WHEN bombs fall, controversy about the law of war is seldom far behind. Airpower is a weapon of such reach and potential devastation that it has long provoked sharp debate about the legality of its operations. In recent campaigns, where combatant casualties have been extremely low, accidental civilian deaths from collateral damage have made headlines. However, senior air planners show great concern for upholding the law of war, in no small part out of a desire for domestic acceptance and to maintain the international unity of effort.

Even in this age of precision warfare, many still raise questions about what constitutes a “lawful target.”

When a command’s staff lawyers advise a combatant commander, they are drawing on centuries of tradition as well as international conventions and treaties. Deciding whether a convoy of vehicles in a Predator Unmanned Aerial Vehicle’s scope is a lawful target demands working knowledge of the principles of armed conflict and a hefty dose of the commander’s judgment.

The Origins of Just War

There are no lawful targets without “lawful” wars. The first concepts of lawful conduct in war sought to make war an instrument of national policy rather than just an exercise in barbarity. Limiting the right to make war was the first step. Among the Romans, Cicero wrote of just war. St. Augustine and St. Thomas Aquinas both regarded war as one of the divine rights of kings. These two Christian philosophers formed the first core of just war doctrine among European societies. Their concepts of just war covered two areas: waging a war for justifiable reasons and conducting war according to a set of rules that recognize mercy and proportionality.

To Augustine, it made “a great difference by which causes and under which authorities men undertake the wars that must be waged.” He defined war as part of the natural life of the state, as long as the war aimed at ultimately securing peace. A monarch had a right to wage war, said Augustine, but had to show mercy toward prisoners and vanquished populations.

Aquinas in the 13th century refined Augustine’s principles into three necessary conditions: War must be prosecuted by a lawful authority, which is empowered to wage war; the war must have a just cause; and it must intend “to achieve some good or to avoid some evil.”

As Europe’s wars of religion tapered off, the sovereign state became the primary agent of right and wrong in warfare. The state shouldered the moral responsibility for wars. Cicero
founded his view of just war on the idea of a human society with norms and morals that transcended the jurisdiction of individual states. Dutch philosopher Hugo Grotius extended this notion in his 17th century concept of natural law with binding, universal norms for behavior in war that applied to all humanity. Governments and rulers might change, but the society of man still demanded restraints on conduct.

For Grotius, wrote legal scholar Mark Edward DeForrest, a war was just if it met three basic criteria:

- The danger faced by the nation is immediate.
- The force used is necessary to adequately defend the nation’s interests.
- The use of force is proportionate to the threatened danger.

The Nuremberg tribunal after World War II again acknowledged the concept of customary internal law, universally applicable and recognized regardless of the state’s legal system.

Traditionally the law of war boils down to two concepts: *jus ad bellum*, which includes a just cause, competent authority, and right intention; and *jus in bello*, or justice within the way the war is waged. In practice, the guiding principles of *jus ad bellum* and *jus in bello* intertwine. Striking the wrong target and causing unnecessary civilian deaths can weaken international or domestic support for a war. A perception of poor conduct by a belligerent erodes the just cause of the war and undermines its legitimacy because causing unnecessary deaths or damage is seen as counter to international norms and customs. In modern coalition warfare, attention to the law of war is a strategic imperative.

### The International Conventions

A second and far more detailed level of the law of war focuses on operations and tactics.

Criteria for lawful targets date to the 19th century. The first Geneva Convention “for the amelioration of the condition of the wounded in armies in the field” was promulgated in August 1864 (although not ratified by the US until 1882). Subsequent Geneva Conventions form the present-day basis for protocols against chemical weapons and for proper treatment of combatants, noncombatants, and prisoners.

The law of war has been polished over and over again in attempts to cope with mass warfare, destructive new weapons, and evolving international norms. Early efforts sought to ban new modes of warfare. The Hague Conventions of 1899 and 1907 updated a series of rules and limitations on the conduct of war and the behavior of the victors when they occupied territory. The desire of the High Contracting Parties was to “diminish the evils of war, so far as military necessities permit.” They listed rules on the treatment of pris-
To be called lawful, targets had to fall within these rules and other new concepts of just war laid down in the post–World War II updates of the Geneva Convention. One of the most important of these new concepts was proportionality. In 1977, Protocol I to the Geneva Convention stipulated that attackers had to “take all feasible precautions in the choice of means and methods of attack, with a view to avoiding, and in any event, to minimizing, incidental loss of civilian life, injury to civilians, and damage to civilian objects.”

