

Kosovo and the Just War Tradition

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Not all ends can justify the resort to the use of military force, and not even the best ends can justify the use of all means.

Existing international norms pertaining to military matters fall into two approximate halves, corresponding to the two components of the traditional "just war" theory: the *jus ad bellum* and the *jus in bello* provisions. While there are several versions thereof, they all contain the principles listed in the table below.¹ These ethical norms are legally enshrined in a number of documents, such as the UN Charter, various Security Council resolutions and rulings by the International Court of Justice².

Table 1: Just War Principles	
<i>Jus ad bellum</i> principles	<i>Jus in bello</i> principles
1. Just cause/intention	1. Just authority
2. Just authority	2. Non-combatant immunity
3. Last resort	3. Proportionality
4. Proportionality	4. Prohibited targets
5. Probability of success	5. Prohibited weaponry

I. POLITICAL GOALS AND THE JUST WAR TRADITION: *JUS AD BELLUM*

The above *jus ad bellum* principles are based on the premise that war is an evil which has to be limited, to the greatest possible extent--but also on the recognition that some wars may be justified. Very few people of today would disagree with these premises, even though they may disagree about the application of the criteria. Their value is thus not so much to provide answers to all questions, but to ensure that the right questions are asked about war.

The various criteria do, however, entail certain dilemmas and call for hard choices.

1. The **just cause** (or motivation) criterion is intended to limit the range of permissible motives for going to war, thereby at least forcing decision-makers to justify their actions in specific terms. Even though only very few wars are formally declared³ (requiring explicitness about the *casus belli*), decision-makers nevertheless have to justify their actions. What constitutes a "just cause" may be disputed, with views ranging from assertive ones about promoting world revolution, religious world views,

self-determination, democracy or human rights⁴ to more defensive ones of restoring lost rights, or defending one's sovereignty and territorial integrity. The general trend (at least until recently) has in the direction of limiting the range of assertive just causes in favour of the strictly defensive ones, with self-defence standing out as the "bottom line".

2. The **just authority** criterion is intended to ensure that not everybody is entitled to wage war. While religious authorities were formerly regarded as such just authorities, since around 1648 the "Westphalian consensus" has been that only states and their sovereign rulers are entitled to wage war.⁵ To this has later been added the requirement that sovereigns should "represent" their citizens, as argued by Immanuel Kant in his 1795 treatise on *Perpetual Peace*.⁶ Not only is this intended to ensure at least a modicum of what we today call "accountability", and ensure that the executive is scrutinized by the legislature⁷ (thereby also strengthening *jus in bello*). It will presumably also ensure peace, according to the fashionable "democratic peace" theory.⁸ As argued below, moreover, we have progressed even further, beyond the Westphalian rules, to the point where today the only legitimate authority is today the United Nations Security Council.

3. The **last resort** (*ultima ratio*) criterion is obviously intended to prevent avoidable wars. It is only "when all else fails" that the use of military force can be legitimately resorted to. However, the term "last" may be more ambiguous than sometimes assumed: Does it refer to time, implying that one should first try all other options (but if so for how long) before resorting to war? Or is it a "logical last", entailing an obligation to prefer all other options to the resort to war, but without any requirement for a particular sequence or duration of actions? Economic and other sanctions are usually regarded as options of the first resort, but their effect is usually, at best, long-term, raising the question for how long sanctions should be upheld before discarding them as inadequate. They also raise serious ethical concerns because of their humanitarian consequences.⁹ Hard though it may be to admit, in some cases, short wars may cause less human suffering than a protracted sanctions regime.

