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Air Power, Accuracy, and the Law of Targeting: Why No Brave New World?

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Jeffrey Walker's paper on "Strategic Targeting and International Law" is clear, punchy, and splendidly heretical. I agree with much of it. It is indeed useful to focus a discussion of targeting on one dimension of warfare. Today it is undoubtedly air power that is the driver of revolutionary changes in the conduct of war, and that presents some of the most difficult and challenging problems as regards the implementation or adaptation of existing legal norms. As Mr. Walker notes, for generations airmen have yearned for accurate, survivable and reliable all-weather day/night weapons. Now they have got them. He and I agree that this situation is strewn with hazards, and that there is no brave new world of precise and legally uncontroversial bombing. I suspect that this situation reminds both of us of that ancient and clever curse: "May your wishes be granted."

However, as will be seen from what follows, I disagree with his main conclusions. Specifically, I disagree with him about why, despite improvements in accuracy, the role of bombing in contemporary warfare remains costly in civilian lives and destruction. In addition, I do not share his extreme pessimism about the role of the laws of war in imposing some limits on bombing. As regards his proposed solution—

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more effective political control of the military—I am all in favor of it, but for reasons indicated below it does not solve the particular problems he identifies.

In responding to his paper I will focus on four main issues relating to air power. First, the significance of the technical developments that have made possible a greater degree of accuracy and discrimination in bombing than in earlier eras. Second, the provisions of the laws of war that relate to targeting, and the ways in which they have shaped and reinforced the tendency toward discrimination in bombing. Third, certain problems that remain, that help to explain why air bombardment is far from achieving perfect precision and discrimination. Fourth, the special difficulties that have arisen regarding the obligations on the defender to distinguish military activities from civilian objects. Finally I will attempt to draw some conclusions.

In each of the sections below, my discussion of the issues, like Mr. Walker's, will focus on four wars:

- The War over Kuwait (1990–1)
- The War over Kosovo (1999)
- The War in Afghanistan (2001–)
- The War in Iraq (2003–)²

These wars have certain similarities. In all of them there have been United States–led coalitions—though the coalitions have involved combat forces from progressively fewer countries.³ In all, the US–led forces had more or less complete command of the air, and used air power (including precision-guided munitions) extensively. In all, they were fighting against one essentially third-world State that was more or less isolated diplomatically and had been subject to economic sanctions. In all, there was at some stage a civil war or regional rebellion ongoing in the country concerned, as well as an international war. In short, these were all thoroughly unequal contests.

The bombing in these wars has been a mixture of strategic (intended to bring about change on its own) and tactical (in support of ground operations). Mr. Walker says of strategic bombardment: “We now have the technology but no longer the need.”⁴ If one interprets this to mean, as much of his paper suggests, that the actual uses of air power in recent wars have been very different from any of the classic visions such as those of Giulio Douhet and Billy Mitchell, I have no problem with his statement. However, if he takes this to suggest that air power today is a would-be solution in search of a non-existent problem, then while I sympathize with the spirit of his remarks I have difficulty in accepting the analysis. He is right that there is a danger of using air power as a default option in situations where, for whatever reason, it is not appropriate. However, for better or for worse, some situations arise in which the application of air power is capable of achieving significant

results—usually in combination with other armed forces, whether on the ground or at sea. Further, we live in an age in which the implementation of international norms, including resolutions of the UN Security Council, sometimes depends on a capacity for strategic coercion, i.e., the use of military and other pressures against a State to secure its compliance with specific demands: in this process, the threat and actuality of air power may have some part to play.

As in Mr. Walker's paper itself, the main focus here is on the laws of war (*jus in bello*) aspects of these wars. The focus is not on the lawfulness of the resort to force (*jus ad bellum*). This subject, while in principle entirely separate, is not always so in practice. As regards the use of air power, there is particular cause for concern about a possible overlap between *jus ad bellum* and *jus in bello*. If air power were believed (even if erroneously) to be a precision surgical instrument that can be applied at low risk to the United States and with a strong likelihood of success, that could incline the government to use it in circumstances in which, in earlier periods, it would have hesitated to use force. In actual cases, of course, other considerations have entered in to decisions to use force. In the first three wars under consideration, the resort to force by the US-led coalitions was widely viewed as justifiable in the circumstances, the most contentious of these three being Kosovo. The Iraq War in 2003 was and remains much more problematical. In this case the United States and partners relied on one principal legal justification for the action: implementation of earlier UN Security Council resolutions. This justification for the resort to force in Iraq was based on serious considerations, but its application was undermined by several difficulties: flawed assessments of Iraqi capabilities, a questionable denigration of the ongoing inspection process, failure to secure explicit Security Council support, and a failure to plan for the occupation of Iraq.⁵ However, in principle any problems that may exist under the *jus ad bellum* regarding the international legal validity of an intervention do not affect consideration of the *jus in bello* aspects.

