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Strategic Targeting and International Law: 
The Ambiguity of Law Meets the Reality 
of a Single-Superpower World

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Strategic Targeting in Recent Conflicts

My charge is to address strategic targeting and the law of war. And isn’t this 
an ironic moment in history for such a discussion? For just at the moment 
when the evolution of the technology of aerial bombardment allows for the fulfillment 
of Billy Mitchell’s vision, we stand on the verge of jettisoning his underlying 
theory as anachronistic and redundant. For 60 years, airmen have bemoaned that if 
they but had pinpoint accurate, survivable, and reliable all-weather day/night weapons, 
the vision of the strategic bombardment gurus would inevitably and inexorably 
be proven correct. We now have the technology, but no longer the need.

As is surely evident in Afghanistan and Iraq, strategic bombardment just isn’t 
the main event anymore. Kosovo was the seeming fruition of the airman’s years of 
toil—a campaign limited from the outset to a purely air operation and therefore by 
necessity heavily focused on strategic targets. The problem is that air power didn’t 
win the Kosovo campaign. The bombing showed little effect on Serbian ground forces 
and the will of the Serb regime showed little signs of cracking in the face of 
around-the-clock bombing—in fact, just the opposite. And ultimately, the precipitating 
event that caused Slobodan Milosevic to fold his tents was the very public

¹The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.
withdrawal of the support—brought about by diplomacy more than by bombs—of his long-time patron, Russia.

So in Kosovo, airmen hit the apparent high-water mark for strategic bombing theory, but at the same time many failed to notice that the plug in the bottom of the doctrinal bathtub had already been pulled. Which brings us to Afghanistan. The Afghan campaign brought unconstructed airmen face-to-face with a horrible problem: how do you draw Colonel Jack Warden’s concentric circles when there’s nothing attachable to draw them around? What do you do when strategic bombing doctrine meets an enemy that would like nothing more than to be bombed back a few centuries? To the Taliban, there wasn’t much of value we could bomb in Afghanistan, since they placed little or no value on the technological, industrial, or economic trappings so dear to Western notions of modernity and progress. Al Qaeda traveled light and could easily disperse and regroup after air attacks. So the air war in Afghanistan took a decidedly different turn for air planners. What the air arm of Operation Enduring Freedom became was that much-maligned role assigned them by Heinz Guderian, father of the blitzkrieg. Air forces became what air doctrine purists most dreaded—“flying artillery” for the very thin, very light, and very agile special operations ground forces supporting whatever indigenous forces could be allied with us.

Iraq seemed to offer airmen a reprieve from this ignominy, but it didn’t quite pan out that way. Operation Iraqi Freedom became something of a laboratory for the future non-strategic uses of air power, with five distinct and geographically defined air sub-campaigns.

First, with the quick capitulation of all but a few pockets of resistance in the southern quarter of Iraq, air forces assumed the role of airborne SWAT teams for what was essentially peacekeeping work. Second, there was the Scud hunt and border patrol of the Western desert. Like in Afghanistan, this was a special operations show, with air power acting as an airborne surgeon—precise applications of measured amounts of force against emerging or fleeting targets with tight control by ground forces with eyes on target or from low and slow tactical drones. Third, there was the Kurdish northern front. Reduced to a wait-and-see role by Turkish skittishness and the lightness of US forces in the area, the role of air power became mostly that of airborne cavalry, providing rescue as needed and exploitation of enemy missteps when possible. Fourth, there was the Big Show—the dual armored thrusts up the river valleys. This was classic close air support and what used to be called battlefield air interdiction. In this area of operations, air power was undeniably cast in the role of airborne artillery—and to very great effect.

Finally, there were bombs over Baghdad. This was the classic strategic hammer role for airpower wistfully dreamt of in its idealized form from Giulio Douhet to
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Jack Warden. However, this piece of Iraqi Freedom was, in comparison to Operation Desert Storm in 1991, a very small sideshow. Why was this? Unlike Afghanistan, Iraq was a modern country with a government and population that had grown accustomed to the infrastructure of a modern economy—electrical power, effective transportation, good telecommunications, urban living—so there were certainly strategic targets available. However, Iraqi Freedom presented in clear focus the second tectonic shift that if not exactly sounding the death knell for strategic bombardment has served notice that airmen better start rethinking strategic doctrine. The primary reason why the strategic bombing campaign over Baghdad was not more vigorous was because from the beginning of planning, everyone realized that it would be foolhardy to break any more china than absolutely necessary since we would be expected to fix most everything we broke. And high on the list of the plates we wanted to remain unbroken was the good will of the Iraqi populace.

