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## The Perception of War versus the Reality of Law

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## **Abstract**

War crime trials have commonly been associated with World War II or Vietnam. Today they are front-page news as the atrocities of the Former Republic of Yugoslavia are replayed for us. While the basic characteristics of warfare have not changed, the application of the law has become more complex for operational commanders. This paper aims to gain better understanding of the complexity vis-à-vis the environment operational commanders and staff find themselves today, the linkages between strategic and operational level (decisions and impacts), and implication on how we, as officers will operate at the operational level (to including the planning staff at NDHQ). The evolutionary nature of conflict coupled with the changing interpretation of just war principles places operational commanders on the horns of a dilemma. The dilemma is that the nature of conflict is evolving faster than the law. This paper argues that civilians, the media, and technology affect the law, which lags behind the present operational environment. Understanding these relationships, operational commanders and staff will be in a better position to plan and conduct missions. Failure to conduct such study will undoubtedly result in failure in the field.

“Sweet is war to him who knows it not.”

Pindar, *Fragment*, 110 (c. 500 B.C.)

## **INTRODUCTION**

War crime trials have commonly been associated with World War II or Vietnam. Today they are front-page news as the atrocities of Rwanda and the Former Republic of Yugoslavia are replayed for us. During a recent trial by the International War Crimes Tribunal for the Former Republic of Yugoslavia (ICTY) of a Serbian general, the judge asked me, as a soldier, how I would personally and professionally define a legal target in Sarajevo in 1994? Having determined what was a legitimate target, how would I engage that target? This question appears to be simple question and there lies the trap. Prior to the trial I thought I knew the answer; however watching the defence and prosecution battle it out in their own war for days, I began to see the dilemma and challenge of being a soldier in a very complex situation. At that point the answer and my very understanding of war and the law was not so clear.

This trial was not a staff college exercise or field exercise where we talk about the application of law in complex environments. This situation was real. Not only was this general on trial; but, our very understanding of the application of law and the linkages between the strategic and operational level of war. What were challenged were factors affecting the application of law in operations? These questions need to be answered when talking about planning and executing tasks at the operational level.

This paper aims to gain better understanding of the complexity vis-à-vis the environment operational commanders and staff find themselves today, the

linkages between strategic and operational level (decisions and impacts), and implication on how we, as officers will operate at the operational level (to including the planning staff at NDHQ). The evolutionary nature of conflict coupled with the changing interpretation of just war principles places operational commanders on the horns of a dilemma. The dilemma is that the nature of conflict is evolving faster than the law. These complexities need to be understood because of the relationships between civilians, the media, and technology and how they relate to the law. Understanding these relationships, commanders and staff will be in a better position to plan and conduct operations. Some historical legal foundation is necessary to situate the foundations of the law used today.

The key concepts contained in the paper focus on the fact that the operating environment is more complex than it has been for some time. The Cold War period may be seen as an aberration in history and that we are going back to a more traditional form of conflict. As we move into the future we move back in time when conflicts were wars were fought in the streets. Added to this environment is the ever-present asymmetric threat complicating the commander's task.

War to include peace support and peace making operations are governed by international law, customary law and the law of armed conflict. These laws provide the very foundation of our society and gives the context and direction that society has decided to take.

The law is evolutionary. Grotius, Clausewitz, the Geneva Conventions, as well as national and international law provide the boundaries that our collective societies have decided. The law is fabricated from the set of morals within a society; however, this paper limits discussion to the law and not the moral aspects of what is right and wrong.

Third World forces are capitalizing on the advantages of complex terrain, defined as cities, jungles or mountains, to nullify or mitigate against the technological superiority and standoff capability those modern forces possess and depend on.<sup>1</sup> While the character of war has not fundamentally changed, the environment has become more difficult due to introduction of “humanitarian law,” the ever-present media, technology and the blurring of combatants and non-combatants. The humanitarian argument was used to justify the Western intervention into Kosovo. Are we now to use “humanitarian law” to determine when and where we will intervene if the actions of a sovereign state do not conform to our beliefs despite the fact that no aggressive action has been taken against another state?

The evolutionary nature of conflict coupled with the changing interpretation of just war principles places operational commanders on the horns of a dilemma. The dilemma is that the nature of conflict is evolving faster than the law of conflict. The state of the law, the influence of the media and public perception, the role of civilians plus the obligations of the operational commander do not operate in isolation of each other. It is assumed that the reader has a basic understanding of the tenets of the law of armed conflict including war and peace support operations.

## **INTERNATIONAL LAW AND THE LAW OF ARMED CONFLICT**

International law is the body of law that governs relations between states and the system of rules and regulations that guide states when conflicts arise between them. International law deals with issues including nationality, the use of armed force, and the human rights of individuals. The Law of Armed Conflict, considered in its broadest sense, determines when states may resort to the use

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<sup>1</sup> Mark Hewis and Rupert Pengelly, “Facing urban inevitabilities,” *Jane’s International Defense Review*, August 2001.

of armed force and how they conduct hostilities during armed conflicts.<sup>2</sup>  
Clausewitz maintained:

To impose our will on the enemy is [the] object of force...The fighting Force must be *destroyed*: that is they must be put in such a condition that they can no longer carry on the fight...War is an act of force, there is no logical limitation to the application of force...[In fact] kind-hearted people might...think there was some ingenious way to disarm or defeat an enemy without too much bloodshed, and might imagine that is the true goal of the art of war. Pleasant as it sounds, it is a fallacy that must be exposed: war is such a dangerous business that the mistakes which come from kindness are the very worst...[However,] if civilized nations do not put their prisoners to death or devastate cities and countries, it is because intelligence plays a larger part in their methods [that was the case among savages] and has taught them more effective ways of using force than the crude expression of instinct.<sup>3</sup>

Clausewitz describes the objective of war and the application of force. The application of force has been refined to include what is and is not acceptable. For example the treatment of prisoners, the status of civilians and the amount of force used (proportionality) to confront one's enemy have all been defined throughout history. The point is that the law has been defined with each successive conflict. Conflicts are continually studied and the results of these studies determine what society deems acceptable. Those actions deemed unacceptable have been recorded in the law as rules for soldiers to obey.

