International Law Studies - Volume 78 Legal and Ethical Lessons of NATO's Kosovo Campaign Andru E. Wall (Editor)

Commentary

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In order to assess the relevance of the Hague and Geneva Conventions and Protocol I to the Kosovo conflict, one has to ascertain, first of all, the nature of the conflict. Without a doubt, the hostilities between NATO countries and the Federal Republic of Yugoslavia (FRY) should be qualified as an international armed conflict.

On the contrary, the qualification of hostilities between the FRY and the Kosovo Liberation Army (KLA) is more controversial. At first glance, it would seem that it should be regarded as an internal conflict, since the conflict took place between the constituted government and an insurgent community within a State. Can the hostilities between the FRY and the KLA be qualified as an international armed conflict, since Article 1(4) of Protocol I applies? Article 1(4) refers to peoples under colonial domination or alien occupation and racist regime fighting for the implementation of their right to self-determination. It does not apply to mere secessionist movements. The question, therefore, is whether the Kosovars are a people entitled to self-determination, or whether they are simply a minority.

The distinction between people and minority is a moot point and international law, while conferring different categories of rights on peoples and minorities, does not define either peoples or minorities. It is true that UN Security Council Resolution 1244² qualifies the inhabitants of Kosovo as "people."

^{1.} Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3, DOCUMENTS ON THE LAWS OF WAR 422 (Adam Roberts & Richard Guelff eds., 3d ed. 2000) [hereinafter Protocol I].

^{2.} S.C. Res. 1244 (June 10, 1999), U.N. Doc. S/RES/1244 (1999).

However, it does not clarify whether this people enjoys the right of self-determination. It only says that the people of Kosovo should enjoy "substantial autonomy." Autonomy fits more with the rights of minorities than with those of people. Be that as it may, the KLA, as a liberation movement representing Kosovo's "people," did not address any declaration to the depositary of Protocol I in order to bring into effect both the Geneva Conventions and the Protocol, as required by Article 96(3) of Protocol I.

The other possibility is to consider the KLA as being so close to NATO countries that the Kosovar militias, under the control of NATO, did not represent an autonomous party to the conflict. The Appeals Chamber of the ICTY, in the *Tadic* case relied on the control criterion to qualify the conflict, which took place in Bosnia and Herzegovina between the Bosnian Serb Army and Bosnia-Herzegovina, as international.³ Since the Bosnian Serb Army was under the strict control of the FRY, the conflict was in reality between the FRY, on one hand, and Bosnia-Herzegovina on the other. The FRY did not regard the conflict against the KLA as international. NATO countries, on the other hand, did not take any stance on that point. Hence, the dual qualification of the Kosovo conflict (NATO countries-FRY; FRY-KLA) still holds good, unless contradicted by a future judgment of the ICTY.

I will now turn my attention to the applicability of the relevant instruments of international humanitarian law (IHL). While the Hague Conventions are mostly regarded as declaratory of customary international law, this is only true in part for the Geneva Conventions and in particular for Protocol I. All NATO countries are party to the Geneva Conventions. As for Protocol I, all were party to it at the time of Operation Allied Force except for France, Turkey and the United States.⁴ All the NATO countries which conducted hostilities against the FRY are parties to Protocol II except the United States, although the United States does consider its provisions to be reflective of customary international law.

The FRY was admitted to the United Nations in 2000 as a new State. However, during the hostilities the FRY considered itself the continuation of the former Yugoslavia, which was party to the Geneva Conventions and to Protocols I and II. If one disregards the continuity claim, other principles could be applied to affirm that the FRY was obliged, during hostilities, to abide by the Geneva Conventions and the two Additional Protocols. Article 34 of the

^{3.} See Prosecutor v. Tadic, Jurisdiction, 105 INTERNATIONAL LAW REPORTS 453, ¶70 (1997).

^{4.} France acceded to Protocol I on April 11, 2001.

