

Discussion

Reasonable Military Commanders and Reasonable Civilians

Charles Dunlap:

I found Professor Bothe's comment about the reasonable military commander and that we ought to have reasonable civilians very interesting. What kind of training regime would you suggest for the civilians to have the competence of the reasonable military commander? Because we find it very difficult to teach even lawyers the art of war sufficiently so that they can render appropriate legal advice.

Michael Bothe:

The point with the "training," I think is not well taken. What is required indeed is a dialogue. This is a two-way street, of course, but "training" implies that I know better and I have to teach the others. That's not the point in a democratic system. We have to have two-way communications and to start a dialogue on that assumption. "I know better" is just the wrong way. I am quite well prepared to tell the same story to some of the human rights organizations who think they know better. This is a lesson I think that both sides should learn.

Harvey Dalton:

I'm a bit worried about that answer. A military commander knows how to employ the Tomahawk land attack missile (TLAM) better. I'm going to defer to his judgment in terms of weaponizing and employing TLAM. I may provide him my legal advice in respect to targeting, but he knows better in terms of that weapon.

Leslie Green:

I, too, am worried about this "reasonable civilian"—this idea of the ordinary civilian and the ordinary soldier. It reminds me of the attitude sanctioned

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by too many war crimes tribunals. What was the thought of a reasonable man? A reasonable man is the man on a downtown bus; that is not the reasonable soldier. One of the reasons that I don't like civilian judges trying military offenses is that they don't know the circumstances that were prevailing at the time that led to the soldier's actions. The question of what is reasonable in times of conflict depends on what is reasonable in the eyes of the man who is involved in that conflict. That would only be accepted by those who have similar background knowledge, not by one who has been securely moved up in some Inn of Court.

Michael Bothe:

Maybe I'm too much under the impact of the constitutional development of my country after the war. One of the lessons that the persons who drafted the German constitution after the war wanted to draw from historic experience was to integrate the military into a civilian system of values, not to have the military as a state within the State. Arguing that military matters are something which the military knows and the civilian doesn't is utterly a step in the wrong direction.

Natalino Ronzitti:

Ruth Wedgwood and Admiral Robertson have advocated the wisdom of having military people sitting on courts that apply international humanitarian law. I have mixed feelings on this point because you are referring to your American tradition. You have military people with the necessary knowledge of international humanitarian law, but I don't know if in other countries there are military people or military judges who have a good knowledge of international humanitarian law.

I guess I'm more concerned because not all wartime crimes are battlefield crimes. There are courts such as the ICC and ICTY that are competent to try not only war crimes, but also crimes against humanity and genocide. Genocide is very, very hard to establish. It is easy to define, but it is really difficult to prove that the person, the head of State, has committed genocide. So I believe that civilian judges can play a role, but you can have special chambers to deal with battlefield crimes. In those cases it would be best to rely on the opinion of the experts.

Legal Advisors and Time-Sensitive Targets

Charles Dunlap:

Kosovo was in many ways a sort of a set-piece operation where you had the luxury of multilevel reviews of targets and so forth, but we are building technological systems to try to close the decision loop in the Air Operations Center to literally minutes where, at best, we are going to be able to have a JAG at the table to try to provide some instantaneous advice regarding targets of opportunity. I'm not sure how these processes will be able to work except by having the JAG being able to make some kind of instantaneous judgment, but this again reflects back on training and the need to know the operational art.

Harvey Dalton:

The dynamic during Kosovo was that we would get these nominations maybe two to three days in advance and we had a constant input of nominated targets. So what we reviewed and approved would be the targets two days down the road. Your point is well taken about the timeline and the fact it's going to get faster. My only suggestion would be that we're going to have to have a lawyer in the loop twenty-four hours a day, seven days a week. It will be a continuous review process and the lawyer can be there for the targets of opportunity. But for the most part this process is a revolving process that may be two days ahead of when you actually use the weapon.

Tony Montgomery:

For time-sensitive targeting in Kosovo, these issues did not even come up to the European Command, much less go to the Joint Staff. Time-sensitive targets or mobile targets were delegated down and the guys on the ground could address those using the same practices they've always used, which are basically using their best judgment. There were people in the Combined Air Operations Center that provided legal advice to General Short.