One of the earliest writers on the law regarding war was Grotius. Grotius' *Just War* theory published in his *De Jure Belli ac Pacis* in 1625 stated that war is the state or situation of those who dispute by force of arms and for any war to be called "just" is not enough that it be made between sovereigns, but it must be undertaken by public declaration, so that one of the parties declares it to the other.<sup>4</sup> The fundamental underpinning of this hypothesis is the right of self-defence and the idea of being "just." These concepts must be established prior

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<sup>2</sup> B-GG-005-027/AF-021, page 1-1.

<sup>3</sup> K. von Clausewitz, "On War," from Howard and Paret eds., 1976.

to engaging in a legal war according to Grotius. Engaging in war can only be just when the threat is physical or imminent in its most rigid sense. Grotius states: “if a Man takes Arms, and his intentions are visibly to destroy another, the other may very lawfully, prevent his intentions.”<sup>5</sup> The right of defence of property is also stated by Grotius’ theory. Green argues that Grotius owed much to natural law concepts, and the notion of a just war has diminished other than its appeal to morality. Despite this fact, there continues to be a Declaration of War embodied in treaty law.<sup>6</sup>

The Archbishop of Canterbury and the Cardinal of Westminster argued for a “just war” in 1982 after the invasion of the Falkland Islands. Today, President George W. Bush and his escalating dispute with Iraq could make another case for a “just war” if he can prove imminent threat. Grotius’ notion of the “just war” will form the foundation for further discussion in this paper on how operational commanders apply the law in war and the implications in a modern context.

*Jus ad bellum* states how nations, at the strategic level, can engage in war. The operational commander must be aware of this idea because it will affect how he conducts operations at the operational level. *Jus ad bellum* is governed by the ideas of:

Just cause

Last resort

Lawful declaration

Political objectives proportionate to costs of fighting

Reasonable chance of success

Rightful intentions

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<sup>4</sup> Leslie Green, “The contemporary law of armed conflict,” Manchester University Press, New York, 1993. page.1.

<sup>5</sup> Green, page.2.

It is outside of the scope of this paper to discuss in detail the conditions listed above. However, commanders must be cognizant of these ideas because of their impact on his actions at the operational level.

There have been roughly 690 cross-border military interventions between 1945 and 1991, and participants have usually managed to escape condemnation.<sup>7</sup> However, in recent experience, actions have been intensified with more widespread involvement and outcomes. Numerous critiques regarding the intervention in Kosovo characterize this action as illegal.<sup>8</sup> The argument has been that the conflict was an internal matter of a sovereign state. The recent posturing of the United States regarding its intention to remove Saddam Hussein and his weapons of mass destruction is illustrative of growing debate. Under international law, the United Nations Charter, Iraq has not broken any law that would necessitate a strike on this country. The fact that Saddam Hussein is a despot and his regime is diametrically opposed to the Western idea of democracy is in itself not justification for a regime change as proposed by President Bush. President Bush has yet to prove, according to Grotius' theory, that Saddam Hussein intends to destroy the United States or that an attack is imminent. Without this proof, under the current laws the legality of any military action against Iraq is suspect. Despite this weakening of the *jus ad bellum*, operational commanders can now find themselves prosecuting missions in an environment that is unlawful according to our understanding of international and humanitarian law.

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<sup>6</sup> Hague Convention III, 1907, Schindler and Toman, "The Laws of Armed Conflict" p. 57 (from Green).

<sup>7</sup> Thomas Smith, "The New Law of War: Legitimizing Hi-Tech and Infrastructural Violence," *International Studies Quarterly* (2002) 46,

<sup>8</sup> John Merriam, "Kosovo and the law of humanitarian intervention," *Western Reserve Journal of International Law*, Winter 2001. This article demonstrates that Kosovo may signify a turning point in the international LOAC. Proponents of the legal doctrine of "humanitarian intervention" say that Kosovo represents a concrete example of legitimate use of force for humanitarian ends. Critics of humanitarian intervention argue that the use of force against a sovereign state violates the most imperative international legal norms, not to mention the Charter of the United Nations. There is

History shows that the character of war has not changed; however, public perception of the fundamental application of law has changed. The law that the operational commander must apply will usually lag behind where the strategic situation has evolved which will make prosecuting the assigned strategic tasks potentially difficult as illustrated by the evolving debate between the United States and Iraq. This situation will undoubtedly place the commander in a dilemma where the game book is somewhat outdated or constrains his actions compared to what the strategic decision-maker may want. Regardless of what the strategic-decision maker wants, the courts will judge the actions of the operational commander based on the extant laws. Eliot Cohen's book *Supreme Command* discusses the civilian-military relationship affecting the environment the discussion on the law must operate.<sup>9</sup>

The law of war or "humanitarian law," as established by the Geneva Laws, which sets forth the legal protections afforded to specific classes of people in wartime or conflict; and the Hague Laws, which govern the overall methods of combat, are now confronted with the changing way warfare is being prosecuted. Schmitt (1998) developed the concept called "*Bellum Americanum*" that hinges on precision-guided bombs, standardized targeting, accepted levels and types of collateral damage, and high bomber flight altitudes.<sup>10</sup> Today's campaigns are hi-tech operations, coupled with slick public relations plans, in a setting where the distinction between soldier and civilian is becoming increasingly blurred. These campaigns may be described as limited wars and it is suggested that they will be the norm for the foreseeable future. The law does not distinguish the difference between war, and application of the law at the operational level in these "limited wars" is more difficult given the complex situation created by the strategic decision-makers.

