of Justice (ICJ) failed to declare that using nuclear weapons is inherently incompatible with international humanitarian law in that it is always conceivable

³⁴ Indeed, it may be that the fixation with the means might concede too much to the paradigm under which it is claimed that the weapons are used.

³⁵ See, e.g., Anderson, *supra* note 33, at 3.

³⁶ *Id.*

³⁷ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8).

³⁸ *Id.*; 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), *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

that a nuclear weapon could be used in ways that minimize collateral damage.³⁹ It is also perfectly possible to imagine a conscientious minelayer considerably limiting the risk of a mine ever harming a civilian. There have long been debates in the humanitarian community about whether certain weapons are inherently indiscriminate or inherently cause unnecessary suffering, and the idea is helpful as a loose marker.⁴⁰ But whenever there has been agreement about a weapon being inherently non-humanitarian, it has always been more as a result of a powerful effort at building an intersubjective consensus to that effect, rather than any logical demonstration that the weapon in question could only be indiscriminate. For example, the Ottawa landmines convention was adopted because powerful arguments were marshaled to the effect that mines were more often indiscriminate than not, and that this alone should justify a political decision to abolish them; such an outcome could not simply have been obtained by deduction from the existing laws of war. This is obviously a familiar debate in the United States where a well-known and powerful lobby has argued repeatedly that it is “not guns that kill people, people kill people.” In the same vein, an argument could be made that a nuclear weapon can be used tactically in a desert to target a military bunker or, conversely, a sniper’s rifle can be used to shoot randomly in a way that does not distinguish between combatants and non-combatants.

In other words, as we try to shift attention away from actual uses of drones in particular times and locations, and attempt to have a conversation about what is inherent to drones, there is a strong risk that we will end up back where we started—that is, looking at particular uses rather than something that was built into the weapon. Nonetheless, there may be a middle road between some grand philosophical claim about weapons having certain inherent features and the dismissive claim that a discussion on specific weapons is not important at all because their compliance with international humanitarian law depends on how they are used. The argument might be, for example, that in the real world, weapons are not just inert objects that can be understood independently of context, history, ideology, economy, or politics. For example, nuclear weapons might well be used tactically in the desert against a strictly military target; in the real world, however, there are thousands of actual strategic nuclear warheads built historically to obliterate cities as part of a superpower game of deterrence that has occasionally

³⁹ *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, ¶¶ 94–95. The argument was that low yield, tactical nuclear weapons might be used in targets removed from any civilian population where they would not risk causing collateral damage. In its defense, the court did nonetheless find that the use of nuclear weapons would be “scarcely reconcilable” with principles of international humanitarian law. *Id.*

⁴⁰ See John Borrie & Rosy Cave, *The Humanitarian Effects of Cluster Munitions: Why Should We Worry?*, DISARMAMENT FORUM, no. 4, 2006, at 5; Jack H. McCall, Jr., *Infernal Machines and Hidden Death: International Law and Limits on the Indiscriminate Use of Land Mine Warfare*, 24 GA. J. INT’L & COMP. L. 229 (1994); Virgil Wiebe, *Footprints of Death: Cluster Bombs as Indiscriminate Weapons Under International Humanitarian Law*, 22 MICH. J. INT’L L. 85 (2000).

proved to be extremely unstable.⁴¹ Opponents of nuclear weapons can be forgiven for thinking that *that* is the main problem, and the fact that some theoretical tactical nuclear weapons uses do not fit that description should not paralyze all arguments against them. A similar argument could be made about guns: they might be used only for hunting, but their history and allure in practice has long associated them with violent social uses directed at other human beings, and their availability and ease of use make them natural ingredients of crime.

Even if we do not make an absolutist claim about the inherent nature of weapons, we can see how certain weapons at least raise ethical and legal challenges more than others, perhaps because they are begging to be used in a certain way, or because of a particular potential for lethality. This is what one might call the “natural slope” of any given weapon. It does not mean that there is something that is so inscribed in it that a weapon could never be put to a different use, but that certain weapons have a certain propensity to be used in a certain way because they were conceived as having a particular purpose and are more broadly understood as having that particular purpose. In the case of drones, it is of course possible to imagine drones being used to spread toxic gas over a large territory in a way that would be fundamentally indiscriminate. Apart from the fact that no such use has been documented, there is a sense that a drone’s natural slope is an ability to get very close to enemy targets, at little risk to the operator, and to strike with high precision. In a sense, this only thickens the mystery, for the ability to discriminate is surely a characteristic that one would applaud from a humanitarian point of view.

III. DO DRONES CAUSE DISPROPORTIONATE HARM?

This Article will return to the impact of drones vis-à-vis enemy combatants, but for the time being the more interesting critique from a humanitarian point of view is that drones have a strong tendency to cause significant civilian casualties.⁴² The laws of war prohibit directly targeting civilians in no uncertain terms.⁴³ They also prohibit the unintentional harming of civilians, unless that harm is proportionate to the military advantage sought.⁴⁴ In that context, there has certainly been great concern about the existence of significant collateral casualties as a result

⁴¹ Brian L. Bengs, *Legal Constraints Upon the Use of a Tactical Nuclear Weapon Against the Natanz Nuclear Facility in Iran*, 40 GEO. WASH. INT’L L. REV. 323, 384 (2008).

⁴² INT’L HUMAN RIGHTS & CONFLICT RESOLUTION CLINIC, STANFORD LAW SCH., & GLOBAL JUSTICE CLINIC, N.Y. UNIV. SCH. OF LAW, LIVING UNDER DRONES: DEATH, INJURY, AND TRAUMA TO CIVILIANS FROM US DRONE PRACTICES IN PAKISTAN, at vi (2012), available at http://www.livingunderdrones.org/wp-content/uploads/2012/09/Stanford_NYU_LIVING_UNDER_DRONES.pdf [hereinafter STANFORD & NYU CLINICS’ REPORT].

⁴³ Additional Protocol I, *supra* note 38, arts. 48, 51.

⁴⁴ *Id.* art. 51(5).

of drone strikes in places like Pakistan.⁴⁵ The claim that drones cause excessive collateral harm is intriguing because one would expect them to produce less—or at least not more than—a host of conventional weapons, including their closest competitors, planes and missiles. Certainly drones are at the opposite end of the spectrum from nuclear weapons and other naturally more indiscriminate weapons.

There are few examples of a sustained drone campaign outside the war on terror, so one is brought back to that particular fact scenario.⁴⁶ Despite its limitations and its specificity, it does reveal several lessons about the nature of drone warfare. In effect, civilian casualties seem to have been significant in the absolute, although figures differ wildly from anywhere between a few dozen to thousands.⁴⁷ The figures are probably higher than those claimed by those who use them, if only because of the difficulty of verifying the impact with certainty. The question of whether they are significant in relative terms is more complex. If international human rights law were the framework, then the figures would be considerable because there is not much leeway built into international human rights law for any civilian casualty (except in the course of police operations or as a result of self-defense, for example). If the laws of war are the preferred framework, then we at least have the possibility that not all civilian casualties will be illegal, because some may have only been hit collaterally. The question is complicated in the extreme if one tries to reason in aggregate—that is, by looking at the accumulated number of drone casualties—because the evaluation tends to get separated from an appreciation of what or who was targeted in each particular case. There might be a way of weaving the overall number of deaths into a larger computation of whether the attacker satisfies *jus ad bellum* proportionality, but that is bound to be a delicate exercise that will remain distinct from the *jus in bello*.⁴⁸ In

⁴⁵ See STANFORD & NYU CLINICS' REPORT, *supra* note 42, at v; *Pakistan Drone Strikes: 2011*, NEW AM. FOUND., <http://counterterrorism.newamerica.net/drones/pakistan/2011> (last visited Aug. 31, 2013) (identifying between fifty-seven to sixty-five civilian deaths resulting from U.S. drone strikes in Pakistan during 2011).

⁴⁶ See *Domestic Drones Are Already Reshaping U.S. Crime-Fighting*, REUTERS (Mar. 3, 2012, 10:06 AM), <http://www.reuters.com/article/2013/03/03/us-usa-drones-lawenforcement-idUSBRE92208W20130303> (discussing drone campaigns used in the United States for law enforcement purposes).

⁴⁷ HUMAN RIGHTS CLINIC, COLUMBIA LAW SCH. & CTR. FOR CIVILIANS IN CONFLICT HUMAN RIGHTS CLINIC, *THE CIVILIAN IMPACT OF DRONES: UNEXAMINED COSTS, UNANSWERED QUESTIONS* 19–21 (2012); STANFORD & NYU CLINICS' REPORT, *supra* note 42, at 153–65; see *Pakistan Drone Strikes: 2011*, *supra* note 45.

