

Propositions on the Law of War after the Kosovo Campaign

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Jus Ad Bellum and the Personal Factor in History

After Kosovo, any purely proceduralist account of the international community's use of force must be found wanting. Belgrade's sovereign claim to Kosovo, even including the right to police the activities of the Kosovo Liberation Army (KLA), did not plausibly include the right to deport the majority of its own ethnic Albanian citizens. After the failed negotiations at Rambouillet and the beginning of the bombing campaign, Belgrade's troops and police deliberately forced 740,000 Albanian Kosovars to flee their villages and cross the borders into Albania and Macedonia—providing a *casus belli* for a continued allied campaign even if any was disputed before. Belgrade committed its clumsy acts of violence and coercion in the full sight of international officials and CNN television cameras. The tactics bore witness to Milosevic's political madness and ethical hedonism. Yet many public international lawyers have felt great difficulty in admitting any legal justification for the NATO intervention in the absence of formal endorsement by the UN Security Council.

This pure proceduralism is odd in the extreme, for even the Security Council's endorsement could not have stilled questions about the outer limits of the post-Cold War Charter of the United Nations. Council decisions may not resolve all issues of international law and ultra vires action, if one is to believe the International Court of Justice in the *Lockerbie* jurisdictional decision. Thus, even with Council endorsement, one would have to resort to the teleology of the Charter, including its strengthened embrace of human rights, to indulge the new limits of Chapter VII.

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Rather than resting upon a mechanistic decision rule, legitimacy for the use of force may also be strengthened by a resort to history—in the appropriate inferences about intention, shown by an adversary’s past behavior. The allied response in Kosovo has to be taken in the context of a decade’s disorder. Milosevic was the excessive personality who lit the tinder for the wars in Croatia and Bosnia, and beguiled the West with a false promise of cooperation at Dayton. Though he rose to power on the back of Serbian nationalism, he sharpened its talons and started three wars. Just as Napoleon was ultimately found to be a threat to the peace of Europe, and Hitler was irrepressibly aggressive, so in this smaller neighborhood, Milosevic showed himself to be the indefatigable author of conflict. To understand the interpretive context of a legal principle, such as an emerging right of humanitarian intervention, requires some attention to history and its actors. Milosevic violated the “one-bite” rule, showing no inhibition against repeating his bouleversement of delicate ethnic balances, savaging local populations, and ignoring NATO’s ultimate commitment to the area evidenced in the Bosnian air campaign in 1995. One may not wish to endorse a principle of humanitarian intervention or regional stabilization for the ordinary case, and yet may admit its validity where the antagonist has shown a hearty and unsated appetite for trouble. After the frustration of the “dual key” use of force in Bosnia, it is hardly surprising that the Security Council was not given the controlling key in yet another war.

The Consanguinity of Jus ad Bellum and Jus in Bello

It is commonly believed that the tactics of war must be judged independently of the purpose of a war. The divorce of purpose and tactics is designed to allow agreement on humanitarian limits even where there is no consensus on the merits of the underlying dispute. But this asserted independence of the two regimes may be no more than a fiction. Defeating Nazism, for example, required measures that are now seen as harsh and even punitive. Even where their legality is conceded under the earlier standards of air war, it is commonly taught in American military curricula that their repetition would now be illegal. It may be that our real judgment of their contemporaneous legality is affected by the radical evil represented by Nazism—an ideology posing an ultimate threat to human welfare. Kosovo, in its smaller venue, may be another illustration of that same quiet linkage. This was not a war to settle a commercial dispute, or remap the location of a boundary valued because of mineral deposits, but rather a war to prevent ethnic expulsions. As such, its speedy conclusion was necessary. A gradual war of attrition that might defeat

Belgrade in slow motion was unacceptable in light of the human survival at stake in the conflict itself. Whether one's framework is utilitarian or pure principle, it is possible to admit that the merits of a war make a difference in our tolerance for methods of warfighting. This teleological view can be incorporated, albeit awkwardly, in the metric for "military advantage" in judging proportionality, for surely we do not value military objectives for their own sake. But it may be better to be forthright, even at the cost of questioning homilies. The latitude allowed to a victor in a conflict is commonly dismissed as self-indulgence—supposing that the law of war is mere victor's justice, might making right. An alternative explanation is possible. Democratic leaders and publics may believe there is an important link between the legitimate purpose of a war and its allowable tactics—at least within the limits of basic humanity and the protection of civilian lives.

