

Commentary

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In several instances during this colloquium scholars have alluded to UN Security Council Resolutions as having the impact “as law.” I’m not sure that I would be willing to accord the Security Council such overarching authority. I certainly agree that the member States of the United Nations, in Article 24 of the Charter, conferred on the Security Council the primary responsibility for the maintenance of international peace and security, and *agreed* that the Security Council, in carrying out its responsibility, acts on their behalf. Furthermore, member States *agreed*, in Article 25, to accept and carry out the decisions of the Security Council in accordance with the Charter. In Chapter VI of the Charter the member States conferred on the Security Council the authority and responsibility to inquire into disputes which may endanger international peace and security, and to investigate those disputes and recommend measures with a view towards pacific settlement. Member States also conferred on the Security Council in Chapter VII the responsibility to determine the existence of a breach of the peace or act of aggression, make recommendations, and decide what measures shall be taken pursuant to Articles 41 and 42 of the Charter, which we all know involve non-forcible and forcible measures to maintain or restore international peace and security.

The international security paradigm established by the Charter, in my view, is an *international mutual security agreement*, in which sovereign States members of the UN have by mutual agreement conferred on the UN Security Council certain responsibilities for the maintenance and restoration of international peace and security, and have agreed to abide by the decisions of the Security Council in this respect. I do not read the Charter, however, as conferring law-making authority on the UN Security Council. In my view, neither

the UN Security Council nor the UN General Assembly commands the authority or the responsibility to establish rules of law applicable to the international community or to any particular State. The Security Council, of course, may by its decisions reinforce applicable principles of international law, and may even advance developing principles of international law.

Each dispute or threat to international peace and security addressed by the Security Council is unique, having its own factual basis. UN Security Council decisions in respect to those factual situations must of necessity be tailored to the factual situation at hand. Because of this, and because decisions of the Security Council often do not reach out and touch all members of the international community, the resolutions of the Security Council do not and should not establish principles of international law applicable to all members of the international community. I think it is a stretch, and a dangerous one at that, to read into the UN Charter authority and responsibility which is not articulated, and which was never intended for those institutions established therein. Even the decisions of the International Court of Justice are applicable only to the parties to a case before the Court, although those decisions can be powerfully persuasive evidence of applicable international legal principles. And, although some may disagree, Article 13 of the Charter authorizes the General Assembly *only* to initiate studies and make recommendations concerning the progressive development of international law and its codification—it is not a law-making body.

I am sure everyone is aware of the difficulty we are now experiencing in the International Criminal Court Preparatory Committee in arriving at a sufficiently precise definition of the crime of aggression. One of the difficulties is the insistence of some States on adopting the definition of aggression embodied in UN General Assembly Resolution 3314 of December 14, 1974, arguing that the resolution articulates the international legal principle defining aggression. If one looks into the preparatory work on the definition, the debate in the General Assembly, and the interventions by States after its adoption by consensus, one would clearly discern that the definition does not represent by any means a definitive statement of aggression, much less the crime of aggression.

This is but one example of the difficulties posed by UN General Assembly declarations purporting to reflect the state of the law. Such pronouncements are so often political in nature, not supported by State practice or the realities of international discourse, and so tainted by underlying political agendas as to be highly suspect. Yet we are confronted with such pronouncements years later as definitive statements of the law. The same would hold true of UN

Security Council decisions, and I would hope that we would not lose our perspective on just how limited UN Security Council resolutions are intended to be, the fact that they too are political statements, and that they do not have the force and effect of law.

Turning now to the applicability of the law of armed conflict to the Kosovo air operation, I think that the appropriate point of departure must be the applicable rules of engagement. Since this was a NATO operation, the NATO rules of engagement were applicable and were employed by all NATO forces. In this respect, the NATO ROE specify that: "ROE first must be lawful. International law defines the lawful limits for the use of force during military operations. . . . The conduct of military operations is circumscribed by international law, to include the applicable provisions of the law of armed conflict. . . . NATO ROE, and the application of them, never permit the use of force which violates applicable international law." Furthermore, each NATO member is bound by its own domestic law, which may further constrain the use of force in certain circumstances and complicate the conduct of combined operations. For United States armed forces, service regulations specify that the international law of armed conflict applies to the use of force in hostilities, and that at all times, commanders shall observe, and require their commands to observe, the principles of international law, including the observation and enforcement of the law of armed conflict.

So from the outset of hostilities on March 24, 1999, indeed during the planning process in preparation for Operation Allied Force, there was no question that the law of armed conflict was fully applicable and that it was incumbent that there be scrupulous compliance with the principles of the law of armed conflict at all times. This was particularly important in the selection of targets, in weaponizing those targets, in choosing aimpoints, and in employing weapons against those targets. US Department of Defense (DoD) attorneys played a critical role in conducting legal reviews and analyses during the entire targeting process, and applied the traditional principles of the law of armed conflict throughout. Allow me to briefly provide you with a couple of examples of the target sets which were attacked during Allied Force, and walk you through the legal issues and concerns posed by those target sets.

