

## Commentary

Henry Shue

Focusing on dual-purpose targets, I would like to do two things. First, I want to do a little bit of abstract worrying, which is inconclusive and really just a plea for other people to tell me whether there is a real issue here or not. Secondly, I want to go onto something that is fairly concrete. When Professor Dinstein began, he made the traditional point that today we are talking about discrimination and tomorrow we will talk about proportionality. Normally that is how we think about things. It seems to me that it is not absolutely clear that proportionality is as separate in the case of dual-purpose targets as it is in the case of other targets although maybe that is so.

I would just like to raise this question. In the really clear case where you have an object, and you ask if this thing is civilian or military and the answer is that this thing is clearly military, so it is eligible to be a legitimate target. Now we ask if we can destroy this thing without causing collateral damage to some other objects which are civilian. So there is a military object, there are other civilian objects located nearby, and so we ask how much damage will there be to the co-located civilian objects? That is the discussion about proportionality. But the thing about dual-purpose targets is that they are undoubtedly military, but they are also undoubtedly civilian. So rather than having two different objects, we have one object that has two different purposes. Now maybe there is no reason not to treat this in essentially the same way, but I am sort of bothered by that. That is, you can say just as we first ask is this object military, and then we go and look at whether the damage to civilian objects will be disproportionate—why can't we just say okay, here we have a military purpose.

Now let's talk about whether the frustration of the civilian purpose, which this same object also plays, is proportional. But because this is after all only one object, I wonder whether the proportionality shouldn't come up a bit sooner. One way of raising the question is to ask something about Professor Dinstein's list. I do not think I am actually disagreeing with him, but the question is what does it mean to say a certain object is, for example, by nature a military objective. If that just means it's over the first hurdle—that it's now eligible for consideration of whether destroying it will cause proportional damage or not—then that's fine. That is, if all we're saying is that everything that's on the list are military objects about which we now need to ask about proportionality, then that's okay.

It seems to me there's some danger—though maybe this is just an unfair reading of the list—that when one says that all the main railroad lines are by nature military objectives, then one may think that the burden of proof lies especially on proportionality. In order to establish that the civilian damage will be disproportional, one somehow has to show more than one would have had to show if this thing was not already on the list. I hope that's just a misreading of what Professor Dinstein is saying. If not, then I would be a bit worried.

I wonder about the role of proportionality with respect to dual-purpose targets in particular. Now to get a little more concrete and specific, I ask this because it does seem to me that in the case of the dual-purpose targets, everything really turns on proportionality. Academic theorists tend to think that proportionality is not much of a task—that it's so vague that it's not going to really do much work. I want to say two things. The first is that I do take some comfort from what has been said by Lieutenant Colonel Montgomery, Ms Judith Miller and Colonel Sorenson. Based on their testimony anyway, it does appear that in the case of the Kosovo bombing campaign proportionality really did do serious work. To the extent that this is true, I guess I do disagree with Professor Dinstein's comment that World War II would still be going on if the same review had been applied.

I certainly don't think we should take the targeting in World War II as any kind of example of acceptable targeting. There was a lot of targeting in World War II that was completely disproportionate. My understanding is that the war might have ended a lot sooner if we had wasted less stuff trying to break civilian morale and used it in more militarily useful ways. So whether or not this whole process, which I don't pretend I actually understood, is needed, I don't know. That there is some such process seems to me to be actually quite a good thing.

Why do we have the *jus in bello*? We have it because we're trying to avoid having total war. The point of *jus in bello* is that some semblance of normal civilian life should continue even during the war, even while the fighting is occurring on the land and the sea and in the air. Babies are to be born. Old people should be able to finish out their lives. People who need medical attention should be able to get medical attention. There has to be at least some civilian life that is protected from the war. So one of the questions about proportionality is "would the elimination of a particular target make it impossible for even elemental civilian processes to continue?" It seems to me that if it would, the answer is that damage is not proportional unless the military value is of some extraordinary significance of a kind rarely found. It seems to me that this is almost always true of the basic energy sources of the society and especially the electrical grid, the destruction of which makes it impossible to purify the water so children will get waterborne diseases and hospitals are put out of business. It is going to be a rare military advantage that is actually proportional to that.

I am not saying we did the contrary in Kosovo. Maybe not. I worry a little bit about the change in the way we bombed electrical facilities toward the end of the war, but I'm not even sure that there's any objection there. It does sound as if we pretty much made a point of not permanently causing prolonged damage.

Just one final point. I have not seen the RAND study Ms. Judith Miller was talking about this morning that apparently argues that a fear about the extent of the civilian damage was part of the reason that Milosevic conceded.<sup>1</sup> I am very impressed with the argument in Robert Pape's *Bombing to Win* book that I am sure many of you know. His thesis is basically that strategic bombing has never succeeded.<sup>2</sup> That is that the attempt to break the will has never succeeded. Pape's argument mainly being that there is a missing mechanism. The argument is that if you caused the civilians enough pain, then they will want to change the government or end the war, so they will. But the "so they will" part is what is usually not there. In the case of many governments if they could have done that, they might have done it a long time ago. It's especially unlikely they'll be able to do it under the conditions of a national security emergency.

So I doubt very much that that was true in the case of Serbia, although obviously I need to look at that report. If so, of course, that is very different from

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1. See Ms. Miller's commentary in this volume.

2. ROBERT PAPE, *BOMBING TO WIN: AIR POWER AND COERCION IN WAR* (1996).

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the position that says the civilian damage is unintended but proportional. If you're hoping for this effect, then you are hoping for the civilian damage. That then has become strategic bombing of the World War II sort, not an example of unintentional civilian damage that might then be proportional. That is a very different matter and, as far as I can see, an unacceptable way to proceed.