Because air power in general, and bombing in particular, played a significant part in these four wars, it does not follow that they are necessarily keys to victory in all modern wars. For example, in the 1982 Falklands War the United Kingdom used air power in a much more restricted and limited way than in these four more recent wars. A major bombing campaign against Argentina and its armed forces would have been hard to sustain, of limited relevance to the situation, and highly questionable on moral and political grounds. Such considerations will apply to many future campaigns. The extensive use of air power is particularly questionable in pacification operations, for example in support of a friendly government or an occupation regime, because it risks antagonizing the very people whose support or neutrality is needed. In these and other cases, the reasons for avoiding

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the use of air power, or for exercising discrimination in how it is used, are not narrowly legal in character: they also involve considerations of interest, common sense and prudence. As Mr. Walker notes, everyone involved in planning the bombing of Baghdad in 2003 “realized that it would be foolhardy to break any more china than absolutely necessary.”⁶ Taking all these reasons into account, Mr. Walker’s skepticism about the use and utility of strategic bombardment, even if presented in broad-brush terms, is a healthy antidote to Douhet-like excesses in devotion to bombing.

The Impact of Technical Developments

Since the Second World War there has been a slow evolution of the means of delivery of so-called conventional weapons. The United States has been at the forefront of this process. At the same time, concern about the indiscriminate use of air power, including by the United States, has endured. The US bombing of North Vietnam from 1964 to 1972, and also the use of air power within South Vietnam, reflected certain improvements in technology but also reinforced this concern. That was one basis for the development of the law of targeting contained in 1977 Geneva Protocol I.

At first glance, the dramatic improvement in the accuracy of air-delivered weapons would appear to have improved the prospects of certain air campaigns being conducted in a manner that is compatible with long-established law-of-war principles, especially the principle of discrimination.⁷ It has even encouraged the hope that, at least in some instances, air war can comply with the more specific rules about targeting contained in Protocol I. Indeed, engineers could be seen as having contributed at least as much as international lawyers to improving the possibilities of discrimination in the use of air power.

The principle that the use of air-delivered weaponry should be discriminate was frequently repeated in all four wars, particularly by senior US government and military decision-makers. The remarkable improvement in accuracy compared to earlier eras was widely noted in the 1991 Iraq War. Subsequent US bombing campaigns, right up to the 2003 Iraq War, reflected both quantitative and qualitative developments in the use of accurate air-delivered weapons. The way in which many citizens of Baghdad went about their business in the midst of a major bombing campaign in March-April 2003 indicates that they seemed to have some understanding of the US attempt to apply the principle of discrimination.

In all four wars, civilian casualties among the population of the territory being bombed were significantly lower than many forecasts made before the commencement of military hostilities. For example, in the United Kingdom the

“Stop the War Coalition” published an advertisement in March 2003 in which it stated: “We want to stop a war which will result in an estimated 50,000 civilian deaths, 500,000 injured and 2 million refugees.”⁸ In the subsequent Iraq War—at least in its intense phase in March–April 2003—casualties and refugee movements were, by any count, far below these levels. This is not to say that they were not worryingly high, and cause for major concern.⁹ In summary, I agree with Mr. Walker that civilian casualties in these wars, and in particular casualties of bombing, have been comparatively low by historical standards; and I also agree with him that this fact does not change everything. Thus there is a need to explore why, despite developments in the law and in weaponry, civilian damage and casualties have continued. These themes are explored in the next two sections.

The Law on Targeting

Probably the law’s most important contribution in these four wars has been the part it has played in the larger overall process of improving discrimination in targeting, especially targeting of airborne weapons. Since at least 1868 the laws of war have required that only armed forces and military targets should be attacked. This apparently simple rule is in fact hugely problematical. It has now been given much greater specificity in the rules on targeting contained in 1977 Geneva Protocol I.

On this matter, my emphasis differs from Mr. Walker’s. He is a skeptic about the value of the rules on targeting. There is still, as he says, an “inherent and completely irreconcilable subjectivity”¹⁰ built in to the balancing test when decisions have to be made as between military advantage and protection of civilian life. Human Rights Watch sees certain issues one way, while the Pentagon has a different spin on them. He even implies that there may have been a deliberate and ongoing collusive process by which we have ended up with a body of combat law that seeks only ostensibly to balance the two “incomparable concepts”¹¹ of military advantage and civilian protection. As he puts it:

Sadly, I have come to believe this was a knowing and deliberate process all along. The agenda worked by the major powers—led by the interests of their military establishments—during the negotiation of all the major law of war conventions was to find a way to present a humane face to the world while avoiding any meaningful restriction on the use of military force. It is poignantly ironic to note that the most historically effective niches in the law of war explicitly protect soldiers, not civilians—bans on dum-dum bullets, glass projectiles, poison gas, and provisions concerning the protection of the wounded and prisoners of war.¹²

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This is quite an accusation, but it neglects a basic fact. It is in the very nature of things that combat is extremely hard to regulate; and therefore that some of the more effective parts of the laws of war should be those that deal, not with combat as such, but with the treatment of individuals who are *hors de combat* or have fallen into the hands of the adversary. Against this background, it is remarkable that there is any significant body of law at all that regulates combat. The most detailed rules of this type are those in 1977 Geneva Protocol I. The fact that the United States has serious disagreements with parts of this treaty, which it has not ratified, does not negate the importance of these rules.

