

Commentary

Richard Sorenson

I am going to shift the focus just a little bit to what is appropriate for my background as a military operational law attorney. During Operation Allied Force, I served at the headquarters of the United States Air Forces in Europe, at Ramstein Air Base in Germany. Along with Lieutenant Colonel Tony Montgomery, I worked targeting issues in theater in concert with NATO. Tony Montgomery from the US European Command and myself down at the air component level can discuss what we did to comply with the law of armed conflict as we planned and executed this operation.

By way of background, both NATO and the United States were doing detailed planning in June 1998 to address the situation in Kosovo. It was simply untenable to accept another Srebrenica, where five to eight thousand individuals were taken out and slaughtered wholesale. As you know, the International Tribunal for the former Yugoslavia (ICTY) convicted General Krstic for his activities at Srebrenica on August 2, 2001. Neither NATO nor the United States, individually, could allow another Srebrenica. In the event we were unable to get consensus in NATO to go with military action, the United States was also planning for the possibility of a US-only operation. My principal role was in planning and executing the US portion of the operation.

The United States had over forty air campaigns developed as a result of detailed planning during the ten months preceding Operation Allied Force. US and NATO planning was occurring in parallel. We had very detailed intelligence information at very high levels of classification. We also had lawyers looking at each and every individual target throughout that time period. There is no question that we had more scrutiny of every single target in Operation Allied Force than has ever been done in the history of warfare.

Military planners and lawyers applied the *jus in bello* as we considered military necessity and proportionality. Every effort was made to eliminate unnecessary suffering whenever possible and to discriminate between military and non-military objectives. There is no question that Operation Allied Force was a successful campaign—it covered seventy-eight days, thirty-eight thousand aircraft sorties, over ten thousand strike sorties, and yet resulted in the unintended deaths of only about 500 civilians. While the loss of every civilian life is regrettable, the proportion of unintended deaths relative to the scale of the operation is unprecedented in warfare.

To plan for those strike sorties we conducted target analysis using a predictive model for collateral damage. The United States used this targeting process with its four-tier collateral damage model to look at each and every target. We used imagery and distance rings around the proposed target to determine whether we had non-military objects within range of the targets. We then would analyze the type of weapon we were putting against the target and adjust our aim point or the weapon employed as required to minimize collateral damage. The model would, for example, predict the damage likely from the use of a particular weapon against a particular building—whether it would cause panel collapse, glass breakage, or eardrum rupture.

Regarding the obligation to discriminate between military and non-military objects, it is difficult to discriminate regardless of what altitude you're flying when you have a high threat level in a very sophisticated air defense environment. Since emissions are created every time a bomb is dropped or a target is otherwise taken down, aircrews are exposed to increased risk with every successive mission. Regardless of risk to our own forces, however, we still have to comply with the law of armed conflict during offensive operations and we did.

Weapons reliability is always an issue during proportionality analysis. You can talk about the possibility of using missiles that are 100% reliable; however, even the United States cannot afford to buy 100% reliable weapons because the costs are about one to three million dollars per weapon. No country in the world is required by the law of armed conflict to have 100% reliable weapons.

Another problem with weapon accuracy is the delivery system. When you have pilots in the cockpit dropping ordinance or submarines launching Tomahawk land attack missiles, the systems don't always function as advertised when you hit the switch to launch the missile or you "pickle off" the bomb. But, again, the law of armed conflict does not require weapons and delivery systems with 100% reliability, rather it requires the acquisition of weapons systems that are lawful under international law and the exercise of due care when utilizing them. Once it is determined that a target is a legitimate military

objective, we must then determine that any unnecessary damage to non-military objects or loss of civilian lives caused by either the choice of weapon, delivery system, or reliability is not excessive in relation to the military advantage anticipated. Of course we must avoid civilian casualties whenever possible and we did that during Operation Allied Force.

The applicability of Protocol I¹ was not an issue from my perspective, because all NATO States applied a common understanding based on customary international law. It is well known that the United States has some reservations with regard to Protocol I, but as far as the execution of Allied Force with our NATO allies, we were able to reach common ground on all the important issues. Every nation signed up to the common NATO rules of engagement developed for Operation Allied Force. These rules also allowed for national reservations when appropriate so that if a country's national laws or policies didn't allow for certain activities, then its national forces would be exempted from those functions.

In summary, I agree with Professor Greenwood's remarks that the law of armed conflict was fully applicable during Operation Allied Force. The targeting analysis was conducted the same as in any other conflict and the captured military personnel were entitled to be treated as prisoners of war.

1. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Conflicts, Jun. 8, 1977, 1125 U.N.T.S. 3, DOCUMENTS ON THE LAWS OF WAR 422 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).