In addition to targeting purely military objectives (i.e., tanks, barracks, bunkers, fighter aircraft, etc.) NATO targeted so-called "dual-use" infrastructure assets such as command, control and communication (C3), electric power, industrial plant, leadership lines of communication (LOCs) and petroleum, oil and lubricant (POL) facilities. This immediately raised issues of discrimination and the prohibitions against attacking civilians and civilian

objects. We were also acutely aware of the rules of proportionality—that collateral damage to civilians and civilian objects was not to be excessive in light of the military advantage anticipated.

It is no secret that NATO targeted electrical power facilities. Such facilities are normally targeted during hostilities, because they do provide energy resources to military forces, and their destruction has a direct military advantage. Nevertheless, during Kosovo, we were careful to avoid undue and prolonged power outages which would have a disproportionate effect on the civilian population. In most cases, attacks on electrical power facilities employed “soft kill” capabilities, which could take the system down for a few hours or a day or two, but would not permanently shut down the power grid. We also were mindful of the possible cascading effects of the attacks on power grids, which could spill power outages over into neighboring countries not involved in the hostilities, and we were careful to ensure that these outages did not occur. There were some “hard kill” power grid attacks, and NATO did shut down the grid throughout Serbia at one point, but the outage was not permanent.

I will readily admit that, aside from directly damaging the military electrical power infrastructure, NATO wanted the civilian population to experience discomfort, so that the population would pressure Milosevic and the Serbian leadership to accede to UN Security Council Resolution 1244, but the intended effects on the civilian population were secondary to the military advantage gained by attacking the electrical power infrastructure.

Likewise, NATO mounted attacks on “dual-use” industrial facilities, those having both military and civilian purposes. But each and every target of this nature was carefully scrutinized by our lawyers, both at the Joint Staff level and in my office (DoD General Counsel). In each case a direct military link was required, or only those portions of the facility having military utility, or conducting military work, were targeted. An example of this type facility was the Kragujevac Arms/Motor Vehicle Plant—one side of which produced automobiles while the other side produced tanks. NATO targeted only that side of the plant producing tanks. I might add that initially this facility was identified as a heavy bomber target, but later disapproved as such because of the proximity of civilian housing.

You might find it interesting to review a recently published RAND study by Stephen T. Hosmer, entitled “Why Milosevic Decided to Settle When He Did.” Hosmer concluded that it was the attacks and the threat of attacks on “dual-use” infrastructure targets that generated the decisive pressure for war termination. Furthermore, Milosevic and the Serbian leadership capitulated

because they expected an unconstrained bombing campaign of even greater magnitude, including carpet bombing of Belgrade, if they rejected the NATO ultimatum delivered by Chermnomyrdin and Ahtisaari on June 2, 1999. This study also concluded that the air campaign against military targets did not significantly influence Milosevic's decision to come to terms. This in my view, has significant and disturbing implications for the application of the law of armed conflict in future conflicts of this type. There very well could be serious consequences for the civilian population should decision makers no longer appreciate the military utility of striking military targets, and applying military pressure solely against military objectives.

These are but two examples of the application of the law of armed conflict during the targeting process for Operation Allied Force. I wish to assure all of you that careful and thorough legal reviews of all targets were conducted at every echelon of command, from the Supreme Allied Commander up through the Joint Staff and in my office prior to the target lists being sent over to the US National Command Authorities (President and Secretary of Defense) for final approval. In many cases sound legal advice led to the deletion of targets, change of ordnance assigned, adjustment of aimpoints, or disapproval of targets because of law of armed conflict concerns. Principles of distinction, proportionality and military advantage were applied on a daily basis throughout the conflict. Although mistakes were made, and weapons did not always perform as accurately as we had hoped, in my view NATO scrupulously complied with the law of armed conflict in every instance. We should be gratified that civilian casualties were kept remarkably low considering the intensity of the air campaign. In many ways, we have the lawyers, and the incredibly talented and dedicated targeteers, to thank for such a superb effort.

One final comment. You undoubtedly are aware of, and may have read the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the FRY.¹ The Report concludes that for several reasons, not the least because the law of armed conflict in the area of "dual-use" targets is not clear, no "in-depth" investigation of the NATO air campaign as a whole was warranted, nor should there be further investigations into specific incidents. While I found this aspect of the Report to the Prosecutor gratifying, the manner in which the committee reached its conclusions is deeply disturbing. To have twenty-twenty hindsight scrutiny, done at leisure,

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.

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of decisions and determinations made in the fog of war, often under instantaneous time constraints and life-threatening conditions by military commanders, pilots, soldiers and airmen, based on allegations by those who do not hold Western nations in very high regard, is a chilling and frightening prospect. I fear that the reservations of the United States with respect to the International Criminal Court are well-founded, based on the aftermath of the Kosovo conflict. I also fear that a precedent has been established, and we can expect such allegations in future instances where the use of force is employed, even in instances of humanitarian assistance. The prospects for Western participation in peacekeeping or peace enforcement operations do not necessarily look good, and one wonders if this bodes well for the force and effect of international law for the future.