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law to support the doctrine of intervention, but it is unclear exactly what a proper intervention entails, and how the Kosovo operation fits into, or modifies, the legal doctrine.

<sup>9</sup> Eliot Cohen, "Supreme Command", The Free Press, New York, 2002.

In order to ensure that the law is applied more consistently, commanders are provided with lawyers on every mission in which the Canadian Forces participate. The law of armed conflict is taught as part of basic training and on all pre-deployment training activities. The Canadian Forces have adopted these measures in addition to others as a result of the Somalia Affair, where Canadian soldiers were responsible for the torture and killing of civilians. Has the application of warfare and the law kept up to each other? I suggest that they have not, creating a dilemma for commanders. This issue is important today given the fact that the law of war is invoked more frequently than ever as illustrated by the War Crimes Tribunals for Rwanda and the Former Republic of Yugoslavia.

The Canadian Forces doctrinal concepts, national law, and the notion of "*Bellum Americanum*" combine to make the operational commander's task far more difficult than ever before. Canadian air doctrine, for example states:

*Strategic air operations are carried out against the enemy's center of gravity or other vital target sets including command elements, military production assets and key supporting infrastructure. The attacks are conducted to effect a level of destruction and disintegration of the adversary's military and civil capacity to the point where he no longer retains the ability or the will to wage war, or carry out aggressive activity.*<sup>11</sup>

The dilemma today's commander faces is how to reconcile the legality of attacking military targets including infrastructure without killing civilians? Do the operations that a commander is exercising on behalf of his country constitute illegal operations if the application of *jus ad bellum* is unlawful? Does this mean that the commander is liable under international or humanitarian law? It is safe to conclude that the state will protect the operational commander in this area subject to the operational commander's adherence to the application of force in

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<sup>10</sup> Thomas Smith, "The New Law of War: Legitimizing Hi-Tech and Infrastructural Violence," *International Studies Quarterly* (2002) 46, page 356.

<sup>11</sup> Canada, "Canadian Forces College Combined and Joint Staff Officer's Handbook," (June 2001), page III-2-3/5.

accordance with the applicable laws. The commander's assessment must take into account all the factors affecting that will affect his actions. While it may be legal to destroy or disrupt the enemy's/adversary's military capacity, is it acceptable to do the same to the civil capacity?

## **MILITARY NECESSITY AND PROPORTIONALITY**

The Law of Armed Conflict is predicated on three principles: military necessity, humanity and chivalry.<sup>12</sup> What constitutes military necessity and how this concept has changed will be examined to determine what factors commanders must consider. This explanation is necessary to prove what is militarily necessary in a complex environment. Several examples will be discussed to show the challenges on the application of the law in complex environments. Green states: "The law of armed conflict, that is to say the *jus in bello*, has no specific regulation as far as weapons control is concerned, although it has made been clear in a variety of instances that means and methods of warfare causing unnecessary suffering are forbidden."<sup>13</sup> The United States manual on *The Law of Land Warfare* states, "the prohibitory effect of the law of war is not minimized by "military necessity" which has been defined as the principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.<sup>14</sup> Determining "military necessity relates to complete submission of the enemy at the earliest possible moment with the least possible expenditure of personnel and resources."<sup>15</sup> This concept is key in selection of targets and application of force. As described in Canadian Forces publications, this concept assumes that force will be controlled, only the force necessary to achieve the result will be used, and the amount of force used will be limited.

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<sup>12</sup> Canada, "The Law of Armed Conflict at the Operational and Tactical Level" page 2-1.

<sup>13</sup> Leslie Green, "Essays on the Modern Law of War" Second Edition, New York, 1999. page 329.

<sup>14</sup> Dept. of the Army, FM27-10, 1956, paragraphs 137, 630, 633.

<sup>15</sup> Canada, (LOAC) page 2-1.

At issue then, is at what point does the commander achieve the desired outcome while minimizing the resources used and number of casualties, when he is fighting an enemy who uses the city and non-combatants as shields to their own operations? This question does not have a simple answer. The answer will depend on the desired outcome and the degree of difficulty in achieving it. In the example of addressing terrorism, the attainment of the end-state where terrorists are defeated is very difficult. Coupled with this fact is the blurring of the distinction between combatant and non-combatant. Israelis are experiencing this challenge with their fight against the Palestinian terrorists in that country. It appears that whatever action the Israelis take, it is criticized because of the civilian casualties and the inability to distinguish the combatants. The law is more easily applied where the combatants are visible whereas, in terrorist or asymmetric battles the enemy is not so easily visible.

