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Modern War, Modern Law, and Army Doctrine: Are We in Step for the 21st Century?

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"Our first problem was with using suppressive fires against the air defense. According to standard Army procedure, we simply estimated where the enemy air defense might be, based on the terrain and the force's operating pattern. But the Defense Department's lawyers insisted that before we shoot at these locations, they had to be 'observed,' that is, not 'templated.' . . . By the lawyers' definition, someone would have to view Serb air defenses through photography or TV within a few hours of the time the artillery was to be fired. This was a requirement derived from the NATO Rules of Engagement that had been approved for the operation, without regard to the kinds of needs we might have for the Apaches. . . . Before we could shoot our suppression, we would have to have visibility over what was there, updated to the last few hours. . . . The commander would either have to accept the risk from other untargeted [templated] locations, or call off the planned mission. Surely there had to be a better way. Never had we imposed such a standard on ourselves. There had to be a misunderstanding, I thought." [1] -- General Wesley K. Clark, USA Ret., concerning legal constraints to suppressive fires in support of AH-64 operations in Kosovo

To most of the US Army, the work of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has little bearing on their pursuits in the profession of arms. Images of genocide, ethnic cleansing, and mass murder, while terrible in their own context, are not the types of crimes to which the men and women of the US armed forces would potentially be a party. Thus, while the US government supports the work of the tribunal as a matter of policy, the findings of the court, beyond the occasional headline, are simply not of interest to US military professionals.

That is a mistake. In fact, when examining current tactical and operational Army doctrine in light of the work of the ICTY, it becomes evident that in some areas, commanders may not have the doctrinal tools or appropriate training mechanisms available to steer clear of potential criminal culpability in future conflicts.

Over the past several years, the Office of the Prosecutor has moved forward in exploring the legal basis of a criminal charge frequently referred to as "unlawful attack." [2] These issues pertain to the legal review of the conduct of military operations that affect the surrounding civilian population (or associated nonmilitary objects). It examines the obligations of military commanders and other combatants under the 1949 Geneva Conventions, the 1977 Additional Protocols, and a broad body of international humanitarian law designed to safeguard civilians and other noncombatants. In select recent cases, these reviews have resulted in the indictment, apprehension, and conviction of operational commanders for violations of these conventions.

It is still premature to postulate how these trials and judgments might affect future US Army tactical and operational commanders, particularly with respect to the conduct of ground operations. However, on the basis of information that is in the public domain, it is clear that there are increasing expectations by the international community that military commanders be held to stricter standards of accountability with regard to making informed decisions on ground operations and target selection. As such, the jurisprudence coming out of the ICTY is likely to raise the bar for commanders to adequately justify the effects of military operations on the surrounding civilian populations and objects. These future effects will not be limited to only the traditional restrictions defined in US Army Field Manual (FM) 27-10, *Laws of Land Warfare*, but also will include more recent legal criteria pertaining to the issues of proportionality, "dual-use" infrastructure, terror, and even environmental damage. [3]

In contrast, Army operational and tactical doctrine in the fields of reconnaissance, intelligence, and fire-support remain heavily biased toward the rapid, accurate, and overwhelming application of force or fires on the enemy target or objective, often coupled with the least possible risk to friendly troops and assets. Less clear, particularly at the tactical level, is any similar doctrinal emphasis on a methodology for ensuring that civilians (or other categories of protected objects) are accurately tracked and protected as much as possible throughout a dynamic battlefield environment.[4] Further, little attention seems to be paid in the doctrinal planning process to the identification of potential situations where civilian and enemy military personnel or objects may be in transient proximity, or where objects of potentially hazardous (or long-term adverse) environmental impact to a surrounding civilian population are identified. Such omissions further preclude a systematic and continuing process of preventing inadvertent attacks against noncombatants, or of effectively monitoring the effects of combat operations on the surrounding civilian population.

Ultimately, these doctrinal shortcomings can lead to excessive civilian casualties, unduly restrictive or inflexible Rules of Engagement (ROE) constraints (driven by adverse public or media perceptions), and, in extreme cases, a future tactical or operational commander facing issues of potential criminal culpability under international justice and humanitarian law.

Background

The concept of charging crimes under the mantra of unlawful attack is relatively new in terms of international humanitarian law. In the World War II era, attacks on proscribed objects or facilities were dealt with on a case-by-case basis and were generally limited to small-scale and clearly egregious incidents, such as machine-gunning lifeboats, deliberately attacking a medical facility, or reprisal raids against villages.[5] Trials as to the "unlawfulness" of specific military operations or campaigns were not pursued as a general rule, in part due to fears that military commanders of the victorious Allied powers could themselves be found potentially culpable for similar acts (or tactics) as the accused.

