DOES THE LAW REALLY MATTER?

The Role of the Law of Armed Conflict in Contemporary Air Operations

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2002 CHIEF OF AIR FORCE FELLOW

AIR POWER DEVELOPMENT CENTRE
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Abbreviations

ADF	Australian Defence Force
ICC	International Criminal Court
INTERFET	United Nations Mission in East Timor
LOAC	Law of Armed Conflict
NATO	North Atlantic Treaty Organisation
PGM	Precision guided munitions
RAAF	Royal Australian Air Force
RAF	Royal Air Force
UN	United Nations
USAF	United States Air Force

Aeronautics opened up to men a new field of action, the field of the air. In so doing it of necessity created a new battlefield; for wherever two men meet, conflict is inevitable.

Giulio Douhet[1]

[1] Giulio Douhet, *The Command of the Air* (trans. by Dino Ferrari), Arno Press, New York, 1972, p. 3.

1 – INTRODUCTION

Qui desderat pacem, praeparet bellum

(Let him who desires peace prepare for war)[1]

A battle currently rages over the future role of the law in war. This battle is divided between two schools of thought: on one side there are those who expect, plan and fight wars; on the other are those who seek to avoid war and minimise unnecessary suffering. The outcome of this ideological clash will affect the future use of force in the international arena. But these two schools of thought are not mutually exclusive. This paper will argue that it is necessary for these antagonists to merge their views in order to forge a robust legal and moral framework to deal with future conflicts. The law surrounding armed conflict has developed over many centuries, and will continue to develop in tandem with these two perspectives.[2]

This paper is the product of ongoing debate concerning the relationship between air power and the law. While humankind has made great leaps in the technology associated with air warfare, it continues to struggle with theories that provide for the best application of air power. The increased destructiveness and lethality, the ability to use precision technology and the transparency of modern warfare has led to an increased involvement of law in matters of war. Today, lawyers are often questioned on the relevance of law to war and are sometimes accused of unnecessarily constraining military operations. Unfortunately, the horror of war remains one of the primary institutions in our international system. Both law and war exist because of our system of international order, which is driven by the self-interest of states. The international community attempts to somehow regulate war through international law. Irrespective of whether the law is judged critically, there is a clear body of rules and principles that are relevant to, and must be considered in conjunction with, all military activities. The law is an important means by which the scourge of war can be moderated without jeopardising the ultimate military objective: victory and enduring peace.

War is a tragic recurring feature of the modern world and presents the ultimate challenge to international legal order. At first glance, the law and war appear to be incongruous concepts. Military theorist Carl von Clausewitz recognised this when he wrote: 'War is an act of force and there is no logical limit to the application of that force'.[3] Yet for as long as humankind and states have resorted to war, there have been continuous attempts to regulate the battle. While war and international relations continue to influence each other, states will continue to use international law to seek to mitigate the effects of war. War therefore occupies a place of prime importance in international law.

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1 Quote from John Terraine, *The Right of the Line*: *The Royal Air Force in the European War 1939–1945*, Sceptre Books, London, 1985, p. 2.

2 Eric S. Krauss and Mike O. Lacey, 'Utilitarian vs Humanitarian: The Battle Over the Law of War', *Parameters*, Vol. 32, No. 2, Summer 2002, p. 73.

3 Carl von Clausewitz, *On War*, in Michael Howard and Peter Paret (ed. and trans.), Princeton University Press, Princeton, 1949 (reprinted 1989).

The law typically attempts to provide some limits on the employment of arms but conflict between belligerents is aimed primarily at bringing about subjugation, often through destruction. In 1864, during the United States (US) Civil War, General William Tecumseh Sherman concluded that 'the cruelty of war cannot be refined', declaring the limits of law in war.[4] It is not surprising that Air Marshal Sir Arthur Harris, commander of the Royal Air Force Bomber Command, reached a similar conclusion following World War II when he stated that 'International law can always be argued pro and con, but in this matter of the use of aircraft in war there is, it so happens, no international law at all'.[5] Clausewitz agreed with this approach:

> Attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it … To introduce the principle of moderation into the theory of war itself would always lead to logical absurdity.[6]

But are these military theorists and practitioners really correct, or does international law have a role to play in modern air warfare?

The law has been viewed by some military commanders as an unwelcome restraint on military activity. Yet in any system there is a need for rules, even an activity as horrific as warfare. Whether or not the law is welcomed, it is highly likely that international law will continue to play a significant role in future military activities. It is therefore important to understand the constraints the law places on air operations. But this raises a number of questions. Is the claim that the law unnecessarily constrains air operations a valid one? Is international law undermining the capability of air operations? Should military success override the concerns of the law of armed conflict? In short, is the law becoming an impediment to air operations?

The aim of this study is to describe the role that international law plays in regulating air warfare, and specifically to define the limits of international law in regulating modern air warfare. This will be achieved by describing the intellectual framework surrounding air power, outlining the growing legal regulation of aerial warfare with particular emphasis on contemporary operations, analysing the legal issues arising from the Kosovo campaign as a case study, and drawing some conclusions for the future of air power operations.

This paper will focus on the theme of the ongoing search for precision and the minimisation of casualties through air power. In the past, the law has been regarded as an obstruction to the successful use of air power, yet the law is at the same time a man-made instrument constructed as an attempt to mitigate the horrors of war and the devastating potential of modern weaponry. The promise of air power is that it has the ability to win wars quickly, or possibly to avoid them altogether. The task of international law is to allow this to be achieved in the most humane way possible. The central premise of this paper is that the concept of moderation is not alien to war. Limitations in international relations are a necessary factor in prescribing how force

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4 William Tecumseh Sherman website at http://ngeorgia.com/people/shermanwt.html, accessed 21 August 2002.

5 Air Marshal Sir Arthur Harris, *Bomber Offensive*, Greenhill Books, London, 1947, p. 177.

6 Clausewitz, *On War*, p. 75.

can be used. Unfortunately, the rule of law has sometimes been subordinated to the more seductive view that anything goes in war. International law is of primary concern for air operations because of the nature of aerial weapon systems and their destructive potential. The legal framework affects all aspects of air operations including the status of aircraft and aircrew, air navigation rights and the role of aircraft and aircrew in combat. It is therefore imperative that those involved in air operations clearly understand the role of international law.

Concepts

It is contended that international society is constituted by self-contained rules. The post-Westphalian international community has clearly rejected the view that war has no limits.[7] The concept of state sovereignty has been reinterpreted so that states, their military forces and individuals are accountable for their actions. There are also a number of universally acceptable concepts, such as the protection of non-combatants from attack. International law has continuously attempted to regulate the conduct of war by prohibiting superfluous injury and unnecessary suffering.[8] 'International law' may be defined as 'a body of rules which binds nations and other agents in world politics in their relations with one another and is considered to have the status of law'.[9] The international community developed the term 'law of armed conflict' (LOAC) to describe the body of law specifically applicable to armed conflicts.[10] LOAC is a subset of international law and is synonymous with the law of war.[11] International law has attempted to ameliorate the unnecessary devastating effects of aerial warfare by regulating air operations through LOAC.

LOAC governs the conduct of parties involved in international and internal armed conflicts and obliges them to take certain precautions to minimise civilian casualties and damage to civilian property. LOAC generally comprises the four *Geneva Conventions* of 1949[12] and their two *Additional Protocols* of 1977,[13] the *Hague*

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7 For further discussion of this concept, see Dr Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society*, Oxford University Press, New York, 2001, pp. 21–32.

8 This terminology is used in *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (*Additional Protocol I), 8 June 1977*. Art.35(2) provides that 'It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering'.

9 Professor Hedley Bull, quoted in Wing Commander Ric Casagrande, 'International Law and the Law of Armed Conflict' in Mark Lax (ed.), *Air Power Presentations 1995*, Air Power Studies Centre, Canberra, 1995, p. 203.

10 E.E. Casagrande, 'Air Bombardment and the Law of Armed Conflict', Working Paper Series, No. 10, Air Power Studies Centre, Canberra, February 1993, p. 2.

11 This paper will utilise the term 'law of armed conflict' as this is commonly used by the ADF. It is recognised that parts of the US Department of Defense use the term 'law of war' to refer to this same body of law.

12 *Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949; Geneva Convention III relative to the Treatment of Prisoners of War, 12 August 1949; Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, 12 August 1949.* The full text of these treaties is available at the United Nations website at http://www.un.org.

13 These are: *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 8 June 1977; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of*

Conventions 1907[14] which regulate the means and methods of warfare, and those principles that have reached the status of customary international law binding on all states because of their wide acceptance among states. LOAC is defined in the 1994 *Operations Law for RAAF Commanders* as 'a subset of international law which governs nations when they are engaged in armed conflict'.[15] It is a code of conduct founded on the principles of military necessity, humanity and proportionality.[16]

A cornerstone of LOAC is the duty to protect civilians and other non-combatants, such as soldiers who are captured or wounded. The distinction between combatants and non-combatants is fundamental to LOAC. While it is legitimate to target and use lethal force against enemy combatants, it is never legitimate to target civilians and other non-combatants. In addition, the anticipated harm to these protected groups of people resulting from an attack must be proportionate to the expected military advantage.[17] There have long been efforts to reduce the suffering of non-combatants. While such efforts are noble, the reality is that civilians have always suffered in war. The number of deaths in war in the 20th century has been estimated in excess of 175 million, the majority of these being civilians.[18] This figure demonstrates that the protection of civilians is an unfulfilled goal that the international community strives to reach but may not be feasible.

International law has sought to regulate the horrors of war in two ways: by restricting the right to resort to war (*jus ad bellum)* and prescribing rules governing the conduct of war (*jus in bello)*. This paper is primarily concerned with the *jus in bello*, as this determines the manner in which air warfare is conducted and prescribes rules concerning the manner in which air combat is conducted.[19] The law requires that the military distinguish at all times between combatants and civilians, conduct attacks only against the military and military objectives and not civilians or civilian objects,[20] and refrain from attacking a military objective when it is likely to cause civilian loss and damage that is excessive in relation to the concrete and direct military advantage anticipated from the attack.[21]

Victims of Non-International Armed Conflicts (Additional Protocol II), 8 June 1977. The full text of these treaties is available at the United Nations website at http://www.un.org.

14 These conventions include *inter alia: Hague I: Pacific Settlement of International Disputes, 18 October 1908; Hague V: Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 October 1907*. The full text of these conventions can be found at the Yale Law School Avalon Project website at http://www.yale.edu/lawweb/avalon/lawofwar/lawwar.htm.

15 Royal Australian Air Force, *Australian Air Publication 1003: Operations Law for RAAF Commanders*, First Edition, Air Power Studies Centre, Canberra, May 1994, p. 2.

16 These principles will be discussed further in Chapter 3.

17 The International Court of Justice has considered the principles of unnecessary suffering and distinction to be the two 'cardinal principles' of international law: see International Court of Justice Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, General List No. 958, 8 July 1996.

18 Phillip S. Meilinger, 'Airwar and Humanitarian Issues: Some Perspectives', unpublished paper at Carr Center of Human Rights Policy, Kennedy School, Harvard, 29 November 2001, p. 10.

19 The *jus in bello* is divided into two streams of law: Hague and Geneva law. Hague law sets limits on the means and methods of warfare which may be used in armed conflict. Hague law—named after the *Hague Conventions*—includes operational conduct, tactics and weapon types and usage. Geneva law was named after the *Geneva Conventions* and seeks to protect the victims of armed conflict and to ameliorate their conditions in war. See Hilaire McCoubrey and Nigel D. White, *International Law and Armed Conflict*, Dartmouth, USA, 1992, p. 189.

20 See *Additional Protocol I 1977*, Art.51 and Art.52 respectively.

21 *Additional Protocol I 1977*, Art.51(5)(b).

The concepts of war and conflict are fundamental to a discussion of international law and air operations. Clausewitz defined war as '… an act of force to compel our enemy to do our will'.[22] Customary international law recognises both a legal and a material state of war. In its traditional legal sense, a war is a conflict involving a formal declaration of war between parties. However, clear declarations of war are rare today. This is also a narrow definition and does not assist in analysing modern conflicts between state and non-state actors. LOAC applies to any armed conflict between two or more states, irrespective of the absence of a declaration of war. Common Article 2 of the *Geneva Conventions* states:

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.[23]

War and armed conflict are therefore overlapping concepts where there is a threat or actual use of armed hostilities to resolve a dispute.[24] The term 'armed conflict' is an elastic term and has been given broad definition. The International Criminal Tribunal for the Former Yugoslavia has held that LOAC applies 'whenever there is a resort to armed force between States'.[25] Armed conflict may be described as a clash of arms between two or more states, even where there is no formal declaration of war and the scale of fighting is small and brief in duration.[26] This paper will use the terms 'war' and 'armed conflict' as being synonymous with the breakdown of the normal conduct of relations between states involving the use of armed force.

LOAC is but one factor shaping war. War is primarily driven by politics. As Clausewitz argued, war is the pursuit of political objectives by way of military force. He stated: 'war is not merely an act of policy but a true political instrument, a continuation of political intercourse, carried on with other means'.[27] This definition of war as part of the political spectrum assists in understanding the relationship between international law and war as it recognises war as an instrument of state interests. The burden of regulating state behaviour and develop laws to protect the innocent victims of war has consequently fallen on the international community.[28]

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22 Clausewitz, *On War*, p. 75.

23 *Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, 12 August 1949*, Art.2.

24 Department of Defence, *Australian Defence Doctrine Publication: Foundations of Australian Military Doctrine*, April 2002, Chapter 3, http://defweb.cbr.defence.gov.au/home/documents/adfdocs/maddp.htm, accessed 16 May 2002.

25 *Prosecutor v. Tadic* (1995) 105 ILR 419, Paragraph 70, p. 453.

26 This is consistent with the *Operations Law for RAAF Commanders* handbook, which defines armed conflict as 'when nations resort to the use of armed force in an attempt to settle a dispute'. See *Operations Law for RAAF Commanders*, Paragraph 5.7, p. 5-2.

27 Clausewitz, *On War*, p. 87.

28 Casagrande, *Air Bombardment and the Law of Armed Conflict*, p. 2.

ADF policy

The core business of the Australian Defence Force (ADF) is to provide for the defence of Australia.[29] The Defence White Paper states that 'The defence of our country and our community from armed attack is one of our highest national priorities'.[30] In carrying out this role, the ADF has an obligation to comply with international law as well as a broader responsibility to meet community standards. While the security of Australia is a paramount consideration for the ADF, international law issues must be considered at all stages of planning and execution of ADF operations and activities.

ADF policy expresses a clear commitment to the principles of LOAC. Defence policy regarding international law is contained in *Australian Defence Force Publication 37* concerning LOAC. This states:

> While it is the military objective of all commanders to win in battle, there must be limits to the means and methods which may be used. Commanders must be aware of their legal and moral obligation to prevent unnecessary injury and suffering and to alleviate as much as possible the calamities of war.[31]

Recent international developments have created a renewed imperative for ADF compliance with LOAC as individual ADF personnel are now subject to the jurisdiction of the International Criminal Court (ICC) along with new domestic legislation pertaining to war crimes. Under the *Rome Statute of the International Criminal Court 1988*, all ADF members are personally accountable to the international community for their actions. The ADF, including the RAAF, must take direct action to ensure compliance with this legislation in accordance with Australia's legal obligations. An understanding of the relevant legal standards is therefore vital to achieving compliance if Australia is to honour its international commitments.[32]

International law concerns dominate the public agenda as the protection of civilians in times of conflict has achieved increasing recognition as a fundamental value of modern Western society. Military practice is characterised by an ongoing balance between competing interests: compliance with international law versus national interests and operational requirements. The challenge faced by the RAAF is to ensure compliance with international law by effectively integrating the principles of LOAC into all of its operations and activities. One way to mitigate the effects of war is to understand war thoroughly and appreciate its complexity. This paper will attempt to provide some insight into the legal regime surrounding air operations. Chapter 2 will consider the intellectual underpinnings of air operations to provide an intellectual background for the conduct of aerial warfare.