⁴⁸ The *jus ad bellum* has its own proportionality requirement, which anticipates that a particular use of force should not use more force than is necessary and proportional to respond to an attack. This is a very broad test that relates to strategic issues and is not particularly helpful to examine particular humanitarian outcomes, which must at any rate be assessed on their own terms. Moreover, the *jus ad bellum* proportionality-satisfying quality of a drone campaign would have to be evaluated in light of that campaign's purpose, but could hardly be a function of the fact that drones were used. See John Forge, *Proportionality, Just War Theory and Weapons Innovation*, 15 *SCI. & ENGINEERING ETHICS* 25, 25–28 (2009).

truth, whether any harm to civilians was proportional needs to be assessed on a case-by-case basis by looking at the military advantage that was sought in each and every case and the number of casualties that occurred. That information, unfortunately, is for the most part unavailable. In the best of cases assessing the legality of collateral damage has always proved to be an arduous task⁴⁹ and if anything it is made harder by the stealth nature of much drone warfare.

Moreover, it is important to note that there may be a significant discrepancy between the sort of collateral casualties that are tolerated under the laws of war, and those that ought to be tolerated morally. It is also probably the case that there is less popular tolerance for the killing of the innocent (particularly women and children) than is in fact occasionally legal. It may be that the long term prospect of the laws of war, specifically collateral damage, is grim due to a civilizing process that makes the public increasingly squeamish about the shedding of any civilian blood. As an implicit critique of the law's excessive tolerance for collateral casualties, this fact is interesting and no doubt partly warranted but this Article will seek to deal as far as is possible with the law as it is and remains largely understood to be by its experts and practitioners.

There may also be a certain queasiness about the radical asymmetry of casualties in asymmetrical warfare today. This Article will return to the question of the asymmetry of drone warfare between combatants and what it portends for the laws of war more generally in the final section.⁵⁰ It is clear, however, that the asymmetry of asymmetrical war is today manifested nowhere more concretely and spectacularly than in the radical disproportion of casualties between the drone-possessing and drone-lacking sides to drone warfare—both in terms of combatants and non-combatants.⁵¹ This of course can help us understand how, from a realistic point of view, the side that does not have access to drones is more likely to make humanitarian inspired arguments about their unlawfulness or humanitarian undesirability.

⁴⁹ See the recent introduction to a special issue of the *Journal of International Criminal Justice* on drones. Jens David Ohlin, *Is Jus in Bello in Crisis?*, 11 J. INT'L CRIM. JUST. 27, 27–29, 43 (2013).

⁵⁰ See *infra* Part VI.A.

⁵¹ Compare *Pakistan Drone Strikes: 2011*, *supra* note 45, with *Active Duty Military Deaths by Year and Manner*, DEF. CASUALTY ANALYSIS SYS., https://www.dmdc.osd.mil/dcas/pages/report_by_year_manner.xhtml (last viewed Aug. 31, 2013) (identifying the number of active military deaths of U.S. soldiers between 1980 and 2010). There is material here for a more general critique of collateral casualties: on the one hand, the technologically superior party may kill thousands in entirely legal ways, while on the other, the technologically challenged party will often kill very few, and often in ways that are deemed illegal. See Cronin, *supra* note 5, at 184–85. This is not the place for such a critique, however. It should be noted that neither under the *jus in bello* nor *jus ad bellum* proportionality is there any normative requirement that one incur comparable civilian casualty levels. Indeed, moral theorists also often typically acknowledge the “common-sense morality” that States privilege at least their civilians and even their military over “enemy civilians.” Thomas Hurka, *Proportionality in the Morality of War*, 33 PHIL. & PUB. AFF. 34, 58–59, 66 (2005).

Let us assume though that harm to civilians was not just excessive in the absolute, which in a sense it always is, but also that it was repeatedly excessive relative to the military advantages sought. This would indeed point to a deeper problem, but still not necessarily one that can be easily ascribed to drones as such. If the harm to civilians is excessive as a result of bad training or evil on the part of those using drones, then the problem is arguably not one of drones but of training and disciplining those who use drones. In other words, if for example there are many collateral casualties as a result of a tendency to dehumanize the civilians of the party to an armed conflict (“enemy civilians”),⁵² then this is a relevant humanitarian fact that tells us that training and discipline should be increased and appropriate sanctions adopted. But this does not tell us anything very specific about the weapons used. Similarly, if the argument is that excessive killing resulted from faulty intelligence, as may well have been the case in Pakistan,⁵³ then that problem should be addressed on its own terms.⁵⁴

What is needed is something that specifically links the excessive collateral casualties to a particular characteristic of drones. It is here that we encounter arguments that drones might desensitize those using them to the deaths they cause because of the distance.⁵⁵ This is a first powerful way of looking at drones that aims at an arguably inherent characteristic. While the possibility cannot be entirely discounted, it is probably more relevant to the question of the willingness to use force—given the decreased risk of casualties for the attacker—than to whether that force is used in a more or less humanitarian fashion. In fact, operating a drone from thousands of miles away may mean that one can do so in a room full of officers and lawyers, which one might expect to at least act as a moderating influence. As Professor Jack Beard has argued, new virtual technologies are “creating unprecedented levels of transparency and are unexpectedly making international law more relevant than ever to armed conflicts.”⁵⁶ In fact, there may be a deep affinity between the virtualization of war and its increasing legalization, as war is increasingly pursued in conditions that allow for the computation of complex legal equations in real time. Claiming that one did not know that striking

⁵² This Article will use the expression “enemy civilians” because it is a good shorthand, although it is a little ambiguous in that it suggests real enmity towards civilians when international humanitarian law insists that there should be none. By enemy civilians, therefore, this Article only mean those civilians who have relationships of allegiance to the opposing party in an armed conflict.

⁵³ *Researcher: Most Civilian Drone Deaths ‘From Faulty Information,’* VOICE OF AM. (Mar. 15, 2013), <http://www.voanews.com/content/researcher-most-civilian-drone-deaths-from-faulty-information/1622442.html>.

⁵⁴ The problem of faulty intelligence is not limited to drones. For instance, special forces could target the wrong person based on faulty intelligence.

⁵⁵ See Blank, *supra* note 2, at 701 (“Some critics challenge the growing use of armed drones, arguing that remote operators are desensitized to the effects of combat and risk approaching targeting—and killing—as a video game rather than a war with real life-and-death consequences.”).

⁵⁶ Beard, *supra* note 2, at 410.

a target might lead to collateral casualties will be increasingly difficult given the abundance of information that real-time drone surveillance provides, not to mention the digital record of an entire operation that can be scrutinized a posteriori for traces of a mistake in conditions of increasing transparency.

If anything, the “militainment” phenomena on combatants are better documented on the actual battlefield, where even in conditions of physical proximity the virtualization of combat may fuse well with certain psychological and cultural traits associated with habitual playing of violent video games.⁵⁷ There is at least anecdotal evidence that soldiers who have piloted drones have suffered from Posttraumatic Stress Disorder, which suggests that the desensitization of remote operators is hardly total.⁵⁸ Moreover, it is in the nature of militaries to create a distance, both physical and psychological, between soldiers and their targets if only for defensive purposes, something which has been evident in most modern weapons developed in past centuries, from the crossbow to artillery. To impugn this is not to say anything specific about drones, but merely to note a very broad trend. As this Article will argue in the next section, there are better contenders for the idea that drones inherently lead to disproportionate casualties.

In short, what is specifically problematic from a humanitarian point of view about drones requires quite a few assumptions: (i) that the problem is indeed about drones and not about something else entirely; (ii) that there is a specifically humanitarian problem with drones, for example that they cause a particularly high number of civilian casualties; and (iii) that the humanitarian problem results from something sufficiently specific about drones that they raise an interesting and at least somewhat *sui generis* problem that is not common to a range of other weapons. The next section will begin to get closer to a case for the moral peculiarity of drones.

IV. THE PARADOXES OF POWER AND RESPONSIBILITY

There seems to be something that excites the conscience about collateral casualties resulting from drone attacks, but it is more complicated than the mere fact of collateral casualties. It can be said with some certainty that drones are in and of themselves weapons that would seem to lead to more discriminate results

⁵⁷ See Linda Johansson, *Is It Morally Right to Use Unmanned Aerial Vehicles (UAVs) in War?*, 24 PHIL. & TECH. 279, 285 (2011) (“[O]ne problem with the use of UAVs today is that the operators may be based on the other side of the globe, making it all dangerously similar to a computer game.”). See generally Noel Sharkey, *Killing Made Easy: From Joysticks to Politics*, in ROBOT ETHICS: THE ETHICAL AND SOCIAL IMPLICATIONS OF ROBOTICS 111 (Patrick Lin et al. eds., 2012) (discussing the role of robots in creating distance between soldiers and their enemies and thus reducing the psychological aversion to killing); Thompson Chengeta, *Are U.S. Drone Targeted Killings Within the Confines of the Law?* (Oct. 31, 2011) (unpublished manuscript) (on file with author) (assessing the legality of drone targeted killings).