In 1993, in response to widespread allegations of crimes occurring as part of the conflict in Bosnia, the UN Security Council established the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law Committed in the Territory of the Former Yugoslavia.[6] In doing so, the international community also created a modern forum for the legal review of unlawful attack (as defined in the Geneva Conventions and the Additional Protocols). This was done, in part, by recognizing such violations as elements of criminal acts charged under Articles 2, 3, or 5 of the Statute of the Tribunal.[7]

As an expansion of the provisions of unlawful attack, the International Criminal Court (ICC) Criminal Statute articulates many of these violations as criminal acts in their own right. These crimes (grouped under Article 8, War-Crimes) include not only traditional violations of the laws or customs of war, but also more modern issues such as the crime of attacking personnel on peacekeeping missions, and the crime of "excessive incidental death, injury, or damage." [8]

Select Issues by the ICTY Office of the Prosecutor and Relevant Trial Judgments

There are several points of departure for examining the work of the ICTY with respect to these rising expectations of the international community, and how it may limit or otherwise affect future Army commanders. First is the *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*. [9] This committee report, and its recommendations, provided the foundation for the Prosecutor's decision to not open a formal investigation into charges of unlawful attack by NATO forces against Yugoslavia as a result of the 1999 bombing campaign. While this report deals primarily with air operations, many of the command, intelligence, and target-selection issues are directly applicable to ground combat operations. Second is the case of the *Prosecutor v. Tihomir Blaskic*, in which former Bosnian-Croatian General Tihomir Blaskic became the first post-World War II commander charged with and convicted of crimes related to unlawful attack offenses with respect to ground operations. [10] Third is the current case of the *Prosecutor v. Stanislav Galic*, in which a Bosnian-Serb corps commander is charged with "Crimes against Humanity" and "Violations of the Laws and Customs of War" based on the conduct of military operations in and around the city of Sarajevo from 1992 to 1994. [11]

In all three cases, findings, legal filings, or judgments support an increasing obligation on commanders to take all

practical and reasonable measures to obtain accurate information on the surrounding noncombatant population and environment before and during the conduct of military operations. They also call for commanders to exercise restraint, when possible, if such information indicates that operations can be reasonably expected to cause "disproportionate" civilian casualties or damage. Further, they suggest that it can be viewed as a dereliction of the commander's responsibilities if he or she fails to take all practical measures in obtaining this information and then incorporating it into the planning and subsequent execution of combat operations. These points will become evident as each case is examined below.

Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia[12]

On 14 May 1999, citing Article 18 of the Statute of the Tribunal, the Prosecutor of the ICTY established a committee to assess allegations of serious violations of international humanitarian law with regard to the ongoing NATO bombing campaign against the Federal Republic of Yugoslavia.[13] Notwithstanding potential jurisdictional issues (i.e., the US government never publicly addressed the issue of US military forces--operating as part of NATO--coming under the legal jurisdiction of the ICTY),[14] this Committee Report details the process under which the allegations of unlawful attack were examined by the Office of the Prosecutor.

To begin, the Committee Report (paragraphs 28 and 29) outlines the broad legal issues specific to target selection and military attacks. As components of that issue, the *actus reus* (physical element) and the *mens rea* (mental element) for committing the crime of unlawful attack are explored. As noted in the Committee Report:

Military commanders are required to direct their operations against military objectives, and to ensure that the losses to the civilian population and damage to civilian property are not disproportionate to the concrete and direct military advantages anticipated. Attacks not directed against military targets and attacks which cause disproportionate civilian casualties or civilian property damage may constitute the *actus reus* for the offense of "Unlawful Attack." The *mens rea* for the offense is intention or recklessness, not simple negligence. In determining whether or not the *mens rea* has been met, it should be borne in mind that commanders deciding on an attack have the following duties:

- a) To do everything practicable to verify that the objectives to be attacked are military objectives;
- b) To take all practicable precautions in the choice of methods and means of warfare with a view to avoiding or minimizing incidental civilian casualties or civilian property destruction, and;
- c) To refrain from launching attacks which may be expected to cause disproportionate civilian casualties or civilian property damage.[15]

Continuing from the Committee Report:

A military commander must set up an effective intelligence gathering system to collect and evaluate information concerning potential targets. The commander must also direct his forces to use all available technical means to properly identify targets during operations. Further, a determination that inadequate efforts have been made to distinguish between military objects and civilian personnel and objects should not necessarily focus on one specific incident. If precautionary measures have worked adequately in a very high percentage of cases, then the fact they have not worked in a small number of cases does not necessarily mean they are generally inadequate.[16]

The above criteria focus on three main issues. First, the military commander is required to establish a reconnaissance, intelligence, and targeting system to direct target identification, selection, and other related battlefield operations. Second, such a system should be designed to provide the commander with the necessary information for making informed judgments as to the potential effects of operations against these targets on the surrounding civilian population and objects. Third, this system is to be maintained and monitored to ensure continued compliance with the goal of

keeping civilian casualties and damage to a minimum. The essence is that a commander is expected to take all reasonable measures to acquire information and use it as necessary to ensure that military operations under his or her command do not either inadvertently target civilian personnel and objects or cause disproportionate civilian casualties or damage with respect to the engagement of the military objective.

Prosecutor v. Tihomir Blaskic, Judgment

In the case of the *Prosecutor v. Tihomir Blaskic*, the issue of civilian populations and objects being the target of attack form the basis of counts two through four of his indictment and subsequent conviction by the ICTY.[17] These counts centered on two issues: Was the destruction justified by military necessity? And were unlawful attacks directed against civilians?[18] In exploring these specific issues, however, the Trial Chamber also examined the broader principles pertaining to both "distinction" and "proportionality" as basic tenets of lawful military operations.[19]

To frame further discussion, the two principles are defined as follows:

. *Distinction* requires that military commanders have the means available to be able to attempt to distinguish between military combatants or targets and civilian personnel or objects. The goal of this principle is the prevention of broad indiscriminate attacks without regard to civilian casualties and property.

. *Proportionality*, also commonly referred to as "justified by military necessity," is developed on a case-by-case basis. It measures the results of an attack against a military objective in relation to the impact caused to the civilian population or objects, to determine whether the results of such an attack might be considered excessive. Under this principle, the attack against the military objective is weighed in light of the military advantages expected or anticipated at the time.[20]

Under these principles, the commander has the obligation to ensure that he or she has the capacity to know and understand the battlefield area or the target environment. The failure of a commander to establish and maintain a system (reconnaissance, intelligence, or target surveillance) capable of distinguishing between civilians and combatants, or the failure to use this system to limit civilian casualties and damage (either in the planning or execution of the operation) can be viewed as proof of intent to make the civilians the object of the attack. It is no longer adequate for a military commander to broadly justify civilian casualties and damage in and around military objectives as unavoidable "collateral damage," secondary to military considerations. This process is legally referred to as "diligence in establishing the necessity and legitimacy of the military objective."

This failure was noted specifically in the conviction of General Blaskic. The Trial Chamber noted that General Blaskic had a "military surveillance" system organized, and thus he had the means to know of the battlefield area in his zone of operations. His failure to exercise this knowledge by ordering attacks on a series of essentially undefended villages (coupled with his troops' criminal activities after the seizure of those villages), led the Chamber to conclude that the attacks could not be justified for "strictly" military reasons--despite acknowledging the tactical value which possession of the villages (along a key road) subsequently gave his forces. Ultimately, the Trial Chamber used this as a basis to conclude that since the attack could not be "justified by military necessity," the civilians were the objects of the attacks.[21]

Prosecutor v. Stanislav Galic[22]

In pre-trial filings for the ongoing case of the *Prosecutor v. Stanislav Galic*, the Prosecutor has further defined her position on the issue of the liability of a commander for attacks against civilians.[23] In this regard, the requirements of Article 57(2)(a) of Additional Protocol I of the Geneva Accords are reiterated, those being that a commander shall "do everything feasible to verify that the objectives are neither civilians nor civilian objects and are not subject to special protection, but are military objectives." [24]

Further, with regard to a commander's basis of knowledge, the Prosecutor noted:

Those who decide upon and order an attack will often do so on the basis of information provided, inter

alia, by intelligence services and they [commanders] will not themselves have the opportunity to check the accuracy of such information. They are nevertheless obliged to ensure that the potential target of an attack was properly assessed, and in case of doubt to its nature, they must seek additional information.[25]

On this basis, the Prosecutor submitted:

These duties apply in situations even where a commander *believed* that an object was a legitimate military objective. If he or she launches an attack and the said object turns out to be a civilian object, the commander must be regarded as having acted "willfully" [i.e. deliberately or recklessly] if he or she failed to do everything objectively feasible to confirm whether the object was in fact a legitimate military objective.[26]

This standard, if accepted as law, would place a significant responsibility on commanders for ensuring positive and proactive reconnaissance, intelligence, and target-acquisition activities at all levels. Along the same vein, it invites a finding of criminal liability on a commander who is responsible for an inadvertent attack upon a civilian object, and who is unable to adequately demonstrate the required diligence in establishing the necessity and legitimacy of the military objective.

