

Some Legal (And A Few Ethical) Dimensions Of The Collateral Damage Resulting From NATO's Kosovo Campaign

John F. Murphy

Introduction

Any analysis of the legal dimensions of NATO's Kosovo campaign should first distinguish between the *jus ad bellum*, the law of resort to the use of armed force, and the *jus in bello*, the law regulating the way the armed force is employed, of that conflict. To be sure, there is no "Chinese wall" separating the *jus ad bellum* and *jus in bello* aspects of the Kosovo campaign. For example, assuming *arguendo*, as some have argued,¹ that international law recognizes a doctrine of humanitarian intervention, and this doctrine serves as a justification for NATO's resort to armed force in the Kosovo campaign, it is arguable that the military action undertaken must be designed to prevent the humanitarian catastrophe unfolding.² Nonetheless, the focus of this paper is not the effectiveness, or lack thereof, of the bombing to prevent or minimize Serbian "ethnic cleansing" or other war crimes in Kosovo. Rather, it is on the collateral damage to civilians caused by this bombing.

According to the organizers of this colloquium, this panel is to address in particular the following issues:

* The author would like to thank Kevin Jarboe, a graduate of Villanova University School of Law and Andrew Kenis, a third year student at the Law School, for research and assistance on this paper.

1. See, e.g., Michael Glennon, *The New Interventionism: The Search for a Just International Law*, 78 FOREIGN AFFAIRS 2 (May-June 1999).

2. I have so argued in my chapter on *Kosovo Agonistes*, in *TRILATERAL PERSPECTIVES ON INTERNATIONAL LEGAL ISSUES* (Chi Carmody, Yuji Iwasawa, and Sylvia Rhodes eds., 2002).

Legal and Ethical Dimensions of Collateral Damage

- (1) Does the use of precision-guided munitions (so-called “smart bombs”) lead to a duty to use those types of weapons exclusively in future conflicts?
- (2) If so, does it mean that two adversaries may be subjected to differing legal and ethical regimes, dependent on their relative level of technological sophistication?
- (3) What degree of injury and damage to civilians can be regarded as excessive, and consequently disproportionate, as compared to the military advantage gained?
- (4) What are the legal and ethical implications of NATO’s apparent efforts to minimize its own combat casualties through high-altitude bombing and avoidance of a ground campaign, and did this greatly increase the risk of civilian casualties?

Each of these issues, along with issues related thereto, will be addressed seriatim in this paper.

Precision-Guided Munitions and International Law

Before turning to the issue of whether international law does or should require the use of precision-guided munitions in future conflicts, we need to define a few terms. The US Department of Defense defines precision-guided munitions as “a weapon that uses a seeker to detect electromagnetic energy reflected from a target or reference point, and through processing, provides guidance commands to a control system that guides the weapon to the target.”³ Like Stuart Belt, in his extensive treatment of the subject,⁴ this paper does not discuss the use of air-to-air missiles, because they normally do not produce collateral damage. Rather, the focus of the paper is on air-to-ground munitions. Again like Belt, this paper does not distinguish between smart, accurate, or precision weapons but instead groups them together as precision-guided weapons. It does distinguish the precision-guided weapon from an

3. Precision Weapons, available at <http://www.dtic.mil/doctrine/jel/doddict/data/p/04864.html>, last visited Dec. 27, 1999, and quoted in Stuart Belt, *Missiles Over Kosovo: Emergence, Lex Lata, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas*, 47 NAVAL LAW REVIEW 115, 118 (2000).

4. Belt, *supra* note 3, at 118.

unguided weapon by noting that the former has some type of in-flight guidance system. This in-flight guidance system may or may not be powered. The so-called Paveway series of weapons, for example, are laser guided.⁵ For a detailed discussion of various kinds of precision-guided munitions, the reader should consult Belt's article.

In his article, Belt notes that US military operations or US-led military operations have seen a dramatic increase in the use of precision-guided munitions from the "opening salvo of Operation Desert Storm" to the "closing shot of Kosovo"⁶—a five-fold increase to be precise. Between the Desert Storm and Kosovo campaigns, Belt points out, there was Operation Desert Fox, an intensive four-day US bombing campaign against Iraq, with the stated goal "to degrade Saddam's capacity to develop and deliver weapons of mass destruction, and to degrade his ability to threaten his neighbors."⁷ According to Belt, Operation Desert Fox offered the US military an opportunity to "battle-test some new smart weapons and reaffirm lessons learned in Desert Storm."⁸ Belt quotes David Isby, writing for Jane's Missiles and Rockets, who reportedly stated: "Operation Desert Fox was the largest air offensive to be waged largely with guided weapons rather than 'dumb' munitions that [had] predominated in all previous major offensive uses of air power, including the 1991 Gulf War."⁹

As elaborately detailed by Belt, there seems to be no question that the United States has made increasingly heavy use of precision-guided munitions in recent military operations. Whether it now has an obligation under international law to do so in future conflicts is the issue to which we now turn.

Does International Law Now Require the Use of Precision-Guided Munitions in Future Conflicts?

It is clear that there is no requirement under international law that precision-guided munitions be used exclusively in future conflicts. A strong advocate of the use of precision-guided munitions, Belt admits that they have their limitations:

5. *Id.* at 118–19.

6. *Id.* at 126.

7. Statement by President William Clinton, quoted by Richard Newman, in *Bombs over Baghdad*, U.S. NEWS AND WORLD REPORT, Dec. 28, 1998, at 32, *cited in id.* at 131 n.108.

8. Belt, *supra* note 3, at 131.

9. David Isby, *Cruise Missiles Flew Half the Desert Fox Strike Missions*, JANE'S MISSILES AND ROCKETS (1999), *cited in id.* at 132 n.110.

Legal and Ethical Dimensions of Collateral Damage

The function of the precision-guided weapon, however, has its limitations. There are limitations on its efficacy and missions that are clearly better suited for mass bombing. Large maneuvering units in the field are excellent targets for unguided, gravity bombs (carpet bombing) and much less so for precision-guided weapons. Not only does the carpet-bombing produce favorable psychological impact, but also the number of precision-guided weapons required to hit the large number of open field targets would be prohibitively expensive. This idea was confirmed by W. Hays Parks, who concluded that B-52s were the right platform to use because they were able to drop a large number of bombs into an area where no protected objects existed and where Iraqi troops were entrenched in the desert and difficult to attack. In essence, the use of precision-guided weapons and that of unguided, en masse bombs have a complementary role. Precision-guided weapons are particularly useful against strategic targets that often times have a locus near heavily populated civilian areas whereas en masse bombing is useful for targets where the goal is widespread damage and the demoralization of troops. This was the practice during Operation Desert Storm.¹⁰

Accordingly, the issue should be restated as whether there is an obligation under international law to use precision-guided munitions in attacks on urban areas. Belt is of the opinion that there is.

