

Legal Perspective from the EUCOM Targeting Cell

Tony Montgomery

The Beginnings

During Operation Allied Force I was assigned to Headquarters, US European Command (EUCOM) as the Deputy Staff Judge Advocate and Chief, Operations Law. My responsibilities included being the legal member of the group that reviewed all fixed targets. In early July 1998, I attended one of the first meetings of the Kosovo Planning Group. This cross-functional group of officers was formed to evaluate the situation in Kosovo and make recommendations on possible courses of action (COAs). As the months passed, and a military confrontation seemed more likely, sets of targets were developed to support each of the various COAs. Target sets were refined, modified and discussed along with each COA.

The legal advisor's role/responsibility in this process is to offer well-reasoned advice, based on relevant data, in accordance with existing law and policy guidance. In the target development process, legal advisors help to ensure that a decision to attack a target or set of targets is based on known facts or reasonable assumptions. Usually, only after sifting through the facts do the assumptions come to light. There are always assumptions: about the weather, weapon effectiveness, absence or presence of people, impact on the enemy and others. Legal advisors identify and then voice concerns when the assumptions being made go beyond the reasonable person standard. This requires knowing the law, awareness of other restrictions, understanding of the military and political objectives, familiarity with the methods of achieving those

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objectives and, finally, the ability to synthesize and make a recommendation on a target or set of targets.

Actions at the time of the attack will be held to the standard of reasonableness; based on the evidence available at the time, factoring in the situation, time to attack and enemy actions. A commander must be reasonable in uncovering facts but clairvoyance is not a requirement. The legal advisor—if doing their job—will point out where in the rush for victory the line of reasonableness appears about to be crossed. Legal advisors provide recommendations on whether the proposed use of force abides by the law of war and do this by offering advice on both restraint and the right to use force.

Of course, the final decision on attacking a target is the subjective one of assessing the value of innocent human lives against the value of capturing/destroying a particular military objective. To assist a commander in making this subjective determination, a legal advisor—just like anyone involved—can provide an opinion and, a recommendation on a target or any other aspect of the operation. However, the final decision will always be the commander's. Legal advisors do not set the political or military objectives of a campaign, nor do they approve or disapprove targets.

Targeting—Some Basics

For those with no personal experience, it may come as a surprise to know that targeting is more than just looking at some “things” and deciding that today those will be destroyed. Objects are selected as targets based on campaign goals, intent, guidance, military objectives, and compliance with the law of war. Targeting is the process that identifies, detects, selects, and prioritizes targets in order to achieve a specific result based on the commander's objectives, guidance, and intent, then matches weapons systems to achieve that result, and finally assesses the results. Target selection is not at all haphazard—at least not at the planning level.

The current theory around which targets were developed during Operation Allied Force is known as “effects based targeting.” Effects based targeting theorizes that by attacking specific links, nodes, or objects the effect or combination of effects will achieve the desired objective. If the theory is correct, following this approach will conserve resources, reduce the overall risk to friendly forces and civilians and, ultimately, shorten the conflict. However, the increasing ability to routinely hit targets with great accuracy has not been matched by a commensurate understanding of exactly which targets must be hit to achieve specific outcomes. Establishing a causal link between targeting

some “thing” and achieving the desired ultimate political outcome is still the challenge.

I say “challenge” because once a decision to use force has been made, understanding the enemy well enough to accurately predict the enemy’s reaction to being bombed is key to the overall efficacy of effects based targeting. Ultimately the goal of Operation Allied Force was to coerce Milosevic to comply with the demands of NATO. Without Milosevic explicitly telling us why he yielded when he did, we simply do not know for sure. We know NATO did achieve its principal military objective of a Serbian withdrawal from Kosovo; however, we were not able to halt ethnic cleansing before it was essentially complete.

