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## **The Armed Drone**

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(in J. Hohmann and D. Joyce (eds), *International Law's Objects* (Oxford University Press, 2018))

### Introduction

The armed drone, as an object and a symbol, is everywhere: in the news, in popular culture, in scholarship. Through and beyond its aesthetic and technical features, this chapter argues that the drone signifies the changing relationship between law and war. The object communicates a set of promises, of war as precise and asymmetrical governance: promises that this chapter assesses and critiques through a discussion of the object's material and symbolic functions.

The importance of drones for the conduct of war is borne out by practice: the use of armed drones in the last fifteen years has developed dramatically. While initially developed for intelligence purposes in the mid-1990s, drones were soon armed.<sup>1</sup>

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On February 4, 2002, the CIA first used an unmanned Predator drone in a targeted killing.<sup>2</sup> Thousands of drone strikes have been recorded since.<sup>3</sup> The technology is proliferating: Eleven states, including the US, the UK, Israel, Pakistan, China and Nigeria, and four non-state actors now own armed drones, with the avowed potential of further proliferation.<sup>4</sup> What is more, armed drones are the tip of an expanding iceberg of unarmed drones used for security and surveillance purposes, including by the United Nations in peacekeeping operations.<sup>5</sup> Finally, the military/security proliferation lies on a bolstering base of private/commercial proliferation: drones delivering packages,<sup>6</sup> drones delivering images,<sup>7</sup> drones as a hobby.<sup>8</sup>

But it is not just the quantity of armed drones and their use that is of significance. It is also the particular quality of this use and the overall policy that they are facilitating. Armed drones are seen as part and parcel of, and enmeshed in, particular campaigns and strategies of armed force. They are thus associated with a way of war that is or seems new and that is or seems in tension with the traditional paradigm of war: the borderless, asymmetrical, War on Terror.

Finally, and what is more, the object's significance cannot be reduced to its use. The

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<sup>1</sup> The Predator #3034 drone was the first to be armed (with Hellfire missiles) in 2001. See Sue Baker, 'Predator Missile Launch Test Totally Successful' *US Air Force* (27 February 2001) <<http://www.dau.mil/pubscats/PubsCats/PM/articles01/afns1m-a.pdf>> accessed 16 February 2017.

<sup>2</sup> See further P. Cockburn, *Kill Chain: The Rise of the High-Tech Assassins* (Verso, 2015). See also Richard Whittle, *Predator: The Secret Origins of the Drone Revolution* (Henry Holt and Co 2014) and P. W. Singer, *Wired for War: The Robotics Revolution and Conflict in the 21<sup>st</sup> Century* (Penguin 2009).

<sup>3</sup> The Bureau of Investigative Journalism is an invaluable source for the recording of drone strikes. See <<https://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/>> accessed 16 November 2016.

<sup>4</sup> A useful database has been compiled by the New America Foundation and can be accessed at <<http://securitydata.newamerica.net/world-drones.html>> accessed 16 February 2017. See also Remote Control Project, 'The Hostile Use of Drones by Non-State Actors against British Targets' (January 2016) at <<http://remotecontrolproject.org/report-civilian-drones-at-risk-of-being-used-by-terrorist-and-other-hostile-groups/>> accessed 16 November 2016; E. Schmidt, 'Papers Offer a Peek at ISIS' Drones, Lethal and Largely Off-the-Shelf, *New York Times* (31 January 2017) at <<https://www.nytimes.com/2017/01/31/world/middleeast/isis-drone-documents.html>> accessed 16 February 2017.

<sup>5</sup> See the interview with Hervé Ladsous, The United Nations Under-Secretary-General for Peacekeeping Operations in Masimba Tafirenyika, 'Drones are effective in protecting civilians' *Africa Renewal* (April 2016) <<http://www.un.org/africarenewal/magazine/april-2016/drones-are-effective-protecting-civilians>>; 'Performance Peacekeeping: Final Report of the Expert Panel on Technology and Innovation in UN Peacekeeping' 22 December 2014 at <<http://www.performancepeacekeeping.org/>> accessed 16 February 2017.

<sup>6</sup> Roger Aitken, 'Delivery Wars: Market "Takes Off" As Amazon Invests In UK Drones & Jets' *Forbes* (6 January 2015) <<http://www.forbes.com/sites/rogeraitken/2016/01/06/delivery-wars-market-takes-off-as-amazon-invests-in-uk-drones-jets/>> accessed 16 November 2016.

<sup>7</sup> Angela Watercutter, 'Drones are About to Change How Directors Make Movies' *Wired* (3 June 2015) <<http://www.wired.com/2015/03/drone-filmmaking/>> accessed 16 November 2016.