At the risk of oversimplification, one may say that treaties and norms of customary international law are the primary sources of international law, as reflected in the Statute of the International Court of Justice.¹¹ Both sources have played a major role in the law of armed conflict. We begin with norms of customary international law.

10. *Id.* at 130.

11. Article 38(1) of the Statute of the International Court of Justice, 59 Stat. 1055, T.S. 993, 3 Bevans 1179, provides:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) subject to provisions of article 59 [which states that “The decision of the Court has no binding force except between the parties and in respect of that particular case”], judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

A. Customary International Law

Parenthetically, it should be noted that the basic concept of customary international law has recently come under attack, and one commentator has gone so far as to call for its elimination as a source of international law.¹² Be that as it may, the law of armed conflict has long recognized the importance of customary international law through the so-called “Martens Clause,” which appears in the preambles to both the 1899 and 1907 Hague Conventions on Laws and Customs of War on Land, as well as in Article 1(2) of the 1977 Protocol I Additional to the Geneva Conventions of 12 August 1949, and which provides in pertinent part: “In cases not included in the Regulations . . . the inhabitants and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”¹³ The practical significance of the Martens Clause is that “it contains a built-in mechanism to fill in the lacunae existing in the law of war at any particular time.”¹⁴ For the United States, the Martens Clause may take on added importance at the present time, since it is not a party to either of the 1977 Additional Protocols.

The classic description of the process of creating customary international law is that of Manley O. Hudson, a Judge on the International Court of Justice and an eminent authority on international law. According to Hudson, the essential elements of the customary international law process include:

1. concordant practice by a number of States with reference to a type of situation falling within the domain of international relations;
2. continuation or repetition of the practice over a considerable period of time;
3. conception that the practice is required by, or consistent with, prevailing international law; and
4. general acquiescence in the practice by other States.¹⁵

12. J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VIRGINIA JOURNAL OF INTERNATIONAL LAW 449 (2000).

13. For a brief discussion of the Martens Clause, see Howard Levie, *The Laws of War and Neutrality*, in NATIONAL SECURITY LAW 307 (John Moore, Frederick Tipson, and Robert Turner eds., 1990).

14. EDWARD KWAKWA, THE INTERNATIONAL LAW OF ARMED CONFLICT: PERSONAL AND MATERIAL FIELDS OF APPLICATION 12 (1992).

15. Manley Hudson, [1950] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 26, U.N. Doc. A/CN.4/Ser.A/Ser. A/1950/Add.1.

Legal and Ethical Dimensions of Collateral Damage

There is general agreement that the first, third and fourth of Hudson's elements are the most crucial under modern approaches to the customary international law process. At the same time, however, each of these three elements has been subject to critical scrutiny and debate.

There is, for example, no agreement on what constitutes State practice.¹⁶ The US Department of State emphasizes the acts of governments but not UN resolutions. This approach supports the claims of States, such as the United States, with strong centralized governments. In contrast, some scholars and less powerful States would include as State practice normative statements in drafts of the International Law Commission, resolutions of the United Nations General Assembly, and recitals in international instruments.¹⁷

Hudson's requirements that States engage in a practice with an understanding that it is required by, or consistent with, prevailing international law and that there be general acquiescence in the practice by other States raises the complex issue of *opinio juris*, which is the general acceptance of a norm as a legal obligation by the world community. The concept of *opinio juris* introduces a subjective element in the customary international law process because it requires that States when engaging in or refraining from a particular practice do so under an understanding that they have a legal right to engage in the practice or a legal obligation to refrain from engaging in the practice.

With respect to the methodological problem of determining *opinio juris*, Professor Anthony D'Amato has suggested that, as a requirement for a finding of *opinio juris*, an objective claim of legality be articulated in advance of, or concurrently with, the State practice allegedly required or permitted by customary international law.¹⁸ Interestingly, under D'Amato's approach, the articulation of a claim of legality could be made either by a State, a recognized writer, or a court.¹⁹ To others, however, this "claims approach" defines away the requirement of the normative conviction of the community.²⁰ Moreover, D'Amato concedes that it is not possible to determine if a majority of States are conscious of any international obligation.²¹

Other commentators would dismiss or at least minimize the importance of an articulation of a claim of legality on the ground that the "best evidence of

16. See Kelly, *supra* note 12, at 500–07.

17. *Id.* at 501.

18. ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 77, 85 (1971).

19. *Id.*

20. See, e.g., Kelly, *supra* note 12, at 479.

21. D'AMATO, *supra* note 18, at 82–85.

opinio juris is actual practice consistently and generally followed.”²² According to this view, a record of consistent and widespread practice raises strong inferences of *opinio juris* without need of further evidence. Before turning to a consideration of whether customary international law requires the use of precision-guided munitions in aerial attacks on urban or other highly populated areas, it may be appropriate to keep in mind a famous statement of the Permanent Court of International Justice in the *Lotus* case:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions on the independence of States cannot therefore be presumed.²³

Although the *Lotus* case has been “strongly criticized for its ‘extreme positivism’ and especially for asserting that restrictions on the freedom of states cannot be presumed,”²⁴ it has never been repudiated by the International Court of Justice. Moreover, its positivist approach may be particularly well suited to issues of the law of armed conflict, which, by their very nature, implicate the vital interests of States.

Let us turn then to State practice regarding the use of precision-guided munitions. As noted previously, the United States has made increasingly heavy use of precision weapons in aerial attacks on targets in urban or other heavily populated areas, and this was especially the case in the Kosovo campaign. What is less clear is the extent to which other States have made use of precision-guided weapons in armed conflict. Belt reports that more than 34 countries are using or have access to the Paveway laser guided bomb series and gives other examples of precision-guided weapons used by various countries.²⁵ His study is extremely thin, however, on the extent of actual use by countries of precision weapons in armed conflict. On the contrary, Belt admits that Russia has made relatively little use of precision weapons in Chechnya, although he attempts to explain this away by noting that there has been some Russian use of such weapons in the conflict and that Russia has never asserted the right to

22. Oscar Schachter, *Entangled Treaty and Custom*, in *INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOR OF SHABTAI ROSENNE* 717, 731 (Yoram Dinstein ed., 1989).

23. *The S.S. Lotus (Fr v. Turk.)*, P.C.I.J. (Ser. A) No. 10, at 18 (Sep. 7).