4. The **proportionality criterion** is simply intended as a safeguard against over-reaction. Not every "wrong" is serious enough to justify, e.g. the total annihilation of the wrong-doer. This becomes even more obvious if one distinguishes between rulers (who are usually the real culprits) and their often innocent subjects. For how long should, for instance, the Iraqi children suffer as punishment of their dictatorial ruler, Saddam Hussein, for something he did a decade ago?¹⁰ There may be something to be said for "setting examples", which may require a certain over-reaction to some transgressions, as this may serve as a deterrent against other prospective transgressors. First of all, however, the entire logic may be flawed and without much empirical support.¹¹ Secondly, the logic (if so it is) would seem to call for a consistency

that has been conspicuously absent in the behaviour of the great powers (especially the United States) in recent years. Why is Iraq not permitted to invade Kuwait and seek to develop weapons of mass destruction, when Israel can develop a fully-fledged nuclear weapons potential and invade neighbouring states with impunity?¹²

5. The "**probability of success**" criterion is often forgotten and difficult to apply. The history of war is replete with examples of lost wars, i.e. wars which in retrospect did not comply with this criterion,¹³ but it makes little sense to demand certainty of success as a just war criterion. A more meaningful application might be to rule out forms of war that have always (or nearly always) failed such as the use of "stand-alone air power"¹⁴; and to use the criterion as an adjunct to the others: To the extent that the party initiating the war does not make a determined effort to achieve success, the probability that it achieves it is small. This invalidates both its claims to have a cause that was just enough to warrant going to war in the first place, and the claim that the war was one of last resort.

Quite a lot has been achieved legally with regard to the application of these *jus ad bellum* criteria to international law, as the world has seen a gradual outlawry of war. In continuity with the 1928 Kellogg-Briand Pact¹⁵, the UN Charter thus proscribes wars of aggressions in the following unequivocal terms:

(2.3) All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

(2.4) All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Whereas aggressive war is thus proscribed, national defence remains legitimate, both for individual states and for alliances, but only in as far as it is acknowledged *ex post facto* as genuine self-defence by the Security Council:

(51) Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

The general rule of today is thus that war is prohibited, and that the only authority entitled to make exceptions to this rule is the UN Security Council.¹⁶ This is a tremendous civilizational improvement over the situation a century or so ago, when

war was generally regarded as a perfectly legitimate means to political ends.

II. MILITARY MEANS TO POLITICAL ENDS: *JUS IN BELLO*

Even in the case of wars that meet all the *jus ad bellum* criteria, the other set of criteria remains in force. Even the most just war must thus be fought in a just manner, i.e. in accordance with the *jus in bello* criteria.

1. The **just authority** criterion is mainly intended to ensure that all parties engaged in war are accountable. There should be no "free agents" in war like the mercenaries whom Machiavelli described as "disunited, thirsty for power, undisciplined and disloyal; they are brave among their friends and cowards before the enemy; they have no fear of God, they do not keep faith with their fellow men".¹⁷ The hierarchical structure of modern armed forces, along with the principle of political supremacy, ensures that responsibility for whatever crimes of war may be committed does not dissipate, but can always be placed somewhere in the hierarchy--at least in "real wars" between sovereign states. The ad hoc establishment of international war crimes (and genocide) tribunals also helps establish the precedent that soldiers are answerable to higher authorities than their governments.¹⁸

2. The principle of **non-combatant immunity** is arguably the most central of all *jus in bello* criteria. The underlying philosophy is that wars are fought by states and their representatives, *in casu* soldiers as long as they remain so.¹⁹ As soon as they surrender they are entitled to treatment as prisoner's of war, which is an approximation to the principle of non-combatant immunity. It is never permissible to wage war against civilians as such, e.g. by bombing residential areas.

3. The **proportionality criterion** is intended as a companion of the former criterion, acknowledging that it is not always possible to distinguish between combatants and civilians (if only because the former might hide amongst the latter). Some collateral damage is thus permissible, and the criterion simply entails that there should be some proportionality between the military objectives aimed for and the collateral damage inadvertently produced. While there is no generally accepted formula for this proportionality, the criterion at least forces military planners to ask the question whether their military objectives are important enough to warrant what the civilian suffering they are causing. It may also serve to discourage seeking "intentional collateral damage", as happened during the Second World War, where at least some air power advocates believed in the strategic advantage of bombing civilian targets, hence deliberately chose military targets close to residential areas.²⁰

4. A list of **prohibited targets** may be derived deductively from criteria 2 and 3, as there are some targets which are, by their very nature, civilian. Present lists include

such facilities as places of worship and hospitals, but there are also more open-ended provisions for declaring cities "open", thereby ensuring that they cannot be (legally) targeted.