Military Objectives and Collateral Injury in a Non-Strategic World

So where does all this get us in terms of the law of war? On the one hand, the air campaign is fragmenting and over-specializing, with the result that fewer and fewer targets are now planned through the target planning cycle and air tasking order (ATO). As a result, the opportunity for systematic review and analysis for collateral damage effects and law of war compliance is rapidly fading. In the Iraq air campaign, less than 20% of all targets struck ever appeared on an ATO. This means that the business of operations lawyers is getting more complicated with less time and more uncertainty. Lawyers will need to think outside the “JAG signs the legal review line on the target folder” box—those days are mostly gone. And there is an enormous amount of work being done right now on strategy tools, collaborative software, and other air campaign planning tools that offer many opportunities for innovative new approaches to target review and law of war compliance in air campaigns. The legal community must take advantage of these opportunities to develop future procedures.

On the other hand, the legal equation is being somewhat simplified in one important respect. Since the strategic bombing campaigns of World War II, one of the messiest and most intractable questions to dog the law of war has been the issue of dual-civilian/military use targets. Unfortunately, modern industrial warfare relies upon essentially the same infrastructure as the modern industrial economy—railroads, ports, marshalling yards, highways, telecommunications, and, above all, electricity and oil. Therefore, striking strategic targets for maximum impact upon the enemy’s war-making capacity by necessity impacts greatly upon the enemy’s civilian population. In addition, much of this dual-use infrastructure tends to cluster
in and around urban areas—for completely logical reasons—and therefore striking these targets in densely populated areas heightens the risk of civilian collateral injury and damage. More accurate weaponry helps to reduce collateral injury from misdirected bombs, but the blast, heat, and fragmentation from a perfectly placed bomb cannot be completely contained, so adjoining structures and nearby persons cannot be completely spared from collateral effects. With the eclipse of the importance of “going downtown” and of the traditional infrastructure-centric strategic bombing in general, we will be granted some relief from these thorny legal problems. It is a pity that after having finally gotten some serious tools for analyzing difficult urban and infrastructure targets—I am thinking of Bug Splat,\(^3\) JMEM multi-tiered analysis,\(^4\) and the ready availability of sophisticated computer modeling of weapons effects—the need for them is declining.

**Expanding the Notion of Lawful Targets?**

However, the frustration borne from the slow realization of how ineffective or unimportant strategic bombing was in Kosovo and Afghanistan and Iraq has caused some airmen to suggest that the problem lies not with the limitations of strategic bombing itself, but rather with the artificial restrictions of international law. Why should the will of the enemy’s population not be a lawful target? Some have suggested that the parameters of lawful objectives should be expanded to include objectives that if struck would discomfort or distress the civilian population. (To be fair, everyone stops well short of advocating directly killing civilians.) For example, why not target symbols of cultural pride like the national soccer stadium? Why not acknowledge that making life difficult for the civilian population in the enemy capital is a lawful objective in that it will undermine political support for the enemy leadership and sap their desire to continue the war? Of course, this was one of the publicly articulated—and more regrettable—reasons why the electrical grids in Baghdad in 1991 and in Belgrade in 1999 were attacked early in those bombing campaigns. Some commanders from Desert Storm have stated at various times that one goal of the initial wave of bombing over Baghdad was to impress upon the Iraqi people that they were now at war—most obviously evidenced by the lights going out for both the Iraqi military and civilians all over the city.

There is, of course, a problem with this expansive approach. First, it is arguably illegal. Second, it should remain illegal. There are several reasons why.

First, targeting the will of the people—explicitly illegal but tacitly accepted as at least a collateral purpose of nearly every bombing campaign—doesn’t work. Never has and probably never will. Killing, wounding, or displacing civilians just makes them angry and generally more resolved to resist—it’s a tragic-comic aspect of
human nature that the more we get hurt the more we are willing to get hurt just to spite the one who’s doing the hurting. Even carpet bombing and fire bombing German and Japanese cities didn’t really break the resolve of the civilian populations. We saw no evidence of this in Serbia in 1999 either.