Mr. Walker's analysis is short of concrete examples. He is not to be blamed for this. To prove beyond doubt that the law has a benevolent influence on targeting, it would be necessary to report in detail on the process by which the decision was made whether or not to attack particular targets; and, if so, with what weapon, at what time, and in what way. Most people, even specialists in strategic matters, simply do not have access to such information. Information of this kind might confirm the substantial positive contribution of law in the decision-making process. In this context, there is a particular need for evidence of plans or missions that were abandoned or modified because of undue risk to civilians and civilian objects.

What are the main rules of law that are applicable to targeting? The rules in 1977 Protocol I are contained in its Part IV, which is on "Civilian Population," and in particular in its Section I on "General Protection Against the Effects of Hostilities." Within this section, eleven articles—48 to 58—contain all the main rules. Article 52.2 is particularly important:

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

Article 52 has to be read, and implemented, in conjunction with other provisions of Protocol I. Among the most important of these is Article 57 on precautions in attack, which establishes a strong set of procedures and criteria that must be satisfied in the conduct of all military attacks. For example, as regards so-called "dual-use" facilities—a term not used in the conventions—Article 57.2(b) sets out stringent criteria on the basis of which many planned attacks on such facilities might have to be canceled or suspended.¹³

These rules on targeting in 1977 Protocol I are well known to present problems for certain States. For example, Article 52, cited above, has been the subject of interpretative declarations by a number of parties to the Protocol.¹⁴ The UK's sixteen statements made at the time of ratification of the Protocol include no less than eight that relate to Articles 50 to 57. All eight articles, and all eight UK statements, relate in one way or another to targeting. A key theme of these eight UK statements is that the commander must necessarily act on the basis of the knowledge that was available at the time, as distinct from information that might have been available to others, or might have emerged later. In short, the commander should not be judged by an unrealistic standard. Other NATO member States have made some similar interpretative statements about Articles 51 to 57.

What is the official US line on the rules on targeting in 1977 Protocol I? Even though it is not a party to the Protocol, the United States has indicated that it accepts and applies many of its provisions. In one major official publication it has stated: "The US views the following GP I articles as either legally binding as customary international law or acceptable practice though not legally binding."¹⁵ The US list includes the following articles that relate directly to targeting:

- Article 51 except paragraph 6
- Article 52
- Article 54
- Articles 57–60

The fact of US acceptance in principle of these articles does not mean that there are no problems regarding the US understanding of them. US interpretations, while basically along similar lines to some of the statements made by NATO members when ratifying Protocol I, sometimes go further. For example, official US definitions of "military objectives" use language that is significantly broader than that of Article 52.2 as quoted above. One US version (with italics added here for emphasis) reads:

Military objectives are combatants and those objects which, by their nature, location, purpose, or use, *effectively contribute to the enemy's war-fighting or war-sustaining capability* and whose total or partial destruction, capture or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.¹⁶

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In one subsequent US version of this definition, namely Military Commission Instructions issued in 2003, the word ‘definite’ has been omitted.¹⁷ This would appear to represent a further departure from the text of Article 52(2).

Some legal experts in the US armed forces have expressed serious concerns about Article 52. For example, Major Jeanne Meyer, co-editor of the *Operational Law Handbook*, stated in 2001 that this article “tries to constrict the use of air power to the specific tactical military effort at hand” and “ignores the reality that a nation’s war effort is composed of more than just military components.”¹⁸ While not suggesting total rejection of the provision, she urged the United States to “resist the pressure to accept restrictive interpretations of Article 52.2.”¹⁹ In general, the United States is anxious to retain some legal justification for attacks on certain targets that may not themselves be purely military, but which may, for example, contribute to the military effort or constitute key parts of a regime’s infrastructure.

All in all, it is not surprising that some commentators have indicated concern about US interpretations of what constitutes a military objective. They see the US interpretation as differing significantly from Article 52, and as tending towards a more permissive definition.²⁰ Are such expressions of concern well founded? One could question the extent to which the current US position really represents, as is sometimes claimed, a shift as compared to earlier US positions; and also whether the US positions generally have not been similar in their meaning to some of the interpretative declarations on Article 52 made by certain other States. However, it is clear beyond doubt that the definition of military targets in Article 52 poses certain problems for the United States despite its general acceptance of this article. Moreover, there are some differences of national approach on these matters, including between the United Kingdom and the United States; and these can cause problems during coalition military operations.