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29 Mission statement in Department of Defence White Paper, *Defence 2000: Our Future Defence Force*, December 2000, p. vii, at http://www.defence.gov.au/whitepaper/wpaper.htm, accessed 22 September 2002.

30 ibid.

31 Department of Defence, *Australian Defence Force Publication 37: Law of Armed Conflict*, First Edition, Canberra, 1996, Chapter 1, Paragraph 101. It is noted that this instruction is, at the time of writing this paper, undergoing substantial review by the Directorate of Operations and International Law within the ADF.

32 The ICC will be discussed further in Chapter 3.

2 – FOUNDATIONS OF AIR POWER

> … sooner or later … the development of the implements of aerial warfare and the technique of using them is altogether likely to catch up with the prophets.[1]

The purpose of this chapter is to provide an understanding of the philosophical framework underlying contemporary air operations. The history of air power is characterised by a growth in technology and the search for precision. At the time of the inception of the aircraft as an instrument of war, technology was only rudimentary. Air power would later revolutionise warfare: it was argued by some proponents that aircraft would provide a new means to win wars and promised swift and decisive victory. The 'true believers' have maintained an overriding belief that air power will dominate future wars.[2] While air power has not yet fulfilled all the dreams of air power theorists, it has transformed the conduct of warfare. Because of the earlier limitations of technology, war was previously a tactical clash between armies in a defined battlefield. Technology changed this basic contract so that with technological advancements the potential arose to attack the enemy's homeland, bringing the effects of war directly to civilians. In this way, technology has enabled war to be directed specifically against the civilian population.

Prior to World War I, the force of air power was both untested and speculative.[3] Air power was considered as a supplementary element to the traditional means of warfighting. Air power doctrine was basic, military aircraft remained undeveloped and restricted to few roles such as aerial reconnaissance, liaison, observation and limited bombardment. All this changed with new developments in technology. The roles of aircraft expanded as new capabilities were developed so that by the end of World War II, technological advancement had greatly improved bombing accuracy and destructive power. Key developments were made in airframes, radio, munitions, armaments and navigation, making the aircraft a potent instrument of war and enabling aircraft to undertake air campaigns with greater precision accompanied by far greater potential for devastation.

Independent airforces were born out of the inadequacies of the technological transition in warfare. Strategic bombing opened a new door on warfare; holding out the promise to end wars decisively. On 1 July 1916, Britain suffered 62,000 casualties in one day of trench warfare on the Western Front.[4] This prompted Britain's Prime Minister, Lloyd George, to look for a way out of a potential defeat and the crippling drain on the nations' manhood. A year later, General Jan Smuts presented a possible solution. Smuts was an ardent advocate of an independent British air force, and

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1 Edward Warner, 'Douhet, Mitchell, Seversky: Theories of Air Warfare' in Edward Meade Earle (ed.), *Makers of Modern Strategy*, Princeton University Press, Princeton, 1943, p. 503.

2 The phrase 'true believers' is used in Alan Stephens (ed.), 'True Believers: Air Power Between the Wars' in Alan Stephens (ed.), *The War in the Air: 1914-1994*, American Edition, Air University Press, Alabama, 2001, pp. 29–68.

3 Phillip S. Meilinger (ed.), *The Paths of Heaven: The Evolution of Air Power Theory*, Air University Press, Alabama, 1997, p. xxi.

4 Martin Middlebrook, *The First Day on the Somme: 1 July 1916*, Penguin, London, 1988, p. 263.

submitted his report to the War Cabinet advocating its establishment on 17 August 1917.[5] He wrote:

> An air service can be used as an independent means of war operations. Nobody that witnessed the attack on London on 11 July could have any doubt on that point … As far as can at present be foreseen there is absolutely no limit to the scale of its future independent war use. And the day may not be far off when aerial operations with their devastation of enemy lands and destruction of industrial and populous centres on a vast scale may become the principal operations of war, to which the older forms of military and naval operation may become secondary and subordinate.[6]

As a result of the Smuts report, Lloyd George approved the creation of the world's first independent air force. The Royal Air Force was formed as an independent service on 1 April 1918, merging the Army's Royal Flying Corps and the Navy's Royal Naval Air Service.[7] This marked the birth of air power as a distinct instrument of war in Western nations.

Theories of air power

Early air power theorists attempted to elucidate a clear role for air power. They shared a belief in the dominance of air power in future warfare and in the offensive role that it would play. These early air power theorists themselves played an important role in the development and regulation of air power—they provided a window through which we can view the foundations of air power, and thereby assist in understanding and interpreting its present role. Douhet, Trenchard and Mitchell were three prominent theorists in the inter-war period.

One of the earliest theorists of air warfare was Italian General Giulio Douhet (1869–1930). Douhet was an influential air power theorist in the inter-war period, and his work is valued as one of the earliest attempts to seriously consider air weaponry and its effect on warfare. Douhet stridently believed that air power would transform warfare. For Douhet, command of the air was vital. The central thesis of his work *The Command of the Air* published in 1921 was: 'To conquer command of the air means victory; to be beaten in the air means defeat and acceptance of whatever terms the enemy may be pleased to impose'.[8] *The Command of the Air* contained his basic precepts: the air would become a crucial battlefield; control of the air would provide control of the surface; aircraft would carry war to all peoples by virtue of its ability to operate in the third dimension; and the psychological effects of air bombardment would be great.[9] The new capability of air power brought a different character to war that emphasised the advantages of offensive action and would bring about 'swift, crushing decisions on the battlefield'.[10]

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5 Alan Stephens, 'Building the Royal Australian Air Force: The Wartime Legacy' in Keith Brent (ed.), *A Chapter of Endless Possibilities: The Birth of Australian Military Aviation*, proceedings of the 2001 RAAF History Conference, Aerospace Centre, Canberra, 2001, p. 131.

6 Quoted in Max Hastings, *Bomber Command*, Papermac, Great Britain, 1979, p. 38.

7 ibid., p. 39.

8 Giulio Douhet, *The Command of the Air* (trans. by Dino Ferrari), Arno Press, New York, 1972, p. 28.

9 Meilinger, *The Paths of Heaven*, p. xiv.

10 Douhet, *The Command of the Air*, p. 30.

For Douhet, there were no limits in war. He believed that 'The purpose of war is to harm the enemy as much as possible; and all means which contribute to this end will be employed, no matter what they are'.[11] For Douhet, aerial warfare was best conducted from the outbreak of war with the greatest possible intensity to disrupt the economy and means of production and thereby force the civilian population to sue for peace. His basic aim of warfare was to 'inflict the greatest damage in the shortest possible time'.[12] Consequently, for Douhet attack on the civilian population was a prerequisite to victory.

> No longer can areas exist in which life can be lived in safety and tranquillity, nor can the battlefield be limited to actual combatants. On the contrary, the battlefield will be limited only by the boundaries of the nations at war, and all of their citizens will become combatants since all of them will be exposed to the aerial offensives of the enemy. There will be no distinction any longer between soldiers and civilians.[13]

A basic premise underlying Douhet's philosophy was that the potent use of air power would ultimately humanise war.[14] In the event that war broke out, air power would end the war quickly and ultimately result in fewer deaths. If civilian morale could be destroyed, then the enemy would be defeated. The easiest way of prosecuting this kind of war was to bomb civilians and social infrastructure. The bomber would use a range of weapons—including poisonous gas, incendiary and explosive ordnance—striking at the heart of the enemy and bringing a swift victory. Yet Douhet overestimated the psychological effects of air bombardment and failed to recognise the technological limitations of air power that existed at the time of his writing.

Chief of the Air Staff of the RAF from 1919 to 1929, Sir Hugh Trenchard (1873–1956), is widely recognised as the father of the RAF, and was an early champion of the strategic effect of air power. Like Douhet, Trenchard carried an unwavering belief in air superiority and the importance of offensive action.[15] For Trenchard, the aircraft provided a new means of waging war: the Trenchard doctrine professed the execution of a strategic bombing campaign aimed at national infrastructure.[16] He was convinced that 'air bombardment of industrial infrastructure would have a devastating and decisive psychological effect on the morale of the civilian population'.[17] Unlike Douhet, Trenchard did not advocate indiscriminate bombardment but instead advocated that industrial infrastructure was a more appropriate target. His reasoning was that the disruption this caused to the population would force the people to demand peace. But like Douhet, Trenchard also overestimated the effects that air bombardment would have on the morale of the civilian population and their will to resist attack.[18]

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11 ibid., p. 181.
12 ibid., p. 51.
13 ibid., p. 9.
14 Phillip S. Meilinger, 'Airwar and Humanitarian Issues: Some Perspectives', unpublished paper at Carr Center of Human Rights Policy, Kennedy School, Harvard, 29 November 2001, p. 2.
15 Alan Stephens, 'In Search of the Knock-Out Blow: The Development of Air Power Doctrine 1911–1915', Working Paper Series, No. 61, Air Power Studies Centre, Canberra, 1998, p. 4.
16 Hastings, *Bomber Command*, p. 48.
17 Meilinger, *The Paths of Heaven*, p. xiv.
18 ibid., pp. xiv, 46, 71.

General William (Billy) Mitchell (1879–1936) was one of the most noted earliest American air power theorists. He was a combat pilot in World War I and influenced the American air arm, as Trenchard did in the RAF. Mitchell shared Douhet's belief in the inevitable dominance of air power through offensive action.

> (bombardment) is a distinct move for the betterment of civilisation because wars will be decided quickly and not drag on for years … It is a quick way of deciding a war and really more humane.[19]

Mitchell shared Douhet's conviction in the efficiency of attacking the enemy's economy as well as the industrial infrastructure. Both believed in the fragility of civilian morale and that a modest bombardment would paralyse civilian and industrial activities.[20] Yet like Trenchard, Mitchell did not share Douhet's theory of targeting the civilian population. Instead, he advocated attack of strategic targets such as factories and transportation as the objective of the air campaign.

Alan Stephens considers Mitchell's projections for the future of air power—like Douhet—to be excessively speculative. Mitchell overestimated both the technical dominance that aircraft would achieve along with the fragility of civilian morale. He made bold claims regarding air power's ability to achieve a quick, cheap victory and underestimated the capacity of civilian populations to withstand strategic bombing.[21] Nevertheless, his ideas concerning the importance of an independent air force were later recognised with the creation of the United States Air Force (USAF) in 1947.

Support for air bombardment

As air power theorists predicted, aircraft had extended the battlefield to include the killing of women and children. By the early 1930s, the theories of Douhet, Trenchard and Mitchell had gained political influence. In 1932, Stanley Baldwin stated in the House of Commons:

> There is no power on earth that can protect the man in the street. Whatever people may tell him the bomber will always get through. The only defence is offence, which means that you have to kill more women and children more quickly than the enemy.[22]

As abhorrent as this was in moral terms, the law regarding the application of strategic bombing remained deficient up until the end of World War II. Prior to World War II, the law on aerial bombardment was almost non-existent. Strategic bombing itself was an untested concept which held the promise of bringing a swift and therefore more humane end to war. In the inter-war years, air power and the threat of strategic bombing became a matter of growing public debate.[23] In his speech about aerial

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19 Quoted in Stephens, 'In Search of the Knock-Out Blow', p. 15.
20 Warner, 'Douhet, Mitchell, Seversky', pp. 498–499.
21 Stephens, 'In Search of the Knock-Out Blow', p. 14. See also Clodfelter in Meilinger, *The Paths of Heaven*, pp. 79–108.
22 Stanley Baldwin, House of Commons, Parliamentary Debates Official report, 5th Series c632, 10 November 1932.
23 Hastings, *Bomber Command*, p. 41.

bombardment to the House of Commons on 21 June 1938, British Prime Minister Neville Chamberlain remarked: 'It is against international law to bomb civilians as such and to make deliberate attacks on civilian populations'.[24] He stipulated that reasonable care must be taken in attacking military objectives so that the civilian population was not inadvertently bombed. This represented an early version of the principle of military necessity, which provides that any aerial attack must be directed against a legitimate military objective, it must avoid the loss of civilian life and damage to civilian objects, and must also be proportionate.[25]

The belief in the ability of the aircraft to deliver the 'knock-out blow' dominated political and military thinking in the 1930s.[26] Prior to World War II, some air power theorists considered aircraft as capable of winning wars on their own. Strategic bombing did not aim at the destruction of the enemy's forces, but rather it aimed to undermine enemy capability by attacking non-military targets.[27] The overall objective remained the same as the objective of tactical air power: to bring about defeat of the enemy.

The RAF entered World War II with a doctrine that supported the area bombing of enemy industrial centres. The RAF envisaged a war against the German civilian population. Civilian casualties were accepted as an inevitable outcome of wartime conflict.[28] The 1940 RAF doctrine manual AP1300 provided that the civilian population was a legitimate target.[29] The 1929 *British Manual of Air Force Law* was originally intended to include a chapter on LOAC; however, this was never included.[30] The manual was explicit in its belief that aerial bombardment was a useful tool to force the enemy to surrender because of the suffering that the population would endure. The manual stated:

> No legal duty exists for the attacking force to limit bombardment to the fortifications or defended borders only. On the contrary, destruction of private and public buildings by bombardment has always been, and still is, considered lawful, as it is one of the means to impress upon the local authorities the advisability of surrender. [31]

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[24] Speech by Prime Minister Neville Chamberlain concerning aerial bombardment to the House of Commons, 21 June 1938, referred to in Detlef Sielbert, 'British Bombing Strategy', British Broadcasting Commission homepage, August 2001, http://www.bbc.co.uk/history/war/wwtwo/area_bombing_01.shtml, accessed 14 October 2002.

[25] Royal Australian Air Force, *Australian Air Publication 1003: Operations Law for RAAF Commanders*, First Edition, Air Power Studies Centre, Canberra, May 1994, Chapter 8. This principle will be discussed further in Chapter 3.

[26] John Terraine, *The Right of the Line*: *The Royal Air Force in the European War 1939–1945*, Hodder and Stoughton, London, 1985, p. 12.

[27] R.J. Overy, *The Air War 1939–1945*, Europa Publications Limited, London, 1980, p. 12.

[28] Jonathan Glover, *Humanity: A Moral History of the Twentieth Century*, Jonathan Cape, London, 1999, p. 70.

[29] Meilinger, 'Airwar and Humanitarian Issues'.

[30] Interview with Hays Parks, Special Assistant to US Army The Judge Advocate General, Virginia, 17 July 2002.

[31] *Manual of Military Law 1929*, Amendment No. 12, January 1936, cited in W. Hays Parks, 'Air War and the Law of War', *The Air Force Law Review*, Vol. 32, No. 1, 1990, p. 54.

This is an early example of the states that possess the most advanced technology not wanting air power to be shackled by law. This sentiment has been mirrored by the US later in history.