The Mechanics of the Operation Allied Force Targeting Process

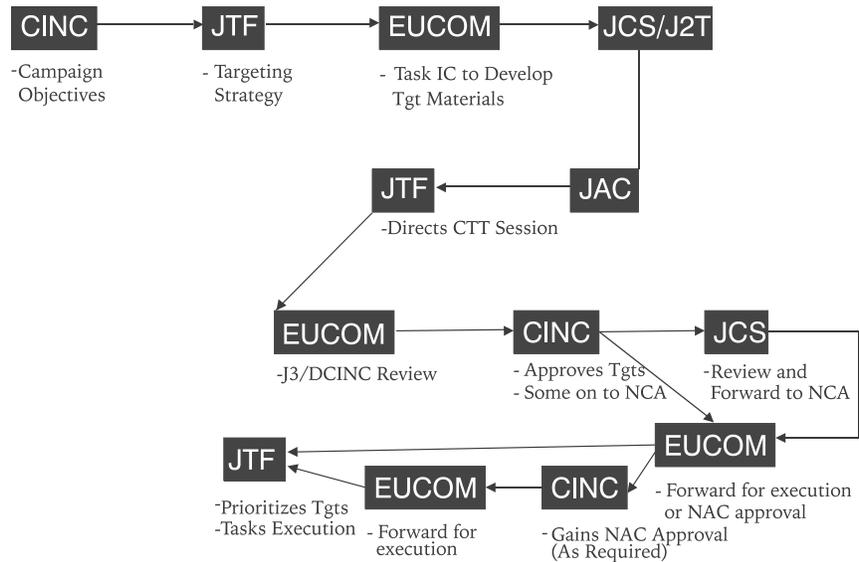


Figure 3.1

Recognizing the acronyms in Figure 3.1 is not as important as knowing that each fixed target basically followed the above route to approval. During Allied Force, those who had authorized the use of force very much wanted to limit the consequences and this process helped achieve that objective. Legal input was embedded throughout the process, with issues being addressed at the point where they were identified. However, this paper will focus on the efforts

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related to obtaining the approval of the commander of the United States European Command (EUCOM/CINC).

Once the air campaign began, a daily list of proposed new targets (or targets that had been previously reviewed, but additional information had been obtained on) was provided to those working within the targeting group. All target nominations were maintained on a spreadsheet that was electronically updated and available for review on a classified website. I would review the information on the new targets using this list.

Early and unfettered access to data is critical for an effective and efficient target review. During Operation Allied Force, target data was stored on and accessed through our classified computer system. Those with access to the system had the ability to have most of the data on any individual target available for review with just a few keystrokes and mouse clicks. This information consisted of imagery, descriptions of the facility and its functions, analysis on impact (military advantage anticipated) if destroyed, possible collateral damage concerns, and historical information on the target. There, literally at my fingertips, was all the data needed to make a good initial legal evaluation of the target.

The results of the legal reviews were inputted into the targeting process using two primary methods. A spreadsheet format that was provided to those working within the targeting group and updated as new targets were proposed. This spreadsheet contained the target identification information, collateral damage concerns, justification for attack, and a law of war determination or recommendation. This method ensured a permanent record for each target reviewed and provided an easy means of recalling inputs on each target.

The second method of input was through the collaborative targeting (CTT) sessions. These sessions were an outgrowth of Serbia's failure to acquiesce as quickly as some had hoped would happen. Continuing the conflict translated into a demand for more and better targets, and faster identification.

Increasing the pace of target development meant, in part, more people devoted to the task. Throwing more people into the mix initially created additional problems. Groups worked and coordinated target products in a serial fashion. One group would forward its work as e-mail attachments, message traffic, fax, and/or phone calls to others with responsibility for different portions of the process. The next group would make changes and forward (or, depending on the changes, return to the first group for reconsideration) to other groups involved in the process. This process continued until the lead group believed the proposed target was ready for decision-maker review. Decision-makers would receive an e-mail with the attached product information

and would either accept the product information or send it back for further development.

The disadvantages of this early process were information overload, uncertainty, and duplication of effort. Using a serial workflow extended the process timeline and provided more opportunities for confusion, ambiguities and errors. There was no consensus among the participants on the rationale for attacking targets. While no illegal targets were attacked during this period, others and myself were concerned that as the tempo increased our ability to provide the necessary oversight would continue to degrade.