What the targeting process that everyone and I have been talking about relates to what we think of as strategic targets, not the ones that pop up and we hit opportunistically. Though I will say that the issue of dealing with the tanks and artillery in houses and how to deal with that from a political level as opposed to just if you see a tank in the house you go and whack it, that did get up to the higher levels just because of the consequences that would fall from NATO forces being seen to go in and take down some houses that supposedly had tanks inside of them.

Coalition Approval of Targets

Charles Kogan:

It appears that there was a certain dissatisfaction on the part of the Europeans with some aspects of their input into the target approval process. This, I believe, came out in the French after-action report by their defense ministry stating that the B-1 raids from Missouri were conducted outside the NATO chain-of-command. I wonder if Lieutenant Colonel Montgomery could comment on that?

Tony Montgomery:

As far as I know, and I have to qualify it in that way, there was no target struck unilaterally by the United States. What I mean is that everything that was struck had some approval by NATO. Now that does not necessarily mean that each of the nineteen countries sat down and approved each of the individual targets. The Supreme Allied Commander for Europe (SACEUR) had been delegated certain authority. The NATO Secretary-General had been delegated certain authority. Since the US European Command (EUCOM) was not in that chain of command, I have never seen and I have no real idea just how much authority SACEUR had been delegated. I am aware of the French after-action report. I have read it. I am just not aware of any instance where there was a unilateral attack by the United States. I would be surprised if there had been one.

There was a great deal of effort made to do as much as possible to provide information, but EUCOM did not work for NATO. All of my efforts and all of the efforts of the EUCOM targeting cell were directed solely towards satisfying the US desire for information on the targets. We did not provide that targeting data directly to NATO. We were never authorized to do that and we did not take that step. Our data went to the Joint Staff. It went to our political authorities and our military authorities. We were aware that there was some dissatisfaction within certain NATO channels concerning the targeting process, but we could not fix that ourselves.

When Civilian Objects Become Military Objectives

Charles Garraway:

I would like to discuss objects because there has been considerable confusion over the definition of military objective in Article 55(2) of Protocol I. I think the problem has been slightly expanded by some of the language used

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today such as “traditional military objects” and “dual-use facilities.” The problem with the definition is between military objectives and civilian objects. Civilian objects are defined as anything that is not a military objective. Not all military objects are military objectives. I would suggest that the *USS Constitution* in Boston Harbor is a military object, but not necessarily a military objective. Similarly, a civilian house, which may not be being used by the military in any way but may be interrupting a tank advance, can by its location be a military objective. So certainly on the European side of the pond, there is a lot of confusion about military objects and civilian objects with people saying that civilian objects cannot ever be attacked, forgetting about the distinction between civilian objects as defined in Protocol I and civilian objects as used in the ordinary common sense term. Would the panel have anything to say on that?

Yoram Dinstein:

A few words about defended and undefended localities on the frontline. It must be understood that in a frontline situation, as a rule, the pertinent issue is less whether an object constitutes a military objective and more whether it is part of a defended locality. The term “locality” (introduced in Protocol I) is narrower than the expression “village, town or city” originally employed by the Hague Regulations. Whatever language is used, the point is that if a prescribed area is defended, any building within the area (other than an assembly point for the collection of wounded, marked as such) would be exposed to attack, irrespective of its ostensible status as a civilian object.

This is particularly relevant to scenario of house-to-house fighting epitomized by Stalingrad. If house-to-house fighting goes on in a particular city block, there is no need to evaluate the legal standing of every edifice within the block. Any such edifice can be shelled, bombed or otherwise attacked notwithstanding the fact that for the moment it does not serve a military function. The reason is the underlying expectation that the tide of house-to-house fighting will ultimately engulf it although, as yet, this has not come to pass. Obviously, the result can be grave collateral damage to civilians.

The issue of collateral damage to civilians is tied in with that of proportionality. The phrase proportionality is often misunderstood. Protocol I does not mention proportionality at all. The only expression used there is “excessive.” The question is whether the injury to civilians or damage to civilian objects is excessive compared to the military advantage anticipated. Many people tend to confuse excessive with extensive. However, injury/damage to non-combatants can be exceedingly extensive without being excessive, simply because the military advantage anticipated is of paramount importance.

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Consider the rudimentary example of the bombing of a major munitions factory. The factory may have thousands of civilian employees who are liable to be injured in an air raid. Notwithstanding the enormous civilian casualties likely to ensue, the enemy air force is allowed to strike the factory.