5. The list of **prohibited weaponry** might be derived in the same fashion from criteria 2 and 3. The list has grown considerably since the banning of the crossbow (against Christians, but not infidels) by the 1139 Second Lateran Council²¹, albeit maybe not fast enough to keep pace with the development of new weapons. The main criteria have been that weapons are illegitimate if they cause "unnecessary suffering", or if they are so indiscriminate in their effects that the principle of civilian immunity cannot be met. Recent additions to the list have been anti-personnel landmines, biological and chemical weapons,²² just as the use (but not possession) of nuclear weapons has been declared illegal by the International Court of Justice.²³

With a few exceptions, all of the above criteria only apply to war in the traditional and legal sense, i.e. primarily to wars between states and, to a limited extent, "wars of national liberation" which are recognized as such. There remains a glaring gap with regard to what seems to be the predominant form of violent conflict of the future, namely intra-state wars.²⁴ These are usually characterized by the predominance of non-state actors, by a blurring of distinctions between regular soldiers, paramilitaries, guerillas and civilians; and, alas, by a deliberate targeting of civilians for which it is often difficult to hold anybody accountable because of the unclear lines of authority and command. For all their importance, I have nevertheless chosen to disregard these "new wars" completely.²⁵

III. CASE STUDY: KOSOVO AND THE JUST WAR CRITERIA

Having thus elaborated upon existing just war criteria, I shall conclude this paper by a brief and tentative application of them to the most recent war in Europe, namely NATO's war against the Federal Republic of Yugoslavia (FRY) from 24 March to 10 June 1999.²⁶

While there is little doubt that NATO regarded its own cause as just, it stubbornly refused to label what it was doing as a war, preferring neologisms such as "humanitarian action by military means". To all practical intents and purposes, however, a 78 days' "campaign" including 37,225 "sorties" (according to U.S. Secretary of Defence Cohen) was very much a war--certainly for those on the receiving end of the air strikes and those civilians who fell victims to the FRY's ethnic cleansing campaign.

A. THE *JUS AD BELLUM* CRITERIA

1. As far as the first *jus ad bellum* criterion was concerned, both sides apparently believed to have a **just cause**. NATO because its motives were pure and unselfish, namely to salvage the civilian Kosovars from a brutal onslaught by the forces of the FRY. They could further refer to a number of UN Security Council resolutions labelling as "wrong" what NATO was seeking to "right". While there may have been other motives at work behind the scenes, there is little doubt that the humanitarian motives were decisive.

Perhaps more surprisingly, the FRY's cause was also "right", at least in the legal sense, as it was a clear case of self-defence against what was (again legally speaking) an act of aggression, according to the definition of the UN General Assembly in Resolution no. 3314 (1974) as the "use of armed force by a State against the sovereignty, territorial integrity or political independence of another State".²⁷ Where the FRY erred was not in defending itself, but in the way they did so, i.e. according to *jus in bello* criteria (*vide infra*).

2. With regard to **proper authority**, there is little doubt that the FRY complied with this criterion. In fact the rejection of Rambouillet draft accord was endorsed by the Yugoslav parliament, and the war was fought on behalf of UN member state under the authority of a universally recognized (however intensely disliked) government.

NATO's case is much more dubious in this respect. As mentioned above, the only political authority with the powers to legitimately mandate the use of force is the UN Security Council, which provided no such a mandate, not even implicitly. It did not help that the war was launched by an alliance of democratic states (and for a good cause), as collective aggression (*viz.* the above definition) is just as unlawful as one undertaken by a single state.

3. The question whether the war was one of **last resort** only arises as far as NATO was concerned, as the party initiating hostilities. There were already sanctions in place against the FRY, and a ceasefire had been signed in October 1998 which was being monitored by the OSCE. Even though it had been violated by both the FRY and the KLA (Kosovo Liberation Army), the intensity of violence had abated considerably.