24. LOUIS HENKIN ET AL., *INTERNATIONAL LAW* 70 (3d ed., 1993).

25. Belt, *supra* note 3, at 125.

Legal and Ethical Dimensions of Collateral Damage

use non-precision bombs indiscriminately near civilian areas.²⁶ The limited evidence of use of precision-guided munitions to date would seem to indicate an absence of any widespread State practice. Significantly, the International Court of Justice has stated that: “Although the passage of only a short period of time is not necessarily . . . a bar to the formulation of a new rule of customary international law . . . State practice . . . should have been both extensive and virtually uniform. . . .”²⁷

Assuming *arguendo* the existence of sufficient State practice to support the existence of a norm of customary international law requiring the use of precision weapons in attacks on urban or other heavily populated areas, even Belt admits that the “harder issue” is whether *opinio juris* is present.²⁸ In his attempt to prove the existence of *opinio juris*, Belt cites statements by US officials or statements in US government documents that confirm the US desire to conduct the Gulf War in a manner consistent with international legal obligations or that recognize the long-standing customary law of armed conflict principle of distinction or discrimination that commanders and others planning an attack take all possible feasible steps, consistent with allowable risk to aircraft and aircrews, to minimize the risk of injury to noncombatants.²⁹ He fails to cite any statements by US officials regarding the Gulf War, Desert Fox, or Kosovo campaigns that in any way recognize a legal obligation to use precision-guided munitions. To be sure, with respect to the Kosovo campaign, Belt is able to quote Lord Robertson, who, when serving as NATO Secretary-General, said that “international law and public opinion” required the use of precision weapons in the Kosovo campaign.³⁰ With respect, this appears to be a weak reed upon which to lean.

26. *Id.* at 161.

27. North Sea Continental Shelf (F.R.G. v. Den./F.R.G. v. Neth.), 1969 I.C.J. 3, 43 (Feb. 20).

28. Belt, *supra* note 3, at 163.

29. *Id.* at 163–64. Belt quotes from a study of the Gulf War commissioned by the Department of Defense that concluded:

Coalition forces took several steps to minimize the risk of injury to noncombatants. To the degree possible and consistent with allowable risk to aircraft and aircrews, aircraft and munitions were selected so that attacks on targets within populated areas would provide the greatest possible accuracy and the least risk to civilian objects and the civilian population.

30. Vago Muradian, *Robertson: Europe Must Spend More Wisely to Achieve Gains*, DEFENSE DAILY, Dec. 8, 1999, at 6, *quoted and cited in id.* at 165 nn.294, 295.

B. Treaties and Conventions

A major problem one faces in analyzing treaty law to determine whether the United States has an international obligation to use precision weapons is that the United States is not a party to Additional Protocol I, the most recent major treaty on the law of armed conflict. Nonetheless, in the section of his article discussing the relevance of treaty law to precision weapons, Belt focuses his primary attention on Protocol I. Obviously, for the United States, Protocol I would be apposite only if its relevant provisions represent a codification of customary international law. Belt appears to assume *sub silentio* that they do, a highly debatable proposition, as we shall see. Before turning to this issue, however, we need to examine briefly some treaties and conventions that the United States has ratified.

A primary premise of the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land³¹ is that “the right of belligerents to adopt means of injuring the enemy is not unlimited.”³² Although the 1907 Hague Convention is a relatively (for the time) comprehensive codification of laws governing land warfare, Articles 25 and 27 apply as well to aerial bombardment.³³ Article 25 provides that “the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.” Article 27 states that

In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the same time for military purposes.

For its part, Article 2 of Hague Convention IX of 1907 Concerning Bombardment by Naval Forces in Time of War³⁴ built upon and improved the

31. Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, DOCUMENTS ON THE LAWS OF WAR 69 (Adam Roberts and Richard Guelff eds., 3d. ed. 2000).

32. *Id.*, art. 22.

33. Much of this discussion of the 1907 Hague Convention draws from Danielle Infeld, *Precision-Guided Munitions Demonstrated Their Pinpoint Accuracy in Desert Storm; But is a Country Obligated to use Precision Technology to Minimize Collateral Civilian Injury and Damage?*, 26 GEORGE WASHINGTON JOURNAL OF INTERNATIONAL LAW & ECONOMICS 109 (1992). Ms. Infeld in turn relies heavily on the magisterial examination of applicable law in W. Hays Parks, *Air War and the Law of War*, 32 AIR FORCE LAW REVIEW 1 (1990).

34. Hague Convention (IX) concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, 26 Stat. 2351, DOCUMENTS ON THE LAWS OF WAR, *supra* note 31, at 122.

Legal and Ethical Dimensions of Collateral Damage

approach taken by Hague Convention IV in that it “identified particular military objects that could be attacked, and recognized the inevitability of collateral damage in the execution of such attacks.”³⁵ In addition, Article 2 explicitly absolved the attacker of responsibility for “unavoidable” collateral damage resulting from the attack of such military objects.³⁶ Also, as Hays Parks has noted, these and other provisions in the two Hague Conventions placed primary responsibility for collateral damage on the defender because it had the superior ability to control the civilian population.³⁷ The civilian population itself also had, to the extent possible, to take steps to remove itself from the conflict. Only if he engaged in an indiscriminate attack would the commander be responsible for collateral damage. In Parks’ view, “responsibility for avoidance of collateral civilian casualties or damage to civilian objects . . . is a shared obligation of the attacker, defender, and the civilian population.”³⁸

This “shared obligation” approach continued under subsequent treaty developments in the law of armed conflict. In particular, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV)³⁹ defines a person protected by the Convention as anyone who, during a conflict or occupation, is “in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”⁴⁰ Any person suspected of, or engaged in, activities hostile to the security of the State will not be afforded protection as a civilian.⁴¹ For their part, States are required to take steps to ensure that their private citizens do not take part in hostilities in a way that could endanger innocent civilians.⁴²

According to Hays Parks, however, this tradition of shared obligation was broken with the adoption of Additional Protocol I. In a lengthy exegesis of the Protocol, especially Articles 48 through 58, the articles most directly relating to combat operations, Parks demonstrates that these provisions shift the

35. Parks, *supra* note 33, at 17.

36. The second paragraph of Article 2 of Hague Convention IX provides that the commander “incurs no responsibility for any unavoidable damage which may be caused by a bombardment under such circumstances.”

37. Parks, *supra* note 33, at 28–29.

38. *Id.*

39. Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, DOCUMENTS ON THE LAWS OF WAR, *supra* note 31, at 301.

40. *Id.*, art. 4.

41. *Id.*, art. 5.

