

## TARGETING AFTER KOSOVO

---

### Has the Law Changed for Strike Planners?

*Colonel Frederic L. Borch, U.S. Army*

Recent reports published by Amnesty International<sup>1</sup> and Human Rights Watch<sup>2</sup> charge that the North Atlantic Treaty Organization 1999 air operations against Serbia—Operation ALLIED FORCE<sup>3</sup>—selected and attacked targets in violation of the law of armed conflict.<sup>4</sup> While the two high-profile organizations clearly supported NATO's goal of stopping the bloodshed in Kosovo, both reports were sharply critical of some NATO combat operations.

*Colonel Borch is an Army judge advocate assigned to the International Law Department of the Center for Naval Warfare Studies at the Naval War College. He holds a master of laws degree (magna cum laude) in international and comparative law from the University of Brussels and a juris doctor in law from the University of North Carolina, as well as a bachelor's degree in history from Davidson College. He is also a graduate of the Army Command and General Staff College, the Army Judge Advocate Generals School, and the Naval War College. He has served in the Office of the Army Judge Advocate General, as deputy chief of the Army Government Appellate Division, and as staff judge advocate at the Army Signal Center at Fort Gordon, Georgia. He is the author of Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to Haiti (2001); The Silver Star: A History of America's Third Highest Award for Combat Valor (2001); The Purple Heart: A History of America's Oldest Military Decoration (1996); and more than twenty articles on legal and other topics.*

*Naval War College Review, Spring 2003, Vol. LVI, No. 2*

Both claimed, for example, that an air strike on a Serbian radio and television station during the campaign was illegal because it was “a direct attack on a civilian object.” Amnesty International and Human Rights Watch further charge that the bombing of two bridges was unlawful because too many civilians were on or near the structures during the attack. Finally, both groups contend that the deaths of civilians during NATO attacks on military targets necessarily meant that NATO had failed to obey the law's mandate to minimize harm to noncombatants. According to Amnesty International, “NATO forces did commit serious violations of the laws of war leading in a number of cases to the unlawful killings of civilians.”<sup>5</sup> Similarly, Human Rights Watch declared that NATO “illegitimate” attacks on nonmilitary targets resulted in excessive civilian casualties.<sup>6</sup> If these and other allegations are true, General Wesley K. Clark, the regional commander

responsible for the conduct of ALLIED FORCE, as well as the NATO planners who sequenced and synchronized the operation, violated the law—and incurred both personal liability and state responsibility for NATO members and the United States. Additionally, if the charges are true, commanders and their planners cannot look to ALLIED FORCE as a model for targeting in future military operations.<sup>7</sup>

So, what is the truth? Is it illegal to attack a government-owned television station? Must a commander instruct a pilot to refrain from attacking a bridge if civilians can be seen on it? Are commanders and their planners responsible if a large number of civilians are killed during an attack? This article concludes, after examining the law relating to targeting and analyzing the facts and circumstances surrounding targets that, allegedly, were illegally attacked, that Amnesty International and Human Rights Watch are wrong, on two grounds. In some instances the facts do not support their claims; where the facts are not in dispute, the two groups have drawn conclusions based on faulty interpretations of existing international law.

NATO selected and attacked legitimate military objectives in the Kosovo campaign. The methods and weapons it used to destroy or neutralize these targets were lawful and proportional to the military advantage expected. Finally, NATO distinguished between combatants and noncombatants and took proper precautions to avoid injuring or killing noncombatants.

### OPERATION ALLIED FORCE

In 1998, Serbian military and police forces flooded into Kosovo and began systematically driving ethnic Albanians from their homes. Roughly 250,000 Kosovars were forced to flee; most of these refugees escaped to neighboring Albania and Macedonia, but the Serbs killed hundreds of men, women, and children in this act of “ethnic cleansing.”<sup>8</sup> When diplomatic efforts advanced by Germany, France, and Italy did not lead to a negotiated settlement with the president of the Federal Republic of Yugoslavia (FRY),<sup>9</sup> Slobodan Milosevic,<sup>10</sup> the United States and its NATO allies decided that only military action would stop the aggression. On 24 March 1999, after talks at Rambouillet, in France, failed to stop Serbian violence against ethnic Albanians in Kosovo, NATO launched Operation ALLIED FORCE. In a seventy-eight-day “phased” air operation, aircraft from thirteen (out of nineteen) NATO member states flew combat sorties against targets in the provinces of Kosovo and Vojvodina, Serbia proper, and Montenegro.

Ninety of every hundred bombs used in NATO’s attacks on airfields; air defense emplacements; bridges; command, control, and communication sites; and police and troop barracks were precision-guided munitions (PGMs)—a significant fact when one considers that PGMs constituted only 9 percent of bombs dropped in DESERT STORM.<sup>11</sup> In addition to these aircraft-delivered PGMs,

long-range cruise missiles fired by the United States and the United Kingdom were used to hit similar targets. The goal of ALLIED FORCE was “to halt or disrupt a systematic campaign of ethnic cleansing.”<sup>12</sup> The means of reaching this end state were chosen on the basis of the belief that a gradual increase in force and intensity would cause Milosevic to halt the aggression in Kosovo.<sup>13</sup> By the time ALLIED FORCE ended, NATO had flown more than 38,400 sorties and released 23,600 air munitions against over nine hundred targets.



Commentators disagree “about exactly what caused Milosevic to accept NATO’s conditions.”<sup>14</sup> He may have capitulated because he was politically isolated and realized that he could not undermine the alliance’s unity and sense of purpose. On the other hand, since Serbian army and police forces had killed or expelled most Muslim Kosovars by early June 1999, he might have acquiesced because he had achieved his objectives. Whatever Milosevic’s reasons, the fact remains that at the end of NATO’s air operation, Serbian forces had ceased their ethnic cleansing operations in Kosovo.<sup>15</sup>

#### THE LAW OF ARMED CONFLICT AND TARGET SELECTION

Under the law of armed conflict, all persons, places, and things may be targeted if they are military objectives. As Article 52(2) of the 1977 Protocol I to the 1949 Geneva Conventions explains, 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 neutralization, in the circumstances ruling at the time, offers a definite military advantage.”<sup>16</sup> Even if a person, place, or thing qualifies as a military objective, however, that does not mean that it may be attacked using any imaginable method. Rather, only *lawful* weapons may be employed.<sup>17</sup> Additionally, any attack on a military objective must be *necessary* to accomplish a military purpose. By way of example, an enemy fighter jet is a military objective, but if it cannot be flown because it is parked in the middle of a city neighborhood miles away from a runway, bombing it is arguably unlawful, because it would not accomplish a military purpose.

