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Protection of Civilian Populations

and

Air Warfare in the 1990s

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Protection of Civilian Populations and Air Warfare in the 1990s

> "What is legal is not necessarily moral and what is moral is not always legal; but, particularly with regard to the law of war, the two are inextricably intertwined."[1]

In 1921, nations at the Washington Conference on the Limitation of Armaments failed to achieve a prohibition on new methods of warfare, such as submarines, poison gas and aircraft. It was determined instead that regulation through "rules for control of new agencies of warfare"[2] might be more feasible and should be considered at a separate conference. A conference commenced at The Hague on 11 December 1922 to deal specifically with aircraft and by February 1923 had unanimously adopted a series of proposed rules to deal with issues surrounding aerial bombardment. Of significance, for example, was an article that would have limited aerial bombardment to the 'immediate neighborhood of the operation of land forces'.[3] These 'Hague Air Rules', however, failed to garner subsequent support from any nation, largely because they were deemed to impose restrictions on operations of this newest of military means[4] that, even in these early days, "…were totally at odds with state practice, technological advances and military thinking."[5]

In the absence of specific laws of war applicable to aircraft or air operations, air warfare continued to be governed by applicable existing Laws of War for land or naval warfare. This situation generated many unsettling questions, especially as the scope of air operations increased during WWII. Most notably, it became obvious that examination of the principles of distinction between military and civilian targets and the principle of proportionality regarding weapons and their effects relating to aerial bombardment, was called for.

Significantly, it was not until the late 1970s, with the adoption of Protocol I (1977) additional to the Geneva Convention of 1949 that a treaty was crafted that addressed these two principles. The Protocol contained distinct regulations that address distinction and proportionality relating to the protection of civilian populations and, by extension, these apply to the growing use and impact of air forces in war.[6] In addition, portions of the Protocol address areas, such as protection civilian populations from damage to the environment and, by so doing, codify restrictions that would apply to wider areas than might normally be considered in the areas of distinction and proportionality in relation to military targets and civilian populations. By their nature, these new regulations have the potential to impact heavily on the operations of air forces in war.

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[1] W. Hays Parks, "Air War and the Law of War" (The Air Force Law Review, _____ 1990), p. 4.
[2] CONFERENCE ON THE LIMITATIONS OF ARMAMENTS cited in Parks, p. 24
[3] Parks, p.30.
[4] Tami Davis Biddle, "Air Power", The Laws of War: Constraints on Warfare in the Western World, Michael Howard et al eds.(London, Yale University Press, 1994), p. 148.
[5] Parks, p. 31.
[6] Leslie C. Green, Essays on the Modern Law of War (Washington, Transnational Press, Inc, 1999), p. 585.

This paper will examine issues arising from those articles in Protocol I that are related to the protection of civilian populations during war. In particular, these will be examined as they relate to the employment of air forces. Canada is a party to Protocol I[7] and has participated with her allies in both the Gulf War and the air campaign in Kosovo. These campaigns bear examination as they represent the first time that Canada has operated air forces in offensive operations in circumstances for which Protocol I is relevant. By doing so, it should be possible to identify areas that may require further study or where contention or confusion exist. Based on this analysis, it is hoped that a number of areas of interest for further study within the Canadian Forces will be identified.

Protocol I and the Protection of Civilians

In his examination of the Laws of Armed Conflict and air forces, Leslie C. Green has summarized the areas in which Protocol I impact upon air warfare. These include:

> …those that deal with the protection of civilians and civilian objects; those that limit the right to bombardment; those concerned with the prevention of excessive incidental non-military losses; those that forbid long-term environmental damage or preclude attacks that will release dangerous forces.[8]

While not explicitly directed only towards air warfare, these articles are relevant to the employment of air forces through the translation of the principles of distinction and proportionality relating to protection of civilian populations into the practical issues of targeting and weapons selection for air forces.