A related point is that of shielding combatants with civilians. A belligerent party shielding a military objective with civilians is acting in breach of the law of armed conflict, and it bears full responsibility for the civilian blood shed by an enemy attack against that military objective. Coming back to my Stalingrad example, once the Soviets decided to turn the city into a battlefield, it was their responsibility to remove civilians from the line of fire. A residential locality on the frontline can be saved from destruction by being declared non-defended. But a belligerent party cannot eat the cake and have it. Logic and experience militate against an attempt to defend a place to the hilt and at the same time expecting the civilian population *in situ* to be protected from the ravages of war.

Relating the Permissible Mission to the Military Advantage

Christopher Greenwood:

There is surely a difference between taking into account what a belligerent is seeking to achieve and trying to determine whether a particular attack will give it a military advantage. Professor Bothe seemed to suggest that we must account for what the belligerent is entitled to seek to achieve. Now it seems to me that an attack does not offer a military advantage if you will destroy something, when its destruction is not going to make the blindest difference to your own military tactics, or to what you expect the enemy's military tactics to be. To say that a State must not destroy something that does indeed interfere with its game plan because that should not have been its game plan in the first place because, for example, it is acting out of humanitarian motives, that seems to me to be an entirely different matter. I would be grateful to see some clarification of the distinction between the two.

Michael Bothe:

This is of course the fundamental issue: how far does the context of the military operation have an impact on the notion of military advantage? I think that the overall context of a military operation has an impact on what can be considered as advantage in this particular context. What you are suggesting is that any conflict is like any other conflict. This is also the basis of the objection of Professor von Heinegg in his Commentary. You say for the purposes of

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the *jus in bello*, any armed conflict is like the other. There is no distinction. I recognize that if I try to make distinctions, then I am very close to mixing *jus in bello* and *jus ad bellum*. I repeat that is something I do not want to do because it means foregoing one of the essential bases of the application of the *jus in bello*, which is reciprocity. Anything which risks negatively affecting reciprocity, I think, should be out.

There, I agree with all the objections that have been made. But this being so, I am still not convinced that you can take the notion of military advantage out of its context. If the declared purpose of a military operation is limited, as it was in Kosovo, you cannot divorce the notion of advantage from that purpose. It is not just the subjective intent; it is the objective character of the entire mission. The Independent Commission on Kosovo comes up with something similar and even goes a little further. They say there should be a protocol three on humanitarian intervention, because it is not appropriate to have the whole spectrum of otherwise lawful means of combat for an exclusively humanitarian intervention. I am not sure whether I would go that far, but I think that without changing the law, my interpretation of military advantage is a possible restraint.

This brings me to the more fundamental question which was asked by Wolff von Heinegg. Is it wishful thinking? Or is it a real development of the law? This is a distinction that sometimes is hard to make if we are in a situation of transition. We do not yet know whether Kosovo is transition or not. Operation Allied Force was for some something novel. It is a part of a process, as the United Nations Secretary-General put it, of redefining sovereignty and drawing different conclusions from the requirements of sovereignty than we did before. I am not so sure whether this is the case, but we are entering the question of the *jus ad bellum* here, and I refrain from commenting on that. If new types of military operations are developing, having completely different purposes from traditional war, then it is not only a matter of the *jus ad bellum*. It's also a matter of the means how these conflicts are conducted.

This also goes into the question of the ethical considerations which are discussed in relation to Kosovo. The standard objection from the moral point of view is from the traditional *bellum iustum* theory (there was a just cause but not a just means). This is standard in the literature on that subject. So these things are linked. And the relationship between *jus ad bellum* and *jus in bello* is not one watertight compartment. That is wishful thinking. We are at a point where the law might change, and I think it's absolutely legitimate to think about the direction in which it changes. My conclusion is formulated farther in terms of the question than in terms of a statement of *lex lata*.

Yoram Dinstein:

I have already tried to underscore in my paper the relativistic nature of a military advantage. Let me add here that often, whereas you do not know for sure what's good for you, you clearly perceive what you would like to deny to the other side. Thus, a military advantage to one belligerent party would simply be a mirror image of a military disadvantage to the adverse side. This brings me to my disagreement with Professor Bothe regarding the issue of bridges and railroads. At a certain juncture in the course of hostilities a bridge may just be standing there, without anyone appreciating its military value. It is only when a belligerent party calculates of what value the bridge could be to the enemy at a later stage that it dawns on military commanders that they'd better do something to eliminate the risk. The issue is not always destruction or capture: neutralization of a bridge to the enemy is another form of military advantage.