By mid-1940, the war was looking bleak for Britain as it was fighting for national survival. With the fall of France, Britain had no other allies in Europe and the US had not yet entered the war. Britain was facing national invasion. It was within this context that sustained air bombardment of Germany became the primary instrument of British war policy. As Prime Minister from 1941–1945, Sir Winston Churchill accepted a policy of bombing civilians to pursue and secure public support and military victory. In January 1943, Churchill met President Franklin Roosevelt at Casablanca to discuss allied action against Germany. The Casablanca Directive was issued as a joint document following this meeting, and this directive declared that the main objective of the bombing was 'the progressive destruction and dislocation of the German military, industrial and economic system, and the undermining of the morale of the German people to a point where their capacity for armed resistance is fatally weakened ...'.[32]

In 1941, D.M. Butt of the War Cabinet Secretariat carried out a review of Bombing Command's strategic bombing offensive against the German homeland. The Butt Report reviewed the effectiveness of this strategy and demonstrated that strategic bombing was not effective. This report found:

a. Of 100 bombers setting out on an operation, many never found the target.

b. Of those attacking the target, on average only one-third placed their bombs within 5 miles of the target.

c. In hazy or inclement weather, the number of bombers finding the target was only one in ten.

d. On moonless nights, only one bomber in 15 found the target.[33]

Despite the findings of the Butt Report, the context of all-out war for national survival allowed the theory of strategic bombing to flourish. Air Marshal Sir Arthur Harris was appointed Commander in Chief of Bomber Command on 22 February 1942, and was the chief architect of RAF bombing policy. He implemented Douhet's theory, believing that offensive bombing held the key to the defeat of Germany and would bring about the collapse of German industry and the morale of its civilian population.[34]

This theory was implemented in the Bomber Command campaign and culminated in the bombing of the city of Dresden on 13–14 February 1945. This strategy was carried out in accordance with British government policy of bombing area targets. Dresden was a city of minor industrial significance and was one of the few remaining large, built-up German cities that had not been bombed during World War II. It was targeted because few other targets remained. As a result of the attack Dresden suffered

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32 Hastings, *Bomber Command*, p. 185.
33 ibid., pp. 108–109.
34 J. Falconer, *Bomber Command Handbook 1939–1945*, Stroud, Sutton, 1998, p. 13.

significant aerial bombardment. The resulting firestorm incinerated between 35,000–135,000 people; the precise number of casualties remains undetermined.[35] But despite such types of attack, Harris' predicted collapse in German morale did not materialise. As the Luftwaffe had failed to break the will of the London population in the Blitz of 1940–1941, these efforts by Bomber Command similarly failed to break the will of the German people. Coupled with this, Bomber Command's loss rate was high: in 19 raids carried out between August 1943 and March 1944, more than 2690 aircrew were killed and 600 aircraft lost.[36]

In World War II, strategic bombing failed to deliver what the air power theorists had promised. The strategic bombing campaign conducted by the Allies continues to raise both legal and moral questions today. Total war rendered the traditional distinction between combatants and non-combatants meaningless and consequently civilians were drawn into the expanding battlespace. The large number of civilian casualties resulting from World War II was a product of the absence of clear legal standards, policy and operational shortcomings.[37] These operational shortcomings primarily related to the technical inability of the Allies to precisely target military objectives.

While developments in World War II caused a transformation in the ways future war would be fought, it was later technological developments that allowed for the more precise application of air power. World War II had produced huge casualties in both civilians and aircrew without delivering the swift and decisive victory that the theorists had predicted. Following World War II, there was a growing regulation of aerial warfare that paralleled the technical development of the aircraft. The next chapter will outline the ongoing attempts by the international community to regulate the emerging capabilities produced by new air power capabilities.

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35 Glover, *Humanity: A Moral History of the Twentieth Century*, p. 79.
36 Falconer, *Bomber Command Handbook 1939–1945*, p. 18.
37 Parks, 'Air War and the Law of War', p. 54.

3 — THE LAW OF AERIAL WARFARE

> … Clausewitz was wrong: moderation is not alien to war, and the self-imposed limitations of international law and custom are not 'imperceptible' but in fact are often crucial to determining how and when force is used in international relations.[1]

This chapter will examine the limitations placed on aerial warfare by the international community. The law of air warfare is concerned with the regulation of the methods and tactics used by states engaged in military operations in the medium of air and space. The law governing such conduct is laid out in numerous international agreements that have treaty status. For Australia and many other countries, international armed conflict is governed by the four 1949 *Geneva Conventions* and the 1977 *Additional Protocol I to the Geneva Conventions*.[2] However, no treaty relating specifically to air operations has been attempted since the draft *Hague Rules of Aerial Warfare* were negotiated in 1923.[3] The law of aerial warfare has not been codified in treaty form and is instead based on principles of general application. This chapter describes the development of LOAC relating to aerial warfare and outlines the general principles that apply to this form of warfare.

The rise of international law

An old maxim is '*Inter arma enim silent leges*: in time of war the law is silent'.[4] Those who question the ability of, or need for, the law to regulate war may agree with Cicero's contention that the law is silent in times of war. However, this is the cry of those who maintain that military actions are unnecessarily constrained by the law. This myth needs to be dispelled—legal restraints on the use of force and international law are not a new phenomenon. Aerial bombardment in particular has always been controversial and throughout history there have been ongoing attempts to control this form of combat capability. This chapter will discuss the development of the modern international legal system as part of an emerging international consciousness, which strives to make the conduct of war more humane. It needs to be recognised that this body of law is not rigid, but rather develops in response to state practice.

The law relating to armed conflict is divided into two categories: *jus ad bellum* (the right to resort to war) and *jus in bello* (the law applied during war).[5] While *jus ad bellum* tries to regulate the resort to armed conflict, this paper is mainly concerned with the *jus in bello* relating to air operations.[6] Once a state has engaged in hostilities

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1 Ward Thomas, *The Ethics of Destruction: Norms and Force in International Relations*, Cornell University Press, London, 2001, p. 1.

2 The full text of these documents is available on the International Committee for the Red Cross website at http://www.icrc.org/ihl.nsf/WebCONVFULL?OpenView.

3 The full text of this document is available at http://www.dannen.com/decision/int-law.html#C.

4 Quote by Cicero in Michael Walzer, *Just and Unjust Wars*, Third Edition, Basic Books, New York, 2000, Chapter 1.

5 Rosalyn Higgins, 'The New United Nations and Former Yugoslavia', *International Affairs*, Vol. 69, No. 3, July 1993, p. 465.

6 L.C. Green, *Essays on the Modern Law of War*, Transnational Publishers, New York, 1985, p. xix.

against an adverse party or enemy, then the conduct towards that party should be in accordance with LOAC (the *jus in bello)*.[7]

The development of LOAC is critical to an understanding of the nature of air operations. As long as there have been aircraft, there have been attempts to regulate the effects of aircraft in war.[8] Early attempts to restrict aerial warfare were motivated primarily by the crude expressions of the self-interest of nations. Up until the mid-19th century, LOAC was based primarily on the customs of individual nations. Accompanying the rise of air power there have been ongoing efforts to codify international law dating from the late 19th century.[9]

The *Lieber Code* of 1863 was the first real attempt to codify LOAC. This was prepared by Professor Francis Lieber of Columbia University and promulgated by President Lincoln in April 1863 during the American Civil War. Lieber considered the killing of non-combatants legitimate provided that casualties were incidental and unavoidable, but he did not support cruelty or wanton destruction in war.[10] For example, Article 15 of the *Lieber Code* provided that:

> Military necessity admits of all direct destruction of life or limb of 'armed' enemies, and of other persons whose destruction is incidentally 'unavoidable' in the armed contests of war.[11]

The Hague Peace Conferences of 1899 and 1907 placed further limits on the means and methods that parties could use to conduct war.[12] While these conferences failed to achieve their principal aim of limiting armament, they did result in the adoption of a number of treaties which restricted air warfare, including prohibiting the launch of projectiles and explosives from balloons and ordnance such as dum-dum bullets.[13] However, these conferences provided little guidance as to what constituted a legitimate target in warfare.

The Hague Peace Conferences are significant in that they represented the first attempt to restrict the application of air power in war. The *Hague Declaration IV 1899* declared a five year prohibition on aerial bombardment. The *Hague Convention IX 1907* concerning bombardment by naval forces in war also had application for air warfare. Article 1 of this treaty provided a *prima facie* prohibition on the bombardment of undefended areas, but Article 2 removed this restriction by exempting military objectives within such areas. Article 2 also absolved the commander of the attacking force of responsibility for any unavoidable damage

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7 The term 'adverse party' is used in the 1949 *Geneva Conventions* and *Additional Protocol I 1977*.

8 W. Hays Parks, 'Air War and the Law of War', *The Air Force Law Review*, Vol. 32, No. 1, 1990, p. 224.

9 Hilaire McCoubrey and Nigel D. White, *International Law and Armed Conflict*, Dartmouth, US, 1992, Chapter 13.

10 L.C. Green, *The Contemporary Law of Armed Conflict*, Manchester University Press, Manchester, 1993, pp. 27–28.

11 Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, http://www.icrc.org/ihl.nsf/52d68d14de6160e0c12563da005fdb1b/c4d7fab1d847570ec125641a00581c23?OpenDocument

12 Ric Casagrande, 'International Law and the Law of Armed Conflict' in Mark Lax (ed.), *Air Power Presentations 1995*, Air Power Studies Centre, Canberra, 1995, p. 213.

13 See *Hague Convention IV 1899* and *Hague Declaration III 1899* respectively.

caused by bombardment. These rules applied at the time of the allied bombing campaign in World War II but were honoured more in their breach than by compliance.[14]

The League of Nations was an attempt to settle international disputes peacefully. Prime Minister Lloyd George forecasted an international law organisation aimed at achieving this in his speech on British war aims in January 1918:

> For these and other similar reasons, we are confident that a great attempt must be made to establish by some international organization an alternative to war as a means of settling international disputes. After all, war is a relic of barbarism and, just as law has succeeded violence as the means of settling disputes between individuals, so we believe that it is destined ultimately to take the place of war in the settlement of controversies between nations.[15]

The League of Nations was a vision of US President Woodrow Wilson. This was contained in his Fourteen Point Declaration on 8 January 1918:

> A general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike.[16]

The League of Nations was subsequently formed under the *Covenant of the League of Nations 1919* in January 1920 with the purpose of maintaining international peace and security in the aftermath of the horrors of World War I. Article 11 of the Covenant stated that

> Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations.[17]

The early years of the League of Nations were marked by some successes. The late 1920s are referred to as the 'Locarno Honeymoon'. This period saw Germany sign the *Locarno Pact* in 1925 and enter the League in 1926. The *Kellog-Briand Pact 1928* saw 65 states commit to the pursuit of peace. But the optimism of this period was soon overshadowed, as the League failed to prevent Japan's invasion of Manchuria in 1931 and Italy's invasion of Abyssinia in 1936. The League also failed to curb re-armament following the failure of the disarmament conference in Geneva in February 1932.

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[14] Copies of these treaties can be found in Adam Roberts and Richard Guelff, *Documents on the Laws of War*, Third Edition, Oxford University Press, Oxford, 2000, pp. 59–137.

[15] 'British War Aims' speech by Prime Minister Lloyd George, 5 January 1918, http://www.lib.byu.edu/~rdh/wwi/1918/waraims.html, accessed 12 August 2002.

[16] See full text of this declaration at the Yale Law School Avalon Project website, http://www.yale.edu/lawweb/avalon/wilson14.htm.

[17] The Covenant forms Chapter I of the *Treaty of Versailles 1919*. See full text of the Covenant at the Yale Law School Avalon Project website, http://www.yale.edu/lawweb/avalon/leagcov.htm.

At the time, the League of Nations was widely criticised as being ineffectual. This was due to a range of factors including its lack of authority, lack of universal membership, the failure of the US to join, and its rule of unanimity where decisions by the League could only be made by a unanimous vote of all members. In 1946, League membership was limited to 32 states, representing less than half of the world's nations. Some view the ultimate failure of the League as the outbreak of World War II. Despite such criticisms the League represents an important early attempt to regulate warfare by joining states in the common purpose of the pursuit of peace. But while the League was attempting to settle disputes peacefully, states continued to work on developing military air power capabilities.

The potential of air power was recognised by the end of World War I. While advocates favoured unencumbered air forces, there was fear of the potential demonstrated by air power in World War I. The *Hague Rules of Aerial Warfare 1923* drafted by the Commission of Jurists was an early attempt to codify the rules of aerial warfare. Article 22 provided that aerial bombardment was prohibited where it was employed for the purpose of terrorising the civilian population, for destroying or damaging private property not of a military character, or for injuring non-combatants. Bombing was legitimate only when directed at specific military objectives in the immediate vicinity of land operations. Where military objectives fell outside this area, they could be attacked providing that collateral damage was less than, and distinguishable from, that which would be caused by indiscriminate bombing. These rules represented a departure from the earlier practices in World War I by constraining targets. While these rules were never formally adopted, they are a summary of thinking behind some of the legal principles that were negotiated to restrict air power. Some provisions have since been accepted into customary international law.[18] No treaty has since been prepared which relates solely to air operations, though later treaties have incorporated important provisions relating to air warfare.[19] There has also been a failure to agree on a list of legal targets. In recent times, this has left air commanders with the task of interpreting the law with the assistance of their legal advisers.

While there had been some early efforts to specifically regulate aerial warfare, there was no clear statement of international law regarding the use of air power at the commencement of World War II. Special Assistant to US Army The Judge Advocate General, Hays Parks, states that this legal haze undoubtedly contributed to the effects of aerial bombardment during World War II and to the ongoing debate that surrounds its legality today. The draft *Hague Rules of Aerial Warfare* may have prevented totally indiscriminate bombing; however, the international community failed to formally adopt these rules. The effect of these rules is therefore difficult to gauge, but they appear to have had a minimal moral influence. Hays Parks made some general conclusions about the state of the law during World War II: indiscriminate bombing was prohibited and civilian casualties were considered to be an inevitable cost of total war; civilian casualties were regarded as an obligation of the attacker, defender and

[18] For example, Art.XIX prohibiting the use of false external marks is now reflected in *Additional Protocol I* 1977, Art.39(2), which prevents the use of flags or military emblems, insignia or uniforms of adverse parties to favour or impede military operations. See McCoubrey and White, p. 308.

[19] Hays Parks considers the authoritativeness of these draft rules as open to question, as they were never formally adopted. See Hays Parks, 'The Protection of Civilians from Air Warfare' in Y. Dinstein (ed.), *Israel Yearbook on Human Rights*, Vol. 27, 1998, p. 66.

the individual civilian; and civilian casualties were attributed to a range of factors including the weather, enemy deception and dispersal of targets.[20]

Modern legal framework

In the aftermath of World War II, the global community joined to form the United Nations (UN) on 24 October 1945 as successor to the League of Nations in an attempt to avoid the scourge of future warfare. The purpose of the UN was set out in the preamble to the *United Nations Charter (UN Charter)*:

> to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
>
> to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
>
> to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
>
> to promote social progress and better standards of life in larger freedom …[21]

This was a substantial mandate. The *UN Charter* provided for an international organisation whose decisions would have legally binding force through its Security Council.[22] The UN had substantial global support: at its inception in 1945 it had 51 members, which included most states in the international system. The UN currently boasts 190 members.[23]

The use of air power is clearly recognised in the *UN Charter*.[24] Chapter VII of the *UN Charter* is explicit about the use of air power in UN action with respect to threats to the peace, breaches of the peace and acts of aggression. Article 42 of the *UN Charter* provides that the UN may:

> take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

While the UN system has its flaws, it also represents a significant attempt to prevent the outbreak of war, deal with international crises and regulate the barbarity of war. It is also an attempt to regulate the conduct of warfare—including aerial warfare—through the development of international law.

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20 Parks, 'Air War and the Law of War', p. 55.

21 Preamble to the *Charter of the United Nations 1945* (*UN Charter*).

22 Art.25 of the *UN Charter* provides that member states are also obliged to carry out Security Council decisions.

23 See United Nations website, http://www.un.org/Overview/growth.htm#2000.

24 E.E. Casagrande, 'Peace Operations: The Air Force Contribution' in *Small Wars & Insurgencies*, Vol. 7, No. 6, Winter 1996, pp. 378–399.

Use of force by states

The use of force is generally prohibited by the *UN Charter* as a means of solving international disputes.[25] The principle underlying the general prohibition on the use of force is state sovereignty.

State sovereignty & the prohibition against use of force

Sovereignty signifies the legal identity of a state in the international system and international law. This concept provides order and stability in international relations between states since sovereign states are regarded as equal. A sovereign state is empowered to exercise exclusive jurisdiction within its territorial borders, including its airspace. States also have a corresponding obligation to respect the sovereignty of other states and not interfere in the domestic affairs of other states. The principle of sovereign equality of states is contained in Article 2(1) of the *UN Charter*.[26]

In 1945, the *UN Charter* reaffirmed these principles. Following World War II, the international community agreed to the *UN Charter* so that the horrors of war would not be repeated, or would at least be ameliorated. The *UN Charter* places a general prohibition against the use of force against other states. Article 2(4) of the *UN Charter* specifically prohibits the use of force:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

States must therefore respect one another's sovereignty and resolve their international disputes peacefully and refrain from the threat or use of force.[27] Professor Yoram Dinstein proclaims this principle to be the cornerstone of modern international law.[28] The principle of non-intervention is enshrined in Article 2(7) of the *UN Charter*, which provides:

> Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state … but this principle shall not prejudice the application of enforcement measures under Chapter VII.