⁵⁸ See Elisabeth Bumiller, *Air Force Drone Operators Report High Levels of Stress*, N.Y. TIMES, Dec. 19, 2011, at A8.

not only because they use ammunition that is itself quite precise but because they allow for long periods of surveillance used to verify intelligence. In contrast to missile operators, drone operators can wait until literally the last second before deciding whether to strike. Additionally, drones often operate in conditions of asymmetry where the attacking party has superior intelligence, control of the airspace, and has time to decide whether and whom to attack. These characteristics provide the drone operators with the considerable ability to choose when, where, and how to strike. This ability is unperturbed by most of the urgencies that would normally affect the rapid-fire decisions in battle—a unique luxury in the history of warfare.

The ability to discriminate is also a function of how a certain weapon allows its users to protect themselves when using the weapon. If a weapon's ability to discriminate creates a risk to its operator's security, then less discriminate outcomes will be more understandable when it is necessary in the heat of battle to protect the operator's safety. For example, it is not hard to see how a sniper rifle is one of the most precise, and therefore discriminate weapons available. But in many situations sniping does come with significant risks for the operator, given the relatively short distance to the target and the risk of being spotted as a result of firing. Authors such as Professors Jack Beard and Peter Singer have eloquently made the case that, by contrast, the discriminatory potential of drones is maximized by the fact that drones protect the life of the operator, thus minimizing the potential for the usual excuses about soldiers putting their lives on the line.⁵⁹ In fact, if there is anything specific and inherent to drones, it is precisely the humanitarian consequences that flow from drones being unmanned and therefore almost entirely secure for their operators. Drones, therefore, make it easier for an attacker to comply with Additional Protocol I obligations to “do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects.”⁶⁰

A. *The Paradox of Precision*

Nonetheless, it is here that one encounters what one might describe as the paradox of precision. It is understandable that mines and nuclear weapons would engender strong humanitarian opposition, but such opposition is less easy to fathom when it comes to weapons that have a strong potential to be used discriminately. Additional Protocol I's prohibition on collateral casualties is a general prohibition that is not explicitly connected to the type of weapon used,⁶¹ but in practice it is as if weapons that promise more precision also appear to elicit stronger moral reactions. The paradox, of course, is only apparent. What matters is not whether weapons are inherently discriminate, which is an impossible abstraction, but how they are used in relation to their potential for discrimination.

⁵⁹ See SINGER, *supra* note 1, at 394–95; Beard, *supra* note 2, at 430, 443.

⁶⁰ Additional Protocol I, *supra* note 38, art. 57(2)(a)(i).

⁶¹ See *id.* arts. 52, 57.

One would therefore expect a relatively more discriminate weapon to be used relatively more discriminately.⁶² In other words, even though an ordinary bomb is less inherently discriminate than a guided missile and is therefore less likely to curry our humanitarian favor, we would be indignant if a guided missile was used in such a way that it caused more collateral damage than an ordinary bomb; inversely, given the same amount of collateral casualties, the more indiscriminate weapon will incur less condemnation because it will be expected to have been less capable of producing discriminate results.

This means that while there is probably an absolute baseline for collateral damage—where the collateral harm is clearly greater than the expected military advantage or where an attack is, effectively, indiscriminate—the equation is likely to be sensitive to the means used. One might think of this in terms of a sliding scale of expectations based on what a particular weapons system allows one to do. Soldiers using weapons that are more discriminate will inevitably be held, if not to higher standards, then at least to a more strict application of the same standards. Drones, in that respect, surely rank high as weapons that one would expect to be used very discriminately because they have that technological capacity. Hence there is understandable shock when significant collateral casualties occur as a result of drones.⁶³ The problem is not necessarily that drones create considerable collateral casualty, but that they cause *more than they should, given their characteristics*. When substantial casualties occur, the suspicion is thus naturally that a drone could have hovered a little longer to verify data and minimize risks to civilians. Alternatively, the only logical conclusion may be that the strikes reflected an anti-humanitarian callousness about collateral damage. In that sense, the use of drones is more likely to give rise to an inference of violations of the laws of war and the operator less likely to be given the benefit of the doubt given drones' inherently precise baseline.

⁶² There is at least anecdotal evidence that the demands of humanitarianism have long been understood to be sensitive to the weapon at stake. For example, one delegate at the 1977 conference that led to the adoption of Additional Protocol I insisted that the obligation to identify objectives as military “depended to a large extent on the technical means of detection available to the belligerents.” CLAUDE PILLOUD ET AL., INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 682 (Yves Sandoz et al., 1987); *see also* Michael N. Schmitt, *The Conduct of Hostilities During Operation Iraqi Freedom: An International Humanitarian Law Assessment*, 6 Y.B. INT’L HUMANITARIAN L. 73, 97–99 (2003).

⁶³ Indeed, civil society has clearly caught on to this dimension, by both praising drones for their discriminatory potential, yet also insisting that they require greater scrutiny whenever civilian deaths arise. *See* HUMAN RIGHTS WATCH, PRECISELY WRONG: GAZA CIVILIANS KILLED BY ISRAELI DRONE-LAUNCHED MISSILES 4 (2009).

B. Differentiated Humanitarian Responsibilities

Nested within the paradox of precision is a moral paradox. The party with the more advanced technology—which is probably the one that invested more resources in developing a discriminate weapon’s systems—ends up being held to higher standards. Indeed, that party might even be liable if it chooses to use a less discriminate weapon when a more discriminate weapon could have reasonably been deployed in a situation where civilians were at risk—an issue that has been alive since at least the first Gulf War.⁶⁴ Conversely, if a party to an armed conflict only has relatively coarse weapons systems to take out certain targets in a city for example, then it will be judged by the relative inefficiency of these weapons. One might question such an outcome on the basis that it puts in question the equality of belligerents, one of the founding principles of international humanitarian law,⁶⁵ and may, therefore, weaken the limitations on collateral damage. It could also lead to awkward outcomes. What if a country were to be perversely incited to equip itself with less discriminate weapons, as a result of fears that possession of these weapons will then be invoked against it to hold it to higher standards?

It is unclear whether this is a realistic possibility given that States have all kinds of purely military incentives to develop and use precision munitions. Although it is difficult to see how States might have an interest in causing more rather than less collateral damage,⁶⁶ this sort of paradoxical logic bears underlining, especially given the costs of developing and employing more discriminate weapons. Still, the risk of a resulting inequality of belligerents is not, as is traditionally feared, an inequality based on the validity/invalidity, or justness/unjustness of the cause for which each party is fighting.⁶⁷ It does not seem to do any fundamental harm to the tradition of restraint in warfare. For one thing, simply because a State with more discriminate weapons is held to a higher standard in terms of ability to achieve reduced collateral damage does not absolve the other party from any of its obligations under the laws of war. Because drones are highly precise weapons, it is quite easy to make an argument that they should be used very discriminately and cause fewer casualties. This may go some way to explain the intensity of the reaction to drone casualties: public opinions, in particular, are incensed by what is seen as the difference between a weapon’s potential for discriminating and its actual discrimination. Certainly one might

⁶⁴ See generally Danielle L. Infeld, Note, *Precision-Guided Munitions Demonstrated Their Pinpoint Accuracy in Desert Storm; but Is a Country Obligated to Use Precision Technology to Minimize Collateral Civilian Injury and Damage*, 26 GEO. WASH. J. INT’L L. & ECON. 109 (1992) (discussing the use of precision-guided missiles in Operation Desert Storm and whether the laws of war can justify their use).

⁶⁵ See Benjamin J. Priester, *Who Is a “Terrorist”? Drawing the Line Between Criminal Defendants and Military Enemies*, 2008 UTAH L. REV. 1255, 1313–14.

⁶⁶ See Nir Eisikovits, *Proportionality and Self-Interest*, 11 HUM. RTS. REV. 157, 164–69 (2010).

⁶⁷ See Vaios Koutroulis, *And Yet It Exists: In Defence of the ‘Equality of Belligerents’ Principle*, 26 LEIDEN J. INT’L L. 449, 465–68 (2013).

expect drone strikes to result in fewer collateral casualties, at least over time, than similar strikes carried out by conventional aircraft in which protecting the life of pilots is at the forefront, thus potentially leading to less precision.

V. HOW THE ABSOLUTE SAFETY OF THE OPERATOR MORALLY CHALLENGES THE LEGALITY OF COLLATERAL CASUALTIES

There is more to drones, however, than their technical ability to discriminate based on a greater ability to protect the operator's life. In particular, the safety of drone operators is not simply a factor that diminishes the potential for States' excuses, nor is it simply the case that this safety increases the number of measures that an attacking party can adopt to minimize collateral casualties. It is also the case that drone warfare will arguably more fundamentally affect the very moral compact that lies at the heart of the laws of war. In this respect, the arguments of Professors Beard and Singer can be pushed even further to take into account not only how drones facilitate compliance with the laws of war but also, potentially, *how they strike at the very nature and content of international humanitarian law*.