It is at this level, where the law meets operations that the interrelation of targeting and weapons must be understood. As Francoise J. Hampson observes, this relationship might best be conceived as a spectrum which at one end would be weapons and targets that would be "…absolutely prohibited on account of the 'unnecessary suffering' and superfluous injury' to which they give rise." At the other end of the spectrum would stand a series of targets that might otherwise be lawful, but due to the potential for disproportionate collateral civilian casualties would not be considered legitimate."[9]

Within this spectrum, aside from areas in which absolute prohibitions exist, there will exist an array of possible combinations of targets and weapons that may be employed. Precision weapons for example, could be used to attack a command post, in a

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[7] Of Canada's Gulf War coalition partners, for example, Australia, Egypt and the United Kingdom had signed but not yet ratified the Protocol, France has neither signed nor become a party to the Protocol, and the United States had sighed but subsequently announced its intention not to become a party. Christopher Greenwood, "Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict" in The Gulf War 1990-91 in International and English Law (New York, Routledge, 1993), p. 64.

[8] Green. p. 585.

[9] Francoise J. Hampson, "Means and Methods of Warfare in the conflict in the Gulf" in The Gulf War 1990-91 in International and English Law, Peter Rowe, editor,(New York, Routledge, 1993) p. 90.

built up area, while less precise weapons could not, even though these would be legitimate weapons against an isolated military target. Once the test of distinction has been met, the principle of proportionality will allow a large range of choice to military commanders. The actual legitimacy of such targets will depend upon judgements of whether definite military advantage will accrue and that the potential risk of civilian casualties is acceptable in relation to the military advantage relating to its destruction.

The application of the regulations embodied in Protocol I has impacted in the two major air campaigns of the 1990s, the Gulf War, and in Kosovo. In both operations, the use of precision-guided cruise missiles and munitions was extensive and resulted in reductions, to the greatest extent possible, of ancillary civilian casualties.[10] The fact that Protocol I has raised the profile of civilian populations within the framework of the Laws of Armed Conflict and required military planners to contemplate more rigorously the consequences of the employment of military means, especially air forces, is undeniable.

However, in 'Air Law and the Laws of War', W. Hays Parks argues that the impact of Protocol I has been negative in several areas. He considers, for example, that the Protocol has shifted responsibility for the protection of civilian populations away from the authorities who have most control over them, to the attacker, who has the least. In addition, he notes that for the first time, civilian objects are raised to the same level of consideration as civilian populations. These changes, in his view, run counter to historical practice and are major failings. In his assessment, attempts to limit air power since its inception have failed to understand that it is a natural development of air forces to increase accuracy in order to enhance military effectiveness.[11]

Protocol I was framed in the 1970s and reflects to a large degree, notions held by many of the smaller nations of the international community as they reflected on air power applications in the Second World War, the Cold war and, as well, the Vietnam War. The air campaigns of the 1990s, in the Gulf and Kosovo, are the first that have benefited from the application of technological development in targeting and weapons. As well, the one-sided nature of these campaigns, in which opposition was virtually non-existent, require caution to be exercised in drawing conclusions about the efficacy such technology. It may be that the 'ideal' air campaigns of the Gulf War and Kosovo constitute an inappropriate baseline against which to judge the longer-term efficacy of treaties such as Protocol I to regulate the use of air power in war.

Protocol I, Treaty Law, and Customary International Law

Protocol I has not been universally accepted. As such it would not be binding as a treaty on nations not party to it. This was the case during the Gulf War when members of the Coalition, the United States and the United Kingdom, in particular, as well as Iraq were not party to the Protocol I. Notwithstanding, rules set out in Protocol I that are judged to reflect customary international law would be binding on all states whether they

[10] Biddle, p. 158.
[11] Hays, p. 225.

are party to the Protocol or not. The Martens Clause adopted at the 1899 Hague Conference states:

> The Contracting Parties clearly do not intend that unforeseen cases should, in the absence of written undertaking, be left to the arbitrary judgement of military commanders. Until a more complete code of the laws of war is issued, the High Contracting Parties deem it expedient to declare that in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and rule of the principles of the law of nations, as they result from the usage established between civilized nations, from the laws of humanity, and the dictates of the public conscience.[12]