State sovereignty is an important concept for air power. State sovereignty extends to airspace and guarantees the neutrality of states and regulates the use of airspace. But sovereignty should not be used to buffer by states from the scrutiny of the international community. In his *Millenium Report* in 2000, UN Secretary-General Kofi Annan wrote: 'National sovereignty must not be used as a shield for those who

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25 *UN Charter 1945*, Art.51.

26 Report of the International Commission on Intervention and State Sovereignty, 'The Responsibility To Protect', December 2001, at the Canadian Department of Foreign Affairs and Trade website, http://www.iciss.gc.ca/Report-English.asp#meaning, accessed 1 May 2002.

27 International and Operational Law Department, *Operational Law Handbook*, The Judge Advocate General's School, United States Army, Virginia, 1998, Chapter 2, 2-1.

28 Professor Yoram Dinstein, 'The Thirteenth Waldemar A. Solf Lecture in International Law', *Military Law Review*, Vol. 166, December 2000, p. 95.

wantonly violate the rights and lives of their fellow human beings'.[29] In light of recent global atrocities, the UN Secretary-General has underlined the need for the UN to re-evaluate the principles of state sovereignty and non-intervention:

> … if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity? … But surely no legal principle – not even sovereignty—can ever shield crimes against humanity … Armed intervention must always remain the option of last resort, but in the face of mass murder, it is an option that cannot be relinquished.[30]

The *Nicaragua Case* provides the most authoritative statement of the norm on non-intervention.[31] In this case, the International Court of Justice found that 'the principle of non-intervention involves the right of every sovereign state to conduct its affairs without outside interference'. The principle forbids all States from intervening directly or indirectly in the internal or external affairs of other States. This has powerful implications for future warfare, as was demonstrated in Kosovo.

Lawful use of force

Despite the general prohibition against the use of force contained in the *UN Charter*, there are some exemptions that may justify a state's recourse to the use of force. The *UN Charter* provides the primary authority for the use of force. It is generally agreed that there are at least two legal bases for the use of force: self-defence pursuant to Article 51 of the *UN Charter*, which recognises the inherent right of collective and individual self-defence; and actions sanctioned by the Security Council under Chapter VII of the *UN Charter*.[32]

a. *UN Charter*, Article 51

Customary international law provides that nations have an inherent right to defend themselves and their sovereignty. This principle has been recognised and codified in Article 51 of the *UN Charter*:

> Nothing in the present Chapter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security…

b. *UN Charter*, Chapter VII

The use of force remains lawful where conducted with the authority of the UN. States may be authorised to take action under Chapter VII of the *UN Charter* where the

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29 Koffi Annan, 'We the Peoples: The Role of the United Nations in the 21st Century', Executive Summary, *Millennium Report of the Secretary-General of the United Nations*, 2000, http://www.un.org/millennium/sg/report/, accessed 25 March 2002.

30 ibid.

31 *Nicaragua Case*, (1986) ICJ Rep., pp. 106–8.

32 ibid., p. 95.

Security Council determines there is a threat to international peace and security. Chapter VII gives the Security Council power to determine the measures that should be used to address acts of aggression or other threats to international piece and security. Where the Security Council decides that such a threat exists, Article 41 of the *UN Charter* provides for the use of measures short of force to compel compliance. This provision contemplates action such as diplomatic and economic sanctions. Article 42 authorises the use of force by members of the UN when measures utilised under Article 41 are inadequate. The former United Nations Mission in East Timor (INTERFET) coalition operation in East Timor was an example of Chapter VII action.

A possible third principle allowing for lawful armed intervention by states is humanitarian intervention. However, this is an emerging principle and is yet to gain international acceptance where action is taken without specific authorisation by the Security Council. The development of this international law norm will be discussed further in Chapter 4 of this paper.

Sources of law

The sources of the law of aerial warfare are found in the same sources as international law. Article 38(1) of the *Statute of the International Court of Justice* 1945 defines these as: international agreements, customary rules of international law, judicial decisions and expert writings.[33]

The development of the four *Geneva Conventions 1949* was a response by the international community to the excesses of World War II. Each of these conventions provide protection to various victims of war: the wounded and sick in the field; the wounded, sick and shipwrecked at sea; prisoners of war; and civilians.[34] While *Geneva Convention IV* was the first treaty devoted exclusively to the protection of civilians, it did not fully address the protection of civilians from hostilities such as targeting of civilian population centres and reprisal actions. This gap suggests that the victors did not want to condemn or limit their own wartime conduct.

The debate surrounding regulation of air warfare has persisted to the present day. Developments in the nature of warfare led to a growing need for further codification of LOAC. The adoption of the *Protocols Additional to the Geneva Conventions of 12 August 1949 (the Additional Protocols)* on 8 June 1977 has provided some clarification regarding the conduct of air warfare and the protection of the victims of armed conflict. *Additional Protocol I* is most relevant to the subject of this paper as it deals with the protection of victims of international armed conflict and the methods and tactics of warfare.[35] The intent of *Additional Protocol I* is found in its preamble, which states that it is necessary 'to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application'.

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[33] The text of this treaty can be found at the International Court of Justice website, http://www.icj-cij.org/icjwww/ibasicdocuments/Basetext/istatute.htm.

[34] These treaties can be found at the United Nations website at http://www.un.org.

[35] *Additional Protocol II* deals with the protection of victims of non-international armed conflict and will not be discussed in detail in this paper, as the focus of this paper is armed conflict.

The 1977 *Additional Protocols to the Geneva Conventions* have codified existing customary international law as well as creating new law.[36] The *Additional Protocols* serve to fill gaps present in the law. *Additional Protocol I* has received broad acceptance by 160 states; however, this treaty has not yet been ratified by all members of the North Atlantic Treaty Organisation (NATO) including the US, France and Turkey.[37] Despite this deficiency, many of its articles are widely considered to represent customary international law, that is, rules that impose obligations on states as a result of their acceptance over time as norms that are binding on states.

The distinction between combatants and civilians is fundamental to *Additional Protocol I*. This treaty endeavours to minimise the impact of armed conflict on civilian persons and objects. Although the concept of distinction between combatants and civilians is at the basis of customary law, it was not until *Additional Protocol I* that the term 'civilian' was clearly defined. Civilians are defined in Article 50 and encompass the civilian population but do not include members of armed forces or prisoners of war. In case of any doubt as to whether a person is a civilian, a person must be considered to be a civilian. Members of the armed forces of a party to a conflict (other than medical personnel and chaplains) are combatants.[38]

Additional Protocol I enshrines the basic legal obligation to protect civilians from the effects of war. Article 52(2) provides that states have a legal obligation to attack only 'objects which by their nature, location, purpose or use make an effective contribution to military action'. Article 51(5)(b) prohibits attacks 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'. This is a key provision as, for the first time, it establishes law that guides the principle of proportionality, one of the fundamental LOAC foundations.

A major deficiency in this treaty is that it has not been ratified by some of the major powers, including the US. The absence of the world's sole superpower as a party to this treaty seriously weakens its strength. However, it is important to recognise that past and current US practice has been largely consistent with *Additional Protocol I* and many of the provisions of this treaty can be considered to represent customary international law. Just what is considered to be customary international law by the US is problematic, as it presents a major interoperability issue for these allies and states that have ratified *Additional Protocol I*, including Australia.

Basic principles of the law of aerial warfare

Treaty law is supplemented by customary law principles that have developed regarding the means and methods of warfare. There are three basic principles of LOAC that govern the conduct of aerial warfare: military necessity, humanity and proportionality. These principles are consistent with three of the Australian principles

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[36] E.E. Casagrande, 'Air Bombardment and the Law of Armed Conflict', Working Paper Series, No. 10, Air Power Studies Centre, Canberra, February 1993, p. 2.

[37] Figures are correct as at 5 June 2002. See International Committee for the Red Cross website at http://www.icrc.org/icrceng.nsf/4dc394db5b54f3fa4125673900241f2f/600d2bd30d7b93e64125624b00402ebb?OpenDocument.

[38] *Geneva Convention III 1949,* Art.4 and *Additional Protocol* I 1977, Art.43.

of war recognised by the ADF: selection and maintenance of the aim, concentration of force and economy of effort.[39] The three LOAC principles of military necessity, humanity and proportionality are discussed below.

Military necessity

The most fundamental principle of the law of aerial warfare is that the use of force against persons, places or objects by combatants must be essential to achieve legitimate goals of war. This principle has four components:

a. force can only be used as is necessary to achieve the military objective,

b. the use of force must result in the least possible loss of life and damage to property,

c. the use of force cannot be prohibited by LOAC, and

d. force must be regulated by the user. [40]

This principle is codified in Article 52(2) of *Additional Protocol 1*, which provides that destruction of targets must provide a military advantage to the attacker. The principle of military necessity has been incorporated in ADF policy.[41] In the context of air power, any aerial attack must be directed at a legitimate military objective. 'Military objective' is defined in Article 52(1) of *Additional Protocol I*. This states:

> 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 neutralisation, in the circumstances ruling at the time, offers a definite military advantage.[42]

Military commanders have the ultimate responsibility for ensuring that civilian casualties and damage to civilian property are not disproportionate to the concrete and direct military advantage anticipated. Of course, determining what is in face a concrete and direct military advantage, is often a most problematic and controversial issue for planners and commanders.

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39 See Department of Defence, *Australian Defence Force Publication 37: Law of Armed Conflict*, First Edition, Department of Defence, Canberra, 1996.

40 Royal Australian Air Force, *Australian Air Publication 1003: Operations Law for RAAF Commanders*, First Edition, Air Power Studies Centre, Canberra, May 1994, Chapter 6.

41 This policy was included in Department of Defence, *Australian Defence Force Publication 3: Rules of Engagement*, First Edition, Department of Defence, Canberra, 31 July 1992, Paragraphs 234–235. This publication has been replaced by a classified document.

42 While this definition is generally accepted as part of customary law, there is still debate surrounding the definition of 'military objective'. The Special Assistant to the US Army The Judge Advocate General on law of war matters, W. Hays Parks, criticises this definition as not adequately addressing war-sustaining capability including economic targets. See Parks, 'Air War and the Law of War', pp. 135–145.

Humanity

The principle of humanity is founded on the belief in the dignity of individuals. It provides that methods and tactics used in warfare must not inflict superfluous suffering on combatants and non-combatants. This principle recognises:

a. the force used must not exceed that required to achieve the military objective,

b. there must be a valid military objective,

c. destruction as an end in itself is prohibited,

d. any destruction of property must contribute to the defeat of the enemy, and

e. wanton killing and wilful infliction of suffering by way of revenge is prohibited.[43]

Proportionality

The principle of proportionality is perhaps the most important for air planners. Proportionality links the principles of military necessity and humanity. This principle provides that the benefit from military action must be proportionate to the anticipated loss of civilian life, incidental injuries, and damage to civilian property that can reasonably be expected to result from an attack. This is now well known as the collateral damage of military operations. Military commanders must not inflict suffering and damage that is disproportionate to the military requirement. This principle requires commanders to balance carefully the military importance of their action with the possible harmful effects to protected persons and property.

The proportionality rule is described in *Additional Protocol 1*. Article 57(2)(a)(iii) states that those who plan an attack must:

> refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

The military worth of a target needs to be assessed in relation to the prevailing circumstances. A commander should select methods of attack that are most likely to minimise incidental damage. In doing so, the commander is entitled to take into account factors such as: danger to their own personnel, weapons systems available, weather, geography, stocks of weapons, and enemy defences.

The principle of proportionality is contained in ADF policy; however, aspects of this concept remain problematic.[44] Australia has made a Declaration relating to Article 51(5)(b) and Article 57 stating that this principle relates to the advantage anticipated from the attack as a whole and not only from isolated or particular parts of the

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[43] RAAF, *AAP1003: Operations Law for RAAF Commanders*, Chapter 6.

[44] This policy was included in *ADFP3: Rules of Engagement*, Paragraph 239.

attack.[45] While this provides some clarity on the Australian position, it has implications for interoperability with other states that may have different interpretations of *Additional Protocol 1*. This issue was clearly identified by the *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* in June 2000 concerning allegations of NATO violations of LOAC during the Kosovo air campaign:

> 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. It is relatively simple to state that there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects. 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 much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.[46]

While proportionality links the fundamental concepts of humanity and military necessity, other important and related objectives of LOAC are distinction and chivalry.

Distinction

LOAC is premised on the distinction between combatants and non-combatants. Distinction requires that an attacker must only direct military efforts against military objects and objectives. Under LOAC, civilians and non-combatants are generally immune from direct, intentional attack. Incidental injury to civilians and non-combatants who are not supporting the belligerent war effort is acceptable only as an indirect and unintended consequence of an attack against a lawful target. The principle of distinction is codified in Article 57(2)(a)(i) of *Additional Protocol 1*, which provides that combatants must verify that the objectives to be attacked are neither civilians nor civilian objects.[47]

Chivalry

Chivalry refers to the established formalities and courtesies respected by combatants during armed conflict. While technology has substantially altered the conduct of war, vestiges of this principle are reflected in certain prohibitions, such as the illegality of perfidy. An example of perfidy is where a military aircraft imitates a civilian airliner to gain a tactical advantage. This has relevance to air warfare as it establishes a code

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[45] RAAF, *AAP1003: Operations Law for RAAF Commanders*, Chapter 6-5, Paragraph 6.11. See also International Committee for the Red Cross website, http://www.icrc.org/IHL.nsf/d49c744360dadc07c1256314002ee738/10312b4e9047086ec1256402003fb253?OpenDocument.

[46] *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 13 June 2000, Paragraph 48, http://www.un.org/icty/pressreal/nato061300.htm, accessed 1 August 2002.

[47] RAAF, *AAP1003: Operations Law for RAAF Commanders*, Chapter 6-5, Paragraph 6.13.

of behaviour in the air. For example, aircraft can use legitimate camouflage but must not engage in unlawful tricks, such as falsely using the Red Cross.[48]

International Criminal Court

> For nearly half a century—almost as long as the United Nations has been in existence—the General Assembly has recognized the need to establish such a court to prosecute and punish persons responsible for crimes such as genocide. Many thought … that the horrors of the Second World War—the camps, the cruelty, the exterminations, the Holocaust—could never happen again. And yet they have. In Cambodia, in Bosnia and Herzegovina, in Rwanda. Our time—this decade even—has shown us that man's capacity for evil knows no limits. Genocide … is now a word of our time, too, a heinous reality that calls for a historic response.
>
> Kofi Annan, United Nations Secretary-General[49]

The principles of LOAC have gained the increased attention of air commanders with the emergence of the ICC. The ICC is a crucial turning point in the development of international law and is certain to affect future military operations. There have been ongoing attempts throughout history to establish tribunals to punish those who have breached LOAC. The concept of an international penal tribunal was first conceived by the League of Nations and embodied in the *Covenant of the League of Nations 1919*, leading to the creation of a Permanent Court of International Justice.[50] However, it was not until 1946 that ad hoc specialist war tribunals were established in Asia and Nuremberg after World War II. Since then, there has been ongoing debate within the international community regarding the need for the establishment of a permanent body to deal with grave violations of LOAC. The international community has reacted to this need with the creation of the ICC. The ICC is a means of ensuring that the perpetrators of the most serious war crimes are held accountable for their actions. It is intended that the ICC will help put an end to impunity.

Background

The ICC is the most recent attempt by the international community to deal with international crimes and provide an enforcement mechanism for international law. One hundred and twenty nations adopted the *Rome Statute of the International Criminal Court* (the *Rome Statute)* on 17 July 1998 at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.[51] The Statute provided for the establishment of a permanent international court to investigate and prosecute those accused of genocide, crimes against humanity and war crimes. It should be noted that terrorism does not fall within the jurisdiction of the court. A provision was included in the Statute that provided a requirement for

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48 ibid., Chapter 6-5, Paragraph 6.14.