A. *Basis for the Laws of War's Tolerance of Collateral Casualties*

It is necessary at this point to backtrack a little and inquire as to why the laws of war allow for collateral harm to civilians in the first place. There are two related reasons why this is conceivably so. The first and most evident is that laws of war that do not allow for any collateral damage would be laws of war so utopian as to have very little claim to regulate war. They would effectively, especially in this day and age, require armies to tread so incredibly carefully as to make the pursuit of war almost impossible. But the laws of war cannot make war impossible or undermine their very basis. They cannot, in other words, be another way of outlawing war, the role traditionally assigned to the *jus ad bellum*. The recognition that not all collateral casualties are illegal demonstrates that, in the fog of war, mistakes are occasionally made and that to criminalize those mistakes—or at least make them violations of the laws of war—would be unrealistic.⁶⁸ Humanitarian lawyers are, in part, pragmatists who know better than to saw the branch on which they are sitting.

So the possibility of collateral damage must be contemplated, as long as it is only a risk and not part of a deliberate or callous targeting of civilians. If such callousness were involved, international humanitarian law would have undermined itself just as lethally as a humanitarian project intent on saving lives. Indeed, if the laws of war only justified what States might be naturally inclined to do without exerting any pressure on them, one might legitimately question whether the laws were of any use—indeed whether they were international law at all. The fundamental logic of this intuition is borrowed from Professor Martti

⁶⁸ See William J. Fenrick, *Attacking the Enemy Civilian as a Punishable Offense*, 7 DUKE J. COMP. & INT'L L. 539, 546–48 (1997).

Koskenniemi's more general work on international law and the notion that international law is forever caught up in an oscillation between apology (defending state interest) and utopia (protecting some higher societal value) as a result of its very epistemology and embeddedness in liberal theory.⁶⁹ International humanitarian law is a broad normative system that must preserve a measure of humanity whilst acknowledging the reality of war. The regime of collateral damage is perhaps the most crucial safety valve for it to do so.

But the rationale for allowing a measure of collateral casualties goes deeper, even though the laws of war, in their characteristic prudishness, remain strangely silent on the matter. In some cases the only way to ensure that there are absolutely no civilian casualties, apart from ruling out a weapon system, would be to ask one's troops to take extra risks themselves. Theoretically, it is possible to imagine that there would be an absolute prohibition on any civilian casualties. This would reduce military work to something close to police work—requiring extreme scrupulousness from the attacker and responsibility towards the other side's civilians as if they were the attacker's own civilians. This would also require that only conventional troops be sent into hostile territory and only engage, at considerable risk to themselves, in such conditions of proximity that they would *never* mistakenly shoot a civilian. Indeed, the author of this Article has argued elsewhere that something like that standard may be appropriate when the attacker explicitly invokes humanitarian motives to go to war and would contradict this motivation if it did not rise up to the occasion in terms of how that war is waged.⁷⁰

The problem is that, outside perhaps the exceptional case of humanitarian intervention, such a position would be even more utopian and unlikely to find many adherents.⁷¹ It would essentially presume that we no longer live in an international world where significantly different obligations exist for States (and their agents) towards their own soldiers on the one hand, and towards "civilians" on the other, most notably enemy civilians. Many reasons can be given as to why States owe morally defensible duties of protection to their own military and cannot, for the most part, ask them lightly to sacrifice themselves for the good of foreign civilians.⁷² If nothing else, safeguarding the life and integrity of the attackers is surely part of the military advantage that one aims to obtain from an attack, especially in a context where the death or capture of even one pilot may have a considerable military and political impact.⁷³ States can at best ask their service

⁶⁹ See generally MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2006) (criticizing international law as either a moralist utopia or a façade for state interests).

⁷⁰ Frédéric Mégret, Missions Autorisées par le Conseil de Sécurité à L'heure de la R2P: Vers une Application Différenciée du Jus in Bello? 13–18 (Jan. 2, 2013) (unpublished manuscript), available at <http://ssrn.com/abstract=2195710>.

⁷¹ See KOSKENNIEMI, *supra* note 69.

⁷² See Hurka, *supra* note 51; Peter Margulies, *Valor's Vices: Against a State Duty to Risk Forces in Armed Conflict*, 37 VT. L. REV. 271, 274–75 (2012).

⁷³ See Margulies, *supra* note 72, at 298 (stating that force protection is "at least relevant to determination of military advantage").

members to take reasonable risks to minimize civilian casualties when such risks are the only way that an armed attack would not create a manifestly disproportional risk to civilians from the beginning. But it is most unclear from an international law point of view that much more can be required.⁷⁴ This means that certain attacks should not be engaged in because they create too much risk for civilians as a result of being intrinsically indiscriminate (and therefore manifestly disproportional). But within the range of attacks that do intend to discriminate, a State's soldiers cannot be forced to engage in a form of "humanitarian heroism" to further reduce the risk.⁷⁵

So at a deeper level the recognition of the inevitability of collateral civilian casualties acknowledges that there is some kind of tradeoff between the lives of one State's soldiers and another State's civilians,⁷⁶ leading Professor David Luban to note that "[i]f ever there was an appropriate use of the overworked phrase 'existential dilemma,' this is it."⁷⁷ The issue emerged perhaps most characteristically in the context of the NATO bombing of the Republic of Yugoslavia during the Kosovo campaign. There was substantial criticism of NATO's "humanitarian war"⁷⁸—perhaps especially due to the humanitarian motive invoked. Indeed, one might object on moral grounds to the idea that soldiers are "ready to kill but not to die"⁷⁹ in a post-heroic age (or at least one in which the parameters of heroism have been narrowly defined to cover only force and mission protection). One might also deplore the zero-casualty doctrine in that

⁷⁴ The debate is nonetheless very alive. *See, e.g.*, Reuven (Ruvi) Ziegler & Shai Oztari, *Do Soldiers' Lives Matter? A View from Proportionality*, 45 *ISR. L. REV.* 53 (2012) (discussing whether proportionality requires an "attacking state to expose its soldiers to life-threatening risks in order to minimize risks . . . to enemy civilians").

⁷⁵ *Id.* at 58–60. As to soldiers themselves, although they certainly have a degree of moral autonomy, that autonomy must express itself partly within the moral bounds set by this framework. As a result, they may not entirely be free to, for example, sacrifice themselves for the good of enemy civilians even if they wanted to because, in a sense, their lives and the success of their mission are not entirely theirs to sacrifice. In other words, soldiers must subject themselves to their State's own well-intentioned paternalism towards them if it is indeed the State's intention that they should prioritize their lives and mission rather than the lives of civilians. *See* MARTIN L. COOK, *THE MORAL WARRIOR: ETHICS AND SERVICE IN THE U.S. MILITARY* 123–24 (2004).

⁷⁶ Sebastian Kaempf, *US Warfare in Somalia and the Trade-off Between Casualty-Aversion and Civilian Protection*, 23 *SMALL WARS & INSURGENCIES* 388 (2012) ("By the 1990s, the norms of casualty-aversion and civilian protection had become the two central characteristics of American warfare. Both norms, however, are inherently in conflict with one another.").

⁷⁷ David Luban, *Risk Taking and Force Protection*, in *READING WALZER* (Yitzhak Benbaji & Naomi Sussmann eds., 2013).

⁷⁸ Adam Roberts, *NATO's 'Humanitarian War' over Kosovo*, 41 *SURVIVAL* 102, 102 (1999).

⁷⁹ Paul Robinson, *'Ready to Kill but Not to Die': NATO Strategy in Kosovo*, 54 *INT'L J.* 671, 672–73 (1999).

it weakens the moral texture of war,⁸⁰ perhaps by so dramatizing the stakes of the internal jus in bello (obligations owed to one's own combatants) as to nullify the provisions of the external jus in bello (obligations owed to non-combatants).⁸¹ Some have argued that a moral warrior should, in certain conditions, be willing to take more risks to himself to minimize non-combatant casualties.⁸² Yet from a legal perspective, when the Prosecutor at the International Criminal Tribunal for the former Yugoslavia (ICTY) reviewed the NATO campaign against the Federal Republic of Yugoslavia (FRY), it could not avoid characteristically asking itself: "To what extent is a military commander obligated to expose his own forces to danger in order to limit civilian casualties or damage to civilian objects?"⁸³ The implicit answer, given the lack of investigations of NATO soldiers, seemed to be: not a great deal and the issue is potentially so fraught and complex as not to justify the expense of significant prosecutorial resources. The ICTY could never conclude that NATO bombings of the FRY were illegal despite being launched from altitudes that would affect pilots' ability to discriminate because the weapons they used seemed to be quite discriminate.⁸⁴

The desire to not expose one's troops to undue risk could not go so far as to result in attacks launched from such conditions of safety that they inevitably result

⁸⁰ See Yagil Levy, *The Tradeoff Between Force and Casualties: Israel's Wars in Gaza, 1987–2009*, 27 CONFLICT MGMT. & PEACE SCI. 386, 388–89 (2010) (describing democracies' policy of "sacrifice reduction" based on "casualty aversion"); Thomas W. Smith, *Protecting Civilians . . . or Soldiers? Humanitarian Law and the Economy of Risk in Iraq*, 9 INT'L STUD. PERSP. 144, 146 (2008) (stating that a "zero-casualty policy implies the lopsided use of force").

