

Judging Kosovo: The Legal Process, the Law of Armed Conflict, and the Commander In Chief

The Honorable James E. Baker

My objective is to give you some personal insights into the application of the law of armed conflict to the Kosovo air campaign from the perspective of a lawyer serving the United States' commander in chief. I am not here out of any desire to tell my story. Almost all of my instincts as a lawyer, former national security official, and judge run against my participation in this forum. However, I have overcome my reticence because I am committed to constitutional government, and I believe that national level legal review is critical to military operations, not just in determining whether the commander in chief has domestic and international legal authority to resort to force, but also in shaping the manner in which the United States employs force, which is the focus of this colloquium.

In short, Kosovo was a campaign during which the law of armed conflict was assiduously followed. The campaign was conducted with uncommon, if not unprecedented, discrimination. I believe the process for reviewing targets within the US government worked well. Where there were mistakes, they were not mistakes of analytic framework or law. Where the process did not work smoothly or effectively, the idiosyncratic nature of a NATO campaign likely came into play. And, let us not lose sight of the fact that the combination of diplomacy and military operations that comprised the campaign was successful in achieving NATO's objectives.

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I would like to focus on a particular aspect of Kosovo—the process of reviewing targets going to the president. At the outset I would like to correct a misperception. In preparing for the opportunity to comment here today, I asked military friends what they would be interested in hearing if they were in the audience. I was struck by the number of times thoughtful officers asked me why the president insisted upon approving all air targets; invoking images of President Johnson crouched over maps of Vietnam. As a matter of fact, the commander in chief did not approve all targets during Kosovo, but rather a smaller subset, which I will describe later. Carrying the analysis to the next step, in my opinion presidential review did not impede effective military operations in Kosovo. Rather, such review was efficient, contributed to the rule of law, and allowed the president to engage more effectively with NATO allies.

During my preparation for this speech, I was also (perhaps as a courtesy) asked about the role of lawyers, and particularly the role of a civilian lawyer at the National Security Council. Therefore, I will begin by describing and assessing my role in applying the law of armed conflict. I will close with a few concerns about the impending collision among the law of armed conflict, the doctrine of effects-based targeting, and a shared desire to limit collateral casualties and consequences to the fullest extent possible.

The Targeting Process

Before, during and after the air campaign, I performed three integrated roles with respect to the law of armed conflict.

1. Preparation

First, I educated and advised the president, the national security advisor, the principals and deputies committees,¹ and the attorney general on the law of armed conflict before (as well as during and after) the air campaign. As with any client, the time you spend educating them up front pays huge dividends when it comes time to apply the law in a live situation. (0400 on a secure

1. The Principals Committee, chaired by the Assistant to the President for National Security Affairs, included the following core members during the Kosovo conflict: the Secretary of State, Secretary of Defense, Assistant to the Vice President for National Security Affairs, Chairman of the Joint Chiefs of Staff, United States Representative to the United Nations, and the Director of Central Intelligence. The Deputies Committee, chaired by the Deputy Assistant to the President for National Security Affairs, included the Deputy Secretary of State or Under Secretary of State for Political Affairs, the Undersecretary of Defense for Policy, Assistant to the Vice President for National Security Affairs, Vice Chairman of the Joint Chiefs of Staff, United States Representative to the United Nations, and Deputy Director of Central Intelligence.

conference call is not the time to introduce any client, especially the national decision-maker, to the concepts of proportionality, necessity and discrimination.)

At the most practical level, I provided background and advice in the form of memoranda, e-mail, and oral input. My sources were customary international law (including those portions of Protocol I recognized by the United States as customary international law), the Geneva conventions, the commentaries on the Geneva conventions, US military manuals and academic treatises, and all who taught me along the way, including a number of the participants in this colloquium.

I have often thought that questions about the president's domestic authority to resort to force are driven by one's constitutional perspective and doctrinal convictions. In contrast, and I know this is risky to say in a room full of experts who have done so much to shape our understanding of the law of armed conflict, the principles underlying the law of armed conflict are generally agreed upon: necessity, proportionality, discrimination, and military objective. It is the different application of these principles to decisions to resort to force and to decisions regarding how force is used that generates most debate.

The law of armed conflict is not law exclusively for specialists. We expect junior personnel to apply these same principles on a tactical level. These are principles that policymakers must understand and apply to their most solemn responsibility: the exercise of force and the taking of human life. I would add, particularly to this audience, that in this respect government lawyers share a common duty with law professors and other experts to educate the policymaker of today and tomorrow in advance of the crisis—and not just to comment after the fact.

