

Discussion

Modern Technology: Is There An Obligation to Use It?

Brian O'Donnell:¹

We had some discussion on the precision-guided munitions issue and I'd like to turn that to the targeting analysis issue for collateral damage purposes. Colonel Montgomery's presentation yesterday discussed the highly technical nature of some of the new technology that we've used to determine the blast patterns of buildings whether it's going to be walls falling in, walls falling out and so forth. Are we establishing in the panel's opinion—probably Hays Parks would be the best person to answer this—a new standard that if we don't take advantage of that new technology in future operations, then we have failed to utilize all reasonable means to minimize collateral damage?

W. Hays Parks:

I don't know enough about the formulas for determining how many civilians are likely to be inside an objective or how many collateral civilian casualties there may be. I will note that years ago I looked at the Top Secret original target package for North Vietnam. It was written in August of 1964 and gave an estimate that there were 2.7 persons living in each structure. I feel sorry for that .7 person whoever that may be. I'll let Tony Montgomery really respond more to that, but I feel that we know what munitions can do. The JDAM that we have is very well developed, quite sophisticated. So I feel fairly good about that side of it provided you have accurate delivery. I have not seen the formulations for how we determine that there's going to be X number of civilians in a particular structure or how likely it is we'll have X amount of collateral civilian casualties. I do think that we may be again creating expectations there

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that when these formula do not work, people will look at them in the most negative fashion.

Mike Newton:²

In fulfilling the obligation of the law to take all feasible measures, it's easy to jump to precision-guided munitions which I think is what the media and much of the public has done. But in point of fact, I think the targeteers and our Air Force colleagues would agree that what really is done is an assessment of how to weaponeer a target, how to attack it, when to attack it in the way most likely to minimize collateral damage. I would give you just one example—the MUP [Yugoslav Ministry of Internal Affairs police forces] police station in Jackavitza. If you attacked it on an east-west axis, there were four-story civilian apartment buildings on either side. They didn't do that. They attacked it with five hundred pound dumb bombs on a north-south access. There's a big bomb crater in the road in front of the building. The building is devastated. There's a big bomb crater in the parking lot behind the building. Beautiful weaponeering, and the civilians on either side weren't affected—the windows weren't even broken. I think that's an example of the kinds of things that US militaries do precisely to minimize collateral damage which lead into a question really for the panel as a whole.

Human Shields: Can Abuse of the Law of War Be a Force Multiplier?

Mike Newton:

There was press reporting on the attack on the RTS station where, when you look at what happened, the US military took steps to minimize collateral damage. It was press reporting that in fact Slobodan Milosevic had advance notice of the attack on the RTS station and the casualties that were caused were caused by the fact that he took people, rounded them up and locked them in the station—literally locked them into the station—as a propaganda vehicle to then exploit to the world media, which he did successfully. I mean the very fact that people perceive of that as an unlawful attack; the very fact that we're still discussing it is, I think, an indicator of Milosevic's success.

If you do go down the road of pursuing future legal developments, how do you envision using the law? I mean it's pretty clear to me that people are using the laws as a force multiplier to actually assist an unethical defendant. How

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would you guard against that because very clearly that's what we're seeing in the practicality on the ground—an unethical defender is using the law as a way to limit and constrain the attacker even when the attacker is making a huge effort to comply with the law? So how would you address that as a matter of law if you do try to come up with an additional protocol or further targeting restrictions?

W. Hays Parks:

I think the one thing that I would look at if we were rewriting additional Protocol I, I would make it a grave breach to use human shields. I think that's not in there. You could perhaps interpret that from using the grave breach provision of the Civilians' Convention if you're on occupied territory. But if you're not, I think the dilemma you have is that some nations felt then and feel now that if I can draft my men and women into my military and have them die in my defense, I can use my civilians the same way. If those are civilians of another country—as happened both I think in Yugoslavia and also happened in Iraq in 1990 when hostages were taken and used as human shields—then you have a grave breach of Article 147. I think, however, we still have the unresolved dilemma that existed at the time of negotiation of Additional Protocol I as to what extent can the leadership of an enemy nation use its own population as human shields.