The Practical Application of "Military Necessity" and "Diligence in Establishing the Legitimacy of the Objective"

Returning to the NATO air campaign over Yugoslavia, the practical application of the "military necessity" and "due diligence in establishing military legitimacy" benchmarks can be observed with respect to three specific incidents. The most significant incident was the NATO attack on the Serbian TV and radio station in Belgrade on 23 April 1999. The bombing of this station occasioned heated international media criticism and raised the issue that the targeting of this admittedly government "owned and controlled" facility was not militarily justified. Such concern centered on the issue of the station being solely part of the "pro-government propaganda apparatus," and that this circumstance alone should not justify targeting the broadcast station, particularly in light of the number of civilian casualties incurred. In this regard, the ability of NATO to publicly articulate in detail how the station (and its associated equipment) was part of the Serbian military command, control, and communications network served to help identify the military advantage expected by NATO from attacking this specific "dual-use" component of the network.[27] Without such intelligence, and the decision to openly come forward with the information derived from it to establish military necessity, it is debatable whether the international community would have accepted NATO's rationale for the attack.

In another reviewed incident, the attack on the Djakovica refugee convoy on 14 April 1999, it was determined that the target was in fact a civilian object. However, despite the nonmilitary nature of the attacked object, NATO claimed that available intelligence and reconnaissance data indicated the convoy was a transient military object. NATO also indicated that the rules of engagement (ROE) in effect at the time precluded a "positive" final visual identification prior to attacking the target. Further, it was noted that when the civilian nature of the object was suspected after the first several passes, attack operations were immediately suspended. Under these circumstances, while the Office of the Prosecutor noted that the ROE might have been a contributing factor, it was determined that neither the aircrew nor the commanders displayed the degree of recklessness in failing to take precautionary measures in identifying the target that would sustain charges.[28] In this instance, the Prosecutor recognized that the standard of "all practicable precautions with a view to avoiding, or minimizing incidental civilian casualties or civilian property destruction" could be met with the diligent use of available intelligence and reconnaissance capabilities. The standard does not require extraordinary steps that place undue or inordinate risk on the attacking forces, or the unrealistic expectation of a perfect view of the battlefield.

The final incident, the Chinese Embassy bombing on 7 May 1999, was, by US government admission, a mistaken attack based on incomplete information and an isolated failure in the target-validation process. As such, the aircrew and direct military leadership were not held responsible for attacking the target, based on incorrect information beyond their control.[29] As this incident was noted to be an isolated failure, and not a systemic lack of diligence, it further did not fit the criteria as a "willful" attack against a civilian target.

Relevant US Army Doctrine

Despite the Prosecutor's findings that there was insufficient grounds to initiate a formal investigation against NATO's prosecution of the air campaign over Yugoslavia, one should not conclude that a ground component review would have fared similarly. NATO air components had months to plan and staff target identification, nominations, and operations. The inherent precision guidance and sophistication of launch platforms and ordnance further contributed to expectations that military objects could be engaged with little threat of collateral damage. Finally, the operational environment allowed for the engagement of ground targets from an altitude well above the range of most Serbian air-defense threats, negating the requirement for widespread supporting or suppressive fires necessary to minimize the risk to allied pilots and aircraft. Ground forces, if engaged, would not have had the same permissive and sterile operating environment, a factor that was clearly understood by NATO's decisionmakers.

In this context, it is useful to refer back to the observations made by General Wesley Clark in dealing with the "disconnect" between the theater ROE considerations (primarily designed for the high-altitude air bombing campaign) and the operational realities of Army AH-64 mission execution. General Clark accurately noted that the ROE interpretation limited the Army to engaging the Serbs in a manner that was different from their training, tactics, and procedures, and well above any prior operational restrictions. These same restrictions also served to place commanders in the difficult position of choosing between mission execution at an increased risk to friendly personnel and assets (with all the inherent liabilities), or abandoning the mission (with all the inherent tactical consequences). It is not hard to imagine the frustration that operational commanders must have felt toward their DOD legal counterparts sitting miles away from their mission reality. Yet, in fairness, can it be said that Army ground doctrine has prepared tactical and operational commanders to fight a middle- to high-intensity engagement in any legal environment other than the wide-open, civilian-sparse southern Iraqi deserts? Should commanders have been surprised to discover that the ROE would not allow them to fight as they had trained?