42. Parks, *supra* note 33, at 118.

responsibility for the protection of the civilian population away from the defender almost exclusively to the attacker.⁴³ He concludes:

Customary international law requires that an attacker exercise ordinary care in the attack of military objectives located near the civilian population, to minimize injury to individual civilians or the civilian population as such incidental to the attack. The defender's responsibility is to exercise an equal degree of care to separate individual civilians and the civilian population as such from the vicinity of military objectives. Where a defender purposely places military objectives in the vicinity of the civilian population or places civilians in proximity to military objectives, in either case for the purpose of shielding military objectives from attack, an attacker is not relieved from his obligation to exercise ordinary care. Responsibility for death or injury resulting from the illegal action of the defender lies with the defender, however. The language of Protocol I—particularly as it has been interpreted by the ICRC and many of the nations known in the course of the Diplomatic Conference as the Group of 77—casts doubt upon whether the limited credibility of the law of war relating to war-fighting *per se* will survive any serious challenge.⁴⁴

Interestingly, in his discussion of relevant provisions of Protocol I, Belt does not acknowledge, in text or footnotes, Parks' critique or that dissatisfaction with Articles 48 to 58 was a primary reason for the US decision not to ratify the Protocol.⁴⁵ Nonetheless, he concludes that

The language in Protocol I was not specific enough, either in form or from a review of *travaux préparatoires*, to mandate the exclusive use of precision-guided munitions (PGMs) in urban areas. Therefore, even if it were declaratory of customary international law norms at the time of its signing in 1977, it would not be dispositive as to use of PGMs.⁴⁶

Accordingly, Belt and Parks appear to be in agreement that treaty law does not require the use of precision-guided munitions in future conflicts. They disagree as to whether customary international law requires the use of

43. *Id.* at 112–202.

44. *Id.* at 168.

45. Belt, *supra* note 3, at 145–51. For other commentary on why the United States decided not to ratify Protocol I, see Michael Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLICY 419 (1987); Abraham Sofaer, *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protections of War Victims*, 82 AMERICAN JOURNAL OF INTERNATIONAL LAW 784 (1988).

46. Belt, *supra* note 3, at 167.

Legal and Ethical Dimensions of Collateral Damage

precision-guided weapons in attacks on urban or other highly populated areas. Belt, as we have seen, believes that it does. Parks has indicated that he agrees with Danielle Infeld that it does not.⁴⁷ Previously in this paper, I have expressed my agreement with the Parks/Infeld position as to the *lex lata* (existing law). Still to be considered, however, is whether the Belt position has merit as a *lex ferenda* (law in formation) proposition.

C. Should International Law Require the Use of Precision-guided Munitions in Urban or Other Highly Populated Areas?

There seems to be little disagreement that, as a policy matter, precision-guided weapons should normally be used in aerial attacks on urban or other highly populated areas. Under many, perhaps most, circumstances, there is a happy congruence between the needs of military efficiency and the avoidance of unnecessary injury to civilian persons or property.⁴⁸ That is, the use of precision-guided weapons will more thoroughly destroy the target, while avoiding or minimizing collateral damage, than will so-called “dumb” bombs. In such cases, the attack is being conducted in complete accord with Article 57(2)(a)(iii) of Additional Protocol I, which requires commanders and others planning an attack to “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.” The problem is that in some circumstances this happy congruence is not present.

Belt admits that precision-guided weapons are not suitable for all circumstances, and indeed cites Hays Parks in acknowledging this fact.⁴⁹ His acknowledgment, however, appears to be limited to attacks on targets far from heavily populated areas, such as large maneuvering units in the field. In contrast, Parks has discussed in detail several circumstances when the use of precision-guided weapons might not be suitable, even in attacks on highly populated areas.⁵⁰ These circumstances include, in particular, adverse weather conditions, technological malfunction, human error, or heavy anti-aircraft fire that requires pilots to zigzag, which decreases the accuracy of an attack.⁵¹ When such circumstances are present, an attacker might reasonably conclude that the use of precision-guided weapons would not be

47. See W. Hays Parks, *The Protection of Civilians from Air Warfare*, 27 ISRAEL YEARBOOK ON HUMAN RIGHTS 65, 85–86 n.57 (1998).

48. For examples, see Belt, *supra* note 3, at 117–37.

49. *Id.* at 130.

50. Parks, *supra* note 33, at 185–202.

51. For further discussion, see Infeld, *supra* note 33, at 131–33.

appropriate. A hard and fast “black letter rule” requiring the use of precision-guided weapons in any attack on an urban area would be dysfunctional under such circumstances. Better perhaps to rely on the judgment of the commander in such cases. Hays Parks emphatically states his view:

Article 57, paragraph 2(a) (iii) [of Protocol I] requires commanders and others planning an attack to “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.” An inevitable question is, “If a commander has a choice between two means for attacking a target, one less accurate than the other, is he obligated to use the most precise means?” Common sense, the definition of *feasible* by many States in the process of their respective ratification or accession—a definition subsequently adopted by the community of nations in their drafting of Protocol III on Incendiary Weapons to the 1980 United Nations Conventional Weapons Convention—and a reading of the relevant punitive provisions of Additional Protocol I clearly indicate that not to be the case. A commander’s good faith judgment remains essential to effective implementation of this provision.⁵²

The definitions of feasible referred to by Parks lend substantial support to his position. In a footnote, he quotes the statement of Italy accompanying its ratification of Protocol I that it “understands . . . that the word ‘feasible’ is to be understood as practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations.”⁵³ Similarly, Article 1(3) of Protocol III on Incendiary Weapons to the 1980 United Nations Conventional Weapons Convention defines “feasible precautions” as “those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.”⁵⁴ This recognition that combat decisions vary depending on the “humanitarian and military considerations” existing at the time argues in favor of maximizing the discretion of the commander rather than imposing a hard and fast rule. Finally, Article 85(3)(b) of Protocol I, which classifies an action as a grave breach only if it involves “launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life,

52. Parks, *supra* note 47, at 85–86.

53. *Id.* at 85 n.54.

54. *Id.* at 86 n.55.

Legal and Ethical Dimensions of Collateral Damage

injury to civilians or damage to civilian objects,”⁵⁵ lends a measure of support to this thesis.

To this commentator, Parks and Infeld have the better of the argument. It appears to be the case that the use of precision-guided weapons is not always suitable, even with respect to targets in heavily populated areas. Moreover, it also appears to be impossible to predict in advance of an attack what circumstances might arise that would make the use of precision-guided weapons inappropriate. If these two propositions are correct, it would make no sense to have a “black letter” rule requiring the use of precision-guided weapons, since this would introduce a degree of undesirable rigidity into the law of armed conflict. The better approach is to leave the decision whether to employ precision-guided weapons to the individual commander whose decision turns on the particular circumstances he faces at the time of armed conflict.