John Murphy:

The only comment I'll make on the situation that's been posed here is that it illustrates the difficulty of getting the facts straight in an armed conflict. Part of the problem in the situation you pose is that Mr Milosevic was successful in getting a certain element of the press to believe the story and that if all the facts had come out, then there really would have been no valid charge that the United States forces had violated the law of armed conflict. In fact, quite the contrary would have been charged. But of course getting the facts straight during any crisis, certainly during armed conflict, continues to be a major—perhaps irresolvable—problem.

Yves Sandoz:

The problem is not so much a need to change the law but to implement it. There are too many violations; but it's not drafting new laws that will change this. We have to find better ways to react to violations of the law. That is the key issue.

Michael Bothe:

I must admit, I have not quite seen where this problem of human shields comes in. This is in violation of the laws of war certainly. In Yugoslavia, this is a subject for the jurisdiction of the ICTY. As it is a violation of the laws of war, it comes under the definition of the crimes which are subject to the jurisdiction of that Court under Article 3 of the Statute of the ICTY. Having said that, I entirely agree that much more attention should be paid to this current practice.

Do We Need An Additional Protocol For Humanitarian Intervention?

Christopher Greenwood:

This question is for Ove Bring regarding his proposal for drafting an additional protocol for humanitarian interventions. Which body of law would apply to States toward which the intervention is directed? In a Kosovo type of case if the coalition which is carrying out the intervention is governed by a new protocol as envisioned on interventions because they are acting in a humanitarian capacity and not self-defense, which body of law would apply to the country in which the intervention is being carried out? Will it be subject to the same body of rules about intervention because it is the intervenee, or will it be able to say that in its own view that it is acting in self-defense indeed for its own national survival and thus subject only to the more lenient standards that are the general rule in Protocol I?

Ove Bring:

First, I would like to say that if we could imagine an additional protocol III in this context, it needs to be a balanced protocol relating to what we've just talked about—the need to get rid of human shields as a way of defense during international conflicts. That issue has to be addressed in the same kind of protocol. But I'm not married to the idea that it must be a negotiated text. It could also be some common statement on how operations should be conducted. That kind of document would not compete with international humanitarian law proper. It would only be something in addition to it with very specific messages being signaled to the parties to that conflict.

I agree that you have a very good point there with regard to who is governed by what body of law. How would Yugoslavia in this case consider the situation in legal terms? They would probably look upon this as a right of self-defense. Although this protocol I'm talking about is not relating to aggression or self-defense for humanitarian intervention or the opposite, they would

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certainly find themselves having the right to conduct warfare under the normal standards of self-defense. I agree with you that that is a problem that has to be looked into further.

If you have a kind of new protocol trying to limit the situation to a certain kind of intervention, that will presume that the armed conflict will stay within the confines of the scope of application that has been drafted in that protocol. If the Yugoslav authorities start to upgrade and escalate the fighting under the principle of self-defense, then that scope of application will fall. You will not find yourself within those parameters any more. You will go back to the ordinary law of armed conflict.

John Murphy:

The briefest of comments regarding this interesting proposal. I have problems with it just as others have expressed problems. One thing I think hasn't been noticed is it seems to be that in the case of where the motivation for the intervention is primarily humanitarian, to change the rules to make it more difficult for there to be military efficiency would obstruct bringing the humanitarian violations to an end quickly. That it seems to me would be dysfunctional and unfortunate. It does seem to me that Professor Bring's proposal brings with it a little bit of the just war concept with all of the difficulties that raises.

Ove Bring:

There have been a lot of points of view put forward with regard to the proposed additional protocol III. Perhaps that suggestion should be looked upon in perspective. Probably the main focus on my paper was the definition of military objectives. At the end of the paper, I wanted to address the ethical lessons of the Kosovo conflicts since that is part of our agenda here. During such an assessment of the ethical dimension of the Kosovo conflict, I think it's appropriate to bring up the idea that is already floating around in the international community about such an additional protocol III. I have taken the many reservations and critical points with regard to it—it might be totally unrealistic and it might be counterproductive in certain respects. Still, I think it addresses the matter of improper balance with regard to the rights of attackers against the hazards that the civilians on the ground are experiencing. But in order to address that problem, if you admit it is a problem in these situations, we don't have to be stuck to a certain legal solution. Additional protocol III that we've been discussing would be a treaty. Another way would be, as I said, perhaps to have a code of conduct which perhaps could get rid of some of the more

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technical devaluating effects that a treaty text would have on international humanitarian law as a whole. Or one could imagine having the Secretary-General of the United Nations issue another bulletin on observance by UN forces on international humanitarian law principles in armed conflict. That kind of bulletin could refer exactly to these enforcement operations and it could be a sort of a guideline for other kinds of similar interventions. That was in the general perspective.