With respect to the previously listed expectations of the international community, it does not appear that much of our current doctrine addresses key legal issues that may arise in a future ground combat environment. In fact, it is clear in much of our doctrine that there is no systemic process that continues after the development of the rules of engagement to address issues pertaining to inadvertent attack or proportionality, particularly in the disciplines of intelligence, reconnaissance, targeting, and fire support. It is at this juncture where future tactical and operational commanders will be at risk for potential criminal culpability unless this area is addressed.

In examining this particular issue, Army Field Manual 6-20-10, *Tactics, Techniques and Procedures for the Targeting Process*, is a proper departure point. This manual discusses in depth the "Detect-Decide-Deliver and Assess process" as well as the roles and functions of the "Targeting Team." [30] Absent in the targeting methodology, however (particularly in the creation of the High-Payoff Target List, the Attack Guidance Matrix, and the Target Selection Standards), is any discussion on the processes that would be used to either predict or monitor the impact of such fires on the surrounding civilian environment. [31]

FM-6-20-10 notes that the responsibility to monitor the effects of friendly operations on the civilian populace is within the realm of the G-5 or civil affairs officer. As part of this responsibility, a G-5 officer is nominally placed in the plans cell of the division or corps main command post. [32] With regard to that representative's role in the targeting process, he or she is to "produce input to the Restricted Targets List (RTL) and to coordinate [civil affairs] support for the Intelligence Preparation of the Battlefield (IPB) and targeting process." [33] In reality, however, it is difficult to envision how the G-5 or civil affairs representative could play any substantive role in a dynamic maneuver environment--either in the euphemistically vague mission of "coordinating [civil affairs] support for the IPB and targeting process," or in the more defined mission of providing input to the RTL.

As presently envisioned, the bulk of the civil affairs assets will be operating out of the rear command post, and will form the nucleus of the rear area operations cell (RAOC). While the RAOC is tasked to gather information from such sources as host-nation agencies, civil affairs units, interrogations of prisoners of war, and defector reports, most of this information relates to a static battlefield environment. This information, while valuable, may be days old, and will not be of particular use in tracking various transient civilian or protected objects (refugee gathering areas, mobile medical facilities or shelters, governmental or nongovernmental organizations, humanitarian relief assets, etc.). In addition, the RAOC will normally be to the rear of the main command post, and consequently well removed from the current

operations cell, the intelligence cell, and the analysis control element. Without constant access to these sources of combat information and tactical and operational intelligence on the enemy side of the forward boundary, it is difficult to envision how accurate monitoring and tracking of these civilian personnel and objects could be accomplished. At the same time, such information assembled at the RAOC must be available in a timely manner to the plans, current operations, and targeting cells, where it can be integrated into the commander's view of the battlefield environment and factored into his or her decisionmaking process.

In examining the role of the G-2 (intelligence) section in the targeting process with regard to minimizing the effects of friendly fires on surrounding civilian populations and objects, the limited discussion in US Army doctrine on the issue revolves around the IPB process, which is described as the "foundation for the rest of the targeting process." [34] While not specifically stated, the assumption appears to be that just as the IPB process will help to identify high-value targets, it will also somehow preclude the inadvertent targeting of nonmilitary objects or personnel--or the targeting of military objects whose engagement will have a significant adverse impact of surrounding civilians.

Despite this blind faith, Field Manual 34-130, *Intelligence Preparation of the Battlefield*, contains almost no discussion on this issue with respect to the conduct of conventional military operations. [35] What little guidance is found in that manual relates to the identification of known "protected" objects or civilian concentrations as part of the situation template. Issues of "dual-use" infrastructure or an analysis of the impact of their destruction to the civilian population are not addressed. Further, with respect to operating on a dynamic battlefield, there is no doctrinal discussion on tasking collectors to identify and track mobile noncombatant populations or objects in the same manner as assets are tasked to confirm or deny potential enemy courses of action and locate high-value targets.