While noncombatants and civilian property may never be directly targeted, the law recognizes that an attack on an otherwise lawful military objective may cause *incidental* injury and damage to civilians and their property. There are, however, limits on such incidental or collateral damage. In the words of Article 57(2) of Protocol I, it must not “be *excessive* in relation to the concrete and direct military advantage anticipated” (emphasis supplied) from targeting the military objective. That is, collateral damage not only must be minimized but may not be disproportionate to any military gain. The law of armed conflict requires attackers to respect this principle of proportionality by demanding that they “at all times *distinguish* between the civilian population and combatants and between civilian objects and military objectives.”<sup>18</sup>

Since the adoption of Protocol I in 1977, the principles of distinction and proportionality have become increasingly important in the selection and attack of targets. For example, it is now generally accepted that “even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack.”<sup>19</sup> Thus, for example, massive bombing of the type used by the World War II Allies against Dresden is no longer lawful—principally because the tens of thousands of German civilians killed was excessive when balanced against the military need to destroy the German railway network in that city. Additionally, the bombing accuracy resulting from the development of PGMs has brought with it a significant reduction in collateral damage. As a result, while the law of armed conflict has not changed—there is no legal requirement to use PGMs, and injuring civilians and their property is lawful if incidental to an otherwise legal attack on a military objective—planners and operators choosing between laser-guided ordnance or “dumb” bombs now more than ever must consider collateral damage. What constitutes “excessive” collateral damage ultimately is very much affected by the subjective mind-set of the commander in charge of an operation or campaign.<sup>20</sup>

Lawful military objectives that almost always satisfy the “military necessity” test include enemy aircraft, vehicles, and warships; naval and military bases; warship construction and repair facilities; military storage depots; airfields, ports, and harbors; troop concentrations and embarkation points; and lines of communication. Lawful targets also include dual-use objects like bridges, railheads, road networks, and similar transportation infrastructure used both by civilians and by enemy armed forces. For example, a power-generating station that supplies electricity both to military structures (e.g., command and control node or air defense site) and public facilities (such as a civilian hospital or school) may be attacked if military necessity requires it.<sup>21</sup> Again, however, regardless of the legitimacy of selecting and attacking a target, collateral damage to

noncombatants and their property must not be disproportionate to the military advantage achieved in destroying or neutralizing the target. An electrical power grid may be targeted if the effect that the loss of power will have on nonmilitary facilities is not excessive when balanced against the advantage gained by removing that energy source from the enemy's military forces.

Finally, because the law of armed conflict requires that "constant care shall be taken to spare the civilian population" from the effects of military operations, noncombatants near a legitimate military target must be warned of an impending bombardment. In the language of Article 57(2)(c) of Protocol I, "effective warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit." This provision is understood to mean that a warning may be general in nature; it need not be specific if this would jeopardize the success of the mission. Even then, only "reasonable efforts" to warn are required by law.<sup>22</sup>

Finally, in targeting a legitimate military objective, attackers may use methods that safeguard their own forces, provided they otherwise comply with the law of armed conflict. In *ALLIED FORCE*, for example, NATO pilots avoiding Yugoslav air defenses dropped ordnance from a "safe" altitude of fifteen thousand feet. This was entirely lawful. First, at least in regard to attacks on fixed targets, delivering precision-guided munitions from this height actually furthered the principle of distinction, because it gave an aircraft more time—undisturbed by flak or surface-to-air missiles—to acquire the object being attacked and guide the weapon to it. On the other hand, the fifteen-thousand-foot altitude did make it arguably harder to minimize collateral damage when attacking moving or nonfixed targets. On balance, however, NATO's decision to protect the force was lawful; it did not violate the principle of distinction.<sup>23</sup>

In sum, the law of armed conflict requires that each target satisfy the definition of military objective; that the means selected in attacking the target be proportional to the military advantage gained; and that incidental damage to civilians and their property be minimized.<sup>24</sup> To ensure that every U.S. military operation follows these legal requirements,<sup>25</sup> judge advocates are integrated into military planning and operations at all levels and a military lawyer reviews every target for "legal sufficiency" prior to any attack.<sup>26</sup>

### **SPECIFIC TARGETS ATTACKED IN ALLIED FORCE**

Amnesty International and Human Rights Watch claim that NATO's attacks on at least five targets were unlawful because either the targets were not lawful military objectives; or the attack accomplished no "definite military advantage"; or the bombardment resulted in excessive and disproportionate collateral damage.<sup>27</sup>

### *Laser-Guided Bomb Attack on the Grdelica Railway Bridge*

On 12 April 1999, an American F-15E Strike Eagle launched a laser-guided bomb to destroy a railway bridge in Grdelica, Serbia. While the bomb was on its way to the target, a passenger train came onto the bridge; the bomb hit the train rather than the bridge. As General Clark explained at a press conference on 13 April, the pilot realized that he had missed his target. Consequently, he “came back around to try to strike a different point on the bridge because he was trying to do [his] job, to take the bridge down.”<sup>28</sup> Taking aim “at the opposite end [of the bridge] from where the train had come,” the pilot launched a second PGM. By this time, however, the train had moved—and it was hit again. Some ten civilians in the train were killed and “at least” fifteen injured.<sup>29</sup>

NATO planners had selected the Grdelica bridge for attack because it was part of a resupply route for Serb forces in Kosovo; Amnesty International and Human Rights Watch acknowledge that this military use made it a legitimate target. Nonetheless, these organizations claimed in their reports that the attack was illegal for two reasons. First, NATO had violated the principle of distinction when the F-15E pilot did not delay his attack while there was “civilian traffic” on the bridge.<sup>30</sup> Second, NATO had violated the principle of proportionality because the

civilian deaths were “excessive in relation to the concrete and direct military advantage anticipated.”<sup>31</sup>

In essence, Amnesty International and Human Rights Watch charge that as there was no need to attack

---

*NATO, wanting to avoid collateral damage to civilians, suspended the attack. It was too late.*

---

the bridge at that particular moment—the structure could have been destroyed ten minutes later, when the passenger train was safely across—the bombardment violated the principle of proportionality.