Since he contends that present customary international law requires the use of precision-guided weapons in attacks on urban areas, Belt recognizes that this raises the second issue the organizers of the colloquium have posed: whether two adversaries may be subjected to differing legal and ethical regimes, dependent upon their relative level of technological sophistication. Belt contends that they may.⁵⁶ He suggests that the problem may be minimized if not eliminated by technology transfer that narrows the gap between the level of technological sophistication of developed countries and that of developing countries, quoting one writer who urges that developed countries provide subsidies to developing countries to enable them to acquire precision weapons.⁵⁷ In Belt’s view, however, the “most balanced approach” is:

The one similar to the environmental stance of “common but differentiated responsibilities.” This has been coined in the law of war arena as “normative relativism.” As the divide between countries grows in regard to military prowess and capability, “there will be subtle stressors that encourage an interpretation of the law of armed conflict relative to the state to which it is applied.” In the end the same standard applies to both states (developed vs. less developed)—that is the need to minimize collateral damage—but there will be a higher standard on the developed state. The theory of normative relativism essentially supports the conclusion that “belligerents are held to the standards to which they are capable of reasonably rising.”⁵⁸

55. *Id.* at 86 n.56.

56. Belt, *supra* note 3, at 167–73.

57. R. George Wright, *Noncombatant Immunity: A Case Study in the Relation Between International Law and Morality*, 67 NOTRE DAME LAW REVIEW 335, 336–37 (1991), *quoted in id.* at 172.

58. Belt, *supra* note 3, at 172–73.

In sharp contrast, Michael Schmitt has contended, “[i]t is simply beyond credulity to suggest that the acceptability of striking a particular type of target or causing a certain amount of collateral damage or incidental injury might one day depend on the characteristics of the attacking state.”⁵⁹ For his part, Hays Parks has observed that: “Lawful combat actions are not subject to some sort of ‘fairness doctrine,’ and neither the law of war in general nor the concept of proportionality in particular imposes a legal or moral obligation on a nation to sacrifice manpower, firepower, or technological superiority over an opponent.”⁶⁰ It might be suggested further that Belt’s reliance on “common but differentiated responsibilities” in the field of international environmental law seems misplaced. It is one thing to suggest that developed States should be subjected to more onerous standards than developing countries in protecting or cleaning up the environment. It is quite another to propose that developed countries should accept standards that could disadvantage them in armed conflict. Since many, perhaps most, developing countries would be unable to comply with a rule requiring the use of precision weapons in attacks on urban areas, this is a good reason not to have such a rule in the first place.

What Degree of Injury and Damage to Civilians Can be Regarded as Excessive, and Consequently Disproportionate, as Compared to Military Advantage Gained?

The question of what degree of injury to civilians is “excessive” and therefore “disproportionate” to the military advantage gained by an armed attack cannot, of course, be answered in the abstract. It raises in sharp relief, however, the issue of the role the principle of proportionality does or should play in the law of armed conflict. Judith Gail Gardam has suggested that proportionality is a “fundamental” component of the *jus in bello* and described it as “the

59. Michael Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE HUMAN RIGHTS & DEVELOPMENT LAW JOURNAL 143, 176 (1999).

60. Parks, *supra* note 33, at 169–70. As an egregious example of the misuse of the concept of proportionality, Parks sets forth the following hypothetical that was presented by an inexperienced Army instructor at The Judge Advocate General’s School of the U.S. Army:

An enemy platoon of forty men is in a defensive position on a hill, armed only with small arms. You have been assigned the mission of capturing the hill. You have the capability of attacking the hill with a company of two hundred men, supported by artillery, tanks, helicopter gunships and close air support fixed-wing aircraft. The “rule” of proportionality requires you to eschew the use of anything more than an infantry platoon armed with small arms.

Legal and Ethical Dimensions of Collateral Damage

balance to be struck between the achievement of a military goal and the cost in terms of lives.”⁶¹ Although she acknowledges that some civilian casualties have always been accepted as the inevitable consequence of a military attack, she contends that “the concept of proportionality . . . has assumed the pivotal role in determining the extent to which civilians are entitled to be protected from the collateral effects of armed conflict.”⁶²

Hays Parks is much more skeptical. He reports that the American military review of Protocol I concluded that the concept of proportionality is not a rule of customary international law and argues that, judged by US domestic law standards, “the concept of proportionality as contained in Protocol I would be constitutionally void for vagueness.”⁶³ To support his “void for vagueness” argument, Parks further contends that

[F]ollowing more than a decade of research [as of 1990] and meetings of international military experts who are anxious to implement the language contained in Protocol I to the extent it advances the law of war and the protection of the civilian population, there remains a substantial lack of agreement as to the meaning of the provisions in Protocol I relating to proportionality. This is a rather disconcerting situation given that other lawyers are claiming that the concept of proportionality is customary international law.⁶⁴

For her part, Gardam acknowledges the significant juridical impact the US position has had on the role the concept of proportionality plays in the law of armed conflict. She concludes:

In the final analysis, it appears that the interpretation by the United States and its allies of their legal obligations concerning the prevention of collateral casualties and the concept of proportionality comprehends only two types of attacks: first, those that intentionally target civilians; and second, those that involve negligent behavior in ascertaining the nature of a target or the conduct of the attack itself, so as to amount to the direct targeting of civilians. The conduct of hostilities in the Gulf conflict indicates that the concept of “excessive casualties” was restricted to that context; the military advantage always outweighed the civilian casualties as long as civilians were not directly

61. Judith Gardam, *Proportionality and Force in International Law*, 87 AMERICAN JOURNAL OF INTERNATIONAL LAW 391 (1993).

62. *Id.* at 398.

63. Parks, *supra* note 33, at 173.

64. *Id.* at 175.

targeted and care was taken in assessing the nature of the target and the carrying out of the attack itself.

The impact of the practice of states such as the United States and its coalition partners on the formation of custom is considerable and cannot be overlooked. It seems inevitable that the concept of proportionality as a customary norm is currently limited to the situations outlined above. Moreover, it seems likely that the interpretation of the conventional requirements of Articles 51 and 57 with respect to “excessive casualties” may be similarly limited.⁶⁵

Michael Schmitt approaches the problem of “excessive casualties” with a focus on the principle of discrimination that mandates discrimination between civilians and their property and legitimate targets.⁶⁶ He suggests that the principle of discrimination comprises two primary facets. The first facet limits or prohibits the use of weapons that are by their nature indiscriminate. One example he gives is “biological weapons that spread contagious diseases, for such weapons are incapable of afflicting only combatants and difficult to control.”⁶⁷ The second facet of the principle prohibits the indiscriminate use of weapons, regardless of their innate ability to discriminate. As an example, he cites Iraq’s use of SCUD missiles against Israel during the Gulf War. This second facet of discrimination, he suggests, in turn consists of three components: distinction, proportionality, and minimizing collateral damage and incidental injury.

The concept of distinction, which prohibits direct attacks on civilians or civilian objects, finds its primary expression in Article 48 of Protocol I, which provides that parties to a conflict must “distinguish between the civilian populations and combatants and between civilian objects and military objectives and accordingly direct their operations only against military objectives.” Under Article 52(2), military objectives are “those 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.”