Returning to FM 6-20-10, the role of the Staff Judge Advocate (SJA) in the targeting process is also briefly discussed, specifically in the area of targeting responsibilities. In this regard the SJA is viewed as an auxiliary player in the process, who is called upon in certain operations "if necessary." [36] Specific roles and responsibilities are undefined. Conversely, in reviewing the first draft of FM 3-06, *Urban Operations*, legal considerations are viewed as critical to the targeting process, presumably a result of operations in this environment having the highest potential for issues with noncombatants and nonmilitary targets. [37] However, even here, other than for the formulation of the ROE, the specifics of how the SJA supports the more dynamic targeting process remain undefined. Completing the circle, in FM 27-100, *Legal Support to Operations*, the SJA branch envisions itself as a major player in the deep operations and targeting cell. However, for specifics as to what tasks SJA officers are to accomplish, and how, readers are referred back to the undefined roles in FM 6-20-10. [38]

In a worst-case scenario, this lack of systemic procedure may lead to specific failures on several counts. First, taking a broad view, there appears to be no effective planning methodology to monitor the impact of friendly force combat operations on civilians or civilian objects on the enemy side of the forward boundary. The intelligence and operations (G-3) sections have the tools to monitor friendly and enemy activity with regard to anticipated courses of action, and the means to do so from the current operations, the deep operations, or the targeting cell and the main command post. The civil affairs representative has no such dynamic tools, and only a limited means from the RAOC. Thus, even when military necessity requires an attack or operation with the anticipation of adverse impact to surrounding civilians, there is no real-time or near-real-time methodology to continuously monitor the effects during the course of the operation outside the visual range of engaged units and observers. The result could be an attack or operation that causes more casualties and damage to the civilian population and objects than expected, and possibly excessive to the military benefit anticipated--with potential criminal culpability for the commander. This may be particularly true with regard to "deep-attack operations," where battle damage assessment collection and methodology focus on analysis of effects on the targets and not on the surrounding battlefield environment.

Second, on the narrower aspect of targeting, the lack of a methodology to track civilian objects (especially transient ones) through the battlefield environment can lead to incidents such as those reviewed by the ICTY during the NATO bombing campaign. Again, this risk is particularly acute with regard to "deep-attack" operations, which rely far more on target information derived from intelligence sources as opposed to visual identification. [39] The varying degree of vulnerability of these collectors (and the associated analysis of their data) to concealment and deception operations greatly increases the chances of such incidents occurring. This also applies to deliberate efforts by the opposing force to create such incidents for their own political and propaganda purposes (as noted in Yugoslavia, Iraq, and

Afghanistan). In this regard, select ground force "counter-fire" assets (artillery, multiple-launch rocket systems) are far more vulnerable to such efforts than rotary-wing or fixed-wing assets.

Third, in recognition of these issues, and the growing sensitivity of public, media, and political leaders to civilian casualties and collateral damage, it should be expected that future rules of engagement will be far more restrictive than those in past ground conflicts. These restrictions will most acutely affect reconnaissance, intelligence, and "over-the-horizon" targeting and fires. The effect on how the Army will be permitted to fight should be reflected in how the Army trains to fight. Suppressive fire directed against templated enemy positions, counter-battery fire based on radar information, missile strikes against enemy command post locations derived through non-visual means (e.g., communications intercepts), and even harassment and interdiction fires may no longer pass legal review if the danger to the surrounding civilian population is judged as too great.[40] If that is the case, then the Army should begin exploring for doctrinal solutions now. Future commanders should not be forced to develop ad hoc tactics on the eve of battle.

Conclusions

As international humanitarian law pertaining to unlawful attack continues to advance and be refined through the course of various war-crime trials, even the most conservative judgments will undoubtedly place additional responsibilities on military commanders in weighing the military objective and the impact on the surrounding civilian population or objects. This will include civilian casualties, short- and long-term damage, and even in some instances the environmental impacts of such operations.

While directives pertaining to the conduct of combat operations in and around the surrounding population should always be contained in the rules of engagement, there appears to be a significant gap in Army doctrine and training for the implementation of such procedures. This is particularly acute at the tactical and operational echelons of corps, division, and brigade, where the risk of inadvertently attacking civilians and civilian objects will be most pronounced. Conversely, joint targeting procedures at echelons above corps, in both doctrine and application, as illustrated in the bombing campaign against Yugoslavia, were demonstrated to be robust enough to withstand international judicial review.

The failure to have these systems or processes in place and exercised may be viewed as an indicator by international humanitarian law specialists that a commander did not take "all practicable precautions with a view to avoiding or minimizing incidental civilian casualties or civilian property destruction," as required. Further, under currently proposed legal standards, this omission might also be viewed as indicative of a "willful" attack on the civilian population or objects, thus exposing a commander to potential criminal prosecution.