As a result, it is of significant relevance to Canada as a party to Protocol I to understand and agree with her allies, as to what provisions are accepted as reflecting customary international law. This is even more relevant to the Canadian Forces as its experience in both the Gulf War and Kosovo campaign has been to participate in air campaigns within a coalition or with other NATO nations that are not party to Protocol I. As a senior State Department official indicated in 1987 when the United States decided not to become a party to Protocol I:

> …Protocol I cannot now be looked to by actual or potential adversaries of the United States or its allies as a definitive indication of the rules that the United states forces will observe in the event of armed conflict and will expect its adversaries to observe. To fill the gap, the United States and its friends would have to give some alternative clear indication of which rules they consider binding or otherwise propose to observe.[13]

At the time, it was recognized that work was required within the United States, as well as in consultation with allies, to determine which of the provisions of Protocol I were applicable as reflecting established customary international law. By 1990, when Operation Desert Shield began, this situation had not progressed substantially.

It is unclear whether in the Gulf War, during the intervening years, or as a result of the Kosovo Air Campaign, significant issues arose as a result of Canada being a party to Protocol I while many of her allies were not. This situation might have generated problems in joint targeting procedures if an issue arose over an objective that involved a treaty provision alone. A party to Protocol I, for example, has undertaken a treaty obligation not to attack civilian objects, while a non-party state could presumably carry out such an attack based on an assessment of military requirements and considerations to minimize civilian casualties. Even when an issue might be regarded as relating to more broadly agreed customary international law, nations must be certain that their perspectives are the same.

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[12] B-GG-oo5-027/AF-020, Law of Armed Conflict at the Operational and Tactical Level, p. 1-2.
[13] Greenwood, p. 64

At the operational level, difficulties may occur even when there may be agreement on a specific rule but military staffs have different interpretations of it. This situation did occur during the Gulf War when "the RAF refused at least twice to bomb targets given it by American Commanders during the Gulf War because the risk of collateral damage…was too high."[14] The practical aspects of a common coalition targeting process will certainly be made more complex as national command elements must be satisfied that their forces observe potentially differing obligations or interpretations of regulations. Since the Gulf War, work has been carried out under the auspices of AUSCANZUKUS[15] to address some of the practical aspects such as the harmonization of military manuals. Reportedly, it has not yet been possible to find common ground, even at the definitional level. This has been the case, particularly in relation to such areas as the scope and meaning of concepts such as 'proportionality'.[16]

In a wider sense, there is likely to be even more difficulty in the development of a body of customary law related to the modern application of Protocol I provisions. As such, customary law flows in part from practice and decisions of relevant tribunals. It has been observed that:

> No such decisions exist regarding the 1977 Protocols. Indeed, international decisions are rare in respect of any of the humanitarian law treaties… Nor is state practice easy either to discover (given the secrecy which generally surrounds the wartime activities of states) or to evaluate (since the nature of armed conflict means that the gulf between principle and practice is likely to be particularly marked).[17]

Distinction and Proportionality in the Gulf War and Kosovo

The principle of distinction requires that commanders distinguish between legitimate targets[18] and civilian objects and the civilian population. The basic principle is reflected in Protocol I and had formed part of customary international law well before the 1990s. As well, there appears to have been acceptances by member of the Gulf War coalition of the definition of 'military objective'.[19] As a result, during the Gulf War, the Protocol I definition of a legitimate military objective was accepted by nations as "declarative of the customary rule" of

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[14] Ibid, p. 108

[15] AUSCANZUKUS. The acronym represents international standardisation working groups that are composed of representative from **Aus**tralia, **Ca**nada, **N**ew **Z**ealand, the **U**nited **K**ingdom and the **U**nited **S**tates.