Under the law of armed conflict, Amnesty International and Human Rights Watch are correct that it was unlawful to attack the Grdelica bridge while a passenger train was on it. While the bridge was a legitimate target, it could have been attacked when free of civilian train traffic; there is no evidence that the mission’s success would have been jeopardized if the aircraft had returned later. That said, the groups’ legal conclusions are irrelevant, as the facts show that the F-15E pilot and weapons systems officer did not know that the train was on the bridge until it was too late to prevent collateral damage from the first bomb. As General Clark explained, the pilot launched his first laser-guided bomb while still “many miles” from the target, from where he “was not able to put his eyes on the bridge.” Over the next few minutes, as their aircraft closed on the Grdelica bridge at very high speed, the pilot and weapons systems officer tracked the bomb’s trajectory on a five-inch video screen; all seemed in order. Then, “at the

very last instant with less than a second to go,” the train came upon the bridge and was struck.<sup>32</sup> It is apparent that there was no intent to harm civilians with the first electro-optical guided bomb. Moreover, the crew intended its second bomb to hit a point on the bridge some distance away from the train; that it in fact struck the train was likewise an accident.

An independent investigation conducted by the International Criminal Tribunal for the Former Yugoslavia (ICTY) confirmed NATO’s claims that the civilian deaths and injuries at Grdelica had been unintended.<sup>33</sup> The lesson to be learned is that while military operations must be conducted in accordance with the law of armed conflict, criminal responsibility requires either an *intent* to violate the law or a *reckless disregard* of it. Consequently, an attacker who acts reasonably in bombing an otherwise legitimate target has a defense against the charge that excessive collateral damage occurred. What happened at Grdelica was a tragic accident, not the result of intentional or reckless conduct; the regional commander and his planners bore no command or individual responsibility for it.<sup>34</sup>

#### ***Bombing of the Refugees on the Djakovica Road***

On 14 April 1999, for about two hours in the afternoon, NATO F-16 and Jaguar aircraft attacked two vehicle convoys traveling on the Djakovica Road in Kosovo. The convoys had been targeted because NATO believed they carried Serb special police forces that had been setting fire to houses in order to drive Albanian Kosovars from their homes. The targets were identified and ordnance released from an altitude of fifteen thousand feet, for reasons explained above. The attack was successful, in that many vehicles in the convoys were destroyed or badly damaged. At some point during the bombing, however, NATO learned that the convoy might comprise “a mix of military and civilian vehicles”; wanting to avoid collateral damage to civilians, it suspended the attack until more was known. It was too late—some seventy civilian men, women, and children had been killed and about a hundred injured. Most of the vehicles in the convoy turned out to have been farm tractors.

Amnesty International and Human Rights Watch reports charged that the attack was unlawful on the ground that NATO’s concerns with protecting its own pilots had caused it to ignore the principle of distinction.<sup>35</sup> That is, by flying at fifteen thousand feet to avoid surface-to-air missiles, NATO attackers had been unable to distinguish between military objectives and noncombatants and their property. NATO countered that as the pilots had believed they were seeing and attacking military vehicles, the civilian deaths and injuries were accidental.

Was the bombing of the Djakovica road refugees a war crime? No. The F-16 and Jaguar pilots thought they were attacking military vehicles belonging to FRY

special police units conducting ethnic cleansing. The danger to them from enemy air defenses made it reasonable to attack from fifteen thousand feet. Finally, while civilians were killed, their deaths were not the result of an intentional or reckless failure to honor the principle of distinction. Just as it had after the Grdelica incident, the ICTY concluded that NATO had not acted improperly at Djakovica: “While this incident is one where it appears the aircrews could have benefited from lower altitude scrutiny of the target at an early stage, the committee is of the opinion that neither the aircrew nor their commanders displayed the degree of recklessness in failing to take precautionary measures which would sustain criminal charges.”<sup>36</sup>

While NATO was cleared of wrongdoing at Djakovica, the committee’s language suggested that there was a bombing altitude—somewhere above fifteen thousand feet—at which ALLIED FORCE aircraft would have been acting with criminal recklessness. Attackers may not adopt self-protection measures that so reduce their ability to honor the principle of distinction that a reasonable person would view them as reckless. At what “line” the reasonable becomes reckless, however, is most difficult to determine. But if NATO’s self-protection measures had made its pilots unable to distinguish between combatants and noncombatants, these measures would have made it difficult—if not impossible—to carry out any lawful attacks.

#### *Attack on the Lunane Bridge*

On 1 May 1999, in the middle of the day, NATO warplanes bombed the Lunane Bridge in Kosovo. Apparently the bridge itself suffered only minimal damage, but a civilian bus on the bridge during the attack was blown in half. An unknown number of civilians were killed.<sup>37</sup>

No one—not even Amnesty International and Human Rights Watch—disputes that the bridge was a legitimate military objective; it was on the main resupply road between Nis, Serbia’s second-largest city, and Pristina, the capital of Kosovo. Rather, Amnesty International and Human Rights Watch charged that NATO had violated the law of armed conflict in that the alliance “did not take the precautionary steps necessary to avoid civilian casualties.” The two organizations insist that NATO could have attacked the bridge at night, when civilian traffic across it was reduced. Alternatively, the two groups argue, by attacking the bridge when a civilian bus was crossing it, the NATO pilots ignored the presence of noncombatants and disregarded the principles of distinction and proportionality. Amnesty International and Human Rights Watch reasoned that if NATO had been conducting aerial operations in accordance with the law of armed conflict, its pilots would necessarily have seen the bus; realizing that attacking the bridge at that moment likely would result in excessive collateral damage, they

would have halted the attack and resumed it only after the bus had crossed the bridge to safety.