<sup>8</sup> Leading to increasing efforts for registration. See European Parliament, 'Press Release: Drones: guidelines for rules on commercial and recreational use and safety' (29 October 2015) <<http://www.europarl.europa.eu/news/en/news-room/20151022IPR98819/Drones-guidelines-for-rules-on-commercial-and-recreational-use-and-safety>> accessed 16 November 2016.

object's significance overflows the object's use through the object's promise, -- or our perception of what the object promises and signifies for the future of war. The drone's perceived promise dominates our debates and is reflected in the object's image. The drone is very real, but it is also a symbol, a myth, a fixture in our imagination. Indeed, the very image accompanying this chapter, which is considered to be 'the most widely reproduced image' of a drone, is tellingly revealed to be a construct, a fiction, superimposed on stock images of the Afghan landscape.<sup>9</sup> The very real object of the armed drone is appropriated, serving as a language to convey and debate the hopes and anxieties over what it signifies, namely the new way of war. To the extent that this new way of war is accepted as 'the new paradigm', the object serves Barthes' ultimate understanding of the myth, namely that 'in the eyes of the myth-consumer...it transforms history into nature'.<sup>10</sup> History can be contested; it is ongoing; its course can be altered. Nature is entrenched. The object, by compellingly communicating the myth of 'the new paradigm', imposes it.

International legal language is at the very center of the tension between the drone's reality and its promise. International legal discourse transforms the object into normative meaning – radical or banal; catastrophic or salutary. International law is grappling with the tensions, promises and dangers that armed drones pose to its categories. As discussed below, international lawyers debate the compatibility of (the use of) drones with the principles of distinction and proportionality, their contribution to the creation of a borderless battlefield and the effects of this to the sovereignty of (weak) states, the classification of combatants and individuals who can be targeted, and the overall manifest lack of transparency and accountability in their use.

The armed drone's significance in international law and international legal debate can be explored through three perspectives/images: the image of the object itself as proliferated in the media, the image(s) the object generates for the targeters, and the image of the object for the targeted. The qualities of the object and the images it generates (of itself and of others) speak to both the promise and threat that international law(yers) see in the armed drone.

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<sup>9</sup> See Alexis C. Madrigal, 'The 'Canonical' Image of a Drone Is a Rendering Dressed Up in Photoshop' *The Atlantic* (20 March 2013) at <<http://www.theatlantic.com/technology/archive/2013/03/the-canonical-image-of-a-drone-is-a-rendering-dressed-up-in-photoshop/274177/>> accessed 16 February 2017.

<sup>10</sup> See Roland Barthes, *Mythologies* (Vintage 2009) 154. This chapter does not purport to follow the Barthesian theory unflinchingly, only to use it in order to enhance the understanding of the significance of the object in the present (international legal) discourse. See *ibid.* 131 *et seq* and 143.

## Perspective 1

### The object itself: A neutrally aggressive, remotely piloted robot.

The image present at the click of the mouse, including on the websites of military technology corporations,<sup>11</sup> suggests a sharp high-tech knife. The drone's sinister aesthetic promises a combination of the necessary aggression with cold precision. It promises a high degree of professionalism in conducting the business that is war. It further promises 'zero-casualties' for one side, combined with a professional adherence to the principles of distinction and proportionality at the other end.<sup>12</sup> It is a tool of governance, through war.

At one level, the armed drone is just another aircraft mounted with weapons. As such it is placed in the historical trajectory of air power and air bombardment. International law has attempted to regulate this method of warfare from its very early stages.<sup>13</sup> Indeed, the central legal categories of the law of targeting, namely the rules of distinction between military and civilian targets<sup>14</sup> and proportionality in the incidental loss of civilian life<sup>15</sup> are part and parcel of air warfare.<sup>16</sup> What is more, the drone can be seen as belonging to a trajectory of distancing and 'bombing from afar' which has been present in air warfare from early on.<sup>17</sup> The accentuation of this trajectory, in the period immediately preceding the production of modern drones, is the source of legal and moral anxieties. 'Smart bombs' and riskless warfare, as exemplified in the Kosovo war, highlighted the potential of air power in decisively determining battle outcome through precise bombing, while minimizing the risk to

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<sup>11</sup> See the images presented on the homepage of the Predator's manufacturer's General Atomics Aeronautical <<http://www.ga-asi.com>> accessed 16 November 2016.

<sup>12</sup> John O. Brennan, (Assistant to the President for Homeland Security and Counterterrorism, US), 'The efficacy and ethics of US counterterrorism strategy', Woodrow Wilson Center, Washington DC, (30 April 2012) in Jameel Jaffer (ed.), *The Drone Memos* (The New Press, 2016) 199, 207: "it is hard to imagine a tool that can better minimize the risk to civilians"; Harold Hongju Koh (US State Department Legal Advisor), 'The Obama Administration and International Law, Address at Annual Meeting of the American Society of International Law' (25 March 2010) in *id.*, 119..

