

## Commentary

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It is the role of a commentator to comment on the program offered, the topic before the panel, or the papers offered before that panel. While my emphasis will be on the latter, necessarily it will range over all three.

The premise for this conference—lessons learned from Operation Allied Force, the NATO air campaign against Serbian forces in Kosovo—raises many questions. Allied Force may be a classic example of the adage, “Bad cases make bad law,” with few valid lessons. As NATO’s first military operation, a prime objective was keeping the nineteen-member alliance intact. Another was continuation of the Clinton Administration’s objective in each of its peace operations after Somalia of using military force, but with the admonition to commanders to “do no harm,” a flawed philosophy akin to wanting to make an omelet without breaking any eggs. In Allied Force, uncommon steps were taken by NATO forces to reduce to an absolute minimum collateral civilian casualties and collateral damage to civilian objects, and in some instances avoiding Serbian military casualties as well.<sup>1</sup> These steps could be

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1. This generated considerable criticism in the official Air Force evaluation. See HEADQUARTERS UNITED STATES AIR FORCE, INITIAL REPORT: THE AIR WAR OVER SERBIA, AEROSPACE POWER IN OPERATION ALLIED FORCE pp. x, 54 (2000). Of particular note is the following (p. x):

Traditionally, air planners have assumed that political conditions will allow the most efficient employment of aerospace power, giving planners the latitude to optimize survivability, target effects, and collateral damage considerations. During the air war over Serbia, such latitude did not exist. Not all members of the 19-nation Alliance would have accepted the intensity and violence required to fight this war if military planning had followed optimum Air Force doctrine. As long as Serbia was unable to inflict significant Allied casualties, NATO accepted some operational inefficiencies associated with those political restraints.

taken because the United States and one or two of its allies had the capability to do so, not because they necessarily felt legally obligated to do so. Professor Murphy's articulation of the essential elements of the customary international law process would indicate that these voluntary actions offer little, if any, precedent as to future law of war interpretation.<sup>2</sup>

The questions my two colleagues were asked are somewhat troubling, as they limit the scope of the inquiry. Specifically, they focus entirely on the obligations of the force engaged in offensive operations, to the neglect of the defending ground force.<sup>3</sup> This flows in part from the incorrect, perhaps intentional, use of the word "attacks" in the 1977 Additional Protocol I<sup>4</sup> to refer to actions taken either by an attacker or defender.<sup>5</sup> Use of "attacks" to refer to acts of defense is etymologically inconsistent with its definition and customary use in any of the six official languages of Additional Protocol I, a point conceded in the *Official Commentary* of the International Committee of the Red Cross.<sup>6</sup> Limiting the definition of attacks to "acts of violence against the adversary" is inconsistent with the customary law principle of *distinction*, partially codified in Article 48,<sup>7</sup> and other provisions of Additional Protocol I that prohibit the use of the civilian population or individual civilians as human

2. See Professor Murphy's paper in this volume.

3. This unfortunate and incorrect effect is demonstrated in articles critiquing Operation Allied Force. See, for example, Peter Rowe, *Kosovo 1999: The air campaign*, 82 INTERNATIONAL REVIEW OF THE RED CROSS 147 (2000) and A. Rogers, *Zero-casualty warfare*, 82 INTERNATIONAL REVIEW OF THE RED CROSS 165, 176 (2000). The former examines only the efforts of the attacker to reduce collateral civilian casualties, while the latter offers only three sentences on the obligation of the defender.

4. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, June 8, 1977, 1125 U.N.T.S. 3, DOCUMENTS ON THE LAWS OF WAR 422 (A. Roberts and R. Guelff eds., 3d. ed. 2000) [hereinafter Protocol I].

5. Article 49, paragraph 1 of Additional Protocol I states, "Attacks' means acts of violence against the adversary, whether in offense or defense."

6. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 603 (Yves Sandoz et al. eds., 1987).

7. Article 48 states: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." Using the term "Parties to the conflict" rather than "States Parties" (to the Protocol) ignores the customary law obligation of a government to take reasonable measures to separate military objectives from civilian objects, and vice versa, in peacetime and war.

shields.<sup>8</sup> That this definition was the beginning of a slippery slope to erode the customary law principle of *distinction* is evident not only in the questions framed for this session, but also in the answers of the two primary presentations. Professor Murphy notes this inconsistency. Others, including some of the sources he cites, have failed to do so.