The Contentious Role of Civilian Tribunals

The enforcement of the law of war has traditionally been left to military judges. This was so in the proposed trial of the Kaiser after World War One. The Nuremberg and Far East trials after World War Two were conducted before military tribunals, designated as such. (Indeed, Nuremberg's limitation of jurisdiction over crimes against humanity to the period of the world war reflected the extent to which the proceeding was conceived as a military trial.) The latter-day invention of the field of "international humanitarian law" has obscured the extent to which implementation of many aspects of the law of war depend on battlefield judgments and knowledge of campaign strategy, and therefore may be suitable to military tribunals. For example, the destruction of the bridges over the Danube in the Kosovo campaign may be understood as a stratagem to force Milosevic to gamble between theatres for the placement of his armor. (He could head north to meet a possible NATO invasion from Hungary, or south to meet a NATO invasion from Albania while continuing his ethnic cleansing operations. With the severance of bridges across the Danube, he had one vulnerable flank). The dependence of the prosecutor at the International Criminal Tribunal for the former Yugoslavia on a committee of experts in evaluating allegations against NATO and in attempting to judge the legitimacy of Kosovo targeting choices shows the extent to which the law of war depends on judgments that may lie outside the experience of lay judges or prosecutors. We have overlooked that the law of war contains both bright-line rules and open-textured principles, and that only the former are so easily applied. This is a serious potential defect in the new International Criminal

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Court as well, where judges are to be chosen on the basis of experience in criminal law or international humanitarian law, but not for familiarity with military operations. The dangers of professional back-scratching in evaluating battlefield events should weigh in, of course, but is limited by the commitments of the military in a democratic society.

One-Trick Ponies and Specialized Armies

To a surprising extent, military equipment is designed for specialized war fighting tasks and this, too, was shown in Kosovo. We learned the same lesson in the 1980 Iranian hostage rescue mission. NATO's weaponry was planned for a very different conflict, in which allied forces would face off against massed enemy troops on the plains of Central Europe.

Much of the academic critique of NATO's operational plans and decision-making in Kosovo ignores the unique and unexpected nature of the Kosovo tasking. This was pick-up ball, redeploying weapons systems in a context far different from their original planned use. If the West is serious about humanitarian intervention as a vocation, it will need to rethink decisions about force structure and equipment. For example, to optimize target discrimination, especially for delicate distinctions between army vehicles and civilian convoys, one would like to have more JSTARS (Joint Surveillance Target Attack Radar Systems). So, too, the ability to react against mobile targets in a mountainous and frequently cloudy terrain would be enhanced by fully integrated data systems among services and allies. The real intention of the international community to implement a new ethic of humanitarian intervention may be judged (as wanting) by the extent to which most traditional powers are cutting back on military spending and force structure. The recent decisions of European countries such as France, Italy, and Germany to reduce military budgets, cut manpower, and shorten conscription periods, do not give much credence to any claimed doctrine of humanitarian police. A lightly-armed European rapid reaction corps will not, by itself, win humanitarian wars.

Surrogate Ground Forces and Conflict Containment

In an unhappy reminiscence of Afghanistan during the Russian occupation, the Kosovo experience shows the difficulties of controlling surrogate ground forces. In the aftermath of the Kosovo war, for example, the KLA extended its "defense" of Albanian communities to northern Macedonia as well as the Presevo valley in Serbia, threatening to regionalize the war. Evaluation

of the efficacy of NATO's Kosovo air strategy in any "lessons learned" must be tempered by the realization that building-up local insurgents will be costly when their long-term political agenda is vastly different from our own.