Second, even a weak declarative norm is still better than nothing in that we at least default to not attacking civilians. Eliminating or even reversing that default could easily put us on the infamous slippery slope and become a race to the bottom. If selecting targets to make the enemy population uncomfortable is lawful, the parameters of just what constitutes discomfort will inevitably expand. If the goal is to sap the population’s will without directly killing them—our consciences would hardly allow that—then why not attack irrigation systems or grain elevators or hospitals or mosques? Some commentators have even suggested this is exactly what the United States did in the first Gulf War by hard killing the electrical generation systems in Iraq, resulting in prolonged famine. We have already engaged in ill-advised expansions of the definition of “military object” even under the current rules—television and radio stations and the infamous “crony targets” in Serbia are good examples. It would be disastrous were we completely to jettison the presumption that civilians—and the will of the people—are immune from direct attack.

Third, allowing direct targeting of the enemy civilian population in any way assumes some sort of collective responsibility on the part of the enemy population. This completely ignores the nature of totalitarian or authoritarian regimes. A totalitarian regime exercising a stern monopoly over the levers of power can stay in place for a very, very long time with little or no direct support from the population. In such States, the opportunities for dissent and resistance are generally very limited. In fact, the very regimes we most want to remove are generally those with the least direct popular support—the Ba’ath regime in Iraq and the communist regime in North Korea spring to mind. (Recall that even in the raucously democratic United States, the first Bush “regime” initially enjoyed the support of a bit less than half of the 52% of the population that even bothered to vote.) Deliberately targeting the will of the civilian population in these circumstances constitutes nothing more than collective punishment and random reprisal.

The final and most significant reason why we must avoid loosening the declarative norm against directly targeting the civilian population is that we surely don’t want any further weakening of the admittedly less-than-effective existing legal standards protecting civilians from the effects of armed attack. It is the sad history of the documents that compromise the law of war that they were written predominantly by soldiers (or diplomatic surrogates afraid to offend soldiers) to the overwhelming benefit of soldiers.
Let us take the example of an important law of war concept, proportionality. The law of war states “indiscriminate attacks are prohibited” and that an indiscriminate attack includes one 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.” Thus says Additional Protocol I on the rule of proportionality in the attack.

The problem of course is that the rule implicitly accepts that it is the attacker who decides what is and is not excessive injury, damage, or death. And the determination of excessiveness turns on the equally ambiguous term “military advantage”—or as further obfuscated in US practice, military advantage “when viewed in the context of the campaign as a whole,” whatever on Earth that means. Except in the most obvious or ludicrous marginal cases, this studied ambiguity yields a systemic default to rendering any military advantage thrown into the balance by the attacker as not excessive in relation to resulting civilian injury and death.

The baby elephant in the room that most of us choose to ignore is the inherent and completely irreconcilable subjectivity built into this so-called balancing test. I vividly recall reading the Kosovo post-conflict report by Human Rights Watch while working in the Pentagon. This thorough and well-substantiated report estimated that 500 civilians had been killed during the 78-day bombing campaign. The reaction of my colleagues and me was “not bad.” The reaction of Human Rights Watch was substantially different. In the report prepared for the International Criminal Tribunal for the former Yugoslavia prosecutor in response to allegations of NATO war crimes in the Kosovo air war, the rapporteur stated,

The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied . . . . For example, bombing a refugee camp is obviously prohibited if its only military significance is that people in the camp are knitting socks for soldiers. Conversely, an air strike on an ammunition dump should not be prohibited merely because a farmer is plowing a field in the area. Unfortunately, most applications of the principle of proportionality are not quite so clear cut . . . . It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants . . . . It is suggested that the determination of relative values must be that of the “reasonable military commander.”

So we are stuck with a rule of paramount importance that rests on comparing two incomparable concepts, purports to subjectively quantify the basically unquantifiable notion of “military advantage,” and defers all decision-making to the party in interest with the least personal and most amorphous stake (soldiers) at the
enormous expense of the other party in interest with the greatest and very tangible personal stake (civilians). To quote the immortal Yul Brenner, “Is a puzzlement.”