This second point is offered to emphasize a concluding comment of Professor Murphy. As he notes,<sup>9</sup> it is ironic that a nation committed to the rule of law, that has spent billions of dollars—in all likelihood more money than all other nations combined—to develop the most sophisticated target intelligence systems, weapons systems capable of the most accurate weapons delivery, precision-guide munitions, that provides the best training for the men and women who operate them, and employs a multi-level, redundant, disciplined target approval process, has its operations placed under a post-conflict microscope, while the illegal actions of its opponent in using human shields, and gross violations of the law of war in other conflicts occurring simultaneously around the world, are ignored. It is doubtful that others who purport to follow the rule of law could have conducted the same campaign with fewer collateral civilian casualties. This “Do as I say, not as I can’t do” approach

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8. Article 51, paragraph 7 states:

The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favor or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

Article 58 provides:

The Parties to the conflict shall, to the maximum extent feasible:

- (a) . . . endeavor to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;
- (b) avoid locating military objectives within or near densely populated areas;
- (c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.

9. Professor Murphy’s paper in this volume.

also suggests a double standard—a very high standard for the United States and a limited number of other Western democracies, and a lower standard for the rest of the world.<sup>10</sup> Hence the adage “Be careful what you ask for” is appropriate in considering the law related to collateral casualties with respect to the precedent of Allied Force.

Emphasis on the predominantly airpower focus of Allied Force neglects the historic lesson that ground force operations cause greater civilian casualties than air operations.<sup>11</sup> For this reason, historically a distinction was made between the risks to the civilian population in the “operational zone,” that is, within enemy artillery range, and civilians more distant from the line between opposing forces.<sup>12</sup> The former were assumed to remain at their own risk. Several efforts have been made to define the degree of protection afforded civilians not within the zone of operations, the most recent being Additional Protocol I.<sup>13</sup> This historic struggle has not been answered satisfactorily to date, but seems to have been lost in the post-Kosovo debate and in the questions posed at this conference.

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10. This is true within NATO itself. Targeting and collateral damage limitations insisted upon by some NATO governments during Allied Force, as noted in footnote 1, contrast markedly with their inability to meet the same standards. As the Air Force report states:

Interoperability achieved many successes in terms of Alliance cooperation, but also fell short in areas such as precision munitions. . . . As the United States military continues to move toward a 21st century force propelled by the revolution in military affairs, the resulting gaps in capabilities with its Allied must be addressed. In future conflicts, the U.S. Air Force must also discover methods to integrate its assets with those of less-technologically advanced allies . . . without resorting to a “lowest common denominator” solution. In the face of a more sophisticated threat, this could be an increasingly significant limitation for those states expecting to participate in a coalition with the United States.

INITIAL REPORT, *supra* note 1, at 47.

Post-conflict reviews of law of war compliance is particularly hypocritical when the criticism comes from citizens of or private organizations in a neutral nation, whose government and people have “opted out” of assuming their share of responsibility for a safer world.

11. See this author’s *Air War and the Law of War*, 32 AIR FORCE LAW REVIEW 1 n.1 (1990) providing World War II German casualty figures and Charles J. Dunlap, *Kosovo, Casualty Aversion, and the American Military Ethos: A Perspective*, 10 UNITED STATES AIR FORCE ACADEMY JOURNAL OF LEGAL STUDIES 95, 103 (1999/2000).

12. See, for example, M. W. Royse, *Consultation*, in LA PROTECTION DES POPULATIONS CIVILES CONTRE LES BOMBARDMENTS 72, 88 (1930). This program of contributions by international law experts was hosted by the International Committee of the Red Cross.

13. This history is summarized and analyzed in Parks, *supra* note 11.

To close this portion of my remarks, the picture posed by the questions, the responses thereto, and sources cited therein, offer a clearer picture than the one seen by the battlefield commander. Appreciating the fog of war in which a commander must operate, the threshold for violation of the law of war is high, whether in the grave breach provisions of the 1949 Geneva Conventions or the 1977 Additional Protocol I, each of which requires *mens rea*.<sup>14</sup> In establishing *mens rea*, a commander's decisions must be based upon information reasonably available to him at the time, and not what may be learned—or alleged—long after the conflict has ended.<sup>15</sup>

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14. Article 147, GC, defines a grave breach as “. . . those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment . . . *willfully* causing great suffering or serious bodily injury to body or health . . . [or] extensive destruction and appropriation of property, not justified by military necessity and carried out *unlawfully and wantonly*” [emphasis supplied].

