

## *Legitimate Targets?*

Based on an innovative theory of international law, Janina Dill's book investigates the effectiveness of international humanitarian law (IHL) in regulating the conduct of warfare. Through a comprehensive examination of the IHL defining a legitimate target of attack, Dill reveals a controversy among legal and military professionals about the 'logic' according to which belligerents ought to balance humanitarian and military imperatives: the logics of sufficiency or efficiency. Law prescribes the former, but increased recourse to international law in US air warfare has led to targeting in accordance with the logic of efficiency. The logic of sufficiency is morally less problematic, yet neither logic satisfies contemporary expectations of effective IHL or legitimate warfare. Those expectations demand that hostilities follow a logic of liability, which proves impracticable. This book proposes changes to international law, but concludes that according to widely shared normative beliefs, on the twenty-first-century battlefield there are no truly legitimate targets.

JANINA DILL is a Lecturer in the Department of Politics and International Relations at the University of Oxford.

*Cambridge Studies in International  
Relations: 133*

**Legitimate Targets?**


EDITORS

Christian Reus-Smit, Nicholas J. Wheeler

EDITORIAL BOARD

James Der Derian, Theo Farrell, Martha Finnemore, Lene Hansen,  
Robert Keohane, Rachel Kerr, Jan Aart Scholte, Peter Vale,  
Kees van der Pijl, Jutta Weldes, Jennifer Welsh, William Wohlforth

*Cambridge Studies in International Relations* is a joint initiative of Cambridge University Press and the British International Studies Association (BISA). The series aims to publish the best new scholarship in international studies, irrespective of subject matter, methodological approach or theoretical perspective. The series seeks to bring the latest theoretical work in International Relations to bear on the most important problems and issues in global politics.



*Cambridge Studies in International Relations*

- 132 Nuno P. Monteiro  
**Theory of unipolar politics**
- 131 Jonathan D. Caverley  
**Democratic militarism**  
Voting, wealth, and war
- 130 David Jason Karp  
**Responsibility for human rights**  
Transnational corporations in imperfect states
- 129 Friedrich Kratochwil  
**The status of law in world society**  
Meditations on the role and rule of law
- 128 Michael G. Findley, Daniel L. Nielson and J. C. Sharman  
**Global shell games**  
Experiments in transnational relations, crime, and terrorism
- 127 Jordan Branch  
**The cartographic state**  
Maps, territory, and the origins of sovereignty
- 126 Thomas Risse, Stephen C. Ropp and Kathryn Sikkink (eds.)  
**The persistent power of human rights**  
From commitment to compliance
- 125 K. M. Fierke  
**Political self-sacrifice**  
Agency, body and emotion in international relations
- 124 Stefano Guzzini  
**The return of geopolitics in Europe?**  
Social mechanisms and foreign policy identity crises
- 123 Bear F. Braumoeller  
**The great powers and the international system**  
Systemic theory in empirical perspective
- 122 Jonathan Joseph  
**The social in the global**  
Social theory, governmentality and global politics

*Series list continues after index*

# Legitimate Targets?

Social Construction, International Law  
and US Bombing

JANINA DILL



CAMBRIDGE  
UNIVERSITY PRESS



CAMBRIDGE  
 UNIVERSITY PRESS

Shaftesbury Road, Cambridge CB2 8EA, United Kingdom  
 One Liberty Plaza, 20th Floor, New York, NY 10006, USA  
 477 Williamstown Road, Port Melbourne, VIC 3207, Australia  
 314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India  
 103 Penang Road, #05–06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of Cambridge University Press & Assessment, a department of the University of Cambridge.

We share the University's mission to contribute to society through the pursuit of education, learning and research at the highest international levels of excellence.

[www.cambridge.org](http://www.cambridge.org)

Information on this title: [www.cambridge.org/9781107694866](http://www.cambridge.org/9781107694866)

© Janina Dill 2015

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press & Assessment.

First published 2015

*A catalogue record for this publication is available from the British Library*

*Library of Congress Cataloging-in-Publication data*

Dill, Janina, 1983– author.

Legitimate targets? : social construction, international law and US bombing / Janina Dill.

pages cm – (Cambridge studies in international relations ; 133)  
 ISBN 978-1-107-05675-6 (hardback)

1. Air warfare (International law) 2. Humanitarian law.
3. War (International law) 4. Air warfare – United States – History.
5. United States. Air Force – History. I. Title.