[16] Hampson, p. 109

[17] Greenwood, P. 69

[18] Legitimate targets include combatants, unlawful combatants and military objectives. B-GG-005-027/AF-020, p. 4-1

[19] "Military objectives are 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, offer a definite military advantage.", Reisman, p. 89

international law and therefore became the legal yardstick used when developing the coalition targeting plans.[20]

The following target sets were established for the Gulf War air campaign.

1. leadership facilities;
2. electrical production facilities powering military systems;
3. command, control and communication nodes;
4. strategic and tactical integrated air defence systems;
5. air forces and airfields;
6. known nuclear, chemical and biological research and production facilities;
7. Scud production and storage facilities;
8. naval forces and port facilities;
9. oil refining and distribution facilities, as opposed to long-term production capability;
10. railroads and bridges connecting Iraqi military forces with logistical support centers;
11. Iraqi military units to include the Republican Guard Forces in the Kuwait Theatre of Operations; and
12. Military storage sites.

It is not the goal here to argue that any of these target sets are not legitimate military objectives. Most are self-evident. Some, however, may or may not be depending on circumstances. In Iraq, for example, the integrated nature of the power elite and the military C2 structure resulted in Ba'ath Party facilities being targeted as a component of 'leadership command facilities'. Under other circumstances, it could be argued that government ministries would not necessarily be legitimate targets. Likewise, when considering electrical grids or bridges, their legitimacy as targets will depend on the degree to which their destruction would 'offer a definite military advantage', and not the fact that they fit a class of target.

In addition, military objectives must meet another test aside from providing a 'definite military advantage'. They must offer a definite military advantage 'in the circumstances ruling at the time':

> This element of the definition precludes military commanders from relying exclusively on abstract categorizations in the determination of whether specific objects constitute military objectives ('a bridge is a military objective'; 'an object located in the zone of combat is a military objective', etc.). Instead, they will have to determine whether, say, the destruction of a particular bridge, which would have been militarily important yesterday, does in the circumstances ruling today, still offer a

[20] Greenwood. p. 72

> 'definite military advantage': if not, the bridge no longer constitutes a military objective and, thus, may not be destroyed.[21]

During both the Gulf War and Kosovo, Canadian Forces aircraft participated in an air campaign that targeted and destroyed significant portions of the adversary's infrastructure. The extent, to which these targets were reviewed as the campaign progressed to ensure that they remained military objectives and the degree to which participants were in position to have done so, if they wished, would be a valuable test of the application of Protocol I to real-world activities.[22] The requirement for this scrutiny is increased as this type of overwhelming air campaign progresses because:

> "As the more important targets are taken out, the relatively less significant targets would assume a greater priority. This would be for two separate reasons. First, the military importance of the target to the adversary might have increased. If the bridge became the only way of crossing a river because all the other bridges had been destroyed, then in military terms its importance would have increased. Second if the attacking forces were to be kept busy, for whatever reason, they would have to work down the list of targets, whatever the actual military usefulness of a particular target. Whilst it might appear that the first is a legitimate reason for reclassifying a target as the military advantage anticipated from its destruction increased, the second would appear illegitimate. It is likely to be difficult to distinguish the two in practice"[23]

As participants in a coalition air campaign, would Canadian Forces commanders possess the mechanisms to make such distinction? This may be especially meaningful in the context of a dominant air force doctrine operating in a coalition, particularly one that focuses on the destruction of strategic infrastructure as its central theme.

The principle of proportionality requires that commanders ensure that collateral civilian damage arising from military operations as a whole is not excessive in relation to the direct and concrete military advantage anticipated from such operations.[24] This responsibility impacts both during the planning process and during execution; It requires commanders to estimate foreseeable incidental civilian casualties. This implies therefore, that commanders, and potentially national command elements, have mechanisms within coalition targeting procedures that define the target and proposed weapon, can estimate casualties, and finally, determine the anticipated military advantage. These requirements imply significant intelligence information not only about the targets, but the surrounding area and other activities there.