⁸¹ See BRIAN OREND, *THE MORALITY OF WAR* 125–27 (2006).

⁸² COOK, *supra* note 75, at 117–28.

⁸³ INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGO., FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA, para. 49 (2000), *reprinted in* 39 I.L.M. 1257 (2000).

⁸⁴ *Id.* at paras. 56, 89–90 (discussing the pilot's ability to observe the target at night and the presumably accurate intelligence gathered by NATO about the target). In this context, attempts at portraying the laws of war in a more "humanitarian heroic" way through appeals to human dignity or human rights are, in the end, just that, namely attempts to transcend the framework of the laws of war altogether. See, e.g., Eyal Benvenisti, *Human Dignity in Combat: The Duty to Spare Enemy Civilians*, 39 ISR. L. REV. 81, 85–91 (2006) (analyzing "armies' duties towards enemy civilians during hostilities under the principle of human dignity"). This Article does not discount these possibilities entirely and shall return to them later to examine how the particular circumstances of drone warfare and its occasional radical asymmetry might lead us to think of it as operating within an entirely different framework. But at this stage, it should be noted that the more orthodox understanding of the laws of war as a tradition is as firmly rooted as one that mediates between military necessity (including the need to protect one's soldiers) and humanity and which lends itself well to an understanding that one's soldiers cannot be sacrificed lightly even to further minimize civilian casualties.

in being fundamentally indiscriminate.⁸⁵ As has been seen, in the same way that the laws of war will collapse as a result of being excessively utopian, international humanitarian law will implode as a result of being too apologetic. At best, the laws of war may impose what might be described as a duty of moderate fortitude, one that involves taking some risks to the mission rather than to one's life, or not engaging in a mission at all, which is always at least theoretically an option.

But it will forever be difficult, within the categories of positive international humanitarian law (as opposed to moral and ethical thoughts on the scope of desirable duties to civilians),⁸⁶ to argue that this sort of tradeoff ought to be strongly or systematically resolved in a way that ends up sacrificing one's troops for some greater humanitarian good. In all likelihood, when it comes to one's combatants, there may even be an ethical obligation to use drones when available rather than risk one's troops if the State has the ability to do so.⁸⁷ Within the fairly considerable margin opened up by Additional Protocol I in terms of collateral damage, as long as an attack is not fundamentally indiscriminate, there is considerable margin for an attacker to minimize risk to himself—essentially at the expense of civilians who happen to be a little too close to a target.⁸⁸

B. How Drone Warfare Affects the Basis for the Laws of War's Tolerance of Collateral Casualties

It is these assumptions that drone warfare arguably fundamentally challenges. All of the above—namely the understanding that collateral casualties will occur because absolutely minimizing them would involve at least some significant risk to the attacker—apply *so long as there is effectively a tradeoff* between the attacking military's lives and those of civilians. But if a weapon can discriminate in conditions of absolute safety for its manipulator (i.e., if the marginal cost of discrimination is very weak to nonexistent) then one would have correspondingly little understanding for that discriminatory capability not being maximized. A drone might be relatively less discriminatory than an infiltrated sniper, but what it loses in terms of discriminatory potential it would arguably more than gain in terms of sheer lack of risk to the human operator. It is here that the nature of the dilemma changes fundamentally and we enter a normative terrain that is quite unique to this unprecedented era of distance warfare. As Professor Kahn puts it,

⁸⁵ For example, lobbing V2 rockets into the United Kingdom kept the Germans safe but evidently led to deliberately indiscriminate bombing in the same way that large scale bombardments of entire German cities kept Allied airmen relatively safe but at considerable cost to German civilians.

⁸⁶ See Walzer's commendation of private Richards who screamed a warning before throwing grenades into cellars in France, lest civilians be killed rather than German soldiers (explaining that this is what we expect of soldiers). MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 151–53 (1977).

⁸⁷ See Bradley Jay Strawser, *Moral Predators: The Duty to Employ Uninhabited Aerial Vehicles*, 9 J. MIL. ETHICS 342, 343 (2010).

⁸⁸ Additional Protocol I, *supra* note 38, art. 50.

“the drone is the technological equivalent of the assassin: it does the assassin’s work but without the risk of personal presence.”⁸⁹

Drones potentially introduce a largely new dimension in that they are perhaps the first weapons system to be *both* highly discriminating and highly—almost entirely, in fact—safe for their users.⁹⁰ In other words, drones strongly attenuate the very tradeoff that was so problematic in the implementation of the laws of war between getting closer and taking greater risks to oneself or shooting from a distance and offloading risks onto the enemy civilian population. To use the terminology of Professor David Luban, drones offer the benefits of the collateral casualty minimizing scenario known as Close Engagement and the safety maximizing scenario of Distant Engagement.⁹¹ This will then inevitably show collateral casualties and damage as a result of drone strikes in a very different light because such casualties will be seen as having occurred *despite* a drone’s precise targeting potential *and* ability to protect the operator’s life. The terms of the equation will therefore surely change radically because one is no longer comparing similar or at least commensurable things (i.e., lives versus lives) but life on the one hand (of the non-combatants) and military or material goals on the other. A State can no longer claim that to preserve the other side’s civilian lives it would need to take considerable risk to its soldiers’ lives—the argument that was typically heard in the context of the NATO bombing of Serbia and that is so perplexing for the laws of war.⁹²

Under those conditions, it will be disingenuous to claim the benefit of collateral damage that is legally tolerated under Additional Protocol I in conditions that do not approximate the factual and normative scenario historically contemplated when Protocol I was adopted. It may be even more disingenuous in a context where there is already a lingering suspicion that armies only too willingly abuse the “collateral damage exception.”⁹³ It is not just the case, therefore, that drone warfare allows greater compliance with the laws of war; it also exposes, at least in its traditional form, the laws of war’s continued imbrication with violence and their increasingly outdated character. It is almost as if toleration for collateral harm were becoming anachronistic given the ability to avoid it. Even as the positive law remains what it is through typical sociolegal inertia,⁹⁴ it is inevitable that the kind of compromise the laws of war struck historically between the principle of military necessity and that of humanity will be reassessed in light of

⁸⁹ Paul W. Kahn, *Imagining Warfare*, 24 EUR. J. INT’L L. 199, 200 (2013).

⁹⁰ Beard, *supra* note 2, at 409–10 (pointing out that drone attacks “involve[] a previously unimaginable level of safety for the faraway crew conducting the attack, an aircraft that could ‘loiter’ over targets unimpeded by the limits of human pilots, and an extraordinary level of legal review for an air strike in progress”).

⁹¹ Luban, *supra* note 77, at 8–9.

⁹² See INT’L CRIMINAL TRIBUNAL FOR THE FORMER YUGO., *supra* note 83, at para. 90.

⁹³ See Cronin, *supra* note 5, at 175, 184.

⁹⁴ There appears to be very little enthusiasm to adopt new instruments on the use of force.

radically changing technological conditions, and how those conditions interfere with the underlying moral substratum of war's regulation.

Several caveats need to be added to this broad brush. First, considering the added capabilities that drone warfare provides, there remains the possibility that an opportunity to strike a very significant military target will arise that is unique and commands a measure of risk-taking vis-à-vis civilians. In other words, drones greatly augment the ability to strike at military targets without hitting civilians, but they cannot eliminate that risk altogether. There may be military opportunity costs involved in a decision to not strike at a certain point that require a rapid reaction because it is possible that the combatants will become unreachable afterwards. If any risk were involved to civilians, presumably the military advantage would have to be considerable. Second, the added capability of drones cannot do much about otherwise lawful targets that surround themselves with civilians, thus maximizing the risk to the attacker of causing collateral casualties. Even if the attacker is not relieved of his responsibilities under the laws of war because the other party is itself in violation, there may be cases where the attacked party's systematic endangerment of civilians effectively limits what drones can do. In that case, drones may not have any significant advantage over conventional weapons. Third, one must take into account the risk that, in trying to minimize civilian casualties, a drone will get too close or hover for too long and will be shot down. Although drones all but eliminate the danger to combatants using them, they obviously replace combatants with a valuable piece of military equipment. One commentator has pointed out that "it doesn't even really matter if the drone crashes."⁹⁵ Yet losing a drone to enemy fire might not be a small loss in terms of military advantage—not simply because of the economic cost of drones, but in some circumstances because actors on the ground may have the ability to derive some technological or intelligence—not to mention propaganda—benefit from the drone.

VI. DRONE WAR AS NOT-WAR?

A. *Drones, Radical Asymmetry and the End of "Battle"*

Beyond the way in which drones redefine the boundaries of acceptable collateral damage lies an arguably deeper and more troubling issue that challenges the humanitarian edifice altogether. It is of course possible to imagine drones being used by two regular armies on something resembling a conventional battlefield, and the future may yield just such a development. But there does seem to be a natural affinity between drones and asymmetrical warfare, in that drones are particularly appropriate when deployed against a low-tech enemy with little or no air defense capability.⁹⁶ In effect, "killing" drones have mostly been deployed in

⁹⁵ Crispin Andrews, *Smart Warfare*, 7 *ENGINEERING & TECH.* 56, 56 (2012).