65. Gardam, *supra* note 61, at 410. In footnote 102 Gardam recognizes that there is disagreement among scholars as to whether the practice of specially affected States is more important in the formation of custom from conventional norms than that of other States but suggests that it “may, however, be more influential in reality by virtue of being more frequent and better publicized.”

66. Schmitt, *supra* note 59.

67. *Id.* at 147.

Legal and Ethical Dimensions of Collateral Damage

Seemingly straightforward and unobjectionable as an abstract proposition, the concept of distinction has given rise to considerable controversy. For example, the International Committee of the Red Cross (ICRC) defines the terms “effective” and “definite” narrowly. In the ICRC’s Commentary on Protocol I, effective contribution includes objects “directly used by the armed forces” (e.g., weapons and equipment), locations of “special importance for military operations” (e.g., bridges), and objects intended for use or being used for military purposes.⁶⁸ The Commentary also interprets the phrase “definite military advantage” to exclude those attacks offering only “potential or indeterminate advantages.”⁶⁹ Under Article 51(3) of Protocol I, civilians are legally protected from attack unless they take a “direct part in the hostilities.” According to the ICRC Commentary, such participation is limited to “acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.”⁷⁰ Under Article 50(1) of Protocol I doubts as to the character of an individual are resolved in favor of finding civilian status, and Article 52(3) provides the same presumption for civilian objects.

The ICRC interpretation has been subject to scathing criticism.⁷¹ In temperate tones, Schmitt has noted:

Others take a less protective approach to the limitations. The United States, for example, would include economic facilities that “indirectly but effectively support and sustain the enemy’s war-fighting capability” within the ambit of appropriate targets. Similarly, some have cited mission-essential civilians working at a base during hostilities, even though not directly engaging in acts of war, as legitimate targets. Thus, while there is general agreement that the Protocol accurately states customary international law principles, notable disagreement persists over exactly what those standards are.⁷²

Schmitt goes on to suggest that proportionality differs from distinction in terms of *scienter*, i.e., the issue of proportionality arises in situations where the attacker knows that an attack on a legitimate military target will result in injury to civilians or civilian property. To Schmitt, this

68. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 636 (Yves Sandoz et al. eds., 1987), *cited and quoted in id.* at 148.

69. *Id.*, *quoted and cited in* Schmitt, *supra* note 59, at 149.

70. *Id.* at 619, *quoted and cited in* Schmitt, *supra* note 59, at 149.

71. See especially Parks, *supra* note 33, at 113–45.

72. Schmitt, *supra* note 59, at 150.

[R]enders the discrimination decision matrix much more complex. With the first tier of discrimination analysis, the question is: ‘May I lawfully target an object or person?’ With proportionality, an additional query must occur: ‘Even if I conclude that targeting the person or object is unlawful, may I nevertheless knowingly cause him or it injury or damage in my attack on a legitimate objective?’⁷³

The difficulty of answering the additional query arises in particular because

[T]he actor must not only struggle with issues of inclusiveness (what are the concrete and direct consequences?), but he must also conduct a difficult jurisprudential balancing test. Optimally, balancing tests compare like values. However, proportionality calculations are heterogeneous, because dissimilar value genres—military and humanitarian—are being weighed against each other.⁷⁴

To be sure, in some cases the proportionality calculation would be relatively simple. Hays Parks cites as the “classic example” of a disproportionate action the destruction of a village of 500 persons simply to destroy a single enemy sniper or machine gun.⁷⁵ But what if the likely cost in civilian lives lost were five? Would (should) this be regarded as “excessive” and disproportionate to the military advantage gained? In such a case, a clash between the military and humanitarian “value genres” referred to by Schmitt might well arise.

Moreover, Parks has suggested three “fundamental” problems with implementation of the concept of proportionality.⁷⁶ The first is the definition of military advantage, and the level at which a determination should be made (tactical or strategic), the second is who should be responsible for the probable civilian losses resulting from the attack (the attacker, defender, or the civilians themselves), and the third concerns what Parks calls the “friction of war.” To Parks, this friction is caused in large measure by uncertainty, and he quotes Clausewitz’s observation that “War is the realm of uncertainty; three quarters of the factors on which action in war is based are wrapped in a fog of greater or lesser uncertainty.”⁷⁷ This uncertainty is based in considerable part on a lack of information regarding the enemy and greatly complicates the decision making process. To Parks, it also counsels against any attempt “to establish an

73. *Id.*

74. *Id.* at 151.

75. Parks, *supra* note 33, at 168.

76. *Id.* at 175.

77. CLAUSEWITZ, ON WAR 119–20 (M.Howard & P. Paret trans., 1976), *quoted in id.* at 183.

Legal and Ethical Dimensions of Collateral Damage

unrealistic form of accountability for civilian casualties that occur incidental to legitimate military operations.”⁷⁸ In his view, this is what Protocol I, especially as interpreted by the ICRC, attempts to do.

In my view, it is not necessary to decide whether “proportionality” is part of customary international law or simply a policy consideration or a “principle” that commanders should take into account during the course of armed conflict. The conscientious commander will make every effort to avoid launching an armed attack when the likely outcome is a clearly disproportionate amount of collateral damage. Under any other than the easy case scenario, however, as Parks and especially Schmitt have noted, the calculation of whether a particular attack will result in proportionate or disproportionate collateral damage becomes exceedingly difficult and problematic. It must also be remembered that a mistaken calculation of proportionality could result in individual liability for a war crime for the commander or in liability for a violation of the law of armed conflict by the commander’s country. Accordingly, it would seem best to limit such liability to the circumstances summarized by Gardam as the US position: where civilians are deliberately targeted or there is negligent behavior in ascertaining the nature of a target or the conduct of the attack itself that amounts to the direct targeting of civilians. Any other standard would pose an unacceptable dilemma for the commander operating under exceedingly stressful conditions.

To return to the point made at the beginning of this section of the paper, the question of what degree of injury to civilians is excessive and therefore disproportionate to the military advantage gained by an armed attack cannot be answered in the abstract. Accordingly, in the next section we turn to the legal and ethical implications of NATO’s apparent efforts to minimize its own combat casualties through high-altitude bombing and avoidance of a ground campaign.

What Are the Legal and Ethical Implications of NATO’s Apparent Efforts to Minimize Its Own Combat Casualties Through High-Altitude Bombing and Avoidance of a Ground Campaign and Did This Greatly Increase the Risk of Civilian Casualties?