<sup>13</sup> Hague Rules of Air Warfare, 1923, in D. Schindler & J. Toman (Eds), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (Martinus Nijhoff, 4th edn, 2004), 317. For a recent codification see Humanitarian Policy and Conflict Research (HPCR), *Manual on International Law Applicable to Air and Missile Warfare* (CUP 2013).

<sup>14</sup> See article 48 of Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection Victims of International Armed Conflicts (12 December 1977, entered into force 7 December 1978, 1125 UNTS 3) (API) and rule 1 of the International Committee of the Red Cross (ICRC) *Study in Customary International Humanitarian Law*: "The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians." See Jean-Marie Henckaerts and Louise Doswarld-Beck, *Customary International Humanitarian Law. Volume I: Rules*, (CUP, 2005), 3.

<sup>15</sup> See articles 51(5)(b) and 57(2)(a) of API and rule 14 of the ICRC's study: "Rule 14. Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited", *supra* note 14, 46.

<sup>16</sup> See article 49(3) of API.

<sup>17</sup> Charles D. Link, "Maturing Aerospace Power," *Air and Space Power Journal*, September 4, 2001.

the targeters through increasing the distance from the target. This potential, and the asymmetry involved, exemplified the dilemmas of killing from afar.<sup>18</sup> Moreover, the debate in the US administration in the 1980s over the targeted killing of specific individuals, and its distinction from proscribed ‘assassinations’, informed and preceded the 1990s’ ‘frantic development of a particular military technology’.<sup>19</sup> The Predator drone was the culmination of this process and the fulfillment of ‘the promise of air power’.<sup>20</sup>

The ‘promise of air power’ is starkly reflected in the armed drone’s design. While its inevitably phallic shape<sup>21</sup> conveys the necessary aggression of war, its sleek and neutral aesthetic tempers it with the impression of cold professionalism. Part of this professionalism is, of course, that of law and lawyers. Targeting is an activity which has been increasingly regulated, not only through subjection to legal rules, but through the involvement of lawyers in decision making at different levels and stages of the targeting process.<sup>22</sup> The increasing legalization of targeting does not necessarily contribute to limiting the use of armed force or to the perceived legitimacy of its effects.<sup>23</sup> Legalization and professionalisation of targeting, as reflected in the armed drone’s image and use, does, however, reflect how both the enabling and limiting functions of the international law of armed conflict are increasingly informing policy.

While the object resembles a warplane, it is also unlike a warplane – in its dimensions and in its materiality. Most drones are significantly smaller and lighter than an average warplane.<sup>24</sup> Importantly, there is no space and no place on it for a human being. The pilot is not part of the object. She is in fact removed, operating it from a distance. This enhances the distancing effect referred to above, while accentuating the moral issues associated with targeting from an entirely safe distance

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<sup>18</sup> Paul W. Kahn, *The Paradox of Riskless Warfare*, [2002] *Philosophy & Public Policy Quarterly* 2; Paul W. Kahn, *War and Sacrifice in Kosovo*, [1999] *Philosophy & Public Policy Quarterly* 1.

<sup>19</sup> Markus Gunneflo, *Targeted Killing: A legal and Political History* (CUP 2016), 157 and chapter 3 in general.

<sup>20</sup> See Robert A. Pape, *Bombing to Win: Air Power and Coercion in War* (Cornell UP 1996).

<sup>21</sup> With varying subtlety and critical stance the phallic symbolism of weapons, ranging from swords to military aircraft, has been an aesthetic trope. See Ada Cohen, *Art in the Era of Alexander the Great: Paradigms of Manhood and their Cultural Traditions* (Cambridge University Press, 2010), 175; Adrian Searle, ‘Fiona Banner’s Toys for Boys are a Turn-On at Tate Britain’, *The Guardian* 28 June 2010, <<https://www.theguardian.com/artanddesign/2010/jun/28/tate-britain-fiona-banner1>>. The flying of military planes in particular has often produced similar interpretations in the Freudian tradition. See Douglas D. Bond, who, as Psychiatric Adviser to the United States Army Air Force in Britain, in his *The Love and Fear of Flying* (1952), opined that ‘the combat aircraft...fulfills childhood desires for an exaggerated phallic power...The shape of many aircraft is strikingly phallic.’ in Ben Shephard, *War of Nerves: Soldiers and Psychiatrists in the Twentieth Century* (Harvard University Press 2001) 295. See generally Kimberly Hutchings, ‘Making Sense of Masculinity and War’ [2008] 10 *Men and Masculinities* 389.

<sup>22</sup> This legalization is charted, for the period between the 1970s and the early 2000s in Janina Dill, *Legitimate Targets? Social Construction, International Law and US Bombing* (OUP 2014).

<sup>23</sup> *Ibid.*

<sup>24</sup> This is the case with the Predator: 8.22m length; 14.8 wingspan; 512kg empty weight. The Reaper is larger: 11m length; 20m wingspan; 2,223kg weight.

