WHEN LAWYERS ADVISE PRESIDENTS IN WARTIME

Kosovo and the Law of Armed Conflict

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The events of 11 September changed how we perceive national security as a society, a government, and as individuals. This is as true of national security specialists, who have been aware that America has been at war with terrorism since at least the 1990s, as it is for those whose sense of geographic security was shattered in New York and Washington. There is talk of "new war" and "new rules," and concern that we not apply twentieth-century lessons to a twenty-first-century war.

Over time, 11 September and its aftermath will test our interpretation and application of domestic law. It may also test the traditional framework under international law for resorting to and applying force. But much will, and should, stay the same for lawyers. As a result, my objective remains, as it was when I spoke at the Naval War College before 11 September, to give some personal insight into the application of the law of armed conflict to the 1999 Nato Kosovo air campaign from the perspective of a lawyer serving the president as commander in chief. I offer these observations not 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 doing so. 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. Lawyers also have an important role to play in sustaining "good-government" process, offering a degree of detachment and long-term perspective.

Constitutional government means that every decision should be made according to law; it also means that, as a matter of process, certain elected and appointed officials should be involved in decisions to resort to force as well as decisions on use of force, even when the need is immediate and the military option clear. Knowing how lawyers performed these tasks during the Kosovo conflict will not answer today's contextual legal questions, but it may offer insight on how to lawyer better and how policy makers effectively use their lawyers as part of a national security process that is necessarily secret.

Kosovo underscores that process and legal judgments are contextual. The contextual parameters in responding to terrorism are different from those for responding to a Balkan crisis. Clandestine and remote military operations against a hidden enemy will dictate different decision processes than do Nato air operations against fixed targets, as will the different political and policy parameters of both situations. As a result, I have not sought to modify an August text about limited air operations against a conventional military into a global text about use of force against terrorists. The legal framework is also different. For example, some of the concerns I anticipated after Kosovo and discuss below about dual-use targets may be less relevant to a war on terrorism, but they remain just the same and may arise in other contexts.

In short, it was my job to make sure that in doing the right thing the U.S. government was doing it the right way.

At least at the outset of current operations against terrorism the United States and its allies will operate within a more permissive legal context. Unlike Kosovo, in responding to 11 September, the *jus ad bellum* is self-evident and beyond rational debate. Those nations responding to terrorism are doing so pursuant to an inherent right of self-defense under customary international law and recognized in Article 51 of the United Nations Charter. The domestic legal context is equally clear—the president's authority as chief executive, as commander in chief, and in conducting foreign relations is at its broadest when defending United States territory. The executive branch acts militarily as well with the unqualified statutory authority of the Congress expressed in Public Law 107-40, the "Authorization for Use of Military Force." Enacted on 18 September, this joint resolution authorizes the president "to use all necessary and appropriate force against those nationals, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on 11 September 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." As Justice Robert H. Jackson wrote half a century ago,

in such cases the president's "authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[1]

Even when threshold legal questions involving resort to force are settled, decision makers must continue to make judgments involving application of the law of armed conflict to the use of force. Regardless of how a conflict is characterized, and regardless of the reciprocal application of the law of armed conflict, U.S. military actions are subject to the law of armed conflict. Title 18 U.S. Code 2441 may also apply. It is long-standing U.S. policy and doctrine to apply the law of armed conflict to U.S. military actions regardless of circumstance. This is good. This is who we are. As I discuss below, how these principles are applied—at what decisional level and with what degree of specificity (e.g., target-by-target, category of target, with what rules of engagement)—will depend on context.

As I also discuss below, the protection of innocent civilian life remains the fundamental principle behind the Geneva Conventions and, more broadly, the law of armed conflict. Indeed, part of our revulsion and contempt for terrorism lies in the indiscriminate, disproportionate, and unnecessary nature of terrorist violence against civilians and noncombatants. Therefore, the moral imperative and relevance of this legal regime is even more apparent today than it was before 11 September. As with Kosovo, policy makers will appreciate that these principles are not only found in domestic and international law; they make for good policy where international public and state support is essential and, particularly in a global contest, where economy of force is imperative.