Twentieth century warfare put airpower in the spotlight. Reactions to the RAF firebombing campaigns in Germany and to similar tactics in the Pacific war led to decades of post-war debate on what truly constituted lawful targets for air warfare. With nuclear weapons looming in the background, making the case for lawful bombing targets became part not only of just conduct of the war, but also of the whole underlying rationale for going to war in the first place.

**Applying the Law of War**

It is not attorneys and judges who apply the law of war. That job falls to political and military leaders, and the law of war is a direct concern for both. Both *jus ad bellum* and *jus in bello* make commanders and political leaders sensitive to the concepts of military necessity and proportionality. Staying within the bounds of the law of war is a key ingredient in keeping up support for waging war in the first place. Sometimes, political concerns prove to be even stronger as a force for restraint than the law of war itself.

In the spring of 1944, the Allies planned attacks on the French and Belgian railway systems to constrain German troop movements before the Normandy invasion. Statisticians estimated that such attacks could cost 80,000 civilian lives. Gen. Dwight D. Eisenhower, the Supreme Allied Commander, and his air commanders challenged those numbers and took the precaution of selecting targets away from population centers wherever possible and warning civilians to stay away. The Allies were well within the limits of military necessity. As British Prime Minister Winston Churchill said at the time, humanitarian concerns were part of the picture, but it was also an issue of “high state policy” not to embitter the French.

Generals and admirals in command of operations have a direct stake in such matters. “You’d have to be crazy not to consult the lawyers since, if you violate the Geneva Conventions, you can be indicted as a war criminal,” said one senior officer in Operation Desert Storm.

Ironically, the early Hague conventions wanted to set up comprehensive rules so that unforeseen cases arising in battle would not “be left to the arbitrary judgment of military commanders” as it was phrased in 1907. However, because criteria such as military necessity and proportionality are central to keeping the conduct of war within lawful bounds, the commander’s judgment is a vital factor.

Take, for example, the Rolling Thunder bombing campaign in Vietnam. “Rolling Thunder was one of the most constrained military campaigns in history,” noted Army lawyer W. Hays Parks in a classic study of that operation. “The restrictions imposed by this nation’s civilian leaders were not based on the law of war but on an obvious ignorance of
Limiting Collateral Damage

“Every target was examined on how to approach it with minimum loss of life,” recalled retired Gen. Charles A. Horner, the commander of coalition air forces for the operation.

Key allies such as Britain were consulted about sensitive topics such as potential fallout from targeting chemical and biological weapons storage bunkers.

Control over lawful targets for air strikes became more intense as the war continued. The bombing of the Al Firdos command post bunker on Feb. 13, 1991, was one of the war’s major targeting controversies. Unknown to the coalition, hundreds of civilians were inside the bunker on the night it was attacked. Although the Al Firdos incident was an accident, not a violation of the laws of war, bombing Baghdad was almost put off-limits. “Targeting in the Baghdad area all but stopped, and General Schwarzkopf began to anguish over every target we nominated,” Horner later said. Gen. Colin Powell, Chairman of the Joint Chiefs of Staff, put targets in downtown Baghdad off-limits. Air planners worked around it by defining Baghdad as anything within only a three-mile radius of the city center.

In this case, senior military leaders went well beyond what was expected by the law of war and kept targets off the list. Those very commanders that the 1907 Hague Convention did not trust turned out to be the most powerful agents of restraint.

The perceived force of public opinion and interallied politics drove strategy again during Operation Allied Force. NATO’s 1999 air war over Serbia. Estimates of collateral damage and casualties were made for nearly every fixed target. In the air-only campaign, each fixed target in Serbian territory had to be approved via a complex, two-week process. Politics, not the dictates of international law, weeded them out.

For example, on April 6, 1999, 222 targets were submitted to Gen. Wesley K. Clark, Supreme Allied Commander Europe, but only 173 made it through the full approval process at the North Atlantic Council.

