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

Commentary

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must congratulate our presenters for their most remarkable contributions; however, congratulation does not mean agreement. This again does not mean that I'm in complete disagreement with all three of them, rather to say that my agreement varies. I will not be able to touch upon all the issues addressed. Hence, I will briefly refer to some details, and then I will close with some more general remarks on some fundamental issues that I'm afraid are too often left out of sight. I will not go into the question of the relevance of Hague Convention IX. I will start with the natural environment.

Professor Bothe is seemingly willing to apply the rules contained in Protocol I¹ on the natural environment as customary international law. First, it needs to be emphasized that Articles 35(3) and Article 55 of Protocol I are so-called "new rules" and, thus, binding only upon States parties to the Protocol. But even when Protocol I is formally applicable, in an international armed conflict, the question remains as to the possible practical impact of these provisions. Remember, they merely prohibit the employment of methods and means of warfare that do or may inflict damage to the natural environment that is "widespread, long-term and severe." There is no conventional method or means of warfare the use of which will clearly be illegal under this prohibition. Even the sinking of an oil tanker cannot always be subsumed under those rules. Moreover, I still have not seen a convincing definition of natural environment. The often-used term "ecosystem" is not a definition, but merely a

^{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).
2. Id., arts. 35(3) and 55.

substitute and not of much help. Hence, the only fairly secure statement on the legal status of the natural environment during international armed conflict is that which is contained in the United States Navy's Commander's Handbook.³ Please note that while the wanton destruction of the natural environment is illegal because it cannot be justified by reason of military necessity, it is of course never a war crime entailing individual criminal responsibility.

Secondly, I would like to address the list approach. The combined list approach suggested by Professor Dinstein seems to be based on quite a condensing logic. Professor Dinstein correctly referred in his paper to the San Remo process and the very intense discussion on whether it was preferable to merely have an abstract definition of military objectives or to also have a non-exhaustive and merely illustrative list of objects that would usually qualify as military objectives. I believe that the decision of the Round Table to be satisfied with an abstract definition was correct. Such lists would be counterproductive because in the eyes of many, the exclusion of certain objects will mean that they may be attacked in exceptional cases only. All legal methodology will not prevent them from such a misunderstanding. I cannot imagine two or more international lawyers, not to speak of government officials, who could reach an agreement on such a list. The papers presented by Professors Bothe and Dinstein illustrate this point.

Thirdly, let us come to the definition of military objectives. First the question of effective contribution to military action. I fully agree with Professor Dinstein that the concept of war-sustaining capability is much too wide, and more importantly has no foundation in international law. This follows from the simple truth that objects such as raw cotton or, to take a more contemporary example, oil, only under exceptional preconditions and circumstances are subject to military measures, i.e., only if they are used for military purposes. In naval warfare, to give but one example, oil exports are not subject to capture if transported on neutral vessels. Only in the case of a breach of a blockade is there the opportunity to capture it. Capture, however, has to be strictly distinguished from targeting even though I must admit that the dividing line is not always so clear.

^{3.} ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 405 (A.R. Thomas and James Duncan eds., 1999) (Vol. 73, US Naval War College International Law Studies).

^{4.} See Professor Dinstein's paper in this volume.

Professor Bothe also maintains in his paper that there are no standing or permanent military objectives.⁵ I am unable to agree with such a statement if made in such an absolute form. It is beyond any doubt that there are quite an impressive number of objects that always qualify as legitimate military objectives because by their nature, and by their very nature, they effectively contribute to military action. To give but one example, take a warship or a military airplane. A discussion like that following the sinking of the *General Belgrano* in the Falklands War should not be repeated, and that discussion should not contribute to casting doubt upon this fact of law and life.

Let me shortly refer to the definite military advantage and the circumstances ruling at the time. Here as with regard to the effective contribution to military action, Professors Bothe and Dinstein have presented quite different positions. I must confess that I'd rather follow the Dinstein approach because of fundamental considerations. To start with the details and by concentrating on the broadcasting station, I would like to add and emphasize that we must admit that under the laws of war, enemy means of communication have always been and always will be considered legitimate military objectives. It must also be emphasized that this is true regardless of the overall aim of the war or of the armed conflict. Professor Bothe maintains that tradition should not be overestimated, but, in my opinion, tradition has a lot to do with State practice, which is not only of significance when it comes to the formation of rules of customary international law.

Let me finally turn to some fundamental issues. Even though Professor Bothe correctly holds that the *jus in bello* and the *jus ad bellum* have to be distinguished and kept apart from each other, I wonder whether he doesn't pay just lip service to that distinction. In view of his further thesis, I have some doubts. In any event, the distinction may not be brushed aside. Moreover, the overall aim that led one of the parties to an armed conflict to resort to use of armed force is irrelevant when it comes to the question whether certain objects effectively contribute to military action of the adversary or whether their neutralization offers a definite military advantage. Apart from the problem that such aims will be merely political, the actual or potential tactics and strategies taken by the adversary or the attacker are decisive. We should not forget that the law of armed conflict is designed as a order of necessity that comes into operation if for whatever reasons States are unwilling or unable to refrain from the use of armed force. It is, so to speak, the ultimate legal yardstick that customary international law is willing to accept.

^{5.} See Professor Bothe's paper in this volume.

The law of armed conflict does not ask for motives, political aims, or the legality of the first use of force. It takes as a fact that the *jus ad bellum* has failed to function properly. Thus, it accepts that the parties to an international armed conflict do apply certain methods and means of warfare in order to harm the respective enemy and by keeping to a minimum one's own losses. This means that the law of armed conflict sets up certain limits, but it has never been designed to prevent armed conflict.

We as international lawyers should never forget that international law is made by States – that means by those who are bound by it. But if the consensus of States can only be verified, let us say to have reached a certain level, we are not allowed as international lawyers to ignore this and to replace the missing basis by pure hermeneutics or to equate what we wish the law to be with the existing law.