Reciprocity in War and the Law of War

Leslie Green:

In any future conflict, particularly one with a coalition character, we've got to carry the public with us. From this point of view I want to raise a question. I'm thinking of the issue of these "clever," or, to use Mike Schmitt's term, "brilliant" bombs. We've got them. By way of contrast, if we are involved in a conflict against an enemy that doesn't have them, are we under an obligation to use only deliberative resources that are available to him? This is reciprocity *par excellence*! It's merely a modern application of the old Asian idea that elephants should only be used against elephants and men against men. Where do we stand from our propaganda point of view in persuading the public when we have the means to wipe them out, but they only have the means to kick us?

W. Hays Parks:

Leslie, I don't recall where that was. I've seen various versions of that. One of them of course was the proposal during the negotiation of Additional Protocol I that was made by Togo, which argued that if two nations were in a war and one of them had an air force and the other did not, the one that had the air force could not use it—nice try!

There's a rather famous quote by Churchill about a disarmament conference where the lion wanted another animal to give up its teeth. And the bear said we all just ought to hug each other—this kind of thing. So, there's a great deal of that. I think the dilemma we have is that unfortunately our opponents do not always follow our doctrine. They don't play to our strong suit. Mr Milosevic would have loved to have neutralized our airpower capabilities to force us into a ground campaign. That's the dilemma you have. However we feel about the obligation to use precision-guided munitions in every case; I think all of us would agree that we are not going to say we'll not use them because we do want to hold down the collateral casualties as much as we can.

Yves Sandoz:

I have two points. First, the question of determining how a poor country, without important military means, could defend itself without violating IHL was at the heart of negotiations which took place during the 1974–1977 Diplomatic Conference. The result of those negotiations was the introduction in Additional Protocol I of 1977 of rules accepting guerilla warfare as a legitimate means of warfare. The principles remain the same, as I mentioned before, but they have to be implemented in relation to the means available. Quite clearly, if the fighting is unbalanced, there is a great risk, as I think John Murphy mentioned too, that respect for the law will decrease and that we will enter into an era of terrorist attacks.

The second point is the following: the NATO action in Kosovo will probably remain a special case. I do not think we will have many cases in which this emergency humanitarian intervention doctrine will be applied. Basically, it is an intervention to ensure the application of the law in stopping a violation of it. This type of intervention is unbalanced by nature. There is no comparison between NATO and Yugoslavian forces. But the fundamental questions for the credibility of such interventions in world public opinion are clarity and impartiality. Clarity in setting forth the threshold over which a State may not step without encountering such enforcement actions and establishing who has the right to decide those actions. And impartiality in taking measures corresponding only to the gravity of the situation and not to the economic or political interest of those deciding and undertaking the action.

John Norton Moore:

When we look at imbalance, we need, for example, to talk about the imbalance of the Iraq Army invading Kuwait. If we talk about the imbalance, talk about the imbalance of the massive human rights violations in Bosnia with 200,000 killed in disregard of the law of war. If we talk about the imbalance, we might talk about the imbalance of a regular army police force directed toward killing civilians in Kosovo in a massive way that we're trying to stop. It seems to me that the real key is to look at what the goals of the democracies are in trying to stop democide and genocide, trying to stop aggressive war. The reality is we want to win those as rapidly as we possibly can at the lowest cost to all involved.

Michael Bothe:

The question of differentiated or equal obligations has been with us all the time because although legally speaking, parties to a conflict are equal, militarily

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speaking they never are. We've had that in different prospects and different respects. For instance the question whether poor countries can afford to provide adequate standards of treatment for prisoners of war if they cannot nourish their own armies. That is one version of that. There is a tension between reciprocity and the fundamental principle of no reciprocity which is also inherent in the laws of war. You do not mete out bad treatment to the other guy as a reaction to bad treatment if you can do better. I think this is all very well covered by Article 57 of Protocol I which says in relation to the attacks that all feasible precautions have to be taken in order to minimize civilian casualties. Now what is feasible for one party is not necessarily feasible for the other party, but this does not lower the standard for the party for which this is feasible.

