

Introduction

Scott Silliman

This first panel will address the overall applicability of the law of armed conflict, also called international humanitarian law, to the NATO operation in Kosovo. We are also going to be focusing on several specific issues that arose during that campaign, one being the legal status of the three Army soldiers who were captured while on a routine mission near the border. As you recall, immediately after they were captured, our State Department announced to the press that the three were “illegal detainees” and many of us—and several are here at this conference—responded vehemently that they were clearly prisoners of war under the Third Geneva Convention, and that to consider them otherwise was to denude them of the protections afforded them under international law.

I'd like to lay a foundation by reading from a portion of the very controversial Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia¹ on this linkage between the *jus ad bellum*, which is a very large debate as all of you know, and the more particular *jus in bello*, which is the focus of this colloquium. It reads:

32. The precise linkage between *jus ad bellum* and *jus in bello* is not completely resolved. . . . [I]n the 1950's there was a debate concerning whether UN authorized forces were required to comply with the *jus in bello* as they represented the good side in a battle between good and evil. This debate died out as the participants realized that a certain crude reciprocity was essential if the law was to have any positive impact. An argument that the 'bad' side had to

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

Introduction

comply with the law while the 'good' side could violate it at will would be most unlikely to reduce human suffering in conflict.

33. More recently, a refined approach to the linkage issue has been advocated by certain law of war scholars. Using their approach, assuming that the only lawful basis for recourse to force is self defence, each use of force during a conflict must be measured by whether or not it complies with the *jus in bello* and by whether or not it complies with the necessity and proportionality requirements of self defence. The difficulty with this approach is that it does not adequately address what should be done when it is unclear who is acting in self defence and it does not clarify the obligations of the 'bad' side.²

The Report to the Prosecutor went on to say that the Committee deliberately refrained from assessing *jus ad bellum* issues and focused exclusively on whether violations of the law of war occurred within the confines of the *jus in bello*. It concluded that there was no basis for further investigation and no basis whatsoever for the referral of war crimes charges against any of the NATO combatants.

With regard to the question of linkage between the *jus ad bellum* and the *jus in bello*, though, there seems to be no ambiguity in the United States position. If there is an armed conflict, whether deemed just or unjust, right or wrong under the *jus ad bellum*, the *jus in bello* applies equally to both sides. That's the position I personally take, but I know that many will disagree with that.

2. *Id.*