Picking Winners

The dilemma of a post-conflict breakdown in law and order (politely termed a mid-level security gap) is familiar to veterans of most peacekeeping missions. Ambassador Bob Oakley has written a troubling survey of the problem for the National Defense University,¹ and Timor-veteran Graham Day has named "policekeeping" as the major problem in post-conflict transitions. Wherever a long-standing government has been displaced, whether in Panama, Haiti, East Timor, or Kosovo, there is a raw edge in the aftermath because basic *gendarme* functions are lacking. In the absence of an effective international police presence, with language skills and the capacity to build a network of local cooperation, it is unlikely that one can control the violent "to-and-fro" between ethnic communities except by measures such as Dayton's *de facto* segregation.

Acknowledging this incapacity to fine-tune factional disputes with an international peacekeeping force, one must be realistic about the available set of outcomes to the conflict. The only real choice, regrettably, may be to "pick a winner"—while realizing that the side favored by the international community will share many of the illiberal qualities of its antagonist. In Kosovo, NATO succeeded in stopping Belgrade's ethnic cleansing of Muslims, but the U.N. follow-on force has predictably been unable to control violent attacks against Kosovar Serbs by the KLA.

The ideal of a multi-ethnic democracy, which was so attractively packaged for media export by the Sarajevo government in the Bosnian war, is hardly characteristic of the aftermath of the Kosovo intervention. One can see something of the same problem in East Timor, where violence against the returning West Timorese and ethnic Chinese continues to be a problem, and, of course, in Rwanda. A decision to intervene must depend not on the pretense of a future multi-ethnic democracy, for that end state will often not be available. It must be on some rougher calculus of which outcome minimizes overall abuse.

1. POLICING THE NEW WORLD DISORDER: PEACE OPERATIONS AND PUBLIC SECURITY (R.B. Oakley, E.M. Goldberg, M. J. Dziedzic, eds. 2002).

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Precision-Guided Munitions and the Transparency of Intention

In the past, technological limits have often obscured the more difficult issues of target discrimination. In the air campaigns of World War Two and the Korean conflict, the radius of uncertainty for ordnance delivery against industrial targets and transportation nodes often mooted the question whether other objects would qualify as military or civilian assets. Gravity bombs and a limited ability to see through weather left a five-mile radius for probable point of impact, and finer gradations would have seemed an intellectual construct.

But the extraordinary precision of guided munitions used in the Yugoslav campaign brings front and center the most contentious questions of targeting. Aim points are made utterly clear to potential critics, and the legal categorization of cigarette factories, television stations, urban bridges, and train depots will be mooted by skeptical observers. With a targeteer's intention made plain for the world to see, the indeterminate language of humanitarian law becomes a potential hazard for warfighters. If munitions are precise, the law is vague. The hazard is increased by the active campaign to juridicalize the law of war in international fora—including the International Criminal Court and the International Court of Justice, not to mention national courts exercising universal jurisdiction. The loose-jointed language of treaty texts provides little comfort against roving legal patrols. Additional Geneva Protocol I of 1977 describes permissible military targets as those making "an effective contribution to military action," but it is hard to know what a civilian judgment of the matter will bring.

The difficulty with attempting clarification of treaty language, or venturing a clearer restatement of customary law, is two-fold. First, the right to restate humanitarian law has lately been claimed by non-governmental organizations and a subset of States proposing a "human security" agenda that may pay little heed to active military security problems. One saw the evidence of this at Ottawa and Rome, in the debates over land mines and the international criminal court. Second, the United States' unique capabilities in air warfare and other advanced methods of war-fighting may lessen the number of supporting allies in law formation. For example, we may have few interlocuters who understand the practical problems of using air power in limited wars. In the Kosovo and Iraq campaigns, the United States flew the majority of air sorties due to the requirements of targeting and the capabilities of advanced avionics. In a world skeptical of *hyperpuissance*, few other countries may admit a shared interest in effective American warfighting, including how to secure a safe air space. Only Washington and a few other capitals will be called upon to think through the

problems of linkage between an adversary's anti-aircraft capability and dual-use electrical grids. To retain a necessary operational flexibility, the United States may be cast in the role of the legal Luddite, seeking to avoid the usurpation of military law by non-military actors and by States unfamiliar with strategic security challenges.