Target Priority and Collateral Damage

Michael Glennon:

Assume that a list of lawfully vetted targets is assembled. Assume further that some of the targets on the list are known to carry a substantially greater risk of collateral damage and civilian deaths. Can those targets be assigned a higher priority? Can they be moved up on the list and hit sooner rather than later because the belief is the war will therefore be ended sooner saving ultimately a greater number of military and civilian lives.

Yves Sandoz:

If I understood the question, you have a reply in Article 57(3) of Protocol I, which states that "when a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects." I think that answers your question.

"No Body Bags" War and the Value of Human Lives

Adam Roberts:

I want to raise the question of whether this really was a "no body bags" war as Ove Bring stated it in his paper. Of course it was in the sense that we know that allied forces did not suffer any combat casualties, but whether it was a clear policy from the beginning that it was a "no body bags" war is a much more debatable proposition. Those embarking on the decision to engage in war knew that they were taking a risk with their own servicemen's lives. I think I'm right in recalling that that was stated in some of the speeches at the

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beginning of the war including I think in President Clinton's. So one has to be very careful before one adopts the *ex post facto* wisdom which assumes that this was clearly understood to be a "no body bag" war at the time. I do not think that it was. On the other hand, the desire to protect the servicemen and women of allied countries was in my view entirely understandable. Again, I don't think it's self-evident, and I'd like the opinions of the panel on this, but just because there was a desire to protect their lives doesn't mean they were being viewed superior in value to the lives of others. And it's far from self-evident that keeping airmen in a position of relative safety increases the risk to the population below. It is possible that in a position of relative safety aircrews could make decisions that were calm and informed as distinct from being made in haste. I come from a country with a tradition of low-level bombing and the risks associated with that low-level bombing are well known. They include risks to those on the ground as well as those performing it.

Ove Bring:

Professor Barry Strauss asked me if you have this kind of solution, what will be the safety of the soldiers, the safety of the Kosovars? Will there be a prolongation of the conflict, etcetera? Well, these are all issues that need to be discussed from this ethical perspective. With regard to the safety of soldiers, I quoted Tony Rogers who said that under international humanitarian law, we have to realize that certain risks will have to be taken. I'm arguing here for a solution that would increase the risk to soldiers and pilots. That is clear. It's a political problem of course for those States as to whether they will or not embark in the beginning on a "no body bags" policy or something close to that. They will have terrific problems in democratic States to accept these increased risks for pilots and soldiers. Still, I think what we need in this international community of today is more political leadership—more political willingness to take risks in order to secure common values of the international community. So that is something which I would like to see more of and I think that many individuals would be prepared to take risks personally in order to achieve things like saving people from genocide or whatever. The safety of the Kosovars in this kind of situation could have been much better with my suggestion, but of course the Kosovo conflict as Yves Sandoz said was unique. It probably will not repeat itself again. I mean there was almost a gigantic humanitarian catastrophe with regard to the refugees in the beginning due to the fact that there were no ground troops. My argument goes in the direction that political leadership has to consider ground troops in situations like this. That could actually shorten the conflict and it could give much better protection. It

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would signal something to the Milosevic regime in this case that would deter them from going further on the track of ethnic cleansing. All these are possibilities.

Chuck Kogan:

Listening to the discussions this morning and particularly the remarks of Mr. Strauss and Mr. Parks, I'd like to make the following observation. The Kosovo war was fought on the basis that coalition lives are more valuable than lives on the other side. This is what war is all about.

W. Hays Parks:

I have to disagree with that. The Kosovo campaign was conducted to save lives. Although it may have cost 500, it probably saved many thousands more than that. I think that's something that's been neglected in these discussions.

Does Kosovo Provide Lessons For The Future?