Is the law as it stands satisfactory? Mr. Walker suggests that it is not. He may be right that the provisions of 1977 Protocol I are not as strong as many would wish; and that when it comes to actual decisions on actual targets, they sometimes leave considerable scope for interpretation and even for a necessarily subjective balancing process. However, he does not suggest specific changes, and he goes too far when he states that “there really is very little if any truly black letter law in this area.”²¹ The real problem may be, not the weakness of the law itself, but the very broad official US interpretation of it. Although Mr. Walker is critical of US practice, especially the danger it poses to civilians, he does not explicitly note the above-quoted US statements that, arguably, stretch almost to breaking point that very scope for interpretation of which he is critical. There are serious arguments both for and against the US emphasis on concentrating attacks on the enemy regime’s sources of power and war-sustaining capability—and the debate about the

adequacy or otherwise of the existing law needs to take account of this critically important debate.

My main disagreement with Mr. Walker's treatment of the law on targeting relates, not to the law's content or interpretation, but to its effect. In the four wars under consideration there is evidence that, so far as the United States is concerned, the effect of all the provisions on targeting contained in Protocol I, and even of the more restricted list of those provisions accepted by the United States, has been much more than the vague and subjective requirement for proportionality mentioned in Mr. Walker's paper. This is not the place to elaborate on this point, or go into the many relevant sources.²² At this stage it may be enough simply to assert that the process of identifying and attacking targets in these four wars has been influenced by legal requirements, including those of 1977 Protocol I. The fact that the US armed forces have to defend their actions by the criteria established in the law of war has had more effect on target selection and on policy generally than Mr. Walker allows. However, it has had less effect in mitigating the horrors of war than might have been hoped. Some of the reasons for this are explored in the next section.

Continuing Problems in the Use of Air Power

The increased accuracy of air-delivered weapons, while undoubtedly a momentous development in the history of war, is no cure-all. Even when coupled with attempts to observe legal restrictions on targeting, it cannot guarantee either success or no deaths of innocents. In the course of these four wars, figures for civilian deaths have apparently not decreased in proportion to the increase in the use of precision-targeted weapons. Why is this so?

Despite the improvements in accuracy, all four bombing campaigns aroused international concern, largely on account of the danger to non-combatants. There were reports of many attacks causing significant civilian casualties and damage. Accuracy in hitting the intended target area did not itself necessarily eliminate such problems. The US bombing of the Amiriya bunker in Baghdad on February 13, 1991 caused approximately 300 civilian casualties. In the Kosovo war in 1999, a railway bridge was bombed when a passenger train was crossing it, with heavy loss of life. In Afghanistan, the International Committee of the Red Cross warehouse in Kabul was hit twice, on October 16 and 26, 2001; and there were numerous subsequent incidents in which large numbers of villagers were killed.

The question is: what are the specific reasons why the combination of increased accuracy of air-delivered weapons and increased acceptance of certain rules relating to targeting have not produced a more dramatic change for the better? Mr. Walker suggests that the main problem is that the relevant body of law is weak,

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especially as regards protection of civilians; and that the United States, as the last superpower left standing, is in a situation of impunity.²³ However, a broader range of factors is at work, many but not all of which are recognized in his paper. In the hostile relations between adversaries in the four wars, at least eleven types of operational problems can be identified:

1. No weapon is more accurate than the intelligence on which its use is based, and this may sometimes be wrong or out of date, resulting in civilian damage and deaths.

2. Many targets are selected at very short notice, for example by ground-based personnel in radio contact with aircraft overhead. This can mean that targets are sometimes attacked without being subjected to cross-checking of information, or lengthy legal and policy consideration. As Mr. Walker states, “fewer targets are now planned through the target planning cycle and air tasking order.”²⁴

3. Precision-guided weapons are generally better at hitting fixed objects, such as buildings, than moving objects that can be concealed, such as people and tanks. This could lead to a perverse prioritization in favor of targeting buildings. (However, preliminary evidence from the 2003 war suggests effective use of air power even against tanks that had been concealed under tree cover.)

4. In all countries, some military targets, whether fixed or mobile, are likely to be in close proximity to civilians and civilian objects. Thus, even when a military target is accurately hit, there may be significant “collateral” damage, including destruction of houses and deaths of civilians.

5. As a response to the increased accuracy of targeting, the “receiving State” may deliberately co-locate military objects close to civilians and civilian objects—thus making it harder to attack them without harming civilians and incurring international criticism on that account. (This problem is discussed further below.)

6. So-called “dual-use targets,” such as a power station producing electricity for both military and civilian uses, are sometimes attacked—often with serious short- and long-term effects on the infrastructure of society.

7. Weapons, even if delivered with great precision, may themselves be of such a nature as to cause serious and indiscriminate damage. For example, it is notorious that cluster bombs frequently pose a hazard to civilians, including children—and may continue to do so long after a war is over.