The main question is, however, whether the negotiations in Rambouillet ever stood any chance of producing an accord without the use of force--and, if so, how long it might have taken, and what would have happened in the course of more protracted negotiations. We shall probably never know this for sure, but NATO (personified by Richard Holbrooke) went out of its way to explain that the military implementation parts of the draft were not negotiable, once the signature of the Kosovar delegations had been secured. Had NATO been prepared to negotiate this (extremely radical and intrusive) military regime with the government in Belgrade, they just might have found

a mutually acceptable solution, e.g. along the lines of the UN Security Council resolution (1244) which ended the war.²⁸ Because it was never attempted, we shall never know whether it would have worked.

4. The **proportionality** criterion is only applicable to NATO and hard to apply, also because of the "CNN effect".²⁹ There is little doubt that the government of Milisovic was in the wrong, as a rather blatant violator of human rights, especially those of the Kosovars. On the other hand, the same could be said about many other governments around the world, who get away with even worse violations with impunity. The intense media coverage of Kosovo, and especially of the Racak massacre in January 1999, may have "forced" NATO to act out of proportion to what it (or others) might have done in even worse situations. Just compare the situation of the Kosovar civilians with the much worse plight of the Rwandese a couple of years before, when both NATO (with the partial exception of France) and the United States stood idly by.

5. Neither side seems to have complied with the criterion that what they were doing should have a **reasonable probability of success**--but NATO even less so than the FRY.

What the FRY should have realized was, of course, that they were up against an alliance with no less than two thirds of the world's military expenditures,³⁰ and one which had mortgaged its "credibility" on victory. Eventual defeat was therefore inevitable, and by postponing it with its ruthless war against the civilian population of Kosovo the FRY sacrificed whatever goodwill it might have had left before the war.

Despite its crushing economic and material superiority, NATO's prospects of victory were far from certain, because of the chosen strategy. As argued above, air power has never won a war alone, as victory requires the use of ground forces. In case this "timeless verity of war" had been forgotten, NATO (and especially the United States) should have been reminded of it by the complete failure of the US-British "Operation Desert Fox" a mere three months before, when they sought to bring the recalcitrant Iraq of Saddam Hussein "to heel" but accomplished the exact opposite: a complete and irreversible expulsion of UNSCOM (United Nations Special Commission).³¹

Rather than viewing the war as a "strategic game" of moves and counter-moves, NATO was obviously taken by complete surprise when the FRY army kept their air defence assets "on the move", hid their tanks in front of kindergardens, and generally took the civilian population hostage. The only "accomplishment" was thus to keep NATO's own losses at zero in conformity with the requirements of "post-heroic warfare".³² To use this as a success criterion, however, invalidates the other just war criteria, as a cause cannot be just for which a state is not prepared to risk the life of a single soldier--especially not in a situation where hundreds of thousands of those Kosovar civilians on behalf of whom the war was fought were being evicted and

thousands of them killed, who might have been saved by NATO troops on the ground.

B. THE *JUS IN BELLO* CRITERIA

Neither side fares much better with regard to the *jus in bello* criteria.

1. The **just authority criterion** was probably only seemingly respected by either side. While little has been officially revealed about NATO's decision-making during the war, quite a lot has leaked about serious disagreements concerning, e.g., targeting policy.³³ In actual fact, it seems that the United States disregarded the views of its allies and had its own targeting policy. By implication NATO as an organization was not truly accountable, as US forces are always mainly responsible to their national Commander-in-Chief, i.e. the US President. Even more seriously, NATO's (and especially the American) refusal to put its own forces on the ground meant that the Alliance effectively relied on the KLA as its only ground forces. This also seriously violated the just authority criterion as these were forces beyond NATO's control and thus unaccountable. In fact, until quite recently they had been referred to as "terrorists" by the Americans.³⁴

As far as the FRY side was concerned, it appears as if the government in Belgrade to some extent deliberately sought to absolve itself of responsibility by using "free agents" such as the paramilitary "Tigers" of Arkan. They were the ones to carry out most of the atrocities, even though the regular armed forces were far from innocent. Much to its credit, the international war crime tribunal refused to absolve Milosevic and consorts on such formal grounds, but issued an indictment of the main culprit in Belgrade.³⁵

