

## Commentary

Harvey Dalton

I think there are three verities that we need to be aware of throughout our discussions in this area. Professor Robertson has already mentioned one—that the use of force is a continuation of political relations by other means. I think another verity is embodied in Article 2(7) of the UN Charter, which provides that domestic matters are the sole responsibility of sovereign States. I think another verity is also embodied in the UN Charter, that is the inviolability of the territorial integrity and political independence of sovereign States.

We've heard from time to time that Operation Allied Force was a humanitarian intervention and that there might be a right of humanitarian intervention. I agree with Professors Roberts and Walker that, at least in my view, there is no right of humanitarian intervention and that the situation in Kosovo was an extraordinary situation dominated by necessity. It was necessary for the NATO alliance to use force. There were no alternative means. All alternative means had been exhausted.

But assuming that Kosovo was a humanitarian intervention, there have been some comments that maybe the rules should be different when we talk about the use of force as a part of humanitarian intervention. My question is why? What makes this so different from an ordinary armed conflict that the rules should be different? If we're going to apply the *jus in bello*, it should apply on all instances of armed hostilities. In this case, the weapons were no less deadly, the systems were just as effective and just as destructive, the clash of the armed forces was just as deadly, and the effects on civilians were no different.

There seems to be some implicit criticism of NATO's decision to keep its planes above fifteen thousand feet as if NATO was not being quite correct in

playing by these rules. I would like to simply point out that the Federal Republic of Yugoslavia (FRY) had one of the most sophisticated integrated air defense systems in Europe. FRY forces did put our pilots and aircraft in harm's way. They shot down two of our aircraft. There's no evidence that I'm aware of that NATO's decision to stay above fifteen thousand feet affected the accuracy of our weapons. We did have outliers (missiles or bombs that drop outside the area they were targeted at). We did have mistakes. But there's no evidence that the fifteen thousand foot restriction or ceiling affected the accuracy. The fifteen thousand foot altitude protected our aircraft against the FRY anti-aircraft artillery, but it did not protect those aircraft against surface-to-air missiles. You might contemplate that fact on your way home from this colloquium when you're flying at thirty-seven thousand feet, because an SA-2 can reach out and touch you at thirty-seven thousand feet.

As Colonel Sorenson mentioned yesterday, fifteen thousand feet is not very high. Mistakes have been made at far less than fifteen thousand feet. I would refer you to the US/UK blue-on-blue clash that occurred during Operation Desert Storm. That incident occurred at much less than fifteen thousand feet.

Finally, I would like to turn very briefly to the reference by Professor Wedgwood to the international institutions and international tribunals. I would agree with Professor Roberts that there has not been a critical review of the Committee's Report to the Prosecutor on the Kosovo operation. I'd like to give you two examples from this report. The Committee uncritically accepted the definition of environmental crime contained in the International Criminal Court statute:

Operational reality is recognized in the Statute of the International Criminal Court, an authoritative indicator of evolving customary international law on this point, where Article 8(b)(iv) makes the infliction of incidental environmental damage an offence only if the attack is launched intentionally in the knowledge that it will cause widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.<sup>1</sup>

Now that was an uncritical acceptance of a crime that was defined in the ICC Statute, and there are a few people here that can tell you—Charles Garaway in particular—that this was a definition that was cobbled together as a

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1. See Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, ¶ 21, 39 INTERNATIONAL LEGAL MATERIALS 1257, 1263 (2000), reprinted herein as Appendix A.

compromise by various lawyers from likeminded States in a restaurant at the top of the Ministry of Foreign Affairs in Bonn in October 1995 or 1996. It's a compromise. Yet here's an uncritical acceptance of this definition in a statute that is not in force. We need a critical review of this Committee's Report.

Another example is the Committee's rather tight control on the attacks on propaganda and a rather critical statement concerning the attack on the RTS (Serbian TV and radio station) transmission facility. It must be known that the RTS system was critical to sustaining the war effort and the ethnic cleansing effort by the FRY. It also directed virulent propaganda against NATO with the view to breaking up the alliance or shattering our unanimity. It was part of a determined effort to conceal what was actually happening in Kosovo. I think it's very important to recognize that in an authoritative regime such as in Yugoslavia, propaganda is essential. Control of the populous is essential and propaganda is the means by doing it. Let me give you a quote from Julius Stone:

Quite apart from the dependence of totalitarian governments on unquestioning and undeviating acceptance of their respective ideologies, preparation for modern war and the waging of it demand a high degree of solidarity of outlook and effort throughout the community. In these circumstances, the undermining of the internal social and political order of the enemy and his psychological assurance become a Military target as important as his physical industrial plant and second in importance only to his armed forces.<sup>2</sup>

So propaganda is a legitimate military objective—at least in this commentator's view.

One final point with respect to the International Criminal Court. Professor Dinstein in his book notes that there are certain principles that are *jus cogens*. These are fundamental principles that trump other aspects of international law. His example of a *jus cogens* principle is the territorial inviolability and the political independence of sovereign States. A final comment. I would suggest to you that there may be another principle of *jus cogens* and that is a principle that no obligation can be conferred on a sovereign State without their express written consent. That is also contained in the Vienna Convention on Treaties. It is also a fundamental principle of international law. If you take that as a principle of *jus cogens*, then those aspects of the ICC statute that purport to extend the ICC's jurisdiction over a non-party State and nationals of a non-party State are a legal nullity.

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2. JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 322 (1954).