At the outset of our discussion in this section, it should be noted that there is a crucial factual issue to be addressed: did NATO’s high-altitude bombing and avoidance of a ground campaign in fact greatly increase the risk of civilian

78. Parks, *supra* note 33, at 202.

casualties? Some critics of the Kosovo campaign have so alleged.⁷⁹ Charles Dunlap, however, has challenged this thesis.⁸⁰ According to Dunlap, lower altitude attacks were attempted but did not prove very effective. On the contrary, he contends, the nature of precision-guided munitions is such that they are often optimally targeted at the altitudes NATO employed. He further suggests that flying at lower altitudes would have increased the chances of success for Serbia's anti-aircraft and short range missile systems and that "[a] crippled twenty or thirty-ton airplane loaded with fuel and high explosives crashing out-of-control into an urban neighborhood can create as much or more devastation among civilians as any errant bomb."⁸¹ Similarly, in his view, a ground assault would have increased the risk of civilian casualties because the weapons of land warfare—artillery, multiple rocket launchers, and machine guns and other small arms—lack the precision quality of high-altitude bombing, and ground combat in an urban environment is a casualty-intensive affair for both combatants and civilians. Finally, Dunlap notes that reportedly, out of the more than 25,000 weapons used in Kosovo, only twenty resulted in collateral damage incidents, "a phenomenal record in the history of warfare."⁸²

Let us assume *arguendo* that the critics are right and the high-altitude bombing and the avoidance of a ground campaign did increase the risk of civilian casualties. What, if any, are the legal and ethical implications of these decisions? We turn to the legal implications first.

A. Legal Implications

There seems to be little question that the decision to engage in high-altitude bombing did not by itself constitute a violation of the law of armed conflict. As Dunlap points out, although the law of armed conflict seeks to protect non-combatant civilians from the adverse effects of war, there is "nothing in that

79. See, e.g., HUMAN RIGHTS WATCH, CIVILIAN DEATHS IN THE NATO AIR CAMPAIGN 2 (2000), available at <http://www.hrw.org/reports/2000/nato/>; AMNESTY INTERNATIONAL, NATO/Federal Republic of Yugoslavia: "Collateral Damage" or Unlawful Killings?, VIOLATIONS OF THE LAWS OF WAR BY NATO DURING OPERATION ALLIED FORCE 17 (2000), available at http://www.amnesty.org/ailib/intcam/kosovo/docs/natorep_all.doc; Richard Bilder, *Kosovo and the New Interventionism: Promise or Peril?*, 9 JOURNAL OF TRANSNATIONAL LAW & POLICY 153, 171 (1999); Ved Nanda, *NATO's Armed Intervention in Kosovo and International Law*, 10 US AIR FORCE ACADEMY JOURNAL OF LEGAL STUDIES 1, 9 (1999/2000).

80. Charles Dunlap, *Kosovo, Casualty Aversion, and the American Military Ethos: A Perspective*, 10 US AIR FORCE ACADEMY JOURNAL OF LEGAL STUDIES 95 (1999/2000).

81. *Id.* at 97.

82. *Id.* at 103.

Legal and Ethical Dimensions of Collateral Damage

legal regime [that] expressly requires an assumption of more risk by a combatant than a noncombatant.”⁸³ Similarly, the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (hereinafter ICTY Final Report) concluded “there is nothing inherently unlawful about flying above the height which can be reached by enemy defenses.”⁸⁴ To be sure, the Committee recognized that the principle of distinction required NATO air commanders to “take practicable measures to distinguish military objectives from civilians or civilian objectives,” and that the 15,000 feet minimum altitude adopted for part of the campaign may have meant the target could not be verified by the naked eye. But it concluded that “with the use of modern technology, the obligation to distinguish was effectively carried out in the vast majority of cases during the bombing campaign.”⁸⁵ Lastly, the Report of the Independent International Commission on Kosovo, established at the initiative of the Prime Minister of Sweden, Mr. Goran Persson, concluded that the “high-altitude tactic does not seem to have legal significance. . . .”⁸⁶

The legal issue, then, would seem to be whether the bombing campaign resulted in injury and damage to civilians that can be regarded as excessive and therefore disproportionate to the military advantage gained—more or less the same issue we considered in the abstract in the previous section of this paper. Any determination as to whether injury and damage to civilians is “excessive” in relation to the military advantage gained by the bombing necessarily includes a measure of subjectivity that may lead reasonable persons to differ over the proper conclusion to be reached. It is accordingly noteworthy that the Independent International Commission on Kosovo was

[I]mpressed by the relatively small scale of civilian damage considering the magnitude of the war and its duration. It is further of the view that NATO succeeded better than any air war in history in selective targeting that adhered to principles of discrimination, proportionality, and necessity, with only relatively minor breaches that were themselves reasonable interpretations of ‘military necessity’ in the context.⁸⁷

83. *Id.* at 99.

84. Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, 39 INTERNATIONAL LEGAL MATERIALS ¶ 55 (2000), reprinted herein as Appendix A [hereinafter Report to the Prosecutor].

85. *Id.*

86. THE INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT 181 (2000).

87. *Id.* at 183–84.

For its part, the ICTY Final Report noted that the NATO bombing campaign involved 38,400 sorties, including 10,484 strike sorties, and the release of 23,614 air munitions, yet only approximately 500 civilians were killed during the campaign. The conclusion of the Report was that “[t]hese figures do not indicate that NATO may have conducted a campaign aimed at causing substantial civilian casualties either directly or incidentally.”⁸⁸

One of the allegations that led to the establishment of the Committee that issued the ICTY Final Report was that NATO forces “deliberately or recklessly caused excessive civilian casualties in disregard of the rule of proportionality by trying to fight a ‘zero casualty war’ for their own side.”⁸⁹ Interestingly, in its discussion of the “principle [not rule] of proportionality,” the Committee expressed some of the same concerns and reservations that have troubled Hays Parks and the US military in their review of Protocol I. They are worth quoting at length.

48. The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied. It is relatively simple to state that there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects. For example, bombing a refugee camp is obviously prohibited if its only military significance is that people in the camp are knitting socks for soldiers. Conversely, an air strike on an ammunition dump should not be prohibited merely because a farmer is plowing a field in the area. Unfortunately, most applications of the principle of proportionality are not quite so clear-cut. It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.

49. The questions which remain unresolved once one decides to apply the principle of proportionality include the following:

- (a) What are the relative values to be assigned to the military advantage gained and the injury to noncombatants and/or the damage to civilian objects?
- (b) What do you include or exclude in totaling your sums?
- (c) What is the standard of measurement in time or space? and

88. Report to the Prosecutor, Appendix A, ¶ 54.

89. *Id.*, ¶ 2.

Legal and Ethical Dimensions of Collateral Damage

- (d) To what extent is a military commander obligated to expose his own forces to danger in order to limit civilian casualties or damage to civilian objects?