KOSOVO, 1999

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 U.S. 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. We should not lose sight of the fact that the combination of diplomacy and military operations that constituted the campaign was successful in achieving Nato's objectives.

I intend 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. I have asked military friends what they would be interested in hearing explained on this subject. 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 Lyndon Johnson crouched over maps of Vietnam. As a matter of fact, the commander in chief did not approve all targets

during Kosovo but only a subset, which I 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.

My military friends have also asked about the role of lawyers, and particularly the role of a civilian lawyer at the National Security Council (NSC), in the conduct of military operations. 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.

TARGETING PROCESS

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

Preparation

First, I educated and advised the president, the national security advisor, the Principals and Deputies Committees,* 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 spent in education at the outset pays huge dividends when the law has to be applied in a live situation (a secure conference call at four o'clock in the morning 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 Geneva Convention Commentaries, U.S. military manuals and academic treatises, and all who taught me along the way.

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, the principles underlying the law of armed conflict are generally

* The NSC 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, U.S. 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, deputy assistant to the vice president for national security affairs, vice chairman of the Joint Chiefs of Staff, deputy U.S. representative to the United Nations, and deputy director of central intelligence.

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 (targets) that generates most debate.

The law of armed conflict is not law exclusively for specialists. We expect junior personnel to apply the same principles on a tactical level. These are principles that policy makers must understand and apply to their most solemn responsibility—the exercise of force and the taking of human life. I would add that in this respect government lawyers share a common duty with law professors and other experts to educate the policy maker of today and tomorrow in advance of the crisis—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, where the lawyer may be less proximate to the decision maker, I imagine that the teaching process is even more important. Not only does a good *advance* law-of-armed-conflict brief educate the policy maker, but any policy maker who hears such a brief will be sure his or her lawyer fully participates in the targeting process. In addition, the policy maker will understand in a live situation that the lawyer is applying "hard law"—specific, well established, and sanctioned—and not kibitzing on operational matters.

I say that in part because some policy makers treat international law as "soft law," and domestic, particularly criminal, law as "hard law." The law of armed conflict is, of course, both. Indeed, in 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. Nevertheless, under 18 U.S. Code 2441, specified war crimes committed by or against Americans violate U.S. criminal law.

Target Categories

My second role related to the law of armed conflict was the review of target categories identified by certain rubrics, such as air defense or lines of communication, under which 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?

Where 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. It might be asked why principals discussed military targets at all. First, as General Wesley Clark, Supreme Allied Commander Europe during the Kosovo campaign, has made clear, 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.[2] If the secretary of state, Madeleine Albright, 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, policy makers brought to bear extraordinary regional knowledge, including insight into Serbian pressure points. The principals had perspectives on the effects of targeting that a military staff officer might not have.

Principals also bore a heavy responsibility for the policy outcome of 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.

Targets

My third law of armed conflict–related role was to review specific targets. If the president was going to be asked to approve 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?

It might be asked why the NSC legal advisor, and not a military lawyer, was doing this. There are at least three reasons.

First, the European Command staff judge advocate and the legal counsel to the chairman of the Joint Chiefs of Staff, among other military officers, were performing these reviews as well. The system of legal review, however, was sufficiently streamlined that it was advisable for me to serve as a fail-safe to ensure that review had in fact occurred on targets going to the president. Moreover, authority to approve is also authority to modify or change, and it was essential that any such changes received legal review prior to final approval by the president.

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 time lines. In my view, there should be at the most senior policy level a lawyer who is directly responsible (and feels responsible) for applying at that level 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 the White House—that issues of law, policy, and operations came together. At the "political" level, a Nato alliance objection to a particular target might be couched in both policy and legal terms. Having a lawyer involved helped to avoid "default judgments" when legal issues were raised by foreign heads of state or ministers.

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, then Samuel R. Berger, expected from his lawyer.

In short, it was my job to make sure that in doing the right thing the U.S. 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? Have the longer-term repercussions of striking a target been 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, detached from commitment to any particular policy approach and with an eye to what Justice Jackson referred to as the "enduring consequences" of the decision.