The solution to this serial process was the development of the collaborative targeting sessions. The CTT sessions ensured all targeting organizations had a common understanding of objectives and guidance, built consensus, validated targeting assessments and integrated operational and legal concerns early into the targeting process. Using NetMeeting, a Microsoft product, on the classified internet system, the sessions “virtually” united representatives from commands throughout the theatre and the United States. Similar in concept and format to an internet “chat room” conducted over our classified computer system, these sessions brought all of the players into the same “virtual” room at the same time. All participants could see the proposed target on their computer monitor, could talk via headsets in real time to each other, and could ask questions and resolve issues. This format enabled everyone’s input—including legal—to get to all those involved at the same time. With all the relevant functional experts gathered together, questions could be asked and resolutions made in minutes rather than days. What might have taken a week before could be done in one night’s session.

Collaborative targeting sessions were generally conducted every night. During a CTT session, the group reviewed proposed targets to determine whether they could be forwarded for approval. For each target, discussion revolved around three issues: 1) the linkage to military effects—the key to gaining legal approval, 2) the collateral damage estimate, and 3) the unintended civilian casualty estimate. The one aspect of this process that consumed most of the time was the collateral damage estimate. Whether it was the nature of the conflict, an outgrowth of the ever increasing visibility of the results of military actions, over sensitivity by political authorities, the desire to make a decision based on some objective “number” (no matter how unscientifically reached or misunderstood) rather than a subjective “value,” or a combination of the above, the collateral damage estimate quickly became central to much of the targeting process. An integral part of this estimate was the Tier System.

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The Tier System was developed prior to Operation Allied Force as an effort to standardize the methodology to be used for estimating collateral damage. Though some aspects of this methodology are classified, the unclassified information provides a general understanding. The system currently has four tiers or levels. Each tier represents an ever-increasing level of analysis. Tier 1 consists of a 1500-foot circle drawn around the outer boundary of a proposed target. If there is no collateral damage concern within that circle, then there is no need to move on to the next tier. Tier 2 involves applying fragmentation data of a specific munition to the actual target. This results in a smaller circle being drawn around the target. If a collateral damage concern still exists, then Tier 3 is used. This involves taking a specific munition, applying its record of accuracy, along with the possibility of error, and determining the probable or possible extent of collateral damage. Finally, if the level of possible collateral damage is still viewed as unacceptable; and the target in question is deemed of sufficient value, then a Tier 4 analysis, involving computer simulation and modeling can be conducted.

Here is an illustrative analogy: Tier 1 is like looking at an object with the naked eye, Tier 2 is like using a hand held magnifying glass, Tier 3 is like using a microscope, while Tier 4 is like using a high-powered electron microscope. The tier system is a useful tool that provides a methodology for evaluating the structural collateral damage and possible effects upon any human within the target area. However, it does not provide the actual number of injuries. Also, just because a target is Tier 1 or Tier 4 does not tell the reviewer anything about the actual value of striking that target within the context of the ongoing campaign. Whether or not destroying a particular target is going to achieve the stated military or political objective is not a part of the tier system analysis.

A target may have zero possibility of collateral damage, but if it also has zero impact on the campaign, then bombing that target is wasting resources, putting aircrews and civilians in danger, and possibly violating the law of war. Still, it is very tempting to point to the tier level of some target and make a value judgment solely on those criteria.

Returning to the target approval process, once a collaborative targeting session approved a target, it was sent forward to the decision authority. Obtaining approval from both the appropriate authorities within the United States and NATO was required before any target could be attacked. (Note that as I was not involved in the NATO process, my discussions are focused exclusively on the US process.) Upon this final approval, the Joint Task Force (JTF) could add the target to the master list and schedule it for attack.