– moral issues on which international law remains agnostic, insofar as the principles of distinction and proportionality are satisfied.<sup>25</sup>

However, when the distance is paired with the drone’s increasing self-reliance<sup>26</sup> the trajectory is significantly advanced, qualitatively so, towards that of the increasing automation and the promise of ultimate autonomy of new weapons technologies.<sup>27</sup> There is something robotic about the drone – even though it is currently remotely piloted. Here the promise of the technology – the promise of technological self-reliance, post-human rationality, post-human humanity<sup>28</sup> -- can be seen in the object’s aesthetic, if perhaps not yet fully borne out in the object’s functionality and use. While the debate over the compatibility of the increasingly automated weapons technology with the law of armed conflict is raging, containing pessimists,<sup>29</sup> optimists<sup>30</sup> and policy-oriented pragmatists,<sup>31</sup> the legal verdict is in abeyance until the technology is realized. Until then, the armed drone’s half-robotic character and incremental promise is a proxy for an ever-braver future new world.

The legalisation, professionalisation and rationalisation evident in the image, use and promise of drones point towards the qualities and values of governance.<sup>32</sup> The drone signifies that ‘war is governance’,<sup>33</sup> governance through targeted legal violence. Such ‘targeted governance’ can be seen as part of a wider trend in global governance and is ‘linked to the idea of efficient, apolitical, knowledge-driven “evidence-based” policy’.<sup>34</sup> These particular qualities of (lethal) decision-making beg for and feed off the promise of technological perfection. Legalization,

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<sup>25</sup> A.P.V. Rogers, ‘Zero-Casualty Warfare’ [2000] IRRC 165, 179.

<sup>26</sup> The Predator’s endurance is 24 hours. The Reaper’s 14. The quest is ongoing: see Ben Sullivan, ‘The US Military is Developing a Drone That Can Fly For a Week Straight’ *Motherboard* (30 January 2017) [https://motherboard.vice.com/en\\_us/article/the-us-military-is-developing-a-drone-that-can-fly-for-a-week-straight](https://motherboard.vice.com/en_us/article/the-us-military-is-developing-a-drone-that-can-fly-for-a-week-straight) accessed 19 February 2017.

<sup>27</sup> Full automation is defined as ‘A weapon system that, once activated, can select and engage targets without further intervention by a human operator.’ See US Department of Defense, ‘Autonomy in Weapon Systems, Directive 3000.09’, 21 November 2012, Glossary, Part II Definitions. See also ICRC, ‘Report of the ICRC Expert Meeting on ‘Autonomous weapon systems: technical, military, legal and humanitarian aspects’, 26-28 March 2014, Geneva 9 May 2014.

<sup>28</sup> Grégoire Chamayou, *Drone Theory* (Penguin 2015) 209. Ronald Arkin, *Governing Lethal Behaviour in Autonomous Robots* (CRC Press 2009); Vik Kanwar, ‘Post-Human Humanitarian Law: The Law of War in the Age of Robotic Weapons’ [2011] *Harvard National Security Journal* 616.

<sup>29</sup> Noel Sharkey, ‘Automating Warfare: Lessons Learned from the Drones’ [2012] *Journal of Law, Information & Science* 140; Peter Asaro, ‘On Banning Autonomous Weapon Systems: Human Rights, Automation, and the Dehumanization of Lethal decision-Making’ [2013] IRRC 687.

<sup>30</sup> Arkin *supra* note 28..

<sup>31</sup> Kenneth Anderson and Matthew Waxman, ‘Law and Ethics for Autonomous Weapon Systems: Why a Ban won’t work and how the laws of War Can’ [2013] Jen Perkins Task Force on National Security and Law Essay Series (Hoover Institution and Stanford University).

<sup>32</sup> See eg Kenneth W. Abbot and Duncan Snidal, ‘Hard and Soft Law in International Governance’ [2000] *International Organization* 421.

<sup>33</sup> Cf Eyal Benvenisti and Amichai Cohen, ‘War is Governance: Explaining the Logic of the Laws of War from a Principal-Agent Perspective’ [2014] *Michigan LR* 1363.