Whether actors like it or not, Kosovo may serve as a harbinger of the manner in which specific U.S. military actions, down to the tactical sortie, will receive legal scrutiny.

It is also important to think broadly about who may be missing from a particular process. For example, I would ask, is this a matter that the attorney general, Janet Reno, should review? If not, might she nonetheless be asked by the press or the Congress for her legal view on whether an action is consistent with the president's constitutional authority? In responding to such queries, it might be asked, would the attorney general be substituting her judgment on military matters for that of the commander? Of course not. Wishing to understand the military objective of an action is not to question the military recommendation. It is, however, central to evaluating constitutional authority and the application of U.S. law to particular facts—and that is a lawyer's task.

At the level of practice and lessons learned, the critical process link was between the National Security Council and the legal counsel to the chairman of the Joint Chiefs—then Captain (now Rear Admiral) Michael F. Lohr, who worked in concert with the Department of Defense (DoD) general counsel. As the national-level military lawyer closest to the operational line, Admiral Lohr served as my primary contact, through whom I could track and review target briefs as they came to the White House from the chairman of the Joint Chiefs and secretary of defense. This communications channel kept me ahead of, or at least even with, the operational time line and ensured that the president, and not just the Pentagon, had the benefit of military and DoD legal expertise. It also provided for a single chain of legal

communication, thereby avoiding confusion. Working together on hundreds of targets, we came to understand each other's vocabulary, tone, and expressions.

When 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 would be for his decision. Second, I wanted to make sure my advice was received. Relying solely on oral communication is to run the risk that the process will move forward without your input, if the principal does not have time to meet or talk before operational time lines dictate a decision. Finally, I found that my advice was cumulative and that policy makers were likely to apply the principles of the law of armed conflict in other contexts, perhaps during conversations and meetings that I did not attend.

ASSESSMENT

Having given a sense of the legal process in the White House involving target review, let me now assess how that process worked, focusing first on the commander in chief and then on the lawyers.

The Role of the Commander in Chief

Briefings for the president on military operations by the chairman included all proposed categories of targets (such as air-defense or ground-force units in Kosovo). The president also reviewed a subcategory of individual targets. Such targets were for the most part targets of heightened policy concern. They might raise, among other things, potential negative allied reactions and, especially, pose potential risks of collateral casualties. Not surprisingly, these were the targets that also raised more difficult questions under the law of armed conflict. Of the approximately ten thousand strike sorties against some two thousand targets during the campaign, the national security advisor and I reviewed two or three hundred individual targets, of which the president examined a subset.

The president's review of targets was crisp: he would hear the descriptions, review the briefing materials, and at times raise questions. He expected issues to have been addressed before they reached him and that any still requiring resolution—perhaps those involving an ally—be quickly and clearly presented. This was not a ponderous process but the kind of decision making that one might expect of a commander in chief.

There is a school of thought that would have preferred that the president review fewer targets, and a qualitatively more limited category of target, than the president did in this case, on the grounds that such review amounted to micromanagement of the armed forces. In this view, which has its genesis in the Vietnam era, the president should issue strategic guidance—a statement of

mission and commander in chief's intent—and blanket 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 in this or any other context, 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 in this context. 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 John P. Jumper, U.S. Air Force,* and others have pointed out, Kosovo was a highly idiosyncratic campaign involving coalition warfare by nineteen democracies—fourteen of which had deployed forces. In this context, some individual target decisions assumed strategic policy implications. A government might fall. A runway might no longer be available. Nato consensus might collapse. In my view, those are implications of presidential dimensions. When allied concerns about targets arose, the president was called.

Further, I would argue that some of the targets the president reviewed required his approval in a context where force was being employed pursuant to the president's constitutional authority and the president had not provided the regional commander in chief blanket authorization to employ force. At the very least, his review removed any possible legal question as to whether select targets went beyond existing presidential authorization.

Finally, a president is accountable to the American people for U.S. operations and casualties. Whether a target was approved at the tactical, operational, or national level, its consequences would ultimately, and usually immediately, rest with Nato's political leaders—and on none more than the president of the United States. This last argument may be a truism, and it was not unique to this campaign—but it applies to an analysis of Kosovo, just the same.