1978 Vienna Convention on the Succession of States,⁵ imposing the rule of automatic succession in case of dissolution of States, is regarded as declaratory of customary international law, or it could be argued that the declaration by the FRY that it would honor the treaties stipulated by the former Yugoslavia should be considered equivalent to a declaration of succession to all multilateral treaties binding the predecessor State.

As far as conduct of hostilities is concerned, the Kosovo war consisted mostly of air warfare, with the exception of cruise missiles launched by warships in the Adriatic, which fall under the aegis of naval warfare. Hague Convention IX regulates naval bombardment. For air bombardment there are no conventional rules, although some commentators have argued that the 1923 Hague Rules on Aerial Warfare are declaratory of customary international law.⁶ Protocol I, Article 49(3) subjects all three kinds of attacks (land, naval and air) to the same rules. Is that provision declaratory of customary international law? The point is important, since France and the United States were not parties to Protocol I. However, the very fact that all NATO countries were not parties to the same conventional instruments, did not raise any serious problem as far as the legal interoperability of forces (for instance, targeting) was concerned.

Three US soldiers were captured on March 31, 1999 at the Macedonia-Yugoslavia border. They were entitled to prisoner of war status. They were wearing uniforms and could not be considered spies. The pretense by Milosevic, subsequently abandoned, to subject them to criminal proceedings was without any legal foundation. Given the nature of the operations, the allies did not capture any FRY soldier. Personnel captured by the KLA and handed over to NATO countries were entitled to prisoner of war status. KLA personnel were covered by Common Article 3 of the Geneva Conventions and by Protocol II. As previously mentioned, the conflict between the FRY and the KLA should be regarded as an internal one.

The Kosovo conflict raised a new problem, that of the interface of the law of neutrality and peacekeeping operations. The case in point refers to the status of military personnel, belonging to a party to the conflict, in the territory of a non-participating State. During the Kosovo war, personnel belonging to NATO countries were stationed in foreign territory, close to the theater of war. They were either part of a peacekeeping operation, such as SFOR in

^{5.} Vienna Convention on Succession of States in Respect of Treaties, Aug. 22, 1978, U.N. Doc. A/CONF.80/31/Corr 2 (1978), 17 INTERNATIONAL LEGAL MATERIALS 1448 (1978).

^{6.} See authorities cited infra note 14.

Bosnia-Herzegovina, or dispatched as a measure of preventive deployment, such as UNPREDEP in Macedonia, whose mandate was terminated on February 28, just before the commencement of hostilities.

According to the customary law of neutrality and the rules of the Hague Convention V, belligerent military units present in neutral territory should be interned. Is the same principle applicable to units, belonging to a party to the conflict, but part of a peacekeeping force? The danger for the enemy is that the military unit might be diverted to a combat mission and take part in the hostilities.

This is a new problem, which should be resolved taking into account the principles embodied in Article 11 of the Hague Convention V of 1907, on the one hand, and the law of the UN Charter, on the other. The resolution of the issue could be along the following lines:

- If personnel are under the command and control of UN Headquarters, the danger that troops be diverted to take part in combat operations is remote;
- The same is true, however with difficulty, if the force, even though under national command and control, is mandated by the United Nations;
- A further line of reasoning could be to invoke Charter Article 103, overriding the law of neutrality, on this point;
- A policy of non-belligerency might also be invoked by the neutral State, hosting foreign troops, insofar as they do not commit any warring act.

During the conflict, NATO aircraft dropped weapons, not used during their mission in Serbia, in the Adriatic, before landing at Aviano, Italy. Landing with the weapons represented a hazard to the safety of the aircraft. The weapons were dropped in jettison areas that had been identified by NATO in previous years on the high seas.