In the Sanskrit epic of the third century B.C., the *Ramayana* stated that a car-warrior should fight a car-warrior. One on horse should fight another on horse.”<sup>16</sup> The *Ramayana* emphasized that it was inappropriate to use disproportional forces to deal with one’s adversaries. They specifically referred to sophisticated forces dealing with less sophisticated forces. This point, made in the third century B.C., speaks directly to the operational commander’s dilemma today. Should commanders use precision-guided munitions like cruise missiles to deal with pinpoint targets? Does the use of a hell-fire missile make sense on a target of three people? The use of technology is becoming more prevalent to the point where military forces are becoming dependant on it. Employing hi-tech weapons to protect soldiers such as was seen in Afghanistan, where soldiers stood off several kilometers and designated targets for overhead B52s is becoming the norm. This application of technology is allowing commanders to get “closer” to their enemies with weapon systems that are far more discriminating while minimizing collateral damage. The margin for error has been

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<sup>16</sup> Green. page 329

reduced; however, when a mistake is made the consequences are far more severe when civilians are injured or killed.

Military necessity has been defined to allow destruction and killing as illustrated by the Lieber Code (1863). Adopted during the American Civil War, the Lieber Code set the tone: "To save the country is paramount to all other considerations" (Art 5); "Military necessity admits to all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable" (Art 15); "The more vigorously wars are pursued, the better it is for humanity" (Art 29)."<sup>17</sup> General Sherman's actions during the Civil War may be one example where the Lieber Code was not adhered to; however, the principle of the Code is valid. It can be argued now that the course of action taken by the international community vis-à-vis the Kosovo bombing campaign and the political rhetoric the Americans are making with regards to a regime change in Iraq goes against the Lieber Code and "humanitarian law."

## **CIVILIANS**

The Geneva Conventions establish a number of categories of who is and who is not a combatant. Additional Protocol I deals with international armed conflicts. Specifically, it introduces some changes in the law with respect to international conflicts.

The recognition that struggles conducted by national liberation movements in the name of self-determination fall in the category of international conflicts;

The extended protection given to civilians and non-military objects; and

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<sup>17</sup> Thomas Smith, "The New Law of War: Legitimizing Hi-Tech and Infrastructure Violence" *International Studies Quarterly* (2002) 46, page 357.

The prohibition of actions likely to have a long-term deleterious effect upon the environment.

The Protocol requires commanders to protect the civilian population and individual civilians, “to the maximum extent possible,” against dangers from military operations.<sup>18</sup> Should civilians take part in operations they lose their protection under Additional Protocol I and take on combatant status, thereby becoming lawful military targets.

Additional Protocol II deals with the application of humanitarian principles to non-international armed conflicts. It provides some protection to the civilian population, stating the conditions for protection of civilians. It deals with the protection of the civilian population against the dangers arising from military operations. Additional Protocol II objective is to amplify the humanitarian protection contained in Common Article 3 to the Geneva Conventions.<sup>19</sup>

Adhering to Additional Protocols I and II’s has become a daunting task when dealing with conflict in an urban or populated area. Today, between 46 and 50 percent of the world’s population resides in urban areas. Demographic studies indicate that this percentage will continue to rise. Much of the growth will take place in the Third World where there is little planning and where we can anticipate future operations will be conducted. Within the last 50 years, the Third World’s population has multiplied fivefold to 1.5 billion people and continues to expand.<sup>20</sup> A United Nations’ study predicts that the Third World population will triple to 4.4 billion between 2000 and 2025. By 2015, 24 of the 30 largest cities in the world will be in “developing” countries, with over 60 percent of all Third

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<sup>18</sup> Hugh Smith, ed., “The Force of Law,” Australian Defence Studies Centre, Canberra, 1994. page.67.

<sup>19</sup> Canada, “The Law of Armed Conflict at the Operational and Tactical Level,” September 2001 page 1-4.

<sup>20</sup> Rogers, Andrei and Williamson, Jeffrey G., eds., “Urbanization and Development in the Third World,” (Laxenburg, Austria: International Institute for Applied Systems Analysis, June 1982), page. 484.

World cities having one million or more people.<sup>21</sup> Over 160,000 people migrate to the city every single day.<sup>22</sup> This growing trend will make it challenging to separate military targets from civilian non-combatants. Adversaries around the world have recognized the urbanization advantage and in order to neutralize the technological advantage of advanced conventional forces, these combatants are achieving an asymmetric benefit by defending and fighting in urban settings.

Commanders and their staffs confronted these issues during World War I and II. In a world which was far more rural, the battles were initially fought on the farmer's fields; however, the fight moved into cities and towns as defenders tried to take advantage where they could. Attackers tried to undermine the resolve of their adversaries using the built-up surrounds, and by targeting their homes, families and industrial infrastructure. Inevitably, civilians were caught in the middle and casualties occurred. The bombing campaign by the Allies and Germans in the Second World War was repulsive, yet an acceptable tactic at the time used by both sides. The bombing raid on Dresden and London cannot be justified as a military target; yet it was illustrative of the type of action that was deemed acceptable. Similar examples of bombing in Vietnam demonstrate the tolerance to inflict non-combatant casualties in the attainment of military and political objectives by commanders in the field. This example demonstrated the American society's tolerance of the military's inability to deliver results and decisive victory.

Over time, this tolerance to inflict casualties among non-combatants has diminished significantly particularly in limited wars. The tolerance by the international community to accept non-combatant casualties has diminished substantially due to both the "CNN" factor and technology. This situation does

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<sup>21</sup> United Nations Population Division, *World Urbanization Prospects: The 1994 Revision* (New York: United Nations, 1995), pages. 86-101.