Modern conventional ground operations will continue to challenge the professional, moral, and legal skills of commanders. Future commanders will have to balance the professional obligations of the mission and its successful accomplishment with the moral obligation to minimize risk to troops under their command. They will also have to balance the objectives and conduct of the mission with their legal obligation to safeguard the surrounding noncombatant population. Commanders need updated doctrine that meets the modern realities of conventional combat in the 21st century.

NOTES

The views expressed herein are those of the author alone, and do not necessarily reflect the views of the International Tribunal or the United Nations in general.

1. Wesley K. Clark, *Waging Modern War: Bosnia, Kosovo and the Future of Combat* (New York: Public Affairs, 2001), p. 304.

2. The term "unlawful attack" generically applies to a broad series of violations of the 1949 Geneva Conventions (IV), *Convention Relative to the Protection of Civilian Persons in Time of War*, and Part IV of the Additional Protocols (1977), *Protection of Civilian Persons and Populations in Time of War*. These are specific charges under the Statute of

the ICTY as "Crime(s) against Humanity," "Grave Breaches," or "Violations of the Laws and Customs of War."

3. Following the 1991-92 Gulf War, some military-law scholars raised significant questions with regard to the allied coalition air operations against the Iraqi power distribution network. Despite the clear military applications of the network, the resulting long-term adverse impact on the Iraqi civilian population led some to question the "dual-use" justification criteria (see William J. Fenrick, "Attacking the Enemy Civilian as a Punishable Offense," *Duke Journal of Comparative & International Law*, 7 (Spring 1997), 544. Similar issues were again raised after the NATO bombing campaign against Yugoslavia in 1999 with regard to the attack of "dual-use" telecommunications and "environmentally sensitive" petrochemical facilities (see UN, ICTY, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 8 June 2000, pp. 19-26 [hereinafter, *Final Report, NATO Bombing*]). The issue of "terror" is being explored in the upcoming case of the *Prosecutor v. Stanislav Galic*, where his allegedly unlawful use of military means against a civilian population resulted in their "terrorization" as a component of a "Violation of the Laws or Customs of War" (ICTY, *Prosecutor v. Stanislav Galic*, Indictment IT 98-29, 26 March 1999; Count One). Undue environmental damage can form the basis for an unlawful attack charge under Article 8 of the draft Criminal Code for the International Criminal Court.

4. Civilian and protected objects as defined by US Army Field Manual 27-10, *Laws of Land Warfare* (Washington: Department of the Army, May 1958, with change dated 15 July 1976), ch. 2, "Hostilities" (sect. 4, "Bombardments, Assaults, and Sieges"; sect. 6, "Treatment of Property During Combat"), ch. 5 (sect. 2, "General Protection of Populations Against Certain Consequences of War"); as well as Protocol One (*Relating to the Protection of Victims of International Armed Conflicts*) and Protocol Two (*Relating to the Protection of Victims of Non-International Armed Conflicts*) of the Geneva Conventions of 12 August 1949, 12 December 1977.

5. These were broadly known as the trials of class "B" and "C" war criminals, which were conducted by low-level military tribunals or courts-martial in the zone of the occupying powers.

6. UN Security Council Resolution 827, 25 May 1993.

7. Article 2 refers to "Grave Breaches of the Geneva Conventions of 1949"; Article 3 refers to "Violations of the Laws or Customs of War"; and Article 5 deals with "Crimes Against Humanity."

8. Article 8(2)(b)(iv) of the ICC Criminal Statute makes it a criminal act to conduct an "attack [against a legitimate military object] which would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term, and severe damage to the natural environment and the death, injury, or damage would be to such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated." While the US government does not (at present) support the establishment of the International Criminal Court (ICC), this Criminal Statute will undoubtedly form a substantial basis for the generally recognized body of laws and jurisprudence referred to as "the Customary Laws of War," which the US government does acknowledge (see FM 27-10, ch. 1. See also DOD Directive 5100.77, 9 December 1998).

9. *Final Report, NATO Bombing*.

10. *Prosecutor v. Tihomir Blaskic*, Case Number IT-95-14-T. Judgment issued 3 March 2000 (under appeal).

11. This trial began on 3 December 2001 in The Hague.

12. In reviewing five specific incidents resulting from NATO air attacks, three were determined to be legitimate military attacks despite civilian casualties (Leskovac Railway Bridge, 12 April 1999; the bombing of Serbian radio and TV, 23 April 1999; and the attack on Korisa village, 14 May 1999). The remaining two pertained to inadvertent attacks on nonmilitary targets or objectives.