⁹⁶ See Mégret, *supra* note 23, at 151 (discussing how drone warfare evolved in response to terrorist threats after September 11).

contexts where only one side had them.⁹⁷ They tend to further reinforce the asymmetry of otherwise already asymmetrical conflicts. States, even though they have widely divergent means, have somewhat similar broad organizational and industrial capabilities; nonstate actors on the other hand are typically at a considerable disadvantage in terms of technology development (except, precisely, when they have State support). Drones and robots in this context radicalize asymmetry by ultimately destroying the element of danger to one side and increasing it to stratospheric heights for the other. They transform the drone makers and operators into demigods rather than combatants, who can decide who lives and who dies. Those on the receiving side of drones have few defensive options if any, except to go into more or less permanent hiding.

As this Article has previously hinted, acquiring such an extreme advantage is arguably part of any warring faction's long-term aspiration in war. The whole history of war could be retold as an effort to make it easier and less risky for one's side to inflict violence, and surely it is hard in principle to make a case against soldiers better shielding themselves.⁹⁸ Yet paradoxically, this ultimate and unexpected success in the mastery over the course of war may be paid in practice by the demise of the very activity over which it was supposed to gain the upper hand. Indeed, perhaps the strongest point that can be made about why drone warfare is normatively problematic, at least in the conditions of radical asymmetry in which it has so far been typically practiced, is that it creates such a wide chasm between those who have drones and those who do not *that it destroys the idea of war as a contest that, while potentially uneven, is essentially still a contest between (humanitarian) equals, indeed a contest tout court.* This idea of "war as contest" is in a sense the unformulated assumption of the laws of war—an idea that one would struggle to find in the Geneva Conventions,⁹⁹ but which historically undergirds the entire idea of warfare. It is on the basis that both sides can harm the other's combatants (and incidentally, its non-combatants) that a sort of historical understanding has evolved that each side can protect itself from that harm in self-defense.¹⁰⁰ The assumption, some would even say the "bond of mutual risk,"¹⁰¹ therefore is a powerful element in minimally socializing what is otherwise a human activity premised on the breakdown of ordinary social relations.

⁹⁷ Andrews, *supra* note 95, at 56–57 ("The latest technological advances seem to have made waging war a less risky business. But only for the big guns. You wouldn't catch the US sending drones over Beijing or deploying smart bullets against the Russians.").

⁹⁸ David Bell, *In Defense of Drones: A Historical Argument*, NEW REPUBLIC (Jan. 27, 2012), <http://www.newrepublic.com/article/politics/100113/obama-military-foreign-policy-technology-drones>.

⁹⁹ Although the very idea of an armed conflict might be understood to imply that a conflict is actually occurring, not simply that one side is entirely at the mercy of the skies.

¹⁰⁰ Paul Kahn, *The Paradox of Riskless Warfare*, PHIL. & PUB. POL'Y Q., Summer 2002, at 1, 3.

¹⁰¹ P.W. Singer, *Military Robots and the Laws of War*, NEW ATLANTIS, Winter 2009, at 25, 42.

Accordingly, drone warfare threatens to change the entire sociocultural experience of warfare, and sooner or later, the laws that take their cue from and purport to govern it. The use of drones in a context where only one side has access to that far superior technology renders war essentially meaningless as a concept. Rather, drone attacks become more like a continuous, one-sided imposition of violence in which one side pays with their lives and limbs, whilst the other side pays, at best, with economic costs. As one commentator once put it, “Here war sheds all features of the classical duel situation and, to put it cynically, approximates certain kinds of pest control.”¹⁰² But “a conflict devoid of any physical risk falls outside the parameters of the moral reasoning that sustains the law of armed conflict.”¹⁰³ As a result, there is theoretically no escaping the fact that the real humanitarian cost of drone warfare is in terms of the irremediable normative breakdown of what it means to be at war, and the corollary understanding that war has moral bounds. This is a point made most compellingly by Professor Paul Kahn:

If the fundamental principle of the morality of warfare is a right to exercise self-defense within the conditions of mutual imposition of risk, then the emergence of asymmetrical warfare represents a deep challenge. A regime capable of targeting and destroying others with the push of a button, with no human intervention but only the operation of the ultimate high tech weapon, propels us well beyond the ethics of warfare. Such a deployment of force might be morally justified—it might be used to promote morally appropriate ends—but we cannot appeal to the morality of warfare to justify this mode of combat.¹⁰⁴

One of the ensuing dangers for the laws of war has sometimes been expressed as that the “replacement of humans by virtual combatants and the corresponding lack of concern about the death or capture of military personnel could even challenge two conditions seen by some as limiting the willingness of States to comply with and enforce their law-of-war obligations in conflicts with terrorists: reciprocity and symmetry.”¹⁰⁵ The collapse of reciprocity and symmetry has an impact on the laws of war, but it is not principally, and perhaps not at all, on the State that has access to “virtual combatants.” After all, that State has managed to seamlessly combine maximum military efficiency and humanitarianism, potentially bringing about, perhaps for the first time in history, a fusion of what were thought to be the polarizing principles of the Law of Armed Conflict:

¹⁰² HERFRIED MÜNKLER, *THE NEW WARS* 132 (2005).

¹⁰³ Charles G. Kels, *Closing Argument: At the Outer Bounds of Asymmetry*, 11 J. MIL. ETHICS 223, 231 (2012).

¹⁰⁴ Kahn, *supra* note 100, at 3.

¹⁰⁵ Beard, *supra* note 2, at 442–44.

necessity and humanity.¹⁰⁶ If anything, the side that has absolute risk-free superiority should endorse even higher humanitarian obligations,¹⁰⁷ and may well be inclined to do so for various self-interested strategic reasons.

The problem lies more, if anything, with how this spectacle will affect the ability and willingness of the other side¹⁰⁸ to engage with the laws of war. If one is not “at war” but merely engaged in a continuous campaign of killing one’s enemies, wherever they may be, then it will be all the more difficult to convince the other side, or for some impartial and neutral actor to convince them, that we are indeed in a regulated activity that they should participate in. There will be, as it were, nothing in it for them. For the most part, there will be no laws of war for them to respect since they will never see the enemy and even if they managed to down a drone by extraordinary chance, they can inflict very little pain on the other side. Now it may be that the enemy is more interested in simply terrorizing civilians and not in waging war in the first place, in which case drones will be an equally abrupt response. In that case, the side that uses the drones is not interested in engaging in war because it sees the “other” as a threat that is perhaps altogether beyond the law. Drones will simply be the last nail in war’s coffin.

But it may also be that drones will lose any prospect of war-like engagement with parties that might otherwise have been interested in fighting a battle according to the laws of war. There is, symbolically, an extraordinarily dehumanizing aspect to drone warfare in that it deprives its targets from ever even being able to engage in a humanitarian gesture that would manifest their good will and constitute them as moral agents of war. Enormous disproportion in means will inevitably encourage the weaker party to compensate what it does not have in terms of technological might by skirting the rules. We have been there before with wars of national liberation in the 1960s and ‘70s.¹⁰⁹ The adoption of Additional Protocol I seemed to implicitly acknowledge that for the normative enterprise to be sustainable, the weaker party in asymmetrical warfare must be able to escape some of the strictures of the laws of war.¹¹⁰ High-tech warfare is now threatening to

¹⁰⁶ There is a sense in which this has of course always been the ambition of law-abiding military. *See generally* DAVID KENNEDY, *OF WAR AND LAW* (2006) (discussing the development of modern warfare and our current understanding of war).

¹⁰⁷ One of the more interesting points in this context is the suggestion that not even enemy combatants ought to be targeted since they are incapable of causing harm to one’s own combatants. *See Kahn, supra* note 100, at 2–8 (arguing that the soldier’s privilege of self-defense is subject to condition of reciprocity because soldiers are not permitted civilian reprisals); Kels, *supra* note 103, at 231.

¹⁰⁸ The above quote assumes a little too conveniently that the other side is a terrorist; however, it could also be a legitimate rebel movement or a technologically challenged state.

¹⁰⁹ *See* Colin Legum, *Guerilla Warfare and African Liberation Movements*, *AFRICA TODAY*, Aug. 1967, at 5 (1967) (describing the role of guerilla warfare in the asymmetric wars of the African Liberation Movements).

¹¹⁰ *See* MICHAEL L. GROSS, *MORAL DILEMMAS OF MODERN WAR: TORTURE, ASSASSINATION, AND BLACKMAIL IN AN AGE OF ASYMMETRIC CONFLICT* (2010); Cian

make even guerilla warfare of the traditional kind impossible, leaving few outlets for legal or quasi-legal violence for nonstate actors.