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 restrictions 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.

As a result of this studied creation of irreconcilable ambiguity into the critical concept of proportionality, it will remain little more than an aspirational norm. The very ambiguity of the rule has the perverse effect of offering significantly less protection to the innocent victims than to those who enjoy a monopoly on the use of force. Until such time as the law explicitly reapportions the greater risk of injury and death—as a normative legal concept and a moral prescription—to those who wield armed force and have voluntarily assumed the risks attendant upon its use, civilians will continue to receive scant protection from the laws of war.

Why Does It Matter Who Bears the Risk?

Why, it may well be asked, am I distressed by the notion that the law of war disproportionately benefits soldiers at the expense of civilians? Quite simply, because one has willingly assumed the risk of death, injury, or capture and the other has not. This requires a little explanation.

As the great British military historian John Keegan persuasively argues, since the advent of means and methods of warfare that allow the application of force at a distance—basically gunpowder weapons—the mark of a great and valorous military officer has ceased being the ability to inflict injury on the enemy with his strong right arm. Rather, with distant means of killing, the mark of the courageous officer has become an indifference to personal safety, a scorn for injury or death. This reached its most ludicrous extreme in World War I, when young lieutenants fresh from Oxford or Cambridge went over the top with nothing but an umbrella or riding crop or soccer ball. However, this is a very clear manifestation of the most fundamental characteristic of the profession of arms—the willingness to engage in self-sacrifice up to and including death. Military men and women often say, “It’s not about the money.” The military profession has traditionally and still does fancy itself a unique calling. It must not be all about the money, otherwise you could simply contract out for infantry to the lowest bidder.
As the United States continues to engage in conflict marked by its vast technological superiority and with its leadership’s aversion to friendly casualties—almost always at the expense of higher civilian casualties—what will it mean to this culture of self-sacrifice, to the ultimate defining characteristic of the profession of arms? Michael Ignatieff, in a New Yorker article soon after the end of the Kosovo air campaign in 1999, asserted, “It was a virtual war, fought in video teleconference rooms, using target folders flashed on screens . . . [it] never reached deep into the psyche of a people . . . [did] not demand blood and sacrifice.” Even the wars of the post-9/11 era have demanded little of the American people—indeed, immediately after 9/11 the President’s call for “blood and sacrifice” consisted for most people of shoe removal in airports and an enjoinder to spend more money shopping. Hardly the stuff that will render us the next “Greatest Generation.”

Assumption of the Risk

So soldiers have willingly assumed the heightened risk of death or injury as members of the profession of arms. This is not to say that I am all-over warm and fuzzy about every civilian. Just as soldiers assume risk, there has long been a tacit but universal acceptance within the law of war regime that in some circumstances civilians also assume a heightened risk. For example, although the blanket prohibition against making civilians the direct object of attack still applies, there are few who would argue that the killing of war workers busily assembling tanks inside a munitions factory is a war crime. Likewise, the torpedoing of civilian merchant vessels laden with war materiel is not a war crime. On the other hand, few would be so bold as to assert that night area bombing of the housing estate where the tank factory workers sleep is lawful—although soldiers asleep in their barracks do bear this risk. The difference is that the law of war tacitly acknowledges that civilians willingly present within a lawful military target assume the risk of being attacked. The concept seems to be that although one should not go out of your way to kill them, this category of civilian quite simply weighs quite lightly in the proportionality equation when attacking an otherwise lawful military target. Again, I can find no explicit statement of this in law—it just seems to be a generally accepted principle of application.

Voluntary human shields are another category of persons that assume the risk of death or injury by willfully placing themselves in harms way at a lawful military objective. Of course, the law is only the law, and as we saw in Kosovo, policy considerations can render immune from attack otherwise lawful targets protected by volunteer civilians.
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Perhaps of more moment for US forces, contractor or civilian employees accompanying US forces in the field logically fall into the category of assessors of the risk. The law of war hints at this in 1949 Geneva Convention III\(^{11}\) by extending some protections to these civilians if they fall into the hands of an enemy force. Both defense contractors and the government have tacitly acknowledged this by paying significantly higher wages to such civilians. As more and more functions heretofore performed by uniformed soldiers are contracted out—and lest anyone be uninformed on this subject, huge swaths of traditional military functions are being contracted—the very notion of what constitutes a combatant versus a civilian is being thoroughly muddled.