However, approval to strike meant much more than just satisfying the rather low thresholds set out by the law of war. The intense concern over the issue of collateral damage meant that targets were approved for strike only at a certain tier level. To achieve that level often meant that only a certain type of munition could be used or the target could only be attacked at certain times of the day. Thus, something as simple as a change in munition could raise the level of collateral damage above what had been approved and, thus, remove a target from the “approved for strike” category.

As a result, though not listed as an official step in the targeting process, reviewing the daily list of proposed strikes for the next two days became a part of the process. This review was simply a quality check—not because people would intentionally ignore orders, but because people enter the data into the computers, people hit the wrong keys and people make mistakes. A single wrong entry or a miscommunication to the personnel who actually had to execute the mission could mean an attack occurring that had not been approved. This is not saying that a law of war violation would occur, just that a target would be struck in a manner that our civilian authorities had not authorized.

In contrast to the hi-tech world of the collaborative targeting sessions, this review was a simple line-by-line comparison of the strike list to the approved target list and the legal review. Usually, this review found no discrepancies; however, on occasion targets listed as approved for attack had not yet been approved at the appropriate level or were being attacked with a munition that raised the possible collateral damage above that approved for the target. When such discrepancies were found, the target would be expedited through the approval process if possible, or the munition would be changed to bring the collateral damage estimate back down. Sometimes this necessitated canceling a strike. After this quality review, the proposed new list of targets would arrive and the process would begin for another day.

Conclusion

After giving this presentation to various audiences, I have found that there is generally surprise at how the targeting process worked. People are surprised to hear that such effort was devoted to each individual target. Of the nearly 2000 fixed targets that were reviewed, each received an independent evaluation within the requirements of the law of war. Is the target a military objective? What military value or advantage is gained from destroying this target? Are we being proportional? Are there any issues with distinction/discrimination?

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For those who disagree with the decisions to attack individual targets, I would simply suggest that the laws of war are certainly subject to different interpretations. It is easy to state that there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects. In reality, whether a specific set of results is “acceptable” is going to depend on the objectives being sought, as well as both the military and political risk those in charge are willing to take. Human rights activists and experienced combat commanders will often not agree on individual targeting decisions. The legal advisor must keep both views in mind and still be able to make a recommendation on a target without losing perspective.

Legal involvement in the targeting process was not limited to just my level. Just as each level of command has its own operators and intelligence officers, so too do they have their own legal advisor. The legal advisors were in constant contact discussing both the broad impact of changes in guidance, as well as specific issues on individual targets.

Operation Allied Force had its share of mistakes, errors, miscalculations and systems malfunctions. Those usually made the evening news and are the subject of continuing, intense discussion and condemnation. The literally thousands of decisions that were made in order to reduce casualties, to limit effects and to deflect the impact do not make the news. The result can be that those who are listening or watching come away with a very one-sided view of the events.

This, in my own view, was—and still is—our biggest miscalculation. Failing to explain before, during and after the fact the efforts that went into the bombing campaign allowed others to interpret it as they saw fit. It did not take being clairvoyant to know that no matter how “just” our cause (at least in the minds of some), our actions would be scrutinized. No one liked what was going on in Kosovo but no one wanted Serbia bombed to oblivion either. This simple truth apparently came as a surprise when the International Criminal Tribunal for the former Yugoslavia—in compliance with its charter—asked questions about the bombing.

Even when we make some feeble attempt at explaining our efforts, we do not provide the depth or detail necessary. Saying we will comply with the law of war is a conclusion that does not do justice to the efforts expended. Further, as a conclusion, there is nothing for people to evaluate and judge. What does the statement “we will comply with the law of war” actually mean? What steps are in place, what guidelines, what processes to ensure compliance?

The assumption that just because we think our cause is “just” that people are going to blindly accept everything we do is born out of arrogance. The

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price paid for that arrogance is a lack of trust, a disbelief, a lingering disquiet that may be kept at bay only so long as those being opposed can be viewed as the “bad” guy. If we care about our obligations under the law of war, then learning the lesson from Kosovo means that the next time we will do a better job of educating people about the process ahead of time. I am confident that this lesson has not been learned.