<sup>22</sup> Marine Corps Intelligence Activity, "The Urban Century," Videocassette, Produced by the Marine Corps Intelligence Activity, 1999.

not imply that the tolerance level will remain here; however, it is illustrative of a factor that commanders must deal with as part of their plans and operations.

The Russians experienced significant civilian involvement during the battle of Grozny in 1994.<sup>23</sup> Disruption or destruction of infrastructure to get at the military targets like command and control systems inevitably adversely affects the civilian population. While dealing with the military aspect of the mission, it is virtually impossible not to affect the civilian non-combatants. Commanders who attempted to comply with Protocols I and II found it difficult to engage lawful military targets when they were intermingled with civilians.

Israel continues to receive international condemnation as it prosecutes its fight against the Palestinians. Recent raids on suspected Palestinian strong points have resulted in little or no benefit. The inability to distinguish military from civilian targets has made the operational and tactical commander's job more challenging. The international and national sentiment that non-combatants' rights be respected has changed the way that hostilities are prosecuted. The historical examples cited here from World War I and II will no longer be tolerated. The Israeli raid in Khan Youris on 7 October 2002 where seven Palestians were killed and dozens injured raised significant protest regarding the legitimacy of the action. Large parts of the international community have not supported the Israeli's contention that they were attacking military targets where terrorists were manufacturing weapons.<sup>24</sup> It appears clear that the Israeli authorities and commanders on the ground did not fully apply either Additional Protocol I or II in the action. It is clear that the Israeli government's desire to control the Palestian problem, while politically driven, has created significant if not insurmountable problems for operational commanders. The strategic objective to either deal with

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<sup>23</sup> Chad Rupe, "The Battle of Grozny," *Armor*, May-June 1999. This article provides a good strategic overview and analysis of the battle. The lessons learned by the Russians during the Second War World appear to have been lost given the poor accounting of the Russian units that attacked the city.

<sup>24</sup> Ibrahim Barzak, Associated Press, "Nine Palestians Die in Israeli Raid," *The Globe and Mail*, 7 October 2002, page. A14

or rid them of the Palestian predicament cannot be adequately or easily translated into legal operations at the operational or tactical level. It is unclear if the Israeli's are using the loose definition of Grotius' "imminent" to justify their preventive and "restrained" actions. In a society where all Palestinians are suspiciously looked upon by Israeli authorities, the application of the law of armed conflict is at best difficult. The West can learn a great deal by studying this conflict, as it appears to be a good example of an asymmetric battle conducted in an urban environment.

Politicians the world over can debate the political conflict between these two groups; however, it is up to the operational commander to determine and prosecute the action necessary to affect the political end-state. Dealing with the Israeli/ Palestian dispute on the open desert terrain, where one military force faces off against another, has been a relatively simple scenario throughout history. The move of the combatants into the significantly confined and heavily populated urban environment has complicated any mission. This problem is exacerbated when the commander is dealing with a foe that may not respect the law of armed conflict including Additional Protocol I and II. Hence, the test is how to identify the combatant from non-combatant when they may be one and the same or live in the same building. As indicated in the demographic studies, this dilemma will increase in time and there is little chance that the tolerance for civilian casualties will change.

During the Kosovo bombing campaign, operational commanders like Colonel Davies, Commander of Canada's Air Force Task Force operating in Kosovo had to determine the legitimacy of such "dual-use targets."<sup>25</sup> In one mission aimed at destruction of a communications node, Colonel Davies had to decide whether the assigned mission was a legitimate military target. A communications facility manned by civilians was used as a node for the Serbian

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<sup>25</sup> Presentation to AMSC 5 by Colonel D. Davies on Rules of Engagement, Toronto, September 2002.

military command and control network. The elimination of this site would contribute to the degradation of the Serbian military's ability to control their forces, thereby putting pressure on them and asserting NATO's ability to interdict Serbian operations. The dilemma faced by the assigned commander was whether this assignment represented a justifiable and legitimate target. While it was technically legal, it challenged the moral tenets regarding military necessity. The days when targets could be clearly identified as military, manned by uniformed combatants or civilians recognizably engaged in military operations, are gone for the most part. In the Serbian communications example above, the civilian airwaves and facilities were shared with military requirements. Had the employees been interviewed or questioned about their role in this operation it is probable that many would be surprised to learn about the extent of their contribution to the Serbian military campaign.

This example can be translated to a scenario closer to home. Imagine yourself in the position of a low or mid-level Bell Canada employee. DND rents band width from a multitude of commercial services in order to operate its day-to-day activities, much like the Serbian military. It can be argued that any communications node becomes a legitimate military target. Do the employees in this scenario reasonably become combatants given the fact that they indirectly support military operations? This question will not be answered in the first instance by strategic level decision-makers. In the first case, the complexity of the question will be left to operational level soldiers such as Colonel Davies. Colonel Davies took the time to evaluate the military necessity of the target, because of the questionable legal status of the task. He determined that the target could be engaged; however, it was done in such a way as to minimize the number of civilian casualties. These casualties' legal status was never fully determined since the law and operations were not synchronized.

This operation illustrates the lag between conventional law as it applies to today's conflicts. The law, predicated on how hostilities were conducted cannot

foresee every situation. Today's conflicts blur the distinction between military and civilian targets. Technology can assist the commander in distinguishing the shades of gray; however, there is a limit to what technology can do and what the law permits. The Bell example is similar to the Kosovo situation that Colonel Davies had to interpret. Attacking the node was legally acceptable; yet, it could be refused based upon moral grounds and inevitably condemned by the media if it was attacked when most civilians were present – a conundrum. The law would be more helpful if it could clarify these multifarious situations.