Advance guidance on the law of armed conflict also helps establish lines of communication and a common vocabulary of nuance between lawyer and client. In a larger, more layered bureaucracy than the president's national security staff, I imagine that the teaching process is even more important where the lawyer may be less proximate to the decision-maker. Not only does a good advance law of armed conflict brief educate the policymaker, any policymaker who hears such a brief will be sure his or her lawyer fully participates in the targeting process. In addition, the policymaker will understand in a live situation that the lawyer is applying hard law, and not kibitzing on operational matters.

I say that in part because some policymakers treat international law as soft law, and domestic, particularly criminal law, as hard law. The law of armed conflict is, of course, both. Indeed, reading some of the literature on Kosovo,

limitations on collateral casualties and consequences seem always to be referred to as a political constraint and rarely as the legal constraint that it also is. Whether this reflects lack of knowledge about the law, or merely recognition that the policy hurdle was often the first encountered, is hard to say. But as you well know, pursuant to 18 U.S.C. §2441, war crimes committed by or against US persons violate US criminal law.

2. Target Categories

My second law of armed conflict related role was the review of target categories, such as air defense or lines of communication, under which rubric specific targets were almost always approved in theater. Among other things, I would ensure that such categories were consistent with the president's constitutional authority and with his prior direction.

How did I play this role in practice? To the extent specific targets or categories of targets were briefed, suggested or debated at deputies or principals committee meetings, I was immediately available in the room to identify issues and guide officials around legal rocks and shoals.

You may ask why principals were discussing military targets at all. First, as General Wesley Clark makes clear in his book *Waging Modern War*, NATO alliance operations involved the careful orchestration of nineteen national policies and, I will add, nineteen legal perspectives, many of which hinged on the nature of targets selected and the risk of collateral casualties. If the secretary of state was to address an appeal from one foreign minister or another to change the course of the campaign, she needed to understand the campaign.

Second, policymakers brought to bear extraordinary regional knowledge, including insight into Serbian pressure points. The principals had special knowledge into the effects of targeting that a military staff officer might not have.

Principals also bore a heavy responsibility for the outcome of a policy carried out through Operation Allied Force. I believe it was their duty to test the scope of operations to ensure we were doing all that we should do to achieve NATO's objectives, but in a way that would hold the alliance together. This was a duty fulfilled.

3. Targets

My third law of armed conflict related role was to review specific targets. If the president was going to approve or concur in a target, it was my duty to ensure the target was lawful. Time and again I returned to the same checklist: What is the military objective? Are there collateral consequences? Have we

taken all appropriate measures to minimize those consequences and to discriminate between military objectives and civilian objects? Does the target brief quickly and clearly identify the issues for the president and principals?

You might ask why the NSC legal adviser and not military lawyers was doing this. There are at least three reasons. First, the European Command staff judge advocate (EUCOM SJA) and legal counsel to the Chairman of the Joint Chiefs of Staff (Chairman's legal counsel) were performing these reviews. The system of legal review, however, was sufficiently streamlined that I served as a fail-safe to ensure legal review had occurred on targets going to the president. Moreover, the authority to approve is also the authority to modify or to change, and it was essential that any such changes receive legal review prior to final approval and execution.

As you know, there is a propensity in government to adopt smaller and smaller decision-making circles in the interest of operational security. The circle can become too small. A decision-making process limited to cabinet principals may ask too much of too few if those principals are to address issues of policy and law on operational timelines. In my view, there should be a lawyer at the senior most policy level who is directly responsible at that level (in addition to the indispensable legal reviews conducted at other levels) for applying the law of armed conflict to each decision involving the use of force.

Second, it was in Washington at the Pentagon, the State Department and at the White House that issues of law, policy, and operations came together. A NATO alliance objection to a particular target, at the "political" level, might be couched in both policy and legal terms. Having a lawyer involved helped to avoid a "default judgment" when legal issues were raised.

Finally, and importantly, I implicitly assumed an additional role as a trustee to the process. I was not self-appointed; rather, this is what the national security advisor expected from his lawyer. In short, it was my job to make sure that in doing the right thing the US government was doing it the right way.