Did NATO violate the law because its attack on a legitimate military objective also resulted in civilian casualties? It did not. At a 2 May 1999 press conference, a NATO spokesman explained that the bus had crossed the bridge “after weapons release” and that there had been no intent to target it. Interestingly, when asked if NATO could conduct its attacks on bridges at night—so as to minimize the danger to civilian buses and trains—the spokesman said, “We did not target the bus as we have not targeted earlier the train. We target bridges, and I am sure that the Serb authorities know that these bridges are of extreme value to their lines of communications and [that] when they allow public traffic over these bridges, then they risk a lot of lives of their own citizens.”<sup>38</sup>

The reference to the Grdelica train indicates that NATO viewed the Lunane Bridge as a similar situation—the attacking pilots had intended to destroy a legitimate military objective. That their ordnance struck a bus was an accident. NATO further maintained that if the damage to the bus and injury to its passengers was in fact accidental, as explained, it had not violated the law of armed conflict; on the contrary, it was, arguably, the Yugoslav government that had done so, as it had no doubt understood that the bridge was a lawful military objective. Article 58(c) of Protocol I requires government officials to take “necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.”<sup>39</sup> By allowing its citizens to use transportation facilities that were almost certain to be attacked, the Federal Republic of Yugoslavia had put their lives at risk. At Lunane the consequences were tragic.

#### ***Missile Attack on Serbian Radio and Television Station***

On 23 April 1999, U.S. missiles<sup>40</sup> struck the downtown Belgrade studios of a Serbian-owned radio and television station.<sup>41</sup> The facility housed commercial telephone, fiber-optic cable, high-frequency radio, and microwave communication equipment. It was connected with more than a hundred radio relay sites in Yugoslavia—forming a network that was principally civilian but that NATO intelligence had determined was integrated with the government’s strategic and operational command and control structure. As NATO officials were to explain at a press conference after the attack, “military traffic [had been] routed through the civilian system,” and the station’s equipment had been used “to support the activities of FRY military and special police forces.”<sup>42</sup>

On about 12 April, NATO issued a general warning<sup>43</sup> to Western media outlets that the radio and television station might be attacked, and in turn the Belgrade government learned of the fact from media reports. When the facility was not

immediately bombed, however, Belgrade apparently discounted the warning and failed to inform the station's staff.<sup>44</sup> Consequently, when NATO ordnance hit the facility, between ten and seventeen civilians—technicians, security workers, and makeup artists—were killed, and about the same number wounded.<sup>45</sup>

According to Amnesty International and Human Rights Watch, the attack “was a deliberate attack on a civilian object and as such constitutes a war crime.”<sup>46</sup> They argued in their reports that as the station transmitted civilian programming only, it had not made “an effective contribution to military action” and so could not have been a proper military objective. Additionally, the groups charged that bombing the facility had been illegal because, even if it satisfied the military objective test, its destruction would not give NATO the “definite military advantage” required by Article 52(2) of Protocol I. The fact the station had been back in operation within hours and had not been reattacked, they argued, necessarily meant that it had little military utility. Amnesty International and Human Rights Watch further maintain that the attack was illegal because the number of civilians killed in the attack had been excessive in relation to any military advantage gained.<sup>47</sup>

Was it lawful to target the Serbian radio and television station? Yes. It had a dual use; it broadcast civilian programming but also was an integral part of the Yugoslav/Serbian military command and control network. This fact made it a lawful military objective. The purpose in targeting it was to degrade the enemy's strategic and operational capabilities—the “definite military advantage” required by Protocol I. That the attack did not permanently neutralize enemy

command and control did not make it any less legal. Finally, even if one assumes for the sake of argument that the civilian casualties were excessive, the true cause of this collateral damage was not

---

*So, must a commander instruct a pilot to refrain from attacking a bridge if civilians can be seen on it?*

---

NATO's bombardment. On the contrary, the deaths and injuries resulted from Belgrade's failure to protect its own citizens in light of the warning received some ten days earlier. If the Milosevic government had informed the station's employees that their workplace was a possible target, at least some of these civilians would not have been in the building when it was hit;<sup>48</sup> the missiles most likely would have harmed no one.

One more issue deserves comment. Prime Minister Tony Blair of Britain and NATO officials suggested that propaganda broadcasts made by the radio and television station had also justified its attack. Not surprisingly, Amnesty International and Human Rights Watch harshly criticized this view, claiming that there is no legal basis for it. The committee of the International Criminal Tribunal for

the Former Yugoslavia examining the matter agreed that this rationale probably could not be the sole basis for an attack. The committee, however, determined that NATO's attack had nonetheless been lawful; its propaganda justification had been "an incidental (albeit complementary) aim of its primary goal of disabling the Serbian military command and control system." However, the committee cautioned that had the station gone beyond broadcasting propaganda and actually urged its listeners to kill Albanian Kosovars or engage in other crimes against humanity, it would have become a lawful military objective.<sup>49</sup>

### *Bombardment of Korisa Village*

During the night of 13–14 May 1999, three NATO aircraft dropped ten laser-guided and gravity bombs on Korisa, a village on the highway between Prizhe and Pristina. The primary target was a Serbian military camp and command post a short distance from Korisa. NATO intelligence believed that there were no civilians in the immediate area. In any event, the NATO pilots "visually identified" an armored personnel carrier, ten artillery pieces, and "dug-in military revetted positions" prior to dropping their bombs.<sup>50</sup> The attack on the military objective was a success; however, the bombs also struck ethnic Albanian refugees living nearby. A "relatively large number of civilians"—as many as fifty—were killed and a roughly equal number injured.<sup>51</sup> Subsequent investigations have not disclosed why these men, women, and children were present in the area. It may have been simply fortuitous that they had encamped near the Korisa military camp. There is, however, evidence that Serbian forces had forced refugees to remain near their positions as "human shields."<sup>52</sup>