Another situation arose when NATO conducted bombing missions on various bridges throughout Kosovo aimed at disrupting the communications lines of the Serbian ground forces.<sup>26</sup> Lieutenant-Colonel Southern, the Military Assistant to the Political Advisor to the Commander KFOR, stated that this targeting was not terribly effective. The result of these attacks did more to disrupt the supply of humanitarian aid to civilians than it did to disrupt Serbian operations. This fact alone should give commanders pause to reflect on the military necessity given limited operational effects versus the consequences for non-combatants. Additional Protocol I parameters should be taken into consideration when selecting targets and determining their true effectiveness on the military objectives of any campaign. The momentary disruption to military forces, which have integral bridging assets weighed against the substantial inference with humanitarian aid during peace support operations, may negate the utility of such actions. Continued prosecution of the plan could place the commander in a situation where his actions could be deemed contrary to Additional Protocol I, as suggested in the Kosovo example.

Protecting civilians from direct attack remains the most compelling *jus in bello* rule. This discrimination becomes thorny when extended to infrastructure such as electrical grids, water works, supply facilities, communication nodes and

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<sup>26</sup> Interview with LCol B. Southern, former Military Assistant to the Political Advisor to Kosovo, 13 October 2002.

the other everyday things taken for granted by citizens. The law of war holds that States wage official battles between official authorized forces excluding non-combatants. In modern warfare, this distinction has become blurred and past practices no longer remain extant. Today's economies are fully integrated into the states' strategy for conflict with other states. The merging of civilian and military communities and efforts into a unified force is a reality which operational commanders face. The so-called "dual-use dilemma" has been resolved gradually by the loosening of what constitutes a legitimate military target.<sup>27</sup> Dual use targets increasingly are treated as ambiguous military targets.

## **TECHNOLOGY**

Technological advancements, in the form of precision-munitions have given the commander the ability to be far more discretionary in the application of force to military targets. The Marine Corps has become the leading Service within the United States in pursuing operational techniques in urban battle.<sup>28</sup> Given urbanization and the use of built-up settings by adversaries, it is not surprising that the United States is developing urban operational stratagems. High technological weapon systems will fundamentally change the way operations are conducted in urban settings. General Krulak's "three block war" is here today and creating new problems for soldiers in the field. Most urban warfare experts believe that current technology may enable forces to improve their effectiveness at close-quarters combat when it takes place, but they can still expect relatively high numbers of friendly and non-combatant casualties and significant collateral damage to urban structures.<sup>29</sup>

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<sup>27</sup> Thomas Smith, "The New Law of War: Legitimizing Hi-Tech and Infrastructural Violence," *International Studies Quarterly*, Vol. 46, No. 3, September 2002. page. 361.

<sup>28</sup> Colonel Randolph Gangle, "Training for Urban Operations in the 21<sup>st</sup> Century," *Marine Corps Gazette*, Vol. 85, No. 7, July 2001.

<sup>29</sup> Robert Hahn and Bonnie Jezior, "Urban Warfare and the Urban Warfighter of 2025," *Parameters*, Summer 1999. p. 74.

It is a mistake to think that operations solely outside of urban settings can be achieved. The adversary will use his comprehensive knowledge of the urban setting coupled with the knowledge of our adherence to the law of armed conflict against us. The characteristics that define urban operations and make them different from operations in open terrain are the physical infrastructure of the city and its occupants. Precision munitions make it easier on one hand to engage military targets; however, it places more constraints on the commander to avoid excessive collateral damage and limits the number of non-combatant casualties. Destruction of infrastructure using high technological weapons is now possible, thereby limiting the exposure to danger of our soldiers. This advantage is a benefit for the commander using the weapon; yet the consideration of the “effects” that these weapons will have on the civilians occupying or affected by the engagement of infrastructure weighs heavily on the responsibility of the commander given Additional Protocols I and II. Protection of civilians is clearly defined in law. International opinion and the media reinforce this fact. Added to this line of reasoning is the recent history of operations where casualties have been relatively few in number but mistakes have been heavily scrutinized. Commanders must consider engagement of targets in these environments both in the physical and moral sense.

Should the commander not have the choice of precision weapons, his assessment will not change; however, the likelihood of collateral damage will be higher. In the case where precision-munitions are available does the fact that the military target is co-located with non-combatants prevent its engagement? This situation may become a problem if doctrinally it meets the criteria for military necessity and the achievement of the expressed end-state.

## **THE “CNN” FACTOR**

The media today are everywhere and represent a factor that requires commanders and staff to take note. Public affairs personnel are part of every

mission and a key component of any campaign. The transmission of the facts, “to inform,” as opposed to “influence,” which is the role of psychological operations, is a necessary element of operations. Media have historically been on the battlefield reporting the news. Whether in Crimea, World War I, Vietnam, Korea or Kosovo, the media are there reporting the news. The change affecting military commanders today is the timeliness of the reporting. In the Boer War, it took weeks to get reports out; today, it is instantaneous. In one particular incident during the Bosnian Civil War, a wife in France watched as her husband was shot and killed on live television.<sup>30</sup> In that particular case, the Commander Sector Sarajevo was faced with answering questions from the media prior to his chain of command being able to verify the information and pass it up to him.