<sup>34</sup> Marianna Valverde and Michael Lomas, ‘Insecurity and Targeted Governance’ in Wendy Larner and William Walters, *Global Governmentality* (Routledge 2004) 233, 245 in Gunneflo *supra* note 19.

professionalisation and rationalisation, through technology, are of course furthering the traditional –Enlightenment – quest of the perfectibility of man.<sup>35</sup> The technological infatuation with perfection, however, also reflects an impatience with the fallibility of human error-in-judgement, as well as a ‘worship [of] data-driven reliability and disdain [of] untested human intuition’.<sup>36</sup> The armed drone is the tool to decrease human fallibility in war, before such fallibility, and humanity, is finally displaced by full automation.<sup>37</sup>

The very qualities of the armed drone as a tool refer to and stand for the qualities of the system in which it is used. The promised sharpness of the tool accordingly ambitiously refers to the sharpness of the international legal system it serves and signifies. Perhaps a link could be made here with Raz’s famous theory of the minimal, formal qualities of the rule of law, where the legal system should be like a sharp knife, to be used for good or ill.<sup>38</sup> Raz’s functional minimalism aims at establishing formal qualities of legal systems, while circumventing unbridgeable disagreement in substantive moral and political judgement. And so it is that the armed drone’s promised qualities of sharp governance-in-war may allow society to eschew such judgement, leading to decreasing political participation<sup>39</sup> and the ultimate loss of human decision-making freedom.<sup>40</sup>

## Perspective 2

The screen: An eyeless but all-seeing generator of images for those who target.

For this promise of rational, professional and legalised governance to be realised, however, the drone as a high-tech tool needs to perform both its aggressive function and its professional/legalised function with efficiency and precision. While the object’s image in its hi-tech gloss in arms dealers’ catalogues may be perceived as supporting this further promise, ultimately the tool’s precision stands or falls on the basis of the quality of the images it generates for its operators, those who target. There are at least two levels of precision required here: in identification and in targeting.<sup>41</sup>

The object is experienced by those operating it as a series of shapes that need to be

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<sup>35</sup> On the history and different directions of this quest the classic work is John Passmore, *The Perfectibility of Man* (Liberty Fund, 3<sup>rd</sup> ed., 2000).

<sup>36</sup> Roger Berkowitz, ‘Drones and the Question of “The Human”’ [2014] *Ethics & International Affairs* 159, 162.

<sup>37</sup> See Arkin *supra* note 28 chapter 4.

<sup>38</sup> Joseph Raz, ‘The Rule of Law and its Virtues’ [1977] *LQR* 195.

<sup>39</sup> Chamayou (n 28) chapter 23 ‘The Fabrication of Political Automata’.

<sup>40</sup> Berkowitz *supra* note 36 169.

<sup>41</sup> See Chamayou *supra* note 28143 who also refers to the precision of the impact.



decrypted in order to be ‘fitted’ to the specific operational categories determined by the law, the rules of engagement, and operational policy. One aspect of this has to do with the quality of the picture the drone’s camera feeds to the screens in the virtual cockpit drone operators inhabit, complemented by maps and status updates. The pictures generated by the armed drones, paired with intelligence gathered through the surveillance function of the drone, allow for the distinction between civilian and military objects. When the target is a human being this distinction translates either in the military status of the individual, ideally indicated by the wearing of a uniform or a distinctive military emblem,<sup>42</sup> or in the determination of whether the individual is a civilian ‘directly participating in hostilities’.<sup>43</sup> Precision in identification and precision in targeting, that is the precision capacities of the object itself, are complemented by a third type of discriminatory precision, that of the policy that governs the use of the object (and which, perhaps, the object itself facilitates).

The armed drone is at the very center of the interrelation of these three types of precision. What the image quality (still) lacks, is made up for through the ‘persistent stare’, the ‘unblinking eye’,<sup>44</sup> the process of ‘target development’ through ‘pattern of life’ analysis<sup>45</sup> and through the weaving of the enemy/criminal nexus, within which the targets develop their targetable quality either as identified individuals or as general types bearing a certain ‘signature’, in accordance with the targeting state’s policy.<sup>46</sup> Accordingly, the ‘promise of precision’ that the object bears is not only one of visual depiction of individual targets. It is also one of depiction, analysis, construction of the area and society that is being surveyed and targeted. It is the promise of precision of ‘lethal surveillance’.<sup>47</sup> While the object looks eyeless, it aims to be all-seeing, generating images through a screen, through which the operators develop, identify, ‘find, fix and finish’ the targets that bear the enemy/criminal signature.<sup>48</sup>

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<sup>42</sup> Art 4 Geneva Convention III Relative to the Treatment of Prisoners of War (12 August 1949, entered into force 21 October 1950, 75 UNTS 135).

<sup>43</sup> Art 51(3) API. See also Nils Melzer (Legal Adviser, ICRC), *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (International Committee of the Red Cross, 2009) available at <<https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>> accessed 17 November 2016.

<sup>44</sup> The terms are used by the US military, specifically in leaked documents of the Intelligence, Surveillance and Reconnaissance Task Force. See Jeremy Scahill, *The Assassination Complex* (Simon & Schuster 2016).

<sup>45</sup> Chamayou *supra* note 28, chapter 5 and Derek Gregory, ‘From a view to kill: Drones and Late Modern War’ [2011] *Theory, Culture and Society* 188.