8. Malevolence, callousness, incompetence, and poor or inappropriate training can also lead to attacks on the wrong places or people.

9. The greater accuracy of weapons risks creating a high level of anger against those individuals and States responsible for target selection. If it is perceived (whether rightly or wrongly) that what is hit is what a targeter intended to hit, there may be a greater sense of outrage among the population of the target State and in

international opinion generally. There is ample scope for conspiracy theories as to why a particular target was attacked.

10. The greater accuracy of bombing makes possible certain forms of action, such as targeted killings of individuals, that may be exposed to a wide range of legal and other criticisms. One example is a targeted killing that risks deaths of large numbers of civilians (e.g., the Baghdad restaurant attack intended to kill Saddam Hussein at the start of the 2003 Iraq War). Another example that could incur criticism, mainly on human rights and *jus ad bellum* grounds, would be a targeted killing (e.g., of an alleged terrorist) in the territory of a foreign country when there is no state of war with, or within, that country. Absence of formal consent of its government would aggravate the problem.

11. In an era marked by frequent threats of “strategic coercion” against certain States to change their policies or even their regimes, there is sometimes tension between the perceived need to make an impressive threat (such as that of “shock and awe” against Iraq in the run-up to the 2003 war) and then, if force is actually used, the need to observe certain limitations on its use. An actual military campaign may be at risk of conforming more to the preceding threats than to the legal and other considerations that might point in the direction of using force discriminately.

The problem of “friendly fire” confirms that the reasons for disasters often relate particularly to poor intelligence and hasty decision-making. In many cases in the two wars in Iraq and in the Afghan war, US bombings led to casualties among coalition forces. It appears that in most instances the target was incorrectly identified or a weapon incorrectly “locked on” to the wrong target. “Friendly fire” is not a laws-of-war issue as such. However, it is a legal issue under the national law of the States concerned, and can lead to national legal action—as it has done in the United States as a result of an incident involving the death of Canadian soldiers in Afghanistan.²⁵ Incidents of US “friendly fire” have also caused considerable concern in the United Kingdom, especially as a result of the 2003 Iraq War.²⁶ The frequency of such incidents confirms the thesis of this commentary, that modern means of war can lead to disaster not because the law is weak, but because the fog, chaos, confusion and sheer malevolence of war have survived into a new era.

A further problem with the new type of US bombing campaign concerns perceptions of the balance of risk. In the eyes of third parties, it can easily look as if the United States puts a lower value on the lives of Iraqis, Serbs or Afghans—even if civilian—than it does on its own almost-invulnerable aircrews. Mr. Walker seems to share this view when he refers to “conflict marked by its [the United States’] vast technological superiority and its leadership’s aversion to friendly casualties—almost always at the expense of higher civilian casualties.”²⁷ I am skeptical about this proposition. It is far from proven that there is any straightforward link between the

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safety of US aircrew and higher civilian casualties. It might just as easily be argued that the capacity to make decisions and to release (or refrain from releasing) weapons in relative safety may contribute to the careful and discriminate use of airpower. However, the hostile perception has some plausibility. Bombing from high altitude must sometimes increase the risk of a target being inaccurately identified; and must also increase the time a weapon takes to reach its target on the ground—by which time, for example, a previously empty bridge may have a passenger train running across it. The perception of invulnerable warriors risking the lives of civilians underneath feeds those hostile views of the United States that form a background against which terrorism can flourish.

Perhaps the most profound problem of all regarding the use of bombing is that the United States and its allies have developed a concept of war aimed at targeting the sources of an adversary's power, not all of which may be strictly and narrowly military in character. Mr. Walker appears to equate this with "targeting the will of the people."²⁸ He is rightly opposed to the idea of a policy aimed at civilians, criticizing it on both legal and practical grounds. However, the US doctrine is not necessarily one of targeting the will of the people. Rather, it aims principally at targeting the key sources and instruments of a regime's power—something that may in particular cases be very different. This is the biggest single challenge to the existing legal regime on targeting.

The debate about the bombing of the TV station in Belgrade in 1999 exemplifies the difficulty of determining what is a legal target. Mr. Walker calls this an example of "ill-advised expansions of the definition of 'military object' even under the current rules." However, it is not clear that what is involved is an expansion of the definition of military object. On the basis of the pre-1977 law, especially the 1954 Hague Cultural Property Convention, Article 8(1)(a),²⁹ a serious argument can be made that attacks on a broadcasting station are not necessarily illegal. The question is rather whether 1977 Protocol I drastically changed this situation by narrowing the definition of "military object." It may or may not be relevant that in the Yugoslav revolution of September/October 2000 the resisters to the Milosevic regime treated the same TV station as a high-priority target. One thing is certain: it will always, and quite properly, be difficult to persuade TV reporters that television stations are legitimate targets!