KZ6695.D55 2014

341.6'3–dc23

2014012739

ISBN 978-1-107-05675-6 Hardback

ISBN 978-1-107-69486-6 Paperback

Cambridge University Press & Assessment has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

*For my parents Ulrike and Harald G. Dill*

## Contents

<i>Acknowledgements</i>	<i>page xi</i>
<i>Table of treaties under international law</i>	xiii
<i>Table of cases</i>	xv
<i>List of acronyms</i>	xviii
Introduction	1
<b>Part I A constructivist theory of international law</b>	<b>17</b>
1 The challenge	19
1.1 The causal dependence of international law	20
1.2 The epistemic dependence of international law	28
1.3 The ontological dependence of international law	31
2 The theory	44
2.1 How international law works: intellectual and motivational effects	45
2.2 What international law is: dependent, but separate	53
<b>Part II The definition of a legitimate target of attack in international law</b>	<b>65</b>
3 Positive law	67
3.1 The definition of a legitimate target of attack	68
3.2 A purposive and textual interpretation	82
3.3 A historical interpretation	96
3.4 The logic warfare ought to follow: sufficiency	105
4 Customary law	112
4.1 The definition of a legitimate target of attack	113
4.2 The United States and the First Additional Protocol	121

x	<i>Contents</i>
4.3	The logic warfare ought to follow: sufficiency versus efficiency 129
	<b>Part III An empirical study of international law in war 143</b>
5	The rise of international law in US air warfare 145
5.1	The institutionalisation of compliance 146
5.2	The growing sense of legal obligation 152
6	The changing logic of US air warfare 163
6.1	The definition of a legitimate target of attack in US air warfare 163
6.2	The logic US air warfare follows: from sufficiency to efficiency 181
7	The behavioural relevance of international law in US air warfare 195
7.1	How international law works: the intellectual effect 196
7.2	How international law works: the motivational effect 208
7.3	Other factors that influence which logic warfare follows 220
7.4	What international law is: constitutive of legitimacy in war 239
	<b>Part IV An evaluation of international law in war 247</b>
8	The lack of normative success of international law in US air warfare 249
8.1	The logic warfare ought to follow: sufficiency versus efficiency 249
8.2	The logic warfare ought to follow: sufficiency versus liability 266
9	The impossibility of normative success for international law in war 278
9.1	The limits of international law in war 278
9.2	The potential of international law in war 290
	Conclusion 299
	<i>Bibliography</i> 311
	<i>Appendix</i> 349
	<i>Index</i> 353



## *Acknowledgements*

This book originated with a doctoral thesis completed at the Department of Politics and International Relations at the University of Oxford. I am deeply grateful to my adviser, Henry Shue. With his wisdom, enthusiasm and immeasurable perseverance he has encouraged and supported me above and beyond his obligations. He continues to provide invaluable guidance and is a source of inspiration in my academic work as well as in my life generally.

For reading parts of the book and providing helpful comments, I would like to thank Charles Beitz, Martha Finnemore, Andrew Hurrell, Peter J. Katzenstein, Robert O. Keohane, David Luban, Jeff McMahan, Chris Reus-Smit, Adam Roberts, Kathryn Sikkink, Benjamin Valentino, Jeremy Waldron, Jennifer Welsh, two anonymous reviewers at Cambridge University Press and four anonymous reviewers at Oxford University Press. For sparking my interest in ethics and for reading several chapters, I am indebted to the members of the Oxford War Workshop: Zahler Bryan, C. A. J. Coady, Ned Dobos, Cécile Fabre, Michael Gibb, Chrisantha Hermanson, Per Ilsaas, Seth Lazar, Alexander Leveringhaus, Marco Meyer, Jonathan Parry, David Rodin, Cheney Ryan, Klem Ryan, Serena Sharma, Henry Shue and Saul Smilanski. I have also benefited greatly from discussions with Dapo Akande, Jutta Brunnée, Stephanie Carvin, Mark Clodfelter, Neta Crawford, Tami Davis Biddle, Matthew Evangelista, Charles Garraway, Isabel V. Hull, David E. Johnson, Walter Ladwig III, Nicolas Lamp, Nicholas Lees, Cetta Mainwaring, Robin Markwica, Nicholas Onuf, Hays Parks, Sarah Percy, Mary Perry, Nina Silove, Hugo Slim, Victor Tadros and Stephen Toope. All remaining errors or inconsistencies in the book are, of course, solely my own responsibility.

This book would not have been possible without the insight and candour of the forty members of the United States armed forces who agreed to be interviewed. For their patience and for their kind willingness to share their expertise on the record I am particularly

grateful to David A. Deptula, Charles Dunlap Jr, Leon A. Edney, Marc Garlasco and John A. Warden III. I am also indebted to Jeff Davies and his family, who welcomed me into their home, giving me the opportunity to learn first-hand not only about the Navy's approach to air power, but also about life on a Navy post. Although I did not use the material gathered in this book, I learned a great deal from fifteen interviews with members of the Royal Air Force.