49 United Nations Secretary-General Press Release SG/SM/6257, 'International Criminal Court Promises Universal Justice', 12 June 1997, http://www.un.org/Docs/SG/quotable/6257.htm, accessed 20 September 2002.

50 *Covenant of the League of Nations 1919*, Art.13.

51 The full text of this treaty can be found at the UN website, http://www.un.org/law/icc/statute/romefra.htm.

60 states to ratify the Statute before the Court could be established.[52] This target was reached on 1 July 2002 and the court was born in September 2002 and will be sited in The Hague.[53]

The ICC is not intended to replace the authority of national courts. Rather, the jurisdiction of the court is firmly based on the principle of complementarity, which provides that the court can only exercise jurisdiction when a national court is unable or unwilling to do so. Priority will always go to national courts at first instance. However, if a domestic government fails to act, or cannot act, the ICC may claim jurisdiction.

Australia signed the *Rome Statute* on 9 December 1998 and ratified it on 1 July 2002. As a consequence of ratification, Australia now has a legal obligation to comply with this statute. The *Rome Statute* has significant implications for ADF personnel: when the ICC is operating ADF personnel will be subject to possible prosecution by the ICC if Australia fails to take action against persons considered to have committed a crime in breach of the *Rome Statute*. Australia has passed domestic legislation to ensure that all war crimes are incorporated as part of Australian criminal law. This step, along with increased public and media scrutiny of military operations, will ensure that commanders and their personnel will be held accountable for any criminal action, even in the theatre of war.

Was the ICC crippled from the outset?

There have been a number of criticisms of the ICC both in Australia and in the US. The most vocal critics of the ICC are from within the US. These critics consider that the ICC may have a deleterious effect on national security. In 2000, Senator Jesse Helms addressed these concerns to the UN Security Council:

> The … supporters argue that Americans should be willing to sacrifice some of their sovereignty for the noble cause of international justice. This, frankly, is laughable. International law did not defeat Hitler, nor did it win the Cold War. What stopped the Nazi march across Europe, and the communist march across the world, was the principled projection of power by the worlds' great democracies. And that principled projection of force is the only thing that will ensure peace and security on the international scene in the future.[54]

The most serious objection to the ICC has been its perception as erosion of the principle of state sovereignty contained in Article 2(7) of the *UN Charter*. As discussed earlier, this principle is an important one as it underpins the international system of order. Yet the concept of sovereignty should not be used as a shield to allow breaches of LOAC to go unpunished. In the *Tadic Case*, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia stated:

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52 *Rome Statute of the International Court of Justice 1988*, Art.26.

53 United Nations website, http://www.un.org.

54 Address by Senator Jesse Helms, Chairman, United States Senate Committee on Foreign Relations, before the United Nations Security Council, 20 January 2000, http://www.sovereignty.net/center/helms.htm, accessed 28 August 2002.

> It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity.[55]

The formation of the ICC is a landmark in legal history and exemplifies the tightening restrictions that are being placed on contemporary air warfare by the international community. The crimes in the *Rome Statute* are now enshrined in domestic Australian legislation. In the absence of US support for the ICC, the onus will be on the ADF to investigate and take clear and decisive action against military members and other individuals who are accused of committing war crimes. There are important interoperability issues that will need to be considered in future coalition operations where coalition partners, such as the US, are not signatories to the *Rome Statute*. The ICC requires constant vigilance to ensure that it will be just, relevant and effective. This vigilance by states must ensure that the ICC does not become politicised.

The next chapter will discuss the legal issues arising out of the application of LOAC in the context of the 1999 air campaign carried out by NATO in Kosovo. This campaign has been both held up as an example of adherence to international law principles and criticised by those who allege criminal action by air power commanders, planners and operators. It is a very useful case study of the increasing significance of the law in contemporary air operations.

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[55] *Prosecutor v Dusko Tadic* (1996) 35 ILM 32, Paragraph 58.

4 — THE KOSOVO AIR CAMPAIGN

> I suggest that the air warriors do not yet have the definitive answers and that the operational history of the NATO war only provides clues. The Yugoslavia campaign does not support any one model for air power in the future, and it is dangerous to think it does.[1]

The importance of precision in air warfare was demonstrated in the 1999 Kosovo air campaign. As had been foreshadowed in the 1991 Gulf War, the promise held out by air power to change the face of warfare came to fruition as technological developments delivered the possibility of a bloodless war for the victors. But this power is not unbridled: military superiority comes at a cost as technical superiority imposes increasing moral and legal restraint imposed by our political leaders and the communities who elect them. Some of these restraints remain ill defined, contested and open to debate.

NATO's compliance with LOAC in its Kosovo bombing campaign is a useful study of the influence of the law in air operations. NATO's use of air power in Kosovo poses important legal questions about how far the law influences air operations. Professor Hilary Charlesworth describes events in Kosovo as 'a meaty international law crisis'.[2] Recent studies have identified an important role for legal rules in the exercise of power, but these studies have not closely analysed the military issues.[3] This chapter considers some of the legal dimensions of NATO's Kosovo campaign including: targeting, casualty avoidance, dual-use targets and media constraints. This chapter will then draw some lessons for the future.

Background

The military campaign for Kosovo had a clear objective:

> Today we and our 18 NATO allies agreed to do what we said we would do, what we must do to restore peace. Our mission is clear; to demonstrate the seriousness of NATO's purpose so that the Serbian leaders understand the imperative of reversing course; to deter an even bloodier offensive against innocent civilians in Kosovo; and, if necessary, to seriously damage the

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1 William Arkin, 'Smart Bombs, Dumb Targeting?', *The Bulletin of the Atomic Scientists*, Vol. 56, No. 3, May/June 2002, pp. 46–53, http://www.thebulletin.org/issues/2000/mj00/mj00arkin.html, accessed 26 September 2002.

2 Professor Hilary Charlesworth, 'International Law: A Discipline of Crisis', draft paper for symposium *Beyond the Kosovo Crisis: Fundamental Questions and Enquiries for the Discipline of International Law*, p. 5, http://www.law.nyu.edu/faculty/workshop/spring2002/charlesworth.pdf, accessed 3 October 2002.

3 This trend is identified in Dr Nicholas J. Wheeler, 'The Kosovo Bombing Campaign: The Limits of Civilian Protection in International Humanitarian Law', in Christian Reus-Smit (ed.), *The Politics of International Law*, Chapter 8, (to be published by Cambridge University Press).

> Serbian military's capacity to harm the people of Kosovo. In short, if President Milosevic will not make peace, we will limit his ability to make war.
>
> Bill Clinton, Former US President[4]

NATO—led by the US—conducted Operation *Allied Force* against Yugoslavia between 24 March–9 June 1999 in an effort to halt the human-rights abuses being committed against the citizens of the Kosovo province by Serbian leader Slobodan Milosevic. NATO Secretary-General Javier Solana stated the aim of the air strikes was 'to prevent more human suffering, more repression, more violence against the civilian population of Kosovo … to prevent instability spreading in the region'.[5] NATO goals demanded that Serbia halt the ethnic-cleansing campaign against the Albanian Kosovars; withdraw Serb troops and police from Kosovo; allow deployment in Kosovo of a NATO-led peacekeeping force; allow the expelled Kosovars to return to their homes; and resume participation in efforts to reach a political solution in Kosovo.[6]

This 78 day air campaign was carried out without UN Security Council authorisation under the umbrella of humanitarian intervention and proved pivotal in preventing gross human rights violations. It was unprecedented in its concentrated use of discriminate air power. There were 28,000 munitions expended during the campaign, 29 per cent of which were smart weapons. Of these, 78 per cent were precision-guided weapons.[7] Yet despite the success of air power, the campaign has been criticised for the harm it inflicted on the civilian population of Serbia and other non-combatants. During the campaign, there were approximately 500 non-combatant casualties.[8] The campaign was also marked by hesitancy in targeting and interoperability problems between the US and its NATO partners. These problems raise important questions about the conduct of future air operations.[9]

NATO action was taken in Kosovo to support the political aims of the Western allied nations. This action was partly justified on the basis of humanitarian intervention 'to prevent more human suffering and more repression and violence against the civilian population of Kosovo'.[10] Yet the legitimacy of the NATO bombing campaign has been criticised as unlawful as it was not authorised by the Security Council or conducted in self-defence, but instead was conducted on the basis of a range of justifications including humanitarian intervention.[11] The concept of humanitarian intervention continues to be widely debated as the resort to force on humanitarian

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4 *New York Times*, 25 March 1999, Article 15 referred to in Ved P. Nanda, 'Legal Implications of NATO's Armed Intervention in Kosovo' in Michael N. Schmitt (ed.), *International Law Studies Volume 75: International Law Across the Spectrum of Conflict*, Naval War College, Rhode Island, 2000, pp. 318.

5 Statement by NATO Secretary-General Javier Solana on air strikes, 23 March 1999, in ibid., p. 318.

6 John A. Tirpak, 'Victory in Kosovo', *Air Force Magazine*, Vol. 82, 10 June 1999, http://www.afa.org/magazine/watch/0799watch.html, accessed 7 September 2002.

7 Arkin, 'Smart Bombs, Dumb Targeting?', p. 6.

8 Benjamin S. Lambeth, 'Lessons from the War in Kosovo', *Joint Force Quarterly*, Spring 2002, p. 12.

9 Benjamin S. Lambeth, *The Transformation of American Air Power*, Cornell University Press, USA, 2000, Chapter 6.

10 Press statement by Javier Solana, NATO Secretary-General, NATO press release, 23 March 1999, No. 040, http://www.nato.int/docu/pr/1999/p99-040e.htm, accessed 9 August 2002.

11 United Nations Security Resolution 1160, 31 March 1998 and Resolution 1199, 23 September 1998, called for an end to the Kosovo crisis but fell short of endorsing humanitarian intervention.

grounds raises many legal and moral issues.[12] The emergence of the concept of humanitarian intervention is considered by some as an important developing international norm offering much-needed protection to innocent civilians. Conversely, humanitarian intervention has been viewed as a direct attack on the well-established principle of state sovereignty. The Independent International Commission on Kosovo found that NATO action in Kosovo was strictly illegal, as it was taken without prior approval of the Security Council, but concluded that NATO action was morally justified. The justification of violence on the grounds of humanitarian intervention increases the complexity of future military operations, particularly where force must be exercised with precision. However, the legal basis of humanitarian intervention does not form part of the scope of this paper, as this issue primarily relates to the *jus ad bellum*, which regulates when states may use force. This chapter instead focuses on the *jus in bello*, which regulates how states may use force, and the way in which precision was exercised in Kosovo.[13] Nevertheless, it is important to recognise that the basis of military action is important as the legality of proposed military action affects public support, and this may flow on to the level of support provided to the nation's military forces.

There are many legal issues raised in the Kosovo campaign that influenced the way in which this campaign was conducted. For air power, the most significant include targeting of civilians and civilian infrastructure, the intolerance for any allied casualties, and reliance on high technology and dual-use targets. These issues have implications for all future reliance on air power.

Targeting

NATO indicated a clear commitment to international norms in Operation *Allied Force*. Legal Counsel to the US National Security Council during Operation *Allied Force*, The Honorable James E. Baker, has concluded that 'Kosovo was a campaign during which LOAC was assiduously followed'.[14] General Wesley Clark (then Supreme Allied Commander Europe) affirmed this view:

> This campaign has the highest proportion of precision weaponry that has ever been used in any air operation anywhere. We are going after militarily significant targets and we are avoiding, [sic] taking all possible measures to avoid civilian damage.[15]

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[12] *Independent International Commission on Kosovo Report*, October 2000, http://www.kosovocommission.org/.

[13] Suggested reading on the topic of humanitarian intervention includes: Professor Yoram Dinstein, 'The Thirteenth Waldemar A. Solf Lecture in International Law', *Military Law Review*, Vol. 166, December 2000; Hugh Smith, 'Humanitarian Intervention: Morally right, Legally wrong?', *Current Affairs Bulletin*, Vol. 68, No. 4, September 1991, pp. 4–11; Dr Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society*, Oxford University Press, New York, 2001.

[14] The Honorable James E. Baker was legal counsel to the National Security Council during Operation *Allied Force*. See The Honorable James E. Baker, 'Judging Kosovo: The Legal Process, The Law of Armed Conflict, and the Commander-In-Chief', presentation at Legal and Ethical Lessons of NATO's Kosovo Campaign conference, United States War College, Rhode Island, 8–10 August 2001.

[15] Jamie Shea (NATO Press spokesperson) and General Wesley Clark, press conference, Brussels, 13 April 1999, http://www.nato.int/docu/speech/1999/s990413a.htm, accessed 29 August 2002.

From the outset of planning for the NATO campaign, the need to limit allied and civilian casualties was a primary consideration for military and political planners. NATO Secretary General, Lord George Robertson, stated that:

> the concern to avoid unintended damage was a principal constraining factor throughout. Many targets were not attacked because the risk to non-combatants was too high.[16]

Funnell notes that of the 2000 targets identified, only 200 were initially considered politically acceptable.[17] Pressures to avoid civilian casualties and unintended collateral damage were greater in Operation *Allied Force* than in any previous campaign involving US forces.[18] The UN High Commissioner for Human Rights, Mary Robinson stated that there was a need 'not only to adhere to the principle of proportionality, but to err on the side of the principle'.[19] It needs to be considered just how far the protection of civilians shaped NATO's targeting policy.

Since 1990, the Western response to questions being raised about military operations in the political arena has been to call in the lawyers. NATO Air Commander, Lieutenant General Michael C. Short stated that every target bombed in Kosovo was closely scrutinised and subjected to legal review by a professional military lawyer.[20] This level of scrutiny first emerged in the 1991 Gulf War, gained prominence in Kosovo and continues today in Operation *Enduring Freedom* in Afghanistan.[21] Michael Ignatieff noted that:

> By 1999, military lawyers had been integrated into every phase of the air campaign, including the finalisation of the air-tasking orders which assigned pilots to specific targets and missions.[22]

But air power enthusiasts have criticised this process and attributed the lack of success in war efforts in part to the legal restrictions placed on air power. It has been argued that the Kosovo campaign was fought by NATO with 'one hand tied behind our back'.[23] Did the application of LOAC go too far in Kosovo?

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16 Lord George Robertson, 'Kosovo One Year On: Assessment and Challenge', 21 March 2000, NATO website, http://www.nato.int/kosovo/repo2000/index.htm, accessed 20 September 2002.

17 Air Marshal Ray Funnell, 'The Use of Military Power in the Kosovo Conflict, Military History Overturned: Did Air Power Win the War?', paper presented at Kosovo and the International Community Workshop, 19–21 September 1999, p. 4.

18 Lambeth, *The Transformation of American Air Power*, p. 204.

19 Wheeler, *Saving Strangers*, p. 272.

20 Lieutenant General Michael Short, 'Operation Allied Force from the Perspective of the NATO Air Commander', presentation at Legal and Ethical Lessons of NATO's Kosovo Campaign conference, United States War College, Rhode Island, 8–10 August 2001. The target review process in Operation *Allied Force* is described in detail in Baker, 'Judging Kosovo'.

21 Interview with Lieutenant Colonel Nancy Richards, International and Operations Law Division, United States Air Force, Pentagon, 17 July 2002.

22 Michael Ignatieff, *Virtual War: Kosovo and Beyond*, Vintage, Great Britain, 2001, p. 197.

23 William R. Hawkins, 'Imposing Peace: Total vs. Limited Wars, and the Need to Put Boots on the Ground', *Parameters*, Summer 2000, pp. 72–82, http://carlisle-www.army.mil/usawc/Parameters/00summer/hawkins.htm, accessed 27 August 2002.