I had a standard mental checklist: Are all the relevant facts on the table—do the president and his principal officials know what they are reviewing? Are the longer-term repercussions of striking a target identified? Have the right process steps been taken? These are, of course, not inherently legal questions, but the lawyer in the room may be the staff person best positioned to test the process with policy detachment.

It is also important to think broadly about whom may be missing from a particular process. For example, I would ask, is this a matter that the attorney general should review? If not, will the attorney general nonetheless be asked by the press or the congress for her legal view on whether an action is

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consistent with the president's constitutional authority. Did this lead to the attorney general substituting her military judgment for those of the commanders? Of course not. Understanding the military objective for an action is not to question the military recommendation. It is, however, central to evaluating constitutional authority and the application of US law to particular facts, and that is a lawyer's task.

At the level of practice points and lessons learned, the critical process link was with the Chairman's legal counsel working closely with the Department of Defense (DoD) general counsel. As the national level lawyer closest to the operational line, Admiral Mike Lohr served as the primary communications channel with whom I could track and review briefs as they came to the White House. This ensured that I was ahead of, or at least even with, the operational timeline and that the president and not just the Pentagon had the benefit of military and DoD general counsel legal expertise. It also provided for one chain of legal communication, avoiding confusion. Because I had the familiarity of working with one person on hundreds of targets, we understood each other's vocabulary, tone and expression.

Where I could, I provided my input and advice in writing. First, I felt I should be no less accountable for my legal concurrence than the president for his decision. Second, I wanted to make sure my advice was received. Relying only on oral communication is to run the risk that the process will move forward without your input, given the competing pressures for principals' time. Finally, I found that my advice was cumulative and that policymakers were ready to apply the law of armed conflict principles in other contexts, including during conversations and meetings that I might not attend.

Assessment

Having given you a sense of the legal process in the White House involving target review, let me now give you my assessment as to how that process worked, focusing first on the role of the commander in chief and then on the role of lawyers.

1. Role of the Commander in Chief

As part of the president's brief on military operations, he was briefed on all categories of targets (that is, he concurred in the framework for addressing certain classes of target such as air defense or ground force targets in Kosovo), and he reviewed a sub-category of specific targets. These were for the most part targets raising heightened policy concerns, because of, among other

factors, potential allied reactions, and especially because of potential risk to US personnel and collateral casualties. Not surprisingly, these were the targets that also raised more difficult law of armed conflict questions. Of the approximately 10,000 strike sorties involving some 2,000 targets, review of targets by the national security advisor and his legal adviser reached into the hundreds of targets (200-300), with the president reviewing a smaller subset of this number.

From my vantage-point, the president's review of targets was crisp; he would hear the description, review the briefing materials and at times raise a question he wanted answered. He expected issues to be addressed before they reached him, or alternatively, that the issue—perhaps with an ally—be quickly and clearly presented. This was not a ponderous process, but rather a decision-making process that one would expect of a commander in chief.

There is a school of thought that would have preferred that the commander in chief not review as many targets or the particular ones that he did, because such review amounts to micromanagement of the armed forces. Under this school, which has its genesis in the Vietnam era, the president should issue strategic guidance, a presidential mission statement of commander's intent, and give the authorization to pursue necessary targets.

While I think it is prudent to test whether the right balance was struck between military efficacy and civilian control, I disagree with the "minimal review" school as applied to Kosovo. In my view, the right balance was struck between national level and theater approved targets. I believe the success of the campaign is highly relevant in this debate—the alliance was sustained and NATO's objectives were achieved.

Why was presidential review important? As General Jumper, and others, have pointed out, this was a highly idiosyncratic campaign involving coalition warfare by nineteen democracies—fourteen with deployed forces. In this context, some individual target decisions assumed strategic policy implications. A government might fall. A runway might close. Or, NATO consensus might collapse. In my view, those are implications of presidential dimension. Not surprisingly, when there were allied concerns about targets, the president would get called.

Further, some of the targets the president reviewed required his approval. At the very least, his review removed any possible question of legal authority with respect to targets reaching beyond the scope of what he had already reviewed.

Finally, whether legally required or not, the president was accountable to the American people for US operations and casualties. Whether a target was

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approved at the tactical, operational or national level, its consequences would ultimately, and usually immediately, rest with NATO's political leadership—and no leader more than the US president. This last argument is not particular to Kosovo. Perhaps it is a truism, but it applies to an analysis of Kosovo just the same.