2. The **non-combatant immunity criterion** was, needless to say, blatantly violated by the Yugoslav forces, who effectively used the civilian population (and especially the Kosovar-Albanian segment thereof) as hostages. Their "war" (if so it was) was thus conducted almost exclusively against civilians, as an intended "indirect approach"³⁶ to fighting NATO. As a military strategy it was very effective, but no less morally indefensible for that. On the other hand, although it was described as such, it was far from unique, but quite reminiscent of, for instance, the French counter-guerilla strategy in Algeria or that of the United States in Vietnam.³⁷

Even though its spokesmen went out of their way to proclaim that NATO was not waging a war against the Yugoslav population, the western alliance also blatantly violated the "non-combatant immunity". Among selected targets (as opposed to those accidentally hit)³⁸ were, for instance, the power supply, bridges, oil refineries, TV stations, cigarette factories, etc., which are clearly not military targets. Virtually everything could, of course, be construed as "dual use" (some soldiers smoke

cigarettes and watch TV, for instance), but doing so completely defies the purpose of the civilian immunity rule.

Moreover, the pattern of NATO bombing raids³⁹ clearly reflected the aforementioned post-heroic attitude to war. This is illustrated in Table 2, showing how ethics can almost be measured in meters. The (alleged) "wonder weapons" such as the Apache combat helicopters were withheld from combat, and ground-attack aircraft such as the A-10 were only used late and infrequently, even though the former could have saved civilians and the latter have attrited the Serbian armoured forces--and in both cases at fairly low risk because of NATO's unchallenged air superiority.

Table 2: The Ethics of Flight Patterns	Flying altitude		
	6,000 m. (e.g. bomber)	600 m. (e.g. A-10)	60 m. (helicopter)
Opportunities for/ Risks of:			
Military hits	Low	Medium/High	High
Collateral civilian deaths	High	Medium/Low	Low
Own casualties	Very low	Medium	High

What NATO could have done was to use ground troops, albeit not for that full-scale invasion of the FRY which became the focus of the debate, and which would indeed have been quite demanding. It would have made much more sense to deploy ground troops (with full air and helicopter support) along the northern "border" of Kosovo. To get the forces to the border would have been a demanding operation, requiring a combination of parachuted troops and equipment with a cross-country assault (e.g. via Albania and/or Macedonia), but it could surely have been accomplished--albeit not necessarily without casualties. Having reached the border, the NATO troops would have had to be seal it as hermetically as possible, which could surely have been done by means of artillery and direct-fire weapons. It would have made sense to deliberately leave open a few "escape routes" for retreating FRY troops, but the remaining FRY troops and paramilitary forces inside Kosova would have had to be "mopped-up", primarily by means of helicopters, A-10 aircraft, tanks, APCs and dismounted infantry. In conformity with the *jus in bello* principles and the laws of war, no attempt should have been made to annihilate these forces, but they should have been given the choice between surrendering their weapons and be immediately released or retreating with their weapons.

3. The **proportionality** criterion seems to have been violated by NATO with its air strikes, producing massive collateral damage, even though they were directed against "military targets" such as those mentioned above. What matters is not (as sometimes alleged by NATO spokesmen) the ratio of accidents to the total number of sorties, but that between the "good" that is achieved and the "bad" collateral damages. The bottom line is that NATO did not salvage a single refugee (i.e. achieved no good) by its war whilst causing very massive intentional as well as collateral damage, inter alia because of the above "post-heroic" flight patterns. In fact the number of refugees rose steeply immediately *after* the bombings commenced as set out in Table 3, which is based on the estimates of the UNHCR.

Needless to say, the proportionality criterion was also blatantly violated by the Yugoslav forces, who were the ones to directly cause the refugee flows.