The Kosovo War raised many other issues indicating how easily a bombing campaign can conflict with the targeting provisions of the laws of war. For example, there were debates about what NATO should do when it started to run out of military targets: should it then abandon the bombing campaign, or move on to other targets? There is also the closely related analytical question: did attacks on dual-use targets, and/or a perceived threat of further attacks directed at civilians and

civilian objects, play a major part in the Yugoslav decision of June 3, 1999 to accept the terms that were being pressed upon it?³⁰ It is difficult to provide a definite answer to that last question. One can certainly doubt whether any “single-factor” explanation is adequate. However, while agreeing with Mr. Walker that Russia’s abandonment of Serbia was of crucial importance, I cannot agree with his strong assertion that “air power didn’t win the Kosovo campaign.”³¹ At the very least it was one important contributory factor. The more difficult question is whether the potential threat to specifically civilian objects and people was a part of the equation that contributed to Serbia’s defeat.

Defender’s Obligation to Distinguish Military Activities from Civilian Objects

There are extensive requirements that apply as much to defenders as to attackers, including the requirement not to locate military forces and equipment in civilian areas or in protected buildings such as hospitals or mosques.³² In these four wars it appears that these legal requirements were deliberately violated by adversaries in order to induce the US-led coalition to engage in an attack that caused civilian casualties and destruction. On several occasions the United States asserted that its opponents had faked civilian damage or, by illegally locating military assets in or close to civilian ones (for example putting gun emplacements next to mosques), had willfully created a situation in which US bombing, if it went ahead, would be likely to cause civilian damage and incur international criticism. Some evidence from the 2003 Iraq War in particular suggested that this may have been happening systematically.

In this reading of events, the laws of war are being cynically misused in order to make the attacker’s actions appear indiscriminate and disproportionate. Such conduct, if it were proved to have the intention imputed here, would of course constitute a tribute of sorts to the practical importance of the principles of proportionality and discrimination. Such conduct is all part of what Brigadier General Charles Dunlap has called “lawfare,” or “the strategy of using—or misusing—law as a substitute for traditional means to achieve an operational objective.”³³

Why is there such a tendency of States subjected to coalition bombing to locate military assets in or near civilian objects such as schools and mosques? Part of the answer may be that it is a logical if deplorable reaction to the situation created by effective US dominance of the air. If the United States and its partners can see and strike anywhere, or at least it is believed that they can do so, it is not surprising that its adversaries should locate their military assets in a place where any US attack would be open to condemnation in the court of world opinion. Similarly, the very

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dominance the United States exerts on the battlefield generally may induce adversaries to other illegal forms of response, including international terrorism.

Conclusions

There is no denying some obvious truths about the impact of technological developments. The increased accuracy in the delivery of weapons has had significant effects; ought to improve possibilities that bombing can bear a reasonable relation to the law of armed conflict; and may contribute to a reduction in numbers of civilian casualties in the territory being bombed. However, as this survey has suggested, none of this means that we are in a brave new world of casualty-free warfare. Indeed, the new accuracy in bombing poses a range of difficult and even threatening problems, many of which relate to the rules on targeting in the laws of war. Such problems contribute to Mr. Walker's pessimistic conclusion that "any positivist notions . . . of the laws of war are basically gone. They have become what the more cynical among us have always suspected—merely an admirable collection of declaratory and aspirational normative statements, to be obeyed or not as the exigencies of the situation dictate."³⁴

I cannot agree with this conclusion. Mr. Walker admits that he has "painted us into a corner."³⁵ Yet his account of the corner is not completely convincing. He is right to focus on the uniqueness of the situation where there is only one Great Power. However, what he says about the supposed impunity of the United States and its allies does not reflect accurately the full range of constraints on decision-makers. True, US decision-makers are protected from the attentions of the International Criminal Court (though in theory their British counterparts are not); and in some measure they are protected from military reprisals as there is no adversary of remotely equal military power. However, US decision-makers involved in such matters as targeting must always have in mind the possibility of a wide range of adverse consequences. Any actions which fly in the face of the decent opinions of humankind, or which plainly violate the laws of war, may result in adverse publicity, internal US legal procedures, local opposition in the area of operations, and a loss of support both domestically and internationally that could undermine ongoing US policies. In the twentieth century the United States acquired a unique international role thanks largely to its success in building, maintaining and leading coalitions of States. That success is now in jeopardy, as the diminishing number of member States in the coalitions between the 1991 and the 2003 Iraq wars perhaps indicates.

What, if anything, can the United States and allies do in regard to the existing (and admittedly modest) body of law as it applies to the use of air power in war? In

principle three courses of action are possible. All three have strengths, and the prudent conduct of policy must involve elements of all of them.