13. *Final Report, NATO Bombing*, pp. 2-3, paras. 1-4. In a 13 May 1999 speech by Justice Louise Arbour at the launch of the ICC ratification campaign, she noted that by becoming "parties to the conflict" on 24 March 1999, 19 European and North American countries (read NATO) have "voluntarily submitted themselves to the jurisdiction of a pre-existing International Tribunal, whose mandate applies to the theatre of their chosen military operations." See ICTY

Press Release, JL/PIU/401E, 13 May 1999, internet, <http://www.un.org/icty>.

14. With respect to the issue of jurisdiction by both the ICTY and the World Court, NATO spokesperson Jamie Shea addressed the issue directly, noting, NATO "obviously recognizes the jurisdiction of these tribunals, but I can assure you, when these tribunals look at Yugoslavia I think they will find themselves fully occupied with the far more obvious breaches of international law that have been committed by Belgrade than any hypothetical breaches that may have occurred by the NATO countries." See 1500 Press Briefing, 17 May 1999, internet, <http://www.nato.int/kosovo/press/p990517b.htm>. To this author's knowledge, US Department of Defense and Department of State officials never publicly addressed the issue, either in the May 1999 time frame or during the public release of the Office of the Prosecutor Committee Report in June 2000.

15. *Final Report, NATO Bombing*, pp. 13-14, para. 28.

16. *Ibid.*, p. 14, para. 29.

17. *Prosecutor v. Tihomir Blaskic*, pp. 4-5. Count 3, "Unlawful attack against civilians"; Count 4, "Attack upon civilian property."

18. *Ibid.*, p. 54, in referring to Article 3 of the Statute of the Tribunal--Violations of the Laws or Customs of War.

19. Fenrick, p. 541.

20. As generally interpreted under international humanitarian law.

21. *Prosecutor v. Tihomir Blaskic*, pp. 209-10.

22. *Prosecutor v. Stanislav Galic*, Prosecutor's Pre-Trial Brief Pursuant to Rule 65ter (E) (i), filed 23 October 2001. A pre-trial brief is a filing on behalf of a party to the case in which the factual or legal submissions of that party are detailed. As such, the filing by the Prosecutor in this case represents her opinion as to how the court might view both the facts and the relevant law.

23. *Ibid.*, paras. 172-76.

24. *Ibid.*, para. 173. Feasible is defined as what is "practicable or practically possible," taking into account all circumstances prevailing at the time, including humanitarian and military considerations.

25. *Ibid.*, para. 175.

26. *Ibid.*, para. 176. Italics added.

27. *Final Report, NATO Bombing*, pp. 33-39, paras. 71-79.

28. *Ibid.*, pp. 30-33, paras. 63-70.

29. *Ibid.*, pp. 39-41, paras. 80-85.

30. US Army, Field Manual 6-20-10, *Tactics, Techniques and Procedures for the Targeting Process* (Washington: Dept. of the Army, May 1996), ch. 2.

31. *Ibid.*, chs. 2, 4.

32. *Ibid.*, ch. 4, p. 4-2.

33. *Ibid.*, ch. 4, p. 4-16.

34. *Ibid.*, ch. 2, p. 2-2.

35. US Army, Field Manual 34-130, *Intelligence Preparation of the Battlefield* (Washington: Dept. of the Army, July 1994).
36. FM 6-20-10, ch. 4, p. 4-16.
37. US Army, Field Manual 3-06, "Urban Operations" (initial draft), ch.7, "Legal Support."
38. US Army, Field Manual 27-100, *Legal Support to Operations* (Washington: Dept. of the Army, September 1999), ch. 5, "Legal Support in War."
39. Department of Defense, Report to Congress, *Kosovo/Operation Allied Force After Action Report (U)* (Washington: DOD, 31 January 2000). In Part V, "Intelligence and Targeting Support, Needed Improvements," the Department of Defense specifically noted this vulnerability with respect to the dynamic targeting process and the rapid collection and dissemination of "no-strike target information to avoid collateral damage" (p. 56).
40. Ibid., pp. 76-77. In assessing the battlefield utility of Task Force Hawk during the Kosovo conflict, the Department of Defense candidly noted that the "Army Tactical Missile Systems (ATACMS), deployed with TF Hawk to engage deep targets and suppress enemy air defenses, were never used due to collateral damage concerns."

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