Article 85, paragraph 3, Additional Protocol I, defines a grave breach (for the circumstances of this panel) as “(a) making the civilian population or individual civilians the object of attack; [or]

(b) launching an indiscriminate attack affecting the civilian population or civilian objects *in the knowledge* that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2(a)(iii). . . .”[emphasis added].

15. See, for example, the reservation taken by Switzerland upon ratification of Additional Protocol I (February 17, 1982), which states, “The provisions of Article 57, paragraph 2, create obligations only for commanding officers at the battalion or group level and above. The information available to commanding officers at the time of their decision is determinative.” Similarly, at the time of its ratification (January 28, 1998), the United Kingdom declared that “Military commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time.” This approach was taken in the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 39 INTERNATIONAL LEGAL MATERIALS 1257 (2000), *reprinted* herein as Appendix A [hereinafter Report to the Prosecutor], with respect to NATO's mistaken attack of the Chinese Embassy in Belgrade on July 5, 1999. See *id.*, ¶¶ 80–85, which found no criminal responsibility.

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In considering ways in which to reduce collateral civilian casualties, *distinction* must be placed in its historic context. It is a mutual obligation, as seen in the following:

<u>Attacker's obligations</u>	Distinction <sup>16</sup>	<u>Defender's obligations</u>
Design/employment of weapon systems		Separation of
Training		civilian population
Target intelligence		military objectives
Target acquisition		Air raid precautions
Warning to civilian population <sup>17</sup>		shelters
		evacuation
		civil defense

The United States has done more than its fair share to fulfill its obligations with respect to improving bombing accuracy:<sup>18</sup>

**U.S. Bombing Accuracy**

<u>War</u>	<u>Number of Bombs<sup>19</sup></u>	<u>Circular Error Probable<sup>20</sup></u>
World War II	9,070	3,3000 feet
Korean War	1,100	1,000 feet
Viet Nam War	176	400 feet
Desert Storm	30	200 feet

Modern weapons systems, such as the McDonnell-Douglas F15E Strike Eagle, using the Global Positioning System (GPS), account for ever-increasing accuracy with gravity (so-called “dumb”) bombs. Today, the circular error probable (CEP) for US strike aircraft dropping “dumb” bombs is less than forty feet. I say this to note an error made in a source of Professor Murphy’s that incorrectly assumed that increased bombing accuracy has occurred only through use of precision-guided munitions.<sup>21</sup>

16. W. Hays Parks, *The Protection of Civilians from Air Warfare*, 27 ISRAEL YEARBOOK ON HUMAN RIGHTS 65, 88 (1998).

17. Hague Convention (IV) Respecting the Laws of Customs of War on Land, Oct. 18, 1907, Annex, art. 26, DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 69, 78; Protocol I, *supra* note 5, art. 57(2)(c).

18. R. P. HALLION, STORM OVER IRAQ: AIR POWER AND THE GULF WAR 283 (1992).

19. Table computed for 90% probability of a single bomb striking a 60x100 foot target, dropping 500-lb. unguided bombs. For discussion of the relative accuracy of World War II strategic bombing, see W. Hays Parks, ‘Precision’ and ‘Area’ Bombing: *Who did Which, and When?*, 18 JOURNAL OF STRATEGIC STUDIES 147–174 (1995).

20. *Circular error probable* is “the radius of a circle within which one-half of an aircraft’s or missile’s projectiles are expected to fall.” U.S. Department of Defense, Joint Publication 1-02, Department of Defense Dictionary of Military and Associated Terms (1994).

21. Professor Murphy’s paper in this volume quoting Stuart Belt, *Missiles Over Kosovo: Emergence, Lex Lata, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas*, 47 NAVAL LAW REVIEW 115, 118 (2000).