If I were asked to strengthen the process, I would make doubly sure that national-level target suggestions, or nominations, are processed in the same manner as targets originating in the military chain of command—that there are no shortcuts and that there is no deference to grade or position. This would ensure that all targets receive the same measure of staff review and analytic scrutiny. I am not in a position to know just how many times senior officials sought to curtail the process through backchannel communications, but during the campaign I sometimes heard that this or that senior official was pushing for a certain proposed target to be included in the next presidential brief, without the regular chain of review. Whenever I became aware of such "advice" I would channel it

* From December 1997 to February 2000 Commander, U.S. Air Forces in Europe, and Commander, Allied Air Forces Central Europe.

into the normal process of selection and review. In any event, the potential for error diminishes if target nominations all receive the same stepped process of review up the chain of command. Where operational necessity dictates speed, my answer is to make the process work faster and smarter but not to accept shortcuts.

The Lawyers' Role

Although I think legal review at the NSC worked well with respect to Kosovo targets, there is no single "best" process. Indeed, one scenario is likely to be so different from the next in terms of policy and military context that it would be dangerous to generalize—or to insist that one template fit all conflicts. Kosovo was not DESERT STORM. DESERT STORM was not DESERT FOX. One has to maintain situational awareness, to find the measure of process and approval that ensures application of the law of armed conflict *and* meets operational time lines, in part through appreciation of the difference between the strategic, theater, and local targets, as well as of the difference between a fixed and mobile target. If there is no one right way to lawyer, however, there is a wrong way—and that is to absent oneself from the decision-making process or simply 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 seventeen, requiring not one lawyer but forty-three to answer). Also, of course, there is the fear that the lawyer may flatly say no to something the policy maker 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 as to the need for close-up lawyering. During the Kosovo campaign, legal advice may not have always received warm and generous thanks, but policy makers 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 knowledge of 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. Within the U.S. government, NSC legal review met all but one operational deadline—one fixed target was put on the president's brief before legal review was complete. When the Oval Office briefing reached that target, I asked that it be set aside until the review was done.

While I always felt pressure, I never let it dictate my analysis. One source of pressure that I had not fully anticipated, however, was the extent of international legal scrutiny that U.S. actions received. 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 U.S. military actions, down to the tactical sortie, will receive legal scrutiny—from nongovernmental organizations, ad hoc tribunals, and perhaps in the near future, a standing International Criminal Court. The latter two may attempt to assert jurisdiction over U.S. personnel. As a result, policy makers should anticipate that public statements intended to influence an adversary might also influence legal observers. Policy makers, 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. The review of the 1999 Kosovo action by the International Criminal Tribunal for the Former Yugoslavia is an illustration. That review concluded that Nato military operations were indeed lawful, but the very fact that it was carried out served notice that doing the right thing, and doing it well and carefully, will not necessarily immunize actors from international legal scrutiny under the law of armed conflict.

AREAS OF FUTURE TENSION

I will close with a few words of caution involving three areas where I would forecast that tension is likely to arise between doctrine, policy, and the law of armed conflict.

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, shock, and thus effect a rapid end to a conflict. There has been commentary about the incremental nature of the Nato air campaign, and the merits of delivering an all-out attack—"going downtown," in the American vernacular—earlier. On one level this aspect of the campaign was dictated by the fact that Nato's combined political leadership had approved specifically a phased air campaign; that fact, therefore, defined the limit of authorized military operations and alliance.

Legal considerations did not drive this result. Indeed, the political self-restraint agreed to by the alliance was reached well before any legal constraint based upon necessity or proportionality was reached. In my view, at the strategic and national level, as a matter of law, these principles provided significant leeway for response given Nato's legitimate objectives of preventing ethnic cleansing and avoiding a larger regional war. But looking forward, we should not lose sight of the fact that there is a legal facet to any decision to "go downtown." Legal judgments depend on factual predicates and judgments. If policy makers believe a symbolic show of force alone (for instance, a flyby) will accomplish the permitted goal, a lawyer will find it difficult, applying the principle of necessity, to

concur in a significant use of force, such as the bombing of national-level military targets in a capital city.