The White House was not an impediment. Secretary of Defense William S. Cohen testified to Congress that President Clinton approved all targets presented to him by the Chairman of the Joint Chiefs of Staff, Gen. Henry H. Shelton. However, the allies disapproved quite a few targets.

The mistakes of the NATO air war—from the accidental bombing of refugee vehicles in a convoy to the accidental bombing of the Chinese embassy in Belgrade—kept the air war under the microscope of international public opinion. Despite the use of precision weapons, every stray bomb caused a surge of doubt about the conduct of the war. Indeed, the concerns about political impact greatly exceeded the restraint imposed by reasonable precaution in the laws of war.

Laws of war and self-imposed targeting restrictions mingled again during Operation Enduring Freedom in 2001–02. Those at the combined air operations center who saw the tactical picture made their frustrations known.

The target calculus in Operation Enduring Freedom was dictated, it appeared, by an intense desire on the part of senior Pentagon and White House officials to wage the war carefully. Targets were carefully scrutinized by Gen. Tommy R. Franks, US Central Command’s commander, the Pentagon, and the White House. “I

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think it’s important to say that the targeting by the United States and by coalition forces has been very careful,” Defense Secretary Donald H. Rumsfeld told CNN in October 2001. “It’s been very measured.”

Cultural and civilian sites were kept off-limits. The policy goal of minimum destruction seemed to be just as important as the broad laws of war in the target selection process. Commanders struggled to ensure that targets hit to support Northern Alliance ground forces stuck to military necessity.

The law was no bar to use of the most modern weapons. Said legal scholar Danielle L. Gilmore, who performed a study of lawful targeting in Desert Storm: “Nothing in the law of war regulates the type of weapon that must be used when specifically attacking particular targets. The applicable law only mandates a balancing of military necessity and unnecessary suffering so that the concept of proportionality is followed. The rule becomes one of reasonable precaution.”

By this criterion, the precautions taken more than upheld the laws of war. “To the extent that there have been significant military targets in areas that do have population nearby,” said Rumsfeld, “they have almost always been targeted with a weapon that has a high degree of precision so that there will not be a high amount of collateral damage.”

Accidental strikes did happen. Yet one incident—the mistaken October 2001 strike on a compound with a Red Cross warehouse—pointed up the obligations of the defenders to do their part. A Pentagon spokesman explained that the International Committee of the Red Cross warehouses were targeted by US forces because the Taliban used them for storage of military equipment. Commingling food aid and military vehicles—even if one building displays the red crescent—goes against the grain of the laws of war. In this case, the strike was inadvertent, but it pointed out that the defenders were not upholding their end of the laws of war. Military vehicles had been seen in the vicinity of these warehouses, according to the Pentagon.

US forces intentionally struck only military and terrorist targets, said the spokesman.

The US code of conduct also led to the intense scrutiny of targets such as civilian vehicles or buildings thought to harbor terrorist leaders. Military necessity depended on the commanders’ judgment, and in Operation Enduring Freedom, commanders chose to take time and exercise caution in identifying lawful targets.

**The Future of Lawful Targets**

Twenty-first century warfare will hold new challenges when it comes to space operations and information operations.

Space law started with Sputnik and is already nearly 50 years old. “There is probably no other field of human endeavor that produced so much international law in such a short period,” noted a 1999 Defense Department general counsel study. Unique to space law is the principle of noninterference, which holds that nations in peacetime must not interfere with the operation of each other’s satellites in space. However, in wartime, laws on the use of force again apply. As the general counsel report noted, “The existing treaty restrictions on military operations in space are in fact very limited.”

Information operations broaden the scope by raising new questions about what exactly constitutes use of force. In 1998, Russia attempted to get the UN to outlaw information warfare, but the UN passed only a weak resolution the following year and other member states declined to follow up. For now, information operations remain subject to a commander’s judgment on the same principles of necessity, proportionality, and discrimination that guide traditional use of force.

Terrorists and other unconventional adversaries will not observe any of these laws. But highly refined concepts of what constitutes a lawful target are deeply ingrained in the American military. High-visibility campaigns and instant media reporting simply underline the need to exercise great care, on political as well as legal grounds. The laws of war leave plenty of room for commanders to judge when a target must be struck due to military necessity. Yet recent experience emphasizes that American commanders, at least, err on the side of caution and respect.

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