Precision-guided munitions were used with great effect during the 1972 Linebacker campaigns over North Viet Nam. They received greater public attention during the 1991 Coalition war to liberate Kuwait, and have been improved since that time. Today the CEP “norm” for a laser-guided precision munitions (PGM) is three meters, with at least eighty per cent (rather than the CEP standard of fifty per cent) within that circle. But PGMs are not a panacea weapon. When a precision-guided munition goes awry, it is considerably less accurate than gravity bombs. For example, in the April 15, 1986 air strike against terrorist-related targets in Libya, the Mk-84 2,000-pound precision-guided bombs of one F-111F assigned to attack Aziziyah Barracks struck 7,400 feet long and 3,700 feet left of the intended target.<sup>22</sup> PGM accuracy may be affected by weather and/or defeated by simple countermeasures. Obscurants, such as smoke, may defeat laser-guided bombs, while electro-optical munitions have similar vulnerabilities.<sup>23</sup> As is true of many aspects of warfare, the simple answer often masks myriad complexities. Who bears the responsibility for collateral civilian casualties resulting from successful obscurant use to defeat precision-guided munitions?

Part of the problem in suggesting an obligation to use precision-guided munitions is neglect of the factors that can result in collateral civilian casualties, almost all of which were evident to one degree or another in Allied Force:

**Factors Affecting Collateral Damage and Collateral Civilian Casualties<sup>24</sup>**

Target intelligence	Distance to target	Target winds, weather
Planning time	Force training, experience	Effects of previous strikes
Force integrity	Weapon availability	Enemy defenses
Target identification	Target acquisition	Rules of engagement
Enemy intermingling <sup>25</sup>	Human factor	Equipment failure
Fog of war		

Not all are within the attacking force’s control. As Professor Adam Roberts noted in a presentation at the US Institute of Peace on March 1, 2001, there is a “rush to judgment that anything that affects the civilian population is illegal.

22. BRIAN L. DAVIS, QADDAFI, TERRORISM, AND THE ORIGINS OF THE U.S. ATTACK ON LIBYA (1990).

23. Gary S. Ziegler, *Weather Problems Affecting Use of Precision Guided Munitions*, 32 NAVAL WAR COLLEGE REVIEW (May–June 1979), at 95; John P. Bulger, *Obscurants: Countermeasures to Modern Weapons*, 62 MILITARY REVIEW (May 1982), at 45.

24. Parks, *supra* note 11, at 184–202.

25. That is, enemy intermingling of military objectives with civilian objects and the civilian population, including the use of human shields. Photographic examples are contained in Parks, *supra* note 16, at 112–113.

It is an error to assume that the law of war provides absolute protection for everything that may be civilian.” It also is an error to view every civilian casualty as a war crime, and/or to place the entire responsibility for civilian casualties on the party to the conflict that has the least control over them.

Offsetting the law of war principle of distinction is the continuing emergence of a ‘counter’ targeting practice by some governments. In order to reduce or defeat an opponent’s military superiority, particularly with respect to airpower, many governments have taken no or limited air raid precautions or steps to evacuate the civilian population. Some have purposely located objects of strategic importance in urban areas, in order to use the civilian population as human shields. This practice became evident in the Korean War. It was experienced in the Vietnam War, both in the air campaigns over North Vietnam and in air and ground operations in South Vietnam; in the 1991 Persian Gulf conflict; and in Allied Force.<sup>26</sup> It is not unique to air operations, as members of Task Force Ranger discovered in their battle in Mogadishu on October 3, 1993 (relearning a lesson experienced a generation earlier in Vietnam). In April 1986, just prior to the US air strike against terrorist-related targets in Libya, Libyan dictator Moammar Gadhafi threatened to round up all foreign nationals and place them in and around his most important facilities. In the last decade, members of United Nations peacekeeping forces in the Balkans were taken hostage and placed adjacent to military objectives as human shields. In one nation, one of the first to ratify Additional Protocol I, an entire downtown city block was razed. A major military command and control center was built underground. The structures that existed on that block previously were meticulously rebuilt, including a school and a mosque. The intent was clear: to use civilian objects and the civilian population to shield this important military objective, and to exploit damage to them and civilian casualties should the military objective be attacked.<sup>27</sup>

Article 51, paragraph 8 of Additional Protocol I states that even where a party to a conflict fails to fulfill its obligations to separate military objectives from the civilian population or, worse, uses the civilian population as human shields, the opposing party is not released from its legal obligations with respect to the civilian population and civilians. Although the United States is not a State Party to Additional Protocol I, this statement is consistent with its

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26. See, for example, W. Hays Parks, *Rolling Thunder and the Law of War*, 33 AIR UNIVERSITY REVIEW (Jan.–Feb. 1982), at 2 (Vietnam War); and U.S. DEPARTMENT OF DEFENSE, FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR 608, 614, 615 (1992).