It is convenient to blame the lawyers, but military operational experience supports a rigorous target review process. In 2001, the Honorable James E. Baker argued that such a process was employed in Kosovo and did not impede effective military operations in Kosovo. Rather, he argued that this process was efficient and contributed to the rule of law, one of the fundamental outcomes required of the conflict.[24] He further advocated that this process should be employed in future military operations to diminish the potential for error.[25] Similarly, General Colin Powell (US Army Chairman of the Joint Chiefs of Staff) supported this approach following his Gulf War experience: 'Decisions were impacted by legal considerations at every level. [During the Gulf War] the law of war proved invaluable in the decision-making process'.[26] It can be argued that NATO's phased air campaign was largely driven by political constraints agreed to by the Allies—and it was this factor that prevented air power from 'going downtown' earlier.[27]

Civilian casualties

In 1921, Douhet argued for a total form of war that incorporated civilians into the battlespace:

> No longer can areas exist in which life can be lived in safety and tranquillity, nor can the battlefield be limited to actual combatants. On the contrary, the battlefield will be limited only by the boundaries of the nations at war, and all of their citizens will become combatants since all of them will be exposed to the aerial offensives of the enemy. There will be no distinction any longer between soldiers and civilians.[28]

Does this philosophy apply today? Kosovo demonstrates that the international community has greater moral and legal expectations from modern warfare than those that applied during World War I and World War II. Collateral damage is an unfortunate consequence of military operations, but is not necessarily a violation of LOAC. The question arises from the Kosovo conflict: what degree of injury and damage to civilians and civilian property can be regarded as excessive and consequently disproportionate to the military advantage gained? At what point does 'collateral damage' become a breach of LOAC?

There has been substantial criticism of the NATO air campaign. Human Rights Watch and a number of other commentators have criticised NATO for the alleged commission of violations of international law in its bombing campaign in the Federal Republic of Yugoslavia. These criticisms included accusations that LOAC placed civilians at unnecessary risk. For example:

> Despite the adulation of Operation Enduring Freedom (OEF) as a 'finely-tuned' or 'bulls-eye' war, the campaign failed to set a new standard for

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24 Baker, 'Judging Kosovo', p. 1.
25 ibid., p. 14.
26 Cited in L.C. Green, *The Contemporary Law of Armed Conflict*, Manchester University Press, Manchester, 1993, p. v.
27 ibid., pp. 15–16.
28 Giulio Douhet, *The Command of the Air* (trans. by Dino Ferrari), Arno Press, New York, 1972, pp. 9–10.

> precision in one important respect: the rate of civilians killed per bomb dropped.[29]

An important test to be applied in considering the question whether NATO violated LOAC is contained in the principle of proportionality: there must be a balance between the military goal to be achieved and the ultimate human cost. Some have considered the principle of proportionality to be void on the grounds that the test for adherence is too vague.[30] However, this argument is rejected because the principle of proportionality has withstood the scrutiny of the international community and has been broadly recognised by states.

The NATO Joint Forces Air Component Commander, Lieutenant General Michael C. Short, has stated that during the Kosovo air campaign, 'Concern for the law of armed conflict was absolutely paramount in my mind'.[31] As he explained, civilian casualties are a devastating by-product of war: 'Never in seventy-eight days did we target Serb civilians, but unfortunately in war civilians are sometimes where you would like them not to be'.[32] During the bombing campaign, NATO aircraft flew 38,400 sorties during which 23,614 air munitions were released.[33] Meanwhile, Human Rights Watch has estimated the number of civilian deaths in Kosovo at about 500.[34]

But mistakes are made in war and nobody should forget that warfare is an inherently bloody business. On 12 April 1999, a passenger train was bombed when it appeared shortly after a pilot released a missile targeting the Grdelica railroad bridge. A pilot attacked a convoy of tractors near Djakovica on 14 April 1999, which the pilot believed to be military vehicles in a convoy on a re-supply route for the Yugoslav Army.[35] *The Final Report to the International Criminal Tribunal for the Former Yugoslavia Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (the *Final Report to the Prosecutor*) investigated numerous allegations of LOAC violations carried out in the Kosovo bombing campaign. The *Final Report to the Prosecutor* found that the Grdelica bridge was a legitimate military objective and the passenger train was not deliberately targeted. It found that while aircrew could have benefited from scrutiny of the target in Djakovica at an early stage at lower altitude, neither the aircrew nor their commanders displayed criminal recklessness.[36]

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29 Carl Conetta, 'Operation Enduring Freedom: Why a Higher Rate of Civilian Bombing Casualties', *Project on Defense Alternatives Briefing Report No. 11*, 18 January 2002, http://www.comw.org/pda/0201oef.html, accessed 17 August 2002.

30 W. Hays Parks, 'Air War and the Law of War', *The Air Force Law Review*, Vol. 32, No. 1, 1990, p. 173.

31 Short, 'Operation Allied Force from the Perspective of the NATO Air Commander', p. 25.

32 ibid., p. 23.

33 See *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 13 June 2000, http://www.un.org/icty/pressreal/nato061300.htm, accessed 1 August 2002.

34 Wheeler, 'The Kosovo Bombing Campaign'. See William M. Arkin, 'Civilian Deaths in the NATO Air Campaign', *Human Rights Watch website*, Vol. 12, No. 1, February 2000, http://www.hrw.org/reports/2000/nato/, accessed 20 September 2002.

35 Wheeler, 'The Kosovo Bombing Campaign'. See also Serbia news reports at http://www.serbia-info.com/news/1999-04/14/10859.html and http://www.serbia-info.com/news/1999-07/23/13474.html.

36 *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, Paragraphs 58–62, 63–70, 80–85.

Civilian infrastructure

NATO initially targeted air defence systems in the Federal Republic of Yugoslavia both to pressure the Serbian leader and as a prelude to a broader campaign. As this initial series of strikes failed to force Milosevic to the bargaining table, NATO expanded its target list to include civilian infrastructure. Electricity supply, military storage and production, airfields, a broadcasting station, bridges, railroads, petroleum stocks, and a water purification plant were all subsequently targeted.[37]

Human Rights Watch have criticised NATO forces for their attack on civilian infrastructure.[38] Human Rights Watch argued that the destruction of bridges that are not central to transportation arteries, or have a purely psychological importance, do not satisfy the criteria of making an effective contribution to military action.[39] The organisation also questioned the legitimacy of the targeting of Serb radio and television headquarters in Belgrade that killed 16 technicians, as these facilities were not being used to incite violence and at worst were used to distribute local propaganda to support the war effort.[40] Where a military target is located near or within a civilian facility, there is a need to balance the military objective with the damage caused. If it is decided that military action is justified, then the means used must be proportionate to ensure minimal collateral damage. All targets must meet the criteria for military objectives and present a clear military advantage. NATO targets included military-industrial infrastructure and government ministries. The *Final Report to the Prosecutor* concluded that NATO was attempting to attack objects it perceived to be legitimate military targets based on information available at the time of planning.[41] The issue of whether the media constitutes a legitimate target group remains debatable. If the media is used to directly contribute to the war effort, then it may be considered to be a legitimate target; if it is merely used to act as a communications method, it is not a legitimate target.[42]

Article 52(2) of *Additional Protocol I* prohibits attacks against non-military objects or attacks likely to cause incidental civilian damage which are disproportionate to the military advantage. US state practice has been to select targets on the basis of a broad interpretation of the definition of 'military objective' in this provision. Major Jeanne Meyer of the USAF Judge Advocate General justifies this position on the basis that this provision does not accurately reflect customary international law or state practice but instead unnecessarily prohibits targets that provide a psychological or strategic advantage.[43] Meyer argues that it was the shift in focus of the air campaign from troops and armament to strategic targets that made the campaign successful.

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37 ibid., Paragraph 44; Interview with General Wesley Clark, NATO Supreme Allied Commander, 2 February 2000, http://www.pbs.org/wgbh/pages/frontline/shows/kosovo/interviews/clark.html, accessed 7 September 2002.

38 Arkin, 'Civilian Deaths in the NATO Air Campaign'.

39 ibid.

40 ibid.

41 *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, Paragraph 91.

42 ibid., Paragraph 47.

43 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', *Air Force Law Review*, Vol. 51, 2001, USAF Judge Advocate General School website, http://afls14.jag.af.mil/dscgi/ds.py/View/Collection-1788, accessed 1 August 2002.

> Bending the will of Milosevic required more than just destruction of objects that contributed to the military effort, particularly if preservation of those objects was not one of his priorities.[44]

General Wesley Clark similarly stated:

> There were other types of targets that had a high political symbolism, which went beyond their actual military value—like the television system. We knew that Milosevic used TV as an instrument of command and control. He used it to control the population, to inflame the passions of ethnic cleansing, and so forth.[45]

Article 52(2) allows targeting calculated to affect enemy troop morale but does not allow for targeting civilian morale. This has been a long debated point with echoes of the way Air Marshal Harris prosecuted the RAF Strategic bombing campaign against Germany in World War II. Lieutenant General Michael C. Short indicated that NATO's intent was to affect Serb civilians:

> There can be no doubt in your mind that with the power down as a result of a hard kill and refrigerator not running and no water in your house and the public transportation system in Belgrade not running and no street lights, that the war was brought home, not just to the ruling elite, but to the average Serb on the street.[46]

Hays Parks has criticised the *Protocol I* definition of 'military objective' as being too narrowly focused on definite military advantage and not paying adequate attention to war sustaining capability.[47] Meyer argues that striking both military and civilian targets is necessary to affect the will of the enemy and ultimately serves humanity, as to interpret this provision restrictively will ultimately cause more destruction.[48] This argument provides that any object can be a legitimate military target if it assists in defeating the enemy. This view may well assist in the execution of air missions, but such an approach must be approached with caution as this opens the door on warfare against the civilian population. This approach also raises questions for interoperability as it diverges from Australian practice, which provides a much narrower reading of this provision. More frightening for the international community, is this a return to Douhet and Harris?

Reliance on high-technology

Kosovo showcased NATO military superiority. On 24 March 1999, President Clinton ruled out committing ground troops to Kosovo amid a public intolerance of casualties

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44 ibid., p. 44.

45 Interview with General Wesley Clark, NATO Supreme Allied Commander, 2 February 2000, http://www.pbs.org/wgbh/pages/frontline/shows/kosovo/interviews/clark.html, accessed 7 September 2002.

46 Lieutenant General Michael C. Short (NATO Joint Forces Air Component Commander), interview by Steve Inskeep, *National Public Radio Morning Edition*, 15 September 1999.

47 Parks, 'Air War and the Law of War', pp. 135–45.

48 Meyer, 'Tearing Down The Façade', p. 54.

in their own military force.[49] Minimising allied casualties was of great importance to NATO. As a consequence, the NATO campaign was carried out with no casualty to its military force.

The Kosovo campaign involved 78 days flying 38,400 sorties without a single NATO casualty.[50] This is an unprecedented achievement and changes the expectations of future war. Ignatieff notes that as a result the basic contract of war—kill or be killed—has been changed.[51] The military contest was so unequal in Kosovo that NATO could only maintain a moral advantage by adhering strictly to the rule of law.

A real issue facing air power planners and operators today is that of cold violence where the physical and physiological distance between a target and the attacker is so great that it allows the attacker to distance themselves from involvement in the process. This raises the question to what extent are military commanders obligated to expose their own military forces to danger to limit civilian casualties or damage to civilian objects?

NATO's reliance on a high-altitude rule of engagement for bombing sorties to minimise the risk of its own casualties has been widely criticised.[52] NATO adopted 15,000 feet minimum altitude for part of its campaign, which meant that targets could not be visually verified. The NATO Joint Forces Air Component Commander has justified this decision on the basis that this is the minimum height required to avoid small arms, anti-aircraft artillery and infra-red missiles.[53] However, NATO was criticised for disregarding the rule of proportionality by trying to fight a 'zero casualty' war on their own side. Allegations were made that NATO aircraft operated at heights which enabled them to avoid Yugoslav attack but which made it impossible for them to properly distinguish between military or civilian objects on the ground.[54] Amnesty International reported that 'the requirement that NATO aircraft fly above 15,000 feet, made full adherence to international humanitarian law virtually impossible'.[55] Arguably, this caused additional civilian deaths.

The *Final Report to the Prosecutor* found that 'there is nothing inherently unlawful about flying above the height which can be reached by enemy air defences'.[56] The report found that due to the increased capability of modern technology, the obligation to distinguish was effectively carried out in the vast majority of cases during the bombing campaign. The Report held that NATO air commanders have a duty to take practicable measures to distinguish military objectives from civilians or civilian

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49 James H. Anderson, 'Ground Troop Scenarios for Yugoslavia: What Would They Take', *The Heritage Foundation website*, No. 1275, 21 April 1999, http://www.heritage.org/Research/Europe/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=18285, accessed 2 September 2002.

50 *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, Paragraph 54.

51 Ignatieff, *Virtual War: Kosovo and Beyond*, p. 161.

52 *Independent International Commission on Kosovo Report*, October 2000, http://www.kosovocommission.org/reports/10-law.html, accessed 27 August 2002.

53 Short, 'Operation Allied Force from the Perspective of the NATO Air Commander', p. 27.

54 *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*.

55 See Chapter 6 of *Independent International Commission on Kosovo Report*.

56 *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, Paragraph 56.

objectives.[57] Further, the Independent International Commission on Kosovo in October 2000 found that:

> Nevertheless, it must be kept in mind that, despite a series of 'mistakes,' NATO's overall record was unprecedented to the extent that it avoided civilian damage through the accuracy of its targeting.[58]

Overall, it can be argued that NATO avoided substantial civilian damage through the accuracy of its targeting. While the issue of 'cold violence' may raise moral questions about the changing nature of conflict, there is no legal requirement for commanders to put their crew at extra risk. Commanders have a duty of care to their own force as well as to implement the principles of LOAC.

The tactic employed by NATO commanders to minimise its own combat casualties through high-altitude bombing and avoidance of a ground campaign was found not to breach legal standards. However, it does raise broader moral questions, as it appears to value the lives of NATO combatants over those of the civilian population in Kosovo and Serbia that it was purporting to protect. Is the life of a pilot more important than the civilians the pilot is claiming to safeguard? What level of risk is acceptable for pilots in future? These issues have clear implications for pilots in future air warfare. Military commanders must always be mindful to balance concern for collateral damage with the risk to which their own force is exposed.[59]

Imperative to use technology

> For NATO combatants the experience of war was less visceral than calculative, a set of split-second decisions made through the lens of a gun camera or over a video-conferencing system. Those who struck from the air seldom saw those they killed.[60]

Ignatieff argues that the war in Kosovo was a virtual one: it was fought remotely, with little of the traditional ground combat. Air power can now be used with zero casualties to our own force while being able to kill with impunity. But as Ignatieff argues, the moral war is difficult to win where this form of violence is used to promote causes such as 'humanitarian intervention', as was the case in Kosovo.

Related to the increasing reliance on technology, there is an emerging tension between the need for accuracy and risk. As technology has delivered precision, there has been an expectation that those states that possess precision guided munitions (PGM) should use these weapons to avoid collateral damage. The US Department of Defense defines PGM as:

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57 ibid.

58 *Independent International Commission on Kosovo Report*, Chapter 6.

59 This consideration was laid down by Lieutenant General Short in Short, 'Operation Allied Force from the Perspective of the NATO Air Commander'.

60 Ignatieff, *Virtual War: Kosovo and Beyond*, p. 4.

> a weapon that uses a seeker to detect electromagnetic energy reflected from a target or reference point and, through processing, provides guidance commands to a control system that guides the weapon to the target.[61]

This raises important legal questions: do those states that possess PGM have a legal duty to use these types of weapons in future conflicts? If so, does this create a two-tiered standard in international law where adversaries may be subject to differing legal standards depending on their technological sophistication?

The US has increasingly used PGM in recent military operations. Murphy notes there has been a five-fold increase in the use of PGM by the US from Operation *Desert Storm* to the close of the Kosovo campaign.[62] In the Kosovo campaign, PGM were used in aerial attacks on targets in heavily populated areas. While the use of PGM helps to limit the effects on protected persons and property, there is a fear that the increasing practice of using this form of weaponry may give rise to an increasing expectation that they must be used in circumstances where there is a significant risk of collateral damage.[63] The question then arises whether this practice gives rise to an obligation under international law to exclusively use these weapons in future conflicts. To determine whether there is a requirement under international law that PGM must be used in future conflicts, it is necessary to consider current international law and modern practice.

