

## Discussion

### *The UN Security Council and the Creation of International Law*

**John Murphy:**

Regarding Judy Miller's comment about the United Nations Security Council and its powers of law creation, I would suggest with respect that the Security Council of the United Nations—at least if it's acting under Chapter VII—has the authority to debate, decide, and enforce international law. For more on this issue, I would recommend the two-volume book *United Nations Legal Order*<sup>1</sup> edited by Oscar Schachter and Chris Joyner, which goes into the authority of the UN Security Council and other bodies of the United Nations to create, to interpret, to apply and enforce international law.

**George Walker:**

I think I agree that Security Council's decisions under Chapter VII are law. Any other resolution of the Security Council, any General Assembly resolution except those governing United Nations governments and most other organizations unless the participants have agreed that they are law, are either supportive of law or the like. General Assembly resolutions may never declare law and they are not law in their own light, but I believe that on the political side of things they can contribute to soft law.

### *The Law of Neutrality Under the UN Charter*

**Christopher Greenwood:**

Regarding the question of the application of the law of neutrality in an environment where you have Security Council action. I think it is clear that if the Security Council adopts a decision under Chapter VII, that decision or

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1. UNITED NATIONS LEGAL ORDER (2 vols.), (Oscar Schachter and Christopher C. Joyner eds., 1995).

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rather the obligation to comply with it prevails over any other rule of international law. There is, therefore, no difficulty if you have a Security Council decision which, for example, prohibits the delivery of particular goods to a particular State. That is why I have some reservation in trying to draw lessons from what happened in the second Gulf conflict and applying them to the conflict in Kosovo.

In the second Gulf conflict, you had a very clear, unambiguous Security Council Resolution 661,<sup>2</sup> which forbid the delivery of virtually anything to Iraq or Kuwait, and a second resolution, 665,<sup>3</sup> which authorized navies of governments cooperating with the government of Kuwait to enforce 661. Now neither of those conditions was satisfied in the Kosovo conflict. Resolution 1160<sup>4</sup> only applied to the delivery of weapons and military equipment to Yugoslavia and there was no equivalent of 665. So on the critical point about intercepting deliveries of oil to Yugoslavia, there was no Security Council authority. For legal basis, you would have had to fall back on the customary international law principles. That's where I would suggest there is a real difficulty in practice.

### *Peacekeepers or an Occupying Force?*

#### **Christopher Greenwood:**

I would just like to say something about the situation after Resolution 1244<sup>5</sup> was adopted because we've only briefly touched on that so far. It seems to me that 1244 moved the goalposts completely with respect to Kosovo because it meant that when ground troops went into Kosovo, they did so under a Security Council mandate. Had that not happened, then I think the legal position would have been a very murky one indeed. Suppose that the Yugoslav government had capitulated as it did, but we had not been able to get a resolution through the Security Council because of the Chinese veto. You would then, I think, be in a position where the troops that now make up KFOR would have been there in effect as belligerent occupants or at least under a regime of belligerent occupation tempered by whatever Yugoslavia had agreed to. That would have been an extremely uncomfortable position indeed. However much we might find 1244 limiting, the law of belligerent occupation would have been a limit a great deal more difficult to live with.

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2. S.C. Res. 661 (Aug. 6, 1990), U.N. Doc. S/RES/661 (1990).

3. S.C. Res. 665 (Aug. 25, 1990), U.N. Doc. S/RES/665 (1990).

4. S.C. Res. 1160 (Mar. 31, 1998), U.N. Doc. S/RES/1160 (1998).

5. S.C. Res. 1244 (June 10, 1999), U.N. Doc. S/RES/1244 (1999).

*The Legality of Blockade or Visit & Search*

**Adam Roberts:**

As I recall the way the issue of visit and search arose during the Kosovo events of 1999, there should have been no problem about the application of most of the law of armed conflict because it applies when there is fighting. But I recall it being said that one of the difficulties was that numerous Western leaders in their wisdom had proclaimed that this was not a war. In the United Kingdom we had, for example, a Minister of Defence then, now Secretary-General of NATO, proclaiming repetitiously that this was not a war. Then the suggestion was made that it was particularly difficult to exercise rights of visit and search when Western leaders had been so industriously and, in my opinion, so absurdly claiming that this was not a war. I wonder if there was a connection there between this *jus ad bellum* problem and the application of that particular branch of *jus in bello*.