Barry Strauss:

I'd like to return to my point that the lessons of this war must be very limited because Serbia's inability to respond massively to NATO attacks leaves us with one dimension unknown. We don't know how NATO would respond if it was provoked in ways that Serbia couldn't provoke it. So from the point of view of what we've learned for the future, the answer is we don't know about that yet.

Cluster Bombs and Long-Term Collateral Damage

Adam Roberts:

I just wanted to raise an issue about this discussion and the focus here on collateral damage and the way in which the discussion has gone. One dimension of damage got largely but not entirely excluded: that is the long-term damage that may flow from use of certain types of weapons and may have an impact long after the conflict. Ove Bring mentioned in his paper the effect of cluster bombs. The principal problem with regard to cluster bombs is not the immediate collateral damage, but rather the long-term effect. That is one issue that I think does arise very clearly from the Kosovo war. So there are other aspects to unintended damage besides the immediate collateral damage that certainly require attention.

W. Hays Parks:

The answer to the question of cluster munitions is threefold: it's historical, it's technical, and it's ongoing diplomatic initiatives. Unexploded ordnance—what we are calling now, explosive remnants of war—are of course part of everyone's history. I think the French have been clearing something like a half million rounds of unexploded ordnance from their own territory for the last fifty some odd years. We recognized it more after Kosovo for the very simple reason that many of the people who lived in Kosovo were allowed to go back to their homes before the areas were cleared thus placing themselves at risk.

I just finished reading Anthony Beevor's book on the battle of Stalingrad.³ Even in the dead of winter when that battle was over, the Soviet Army did not let the civilians return to their homes until the unexploded ordnance was cleared. That of course is a responsibility of a sovereign nation to do that. We have the gap in Kosovo because there was no sovereign there to prevent people from returning. The United Nations and others, however, have noted the activities of the United States and a number of other nations in going in to clear not only antipersonnel landmines but to assist in clearance of all unexploded ordnance, and they've been praised for that effort.

Lastly, the diplomatic part. Last September the International Committee of the Red Cross hosted a meeting in Leone that was chaired by Yves Sandoz. While its original focus was on cluster munitions, the issue eventually evolved to explosive remnants of war. We are in the middle of the second review conference to the UN Conventional Weapons Convention now where this issue is under consideration. One of the things that we're looking at—and it will be a long-term solution—is requiring some sort of a self-destruct or self-neutralization device on all ordnance. That could be very expensive, but in the long run it will save lives and save money. It costs roughly \$500 to clear one piece of unexploded ordnance whereas something like this would be less than \$50 a round. We're looking at it very seriously. We have not only a humanitarian and technological interest in doing it, but also a military interest. No commanding officer likes to have his own troops advance through their own unexploded ordnance. So this may be one of those places where all of this will come together. It may take some time because obviously some people will say we can't afford that. It may take twenty years to do it. It's an issue being focused on. It is certainly not related just to cluster munitions.

3. ANTHONY BEEVOR, *STALINGRAD: THE FATEFUL SIEGE, 1942–1943*, at 407 (1998).

The Principle of Proportionality

John Murphy:

I want to clarify a point with respect to Yves Sandoz' comments. I'm an agnostic as to the debate that you have with Hays Parks on whether there is or is not a rule of customary international law called the rule of proportionality. I'll leave it up to you folks to continue to do battle on that. I am similarly an agnostic because I think it's really beyond my technical competence to get into the question of whether Protocol I strikes an improper balance between the obligations of the attackers and the obligations of the defenders. I did note that in my paper. I will say this in respect to the rule of proportionality. It does seem to me that it is applied, whatever its status, in terms of a question of whether the collateral damage is excessive compared to the military advantage. I think it is a very difficult rule to interpret and apply and I think that's been brought out in the course of our discussions not only this morning but at other times and no doubt it will arise again.

Henry Shue:

I would like to say a bit more about the role that the considerations of proportionality play in target selection. A lot of us were fairly skeptical about how important proportionality can be because it is so vague. But you all say that proportionality absolutely did come into consideration. There's kind of two ways it can work. One, effective proportionality can be that you decide that rather than hitting a particular target the way you would like to, you hit it some other way—at night instead of in the day, or with a precision weapon instead of a non-precise one—but you still go ahead and hit it. Were there very many cases in which you said of a dual-purpose target, "Yes, it has military value, but its civilian value is so great that we shouldn't hit it at all with consideration to proportionality?" Were any targets ever totally ruled out rather than just hit some other way? It sounds as if for example the electrical grid was treated that way until the end of the bombing campaign.

