

Commentary

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I shall confine my comments to the papers presented by Professors Roberts and Wedgwood. First, as to Adam Roberts's paper. Professor Roberts has laid out eight issues that arose during the Kosovo air campaign, which he asserts are likely to affect the way in which the law is viewed, influences events, and develops further in the future. I will single out three of these for my comments.

First, is there now a stronger link between *jus in bello* and *jus ad bellum*? Roberts asserts that the 1990s saw a strengthening of the idea that a systematic pattern of basic humanitarian norms may justify acts of military intervention. "Quite simply," he states, "massive violations of *jus in bello* can help to legitimize certain uses of force."¹ While I do not quarrel with Roberts's conclusion, it seems to me that while justification for intervention by another State or international entity may rest in part on a systematic pattern of violations of *jus in bello* in a civil war, that is solely an issue of *jus ad bellum*. The conduct of the intervening party once involved in the conflict is completely independent of whether or not the intervention meets the test of *jus ad bellum*. The intervening party is obligated, both by treaty and customary international law, to abide by the principles and rules of *jus in bello*. With respect to the obligations of the almost universally binding 1949 Geneva Conventions, Common Article 2 provides unequivocally: "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war

1. See Professor Roberts's paper in this volume, *supra*, at 410.

is not recognized by one of them.”²

This principle is reiterated in Articles 1(1) and 3(a) of Protocol I, which state that the Protocol shall apply “from the beginning” of any armed conflict referred to in Article 2 of the 1949 Conventions.³ Although not all parties to the Kosovo intervention were parties to Protocol I, the principle it states seems to have been generally accepted as a part of the customary law of war. The United States CJCS Standing Rules of Engagement provide, for example: “US forces will comply with the Law of War during military operations involving armed conflict, no matter how the conflict may be characterized under international law, and will comply with its principles and spirit during all other operations.”⁴ The US Navy’s *Commander’s Handbook on the Law of Naval Operations*, likewise provides as follows: “Regardless of whether the use of armed force in a particular circumstance is prohibited by the United Nations Charter (and therefore unlawful), *the manner in which the resulting armed conflict is conducted continues to be regulated by the law of armed conflict.*”⁵ This principle is valid today and should be applied in any future conflict.

Now to the second question that Professor Roberts asks that I would like to address. Is there tension between the NATO/US strategic doctrine which aims at putting pressure on the adversary’s government and the implicit assumption of the laws of war that the adversary’s armed forces are the main legitimate object of attack? If so, how can this tension be addressed?

My answer is that I do not believe there is a tension between the *strategic* objective of putting pressure on the enemy’s leadership and the *tactical* conduct of the military campaign. After all, the ultimate object of any military campaign is some political objective; the campaign itself can be fully

2. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, signed at Geneva, 12 August 1949, authentic text in *Final Record of the Diplomatic Conference of Geneva of 1949*, vol. 1, Federal Political Department, Berne, 205–224, reprinted in *THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS* (Dietrich Schindler and Jiri Toman eds., 1988). The provisions of Convention II (Wounded, sick and shipwrecked), Convention III (Prisoners of War) and Convention IV (Civilians) are identical.

3. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Conflicts, June 8, 1977, 1125 U.N.T.S. 3, *DOCUMENTS ON THE LAWS OF WAR* 422 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).

4. Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3121.01A, Standing Rules of Engagement for US Forces, Enclosure A, ¶ 1g (Jan. 15, 2000).

5. *THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS*, NWP 1-14M/MCWP 5-2.1/COMDTPUB P5800.1, at ¶ 5.1 (1997) (emphasis added).

compliant with law of war in reaching this *strategic* objective. As Clausewitz wrote in his much-quoted statement, “War is not merely a political act, but also a political instrument, a continuation of political relations, a carrying out the same by other means.”⁶ This statement is neutral with respect to the legitimacy of the military means and methods of carrying out the campaigns. The legitimacy of the resort to armed force does not excuse the violation of the laws of war (*jus in bello*) nor does it render unlawful the compliant actions of a soldier, airman or sailor engaged in a conflict, the entry into which by his nation may be regarded as unlawful under the principles of *jus ad bellum*.

It should be noted in this connection that the Committee established by the Prosecutor of International Criminal Tribunal for the former Yugoslavia (ICTY) was asked to address the linkage between the *jus in bello* and the *jus ad bellum*.⁷ The Committee was specifically asked to address the allegations that since the resort to force by NATO had not been authorized by the Security Council, the resort to force was illegal and consequently “all forceful measures taken by NATO were unlawful.”⁸ The Committee declined to address this issue as a matter of practice, “which we consider to be in accord with the most widely accepted and reputable legal opinion.”⁹

The third question raised by Professor Roberts that I would like to address is what, if anything, might need to be done about the paradox that the United States is simultaneously a principal upholder of the obligation of States to observe the laws of war, and a non-party to several important agreements.