<sup>46</sup> See Department of Justice White Paper, *Legality of a Lethal Operation by the Central Intelligence Agency against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa’ida or an Associated Force*, (25 January 2011) in Jaffer (n 12), 127 and Kevin Jon Heller, ‘One Hell of a Killing Machine: Signature Strikes and International Law’ [2013] *Journal of International Criminal Justice* 89.

<sup>47</sup> Katherine Hall Kindervater, ‘The emergence of lethal surveillance: Watching and killing in the history of drone technology’ [2016] 47(3) *Security Dialogue* 223..

<sup>48</sup> Scahill *supra* note 44, 40.

It is the qualities of the above experience that determine the relationship between the targeter and her target and the particular quality of the distancing effect, the removal from the 'fog of war'. The cognitive uncertainty and emotional tension associated with the 'fog of war' has traditionally been perceived as a major obstacle in the regulation of human behaviour in war and the potential for accountability for that behaviour. This is reflected in the treaty texts deferring to the 'military commander's' reasonable perception and anticipation,<sup>49</sup> especially in establishing the onerous requirements for individual criminal liability for the war crime of disproportionate attack.<sup>50</sup>

The object's promised removal of this 'fog of war' has proved no panacea.<sup>51</sup> Nor is the physical distancing straightforward. There are two kinds of problems so far identified. The first one, perhaps to be expected, is one of 'joystick mentality', of bureaucratically supported levity, of lawyerly enhanced nonchalance in deciding to 'kill the bug' on the screen.<sup>52</sup> The other problem is that the cognitive and emotional fragmentation of action and consequence, consciously or unconsciously, effects a different sort of trauma on the targeter. As Chamayou puts it, '[t]his new combination of physical distance and ocular proximity gives the lie to the classic law of distance: the great distance no longer renders the violence more abstract or more impersonal but, on the contrary, makes it more graphic, more personalized.'<sup>53</sup> The distancing between the targeter and the targeted effected through the object is not just physical, but entails an element of estrangement and alienation, a moral distancing, which however does not, ultimately, lighten the load of killing.

And so it is that neither the promise of precision nor that of rational removal from the 'fog of war' are entirely satisfied. Neither are the object's promises of professionalisation and legalisation, at least in the relationship between the drones' operators and the society which has ostensibly engaged them. So far the use of the drone, perhaps through no inherent technological characteristic of its own, is one

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<sup>49</sup> See Robert Sloane, 'Puzzles of Proportion and the 'Reasonable Military Commander': Reflections on the Law, Ethics, and Geopolitics of Proportionality' [2015] *Harvard National Security Journal* 299 and Jens David Ohlin, 'Targeting and the Concept of Intent' [2013] *Michigan JIL* 79.

<sup>50</sup> See Rome Statute of the International Criminal Court (17 July 1998, entered into force 1 July 2002, 2187 UNTS 3) article 8(2)(b)(iv): 'Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be *clearly excessive* in relation to the concrete and direct overall military advantage anticipated' (emphasis added).

<sup>51</sup> See e.g. Micah Zenko and Amelia Mae Wolf, 'Drones Kill More Civilians than Pilots Do' *Foreign Policy* (25 April 2016) at <http://foreignpolicy.com/2016/04/25/drones-kill-more-civilians-than-pilots-do/> accessed 17 November 2016.

<sup>52</sup> A 'bug splat' is reported to be the military slang for a person killed through a drone strike. See Michael Hastings, 'The Rise of the Killer Drones: How America Goes to War in Secret, 16 April 2012, *Rolling Stone* <<http://www.rollingstone.com/politics/news/the-rise-of-the-killer-drones-how-america-goes-to-war-in-secret-20120416#ixzz3x8q0LdEC>>

<sup>53</sup> Chamayou (n 27) 117.

of secrecy. The secrecy of the object's operation has, perhaps not inevitably, meant that, especially in the US, the programme has mostly been administered not by the military but by the intelligence services. The implications of this are, firstly, that CIA operatives are not members of the armed forces under article 4(A)(1) of Geneva Convention III and do not necessarily satisfy the criteria of privileged combatancy under article 4(A)(2). They may consequently be seen to act outside the recognised legal categories, lose the combatant's privilege to kill and may accordingly be open to prosecution for murder.<sup>54</sup> Secondly, the promise of legalisation does not seem to extend to meaningful reviewability of the use of this sharp tool, even though legalisation is sometimes relied on to deliver us from the evil of the object's misuse.<sup>55</sup>

For better or worse it seems that, so far, secrecy is part of the object's mystique. While 'accountability regimes' are being suggested,<sup>56</sup> the fear is that the combination of secrecy and distancing in killing, enhanced by the prospect of further removing individuals from the operation of increasingly autonomous weapons, will substitute the object for persons. The formal qualities of the object and the high-tech professionalism of its operation suffice; scrutiny is deferred; no external review is necessary. As with the dehumanization of war as governance,<sup>57</sup> the function of the armed drone's promise of precision may very well end up being its betrayal. For all the images it generates, the armed drone seems to contribute to moral and political concealment and mystification.