In a statement of understanding on this issue made when signing Protocol I, a number of states allowed that:

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[21] Professor Kalshoven cited in Greenwood, p. 74.
[22] Greenwood, p.75
[23] Hampson, p. 94
[24] B-GG-005-027/AF-020, p. 2-2

> Military commanders and others responsible for planning, deciding upon and executing attacks 'necessarily have to reach decisions on the basis of their assessment of the information from all sources is available to them at the relevant time'.[25]

This appears to provide some relief from what constitutes a significant responsibility placed on planners and executors of modern air campaigns. There would seem, even so, to be potential difficulties. Is a greater burden placed on states that have access to more sophisticated intelligence gathering systems? What is the obligation in the face of conflicting intelligence? A question for the Canadian Forces is to what extent our doctrine related to Joint and Combined targeting provides mechanisms for national contingent commanders to exercise such responsibilities within a coalition setting, given our reliance on non-national intelligence ?

A further issue that bears upon proportionality in the area of weapons selection relates to how different national attitudes to own force casualties may play out in differing interpretations of what constitutes the 'definite military advantage' sought from an attack.

> Both in assessing the military advantage anticipated and in balancing that against the likely lose of civilian life, commanders are likely to be heavily influenced by their attitudes to military casualties. If military casualties are to be avoided as a matter of the highest prrority, this is likely to mean aerial bombardment in preference to ground war, and the use of aircraft flying beyond the range of surface-to-air missiles (SAMS). No forces are indifferent to military casualties. Indeed all forces will go a long way to keeping them to a minimum. The extent to which this happens, however, does appear to vary.[26]

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This might play itself out in a situation in which members of a coalition hold different views on the level of collateral civilian casua

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Needless to say, the degree to which 'humanitarian' considerations relating to the safety of civilian populations and objects weigh compared to considerations of the safety of a nation's own military personnel will no doubt take place in a subjective context. National commanders in coalitions must understand the impact of such attitudes and any decisions relating to the concept of 'proportionality' that are driven by them, as they will certainly have "…an impact on the lives of both enemy civilian and combatants."[27] As noted above, the relatively casualty-free air campaigns of this decade may not be the most appropriate baseline for judging the precise fashion in which the practical application of air power match the regulations embodied in Protocol I.

A final area of discussion that bear upon both the principles of distinction and proportionality is in the protection afforded to civilian populations with respect to potential damage to the environment as a result of military operations. Three articles in Protocol I provide regulations relating to the environment. Article 54 contains rules regarding 'protection of objects indispensable to the survival of the civilian population', article 55 speaks to 'protection of the natural environment', and article 56 provides rules relating to 'protection of works and installations containing dangerous forces'.[28]

There are many other international treaties in which issues of environmental protection are found, and coupled with international customary law, it is possible, to conclude that,

> …actions resulting in massive environmental destruction, especially where they do not serve a clear and important military purpose would be questionable on many grounds, even in the absence of specific rules of war addressing environmental matters in detail.[29]

This stated, it is not intended to conduct a detailed analysis of the impact of the Gulf War or Kosovo air campaigns on the environment. These details are available in Adam Robert's article or any of the preliminary reports from Kosovo[30] that provide good indications of the significant environmental impact that can result from the type of modern 'strategic' air campaigns that were waged there.

The issue for consideration here is that, despite modern air campaigns being the most discriminate in history, with technology providing accuracy that reduces collateral civilian damage, the nature of strategic air campaigns may result in increased human suffering over the longer term. In much the same way as economic embargo often targets those least responsible or able to cope, the destruction of strategic infrastructure through a precise and decisive air campaign may be 'good war' but result in an 'insufferable peace':

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[27] Ibid, 109.
[28] Reisman, p.87 and pp.90-91.
[29] Adam Roberts, "The Environment in the 1990-91 Gulf War", in The Gulf War 1990-91 in International and English Law, Peter Rowe, editor,(New York, Routledge, 1993,) p. 116.
[30] Young, Ian, "UN warns on catastrophe from war in Kosovo", Chemical Week, (28 April 1999) as an example.