The Issue of Impunity

One final factor—and this is a big one—is rapidly undermining what we all were taught as the positivist legal regime regulating armed conflict. From the earliest conferences in St. Petersburg, there was a very rough equivalency of threat amongst the major powers who created the law of war treaty regime. Be it the Great Powers of the 19th century, Democracies versus Fascists in the inter-war years, or the US bloc versus the Soviet bloc of the Cold War, there was always a rough equivalency in the damage each could do to the other. This more or less balanced military threat produced a mutuality of self-interest amongst the major players who most influenced the development of the law of war treaties. If all your potential enemies have the wherewithal to do to you what you can do to them—be it take prisoners or strategically bomb or sink merchant shipping—then everyone faced a somewhat tarnished Golden Rule: don’t do some things unto others or they just might do the same unto you. And this was until recently the positivistic enforcement mechanism—admittedly less than totally effective—that underpinned whatever success the law of war regime may have enjoyed in theory and application.

But with the emergence of the United States as the last superpower left standing, we are faced with a significant threat to this implicit enforcement mechanism—impunity. Now I don’t intend to use this word with any of its negative connotations. I mean plain old impunity—the ability to act without constraint. This is after all what the Holy Grail of air campaign planners, air supremacy, means—the ability to act with impunity over the entire area of operations. And in a military sense—although not a political one—the United States and its usual allies find themselves in this position. Militarily, we can pretty much do whatever we want with little reciprocal risk of an enemy doing much back at us.

That said, any positivist notions—and you will notice that I don’t count the marginally effective international criminal tribunals in this mix—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.

Where Do We Go from Here?

So I have painted us into a corner—the law is inherently ambiguous, is more aspirational than effective, and was never really intended to protect civilians much in the first place. With one enormous military power now ruling the international roost, the self-interest and reciprocity of threat that served to shore up what compliance there was has evaporated. But the law of war regime as it exists today is all we’ve got. Can we do any better with it?

I’m not really sure, although I’m willing to give it some serious thought and hope the readers will as well. The law of proportionality is hardly unique in its inherent ambiguity—a lot of domestic law falls into the same category. If you’re a full-blown critical legal studies disciple, all law is inherently ambiguous because law is a creature of language and all language is inherently ambiguous. And in international law we get the added confounding factor of equally authentic texts in several languages. What’s a lawyer to do?

Step one may be to simply acknowledge that we need to make clear policy choices rather than tortured legal justifications as to the allocation of risks from the use of military force. As lawyers, we need to stop hiding behind pseudo-positivist “black letter” arguments—there really is very little if any truly black letter law in this area. And in modern democracies, there is already a mechanism for making these policy-driven allocations of risk—political control of the military. Much as soldiers grind their teeth at what is often perceived as niggling interference from the political masters, this is the most effective way to allocate risk in an open and coherent fashion. And as professional soldiers doing the dirty work of democracy, you might as well stop carping about it and acknowledge this is not only the way things are, it is the way things should be.

Notes

1. Lieutenant Colonel Walker is a retired US Air Force judge advocate.
2. John A. Warden, The Enemy as a System, AIRPOWER JOURNAL 40 (Spring 1995). Colonel Warden’s five rings are (1) the command ring—the enemy command structure, which may be a civilian at the seat of government or a military commander; (2) the enemy’s organic essentials—those facilities or processes without which the State cannot maintain itself, e.g., in many instances, electricity and petroleum products; (3) the infrastructure ring containing the enemy State’s transportation system, including rail lines, airlines, highways, bridges, airfields,
ports, and other similar systems; (4) the enemy State’s population; and (5) the enemy’s fielded military forces.

3. A mathematically based software program that predicts a munition’s fragmentation pattern based on the angle and direction at which the munition is falling.

4. The Joint Munitions Effectiveness Manuals provide methodologies to permit standardized comparison of weapon effectiveness against a variety of targets.