**Christopher Greenwood:**

Well I don't think it has anything to do with whether there was a state of war in the formal sense. I really think that is an issue which has become almost completely a museum piece. Having said that, I think that if you repeatedly say in public we are not fighting a war, you are not simply saying there is no technical state of war in being. You are trying to damp down expectations of the level of violence that is going to occur. If you do that, then you almost invariably as a matter of political reality—if not a matter of law—constrain your freedom of action in the future.

**Wolff H. von Heinegg:**

Let me address the subject of visit and search. I really don't understand this debate over the legal issues involved, because when we are just concentrating upon the legal issues and not on the policies, it is quite clear that at least that part of the law of neutrality would strictly be labeled the law of maritime neutrality. If you look at the law of maritime neutrality and if you look at the works of the International Law Association as well as the San Remo Manual,<sup>6</sup> there is no doubt that as soon as a belligerent decides to conduct visit and search operations it is perfectly in order and in conformity with the existing

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6. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA ¶¶ 93–104 (Louise Doswald-Beck ed., 1995).

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law. In my opinion, this is customary law and there is a customary right of belligerents to conduct visit and search operations.

Now when it comes to certain legal limitations that have been suggested this morning, well I warn you against mixing up self limitations with legal obligations. A belligerent would be entitled to conduct visit and search operations with regard to neutral shipping everywhere in the high seas outside neutral territorial waters. Of course, he probably would not do that in the Atlantic if he is engaged in the Indian Ocean, but that is just a self limitation and nothing else. So when it comes to this part of the law of neutrality that means maritime neutrality, I think there can be no real doubt about the legality of conducting visit and search operations.

### **Natalino Ronzitti:**

We both agree that visit and search is legal as soon as there is an armed conflict. About the legal limitation, there is some practice and precedent that you are entitled to search a ship within the limits of self defense, but it's very difficult to exemplify what these limitations are.

### **Christopher Greenwood:**

I take the point that there are any number of texts from the Naval Commander's Handbook<sup>7</sup> in the United States to the International Law Association to the San Remo Manual that talk about rights of visit and search. I subscribe to the views that the right could have been exercised in these circumstances if it was really necessary to do so. The problem was more a political than a legal one. But I do think we have to go into this with our eyes open. Our own governments would be exceptionally reluctant to accept the exercise of those kind of belligerent rights if we were on the receiving end of them in conflicts in which we were neutral. It is simply not the case today that one can give the kind of confident advice that "don't worry this right is clearly established in customary international law, nothing else to bother about." I think that that would not today be responsible advice for a lawyer to give. Also, I don't accept that limitations as to area are purely politically self-imposed imitations. I think that if Iran had sent frigates to the Mediterranean during the first Gulf war, which it could just about have done, and made a few token visit

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

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and searches there, we would not have accepted the legality of that in Britain. The United States would not have accepted its legality either.

### **Ove Bring:**

I think I rather stand on the line with Chris Greenwood being more cautious of the applicability of the law of neutrality in warfare than Wolff von Heinegg who takes a more cock-sure attitude that the traditional law of neutrality is still in place. I take this view because the law of 1907 was adopted at a time when there was no law of collective security—there was no UN Charter. In 1907 the use of force for visit and search purposes was not doubted at all. What has happened since then is that we have the law of collective security: belligerents may not automatically, or perhaps should not automatically at least, rely on the option of the use of force in relationship to States that are not involved in the armed conflict. There is a tension between the law of 1907 and the law of 1945, and that is a logical, legal and ideological tension. I'm not sure that this has resulted in state practice confirming one thing or the other, but it is a matter that should be discussed in legal circles because I think that it is a problem.

### **Christopher Greenwood:**

First of all, without looking to get into the argument about whether the NATO operation in Yugoslavia was lawful or not, I agree entirely that there is a real problem if you have a State that maintains that there is no right of humanitarian intervention at all, or that, if there is, it doesn't apply to Yugoslavia, and then takes the position "what right have you to stop us from trading with an existing trading partner?". But that same problem arises where you have a State not involved in the conflict that says we don't accept your self-defense argument. Obviously you can't contend that there is no right of self-defense in international law.