> Any wars in future decades and centuries are likely to be in areas where there are high chances of the environment being affected. This is mainly because economic development results in the availability of substances (oil, chemical, and nuclear materials being the most obvious example) which can very easily be let loose on the all-to-vulnerable land, air and water on which we depend, and which are liable to be discharged by accident or by design; because some parts of the natural environment are becoming more constricted and fragile due to peacetime trends; because much of the environment in which we live (especially water supplies) depend on the smooth running of an infrastructure easily disrupted by war; and also because some weapons (nuclear weapons being only the most extreme case) may themselves have terrible effects on the environment.

The successful air campaigns in the 1990s have certainly raised environmental concerns to new prominence. The Canadian Forces along with other likely partners must examine the means by which the principles of distinction and proportionality will be implemented in future air warfare so as to ensure military practice accords with Protocol I obligations.

Conclusion

The 1977 Protocol I additional to the 1949 Geneva Convention represents the current state of efforts to regulate warfare and provide protection to civilian populations. As such, the Protocol has significant impact on air warfare. This paper highlighted a number of issues that are relevant to the Canadian Forces, particularly in regard to its participation with allies in the two major air campaigns of the 1990s, in the Gulf War, and Kosovo. As noted, Protocol I is legally binding on some nations, including Canada, as a treaty and on all states in as much as it is determined to be reflective of principles and practices recognized in customary international law. This does not mean, however, that the rules of war exist as an inviolate set of regulations that will apply in the same fashion in every instance. Even the fundamental principles of distinction and proportionality can and will be subject to slightly different interpretations when translated from the general to specific military practice and implementation in combat.

This situation must be recognized and accommodated as the Canadian Forces continues to cooperate with this country's allies in the future. 'Coalitions of the willing' will likely continue to be a fixture on the international scene and the experiences during the Gulf War and in the Kosovo air campaign have pointed out that even nations that have cooperated closely in the past do not always see issues from the same viewpoint. This is especially true when the lives of a nation's sons and daughters are at stake.

The 1990s have been the first true test of the impact of Protocol I on warfare, and most particularly on air warfare. It may as yet be too early to determine if it will, in the end deliver on the promise of greater protection for civilian populations from the ravages of conflict. The Lieber Code, one of the first attempts to codify the laws of war, greatly influence the General Orders No. 100 issued during the American Civil War. These

orders recognized the essential truth that citizens of nations at war cannot be exempt from the rigors and hardships of that war.[31]

This self-evident truth remains, notwithstanding the efforts embodied in Protocol I to mitigate the ravages of war upon civilian populations. The impact of war on civilian populations cannot be regulated away. Even so, the future of air warfare is changing, particularly if:

> …the most useful targets are also the most discriminate targets, and if technology makes discrimination possible, then the future may also see behavior different than that which has characterized aerial warfare throughout the early part of this century."[32]

The experiences of this decade have not, however, provided evidence that more discrimination equates to less suffering. As Jeffery Record has noted, it is possible to wreck economies via a modern air campaign. In the 1990s, this has not translated into regimes being replaced and may instead impose levels of suffering on civilian populations unanticipated by the drafters of Protocol I. Thus efficient modern air campaigns, while legal in relation to the laws of armed conflict, will continue to raise disturbing moral issues.[33]

Will the legacy of Protocol I be to reduce immediate collateral civilian casualties through a higher standard of distinction and proportionality in targeting and attack, yet generate much longer-lasting human suffering through destruction of infrastructure or longer-term environmental effects? Canada and the international community, as well as their military forces, must conduct rigorous analysis of the experiences of the 1990s to ensure that appropriate lessons are drawn from them and then applied to moving the Laws of Armed Conflict forward.

[31] Parks, p.8.
[32] Biddle, p. 159.
[33] Jeffery Record, t1 10.0P AMH0 10.02 1015881 Tc 0..760383ID 1.02 113.95854 856.762258 Tj10.02 0NID 1.02 113.95854 8568

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