

## Commentary

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I would first like to thank Professors Murphy and Bring for such excellent papers, and the organizers for having invited me. This is an act of faith on their part because I am neither a warrior nor a lawyer. I know that most of you in this room fit one or the other if not both of these categories, so I'll direct my remarks towards you. In particular, I will try to avail myself with the Socratic method or as some would put it the 'Jeopardy approach.' That is, I'll pose my comment in the form of questions.

Let me point out first that I am a historian. And as a historian, it's my duty to tell you that I represent a guild that has a fundamental skepticism about our enterprise here because historians are famously cautious about the possibility of learning from history. Historians would ask can we learn any lessons from the Kosovo conflict? Some of you will know the anecdote about the historian who was asked, 'What do you think of the French Revolution?' And he replied, 'It's too soon to tell.' Well, it may or may not be too soon to tell about Kosovo, but we need to ask about the Kosovo conflict—what can we learn from it?

We begin by asking what can we learn about the role of lawyers? Professor Moore has told us that lawyers played a unique role in the Kosovo conflict in the history of modern warfare or indeed the history of warfare, in the role they played in advising on the tactics of this conflict. We need to ask is Kosovo the wave of the future? Will lawyers play a similar role in future wars? Or was Kosovo unique? Was it an abrogation? To what extent do the unique characteristics of the Kosovo warfare shape what happened there? In particular let me pose a question—what would have happened during the Kosovo war if groups of Serb terrorists had bombed hospitals in NATO countries? Would

this have affected NATO's tactics in this war? Would lawyers have been able to convince commanders and indeed to convince politicians to be similarly restrained in their response in Serbia? More generally—and this is my second question—when we think about the Kosovo war, should we think of it as fundamentally a humanitarian intervention, or should we think of it as a political conflict whose aim was to stabilize NATO's volatile southeastern flank? I think we have to ask this question when we look more broadly at the strategy of the Kosovo conflict.

Some of the questions and comments that arose yesterday I think would cause us to ask whether NATO's strategy in Kosovo was strictly military or was it rather following a political and psychological strategy? Did NATO plan to win the war by destroying Serbia's military potential for action in Kosovo, or was NATO rather aiming at delivering a message to Mr Milosevic and other members of the Serb elite that if the war were to continue, that eventually NATO would flatten the economic infrastructure of Serbia? I think we need to ask that as a factual question. We also need to ask it as an ethical question. What about the ethics of NATO's strategy in this war? In particular we need to ask it about the question of dual-use targets. NATO did target a number of dual-use facilities that had military use and so was legally proper to target, but they also were very important for the Serb economy. The question is to what extent were they targeted because of their military use? To what extent were they targeted because of their economic and therefore their political use? If this targeting was legal, was it also ethical?

To turn the question around, to ask it in a somewhat different way, we've heard that the strategy in this war was not to strike a quick devastating knock-out blow, but rather it was a strategy of slow escalation. The war lasted seventy-eight days when it could possibly have ended much sooner. We need to ask the ethics of this strategy and in particular how many additional Kosovars suffered or died as a result of the prolongation of the war? How would we balance that number against the number of civilians who were perhaps spared in Serbia because of the particular strategy that NATO followed?

Now let's turn from strategy to tactics and look more specifically at collateral damage. On the subject of collateral damage, let me be forgiven for just stating the obvious. The term collateral damage is a euphemism—if not indeed Orwellian. We're asking of course how many civilian casualties, how many deaths, how many injuries, how much civilian suffering is permitted in the conduct of war? The figure of five hundred civilian deaths in Serbia is before us. We need to ask the question, was this an excessive number of deaths in this conflict? Or does it reflect restraint? Does it reflect admirable restraint?

From this we need to ask about NATO commanders. In their behavior in this war were there significant deviations from the rules of proportionality and feasible precautions? Was there to a significant degree too liberal an interpretation of what a military objective was in Serbia and Kosovo?

From this we need to go to a factual question. It's one that's been raised before, but I think we need to raise it again and ask for clarification from the experts. It's a factual question regarding high-altitude bombing. That is, by bombing at 15,000 feet rather than going lower as a general rule, did NATO increase the possibility of civilian casualties? Did it increase the number of civilian casualties? Depending on what our answer to that question is, I think we come up with a serious ethical question. That is, how do we weigh in the balance concern for the safety of soldiers' lives as opposed to concern for civilian lives? To ask the question in a different way, just what risks can we ethically ask soldiers to undertake? Can we for example ask soldiers to expose themselves to hostile fire from other soldiers in order to minimize the number of civilian casualties? Is that a fair and ethical thing for us to demand? To go a step further, is it a democratic thing for us to demand?

Now I raise the question of whether it's a democratic thing to demand because the question of chivalry has come up—the question of chivalry and military honor. To my ears, these strike me as rather unusual terms to hear in talking about modern warfare. When I hear about chivalry and military honor, I have to ask myself whether these are appropriate terms or whether they are not instead aristocratic hangovers from an age of gentlemen warriors. We can certainly ask soldiers never to deliberately target civilians. We certainly must ask soldiers never to deliberately target civilians. We must ask commanders to follow the laws of armed conflict in choosing their targets. But again, can we ask soldiers to knowingly risk their own lives in order to minimize civilian casualties?

Moving on from this, I wanted to ask some questions about Professor Bring's proposal for defining military objectives more tightly in future multinational humanitarian interventions. In particular I wanted to ask the following questions. What would the effect of his proposal be on the safety of soldiers following this much more restricted definition of military objectives? What would its effect have been in the Kosovo campaign? What would its effect have been on Kosovars in prolonging the campaign? And what would its effect have been on enemy power?

Turning to Professor Murphy's discussion of the role of precision-guided munitions in urban and highly populated areas, it may indeed be the case that we ought not to employ any black letter rule in demanding that precision-

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guided munitions be used. But would it not make sense to say that depending upon feasibility—the feasibility of using them and upon the discretion of the commanders—that indeed precision-guided munitions should be used in urban and highly populated areas whenever possible. So not a black letter rule, but something that should be striven for in the interest of minimizing civilian casualties. A follow-up question on that for the experts would be to what extent would finances make this possible or impossible?

The question of finances brings me to my final question. That is one about the differences of the different kinds of States that fight war, the differences in ethics might be expected between technologically poor States and technologically rich and sophisticated States. In particular, should we expect democratic countries to fight their wars by democratic principles? Should we expect democratic countries particularly when they are engaging in humanitarian interventions to fight wars by humanitarian principles? Or rather, should we say that it's simply impossible to expect that of democratic countries and unfair to expect that of democratic countries? Should we say that war is not a humanitarian business and that the proper role of democratic principles in the conduct of war is making democratic political decisions about the nature of war, the aims of war, the purpose of war and having made those decisions to fight war cleanly and fairly and according to the laws of armed conflict, but fighting the war using all force at a country's disposal in order to win the war as quickly as possible, to achieve a political goal that is in and of itself humanitarian and humane? I'll leave that as my final question. I'm sure the discussion will take it further.