50. The answers to these questions are not simple. It may be necessary to resolve them on a case by case basis, and the answers may differ depending on the background and values of the decision maker. It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases. It is suggested that the determination of relative values must be that of the “reasonable military commander.” Although there will be room for argument in close cases, there will be many cases where reasonable military commanders will agree that the injury to noncombatants or the damage to civilian objects was clearly disproportionate to the military advantage gained.

51. Much of the material submitted to the OTP [Office of the Prosecutor] consisted of reports that civilians had been killed, often inviting the conclusion to be drawn that crimes had therefore been committed. Collateral casualties to civilians and collateral damage to civilian objects can occur for a variety of reasons. Despite an obligation to avoid locating military objectives within or near densely populated areas, to remove civilians from the vicinity of military objectives, and to protect their civilians from the dangers of military operations, very little prevention may be feasible in many cases. Today’s technological society has given rise to many dual-use facilities and resources. City planners rarely pay heed to the possibility of future warfare. Military objectives are often located in densely populated areas and fighting occasionally occurs in such areas. Civilians present within or near military objectives must, however, be taken into account in the proportionality equation even if a party to the conflict has failed to exercise its obligation to remove them.

52. In the *Kupreskic* Judgement (Case No: IT-95-16-T 14 Jan 2000) the Trial Chamber addressed the issue of proportionality as follows:

“526. As an example of the way in which the Martens clause may be utilized, regard might be had to considerations such as the cumulative effect of attacks on military objectives causing incidental damage to civilians. In other words, it may happen that single attacks on military objectives causing incidental damage to civilians, although they may raise doubts as to their lawfulness, nevertheless do not appear on their face to fall foul *per se* of the loose prescriptions of Articles 57 and 58 (or of the corresponding customary rules). However, in case of repeated

attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardize excessively the lives and assets of civilians, contrary to demands of humanity.”

This formation in *Kupreskic* can be regarded as a progressive statement of the applicable law with regard to the obligation to protect civilians. Its practical import, however, is somewhat ambiguous and its application far from clear. It is the committee’s view that where individual (and legitimate) attacks on military objectives are concerned, the mere *cumulation* of such instances, all of which are deemed to have been lawful, cannot *ipso facto* be said to amount to a crime. The committee understands the above formulation, instead, to refer to an *overall* assessment of the totality of civilian victims as against the goals of the military campaign.⁹⁰

One may assume that the Committee’s acknowledgment of the ambiguous and controversial nature of the principle of proportionality contributed to its conclusion that NATO had not conducted “a campaign aimed at causing substantial civilian casualties either directly or indirectly.”

For its part, the Independent International Commission on Kosovo accepted “the view of the Final Report of the ICTY that there is no basis in available evidence for charging specific individuals with criminal violations of the laws of war during the NATO campaign.” It did add, however, rather cryptically, that “some practices do seem vulnerable to the allegation that violations might have occurred, and depend for final assessment upon the availability of further evidence.”⁹¹

Pending the presentation of further evidence, one may safely conclude that the injury and damage to civilians caused by the NATO bombing campaign were not excessive but rather proportionate to the military advantage gained. Hence the bombing did not violate the law of armed conflict merely because it resulted in collateral damage.

B. Ethical Implications

There remains the issue of the ethical implications of the high-altitude bombing and the avoidance of a ground campaign. According to the Independent

90. *Id.*, ¶¶ 48–52.

91. THE INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, *supra* note 86, at 184.

Legal and Ethical Dimensions of Collateral Damage

International Commission on Kosovo, although the high-altitude bombing lacked legal significance, “it does weaken the claim of humanitarianism to the extent it appears to value the lives of the NATO combatants more than those of the civilian population in Kosovo and Serbia. . . .”⁹² If, however, Charles Dunlap’s claim that the high-altitude bombing was more protective of civilians than lower level bombing would have been is correct, the suggestion of the Commission is clearly invalid. Moreover, even if he is incorrect and the high-altitude bombing and the avoidance of a ground war resulted in a higher number of civilian casualties than would have been the case if low level bombing and a ground campaign had been launched, it does not necessarily follow that such a decision violated ethical or moral precepts. As Dunlap points out, “Americans do not instinctively draw a distinction that finds its soldiers’ lives less precious than those of the citizens of an enemy state. This is traceable to the American concept of who composes its military: citizens with just as much right to life as enemy citizens.”⁹³ Reasonable persons may disagree with Dunlap’s reasoning and the values it reflects. But at a minimum the ethical and moral case against NATO’s high-altitude bombing and avoidance of a ground campaign on the ground that they caused excessive collateral damage is debatable.

A Few Concluding Thoughts

Regardless of whether they have an international law obligation to do so, it is likely that the United States, other NATO members, and developed States in general will make greater and greater use of precision-guided munitions in future conflicts because as the technology develops—in Michael Schmitt’s words, “the weapons of future wars will be more than smart—they will be ‘brilliant’”⁹⁴—the “happy congruence” between the needs of military efficiency and the avoidance of unnecessary injury to civilian persons or property will increasingly be present. At the same time, however, as also noted by Schmitt, the protections the law of armed conflict affords to civilian persons and property are likely to be less and less effective in practice. This is because the technologically weaker States, as well as terrorists or other non-governmental actors, may increasingly conclude that they must attack the civilian

92. *Id.* at 181.

93. Dunlap, *supra* note 80, at 100.

94. Schmitt, *supra* note 59, at 164.

population of the enemy State to offset the latter's great advantage in firepower. As Schmitt puts it,

[I]n many cases, their only hope is not to prevail in combat, but rather to raise the costs for their opponents to an unacceptable level. The fewer targets the States with lesser technology are permitted to strike, the less opportunity they will have to impose costs on their advantaged opponents. By the same token, the more limits placed upon their opponents, the greater the advantage to these States.⁹⁵

This “normative relativism,” Schmitt suggests, bodes ill for the principle of discrimination in the future.⁹⁶

To this observer, it is ironic that so much attention has been devoted to the issue of whether NATO complied with the *jus in bello* in its Kosovo campaign. For when one looks at practices in other armed conflicts around the world—Chechnya, Afghanistan, the Sudan, the Congo, and Sierra Leone, to name just a few—one sees not only no effort to comply with the *jus in bello* but barbaric practices that flout even the most elementary dictates of humanity. Accordingly, the most strenuous efforts should be made to induce States and other combatants to adhere to at least the ethical and moral dimensions of international humanitarian law, regardless of the presence or absence of a formal legal obligation to do so. Steps that might be taken to this end are beyond the scope of this paper.⁹⁷

95. *Id.* at 171.

96. *Id.* at 172.

97. For discussion of some steps that might be taken, see my chapter on *Kosovo Agonistes*, *supra* note 2.