If I were to strengthen the process, I would make doubly sure that national level target suggestions, or nominations, were processed in the same manner as targets originating in the military chain of command; no shortcuts and no deference to grade or policy position. This would ensure that all targets receive the same measure of staff review and analytic scrutiny. Frankly, I am not in a position to state whether this was a novel or recurring problem during Kosovo. But there were times during the campaign when I would hear that so and so was pushing for a certain proposed target to be included in the next presidential brief. If I was aware of such “advice” I would channel it into the normal process of selection and review. In any event, the potential for error will diminish if target nominations all receive the same stepped process of review. Where operational necessity dictates speed, my answer is to make the process work faster, but do not adopt shortcuts.

2. Lawyers' Role

Although I think legal review at the NSC worked well with respect to Kosovo targets, there is no one answer to good process. Indeed, the policy and military context of one scenario is likely to be so different from the next that it would be dangerous to generalize—or to insist on one shoe size for all conflicts. Kosovo was not Desert Storm. And Desert Storm was not Desert Fox. One has to maintain situational awareness. If there is no one right way to lawyer, however, there is a wrong way and that is to absent yourself from the decision-making process or be prone simply to defer to others' conclusions.

Lawyers are not always readily accepted into the military targeting team. This reluctance has to do with concerns about secrecy, delay, lawyer creep (the legal version of mission creep, whereby one legal question becomes 17, which requires not one lawyer but 43 to answer). And, of course, fear that the lawyer may “just say no” to something the policymaker wants to do. I was fortunate that the national security advisor, secretary of defense and chairman and vice chairman of the joint chiefs of staff needed no persuading on the need for close-up lawyering. During the Kosovo campaign, legal advice may not have always received warm and generous thanks, but policymakers never hid from it or sought to shut it out.

In return, I think the lawyers fulfilled their responsibilities under the contract. We kept the number of participants to the absolute minimum; for example, if a matter of domestic legal authority needed to be limited within the Justice Department to the attorney general alone, then the attorney general alone it was. And, within the US government, NSC legal review met all but one operational deadline. One target was put on the president's brief before legal review was complete. Therefore, when the president reached the target during an Oval Office briefing, I asked that it be set aside until that review could be completed.

While I always felt pressure, I never let pressure dictate my analysis. One such pressure I did not fully anticipate was the extent to which US actions would receive international legal scrutiny. In any event, we applied the law, because it was the law, not because there was an audience.

Whether actors like it or not, Kosovo may serve as a harbinger of the manner in which specific US military actions—down to the tactical sortie—will receive legal scrutiny, from NGOs, ad hoc tribunals, and the International Criminal Court, the latter two of which may attempt to assert jurisdiction over US actors. As a result, policymakers should anticipate that the same public statement intended to influence an adversary might also influence the legal observer. Policymakers, and not lawyers, should surely decide what points to emphasize in public statements, but they should do so conscious of the legal implications of what is being said. As the International Criminal Tribunal for the former Yugoslavia (ICTY) review of NATO action illustrates, although that review concluded our actions were indeed lawful, merely doing the right thing and doing it well and carefully will not necessarily immunize actors from law of armed conflict scrutiny.

Areas of Future Tension

I will close with a few words of caution involving three areas where I would forecast tension in the future between doctrine, policy and the law of armed conflict.

1. Proportionality, Necessity, and “Going Downtown”

First, there is a potential tension between proportionality and necessity on the one hand, and on the other hand, the military importance of striking hard at the outset of a conflict to surprise, to shock, and thus to effect a rapid end to conflict. There has been commentary about the incremental nature of the air campaign, and the merits of “going downtown” earlier. On one level this

aspect of the campaign was dictated by NATO's phased air campaign; that is what NATO approved and therefore that was the limit of alliance authority and consensus.

Legal considerations did not drive this result. Indeed, the political constraint agreed to by the alliance was reached well before any legal constraint based on necessity or proportionality, particularly so given NATO's objectives of preventing ethnic cleansing and avoiding a larger regional war. But looking forward, we should not lose sight that there is a legal facet to any decision to "go downtown." Legal judgments depend on factual predicate. If policymakers believe a symbolic show of force alone will accomplish the permitted goal, a lawyer would find it difficult to concur in the bombing of national level military targets in a nation's capital.

2. Dual-Use Targets

Similarly, so called "dual-use targets" present any number of inherent tensions. The law of armed conflict attempts to posit a clarity in the distinction between military objective and civilian object that may not exist on the ground. I found that dual-use targets largely appeared on a continuum. This seemed particularly true because we were dealing with a dictatorship with broad, but not always total, control over potential dual-use targets, like media relay towers or factories. In such an environment, facilities can be rapidly converted from civilian to military to civilian use at the direction of a government not bound by Youngstown Sheet and Tube.