The momentous significance of some bridges should be manifest to all when it is borne in mind that World War II may have been prolonged by some six months only because of a British failure to capture a crucial bridge on the Rhine ("a bridge too far"). And it may as well be added that, had not the US Army captured intact the rail bridge at Remagen, the issue of the crossing of the Rhine might possibly have plagued the Allies a lot longer than it did.

What is true of bridges may also be true of railroads. The Panzer divisions in the Battle of Normandy fought superbly. But since the rail system had been paralyzed by Allied bombings, the Panzers had to reach the frontline—sometimes from the other side of France—on their own power. This took a long time (in some cases, up to two weeks), denying the Germans the opportunity to stop the Allied forces at the beaches. Moreover, by the time that the German armored units arrived at the frontline, they were (1) out of fuel, (2) in dire need of repair of many machines (while lacking the facilities to undertake the repair), and (3) the crews were tired and in some instances expecting defeat. In all, the dramatic Allied victory in June 1944 probably owes more to the systematic bombings of the French railroads than to the actual matching of tanks against tanks.

"Dual-Purpose" Targets

Yoram Dinstein:

A question was posed to me about "dual purpose" targets. I am not enamored of this phrase and have not used it in my paper. It appears neither in Protocol I nor in any other LOAC instrument that I am familiar with. I do not know where "dual use" comes from, and can only surmise that it has

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penetrated the lingo through articles published by human rights (rather than law of armed conflicts) scholars. To the best of my knowledge, references to “dual use” started with ill-founded criticisms of coalition bombings of the electric grid in Iraq in 1991. Since the electric grid in Iraq was totally integrated, attacks against it—and its installations—resulted not only in a tremendous military advantage (shutting down radar stations, military computers, etc.), but also extensive damage to civilians: hospitals stopped operating, water pumping and filtering facilities came to a standstill, etc. From a legal viewpoint, a “dual use” of Iraq’s electric grid did not alter its singular and unequivocal status as a military objective. There was, as usual with military objectives, the question of proportionality where collateral damage to civilians is concerned. But the extensive damage to civilians was not excessive in relation to the military advantage anticipated. What was true of Iraq is equally true of Kosovo.

One has to constantly bear in mind that war is war; not a chess game. There is always a price-tag in human suffering. Admittedly, Kosovo is not a very appropriate backdrop for such a point to be made, inasmuch as the war was conducted on NATO’s part on the assumption of zero casualties (although that meant zero casualties to NATO). In any event, no serious war can be founded on such an assumption. Some wars are more unfortunate than others in terms of actual bloodshed, but in the long run civilian suffering cannot be utterly avoided.

John Murphy mentioned that in present-day wars it may paradoxically be safer to be a combatant than a civilian. This shocking truth has become a governing factor of modern hostilities only since the outbreak of World War II. Earlier, the situation was entirely different. As late as World War I, in the Western Front at least, civilian casualties were mild while a whole generation of young combatants was destroyed in the trenches.

The current disproportion of the civilian/combatant ratio of casualties is totally unacceptable. Anyone even mildly interested in international humanitarian law must strive to bring about a better world in which civilized losses in war are minimized. Nevertheless, the realistic goal is to minimize civilian casualties, not to eliminate them altogether. There is no way to eliminate civilian deaths and injuries due to legitimate collateral damage, mistake, accident and just sheer bad luck.

Targeting Regime Elites

John Norton Moore:

As we seek to stop aggressive war and to end the all too frequent slaughter of civilian populations as we saw in Bosnia and had begun to see in Kosovo before the NATO intervention, there has been increasing theoretical interest in the focusing of deterrents, including intra-war deterrents, on the regime elites who were ordering the aggressive war or the genocide in the first place. From that observation, I have a couple of questions for any member of the panel who would like to respond. First, did NATO in fact consider that in relation to targeting Milosevic or his assets or his principal henchmen? Second, did the laws of war constrain NATO in any way from targeting the regime elites in Serbia if NATO had wanted to do so? And third, if there were any such constraints, do you believe that it is necessary to modify the law of war to permit the kinds of targeting of assets of regime elites or at least those that are ordering the continuation of such wars? And if so, what kinds of constraints or restraints if any would you put on them?