The use of the high seas for military purposes is without any doubt lawful. Therefore one may conclude that jettison areas are not contrary to international law. However, the weapons dropped by NATO aircraft lie on the continental shelf of both Italy and Croatia. Italy was a member of the warring coalition, which took part in the identification of jettison areas, and consented to the weapon dropping. However, the case of Croatia, a State that did not take part in the armed conflict, is different. Could the continental shelf of a neutral State be used for warring activities? Our answer is yes, since the continental shelf is not under the sovereignty of the coastal State, which only enjoys sovereign rights on it. The same solution proposed for mines or other

devices on the continental shelf should be followed. Military activities on the continental shelf of a foreign State are lawful, provided that the economic activities of the coastal State are not irremediably impaired. The principle of "due regard" should be taken into account.

Unlike total exclusion zones, jettison areas are a new phenomenon. Should they be regulated? The first problem is whether there is a duty of notification. Incidents may occur, as happened with Italian trawlers in the upper Adriatic, which caught a number of weapons in their nets. A duty of notification of minefields, as soon as military exigencies permit, is established under Article 3 of the Hague Convention VIII. The same rationale could be invoked as far as dropping of weapons is concerned, even though the danger is more remote than with mines. It should also be taken into account that in the Corfu Channel case, the International Court of Justice (ICJ) stated that Albania had the duty to notify of the danger to navigation represented by mines floating in its territorial waters.⁷

The second problem is whether there is a duty to remove weapons dumped in the high seas at the end of hostilities. Article 5 of the Hague Convention VIII establishes a generic duty to remove mines. De-mining is a duty, which has been rendered more stringent by new conventions on land mines. Environmental considerations play a role, not only during the armed conflict (Articles 35(3) and 55 of Protocol I), but also after its termination. After the termination of hostilities, Italy and other NATO countries dispatched 13 minesweepers to remove the weapons dropped during the war. However, that operation was considered a sort of exercise and not regarded by NATO as a duty imposed by international law.

The law of neutrality has not been abolished by the entry into force of the United Nations Charter. The ICJ reaffirmed the permanent validity of this body of law in 1996 in its advisory opinion on *Nuclear Weapons*, even though the Court took into consideration only the rights of neutral States and not those of belligerents vis-à-vis neutrals.⁸ The right to visit and search neutral shipping in order to confiscate contraband of war is a well-established right under the law of neutrality, which has also been exercised during naval conflicts that have occurred since the entry into force of the UN Charter.

During the Kosovo war, NATO envisaged exercising belligerent rights against neutral shipping in order to stop the oil supply to FRY. This position was opposed

^{7.} See Corfu Channel (U.K. v. Albania), 1949 I.C.J. 4, 22 (Dec. 5).

^{8.} Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 78 (July 8).

by the Russian Federation, according to which the control of shipping bound for the port of Bar could be enforced only if authorized by a UN Security Council resolution. Also, among NATO allies, France and Italy were not enthusiastic. Resolution 1160 established an embargo on the sale and supply of war material to FRY, but did not authorize any enforcement measures, except those which could be exerted by a country on its own shipping.⁹

It is true that foreign shipping may not be visited and searched, unless a Security Council resolution authorizes appropriate measures to enforce an embargo established by the Security Council. This is a well established practice going back to the Rhodesia case¹⁰ and implemented more recently against Iraq,¹¹ the former Yugoslavia¹² and the FRY.¹³ However, this statement holds true in time of peace, i.e., in a situation in which there is no armed conflict. In such a case, in the absence of a Security Council resolution, States are authorized to control shipping flying their flag or belonging to foreign countries, which agree that their ships, usually under reciprocity, may be visited. A completely different situation arises when an armed conflict is going on. Warring States, as practice shows, are entitled to exercise belligerent rights, including visit and search. One can only discuss whether there is any geographical limitation or whether visiting and searching may be conducted anywhere. This depends on the scale of hostilities. The principle of necessity and proportionality might advise that those activities be conducted close to the theater of war.