After a while, it may become difficult to determine whether drone warfare is merely a response to the battlefield evading tactics of the “terrorist,” or whether it is not also a cause of the combatants deserting the battlefield in the first place. In all likelihood, both are part of a self-reinforcing symbiotic loop that sees both sides symbolically and effectively abandoning the battlefield. In fact, drone warfare can be seen as the powerful and technologically sophisticated version of the asymmetric warfare tactics of the weak. It, therefore, awkwardly shares something of the ethos of avoidance that it despises in the enemy, even though it does so legally (by maximizing its technological advantage) where the other side does so illegally (by avoiding conventional battle although increasingly, there is no conventional battle to be found). It may also reveal an uncomfortable truth, in that over time the laws of war privilege the powerful by sanctifying their military technological prowess as more conducive to a humanitarian outcome. Additionally, it purports to lock the technologically challenged party in a confrontation that it is sure to lose.¹¹¹

B. The “Putting Up a Fair Fight” and the “Decline of War” Arguments Distinguished

Note that this point is different from the suggestion that the technologically superior army should take greater risk and fight on the battlefield. There is certainly no normative principle that says one ought to “expose oneself to a good fight,” and refrain from killing enemies at no risk to oneself even though one can. Perfidy in the laws of war only covers situations where one masquerades as a “friendly,” for example, obviously not situations where one is merely trying to maximize defense through distance or camouflage. As Professor Laurie Blank put it, “The law of armed conflict—or international humanitarian law (whichever you prefer)—does not require a ‘fair fight’. Rather, it requires that each side ‘fight fairly.’”¹¹² The chivalry route is therefore likely the wrong way to address the problem from a legal point of view. It thrives on an ethos that is a little passé,

O’Driscoll, A *‘Fighting Chance’ or Fighting Dirty? Irregular Warfare*, Michael Gross and the Spartans, 11 EUR. J. POL. THEORY 113 (2012).

¹¹¹ René Provost, *The Move to Substantive Equality in International Humanitarian Law: A Rejoinder to Marco Sassóli and Yuval Shany*, 93 INT’L REV. RED CROSS 439 (2011) (noting arguments that “the rules of the laws of war will typically legitimize the tactics of the powerful parties and invalidate those of very weak ones”).

¹¹² Kenneth Anderson, *Laurie Blank on Mark Mazzetti’s ‘The Drone Zone’—Last in Series from Lewis, Dunlap, Rona, Corn, and Anderson*, LAWFARE (July 21, 2012, 10:37 AM), <http://www.lawfareblog.com/2012/07/laurie-blank-on-the-mazzetti-the-drone-zone-last-in-series-from-lewis-dunlap-rona-corn-and-anderson>; see also Strawser, *supra* note 87, at 356 (presenting the idea of a moral theorist who is interested in whether a warrior engaged in a just war should engage in a fair fight, rather than whether any one merely under the jus in bello should do so).

especially when applied between combatants. Additionally, it is based on an assumption of common professional code beyond enmity that is largely absent in today's asymmetrical warfare and which we may have reason to be morally wary of as it historically sidelined civilians.

The point is precisely that the superior party cannot be asked to change anything it is doing from within the tradition of the laws of war. This does not mean, however, that the argument about the unfairness of drone war is entirely beside the point. Rather, it suggests a difference between behavior that is *in violation* of the laws of war and behavior that, whilst entirely legal, might be said to be more generally *destructive* of the laws of war through the disabling of the sort of implicit assumptions within which war is embedded. These are two different notions and failure to distinguish them risks obscuring the debate. The point about drones, then, is not that their use is illegal but that their use belies the relevance of a model of violence historically incarnated by the idea of war, which is quite a different argument.

A useful analogy is one that the author of this Article has explored elsewhere between the laws of war and sports.¹¹³ There is obviously a difference between violating the rules of a sport and achieving such crushing superiority in the sport that the opponent not only loses their taste for the game, but the game in fact becomes no game at all. So imagine, for the sake of illustration, a game of tennis in which an average player is pitted against Roger Federer. In addition, Federer uses a top-notch, state of the art racket, whilst the average player has to use a 1930s-style wooden racket. There is of course no obligation for Federer to concede an easy point to the opposite player, even though we might think it would be nice for him to do so. Moreover, we would certainly not argue that Federer winning in three straight sets without losing a single point was in violation of the rules of tennis. By the same token, we might understand if the other player decided this was not a psychologically or existentially interesting practice for him to engage in and quit the game entirely, perhaps looking for an alternative game to play. Furthermore, we might do the same, leaving a mindless show that had none of the attributes of what makes a game interesting and worth watching.

Now of course one of the many differences between tennis and war is that the former is played on the basis of consent, whereas the latter is played whether a participant wants to or not on the basis of the existence of a particular real world configuration (i.e., an armed conflict). So in a sense, those who refuse to "play the game they will forever lose" are not entitled to withdraw from a conflict under the laws of war in the way one could pull out of a game that one had lost taste for. Nonetheless, in the real world we must understand that the willingness of actors to play by the rules of war cannot be taken for granted, either because nonstate actors are not actively involved in the development of those rules and invested in their existence, or more generally, because they feel that they stand to lose more from playing that particular game. If anything the applicability of those particular rules

¹¹³ Frédéric Mégret, War, Sports and the Law: The Laws of War as "Rules of the Game" (Nov. 24, 2008) (unpublished manuscript) (on file with the author).

may be what is at stake, something quite evident in the context of the War on Terror.

VII. NOVELTY OR CONTINUITY? THE LAWS OF WAR AND EXOGENOUS TECHNOLOGICAL SHOCKS

The irony is that mastering a way of waging war that is eminently legal ends up being the death knell of the laws of war—at least as we know them. This is so not because it may relatively safeguard civilians,¹¹⁴ but because that ability is gained through such military superiority that any sense of a contest dissipates from war. There is a deeper lesson in this for the laws of war, which run the risk of creating incentives for technological developments that in turn undermine its core model. As Charles Kels has argued, “A corollary to the incongruity of riskless warfare is to query whether the ensuing breakdown of ethical and legal norms unwittingly encourages the very instability that the law of war attempts to control, thereby endangering the civilian populations of all parties to the conflict.”¹¹⁵

One way of looking at these developments in the broader perspective is through an examination of similar historical precedents to the development of drones. One might look at the problem as one of exogenous technological shocks affecting the normative system that is international humanitarian law. Because the very goal of war is to attain superiority over one’s enemies, it is only natural that from a military standpoint armies will seek to develop superior weapons. Every now and then, however, a game-changing technology will come into play that creates such an asymmetry that it will lastingly put the laws of war off keel.

A classic example is the invention of the crossbow, which conferred a very considerable military advantage to those troops that mastered its art; another example is the onset of modern aviation and the possibility, only just barely contemplated toward the end of World War I, of aerial bombardment. In both cases, an attempt was made to reinstate the laws of war’s broad symmetry by trying to outlaw the weapon. In the case of the crossbow, Pope Innocent II famously pronounced it to be “hateful to God and unfit for Christians”;¹¹⁶ in the case of aerial bombardment, a Commission of Jurists was set up as part of the 1921 Washington Conference on the Limitations of Armaments, which adopted a fairly restrictive code for aerial warfare.¹¹⁷ It is no surprise that calls to severely regulate or perhaps even outlaw certain means and methods of combat were at their strongest in conditions of technological asymmetry, that is, when one side—the

¹¹⁴ The relative safety of civilians is something that the side that benefits from such safety should be satisfied with and which cannot be a bad thing for the humanitarian project.

¹¹⁵ Kels, *supra* note 103, at 223.

¹¹⁶ BERNARD BRODIE & FAWN M. BRODIE, FROM CROSSBOW TO H-BOMB: THE EVOLUTION OF THE WEAPONS AND TACTICS OF WARFARE 35–37 (Ind. Univ. Press rev. & enlarged ed. 1973) (1962).

¹¹⁷ Hamilton DeSaussure, *The Laws of Air Warfare: Are There Any?*, 1975 MIL. L. REV. 287, 290 (1975).

side that mastered the technology—stood to suffer disproportionately from such regulation.

The attempts at regulating both the crossbow and aerial bombardment were almost unmitigated catastrophes.¹¹⁸ In the case of the crossbow, the weapon was first only prohibited between Christians, allowing crusaders to use it at will against the Saracens. But it was quickly used between Christian nations as well, ultimately showing that a technological advance such as this was too precious to be relinquished against real foes.¹¹⁹ The Washington Conference never led to a convention and was essentially a fiasco.¹²⁰ In both cases, it seems, the normative effort was suspected of unduly reining in technological progress under a humanitarian guise. These efforts did not add much to what could be distilled from general principles of the laws of war and unduly restricted States' abilities to develop a military advantage. If the precedents of the crossbow, aerial bombardment and colonial warfare are any indication, then one would think that efforts to regulate drone warfare would be headed the same way because it simply beggars belief to think that parties who have such an edge would voluntarily limit, let alone relinquish, their advantage.