Michael Bothe:

Well, I cannot of course comment on what NATO considerations in this respect were, as these were not privy to me. As far as the law of war is concerned, targeting the elite is perhaps not the right term in this respect. It matters whether the persons in question are combatants or military commanders. If the president happens to be the military commander, as said earlier today, he or she can be targeted. If not, no. This is of course a certain constraint. I think it is a healthy constraint if you ask me. I would not like to see the laws of war modified in this respect because that would really open the door to do away with the distinction which I think is a healthy one.

Robert F. Turner:

We are trying to distinguish *jus ad bellum* and *jus in bello*, but the modern view is (at least when you're dealing within the setting of aggression) that the prevailing responsibility of States is not to be neutral but to be in opposition to aggression. You are not obliged to send troops, but you are not supposed to be in favor of the aggressor. If you are in a setting where international law allows the use of lethal force in self-defense or collective self-defense in response to the aggression, then the question becomes not are you assassinating a leader, which is by definition murder, but rather which target do you use lethal force against. If one of your choices in your best professional judgment is that we

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can stop this aggression by taking out the head aggressor, the head war criminal—even if he doesn't wear a uniform, but is the person who made the decision to commit the aggressive act—are you saying that it is in every instance preferable to say no, we would rather slaughter twenty or thirty thousand soldiers out on the field who may have had nothing to do with the policy and may have had no chance of going to Canada? Saddam Hussein, for example, was rough on his deserters. How do you deal with the doctrine of proportionality when you say it is better to kill thirty thousand innocent soldiers than to endanger the key war criminal who started the entire attack? Does that change anybody's attitude?

Wolff H. von Heinegg:

What you just asked only at first glance seems to be logical, because it does not matter. What the law of armed conflict has achieved from 1977 and beyond is something that we should not underestimate. There is the principle of distinction not only with regard to targeting, but also with regard to the question of distinction between combatants and noncombatants. So if there is a person that is not a combatant, a noncombatant I must say, then this person may not be attacked—period. It doesn't matter whether this decision will lead to twenty thousand deaths in the field, because those who are dying in the field or in the air or in the sea are combatants. They are legitimate military targets.

If we are trying to modify the existing law by such considerations, then what we have achieved until now will be destroyed very easily. As soon as you accept that *jus ad bellum* considerations play a role when it comes to the question of applicability of the *jus in bello*, the *jus in bello* is lessened. It is being deformed. Suddenly it doesn't depend only on the parties to the conflict, but on somebody else (like Her Majesty's government, for example) to determine whether certain measures taken during armed conflict by the parties to the conflict are legal or not under the laws of war. I say we must rather leave the laws of war and leave the law of armed conflict as it is with the principle of distinction between combatants and noncombatants and not modify it with any considerations taken from outside the law of armed conflict.

Robert F. Turner:

The concept of the noncombatant was one of innocence. It was that this person's life has no effect on the outcome of the war, and therefore they should not be harmed. If you trace the history of the law or the rule that says you cannot touch the other guy's king, Vattel and Grotius and others point

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out this is not the logical rule of law. This is an agreement that the leaders made to protect their own safety in an era where waging aggressive war was the sovereign prerogative of kings. What I am saying is now that we have moved on to make waging aggressive war a war crime, why do we still decide that the head war criminal is an innocent party who should be given the same protection as a Red Cross worker at the expense of all these young kids that get sent out there and slaughtered?

Harvey Dalton:

The study that Judith Miller cited this morning did conclude that there was an effort to impose pressure on the elites of Yugoslavia so as to have them impose pressure on Milosevic to terminate the conflict. That was done by targeting military-industrial plants and facilities owned or run by these elites and, as Ms Miller mentioned this morning, the Rand Study found that that was in fact more effective than the attacks on the military objectives. Now that is a very disturbing conclusion. I think it is very disturbing, because I do think the laws of armed conflict still apply. At least from our standpoint in targeting and approving these targets, there had to be a very clear military link between these industrial facilities and the war effort. We required that, but the pressure later on may be otherwise.

John Norton Moore:

I think this does raise some very important questions because all that we have and all that we do and all that we should do in the law of war, as in any other area of law, needs to serve a variety of important goals. We are trying to serve the humanitarian goals of preventing aggressive war, of minimizing casualties and preventing genocide. If, in fact, we discover as a significant body of newer information such as the Rand study is suggesting that a focus on regime elites, including the head of the State if necessary, is more effective than a variety of other applications, then it seems to me that is something that deserves very careful consideration.