Dual-Use Targets

Similarly, so-called dual-use targets embrace any number of inherent tensions. The law of armed conflict attempts to posit, in the distinction between military objective and civilian object, a clarity that may not exist on the ground. I found that dual-use targets—like media relay towers or factories—largely fell on a continuum between objects that were distinctly civilian and those that were distinctly military. This seemed particularly true because we were dealing with a dictatorship with broad, but not always total, control over potential dual-use targets. 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 & Tube Co. v. Sawyer* (that is, a domestic legal regime that recognizes that the head of state or of government does not have unlimited authority over private property even in time of war, as the U.S. Supreme Court ruled in 1952, when it barred President Harry Truman from authorizing the government seizure of private steel mills in the face of a Korean War steel-mill strike, absent legislative authorization to do so).[3]

In such a context, "effects based" targeting (roughly, a framework for targeting that starts with the identification of a political objective from which flow target selections based on their potential effect on an enemy's decision-making process, rather than the identification of targets based on the direct and immediate military advantage of their destruction) and the law of armed conflict may be on a collision course. The tension is particularly apparent where a facility or enterprise financially sustains an adversary's regime, and therefore ultimately 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 these may be exactly the targets that if attacked might not only persuade a dictatorial adversary of one's determination but also, more importantly, shorten the conflict and therefore limit the number of collateral casualties that would 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 hurtling 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 of the Geneva Conventions. My purpose is to identify a very real area of tension that warrants further review and that will confront lawyers in the future.

Protection of Noncombatants and Traditional Understandings of Military Objective

The law of armed conflict generates a number of potential ironies in the interest of higher principles and clarity. For example, the law of armed conflict prohibits "treacherous killing"—for instance, the hiring of a noncombatant to poison a military leader—but permits the use of more dramatic force, even with significant collateral consequences, to attack the same military leader or a military headquarters with the same objective—disrupting command and control. During the Kosovo campaign, lawyers were never squarely confronted with a target that was of sufficient financial or symbolic value to the regime that it might well end or shorten the conflict with minimal collateral consequences but that nonetheless failed a traditional test of military objective because it did not make a direct and effective contribution to military operations or was civilian in nature. 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 for legal judgments made 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 conflict in which 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 in the awareness of the factual and temporal context in which the decisions were made. National security decision making is not judicial decision making. Time is more of the essence, and information is not necessarily of evidentiary quality.

Just as conflicts with low military casualties, even none at all, have resulted in a public expectation—some suggest a de facto policy constraint—regarding the scope of U.S. military action, some have used Kosovo to advance a legal view that the law of armed conflict virtually prohibits collateral civilian 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.

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 future conflicts incur as few collateral casualties as Kosovo did.

I hope that these recollections and perceptions give some insight into the process of legal review at the commander-in-chief level during the Kosovo air campaign. I also hope that they have given a sense of the issues, at least in a manner consistent with my duty to safeguard the deliberations that took place. In turn, such a review, I hope, will inform current and future policy-legal teams as they address America's conflicts.

My messages are 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.

Second, lawyers 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.

Third, the law of armed conflict is hard law. It is U.S. 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. The United States should be second to none in compliance, as was the case in 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 provides a framework to ensure that force is used in the most humane and economical manner possible. Whether we agree on the precise definition of military objective, or on each and every Kosovo target, I am confident that all can agree on the moral imperative of minimizing civilian casualties and suffering to the fullest extent possible.

NOTES

1. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952).
2. Wesley K. Clark [Gen., USA, Ret.], *Waging Modern War: Bosnia, Kosovo, and the Future of Combat* (New York: Public Affairs, 2001).
3. *Youngstown Sheet & Tube Co. v. Sawyer*. See also Maeva Marcus, *Truman and the Steel Seizure Case: The Limits of Presidential Power* (New York: Columbia Univ. Press, 1977), and Alan F. Westin, *The Anatomy of a Constitutional Law Case: Youngstown Sheet & Tube Co. v. Sawyer; The Steel Seizure Decision* (New York: Macmillan,1958).