Beyond mere differentials in technology, it seems that what is at stake is something deeper relating to the very structuration of war as a social activity and the ability to define it. It should come as no surprise in this respect that the normative register of the crossbow mapped a not so subtle civilizational divide. Ultimately the question was not whether the crossbow was inherently unlawful, but against whom it was inherently unlawful and against whom it might be used. Similarly when it came to the 19th century laws of war the question was as much what the laws should regulate as whom they should apply to, and especially, against.¹²¹ Aerial bombardment of civilians, as well as the use of gas against them, was pioneered in the deserts of Abyssinia. Whether it be the Saracens or "savages," it was the presumed unwillingness or inability to respect the laws of war that justified the use of extraordinary techniques that the West claimed to shun normatively in its midst (although obviously not necessarily in actual fact). As Professor Sam Moyn puts it, there is arguably "a continuum, not a break, between the aesthetics, subjectivity, and morality of colonial warfare and its successors today, including in drone campaigns."¹²² In that respect, drones are less a radical novelty than specifically a continuation of the tradition by which the laws of war both include and exclude, socialize and desocialize into international society.

Arguably, however, drone warfare marks less an attempt to push certain types of warfare beyond the law, than it is an effort to draw on the law for strategic gain.

¹¹⁸ *Id.*; CHARLES G. FENWICK, INTERNATIONAL LAW 667, 677 (1965).

¹¹⁹ BRODIE & BRODIE, *supra* note 116, at 35–37.

¹²⁰ DeSaussure, *supra* note 117, at 290.

¹²¹ Frédéric Mégret, *From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Humanitarian Law's 'Other,'* in INTERNATIONAL LAW AND ITS OTHERS 265 (Anne Orford ed., 2006).

¹²² Samuel Moyn, *Drones and Imagination: A Response to Paul Kahn*, 24 EUR. J. INT'L L. 227, 229 (2013).

The argument for drone use is very much formulated as an argument for *legal* drone use because the law is largely perceived as enabling the sort of use of force that the US in particular has in mind rather than constraining it, precisely because drones seem both highly effective and highly humanitarian. Drone use, in other words, is not really about invoking the “exception” of warfare against terrorism but about insisting that one can wage war even against a foe that is intent on not doing so. As Professor Moyn argues, “it is not the loss of ‘classic interstate war’ as a real or imagined paradigm but the application of old and new humanitarian norms born in it to continuing irregular war that may mark the fundamental novelty.”¹²³ Insisting on the need to continue to respect the laws of war is, paradoxically, one of the ways in which one can show that the other side is unworthy of them even as one continues to benefit from their considerable legitimization of the use of force.

In this context, three scenarios for the future of warfare-as-defined-by-asymmetrical-drone-use seem plausible. The first is that, failing to level off with their more powerful technological adversaries, groups that have limited access to drone technology will be pushed even further into a rejection of the conventional warfare model. War would thus cease to be pertinent as a basic scenario for the bilateral use of violence, or would at least become unrecognizable through persistent subtraction of at least one purported player in the “game.” The second scenario is of course the one that proved most pertinent in the context of the crossbow and aerial bombardment, namely that most armies rushed to develop a similar capability in a way that might not ensure victory but at least “rescued” war from becoming an entirely one-sided killing enterprise and therefore a normative investment that the other side had no interest in making. In this scenario, it is technological diffusion and relative homogenization that saves the laws of war’s regulatory potential. As I have hinted, even though drone warfare is currently the weapon of choice of asymmetrical warfare, it may well be that this is merely a transitory phase and that drones, rather than heralding or at least symbolizing a new type of warfare, will merely be “digested” by various existing modes of institutional violence.

The third scenario, perhaps the most relevant, is that we are in what may be a long period of transition in which drones continue to shape warfare in a very asymmetrical direction, but in which various normative options offer themselves at least to the party that has drones and must make sense of its superiority. At one end of the spectrum, the use of drones may inaugurate the dismantling of restraints on war through a realization that there is no legitimate “adversary,” no one on the other side still capable or willing of engaging the drone manipulators on their terms. This might then give rise, rather somberly, to a view of “statecraft, as the administration of death,” a “high-tech form of a regime of disappearance” whose inspiration is Machiavelli;¹²⁴ and in which the killing power will take advantage of the fact that it is neither in a situation of war nor in a situation where human rights

¹²³ *Id.* at 231.

¹²⁴ Kahn, *supra* note 89, at 226.

obligations are owed. In many ways, this has been the preferred route of the war on terror in the last decade.

At the other end of the spectrum, the more technologically endowed party could continue to seek to wage war even against parties that were committed not to wage “war” against it, effectively applying a sort of unilateral laws of war and reinforcing the notion that asymmetrical norms must correspond to asymmetrical conflicts. Perhaps, then, the application of *sui generis* rules, somewhere at the intersection of the laws of war and international human rights law, might make most sense with regards to the evolving challenges of drone warfare—one in which the heightened capacity of the attacker and his ability to “wage war without really waging one” is matched by an added scruple in terms of safeguarding civilian lives.¹²⁵ Drone warfare might be seen as a bizarre synthesis of war-making and policing,¹²⁶ requiring a new historical compromise between law and morality. It would conceptualize drone fighting as part of a body of norms rooted less in expectations of reciprocity or in some fundamental obligation owed to those targeted as human beings, than in a sense that with immense power must come heightened responsibilities. Although this path might still be associated with a sort of “exit” from war in that it seems to burden the technologically superior side with obligations that it cannot expect the asymmetrically disadvantaged side to reciprocate, it could also be understood as maintaining the very ethos of war by keeping alive a sense of drone operators’ military self-worth and human dignity as a particular way of ethically living up to one’s potential for death and destruction.¹²⁷

VIII. CONCLUSION

This Article has sought to explore whether drones raise a specific humanitarian issue, that is, one not raised in similar fashion by other existing weapons. It has sought to cautiously advance an argument that many of the worrying aspects of drones are either not humanitarian or are not specific to drones. This does not discount the importance of the issues that arise, but simply sets them apart from the limited ambitions of the Article. Although shunning any strong claim about the inherent character of any weapon, including drones, this Article has argued that weapons do not exist in the abstract and in practice almost always have to be understood against the background of certain assumptions about their typical use. Drones may cause significant collateral casualties, but how significant

¹²⁵ The idea of a “differential laws of war,” in that respect, is clearly one of the most relevant normative debates of the day. *See generally* Gabriella Blum, *On a Differential Law of War*, 52 HARV. INT’L L.J. 164 (2011) (describing the idea of differential laws of war).

¹²⁶ Kahn, *supra* note 100, at 4.

¹²⁷ *See generally* Shannon E. French, *Sergeant Davis’s Stern Charge: The Obligation of Officers to Preserve the Humanity of Their Troops*, 8 J. MIL. ETHICS 116 (2009) (describing ways to maintain the self-worth and sense of human dignity of military personnel).

is a vexed issue from the perspective of the laws of war. The more interesting point seems to be that, regardless of the answer to the previous question, drone casualties often appear unnecessary or disproportional. This Article argues that this is less because of the absolute or relative numbers of such casualties than because of the particular expectations that surround drones. Drones are not only potentially highly discriminating weapons; they are also, uniquely in the history of warfare, immensely safe weapons for their users. This creates an expectation that they will be used in ways that are highly protective of civilian life *because they can*.

Beyond changing the ability of a party to comply with the laws of war, this Article has argued that drones influence the delicate balance between the principles of necessity and humanity and forces us to reexamine assumptions about the permissibility of collateral casualties. The possibility of collateral casualties was always contemplated not just because accidents happen, but because of an implicit understanding that there is a tradeoff between the attacker's security and that of civilians in the vicinity of military targets. This has spurred considerable reflection about how far soldiers should be willing to go to put their lives on the line in an effort to minimize civilian casualties, which from a legal point of view typically receives a fairly conservative answer (i.e., there is very little obligation to sacrifice oneself for a greater humanitarian good). However, now that the attacker is in some cases virtually risk free, new questions are bound to arise about the humanitarian tolerance of collateral casualties. The better view, this Article has argued, is that this change in the technological circumstances of war should have an effect in the direction of greatly reducing the tolerance for collateral casualties. This may already be the public's perception even though the law itself is somewhat slow to follow, perhaps because drone-detaining powers are keen to have their cake and eat it too—that is, they want both a technology that should really allow the quasi elimination of collateral casualties and the law's continued tolerance for such casualties. Nonetheless, in continued conditions of technological asymmetry one might expect the laws of war themselves (or the "laws of drone use" as something distinct) to also evolve along asymmetrical lines. The risk otherwise is that war will become so lopsided a social activity that the weaker party will have very little incentive to participate in it, let alone comply with the laws governing it; indeed, the risk is that the idea of war as a particular form of regulated social violence will become obsolete and misleading. Rather than seek a return to war as it was (or is imagined as having been), drones may offer an opportunity to reflect on the paths that should be taken to regulate overwhelmingly dominant force in conditions where it has marginalized much of what made war historically and normatively relevant.