Exactly the same problem arises if a neutral country says it doesn't accept that Iran is acting in self-defense against Iraq. "We don't accept Iraq is acting in self-defense against Iran, thus what power do you have to prevent us from trading with an existing trading partner." It is, I think, the question mark that hangs over this area of the law of neutrality in the twenty-first century. Now there is an answer to that, and the answer is that the customary international law of neutrality continues to provide certain elements of rights to belligerents irrespective of the legality of the resort to force. If you didn't have some principle of that kind, then you would in effect be scrapping the law of neutrality all together. But I come back to a point I made in my opening statement. Where you have a combination of real doubt—admittedly doubt I don't share, but

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real doubt nonetheless—about the legal basis for an operation in the first place, coupled with doubts about how far the law of neutrality has survived into the modern era in relation to intercepting ships and doubts about the necessity for such action, then you have a real problem about stopping neutral ships irrespective of what your lawyers tell you.

### *Applying the LOAC: A Question of Intent or Act?*

#### **Ruth Wedgwood:**

I had a question for Judy Miller and for anybody else who wants to comment on it. When I recently spoke to Dejan Sahovic who's the new Yugoslav Permanent Representative to the United Nations, he concurred essentially with the conclusion of the Rand Study. His answer to the question "why did Milosevic ultimately step down from the campaign?" was that he thought that Milosevic doubted the ultimate loyalty of the Yugoslav Army. The disloyalty was not ideologically based, but rather that they would fear for the safety and comfort of their own families.

My question is the old catholic question of motive versus purpose, or intention versus act. If in fact we succeeded because the Serbs believed we would reduce Belgrade to a flattened version of Frankfurt or Hamburg after the Second World War, was that a licit kind of animation? The threat of force versus the actual use of force, because we may indeed have chosen our target. I know we chose our targets with great care, but if the Serbs believed we would not let up until everything they used in civilian life was destroyed, then we may have won the war by intimating, or allowing them to conclude, that we would use force in a much more unrelenting way that would raise far greater questions of proportionality.

#### **Judith Miller:**

I don't think objectively speaking that the people of Yugoslavia should have had that fear. In point of fact we were not razing parts of Belgrade. In fact, NATO and the United States were saying throughout—and we were saying it because it was true—that we were going to follow the law of armed conflict. So I can't account for the belief, if it occurred, among the army and the civilian population that we were going to practice total war. That simply wasn't in the cards from anyone's perspective, or from anyone's formal or informal statements.

I do think that if in fact somehow that perception is what really drove Milosevic to relent, then that does create some issues for people going forward

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because you're presumably going to hear military commanders say that we want to do X or Y. We're going to have lawyers even harder pressed to explain you can't do that because it's not allowed under the law of armed conflict. I think it does challenge one's ideas about what it is to engage in hostilities in a world where our every move is covered on CNN and reported instantaneously. It may have reverberations that are somewhat different than we've been accustomed to previously.

*Enforcement of the Laws of Armed Conflict and 20/20 Hindsight*

**Christopher Greenwood:**

If I may respond to something Judy Miller said on the question of enforcement. I take the point entirely, and I recognize the difficulty for a civilian in speaking on a subject of this kind to a predominantly military audience. I recognize entirely that it is uncomfortable to have the idea of a judge and a court with twenty-twenty hindsight second guessing the decisions you took in the heat of the moment, but I don't think we should be afraid of this. I don't think we should be worried by the sight of our own shadow.

If you take for example what was happening in Northern Ireland over the last thirty years; any British soldier firing a weapon at somebody in Northern Ireland did so knowing that the decision that he took in the heat of the moment was likely to be hauled over afterwards in great detail by people with twenty-twenty hindsight. The fact of the matter is, it didn't chill all military activity in Northern Ireland. It may have produced some circumstances and cases where we would question the result, but the fact of the matter is that it hasn't handicapped the British forces in what they set out to do. And I don't think the prospect of an International Criminal Court or the International Criminal Tribunal for the former Yugoslavia is going to have that effect on military action in general. Perhaps a more important point is that whether we like it or not, this is a fact of life. It's not something we're going to be able to escape from and there's no point in our pretending otherwise.