There is a general presumption under international law that entitles combatants to choose their means of warfare. Article 22 of the 1907 *Hague Convention IV Respecting the Laws and Customs of War on Land* provides that 'the right of belligerents to adopt means of injuring the enemy is not unlimited'. Much of LOAC is premised on this assumption. The now defunct Permanent Court of International Justice in the *Lotus Case* asserted that 'Restrictions on the freedom of states cannot therefore be presumed'.[64] This case has not been repudiated by its successor, the International Court of Justice. The International Court of Justice has stated that:

> Although the passage of only a short period of time is not necessarily … a bar to the formulation of a new rule of customary international law … State practice … should have been both extensive and virtually uniform.[65]

There is insufficient state practice to support the existence of a norm of customary international law requiring the use of precision weapons. While serving as NATO Secretary-General, Lord Robertson said that 'international law and public opinion'

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[61] US Department of Defense Dictionary, 14 August 2002, http://www.dtic.mil/doctrine/jel/doddict/data/p/04079.html, accessed 7 September 2002. It is noted that the term 'precision weapons' is not defined in the RAAF air power doctrine manual, Royal Australian Air Force, *Australian Air Publication 1000: Fundamentals of Australian Aerospace Power*, Fourth Edition, Aerospace Centre, Canberra, August 2002.

[62] Prof. John F. Murphy, 'Some Legal and a few Ethical Dimensions of the Collateral Damage Resulting from Nato's Kosovo Campaign', presentation at Legal and Ethical Lessons of NATO's Kosovo Campaign conference, United States War College, Rhode Island, 8–10 August 2001, p. 3.

[63] This issue was raised in interview with Major General Thomas Fiscus, The Judge Advocate General, United States Air Force, Pentagon, 17 July 2002.

[64] *The Case of the S.S. Lotus* (France v. Turkey) PCIJ Ser. A No. 10 at p. 18.

[65] *North Sea Continental Shelf* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands) 1969 I.C.J. 3, p. 43.

require the use of precision weapons in the Kosovo campaign.[66] This does not of itself indicate that NATO conduct was based on a belief that using precision weapons was part of its international law obligations.

The existing international law rule is simply that action must be taken by warring combatants to minimise collateral damage. Collateral damage per se is not illegal. Consequently, damage caused by weapons other than PGM is not illegal. Rather, politics and public opinion will always play an important role in restricting state practice.[67] This position has been sharply criticised as untenable by the US.[68] Policy-makers have become increasingly concerned about collateral damage and the possible loss of support for military operations. Consequently, it is politics and not the law that is increasingly constraining the conduct of operations.

If it is considered that international law imposes a legal obligation upon states to use the most modern form of weaponry in future conflicts, does this create a two-tiered standard in international law? That is, one standard for those states who have PGM, and another for those who do not possess such technology or do not wish to avail themselves of it. Some commentators suggest that this is the case, proposing to balance the playing field by technology transfer to developing countries to enable them to acquire precision weapons.[69] However, this position has been criticised as a misunderstanding of the rule of proportionality laid out in *Additional Protocol I*. Developed states are not subject to a more onerous standard that could disadvantage them in armed conflict. Hays Parks states that:

> Lawful combat actions are not subject to some sort of 'fairness doctrine', and neither the law of war in general nor the concept of proportionality in particular imposes a legal or moral obligation on a nation to sacrifice manpower, firepower, or technological superiority over an opponent.[70]

The latter position represents a more practical interpretation of international law. To mandate a balanced technological battlefield would be a perverse legal requirement.

Should there be a mandatory rule requiring the use of precision guided weapons? Article 57(2)(a)(ii) of *Additional Protocol I* requires planners to:

> take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects.

PGM are useful against strategic targets that are located near or in heavily populated civilian areas, whereas mass bombing is useful where the goal is widespread damage or where military targets are distinct from civilian areas. PGM have limitations that

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66 Quote from Murphy, 'Some Legal and a few Ethical Dimensions of the Collateral Damage Resulting from Nato's Kosovo Campaign', p. 8.
67 Interview with Lieutenant Colonel Nancy Richards.
68 Interview with Major General Thomas Fiscus.
69 Murphy, 'Some Legal and a few Ethical Dimensions of the Collateral Damage Resulting from Nato's Kosovo Campaign', p. 14.
70 Parks, 'Air War and the Law of War', pp. 169–170.

make a mandatory rule requiring their use inappropriate.[71] These limits include human error, the fog and friction of war, technical malfunction, intelligence failure, weather conditions and enemy defences. It must be recognised that precision weapons are also limited in number, expensive and not always accurate.[72] The use of PGM should remain at the discretion of the air commander. Hays Parks is right to conclude that 'A commander's good faith judgment remains essential to effective implementation of this provision'.[73]

Dual-use targets

Dual-use targets also present air planners with difficulties. Dual-use targets are those targets that are used for both military and civilian purposes, such as power plants that provide electricity to both the civilian population as well as the military. The nature of modern society is such that it has brought about a meshing of strategic targets as part of the civilian infrastructure, as city planning rarely accounts for future warfare.[74] Consequently, military objectives are often located in populated areas. This is an important issue for military commanders in the targeting process. LOAC attempts to provide a distinction between military objectives and civilian objects, but this distinction becomes blurred in contemporary advanced society in which there are many dual-use objects.

Frustration arises where striking dual-use targets may be perceived to shorten a conflict and ultimately limit the collateral damage that will result. For this reason, Meyer urges a liberal reading of Article 52(2) of *Additional Protocol I* 'to exploit the unique capabilities of air power to assist in the quick and humane termination of conflict'.[75] Some commentators have considered electric power systems to be vital strategic targets, which have value in degrading the enemy's military capability as well as influencing enemy national morale. However, Dr Daniel Kuehl recognises that destruction of these targets has important and devastating second order effects. Also, assessing the impact of such action on enemy morale is an impossible task. Kuehl concludes that the long-term effects of such an attack is likely to be severe; however, the immediate impact on military systems and morale is unclear.[76] The Honorable James E. Baker recognises the inherent tensions between the doctrine of military objective and dual-use targets, but cautions against sending the law 'hurdling down the slippery slope toward collateral calamity' by advocating an overhaul of existing international law.[77]

Hays Parks argues that 'responsibility for avoidance of collateral civilian casualties or damage to civilian objects … is a shared obligation of the attacker, defender and the civilian population'.[78] This issue has arisen in relation to human shields where defenders have placed their civilian population in harms' way. In Kosovo, civilian

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71 Murphy, 'Some Legal and a few Ethical Dimensions of the Collateral Damage Resulting from NATO's Kosovo Campaign', pp. 3, 13.
72 Interview with Lieutenant Colonel Nancy Richards.
73 Parks, 'Air War and the Law of War', pp. 85–86.
74 Interview with Hays Parks, Special Assistant to The Judge Advocate General of the Army, Virginia, 17 July 2002.
75 Meyer, 'Tearing Down the Façade', p. 53.
76 Dr Daniel Kuehl, 'Air power vs. Electricity: Electric Power as a Target for Strategic Air Operations', *The Journal of Strategic Studies*, Vol. 18, 1995, pp. 237–266.
77 Baker, 'Judging Kosovo', p. 16.
78 Parks, 'Air War and the Law of War', pp. 28–29.

protestors placed themselves at risk by forming human shields on bridges in Belgrade and Grdelica to protect the bridges from NATO attack.[79] The 'shared obligation' approach advocated by Hays Parks holds that the civilian population itself has an obligation to remove itself from conflict. While this approach seems like a practical approach to the question of responsibility, the current legal regime in Articles 48–58 of *Additional Protocol I* clearly places the responsibility for the protection of the civilian population on the attacker. This further complicates the decision-making of air planners and commanders.

The question arises, then, when is a dual-use target a lawful target? Civilians located near military objectives must still be considered in calculating proportionality, even where a warring party fails to exercise its obligation to remove them.[80] The rules of proportionality and discrimination apply even where there is co-mingling of targets. It is recognised that tension exists between the principle of military objective and dual-use targets and that this issue warrants review. This tension is particularly important in the coalition environment, where unity is a centre of gravity.[81] This is a live issue that will confront air commanders in the future.

Media reporting of LOAC issues

There are other factors apart from the law that directly affect the conduct of military operations. The pervasiveness of global media has impacted on the use of force, and its influence is likely to grow. Ignatieff describes this phenomenon:

> … there is no such thing as purely military success: a strike which takes out a target but leaves behind moral or political debris is a strike which has failed.[82]

The media has enabled military operations to be immediately transmitted to the international public. As a result, sensitivity to civilian suffering and casualties has shaped the application of force by swaying policy and clouding the law.[83] An example of this was media reporting during Operation *Desert Storm*. With a number of prominent exceptions, this reported limited collateral damage and raised the bar of public expectation. This sensitivity severely constrained target choices in Kosovo and as a consequence commanders required a clear legal and moral justification for striking individual targets. The end result was that lawyers became even more actively involved in operation and mission planning. The reality is that military success is now largely dependent on public support and acceptance and military forces must work within such constraints.[84] Military commanders ignore the media and the law at their peril.

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79 World Media Watch, 'Serb Media', *British Broadcasting Commission Online News*, 10 April 1999, http://news.bbc.co.uk/1/hi/world/monitoring/316147.stm, accessed 1 October 2002.

80 *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, p. 14.

81 Comment by NATO Secretary General in Robertson, 'Kosovo One Year On: Assessment and Challenge'.

82 Ignatieff, *Virtual War: Kosovo and Beyond*, p. 197.

83 Interview with Lieutenant Colonel Nancy Richards.

84 Daniel Byman and Matthew Waxman, 'Defeating US Coercion' *Survival*, Vol. 41, No. 2, Summer 1999, pp. 109.

Where is Kosovo leading us?

The search for precision and casualty avoidance has—to some extent—ended in Kosovo: the bombing campaign achieved its objectives without a single NATO combat fatality. This achievement transformed expectations of future air warfare and has raised the moral and possibly the legal benchmarks for future operations.[85] Precision has now become an expectation. This raises public and political expectations for future air commanders and presents them with a more complex task.[86] Yet it still does not address the question of civilian casualties under LOAC.

The central question for future operations is how to conduct effective military operations while adhering to LOAC. This means minimising civilian casualties and carefully weighing collateral damage against military accomplishment. This issue strongly influenced NATO strategy in the Kosovo campaign. Indeed, some in the US Department of Defense have claimed that the fear of increasing deaths may have undermined military effectiveness and have predicted that this may produce a culture of hesitation, which may in turn impair military effectiveness.[87]

Following Operation *Allied Force*, there is still controversy surrounding the use of aerial weapons. Kosovo has demonstrated that the rule of law plays an integral part in modern air operations. NATO preserved its moral legitimacy in the international community by strict adherence to rules of engagement set by allied governments. The limitation of unnecessary civilian casualties enabled NATO to maintain this moral advantage. This demonstrates the need for precise targeting and the avoidance of civilian casualties to be integrated into the decision-making process of future air operations. A lesson to be drawn from Kosovo is that any violation of international norms can prove costly and counterproductive to military operations. This is exemplified by the close scrutiny of NATO targeting practice in Operation *Allied Force*. Public support and coalition unity will always be drivers in the Western way of war.

Constraints in future air operations are likely to be legally as well as politically driven. Operation *Allied Force* in Kosovo was marked by controversy over target selection and demonstrated the difficulty of balancing the concepts of maximising military effectiveness with avoiding collateral damage. Continued technological advances in precision guidance and target identification may alleviate some of the difficulties faced by commanders, but these advances will not be a panacea for all problems facing air commanders. Indeed, it is anticipated that these improvements will tighten legal and political restraints on military operations and raise public expectations concerning the conduct of air operations.[88]

The legal requirements surrounding the use of precision weapons remain unclear. The use of PGM in highly populated areas makes sense as a matter of policy, as these are likely to effectively destroy a target while at the same time minimising collateral

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85 Ignatieff, *Virtual War: Kosovo and Beyond*, p. 161.

86 Interview with Dr Phillip Meilinger, Deputy Director, Aerospace Center, Science Applications International Corporation, Virginia, 23 July 2002.

87 William Arkin, 'Fear of Civilian Deaths May have Undermined Effort', *Los Angeles Times*, 16 January 2002, http//:www.latimes.com/news/nationworld/world/ls-011602milmemo.story, accessed 25 January 2002.

88 Matthew C. Waxman, *International Law and the Politics of Urban Air Operations*, RAND, Washington DC, 2000, pp. iii–iv.

damage. This tactic will save lives where enemy defences are concentrated in urban areas and around strategically important targets. This form of attack also satisfies the requirement in *Additional Protocol I* to minimise collateral damage. The language of *Additional Protocol I* clearly does not mandate the exclusive use of PGM in armed conflict, but it remains arguable as to whether there is an emerging principle of international law requiring PGM to be used where the risk of substantial collateral damage exists, such as in concentrated civilian population centres.

Military experience in Operation *Allied Force* suggests a similar targeting conclusion to that reached following World War II: an effective strategic aerial bombing campaign needs to be discriminate. The coalition's focus on specific military targets coupled with the use of precision weapons in Kosovo precluded the large number of civilian casualties that characterised the strategic bombing campaign in World War II. In the age of instant media communication, this tactic played an important role in reinforcing the coalition's moral high ground.

Still, more can be done to protect civilians. Nicholas Wheeler argues that it is reasonable for military forces to be required to reduce their risks of harming civilians.[89] The principles of LOAC support this approach and provide that civilians enjoy a protected status and should not be the subject of attack. An issue that continues to arise is the use of human shields to prevent attack. While this defensive tactic clearly breaches LOAC and endangers civilians, it should not be used as an argument to justify civilian deaths resulting from military action. However, this duty must be balanced with the duty of care to military personnel such as aircrew. What risk should be incurred by aircrew in order to minimise civilian casualties? This becomes a real issue of balancing the lives of military personnel against civilians. The air commander must make this judgement based on all relevant facts.

Meyer has argued that the application of LOAC can result in an unnecessarily legalistic approach that restricts military strategy. This view claims that the law has to catch up with the practical realities of modern war fighting. Indeed, LOAC requires continuous review to ensure that it keeps pace with changes in technology and the tactics employed by states to protect their interests.

International law is not the only factor constraining air warfare. Military commanders must also be concerned with a new aspect of war: the media. An emerging norm has been that military action is now expected to be viewed and judged simultaneously via the media. Consequently, military commanders must be able to adequately justify their actions in full view of the international community. This is not a new concept in that LOAC has required military action to be accountable to the international community since World War II. But this was an important lesson learnt from the NATO experience in Kosovo and needs to be a standard operating procedure in future air operations.

Air power was successful in achieving its military mission in Kosovo. This success may invite some to consider air power as a panacea for future conflict, holding out the possibility of relatively bloodless battles. Precision guided missiles offer the

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[89] Dr Nicholas J. Wheeler, 'Dying for "Enduring Freedom": Accepting Responsibility for Civilian Casualties in the War Against Terrorism', *International Relations*, Vol. 16, Issue 2, August 2002, pp. 205–227.

possibility of victory in war with an absence of allied casualties and minimised civilian casualties. Eliot Cohen writes that air power is seductive in its military strength, 'in part because, like modern courtship, it appears to offer gratification without commitment'.[90] But air power cannot entirely eradicate the 'fog of war' identified by Clausewitz or the inevitable spread of the effects of air power to non-combatants. War remains a brutal business.