The media not only report the facts; they also have the opportunity to editorialize and challenge the validity of every action. The media are knowledgeable in their own right and must be treated accordingly. It can be assumed that the media will challenge commanders in the field as to why they attacked a position or demand justification for the killing or wounding of civilians. Commanders who face the normal series of operational challenges must now contend with legal questions from reporters on matters ranging from why they are conducting an illegal operation, such as the Kosovo campaign, or attacking civilians in some Palestinian community. Public opinion can be won and lost during these encounters and the video produced can have tremendous impact on operations.

The military and media are two essential groups in society whose distinct roles create a healthy suspicion of the other. Somalia and the continual attention by the media of the military has had an impact on the psyche of the military officer and soldier. Perceptions and all too often misperceptions between these two groups must be acknowledged and addressed. Allan English states: “The press is the watchdog over institutions of power, be they military, political,

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<sup>30</sup> Personal account as Military Assistant to the Commander Sector Sarajevo (1994-95).

economic or social. Its job is to inform the people about the doings of their institutions.”<sup>31</sup> The media have had and continue to have a significant influence on the military, and by extension there is an impact on the way that commanders act. This relationship, characterized by suspicions, and prejudices coupled with cooperation, has either a direct or indirect impact on operations.

The images transmitted around the world of dead soldiers being dragged through the streets of Mogadishu or beheaded Russian soldiers in Chechnya, can change the direction and tone of campaigns. The tolerance of the international community for mistakes, such as the friendly fire incident where four Canadians were killed in Afghanistan, has changed over time and commanders must address this change. The media deal in perceptions, which may conflict, with the realities that the commander must face. Despite the challenge between reality and perception, the commander has an obligation to deal with both. The media will make its case in the public domain and determine whether the actions of any commander are warranted or not. The Israelis may be legally justified to attack Arafat’s headquarters; however, international opinion may deem this action to be heavy-handed and inappropriate. Military actions of commanders in the field, on today’s battlefield, have direct repercussions on political pressures, strategy and decisions thanks, in part, to live broadcasts by the media. These dynamics have bearing on how the law is applied in operations. Commanders must be cognizant of this and act accordingly. Sentiment generated by the media is a powerful tool and moral perceptions may hold sway over the letter of the law. Perceptions may create reactionary pressure that actually leads to changes in the law. The change in the law regarding the use of anti-personnel landmines is a good example of this point.

President George W. Bush’s current stand regarding Iraq has elicited a very high profile public debate illustrative of his use of the media to develop his

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<sup>31</sup> Allan English, “The Changing Face of War,” McGill-Queen’s University Press, Montreal, 1998, page 255.

position. The discussion regarding a pre-emptive strike flies in the face of what we understand to be international law; however, an argument has been made, rightly or wrongly, that the United States can and will act according to the latest decision from its Congress. The case can be made that Iraq's intent has not been clearly established in today's terms; yet, the United States is poised to make a pre-emptive strike to rid the world of Saddam Hussein and his weapons of mass destruction. This discussion in the world forum is challenging and potentially changing the law, as we understand it and the boundaries to which commanders are subject.

## **DUTIES OF THE OPERATIONAL COMMANDER**

Critics of the Kosovo bombing campaign suggest that the intervention was illegal under the *jus ad bellum* theory. The question germane to the discussion is what are the legal consequences for the commander who is operating in an illegal action? States resolve to prosecute an unlawful war or conflict with another nation place the forces that prosecute that mission in an untenable situation. The escalating tension between the United States and Iraq and the emotive belief that war is inevitable cannot be justification for hostility under the current law of armed conflict or the United Nations Charter. At this time, no state, namely Iraq, has violated the sanctity of another state, unlike the situation that precipitated the Gulf War in 1991. It is for these reasons that critics have accused NATO with the same argument in the Kosovo campaign.

A question that has not been answered is whether soldiers operating in the face of the illegality of the action. An argument could be made that offensive operations conducted in either Kosovo or Iraq puts the attacker in the situation where they have violated Grotius' idea of "just war." This example shows where the strategic decision to intervene puts the operational and tactical level soldiers into a the situation described above are liable under the law to crimes given the situation that might be construed as illegal and thus open to prosecution by

international courts. Referring back to Colonel Davies' communications node target, not only does this example represent a military target, but also does the engagement of it represent a higher crime? The conundrum between the strategic and operational level, resulting from the change in the environment created by decision-makers, creates a potential problem for operational commanders. The law that commanders must employ may not conform to the new environment given to them from the strategic decision-makers. There is a belief that the rules governing *jus ad bellum* and *jus in bello* are separate. This idea allows the commander to prosecute the mission according to the rules regardless if the conditions of war are not fulfilled. I suggest that this separation is no longer as clear cut as it once was. This problem, using Kosovo, could place the commander in either an illegal war or constrain his actions because of the law. Palestian's supposedly firing at Israeli military units from a hospital, challenging the very nature of military necessity. The answer is not clear-cut as the Israelis found out during their operations on 9 October 2002 against Arafat's forces.

Today's reality where targets are studied to determine their suitability in a blurred environment that mixes combatants with civilians puts commanders in a most untenable situation. Commanders decisions are transmitted over the airwaves and watched by the world in the confines of their homes and analyzed at length illustrating the perception versus reality of the situation depending on which side of the television screen you are on. The pressure being placed on the operational commander with how to apply the law constrains their ability to prosecute operations in such a complicated environment. This situation is becoming more complicated as the fight moves into the urban setting and the willingness of the international community to prosecute war crime tribunals rises. It is rare that the bureaucrats or politicians, who put soldiers in these situations, are prosecuted. The reverse is not the case and soldiers are more apt to be tried given the history of the War Crimes Tribunal for Rwanda and the Former

Republic of Yugoslavia. The establishment of the new World Court seems to reinforce this new element of armed conflicts.