Table 3: Refugees from Kosovo⁴⁰	23 March	4 April	23 April	14 May
in Albania	18,500	170,000	362,000	431,500
in Macadonia	16,000	115,000	133,000	233,300
in Bosnia	10,000	0	32,600	18,500
in Montenegro	25,000	32,000	66,500	64,300
Other	0	0	17,929	44,525
Total	69,500	317,000	612,029	792,125

4. While there is no question about the FRY's violation of the **prohibited targets criterion**, there remains some uncertainty about NATO. Some bombs did, of course, fall on prohibited targets such as a refugee column and a maternity ward in a hospitals, and several or the "surgically precise" air strikes hit the wrong countries (e.g. Bulgaria and Albania) just as several embassies were hit, including those of neutral Switzerland and Sweden. While the latter constituted both a breach of the rules of diplomatic immunity and neutrality, there is little doubt that the hits were minor and almost certainly accidental. The same cannot be said for the massive attack against the Chinese embassy in Belgrade, which may well have been deliberate despite the stubborn US denial.

5. Apparently no actually **prohibited weaponry** was used during the war by either side. However, some of NATO's preferred weapons might rightly belong to the list of non-discriminating weapons, especially when dropped from high altitudes. This goes for cluster bombs such as the British "BL 755" or the U.S. "CBU87B", which are essentially area-impact munitions; graphite bombs which have not only destroyed military, but also civilian power grids; and the depleted uranium shells used by the A-10 aircraft, which cause long-lasting radioactive contamination.⁴¹

IV. CONCLUSION

We have thus seen that both sides in the Kosovo war were in clear breach of the just war criteria, as summarized in Table 4.

This is, of course, merely the present author's assessment, which does not count for much. What would have been desirable was an authoritative ruling by the highest international legal authority, i.e. the International Court of Justice. The FRY filed a lawsuit against NATO during the war⁴², referring to both *jus ad bellum* and *jus in bello* principles, including the Genocide Convention. Unfortunately, however, the United States denied the ICJ its permission to have its case tried with a rather baroque reference to the reservations it had attached to its (belated) ratification of the

Genocide Convention. While this may have saved the USA and NATO legally, it did little to enhance their moral position.

Table 4: NATO'S War Against the FRY and the Just War Criteria			
<i>Jus ad bellum</i>		<i>Jus in bello</i>	
1. Just cause/intention:		1. Just authority	
NATO: YES?	FRY: YES	NATO: YES(?)	FRY: NO(?)
2. Just authority		2. Non-combatant immunity	
NATO: NO	FRY: YES	NATO: NO	FRY: NO
3. Last resort		3. Proportionality	
NATO: NO	FRY: n.a.	NATO: NO	FRY: NO
4. Proportionality		4. Prohibited targets	
NATO: ?	FRY: n.a.	NATO: ?	FRY: NO
5. Probability of success		5. Prohibited weaponry	
NATO: NO	FRY: NO	NATO: NO(?)	FRY: NO(?)

V. NOTES

1. For a comparison of three different versions see Hallett, Brien: "Just War Criteria", in Kurtz, Lester (ed.): *Encyclopedia of Violence, Peace and Conflict* (San Diego: Academic Press, 1999), vol. 2, pp. 283-293. On the ethical foundations of just war theory see, e.g., Walzer, Michael: *Just and Unjust Wars. A Moral Argument with Historical Illustrations* (New York: Harper Torchbooks, 1977); Johnson, James Turner: *Just War Tradition and the Restraint of War. A Moral and Political Inquiry* (Princeton: Princeton University Press, 1981); idem: *The Quest for Peace. Three Moral Traditions in Western Cultural History* (Princeton: Princeton University Press, 1987); idem: *Morality and Contemporary Warfare* (New Haven: Yale University Press, 1999); Elshtain, Jean Bethke (ed.): *Just War Theory* (Oxford: Blackwell, 1992); Nardin, Terry (ed.): *The Ethics of War and Peace. Religious and Secular Perspectives* (Princeton, NJ: Princeton University Press, 1996); Smock, David R. (ed.): *Religious Perspectives on War. Christian, Muslim, and Jewish Attitudes Toward Force After the Gulf War* (Washington, D.C.: United States Institute of Peace, 1992).

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