**W. Hays Parks:**

I agree that we often times are judged in law enforcement situations with twenty-twenty hindsight. Every law enforcement officer in the United States, any soldier who uses force in the United States, is subject to a line of cases that govern whether that person should have used deadly force in that circumstance. We have those processes at both the state and federal level. We are not blessed like you are with a European Court of Human Rights. That's your

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burden. You can have it; we don't want it. The example I can think of is the 1988 SAS killing of the three Irish Republican Army terrorists in Gibraltar. There was a very political 10 to 9 decision that found the use of force unlawful.<sup>8</sup> That's the kind of chilling decision that we are concerned about when talking about judging decisions that commanders make in the fog of war.

### **Christopher Greenwood:**

First, I understand where you're coming from and the answer is you need to make sure you get the right judges. You need to make sure you have people who are not there just because they have a political axe to grind, but are genuinely seeking to apply the law impartially. Then I think you have nothing to fear provided that you get over the second hurdle. It has got to be clearly understood by everybody concerned that you are looking at an event after it happened. Therefore, there is inevitably a degree of detachment and a degree of hindsight, but you have got to apply a test that is actually capable of being applied by somebody in the heat of the moment. There's an English case on self defense from about thirty years ago which contains the passage that detached reflection is not to be expected in the face of an uplifted knife. I think it's essential to appreciate that that is the standard which has to be applied, for example, to any investigation of a pilot's decision to fire a missile on the basis of a couple of seconds in which he had a chance to appreciate the situation in front of him.

### **Judith Miller:**

The problem I have with the International Criminal Court (ICC) is that as it's currently constituted it does not have the sort of ground rules that Christopher Greenwood has pointed to. Impartial judges, impartial prosecutors, and a body of law that is knowable in advance and fairly applied has not been guaranteed by the ICC as currently envisioned and embraced by so many people in the world. I regret personally that we are in this situation. I do not believe the United States is entitled to do what it wants to do without scrutiny. I simply want to have an institution set up that we can rely on, and everyone else in the world can rely on, to do it in a fair way.

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8. See *McCann and Others v. the United Kingdom*, 324 Eur. Ct. H.R. (ser. A) (1995) holding by only ten votes to nine that United Kingdom had violated the European Convention on Human Rights. The European Commission on Human Rights had previously voted eleven to six that the use of lethal force was "no more than 'absolutely necessary.'" *McCann and Others v. the United Kingdom*, App. No. 18984/91, Eur. Comm'n. H.R. (Mar. 4, 1994), p. 251.

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My point about the Report to the Prosecutor is that you must look at that and think about it from the point of view of a lawyer in the Department of Defense trying to give good advice to the secretary and the chairman and everyone else trying to carry out a military mission. If you read that Report and try to figure out what kind of advice you're going to give, then I think it raises a lot of serious questions. So the point I'm making is that there are issues that it raises and approaches that it took that I think are not necessarily the obvious way to interpret the law of armed conflict and apply it in individual instances.

### *Are the Laws of War a Constraint?*

#### **Adam Roberts:**

There has been an implication that the laws of armed conflict are essentially a constraining factor on the waging of war. Of course they are a constraining factor, but there are two sub-aspects of that that should be brought out. One is that some of the most important parts of the law of armed conflict don't deal with combat as such, but with the treatment of victims of war, prisoners of war, inhabitants of occupied territory and so on. Those crucially important bits of the law of armed conflict are not as it were affected by this critique, but the law of armed conflict is still constraining in a number of respects.

It's also true that the law of armed conflict is a very important means whereby the conduct of war can be kept within limits which Western publics will accept. In that sense, it is enabling and not constraining. We've seen plenty of evidence of that in the at least three major wars in which Western democracies have been involved in the last twenty years—the Falklands War, the 1991 Gulf War and Kosovo. In all three, a sense that the forces involved were fighting within certain constraints and were treating prisoners honorably and everything else was an important precondition for continued public support for the operations. So while it is true that the laws of war may be constraining, we should not think of them as exclusively a constraining and restraining factor.