### Perspective 3.

#### A dot in the sky, or maybe not even that: A constant and invisible threat for those who are targeted.

The all-seeing precision associated with the armed drone is experienced rather differently in the areas under its surveillance and fire. There, the object is not really seen. It is near invisible, a dot in the sky, and it is faintly audible, signified by '[t]he

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<sup>54</sup> Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Study on Targeted Killings, ¶ 84, Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) para 71.

<sup>55</sup> In the context of the future practice of President Trump, see Harold Hongju Koh, 'National Security Legal Advice in the New Administration' *Just Security* (16 November 2016) <<https://www.justsecurity.org/34507/national-security-legal-advice-administration/>> and see Chase Madar, Rules of Disengagement: How the Lawyerly Discourse of Drone Warfare Misses the Point' *Bookforum* (December/January 2017) [http://www.bookforum.com/inprint/023\\_04/16816](http://www.bookforum.com/inprint/023_04/16816) accessed 17 November 2016.

<sup>56</sup> See Symposium: Toward a Drone Accountability Regime in [2015] *Ethics & International Affairs* 15.

<sup>57</sup> See above notes 32-40 and text.

buzz of a distant propeller [as] a constant reminder of imminent death.’<sup>58</sup> Nevertheless, its faint visual and audible marks are sufficient to overwhelm the targeted. The sound the object emits communicates threat and establishes fear.<sup>59</sup> The object’s threatened presence is sufficient to contaminate a clear blue sky: ‘I no longer love clear blue skies. In fact, I now prefer grey skies. The drones do not fly when the skies are grey.’<sup>60</sup> The perspective of the population ‘under drones’, beyond the targeted and the killed, highlights that measuring precision based purely on casualties and applying the legal principles of distinction and proportionality exclusively in relation to ‘loss of civilian life’ doesn’t fully capture the armed drone’s effect and radius. It is perhaps an inescapable feature of the object’s current qualities that the populations under its persistent stare experience its promise of professionalized precision as generalized threat and daily terror.<sup>61</sup>

Because, ultimately, the armed drone, not due to any inherent technological feature, but in how it is used and how it is perceived, is an object at the center of an entirely asymmetrical relationship. This is the final promise of the object of the armed drone, one of asymmetry, one of the military and technological invulnerability of those who employ the object. In embodying asymmetry, the drone is at the heart of a change of paradigm that re-imagines war as the top-down ‘administration of violence’,<sup>62</sup> part and parcel of the realisation of war as governance. Drones are not made to destroy other drones.<sup>63</sup> This asymmetry, together with legalisation, professionalisation, and rationalisation, complete the picture of the drone as a tool of administration.<sup>64</sup>

Of course, this asymmetrical element is not necessarily inherent in the object itself, it is only reflective of a historical moment now almost past. Even if the specifications of the drone facilitate and fit with the practice of surveillance plus air-to-ground targeting of technologically much less advanced enemies, this ‘promise

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<sup>58</sup> See David Rohde, ‘The Drone War’, *Reuters* (26 January 2012), <http://www.reuters.com/article/2012/01/26/us-david-rohde-drone-wars-idUSTRE80P11I20120126>.

<sup>59</sup> Lawrence English, ‘The Sound of Fear: From Long Range Protester-Deterring Acoustic Devices to Military Drones’ *The Conversation* (7 October 2016) <<http://www.abc.net.au/news/2016-10-08/the-sound-of-fear/7913512>> accessed 17 November 2016.

<sup>60</sup> Zubair Rehman, whose grandmother was killed by a drone strike, quoted in Derek Gregory, ‘Little Boys and Blue Skies’ *Geographical Imaginations* (3 September 2015) <<https://geographicalimagination.com/2015/09/03/little-boys-and-blue-skies/>> accessed 17 November 2016.

<sup>61</sup> International Human Rights and Conflict Resolution Clinic (Stanford Law School) and Global Justice Clinic (NYU School of Law), *Living Under Drones: Death, Injury, and Trauma to Civilians From Us Drone Practices in Pakistan* (September 2012).

<sup>62</sup> Paul W. Kahn, ‘Imagining Warfare’ [2013] *EJIL* 199.

<sup>63</sup> Air-to-air combat technology is not currently used. Anti-drone technology is focusing on ground-to-air missiles.