It is a mistake to reach the conclusion following the success of the air campaign in Kosovo that air power alone can now win all wars. Kosovo has demonstrated that air power, when used decisively, can assist in achieving strategic military and political objectives. However, General John Keane, US Army Vice Chief of Staff is correct in his conclusion that contemporary operations must be conducted in an integrated manner.[91] Former Air Marshal Ray Funnell supports this approach: '… military power is and should be considered as an integrated and coherent whole, a fact of which NATO planners and decision-makers seemed to be unaware'.[92] Military power needs to be utilised in its entirety in order to achieve maximum effectiveness. It is important not to reduce military operations to a contest between air, sea and land power. This is not to deny air power its victory in Kosovo, but it serves as a necessary warning for the future.

Military experience in Kosovo demonstrated that air power can now deliver the swift and decisive victory predicted by Douhet. At the same time, this experience raises important questions about the future application of precision weaponry. The next chapter will deal with some of the challenges facing air power in the future, including the role that LOAC will play in future air operations. It also raises criticisms about the role of international law in regulating conflict.

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[90] Eliot A. Cohen, 'The Mystique of US Air Power', *Foreign Affairs*, Vol. 73, No. 1, January/February 1994, pp. 109–24, http://www.bowdoin.edu/~prael/140/cohen.html, accessed 27 August 2002.

[91] General John Keane, Interview, *Janes Defence Weekly*, Vol. 32, 30 January 2002, http://jdw.janes.com, accessed 18 July 2002, p. 32.

[92] Funnell, 'The Use of Military Power in the Kosovo Conflict, Military History Overturned: Did Air Power Win the War?', p. 9.

5 — CHALLENGES FOR THE FUTURE

> Human history becomes more and more a race between education and catastrophe.
>
> H.G. Wells[1]

Technology has promised to save the international order. But while technology has the capacity to end wars swiftly and enables relatively bloodless wars, technical superiority should be accompanied by legal and moral restraint. It must be recognised that air power exists within a political framework, as Clausewitz argued. Politics, in conjunction with the application of law, drives the application of technology in war. The role of law is also important in promoting global security and peace among states. Law is not the only means by which the horrors of war can be moderated and military objectives achieved, but it is a prominent one. LOAC has the potential to mitigate suffering; however, this is a difficult mandate to achieve in a global international order dictated by the vested interests of individual states. Yet the law represents only a framework within which states can act. As conflict cannot be avoided, the law is required to guide state behaviour and provide a minimum standard upon which to safeguard humanity.

Criticisms of international law

> The road to hell is paved with good Conventions.[2]

Geoffrey Robertson wrote, 'There has been no diplomatic exercise so persistent, yet so unfulfilled, as the twentieth century search for a law to preserve the peace of the world'.[3] Air power has played, and will continue to play, a central role in this search. Yet questions are frequently raised regarding the efficacy of the law in regulating air warfare. There have been numerous criticisms of LOAC: it is unclear and ineffective, it constrains air power, and it creates an uneven playing field as not all states choose to adhere to it.

International law may be considered in some ways to be unclear and ineffective. But the law is an imperfect instrument: it is not a clearly defined, tangible object, but by its very nature changes and responds to the vested state interests. International law is an amalgam of state interests, and as state interests themselves change, international law develops in response to this. As a creation of states and humankind, international law also exhibits the flaws and difficulties inherent in both. The reality is that international law is only as good as contributing states are willing to make it. This is a challenge for individual states in the future.

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1 H.G. Wells, *The Outline of History: Being a Plain History of Life and Mankind*, Cassell, London, 1920.

2 Bert Rolling, *The Law of War and National Jurisdiction since 1945*, Hague Academy, Recueil des Couis, 1960, p. 445, cited in Geoffrey Robertson QC, *Crimes Against Humanity: The Struggle for Global Justice*, Penguin, Australia, 2000, p. 167.

3 ibid.

International law is often blamed for unnecessarily constraining air power and impeding military operations. Yet international law helps regulate warfare by providing certain limits on state action. There are limits in war and abiding by these limits achieves a number of objectives that are consistent with state interests. Compliance enables states to meet moral imperatives along with international humanitarian obligations. From a strictly pragmatic viewpoint, it is also in the interests of states and their military forces to observe international law. Practical benefits include: a more disciplined and focused military force, reduction in the risk of allied and civilian casualties, an opportunity to influence public opinion and garner international support, improved national image and less liability exposure. Failure to embrace international law has the potential to impact on the success of military performance as well as undermining public confidence in the role of the military. While national survival is not at stake, it is easier for states to adhere to these obligations as was the case for NATO forces in Kosovo. However, where a state considers that its vital interests are at stake it is a more difficult challenge to maintain compliance. The challenge for the RAAF in the future is to ensure the consistent application of LOAC.

Compliance with international law is sometimes viewed as unfair where some states do not comply with the spirit or letter of international law. This creates the perception of providing an advantage to rogue states who choose to flout international law. But there are few examples where this occurs. Any system of legal regulation relies on its participants to comply. So how is international law to be enforced during armed conflict? The *Geneva Conventions* provide that all parties to a conflict must adhere to the basic principles of LOAC. Common Article 2 of the *Geneva Conventions* provides that these conventions apply to all cases of armed conflict, even if a state of war is not recognised by one of the parties to the conflict. Further, *Additional Protocol I* reaffirms that the provisions of the *Geneva Conventions* must be fully applied in all circumstances to all persons whom it seeks to protect, without any adverse distinction based on the nature or origin of the armed conflict.[4] But LOAC cannot prevent all conflict. USAF Judge Advocate General Lieutenant Colonel Jeffrey Walker describes the high moral ground as one of the centres of gravity for the military and concludes that moral persuasion is a mechanism for enforcing the norms of international law.[5] It remains incumbent upon states themselves to achieve compliance.

Despite these criticisms, states and their military forces must strive to adhere to the highest possible standards of compliance with international law. It needs to be emphasised that failure to comply with LOAC can have significant ramifications for military forces. Violation of LOAC may result in action being taken by the international community (such as military action, economic sanctions or further conflict); it can undermine public faith in political or military forces; it may tarnish the reputation of an offending state, thereby affecting its legitimacy; or it can ultimately result in the prosecution of military personnel.[6] It certainly can affect the military end state which should be to achieve a lasting peace. The emergence of the ICC has created an independent international forum in which individuals can be held accountable for grave breaches of international law.

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4 See Preamble to *Additional Protocol I*.

5 Jeffrey K. Walker, 'Old Laws and New Wars', *The American Society of International Law*, Vol. 94, 2000, pp. 312–14.

6 Dr K.A. Kyriadkides, 'Air Power and International Air Law' in Stuart Peach, *Perspectives on Air Power: Air Power In Its Wider Context*, The Stationary Office, London, 1998, p. 80.

The role of international law in future air operations

International law provides a framework for air operations.[7]

Major General Thomas Fiscus
The Judge Advocate General, USAF

General Colin Powell recognised the need for a change in the approach to future conflict when he stated: 'new rules are needed; old assumptions need to be rooted out. The kinds of warfare we had thought about for 50 years is gone'.[8] The nature of conflict is changing, not only in its means but its ends. Whereas previously the enemy and its targets were readily identifiable, the scope of the battlespace has expanded and this dictates that the nature of future military operations will be different. Previously, conflict took the form of conflicts between defined states. While there is no guarantee that traditional wars are over, intra-states conflicts are increasingly emerging from factions within states. The effect of this is a likely rise in operations such as the humanitarian intervention that took place in Kosovo. It is critical that the law continues to adapt to this changing nature of warfare in order to maintain its relevance.[9]

What does this all mean for air operations in the future? There are numerous emerging questions facing air commanders in contemporary military operations that remain unanswered. When must precision technology be used? Should states be compelled to use precision weapons simply because they possess this capability? Is there now a two-tiered standard in international law whereby those states who possess PGM must use these, and those without need only adhere to a lower standard of precision? What level of force can be used against civilians who place themselves in harm's way in a military conflict?

International law attempts to provide guidance on these issues for future conflicts. The basic principles of LOAC providing for military necessity, humanity and proportionality are the benchmarks that must be adhered to. But the application of these principles is likely to prove difficult in future conflicts: the increasing occurrence of dual-use facilities makes it difficult to distinguish between military and civilian targets, the use of human shields continues to raise both legal and moral questions, and determining second order effects is likely to prove a difficult task. Future joint operations with the US are likely to bring these issues to the forefront, as the US diverge on the application of some LOAC principles, such as those contained in *Additional Protocol I*. US practice is of critical importance to Australia as our principal ally and future leader of coalition forces.

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7 Interview with Major General Thomas Fiscus, The Judge Advocate General, United States Air Force, Pentagon, 17 July 2002.

8 Bruce W. Nelan, 'What Price Glory?', *Time*, 27 November 1995, p. 35.

9 Carl H. Builder, 'Are We Looking In All the Wrong Places?' in Keith Thomas (ed.), *The Revolution in Military Affairs: Warfare in the Information Age*, Australian Defence Studies Centre, Canberra, 1994, p. 19.

RAAF compliance

As a professional military force, the RAAF must comply with the rule of law and behave as a good global citizen. The RAAF has expressed a clear intention to address both legal and moral issues in contemporary operations. This is evident in ADF military doctrine, which states:

> It is therefore imperative that the basis and conduct of the ADF's operations should be both moral and legal. By using the ADF in ways that are justifiable, the ADF's (and the nation's) hard-won stature and credibility in the application of military power can be assured.[10]

The RAAF needs to take its international law obligations seriously. Australia has broad obligations under LOAC, making compliance a real issue for military commanders. The RAAF is faced with the challenge of ensuring that international law considerations are fully integrated into its planning and operations. Failure to successfully implement the spirit of international law is likely to impact upon the success of future operations as well as harm its public image. International law will also be increasingly relevant to RAAF activities as military personnel are now subject to the jurisdiction of the ICC. Australia needs to act as a leader in setting sound strategies for compliance. In order to move towards compliance, the RAAF needs to ensure the implementation of effective LOAC training, as the education of military forces is the key to the future. But it is not enough for the RAAF to claim compliance by mere lip service—instead it must be able to clearly demonstrate effective implementation throughout the organisation. Commitment of senior leadership is critical for this to occur. These are the challenges for the future.

[10] Department of Defence, *Australian Defence Doctrine Publication: Foundations of Australian Military Doctrine*, April 2002, DEFWEB, http://defweb.cbr.defence.gov.au/home/documents/adfdocs/maddp.htm, accessed 16 May 2002.

6 – CONCLUSION

The restraint of war is the beginning of peace.[1]

This paper set out to answer the question: does the law really matter? In order to do this, this paper has considered the theme of the search for precision and the limitation of casualties through air power. Air power has promised much: it initially promised to ameliorate the scourge of war. Air power has indeed come a long way since its inception at the beginning of the 20th century and now seduces us with its destructive power, technological precision and ability to limit casualties. Yet the very nature of the weapon of air power determined from the outset that civilians would not be immune from attack, but instead would be drawn into the expanding battlefield.

Technological advances have proved to alleviate some of the problems facing military commanders. Technology has brought about the ability to conduct a relatively bloodless war with limited casualties for the attacker and the attacked. While the effects of air power can be devastating, recent advances in weaponry have assisted military forces in reducing their casualties. This lesson was learnt in Kosovo, where the number of civilian casualties was minimal in comparison with the number of air munitions used. However, the attainment of precision through technology has come at a price. As various commentators have pointed out, the use of technology is fraught with difficulty as legal and moral questions arise with emerging technological developments. This situation has been further complicated by the failure of the law to keep adequate pace with the application of modern technology in warfare.

The last century has also witnessed an attempt to increasingly regulate air operations, and is characterised by a growing body of treaty law and rules of customary law. The law has been utilised as an attempt to address changes in the means and methods of warfare. Military operations are constrained by the law of armed conflict, as this forms the foundation stone of the international legal system and prescribes the conduct of warring parties. To date, the law has had a profound impact upon the conduct of states: the law has shaped state action in war and minimised the extent of suffering of non-combatants.

Yet it is easy to be sceptical about the law of armed conflict. In some ways the law appears to be inadequate. The law has not been able to prevent all conflict. Even worse, the law is sometimes viewed as an impediment to military commanders fulfilling their goals. Regulation has become increasingly complex with the advent of precision. Despite these difficulties, the law is likely to play a pivotal role in current and future air operations as it underpins all military activities. Australia must comply with domestic and international law as part of its obligations as a responsible member of the international community. The challenge is to utilise air power to achieve military objectives, while at the same time operating within the confines of international norms.

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[1] Michael Walzer, *Just and Unjust Wars*, Third Edition, Basic Books, New York, 2000, p. 335.

There are some important lessons to be drawn from the role of international law in contemporary air operations such as Operation *Allied Force* in Kosovo:

a. The law of armed conflict is continuously evolving. There seems little likelihood that the international legal system will produce a concise body of law aimed specifically at regulating air operations in the near future. The law of armed conflict requires constant review and consideration as new capabilities emerge and are exploited. The RAAF needs to be actively involved in the law-making process to ensure that it influences and shapes necessary changes that may assist in the conduct of future operations.

b. Legal considerations exert significant influence upon the conduct of air operations. While some states and individuals have used military force to achieve their objective without regard for the norms of international law, a valuable lesson from Kosovo is that any violation of such norms can prove costly and counterproductive to the successful attainment of military objectives. The creation of the International Criminal Court is a powerful reminder for those who choose to disregard international norms in the future.

c. The law of armed conflict sets up a framework that regulates both the resort to war and the conduct of war; however, the law is not the only factor influencing the nature of air operations. There are other significant factors that shape air operations, such as politics and the media. The experience in Kosovo demonstrates that these forces will continue to heavily impact upon the conduct of future air warfare.

d. All states have a duty to exercise their military power with care and restraint. This duty is particularly onerous upon those powers that possess and have the ability to utilise modern technology such as air power and particularly precision weapons. There is also an emerging requirement for a tiered-level of compliance under international law, where the 'haves' possess a legal duty to use the technology that is available to them and the 'have nots' appear to have a lower duty of care. It is likely that the US will seek to preserve its ability to utilise air weaponry of its choice and resist the development of such a norm under international law. Recognition of any such norm requires formal clarification by the international community. However, this requirement should be resisted by the international community, as such a requirement would unfairly tie the hands of military forces in future operations.

e. A clearer system of legal regulation is required to optimise the potential of air weaponry and to clarify the future for air commanders. At present, air commanders are faced with a vast and complex network of international law. It would be useful to develop a specific treaty codifying legal aspects of aerial warfare to provide clearer guidance to air commanders on the scope of their duties. However, this strategy is unlikely to gain the much-needed support of the US given its current position—which perceives legal involvement in military operations to be too interfering and seeks to avoid further legal restriction—particularly if such a treaty were to be negotiated by way of a multi-lateral process. However, a treaty governing air warfare would directly benefit the RAAF in the conduct of its operations.

f. A global approach is required to maintain international peace and security. States need to work cooperatively towards achieving a clearer form of regulation for air operations. While there will always be renegade states who do not comply with the law, this does not provide a legitimate excuse for non-compliance by those states who have expressed an intention to abide by such rules. International law is an imperfect instrument, but it plays a critical role in military operations and in maintaining international peace and security.

The air campaign in Kosovo provides only a snapshot of the legal complexities surrounding contemporary air operations but it serves as a useful lesson for the future. International law is at present inadequately equipped to deal with the changes in air warfare that have resulted from recent leaps in technology. Instead, commanders are currently faced with a quagmire of international treaties, customs and general principles that affect their decision-making. To resolve this problem, international law requires a comprehensive treaty dealing specifically with air law matters. In the meantime, legal advisers will need to continue providing clear guidance to assist commanders in tiptoeing through this legal minefield.

The history of humanity is one of ongoing conflict and acts of brutality. Future conflicts must involve reconciliation between the war planners and those who seek to minimise the harmful effects of war. This will ensure that future operations are conducted in the most humane and effective manner while at the same time achieving operational success. It would be wise to heed the advice of Douhet who recognised the importance of understanding the nature of future warfare: 'Victory smiles upon those who anticipate the change in the character of war, not upon those who wait to adapt themselves after the changes occur'. [2]

[2] Giulio Douhet, *The Command of the Air* (trans. by Dino Ferrari), Arno Press, New York, 1972, p. 30.

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