For lively discussions, I would like to thank Michael O'Hanlon and the members of the fall 2009 class on defence analysis at the Woodrow Wilson School of Public and International Affairs. Furthermore, I have benefited enormously from the Summer Workshop for Analysis of Military Operations and Strategy (SWAMOS) in 2008 and have been inspired by its participants as well as its conveners, Richard K. Betts and Stephen Biddle. For opportunities to present parts of this work and receive valuable feedback, I would like to thank among others the members of the Oxford Changing Character of War (CCW) Programme, the Oxford Institute for Ethics, Law and Armed Conflict (ELAC), Oxford University's Centre for Socio-Legal Studies, the Law Faculty at Warwick University, the Mario Einaudi Center for International Studies at Cornell University and the Institut für Theologie und Frieden Cologne. The following organisations kindly provided the resources necessary to collect data and to write this book: the Studienstiftung des Deutschen Volkes, the Deutscher Akademischer Austauschdienst, Merton College (Domus Scholarship), the Cyril Foster and Norman Chester Funds, Oxford University's Faculty of Law, Wolfson College Oxford and the Woodrow Wilson School of Public and International Affairs at Princeton University.

For their unfailing support I am grateful, more than words can express, to my family in Hanover and Selbitz and to my additional family in Munich and Oxford.

## *Table of treaties under international law*

- Instructions for the Government of Armies of the United States in the Field, General Order no. 100 of 1863 (Lieber Code)
- Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grams Weight of 29 November 1868 (St Petersburg Declaration)
- Declaration on the Launching of Projectiles and Explosives from Balloons of 29 July 1899
- The Convention on the Laws and Customs of War on Land of 29 July 1899 (The Hague II), revised in The Hague IV of 18 October 1907
- The Convention of the Bombardment by Naval Forces in Time of War of 18 October 1907 (The Hague IX)
- Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, drafted by a Commission of Jurists at The Hague, December 1922–February 1923
- Covenant of the League of Nations (28 June 1919), Including Amendment to December 1924
- General Treaty for Renunciation of War as an Instrument of National Policy 1928, entered into force 24 July 1929 (Kellogg–Briand Pact or Pact of Paris)
- Statute of the International Court of Justice (1945)
- First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick Armed Forces in the Field, first adopted 1864, last revision 1949
- Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, first adopted 1906, last revision 1949
- Third Geneva Convention Relative to the Treatment of Prisoners of War, first adopted 1929, last revision 1949
- Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, first adopted 1949

- Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (European Convention on Human Rights)
- Vienna Convention on the Law of Treaties (1969)
- American Convention on Human Rights, 'Pact of San Jose', Costa Rica, 22 November 1969
- Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts, adopted 8 June 1977 (First Additional Protocol)
- Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Algiers, 12 December 2000
- Rome Statute of the International Criminal Court of 1 July 2002

## *Table of cases*

### **European Court of Human Rights (EurCtHR)**

- Andreou *v.* Turkey, EurCtHR, Judgment (Merits and Satisfaction) of 27 October 2009, no. 45653/99
- Bankovic and Others *v.* Belgium and 16 Other Contracting States, EurCtHR, Court (Grand Chamber) Decision on Admissibility of 12 December 2001, EurCtHR Reports 2001–XII, no. 52207/99
- Behrami and Behrami *v.* France and Saramati *v.* France, Germany and Norway, EurCtHR, Court (Grand Chamber) Decision on Admissibility of 2 May 2007, no. 71412/01 and no. 78166/01
- Emin and Others *v.* Cyprus, EurCtHR, Court (Fourth Section) Decision on Admissibility of 3 April 2012, no. 59623/08
- Ergi *v.* Turkey, EurCtHR, Judgment (Merits and Just Satisfaction) of 28 July 1998, EurCtHR Reports 1998–IV, no. 23818/94
- Georgia *v.* Russian Federation, EurCtHR, Application to Institute Proceedings of 9 February 2009, no. 38263/08
- Georgia *v.* Russian Federation, EurCtHR, Court (Fifth Section) Decision on Admissibility of 13 December 2011, no. 38263/08
- Güleç *v.* Turkey, EurCtHR, Judgment (Merits and Just Satisfaction) of 27 July 1998, EurCtHR Reports 1998–IV, no. 21593/93
- Güzelyurtlu and Others *v.* Cyprus and Turkey, EurCtHR, Applications to Institute Proceedings of 13 May 2009, no. 36925/07
- Isayeva and Others *v.* Russia, EurCtHR, Judgment (Merits and Just Satisfaction) of 24 February 2005, no. 57950/00
- Loizidou *v.* Turkey, EurCtHR, Preliminary Objections of 23 March 1995, EurCtHR Reports 1995, no. 310
- Loizidou *v.* Turkey, EurCtHR, Judgment (Merits) of 18 December 1996, EurCtHR Reports 1996–VI, no. 15318/89
- Markovic and Others *v.* Italy, EurCtHR, Judgment (Merits) of 14 December 2006, no. 1398/03

