

## Commentary

Harvey Dalton

As I am standing in for Admiral Michael Lohr, I want to approach this from the standpoint of the legal counsel to the Chairman of the Joint Chiefs of Staff—the position that then Captain Lohr held during Operation Allied Force. I will explain the process he employed in providing legal advice to the Chairman and to the General Counsel of the Department of Defense with respect to targeting in Kosovo. We have heard from the former General Counsel, Ms. Judy Miller, from Judge Jamie Baker who provided the National Security Council point of view, and from Lieutenant Colonel Tony Montgomery who provided the US European Command point of view. So this is another link in the legal chain in terms of targeting and the approval of targets at the national level.

At the outset of the conflict, it was expected that Operation Allied Force was going to be quick and easy. There were about fifty to seventy-five pre-designated targets approved in advance. These were very traditional targets that were chosen for immediate military impact. They involved command and control, integrated air defense system, airfields, and aircraft—thoroughly traditional military targets. But Operation Allied Force was not quick and short lived. We realized very quickly that the Serbs were not going to leave Kosovo easily. This caused two things to happen: there was a need for more targets, and there was a need to move to different type of targets other than just the traditional military targets.

The requirement for more targets led to two routes for approval. Most targets, mainly the traditional military targets, were approved in the theater by the US European Command. These targets did not come up to the Joint Staff level, or up to the General Counsel level, or to the Secretary of Defense or

---

### Commentary

---

president. So this idea that the president approved each and every target is simply not true. The vast majority of targets were approved in-theater. Some targets did have to come back to the Pentagon for review and approval. The military industrial targets, the electric power grids, certain infrastructure, any targets within Belgrade, and those targets that were assessed to have a high potential for collateral damage did have to be reviewed by the Pentagon.

When a target came to the Pentagon, and this is a little bit different from what happened at the European Command, two things happened. The J2, which is our intelligence division, and the Joint Staff immediately began an independent assessment of the target. Aside from what the European Command had done in-theater, the Joint Staff intelligence division started an immediate assessment of the target. This included what Lieutenant Colonel Montgomery referred to as the four-tier assessment. That is a refined assessment that tries to determine as accurately as possible the potential collateral damage that might be sustained in attacking a target. Slides were then produced for briefing the Chairman of the Joint Chiefs of Staff and, if necessary, the secretary of defense and the president. The contents of the slides showed the objective or military linkage of the target. Was it command and control, was it integrated air defense, was it industrial-military, and what was the collateral damage estimate? The assessment might include “high collateral damage,” or it might include a specific number of anticipated unintended civilian casualties. The slide would also have a casualty estimate which would include sometimes both the combatants and the noncombatants.

The Joint Staff then produced a matrix, which I don’t think they did at European Command. This matrix rated the military significance of the particular target, i.e., whether it was so important that it might cause the termination of hostilities or whether it was a target that merely sustained the military or sustained the Serbian operations in Kosovo. Collateral damage was given a rating of high, medium, or low.

Next came the risk assessment of outliers—the potential for a bomb or missile to miss its target and land somewhere else. This assessment was particularly important where we were using bombs or missiles and where there was a heavily built-up area with large urban structures around the target. There was a greater risk of outliers in those situations. Finally, the matrix would indicate whether the recommendation was to approve the target, disapprove the target, ask for more information, or hold it while we received additional information.

Based upon this information, and based upon the target folders that were received by the Joint Staff, the legal counsel would conduct a legal assessment.

This was a basic law of armed conflict legal assessment: operations may be directed only against military objectives, the civilian population is not to be the object of attack, there can be no intent to spread terror among the civilian population, indiscriminate attacks are prohibited, and the damage to civilian property cannot be excessive in light of the anticipated military advantage. Military objectives were those objectives which by their nature, location, purpose or use make an effective contribution to the military action and whose destruction in the circumstances ruling at the time offered a definite military advantage. That was the rule that was employed in terms of what is a military objective. Take all precautions in means and methods of attack to avoid and minimize incidental injury and death and damage to civilians. This in many cases influenced the aim points of the weapons to try to direct the weapons and the effects of the weapons away from civilians, civilian objects, civilian places.

A number of targets were sent up for further review by the secretary of defense and, occasionally, the president. The four-tier analysis was part of those target packages. The four-tier analysis tried to estimate the damage by fragmentary blast, skin piercing fragments from the blast, window breakage (because that could create a lot of damage and incidental injury), building collapse (the possibility of building collapse or which buildings would be expected to collapse), and eardrum rupture, which obviously causes civilian injuries. Those were the four types of injuries that were modeled and simulated by computer with each type of weapon that was considered as a possible weapon to be employed. This made a lot of difference. It was all visualized, displayed, and we could actually determine to a reasonable degree the extent of collateral damage.

This was the type of analysis that was done by the lawyers, the intelligence community, and the operators. This is what went to the Chairman of the Joint Chiefs of Staff. There may have been ten targets every four or five days that were carried to the president. The chairman would brief those targets to the president, and the president would make the decision to approve, disapprove, request more information, or hold the target. That was essentially the process that the chairman's legal counsel was involved in.

Of course the military objective overall was to force the Serbs to withdraw from Kosovo. NATO in no way unleashed an unlimited war; it was very tightly controlled. There was always some element of political control at all times, which was necessary because we had to hold the coalition together. We did target some of the propaganda capabilities of the Serbs primarily through information operations—non-lethal type attacks. We hit military industrial,

---

*Commentary*

---

dual-use electric power, petroleum because petroleum always supplies the military and the military runs on petroleum products, and infrastructure.

Note the comments by Professor Bothe about the type of infrastructure that can be targeted. In our targeting and in our legal review there were a number of bridges, roads, infrastructures that had no military value whatsoever. We had a couple of targets nominated that were two-lane wooden bridges across drainage ditches. They had no military value whatsoever, and those targets were not approved. So even though it was hostilities, we did not go after all military objects. We went after those that counted, or least the ones we thought counted.

One final comment—I hope you don't get the impression that we are patting ourselves on the back. We did not come here to talk about the wonderful job we did. We came to talk about the process that we went through, and the process that we will hopefully go through and approve each time we employ the use of force. I do think it is necessary that people are aware of the great care and the great effort that goes into targeting, including its legal analysis.