While acknowledging that the military command post was a legitimate military target and agreeing that it was a serious violation of the law to use the refugees as human shields,<sup>53</sup> Amnesty International and Human Rights Watch nonetheless charged that NATO's attack was unlawful. NATO's pilots, they held, had "failed to take sufficient precautionary measures to ascertain that there were no civilians present" before they dropped their bombs. The high number of civilian casualties, the organizations maintained, had been excessive in relation to the military gain—a violation of the principle of proportionality.<sup>54</sup>

The basic problem with the stance taken by Amnesty International and Human Rights Watch is that it does not comport with existing law. NATO forces attacked a legitimate military objective. The facts that NATO intelligence officers believed that no civilians were in the area and that the pilots saw none undercut any conclusion that the civilian deaths resulted from any NATO failure. If the commander authorizing the aerial attack and the officers planning it did not know that there were civilians present—as they might well not know, in wartime conditions—the law offers a "mistake of fact" defense. The history of warfare is

replete with examples of “fog of war” producing unintended consequences—especially harm to innocent civilian men, women, and children. While such episodes are always regrettable, it does not necessarily follow that some person or state is responsible for them. Not surprisingly, the ICTY committee investigating the Korisa attack concluded that “credible information available is not sufficient to tend to show that a crime . . . has been committed by the aircrew or by superiors in the NATO chain of command.”<sup>55</sup>

### HARD AND FAST RULES?

Roughly five hundred civilians were killed by the NATO air campaign in Kosovo.<sup>56</sup> While this loss of life is both sad and lamentable, the ratio of sorties to civilian deaths in that campaign was more than seventy-five to one. This ratio certainly supports the conclusion that NATO tried to minimize casualties and conducted ALLIED FORCE in accordance with the law of armed conflict.

For high-profile groups like Amnesty International and Human Rights Watch, however, civilian casualties or other collateral damage will never be acceptable. Such organizations have the not-so-hidden agenda of promoting rules that would make the legal conduct of war impossible, in order to end warfare itself—at least by law-abiding states. Amnesty International, for example, insists that an attacker has a “responsibility under international humanitarian law to take *all possible precautions* to avoid harming civilians.”<sup>57</sup> The law of armed conflict, however, places no such requirement on combatants. Protocol I states clearly that “civilians enjoy *general* protection against dangers arising from military operations”;<sup>58</sup> this means that no crime has been committed if civilians are harmed in a military attack if such injury is collateral and not disproportionate to the definite military advantage gained.

Recognizing that “hard and fast rules” would advance their long-term goal, Amnesty International, Human Rights Watch, and others steadfastly insist that the law of armed conflict is a collection of clear and unambiguous strictures. But any rule is subject to subjective judgment, in terms of how it is applied to a particular set of circumstances. Thus, for example, there is no requirement for an attacker to warn civilians near a target of the specific time and place of a future attack. On the contrary, because it seeks to *regulate* rather than *outlaw* military operations, the law of armed conflict requires only that “reasonable efforts” be made to warn, and then only when the military situation permits. It is in the face of this clear legal standard that Human Rights Watch insists that NATO “did not take adequate precautions in warning civilians” prior to its attack on the Belgrade radio and television station.<sup>59</sup>

Applying the law of armed conflict is not like using a calculator to solve a mathematical equation. On the contrary, because of the many subjective

variables involved in military operations, the law necessarily requires that those responsible apply and balance many factors both tangible and intangible. It follows that the claim that the law of armed conflict can be applied with precision is dangerous, for two reasons. First, when groups like Amnesty International and Human Rights Watch claim that NATO committed war crimes, some individuals and governments inevitably believe that it is true. This threatens to deprive the United States and NATO of the moral high ground—an important component of success. Further, if America’s friends believe that it selects and attacks targets in violation of the law, they will stand aloof from future coalition operations in which the United States participates—a direct threat to its national security strategy of engagement. Second, such false claims could restrict the flexibility of regional commanders in carrying out warfighting missions. If Amnesty International and Human Rights Watch repeat their allegations often enough, Congress, the White House, and the Pentagon may ultimately accept them and thereafter make target-related decisions on the basis of misinformation about the law. It is critical that leaders at the strategic and operational levels of war understand that NATO’s attacks on targets in ALLIED FORCE were entirely lawful. The law of armed conflict did not change before, during, or after the operation. Only legitimate military objectives were targeted and attacked, and no collateral damage occurred as a result of violations of the law.

Regional commanders and their planners can properly look to ALLIED FORCE as a model for targeting in such campaigns in the future. They must choose lawful military objectives and plan legal attacks on those targets. But these commanders and operational planners—and the judge advocates serving them—must be just as vigilant in countering those who would improperly restrict the lawful waging of war.<sup>60</sup>

---

#### NOTES

1. Amnesty International, founded in 1961, describes itself as “a Nobel Prize–winning grassroots activist organization with over one million members world wide.” Amnesty International works to “free all prisoners of conscience . . . ensure fair and prompt trials for political prisoners . . . abolish the death penalty . . . [and] end extrajudicial executions and ‘disappearances’”; for more information, see [www.aiusa.org](http://www.aiusa.org). U.S. joint doctrine categorizes Amnesty International as a nongovernmental organization. *Interagency Coordination During Joint Operations*, Joint Publication 3-08, vol. 1 (Washington, D.C.: U.S. Government Printing Office [hereafter GPO], 1996), p. GL-10.
2. Human Rights Watch, a nongovernmental organization like Amnesty International, was founded in 1978 as “Helsinki Watch.” It describes itself as “the largest U.S.-based human rights organization.” Human Rights Watch initially monitored compliance with the human rights provisions of the Cold War–era Helsinki accords, but “when the Reagan administration argued that human rights abuses by right-wing ‘authoritarian’ governments were more tolerable than those of left-wing ‘totalitarian’