- Özkan *v.* Turkey, EurCtHR, Judgment (Merits) of 6 April 2004, no. 21689/93  
 Varnava and Others *v.* Turkey, EurCtHR, Judgment (Merits and Just Satisfaction) of 18 September 2009, no. 16064/90

#### **Inter-American Court of Human Right (IACtHR)**

- Bámaca Velásquez *v.* Guatemala, IACtHR, Judgment on the Merits of 25 November 2000, Series C no. 70  
 Las Palmeras *v.* Colombia, IACtHR, Preliminary Objections of 4 February 2000, Series C no. 67  
 Serrano de la Cruz Sisters *v.* El Salvador, IACtHR, Preliminary Objections of 23 November 2004, Series C no. 120

#### **International Court of Justice (ICJ)**

- Islamic Republic of Iran *v.* United States of America, Case concerning Oil Platforms, ICJ, Judgment on the Merits of 6 November 2003, ICJ Reports 2003, p.161  
 Legality of the Threat or Use of Nuclear Weapons, ICJ, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 94  
 North Sea Continental Shelf Cases, ICJ, Judgment on the Merits of 20 February 1969, ICJ Reports 1969, p. 3

#### **International Criminal Tribunal for the Former Yugoslavia (ICTY)**

- Prosecutor *v.* Blaškić, ICTY, Judgment of the Appeals Chamber of 24 July 2004, IT-95-14-A  
 Prosecutor *v.* Boškoski and Tarčulovski, ICTY, Judgment of the Trial Chamber of 10 July 2008, IT-04-82-T  
 Prosecutor *v.* Boškoski and Tarčulovski, ICTY, Judgment of the Appeals Chamber of 19 May 2010, IT-04-82-A  
 Prosecutor *v.* Galić, ICTY, Prosecution Pre-trial Brief of 30 November 2001, IT-98-29-PT  
 Prosecutor *v.* Galić, ICTY, Judgment of the Trial Chamber of 5 December 2003, IT-98-29-T  
 Prosecutor *v.* Galić, ICTY, Judgment of the Appeals Chamber of 30 November 2006, IT-98-29-A  
 Prosecutor *v.* Gotovina *et al.*, ICTY, Judgment of the Trial Chamber of 15 April 2011, IT-06-90-T

*Table of cases*

xvii

- Prosecutor *v.* Gotovina and Markač, ICTY, Judgment of the Appeals Chamber of 16 November 2012, IT-06–90-A  
Prosecutor *v.* Kordić and Čerkez, ICTY, Judgment of the Appeals Chamber of 17 December 2004, IT-95–14/2-A  
Prosecutor *v.* Kunarac *et al.*, ICTY, Judgment of the Appeals Chamber of 12 June 2002, IT-96–23 and IT-96–23/1-A  
Prosecutor *v.* Martić, ICTY, Judgment of the Trial Chamber of 12 June 2007, IT-95–11-T  
Prosecutor *v.* Milošević, ICTY, Judgment of the Appeals Chamber of 12 November 2009, IT-98–29/1-A  
Prosecutor *v.* Milutinović *et al.*, ICTY, Judgment of the Trial Chamber of 26 February 2009, IT-05–87-T  
Prosecutor *v.* Popović *et al.*, ICTY, Judgment of the Trial Chamber of 10 June 2010, IT-05–88-T

**Other courts**

- Beit Sourik Village Council *v.* The Government of Israel, Israel High Court of Justice, Judgment of 30 May 2004, HCJ 2056/04  
France *v.* Turkey, Case of the SS ‘Lotus’, Permanent Court of International Justice, Judgment of 7 September 1927, File E.c. Docket XI Judgment no. 11.  
USA *v.* List *et al.*, Hostage Case, American Military Tribunal Nuremberg, 1948, 11 NMT 1230 at 1253ff. 1256

## Acronyms

API	First Additional Protocol
C3	command, control and communication
CAS	close air support
DMPI	desired mean point of impact
EBOs	effects-based operations
GC I	First Geneva Convention
GC II	Second Geneva Convention
GC III	Third Geneva Convention
GC IV	Fourth Geneva Convention
ICJ	International Court of Justice
ICL	international criminal law
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	international humanitarian law
IL	international law
IR	international relations (the discipline)
JAG	Judge Advocate General
NATO	North Atlantic Treaty Organization
ODS	Operation Desert Storm
OIF	Operation Iraqi Freedom
OLB I	Operation Linebacker I
OLB II	Operation Linebacker II
ORDC	<i>Official Records of the Diplomatic Conference</i>
ORT	Operation Rolling Thunder
UAV	unmanned aerial vehicle
UN	United Nations
UNC	United Nations Charter