In such a context, effects-based targeting and the law of armed conflict may be on a collision course. The tension is particularly apparent where a facility financially sustains an adversary's regime, and therefore the regime's military operations, but does not make a product that directly and effectively contributes to an adversary's military operations. The policy frustration is that in a dictatorial context, these may be exactly the targets that not only might persuade an adversary of one's determination, but more importantly striking such targets may shorten the conflict and therefore limit the number of collateral casualties that will otherwise occur.

I am not arguing here for a change in the law; I am very conscious that too malleable a doctrine of military objective will send the law hurdling down the slippery slope toward collateral calamity. Nor, I should be clear, am I suggesting that the United States applied anything other than a strict test of military objective as recognized in customary international law and by those states that have adopted Protocol I. My purpose is to identify to you a very real area of tension that warrants further review and that will confront lawyers in the future.

3. Protection of Noncombatants and Traditional Understanding of Military Objective

The law of armed conflict generates a number of ironic results in the interest of a higher principle or in the interest of clarity. For example, “treacherous” killing of military leaders (as that term is understood under the law of armed conflict) is prohibited, but the law of armed conflict permits the use of more dramatic force, even with significant collateral consequences, to attack a military headquarters with essentially the same objective of disrupting command and control. During the Kosovo campaign, lawyers were never squarely confronted with the target that would have the effect of ending the conflict with minimal collateral consequences, but which nonetheless failed a traditional test of military objective. But I sensed that such an issue could have arisen.

Without diminishing the paramount principle of protection for noncombatants, I wonder whether the definition of military objective deserves another look, in the interest of limiting collateral casualties. Are traditional definitions adequate, or do they drive military operations toward prolonged conflict and ground combat? Do they provide enough guidance to shield the commander from prosecution where the commander has made legal judgments in good faith?

These are more than academic questions of passing interest. The potentially poor fit between traditional categories of military objective and the reality of a conflict where targets fall on a continuum of judgment between military and civilian, becomes more perilous in an age of international scrutiny where good faith differences of view can take on criminal implications. Those who do evaluate such actions should do so aware of the factual and temporal context in which decisions are made. National security decision-making is not judicial decision-making. Time is more of the essence, and information is not necessarily of evidentiary quality.

Further, as much as I would hope that the United States is not engaged in armed conflict in the future, there are no doubt national interests that will require the exercise of force. As Air Vice-Marshal Mason has said, it is honorable for democracies to strive to the fullest extent possible to eliminate collateral casualties from armed conflict. Just as low and no casualty conflicts have resulted in a public expectation, and some suggest a de facto policy constraint, regarding US military action, some have used Kosovo to advance a legal view that the law of armed conflict virtually prohibits collateral casualties. This is an honorable and worthy aspiration, but not law. Nor should it be law, or the tyrants of the world will operate with impunity.

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The law of armed conflict does not prohibit collateral casualties any more than international law prohibits armed conflict. It constrains, regulates, and limits. War is almost never casualty free and we will be extraordinarily lucky if the next conflict incurs as few collateral casualties as Kosovo.

Conclusion

In closing, I hope I have given you some insight into the process of legal review at the commander in chief level during the Kosovo air campaign. I also hope I have given you a sense of the issues, at least in a manner consistent with my duty to safeguard deliberations.

My message is clear. First, lawyers are integral to the conduct of military operations at the national command level. They must be in the physical and metaphorical decision-making room. And, they can perform their duties to the law in a timely and secure way that meets operational deadlines and needs. Those who uphold the law of armed conflict bring honor to the profession and to the armed forces.

Second, the law of armed conflict is hard law. It is US criminal law. Increasingly, it will also serve as an international measure by which the United States is judged. The law of armed conflict addresses the noblest objective of law—the protection of innocent life. And the United States should be second to none in compliance, as was the case with Kosovo.

Finally, application of the law of armed conflict is a moral imperative. If international law regulates, but does not prohibit war, the law of armed conflict helps to ensure that force is used in the most economical manner possible. Whether we agree on the precise definition of military objective, or on each and every Kosovo target, I am confident that we all agree on the moral imperative of minimizing civilian casualties and suffering to the fullest extent possible.