Professor Roberts lists a number of agreements to which the United States is not a party, the most significant being Protocol I. While the other agreements listed are important, Protocol I is the most significant because it gives concrete definition to a number of principles that traditionally formed a part of the customary laws of war governing the methods and means of warfare but which have not been codified in a single document. As Professor Roberts acknowledges, although it is not a party, “the United States takes at least some of these accords more seriously than some States that are parties.”¹⁰ As Colonel Graham has stated, the fact that the United States was not a party to

6. KARL VON CLAUSEWITZ, ON WAR (1832).

7. See Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, ¶¶ 30-4, 39 INTERNATIONAL LEGAL MATERIALS 1257, 1265-6 (2000), reprinted herein as Appendix A [hereinafter Report to the Prosecutor].

8. *Id.*, ¶ 30.

9. *Id.*, ¶ 34.

10. See Professor Roberts’s paper in this volume, *supra*, at 428.

Protocol I had no effect on the conduct of the war in Kosovo.¹¹ What the United States loses by not being a party, in my view, is the legal (and moral) authority, in taking to task non-complying States which are parties, of reliance on the implementation and enforcement provisions of these agreements. As Roberts points out, a principal feature of these latter-day agreements is their provision for implementation and enforcement measures. Adherence would enable the United States to rely on and cite specific binding agreements instead of relying on the sometimes vague and ambiguous principles of the customary international law of war.

A greater paradox in this field, and perhaps a more fruitful field for future action, is pointed out by Professor Murphy in the final paragraph of his paper submitted to this colloquium. He states:

To this observer, it is ironic that so much attention has been devoted to the issue of whether NATO complied with the *jus in bello* in its Kosovo campaign. For when one looks at practices in other conflicts around the world—Chechnya, Afghanistan, the Sudan, the Congo, and Sierra Leone, to name just a few—one sees not only no effort to comply with the *jus in bello* but barbaric practices that flout even the most elementary dictates of humanity. Accordingly, the most strenuous efforts should be made to induce States and other combatants to adhere to at least the ethical and moral dimensions of international humanitarian law, regardless of the presence or absence of a formal legal obligation to do so.¹²

Now let me turn briefly to Professor Wedgwood's paper. I can be brief here because what I have said earlier applies to some extent to the issues she raises. She states that the "asserted independence of the two regimes [*jus ad bellum* and *jus in bello*] may be no more than a fiction."¹³ She argues that the Kosovo campaign was not a war to settle a commercial or boundary dispute but one to protect basic human rights and therefore that, "[w]hether one's framework is utilitarian or pure principle, it is possible to admit that the merits of a war make a difference in our tolerance for methods of warfighting."¹⁴

I submit such a principle places one on a very slippery slope. Any linkage between the two principles has been universally rejected by the relevant international agreements and (in the words of the Report to the Prosecutor) "the

11. See Colonel Graham's comments in this volume, *supra*, at 378.

12. See Professor Murphy's paper in this volume, *supra*, at 255.

13. See Professor Wedgwood's paper in this volume, *supra*, at 434–5.

14. *Id.*

most widely accepted and reputable legal opinion.”¹⁵ In my comments on Professor Roberts’s paper I made the point that both international agreements and customary international law have firmly settled that the rules of war apply to the conduct of hostilities regardless of whether we are assessing the conduct of those on the “good” side of the conflict or those on the “bad” (or aggressor) side. I repeat it here because I firmly believe it is well established in all of the international agreements that deal with the subject and in customary international law. I also believe it is morally justified and the only workable way of judging compliance with the law of war by subordinate participants in the conflict. Judging which is the “good” or the “bad” side of any conflict is essentially subjective. I have never heard of a national leader who did not assert that his cause was “just.” Are we to judge the conduct of subordinate military officers on the ground that they find themselves fighting on the wrong side of a war? I submit that the question answers itself.

I agree, however, with Professor Wedgwood in her expressions of concern about the contentious role of civilian tribunals in the post-war trial of those accused of violations of the law of war. This problem is aggravated by the development of precision-guided munitions and the increasing transparency of targeting decisions made by military authorities resulting from almost instantaneous on-scene television reporting and analysis as well as cockpit-monitoring of strike weapons from launch to detonation. What may appear to be a reasonable and lawful targeting decision to a commander enveloped in the fog of war may take on an entirely different appearance with the advantage of hindsight. Judging whether that decision is lawful or not is certainly difficult for any tribunal but particularly so for one which may not have a full appreciation that, as Professor Wedgwood states, “implementation of many aspects of the law of war depends on battlefield judgments and knowledge of campaign strategy.”¹⁶ While it would be desirable in my view (and apparently also in Professor Wedgwood’s) that such judgments should be made by a military tribunal with membership familiar with these factors, I am afraid that we have gone too far down the road toward civilian tribunals to make possible a reversal of that policy. The tribunals for Yugoslavia and Rwanda, the Statute of the International Criminal Court and the provisions of the Geneva Conventions for universal jurisdiction of “grave breaches” have set us off on a course that may be irreversible. We can, I think, however, take some temporary comfort at least from the Report to the Prosecutor, which appeared to take a

15. Report to the Prosecutor, Appendix A, ¶ 34.

16. See Professor Wedgwood’s paper in this volume, *supra*, at 435.

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knowledgeable and sophisticated approach to its analysis of allegations of war crimes by NATO forces in the air campaign.