Judith Miller:

Proportionality was key in respect to any targeting decision that I am aware of in Kosovo or in any other context in which military force was used by the United States in conjunction with its allies while I was at DoD. And while it may sound vague, I think we all have very much in mind that it is a principle that needs to be applied. You can't say, "Well, there are X human lives at stake or civilians versus an enormous military value." There's no way to boil

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that down to a formula. But our intelligence people, the people who put together target folders and background information, and the modeling that we've done have allowed us to actually think in specifics not just generalities. We knew that there were housing developments close to something that we cared about attacking and there were a number of occasions where targets were rejected.

I'm confident there were a number of targets rejected before they ever got to my level because we had so many other good lawyers and target people working in the field, which is the first line of the appraisal. But there were some targets that came through from the field that we asked questions about, looked at, and ultimately concluded that they were not appropriate targets to take on. So while it's not a science, I think certainly everyone I worked with on the operational side and the Joint Staff, in the policy world of DoD, and the legal community felt that that was the guiding principle of really paramount importance.

Richard Sorenson:

We closely scrutinized each and every target. That of course started out fundamentally with military necessity, but then would go down to the number of military casualties that would happen and the number of civilians that potentially would die. We were really looking at "effects based targeting." We're not looking at simply blowing up a particular building or whatever. If we can achieve the desired effect with some other means that minimizes the unnecessary suffering, then that was also considered. So if we could go with alternative means to achieve the same effect that's required by military necessity. And that was considered throughout the campaign. The bottom line is we had a lot of data.

Flying At 15,000 Feet

Susan Fink:⁴

As a military pilot who's been in academia for about a year now, I've been struck by the number of times I've heard that one of the things that we need to really think about in humanitarian intervention is how we can put our pilots at 15,000 feet and knowingly kill hundreds of people when the reason for this is humanitarian intervention, not just a regular international war, but

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humanitarian in purpose. When I dig a little deeper, I find that the argument is two-fold. First, it's a moral and ethical one that must be taken into account when decision makers at the highest level entertain a thought of humanitarian intervention. And then deeper it is that the altitude at which pilots fly actually increases the number of civilians killed. Pressing this a little further, there is some ambiguity about whether there were precision-guided munitions available or whether we'd run out of those at this point and were reverting to other weapons, etcetera. But my question is this—it's probably more appropriate to ask this of a moral and ethical panel—but I would like to ask the legal experts whether you entertain this from a legal standpoint. Secondly, what advice would you give to those who live in the land of the doable—those who live in the land of the political who have to make these decisions—what advice you would give them to either rebut, entertain or take this into account when making a decision to go in to humanitarian intervention?

Richard Sorenson:

Let me start out by saying that I don't think there are facts to support that in reality in particular with Kosovo. The problems with hitting the convoys from fifteen thousand feet occurred when Milosevic intentionally intermingled combatants with noncombatants—it was difficult to discriminate. I think there were relatively few civilians killed as a result of those strikes from fifteen thousand. And in fact, the pilots did go down to six thousand. They had binoculars. They were in fact complying with their obligations under the law of armed conflict to discriminate between combatants and noncombatants. So I don't think the facts are out there. It makes great newspaper copy, sells newspapers, airtime and interviews, but the facts just simply aren't there to suggest that by keeping our pilots at 15,000 feet to protect them we were engaging in basically carpet bombing. I understand what carpet bombing is and that did not happen. The A-10 pilots did not pick off their general-purpose bombs anywhere. They had specific targets that they had spotted and were releasing their ordnance against those military targets that they had identified. Sometimes there was misidentification and that goes with the fog of war. The military commanders that are in command of military forces, and the pilots that are flying planes and releasing ordnance, use their best military judgment at the time, assessing all the facts, knowing that they cannot intentionally target civilians due to the training they have received on the law of armed conflict. Plus targeting reviews happened at all levels, including during the operations going after field forces in Kosovo proper, to ensure we were distinguishing between military and civilian targets.