1. *Adhere strictly to the existing black-letter law on targeting, especially the law as outlined in 1977 Geneva Protocol I.* This course has serious merits, and Mr. Walker, despite his conclusion that there is “very little black letter law,” shows his sympathy for it, advocating strongly a default rule of not attacking civilians.³⁶

2. *Recognize some right to interpret and adapt the rules in practice.* The fact that many States have made interpretative declarations in respect of some of these rules suggests the strength of this approach. It indicates that the rules can properly be interpreted to take account of changing circumstances and the legitimate interests of States. In principle some degree of flexibility in treaty interpretation can have an important function if the law is not to be seen as rigid and irrelevant. However, there is a difference between a legitimate interpretation of the rules and an unacceptable departure from them. Any actual departure needs to be managed carefully if it is to be accepted by other States. A purely unilateral US departure from the targeting provisions of Protocol I would be problematical. A possible difficulty of this course is that different States might want to adapt or weaken the rules in different ways, until very little was left of the treaty regime.

3. *Revise the law.* In general, there is remarkably little pressure to change or amend the basic rules on targeting, including those in 1977 Geneva Protocol I. There has been a dearth of specific proposals for formal agreement on these matters—whether to strengthen the law by making it more restrictive, or alternatively to dilute it in order to bring regime-supporting activities and institutions more explicitly into the category of legitimate targets. The main impetus for new law, so far as the use of weapons is concerned, is focused on such highly specific tasks as limiting or prohibiting the use of cluster bombs.

Perhaps because he senses the difficulty of all these courses, Mr. Walker concludes with a plea for political control of the military, which he sees as “the most effective way to allocate risk in an open and coherent fashion.”³⁷ I am all in favor of political control of the military, but to imagine that it is a solution to the problems addressed in his paper is sheer escapism. The track record, including recently, suggests that on the particular issue that concerns us here—effective implementation of the law of armed conflict—political control often leads to confusion and failure. We have heard eloquent testimony at this conference suggesting that in early 2003 it was political control that contributed to the remarkable failure of the Pentagon to make plans for the occupation phase in Iraq. Similarly, in January 2002 it was largely at the political level that a number of confusing statements were made about the status and treatment of detainees at Guantanamo. Unfortunately both the US and UK governments are somewhat distrustful of their own bureaucracies

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and those in the bureaucracies with specialist skills (including the law) sometimes suffer in consequence.

My conclusions are that despite dramatic improvements in accuracy we are not in an era in which the use of air power offers an escape from the cruelties and disasters of war; that, albeit alongside a wide range of other considerations, the law as it currently exists does offer a useful practical guide to targeting; that no country, not even the United States, can afford to ignore basic legal provisions applicable to targeting; that the interpretation to be placed on the law of targeting poses problems for many countries, and not just the United States; that the law faces a major challenge in doctrines based on attacking the adversary regime's sources of power; that implementation of the laws of war, while certainly a matter for political control, must also remain central to the activities, planning and ethos of the armed forces; and, finally, that recent air campaigns show how complex and paradoxical implementation of the law can be—but not that it has ceased to be an important standard for guiding the conduct of military operations.

Notes

1. Sir Adam Roberts is Montague Burton Professor of International Relations at Oxford University and Fellow of Balliol College.
2. I have deliberately not followed the common and ethnocentric practice of referring to the events of 1990–91 as “the first Gulf War” and those of 2003 as “the second Gulf War.” If there was a “first Gulf War,” it was the Iran-Iraq War of 1980–88, which was a more catastrophic event for both societies than either of the subsequent wars. It is hard to justify the use of terminology that appears to ignore that war completely.
3. The term “coalition forces” is used here as convenient shorthand for the United States–led forces in all four wars. As regards Iraq in March–April 2003, it is questionable whether the term is appropriate to describe what was principally a “coalition” of only two armed forces, from the United States and United Kingdom, with the addition of a few Scud-hunting Australian commandos in the western desert, and Polish troops assisting US Navy Seals in the south. The use of the term was much criticized, mainly because it was seen as implying the active involvement in the conflict of a larger grouping of countries than was in fact the case.
4. See Mr. Walker's article, *Strategic Targeting and International Law*, which is Chapter VII in this volume, at 121.
5. On international legal aspects of the decision to use force in Iraq, see Adam Roberts, *Law and the Use of Force After Iraq*, 45 SURVIVAL 31 (Summer 2003).
6. Walker, *supra* note 4, at 123.
7. The principle of discrimination, which is about the selection of weaponry, methods and targets, includes the idea that non-combatants and those *hors de combat* should not be deliberately targeted.
8. Half-page advertisement for Stop the War Coalition, THE GUARDIAN (London), Mar. 3, 2003, at 17.
9. An independent US think-tank has estimated that between 3,200 and 4,300 civilian non-combatants died as a result of the military operations in Iraq between March 19 and April 20,