27. See, for example, W. Hays Parks, *Crossing the Line*, U.S. NAVAL INSTITUTE PROCEEDINGS (Nov. 1986), at 40, 50, and DAVIS, *supra* note 22, at 15, 18, 19.

post-World War II practice. A point this conference might have addressed is: In light of the increasing, illegal reliance upon human shields by some, to what extent can it be expected that the other side can assume the responsibility for minimizing collateral civilian casualties beyond its legal obligation?

Professor Bring suggests a new additional protocol to limit (if not prohibit) attacks on military objectives in urban areas.<sup>28</sup> Recent State practice suggests this would merely exacerbate the problem, encouraging many to make increased use of civilian objects and the civilian population to shield military objectives from attack.

Professor Bring also suggests more effective warnings. I differ from his reading of the Final Report to the ICTY Prosecutor regarding Allied Force regarding NATO's attack on the Serbian Television and Radio Station in Belgrade, which I see as corroborating General Wesley Clark's statement that as a result of NATO warnings that the Serb Television and Radio Station building was about to be attacked, the Serbs ordered international journalists to report to the building, using them as human shields.<sup>29</sup>

28. Professor Bring's paper in this volume.

29. WESLEY CLARK, *WAGING MODERN WAR* 264 (2001) and Alex Todorovic, *Serb TV Chief Accused Over Air Raid*, *THE DAILY TELEGRAPH* (London), Feb. 14, 2001, at 19. The ICTY Prosecutor's report does not support Professor Bring's argument. The report states in part:

[S]ome doubts have been expressed as to the specificity of the warning given to civilians by NATO of its intended strike, and whether the notice would have constituted "effective warning . . . of attacks which may affect the civilian population, unless circumstances do not permit" as required by Article 57(2) of Additional Protocol I.

Evidence on this point is somewhat contradictory. On the one hand, NATO officials in Brussels are alleged to have told Amnesty International that they did not give a specific warning as it would have endangered the pilots. . . . On this view, it is possible that casualties among civilians working at the [radio and television station] may have been heightened because of NATO's apparent failure to provide clear advance warning of the attack, as required by Article 57(2).

On the other hand, foreign media representatives were apparently forewarned of the attack. . . . As Western journalists were reportedly warned by their employers to stay away from the television station before the attack, it would also appear that some Yugoslav officials may have expected that the building was about to be struck. Consequently, UK Prime Minister Tony Blair blamed Yugoslav officials for not evacuating the building, claiming that "[t]hey could have moved those people out of the building. They knew it was a target and they didn't. . . . [I]t was probably for . . . very clear propaganda reasons." . . . Although knowledge on the part of Yugoslav officials of the impending attack would not divest NATO of its obligation to forewarn civilians . . . , it may nevertheless imply that the Yugoslav authorities may be partially responsible for the civilian casualties resulting from the attack and may suggest that the advance warning given by NATO may have been sufficient under the circumstances.

Report to the Prosecutor, Appendix A, ¶ 77.

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This issue is not new, nor changed by Additional Protocol I. Hugh Trenchard, Marshal of the Royal Air Force, identified the problem in 1928:

As regards the question of legality, no authority would contend it is unlawful to bomb military objectives, wherever situated. Such objectives may be situated in centers of population in which the destruction from the air will result in casualties also in the neighboring civilian population. The fact that air attack may have this result is no reason for regarding the bombing as illegitimate provided all reasonable care is taken to confine the scope of the bombing to the military objective. Otherwise a belligerent would be able to secure complete immunity for his war manufactures and depots merely by locating them in a large city . . . a position which the opposing belligerent would never accept.<sup>30</sup>

A parallel issue relating to interpretation of Additional Protocol I with respect to precision-guided munition use was raised between World Wars I and II. Professor M. W. Royse, a World War I Marine Corps aviator, went on to a long and respected academic career at Harvard. In 1928 he authored what remains the best work on the law of war as it relates to aerial bombardment.<sup>31</sup> Speaking at a 1930 conference of international legal experts hosted by the International Committee of the Red Cross, Royse noted “It is possible to gauge the immunity of civil populations by noting restrictions on ‘permissible violence.’ Rules of war restrict the means and methods of warfare only . . . when the rule does not have the effect of placing one or more States at a disadvantage.”<sup>32</sup> The increasing conduct of some States in using human shields, and some interpretations of Additional Protocol I offered in this meeting that place the entire responsibility for civilian casualty avoidance on nations employing more advanced weaponry, are likely to erode rather than enhance respect for the law of war and civilian protection.