The United States appears to have recognized the dilemma that their soldiers now face on operations. Their refusal to participate in the World Court raises the question that the legality of actions in conflict is now at odds with the decision to enter these hostilities. The law appears to constrain the ability for soldiers to prosecute strategic level objectives given the lag between the law and the changing global environment that soldiers now operate in. The law, which may be in conflict, judges soldiers by the actions and decisions of their governments. They will be measured against established laws, be that the law of armed conflict, international law or even the law of the land. These laws, that provide the boundaries of acceptable and non-acceptable behaviour are not negotiable to the commander on the ground. Adherence to the law and even alterations to it are often subject to case-by-case scrutiny – with no fixed point or reference applied. The ongoing debate regarding Iraq is an example of the United States and the world community applying situational law in the decision of justifying a pre-emptive strike where cause has not been proven. This call for action and legal change comes from statesmen not the soldiers who must carry out the orders. Commanders today find themselves potentially fighting wars where the legal foundations may be questionable but the might of their nation undeniable.

It is important to separate the legal aspect of this discussion from the moral aspect. This paper focuses on legal, not moral arguments, which are often intertwined in the context of world opinion, with respect to the operational commander and his staff. The operational environment and political situation in which soldiers find themselves is changing and the law that governs their actions has not changed or has lagged.

This fact is illustrated in the current war crime trial of General Galic, former Romania Corps Commander who was responsible for the siege of Sarajevo during the period 1994 to 1996. The Sarajevo Romanija Corps controlled all the Bosnian Serb territory around Sarajevo, including established confrontation lines and artillery positions. General Galic was the commander of approximately 18,000 soldiers controlling access of UN and Bosnian civilians into and out of Sarajevo. He was accused of criminal responsibility for planning, instigating, ordering, committing in the planning and execution of shelling and sniping against the civilian population.<sup>32</sup> The 1<sup>st</sup> Bosnian Corps was headquartered in Sarajevo and General Galic's dilemma was how to determine what was a legitimate target. Putting aside the atrocities including shooting of civilians, the military challenge of how to conduct operations in an urban environment is a valid question all operational commanders should study. As the judge of the criminal tribunal posed to me, what constituted a military target when a military headquarters was located in an apartment block? If justified, what weapon systems are authorized to use against this target? All very good questions that do not have simple answers. In this situation, the operational commander, like General Galic was in a no win situation; however, this point illustrates the situation that strategic and political leaders put commanders in the field everyday. Had General Galic been an agent for a nation who was considered to have might and international allies he may never have been brought to trial. Clearly, the law does not permit such actions but this is what is occurring throughout the world today. Therefore, this situation challenges the commander and most would refuse to engage such targets given the collateral damage and inability to separate combatants from non-combatants.

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<sup>32</sup> The Sarajevo Romanija Corps formed a significant part of the VRS under the ultimate command of Ratko MLADIC, the Commander of the Main Staff and Radovan KARADZIC, initially President of the Presidency of the Bosnian Serb administration in Bosnia and Herzegovina and, subsequently, as President of the "Republika Srpska" and designated Supreme Commander of its armed forces. By 10 September 1992 the Sarajevo Romanija Corps controlled all the Bosnian Serb territory around Sarajevo, including established confrontation lines and artillery positions.

## CONCLUSION

The types of operations have changed since the end of the Cold War. These changes highlighted by the move from a bipolar to a multi-polar world have created new demands for operational commanders to contend with. Urbanization is nothing new to soldiers; however, we have not operated in these environments for years and we must relearn the rules of our forefathers. While the basic characteristics of warfare have not changed, the application of the law has become more complex for operational commanders.

The adversary of today and tomorrow will continue to use cities and towns to achieve an asymmetric advantage over us. This advantage will challenge us in how we apply technology to deal with legitimate targets in accordance with the law. We will not have the luxury to choose which opponent we want to fight or the latitude to fight using their interpretation of the law. The law of armed conflict, which has evolved over time, governs us. Examples of bombing campaigns in World War II with its associated civilian casualties will not be tolerated by society again. It has been shown that the law is not applied in a vacuum. The application of law is affected by political decisions that change the environment that commanders must operate. Added to this fact is the omni-present media, reporting on every action live. The combination of the law, the political environment and media affects the way that commanders operate and apply the law. The key conclusion is that the environment is changing faster than the law. This reality must be dealt with by the operational commander and staff as best as they can given their knowledge of the law, the operational objectives to be achieved and the strategic decision-maker's intent.

These circumstances makes the environment that commanders operate in today more complex and difficult than ever before. The time to think about these complexities is not when the soldier is faced with the decision in the field. Soldiers, principally operational commanders and their staff, need to understand the complexities prior to engaging in conflict. A thorough understanding of what constitutes a legitimate target in today's environment is not an easy question. The linkages between the strategic and operational level must be clearly understood. The factors affecting operations need to be clear and incorporated in all activities. Failure to conduct such study will undoubtedly result in failure in the field. Should this failure occur, a Canadian or other national operational commander might find himself in a court room on trial for a war crime as the Serbian general found himself in The Hague.

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