A blockade of the port of Bar was also envisaged by NATO countries to impede the oil supply to the FRY. This idea was immediately qualified by the Russian Federation as contrary to international law and was also opposed by France and Denmark within the Alliance. Lacking a Security Council resolution, those countries did not regard a blockade as in keeping with international law. A blockade is still considered a lawful measure, at least when established by the United Nations, as it is one of the measures referred to in Article 42 of the Charter. But a blockade is a far more intrusive measure than visit and search and might contribute to an escalation of the conflict. Yet these are policy considerations. From a legal viewpoint, the considerations

^{9.} S.C. Res. 1160 (Mar. 31, 1998), U.N. Doc. S/RES/1160 (1998) \P 8. This was restated in paragraph 7 of S.C. Res. 1199 (Sep. 23, 1998), U.N. Doc. S/RES/1199 (1998) without any mention of enforcement measures.

^{10.} S.C. Res. 221 (Apr. 9, 1966), U.N. Doc. S/RES/221 (1966).

^{11.} S.C. Res. 665 (Aug. 25, 1990), U.N. Doc. S/RES/665 (1990).

^{12.} S.C. Res. 713 (Sep. 25, 1991), U.N. Doc. S/RES/713 (1991); S.C. Res. 757 (May 30, 1992), U.N. Doc. S/RES/757 (1992).

^{13.} S.C. Res. 787 (Nov. 16, 1992), U.N. Doc. S/RES/787 (1992).

made before, in relation to visit and search, are also valid, *mutatis mutandis*, with regard to blockade. In time of peace, a blockade to enforce an embargo requires an authorization by the Security Council; in time of armed conflict, Security Council authorization is not necessary.

The Kosovo conflict once again brought attention to the question of the use of neutral territory as a base for hostile operations or in a manner contrary to neutrality rules. The 1923 Hague Rules on Aerial Warfare, regarded by several writers as declaratory of customary international law, establish two basic principles, as far as neutrality is concerned. Belligerent military aircraft are forbidden to enter the jurisdiction of a neutral State (Article 40); a neutral State should prevent the entry into its jurisdiction of belligerent military aircraft (Article 42).

Austria and Switzerland did not permit NATO aircraft to over fly their territory. This posture is in keeping with law of neutrality, as proven by the Hague rules. On the contrary, Bulgaria, Hungary, Romania and Slovenia agreed that their airspace could be used by NATO aircraft. This practice might be justified only if one admits that a policy of non-belligerency is in keeping with international law. If a deviation from the rule of impartiality is the consequence of a Security Council resolution, non-belligerency does not raise any particular difficulty. Security Council Resolution 1160 established an arms embargo against the FRY. Consequently, States not taking part in the hostilities were forbidden to supply the FRY with war material, but were allowed to sell weapons to NATO countries (something which did not happen in practice). It is more difficult to justify derogation from neutrality rules, in the absence of a Security Council resolution, imposing sanctions on the enemy and/or qualifying it as an aggressor. Even if it is argued that non-belligerency does not constitute a violation of international law, one has to admit that the belligerent, without infringing any neutrality rule, would be allowed to react against non-belligerent States, since their territory is being used by the adversary for warlike purposes.

^{14.} Remigiusz Bierzanek, Commentary to the 1923 Hague Rules for Aerial Warfare, in THE LAW OF NAVAL WARFARE 404–6 (Natalino Ronzitti ed., 1988). R.R. Baxter says in commenting on the Rules: "While these Rules were never put in treaty form, they nevertheless had a profound impact on the customary international law governing aerial bombardment." This passage is quoted by Yoram Dinstein, The Law of Air, Missile and Nuclear Warfare, 27 ISRAEL YEARBOOK ON HUMAN RIGHTS 1 n.2 (1977). See also the decision by the Tokyo District Court, December 7, 1963 in the Shimoda Case, in 8 THE JAPANESE ANNUAL OF INTERNATIONAL LAW 212ff (1964).