- governments,” Human Rights Watch changed its focus “to counter this double standard.” Human Rights Watch now investigates and works against human rights abuses worldwide. For more information on Human Rights Watch, see [www.hrw.org](http://www.hrw.org).
3. For more on ALLIED FORCE, see Wesley K. Clark, *Waging Modern War: Bosnia, Kosovo, and the Future of Combat* (New York: PublicAffairs, 2001); Andrew J. Bacevich and Eliot A. Cohen, eds., *War over Kosovo* (New York: Columbia Univ. Press, 2001); Barry R. Posen, “The War for Kosovo: Serbia’s Political-Military Strategy,” *International Security* (Spring 2002), p. 75; Miron Rezun, *Europe’s Nightmare: The Struggle for Kosovo* (Westport, Conn.: Praeger, 2001); Albrecht Schnabel and Ramesh Thakur, eds., *Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action, and International Citizenship* (New York: United Nations Univ. Press, 2000); Ivo H. Daalder and Michael E. O’Hanlon, *Winning Ugly: NATO’s War to Save Kosovo* (Washington, D.C.: Brookings Institution, 2000); Michael Ignatieff, “The Virtual Commander: How NATO Invented a New Kind of War,” *The New Yorker*, 2 August 1999, p. 31; Stephen Biddle, “The New Way of War? Debating the Kosovo Model,” *Foreign Affairs* (May–June 2002).
  4. The “law of armed conflict” is a general term that includes the more restrictive categories of “law of war” (customs and laws regulating war) and “international humanitarian law” (customs and laws regulating the treatment of noncombatants, like civilians and prisoners of war). For the purposes of this article, the law of armed conflict includes the principles enunciated in the Hague Conventions of 1907, the Geneva Conventions of 1949, and the 1977 Protocol I to the Geneva Conventions. The United States has never ratified Protocol I; however, it views some provisions as either legally binding as customary international law or acceptable practice though not legally binding. For example, the United States accepts the legality of Article 51 (protection of the civilian population), Article 52 (general protection of civilian objects), and Article 57 (precautions in attack)—all of which govern the selection and attack of targets. For more on the U.S. view of Protocol I, see “Remarks of Michael J. Matheson, Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions,” *American University Journal of International Law & Policy* 2, no. 419 (1987). Additionally, regardless of the legal status of Protocol I vis-à-vis the United States, all NATO members other than Turkey have ratified it. Accordingly, as ALLIED FORCE was conducted by a coalition almost all thirteen members of which had ratified Protocol I, as a practical matter its provisions applied to all military operations in that campaign.
  5. Amnesty International, *Report: NATO/Federal Republic of Yugoslavia: Collateral Damage or Unlawful Killings?* [hereafter Amnesty International Report], [web.amnesty.org/ai.nsf/Index/EUR700182000?OpenDocument&of=COUNTRIES\YUGOSLAVI](http://web.amnesty.org/ai.nsf/Index/EUR700182000?OpenDocument&of=COUNTRIES\YUGOSLAVI) [11 March 2000], p. 1.
  6. Human Rights Watch, *Report: The Crisis in Kosovo: Civilian Deaths in the NATO Air Campaign [sic]* [hereafter Human Rights Watch Report], [www.hrw.org/reports/2000/nato/Natbm200-01.htm](http://www.hrw.org/reports/2000/nato/Natbm200-01.htm) [10 February 2000], p. 1.
  7. Others claiming that NATO committed “war crimes” during ALLIED FORCE agreed with Amnesty International and Human Rights Watch. For example, Canadian law professor Michael Mandel described the bombing campaign “as a coward’s war . . . not even partially legitimized by the Security Council of the United Nations”; Charles Trueheart, “Taking NATO to Court,” *Washington Post*, 20 January 2000, p. A15. This article, however, addresses only the Amnesty International and Human Rights Watch allegations.
  8. The expression “ethnic cleansing” is relatively new. In the context of the conflict in Kosovo, the phrase means “rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area.” Ethnic cleansing, which has included murder, torture, arbitrary arrest and detention, rape and sexual assault, deportation, and the like, constitutes “crimes against humanity” and is a violation of international law. W. Michael Reisman and Chris T. Antonio, *The Laws of War* (New York: Vintage Books, 1994), p. 389.
  9. The Federal Republic of Yugoslavia (FRY) consists of Serbia and Montenegro; both are sometimes called “Former Yugoslav Republics”—a reference to the Yugoslav federation that existed during the Cold War. Serbia, as the largest and most populous republic, dominates the FRY. Kosovo is the southernmost province of Serbia.