<sup>64</sup> See Eliav Lieblich and Eyal Benvenisti, ‘The obligation to exercise discretion in warfare: Why autonomous weapons systems are unlawful in Susanne Beck, Nehal Bhuta et al. (eds), *Autonomous Weapons Systems – Law, Ethics, and Policy* (CUP 2016) 245.

of invulnerability' is one more promise that will be broken. Leaving aside the unknowns of qualitative technological shifts, the proliferation, including privatisation, of the existing technology ensures the battle for asymmetry and invulnerability is to continue.<sup>65</sup> The present state of asymmetry in military technology exemplified by the armed drone is contingent and precarious. This is one more reason to resist the mythical, paradigm-setting function of the object of the armed drone in the relation between war and law.

The other notable tale of asymmetrical weapons technology – the invention of the rifle and its use in colonial wars in the late 19<sup>th</sup> century – is instructive. Its role in establishing asymmetry was crucial and decisive, so much so that post-1870 armed confrontations 'resembled hunting more than war',<sup>66</sup> a metaphor revealingly revived today.<sup>67</sup> The vertiginous asymmetry and comfortable invulnerability can be glimpsed at the battle of Omdurman in the Sudan, 1898. Churchill, a participant, described how the British infantry 'steadily and solidly' fired against the Sudanese Dervishes in 'the most signal triumph ever gained by the arms of science over barbarians.' The radical asymmetry in vulnerability between targeters and targeted, as enabled by the technological object, was determinative. As Churchill put it, 'the mere physical act became tedious'.<sup>68</sup>

The object of the rifle, however, did not remain confined to that particular relationship of asymmetry and was even instrumental to what came after. The targeter/targeted relationship of colonial technology and tactics facilitated the carnage and stalemate, the 'total war' that was the First World War.<sup>69</sup> 'The effect of modern infantry weapons on the battlefields of Europe was quite the opposite of what it had been in Africa. Instead of bringing about the quick and easy success the European powers had become used to, the new firearms made victory impossible.'<sup>70</sup> Whether a similar fate awaits the drone, the symbol of 'post-modern war' as object of future total war, can only be a matter of speculation.

### **Concluding Remarks: Normalizing Endless War**

This chapter has used the object of the armed drone – its technical characteristics,

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<sup>65</sup> Samuel Moyn, 'Drones and Imagination: A Response to Paul Kahn' [2013] EJIL 227.

<sup>66</sup> Daniel R. Headrick, *The Tools of Empire: Technology and European Imperialism in the Nineteenth Century* (OUP 1981) 115.

<sup>67</sup> See George A. Crawford, *Manhunting: Counter-Network Organization for Irregular Warfare* (JSOU 2009); Chamayou *supra* note 28 at 32 quoting then US Secretary of Defense Donald Rumsfeld: "How do we organize the Department of Defense for manhunts?"

<sup>68</sup> Winston Churchill, *The River War: An Account of the Reconquest of the Soudan* (Longman's, Green and Co, 1899) in Headrick *supra* note 66 at 118.

<sup>69</sup> Roger Chickering and Stig Förster (eds.), *Great War, Total War: Combat and Mobilization on the Western Front, 1914-1918* (CUP, 2000).

<sup>70</sup> Headrick *supra* note 66, 124.

its materiality, its aesthetics, and the way it is perceived— to discuss its significance in the evolution of the relationship between law and war and assess and critique the present moment it signifies. The armed drone currently signifies, symbolises, promises and mythologises the ‘new way of war’: war as governance, sharp and precise; war as professionalised vertical administration of violence; war as a fundamentally asymmetrical relationship between the targeted and the targeter both materially and morally. These promises are at least partially betrayed. Too often, the armed drone, either inherently or at least in its current use, entails indistinction and relies on and creates mystification. The war particularly associated with armed drones, the ‘war on terror’, is widely referred to as the ‘forever war’,<sup>71</sup> the ‘everywhere war’,<sup>72</sup> ‘a clean and endless war’.<sup>73</sup> War is spreading and is increasingly normalised. Such normalisation through the object-symbol, to recall Barthes,<sup>74</sup> ‘in the eyes of the myth consumer... transforms history into nature’. For all the object’s forceful material and aesthetic qualities, this transformation should be resisted. The international law categories and structures related to the armed drone in this essay are crucial in appreciating the object’s past, in critiquing its present, and in contesting its future.

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<sup>71</sup> Dexter Filkins, *The Forever War: Dispatches from the War on Terror* (Vintage 2009); Harold Hongju Koh, ‘How to End the Forever War?’ (Oxford Union, Oxford, 7 May 2013) <https://www.law.yale.edu/system/files/documents/pdf/Faculty/KohOxfordSpeech.pdf> accessed 18 November 2016.

<sup>72</sup> Derek Gregory, ‘The Everywhere War’ [2011] *The Geographical Journal* 238.

<sup>73</sup> Samuel Moyn, ‘Toward a History of Clean and Endless War’ (9 October 2015) *Just Security* at <https://www.justsecurity.org/26697/sanitizing-war-endlessness/> accessed 19 February 2017.

<sup>74</sup> See *supra* n 10 and accompanying text.