2003. Carl Conetta, *The Wages of War: Iraqi Combatant and Noncombatant Fatalities in the 2003 Conflict*, Project on Defense Alternatives Research Monograph no. 8, at 2–3 (Oct. 2003).
10. Walker, *supra* note 4, at 126.
 11. *Id.*
 12. *Id.* at 127.
 13. Mr. Walker cites part of Article 57.2(b) of 1977 Protocol I in his paper, *id.* at 126.
 14. Declarations made by States that have a bearing on their understanding of 1977 Geneva Protocol I, Article 52, include those by Australia, Belgium, Canada, Germany, Ireland, Italy, Netherlands, Spain and the United Kingdom. Texts in DOCUMENTS ON THE LAWS OF WAR 500–11 (Adam Roberts and Richard Guelff eds., 3d ed. 2000).
 15. Judge Advocate General’s School, *Operational Law Handbook*, JA 422, ch. 2, p.11 (2002).
 16. US Navy/Marine Corps/Coast Guard, *The Commander’s Handbook on the Law of Naval Operations*, NWP 1-14M, MCWP 5-2.1, COMDTPUB P5800.7 ¶ 8.1.1 (1995). For an annotated text, see ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 402 (A. R. Thomas and James C. Duncan eds., 1999) (Vol. 73, US Naval War College International Law Studies).
 17. US Department of Defense, *Military Commission Instruction No. 2, Crimes and Elements for Trials by Military Commission*, April 30, 2003, *available at* www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf.
 18. Jeanne M. Meyer, *Tearing Down the Facade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine*, 51 AIR FORCE LAW REVIEW 143, 166, 181 (2001).
 19. *Id.* at 182.
 20. *See, e.g.*, Bofaxe No. 256E of May 15, 2003, issued by the Institute for International Law of Peace and Humanitarian Law of the Ruhr-University Bochum, *available at* <http://www.ifhv.de>.
 21. Walker, *supra* note 4, at 130.
 22. On the relevance of legal considerations in the bombing campaign in the 1991 Gulf War, see Adam Roberts, *The Laws of War in the 1990–91 Gulf Conflict*, 18 INTERNATIONAL SECURITY 134 (Winter 1993/94).
 23. Walker, *supra* note 4, at 129.
 24. *Id.* at 123.
 25. On September 13, 2002, two US pilots, Major Harry Schmidt and Major William Umbach, were charged by the US Air Force following an incident in which they mistakenly bombed and killed Canadian troops in Afghanistan on April 17, 2002. These were the first criminal charges against US pilots in connection with the events in Afghanistan. In the course of 2003 Major Umbach announced plans to retire from the military with a reprimand on his file. Meanwhile Major Schmidt initially declined an offer of administrative punishment, but later agreed to accept a nonjudicial hearing. At that hearing, on July 6, 2004, he was found guilty of dereliction of duty and was punished with a reprimand and a forfeiture of US \$5,672 in pay. He lost his final Air Force appeal on August 3, 2004. News report in THE TIMES (London), Sept. 14, 2002, at 16; and Associated Press reports of June 25 and October 18, 2003, and July 7 and August 3, 2004.
 26. In October 2003 a UK soldier, Trooper Christopher Finney, was awarded the George Cross—the second highest honor for gallantry—for his bravery under US “friendly fire” in the 2003 Iraq War. In November 2003 the BBC’s World Affairs Editor published an account of another such incident in Iraq in which at least 16 people were killed and 45 injured. *See* JOHN SIMPSON, *THE WARS AGAINST SADDAM: TAKING THE HARD ROAD TO BAGHDAD* (2003).
 27. Walker, *supra* note 4, at 128.
 28. *Id.* at 124.

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29. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 14, at 373.

30. Re the factors that led Milosevic to back down, see Adam Roberts, *The Laws of War After Kosovo*, in LEGAL AND ETHICAL LESSONS OF NATO'S KOSOVO CAMPAIGN 416–17 (Andru E. Wall ed., 2002) (Vol. 78, US Naval War College International Law Studies). As mentioned there, for a challenging argument that the NATO bombing was a key factor in leading to the decision to back down, and that one element was a belief that the bombing would become less discriminate if Milosevic did not settle, see Stephen T. Hosmer, *The Conflict Over Kosovo: Why Milosevic Decided to Settle When He Did*, RAND report MR-1351-AF, at 91–107 (2001).

31. Walker, *supra* note 4, at 121.

32. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 18, 6 U.S.T. 3516, 75 U.N.T.S. 287, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 14, at 301; Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 58, 1125 U.N.T.S. 3, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 14, at 422. Two States against which the United States fought in recent wars—Afghanistan and Iraq—were not parties to 1977 Protocol I.

33. Brigadier General Charles Dunlap, US Air Force, *Air and Information Operations: A Perspective on the Rise of “Lawfare” in Modern Conflicts*, presentation prepared for the US Naval War College Conference on Current Issues in International Law and Military Operations, Newport, Rhode Island, June 25–7, 2003.

34. Walker, *supra* note 4, at 130.

35. *Id.*

36. *Id.*

37. *Id.*