10. For a recent and thorough examination of Milosevic's conduct during ALLIED FORCE, see Joseph Lelyveld, "The Defendant," *The New Yorker*, 27 May 2002, pp. 82–95. Milosevic is now on trial for war crimes at the ICTY in the Hague, Netherlands. A guilty verdict is both likely and expected. For more on the ICTY, see note 29.
11. Eric Schmitt, "It Costs a Lot More to Kill Fewer People," *New York Times*, 2 May 1999, p. WK5.
12. General Wesley K. Clark, Remarks to the American Enterprise Institute, 31 August 1999, quoted in Human Rights Watch Report, p. 2.
13. But there was sharp disagreement among both the NATO members and the military about *how* to apply pressure on Milosevic. For a thorough discussion of differing views in the alliance, see U.S. General Accounting Office, *Kosovo Air Operations: Need to Maintain Alliance Cohesion Resulted in Doctrinal Departures* (Washington, D.C.: 2001). In the military, the disagreement was equally pronounced. General Clark, for example, believed that Serbian army and police units in Kosovo should be the focus of the bombing. Lieutenant General Michael Short, on the other hand, "believed this to be a waste of valuable munitions and sorties." Consequently, Short advocated bombing strategic targets that would destroy Milosevic and his leadership structure. Scott A. Cooper, "The Politics of Airstrikes," *Policy Review* (June and July 2001), [www.policyreview.org/jun01/cooper.html](http://www.policyreview.org/jun01/cooper.html). See also "Operation ALLIED FORCE from the Perspective of the NATO Air Commander," keynote address, Legal and Ethical Lessons in NATO's Campaign in Kosovo conference, Naval War College, Newport, R.I., reprinted in *Legal and Ethical Lessons in NATO's Campaign in Kosovo*, ed. Andru E. Wall, International Law Studies, vol. 78 (Newport, R.I.: Naval War College, forthcoming 2003), pp. 23–26; David A. Deptula, "Firing for Effects," *Air Force Magazine*, April 2001, pp. 46–53.
14. U.S. Department of Defense, *Report to Congress: Kosovo/Operation ALLIED FORCE After Action Report*, 31 January 2000, reprinted as JMO NWC 2102 (Newport, R.I.: Naval War College), p. 10. See also Stephen T. Hosmer, "The Conflict over Kosovo: Why Milosevic Decided to Settle When He Did," Report MR-1351-AF (Santa Monica: Calif.: RAND, 2001), [www.rand.org/publications/MR/MR1351](http://www.rand.org/publications/MR/MR1351).
15. For less laudatory perspectives on NATO operations in ALLIED FORCE, see Tariq Ali, "After the War," in *Masters of the Universe: NATO's Balkan Crusade* (New York: Verso, 2000), p. ix.
16. *Additional Protocol I (1977) to the Geneva Conventions of 1949*, 1125 UNTS 3 [hereafter Protocol I].
17. Weapons may be illegal per se or illegal by an improper use. Biological and chemical weapons are per se illegal. Certain projectiles (i.e., "dumdum" bullets) also are outlawed. An otherwise legal weapon chosen with an *intent* to cause unnecessary suffering would be an example of improper, and therefore illegal, use. In any event, every weapon in the U.S. inventory must be reviewed for legality under the law of war. For more on this requirement, see U.S. Army Judge Advocate General's School, *Operational Law Handbook* (Charlottesville, Va.: Judge Advocate General's School, 2000), pp. 5–11.
18. Protocol I, art. 48 [emphasis supplied].
19. International Court of Justice, "Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons," *International Legal Materials* 35 (1996), p. 936.
20. For a good discussion of the PGMs/collateral damage issue, see Stuart W. Belt, "Missiles over Kosovo: Emergence, *Lex Lata*, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas," *Naval Law Review* 47 (2000), pp. 115–75; C. B. Shotwell, "Economy and Humanity in the Use of Force: A Look at the Aerial Rules of Engagement in the 1991 Gulf War," *Journal of Legal Studies* (1993), pp. 27–29.
21. For an exhaustive list of proper targets, see U.S. Navy Dept., *The Commander's Handbook on the Law of Naval Operations*, Naval Warfare Publication 1-14M/U.S. Marine Corps MCPW 5-2.1 (Washington, D.C.: Department of the Navy, October 1995), para. 8.1.1.
22. *Ibid.*, para. 8.5.2; Reisman and Antonio, pp. 92–93.
23. For more on NATO's force protection decision, see note 35.
24. Despite the clear and unequivocal requirements of the law, a recent article by two Air Force officers claims that a target should only be attacked if "moral" and "consistent with our cultural norms." Jeffrey L. Gingras and Tomislav Z. Ruby, "Morality and Modern Air War," *Joint Forces Quarterly* (Summer 2000), p. 109. Fortunately, as will be argued, there is no legal basis for this idea.

25. Defense Dept. Directive 5100.77 requires the U.S. armed forces “to comply with the law of war in the conduct of military operations and related activities.” Joint doctrine echoes this requirement in stating that “the Armed Forces of the United States must *account for our actions*” in conducting military operations [emphasis in original]. U.S. Joint Chiefs of Staff, *Joint Warfare of the Armed Forces of the United States*, Joint Publication 1 (Washington, D.C.: GPO, 10 January 1995), p. ix.
26. Judge advocates at the U.S. European Command (EUCOM) carefully evaluated ALLIED FORCE targets and advised General Clark and his planners and operators on the legality of selecting and attacking each and every one. Col. Warren D. Hall III, Staff Judge Advocate, U.S. European Command (EUCOM), Stuttgart, Germany, telephone interview by author, 20 April 2001; Lt. Col. Tony E. Montgomery, deputy staff judge advocate and chief, Operational Law Division, EUCOM, Stuttgart, Germany, e-mail interview by author, 27 April 2001. See also Michael Ignatieff, *Virtual War* (New York: Metropolitan Books, 2000), pp. 197–98.
27. Amnesty International Report, pp. 2–4.
28. *Ibid.*, p. 23.
29. International Criminal Tribunal for the Former Yugoslavia (ICTY), “Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia” [hereafter ICTY Report], *International Legal Materials* 39, p. 1257. The ICTY was established on 25 May 1993 by UN Security Council Resolution 827. The tribunal’s mission is to prosecute persons responsible for serious violations of humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined. Since its creation, the ICTY has heard criminal cases involving mass killings, the organized detention and rape of women, and the practice of “ethnic cleansing.” After Amnesty International and Human Rights Watch charged NATO with violating the law of armed conflict during ALLIED FORCE, a committee appointed by the ICTY prosecutor conducted an independent investigation of the allegations. While this article contends that the ICTY Report is legally sound, not all agree. For less favorable views, see Michael Bothe, “The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY,” *European Journal of International Law* 12 (2001), pp. 531–35; and Natalino Ronzitti, “Is the *Non Liquef* of the Final Report by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia Acceptable?” *International Review of the Red Cross* 82 (2000), pp. 1017–28.
30. Amnesty International Report, p. 23.
31. *Ibid.*
32. General Wesley K. Clark, press conference, NATO Headquarters, Brussels, 13 April 2001, quoted in ICTY Report, p. 1273.
33. *Ibid.*, p. 1275.
34. Even where a regional commander *intends* a specific act, if the intent is based on an honest (however mistaken) belief that the act is legitimate, that commander has a defense. For example, after World War II, Generaloberst (Colonel General) Lothar was acquitted at Nuremberg of charges that he had unlawfully destroyed civilian property and driven forty-three thousand Norwegians from their homes in a “scorched earth” policy taken to stop the advancing Red Army. In fact, the Soviets were not near Rendulic’s forces, but he did not know this. The tribunal concluded that “the conditions, as they appeared to the defendant [Rendulic] at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made.” See Shotwell, n. 144.
35. Both the Amnesty International and Human Rights Watch reports suggest that NATO aircraft in ALLIED FORCE placed too great a premium on their own safety—and that flying at high altitudes was generally unnecessary. This view, however, is erroneous. The threat to allied aircraft was very real; the Serbs, dispersing their anti-air assets and selectively emitting their radars, “forced NATO aircrews to remain wary and denied them the freedom to operate at will in hostile airspace.” NATO was unable to suppress anti-air assets completely, and its pilots were obliged to take “aggressive and hair-raising countertactics” to avoid being shot down. Benjamin S. Lambeth, “NATO’s Air War for Kosovo: A Strategic and Operational Assessment,” Report MR-1365-AF (Santa Monica, Calif.: RAND, 2001), p. 76 n. 22.
36. ICTY Report, p. 1277.
37. FRY officials claimed that forty civilians riding on the bus had been killed; NATO conceded that