A second concern is the general collapse of State consent as a basis for norm-setting. In recent negotiations, we have seen a "vanguard" theory of law creation—a low number of ratifications needed for treaties to come into force, a prohibition on reservations so that a package must be taken on an all-or-nothing basis, the bald assertion of third party jurisdiction, and the view that soft law can become hard law on a quick timetable. The doctrine of the persistent objector is itself under challenge if the subject matter concerns human rights, and the once narrow category of *jus cogens* (the peremptory norms binding regardless of State consent) may become a cornucopia. At the Ottawa landmines negotiation and the Rome international criminal court conference, the chairmen abandoned the view that treatymaking should proceed by consensus, or even that treaty texts should have the support of major effective actors. An attempt to restate customary law is likely to leave the United States as a prime target of rhetorical bombardment.

Timing is another problem. It is dangerous to codify the law before one knows what the practical problems will be. International armed force has lately been asked to achieve some difficult ends in limited wars—including coercing local governments to end the mistreatment of ethnic minorities and persuading host States to withdraw support from terrorist groups. In these conflicts, the likely end-state will not be unconditional surrender and long-term occupation. It's not clear that we know how to gain this new type of partial compliance, through a "tariff" theory of warfare. In traditional warfare as well, an adversary's threatened misuse of weapons of mass destruction (WMD) will present new problems in strategy. In some states, civilian facilities have been lamentably misused to shield WMD manufacture. Pesticide plants convert quickly to chemical weapons manufacture, and biological laboratories can turn from diagnostics and vaccines to preparing biological pathogens for weaponization. This dual-use imperils the traditional attempt to separate civilian and military objects. We also have little knowledge of conflict termination strategies. The radius of clear-cutting destruction in prior world wars gives us little basis for judging whether narrow targeting against a limited set of assets will dissuade an adversary from acting badly. One devoutly wishes to protect civilian populations on both sides from the hardships of war.

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Yet leadership morale and regime stability are also linked to the general condition of a country's infrastructure.

Indeed, if law is to be based on accepted State practice, we should be honest about the possible mismatch between the humanitarian purposes of well-intended States in using armed force and the facts of the battlefield. Strategists of air power argue that the pinprick bombing of purely military materiel may not suffice to cause regime collapse. Targeting tanks on the battlefield may be effective in a desert war or on the plains of Europe, but it can be wholly ineffective as a strategy where the adversary's illicit behavior is carried out by unconventional means or even where the adversary happens to enjoy mountainous terrain and cloudy weather. The prudential view of choosing a fight in the most advantageous circumstances—whether against an ideological antagonist or an aggressor bent on regional or global domination—is not available if one is undertaking intervention for humanitarian ends within a civil conflict. Lacking a choice of the field of engagement, humanitarian intervention may be forced to resort to bluntly coercive methods.

Proportionality and Repair

In humanitarian intervention, the “incidental” damage to civilians will include both wartime casualties and damage to the infrastructure. (Indeed, it was anticipation of the latter that persuaded Milosevic to surrender, if we credit Belgrade's new ambassador to the United Nations and former Finnish president Martti Ahtisaari.) The hardship to civilians from infrastructure damage is likely to deepen over time, as supplies run short, weather gets colder, and civilians become exhausted in jerry-rigging alternatives. Unspent munitions also can pose a continuing danger, as we see in the case of cluster bombs.

We may wish to think of proportionality as *possessing the element of time*—and as a *dynamic* requirement. If the victorious country and its allies assist in rapid repair of the infrastructure and economy, the effective penalty of “incidental damage” will be far less harsh. The post-war clearance of unexploded munitions, though not a legal requirement as such, can also limit direct civilian damage (though continued local fighting may make it hard to do this safely or expeditiously). Proportionality in warfighting should be seen as a joint responsibility of the civilian and military sectors together, extending into the post-conflict period.

Conclusion

In a post-Kosovo world, the international community must be prepared to look at humanitarian intervention with clear eyes, in determining when it is legitimate to intervene and in thinking through the applicable standards. We must also recognize the complexity of the tasks we give our military forces in hazardous and remote environments. Any post-conflict evaluations must appreciate the difficulties inherent in the application of the rules of conventional warfare in the intricate tasks of limited war, coercive diplomacy, and humanitarian protection.