Comments also are necessary regarding two arguments made by Professor Bring in his paper. The first concerns counting civilian deaths within a military objective as “collateral civilian casualties.”<sup>33</sup> It is clear that the Pentagon would be a military objective in war. It should be equally obvious that a

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30. Charles Webster and Noble Frankland, *THE STRATEGIC AIR OFFENSIVE AGAINST GERMANY 1939–1945*, Vol. IV, Annexes and Appendices, 73 (1961).

31. M. W. ROYSE, *AERIAL BOMBARDMENT AND THE INTERNATIONAL REGULATION OF WARFARE* (1928). This comment is made with full and great appreciation and respect for the many works by James Maloney Spaight, including his three-edition *AIR POWER AND WAR RIGHTS*, published in 1924, 1933 and 1947.

32. Royse, *supra* note 12, at 77.

33. See Professor Bring’s paper in this volume.

civilian working there assumes a certain risk. His or her presence would not change the nature of the Pentagon as a legitimate target. Civilians killed within an obvious military objective are not “collateral civilian casualties.” Counting civilians employed within a military objective as “collateral civilian casualties” would only encourage increased civilian presence in a military objective in order to make its attack prohibitive in terms of collateral civilian casualties.

Finally, Professor Bring declares without any documentation or authoritative reference that the proportionality language contained in Article 51, paragraph 5(b) of Additional Protocol I is “arguably a codification of traditional customary law.”<sup>34</sup> The principle of proportionality has gained importance over the past thirty-five years, but within the limited audience of Western democracies. The principle of proportionality is important today to the US and its NATO allies. I do not disagree with its intent. I do disagree with some of the radical interpretations being offered of it. To suggest that it is customary law is bad history, as I have shown elsewhere.<sup>35</sup>

One question asked by conference planners is: “Does the use of precision-guided munitions lead to a duty to use those types of weapons exclusively in future conflicts?” The answer should not be viewed solely through the US defense budget, which (misguidedly) some see as unlimited. Were I a lawyer for another government, my advice to that government would be: Don’t buy them. There is no legal obligation to acquire them. But if you do buy them, you may be required to use them or face criminal prosecution for failure to use them when some believe you should have. Also, it may encourage an opponent to use human shields to offset your technological advantage.

Another answer is a question: How far does one take this argument? Two of the most precise attacks in recent years were the 1983 truck bomb attack on United States peacekeepers in Beirut, and last year’s suicide barge attack on the *USS Cole*. Had a State party to an armed conflict carried those out, would it be legally obligated to continue precision suicide attacks? Similarly, on April 16, 1988, an Israeli special operations team entered the home of Khalil el-Wazir, also known as Abu Jihad, the military commander and chief of

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34. See Professor Bring’s paper in this volume. Following the colloquium, Professor Bring advised me that this statement was based upon the argument offered by Hans Blix in his *Area Bombardment: Rules and Reasons*, 49 *BRITISH YEAR BOOK OF INTERNATIONAL LAW* 1978, at 31–69 (1980). While I hold both Hans Blix and Professor Bring in the highest respect, the practice of nations offers no evidence to substantiate this claim.

35. Parks, *supra* note 16, at 90–97.

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operations for the Palestine Liberation Organization, in Sidi Boussaid, Tunisia. Abu Jihad was killed as he reached for his weapon. His wife and two children, present in the room, were left unharmed. That is the epitome of *distinction*. Is it not a logical and inevitable extension of the question posed to this panel to suggest that a nation that has such a special operations capability would be legally obligated to use it against military objectives in urban areas even before resorting to precision-guided munitions? Such a suggestion is absurd, of course, but no less than the argument some have made with respect to precision guided munitions.

I will close with one final comment, and that is to suggest that air power advocates to some degree may be victims of their own hype. Promising degrees of accuracy that cannot always be met raises public expectations, and allows critics to argue that collateral civilian casualties resulting from the friction of war may have been intentional. Touting technological precision may lead to expectations that are unrealistic.<sup>36</sup> It is a case of let the advocate or proponent beware.

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36. The official US Air Force analysis of Allied Force, received after this author's comments were given, agrees: "The benchmark for high bombing accuracy and low collateral damage, however, may create unrealistic expectations for political leaders and the public at large in future air operations fought under very different circumstances. . . ." INITIAL REPORT, *supra* note 1, at 54.