- there had been casualties but did not agree to a specific number.
38. Amnesty International Report, p. 35.
  39. Protocol I, art. 48.
  40. Eight Tomahawk missiles were used to hit the state-run radio and television station in Belgrade. In all, the United States and United Kingdom launched a total of 238 Block III Tomahawk missiles during Operation ALLIED FORCE. The 198 that hit their targets accounted for nearly half of all government, military, and police headquarters, integrated air defense systems, and electric power grids in the country. Bryan Bender, "Tomahawk Achieves New Effects in Kosovo," *Jane's Defence Weekly*, [www.janes.com/defence/naval\\_forces/news/jdw/jdw000718\\_1\\_n.shtml](http://www.janes.com/defence/naval_forces/news/jdw/jdw000718_1_n.shtml) [18 July 2000].
  41. This was part of a coordinated attack; on the same night, radio-relay towers and power stations supplying electricity to these facilities were also hit. ICTY Report, p. 1277.
  42. Amnesty International Report, p. 42; ICTY Report, p. 1277.
  43. Amnesty International Report, p. 33.
  44. Human Rights Watch provides this explanation as to why the warning was disregarded. Human Rights Watch Report, p. 12.
  45. Human Rights Watch claims that sixteen civilians were killed and sixteen wounded; Human Rights Watch Report, p. 12. The ICTY prosecutor's report, however, argues that "there is some doubt over exact casualty figures"; ICTY Report, p. 1277.
  46. Steven Erlanger, "Rights Group Says NATO Bombing in Yugoslavia Violated Law," *New York Times*, 8 June 2000, p. A8.
  47. Amnesty International Report, p. 31.
  48. Any civilian employee who chose to continue working in the facility would have knowingly accepted the risk. Interestingly, the *Daily Telegraph* (London) recently reported that the head of the station at the time was later arrested for failing to warn his employees that a NATO attack was likely. Alex Todorovic, "Serb TV Chief Accused over Air Raid," *Daily Telegraph* (London), 14 February 2001, p. 19.
  49. ICTY Report, pp. 1278–79. After the ICTY Report was published, the European Court of Human Rights decided *Bankovic v. Belgium and Others*. In that case, six Yugoslav nationals (five acting on behalf of deceased radio station employees and the sixth acting on his own behalf for personal injuries suffered in the attack) sought compensation from the seventeen European members of NATO; the United States and Canada were not named in the suit, since they are not members of the Council of Europe or signatories to the Convention on Human Rights. The plaintiffs argued that NATO had violated the European Charter on Human Rights guarantee of a right to life in bombing the Belgrade station, in that the attack had killed innocent civilians. On 19 December 2001, a unanimous European Court refused to hear the case, holding that it had no jurisdiction over an event occurring in Yugoslavia, as Yugoslavia was not part of the forty-three-member Council of Europe. In any case, said the Court, the European Convention on Human Rights "was not designed to be applied throughout the world." The jurisdictional basis of the Court's decision meant that there had been no examination of—let alone decision on—the merits of the case. *Bankovic et al. v. Belgium et al.*, 11 *Butterworths Human Rights Cases* 435 (2002), [www.echr.coe.int](http://www.echr.coe.int). See also "Serbian TV Bombing Case Thrown Out," CNN.com/World, 20 December 2001, <http://www.cnn.com/2001/WORLD/Europe/12/19/Brussels.yugo/?related>.
  50. Amnesty International Report, p. 39; ICTY Report, p. 1282.
  51. ICTY Report, p. 1282.
  52. *Ibid.*, p. 40.
  53. Using civilians (or other protected persons) as human shields violates customary international law and Article 51(7) of Protocol I.
  54. Amnesty International Report, p. 41.
  55. ICTY Report, p. 1282.
  56. Human Rights Watch concludes that "as few as 489 and as many as 528 Yugoslav civilians were killed by NATO bombardments during ALLIED FORCE." Human Rights Watch Report, p. 4.
  57. Emphasis supplied. Amnesty International News Release, "Kosovo: Amnesty International Concerns Relating to NATO Bombings," [www.amnesty.org/news/1999/47006999.htm](http://www.amnesty.org/news/1999/47006999.htm) [18 May 1999].
  58. Protocol I, art. 51.1 [emphasis supplied].
  59. Human Rights Watch Report, p. 9.

60. For more on the legality of NATO's operations in Kosovo, see Catherine Guicherd, "International Law and the War in Kosovo," *International Institute for Strategic Studies* 41 (1999), p. 20; Heike Krieger, ed., *The Kosovo Conflict and International Law*, Cambridge [Univ.] International Documentation Series (Cambridge, U.K.: Cambridge Univ. Press, 2001); Michael E. Smith, "NATO, the Kosovo Liberation Army, and the War for an Independent Kosovo: Unlawful Aggression or Legitimate Exercise of Self-Determination?" *Army Lawyer* (February 2001), pp. 1–22; Christopher Greenwood, "The Applicability of International Humanitarian Law and the Law of Neutrality to the Kosovo Campaign," in *Legal and Ethical Lessons in NATO's Campaign in Kosovo*, ed. Wall, pp. 39–74; Adam Roberts, "The Laws of War after Kosovo," in *ibid.*, pp. 405–36.