

# Application of the Law of Armed Conflict During Operation Allied Force: Maritime Interdiction and Prisoner of War Issues

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## *Introduction*

NATO's 1999 Operation Allied Force, to succor Albanian Kosovars and others (e.g., Roma) indigenous to the former Yugoslavia's<sup>1</sup> Kosovo province subjected to brutal actions, including murder, rape and displacement from their homes by Serbian forces under SFRY President Slobodan Milosevic's direction, was a legitimate collective action for humanitarian intervention pursuant to principles of state of necessity under circumstances known at the time.<sup>2</sup> NATO's Kosovo intervention was but one of those crises where States, individually or collectively, succored indigenous nationals, as part of a rescue operation for their own or other non-State nationals, or with the sole

1. Hereinafter referred to as SFRY. There may be no "Yugoslavia" in the future. A March 14, 2002 agreement, which must be approved by Serbia and Montenegro, declares the area of the former Yugoslavia will be known as Serbia and Montenegro. See Ian Fisher, *Serbia and Montenegro Sign a Plan for Yugoslavia's Demise*, N.Y. TIMES, Mar. 15, 2002, at A3.

2. For analysis of principles of the state of necessity doctrine for collective humanitarian intervention and its application to Operation Allied Force in Kosovo, see George Walker, *Principles for Collective Humanitarian Intervention to Succor Other Countries' Imperiled Indigenous Nationals*, published in the American University International Law Review (2002). Milosevic raised the issue of the NATO campaign's lawfulness in his opening statement in his genocide and war crimes trial in The Hague. See Ian Fisher & Marlise Simons, *Defiant, Milosevic Begins His Defense by Assailing NATO*, N.Y. TIMES, Feb. 15, 2002, at A1.

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goal of protecting indigenous nationals. Some occurred during the nineteenth and twentieth centuries before the United Nations Charter era, in some cases pursuant to the Concert of Europe, which lasted in one form or another from 1815 through most of the nineteenth century. Scholars have traced these principles to ancient times.<sup>3</sup> Others have arisen since 1945, i.e., after the Charter became effective for interstate relations.<sup>4</sup> Among the more important of the latter was NATO's bombing and sea interdiction campaigns, conducted pursuant to UN Security Council decisions authorizing them, that led to the 1995 Dayton Accords for Bosnia-Herzegovina, which included protection for indigenous peoples. NATO's 1999 Operation Allied Force action was among the latest of this kind of campaign. What made Allied Force unique was that it was the first time a collective self-defense organization constituted under Article 51 of the Charter intervened while the Security Council was seized of a crisis the Council had said threatened international peace and security.

***A. Relevance of the General Law of Armed Conflict and Neutrality Law***

Other papers in this volume discuss the lawfulness of particular NATO attacks. A more fundamental question is whether the law of armed conflict and the law of neutrality, which apply during war in the traditional sense, govern during operations like Operation Allied Force.

There is a developing view that military operations operating under UN Security Council decisions pursuant to Articles 25 and 48 of the Charter do not necessarily follow the law of armed conflict. When a Council decision is contrary to law of armed conflict principles, particularly those in a treaty, the decision must be followed. This rule, rooted in Article 103 of the Charter and the obligatory nature of Council decisions, does not account for contrary

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3. See Walker, *supra* note 2.

4. See *id.*

customary or general principles norms, nor does it consider the possibility of a *jus cogens* norm in the law of armed conflict.<sup>5</sup> If a Council decision does not specify rules of conduct for conducting military operations that would appear to contradict the law of armed conflict, and this is the usual case, the law of armed conflict should be followed. If non-mandatory UN resolutions<sup>6</sup> are contrary to law of armed conflict rules, the only established body of law for standards is the law of armed conflict, and it should be followed. The same is true for Council decisions authorizing force with unspecified standards; the law of armed conflict should be followed. Thus although the law of armed conflict, strictly speaking, does not govern because a UN resolution-authorized

5. UN CHARTER arts. 25, 48, 103. *Jus cogens*, i.e., a peremptory norm that trumps inconsistent treaty, customary and general principles rules, is a vague doctrine whose contours are less than certain; it is not cited in traditional international law sources, e.g., Statute of the International Court of Justice, Articles 38, 59; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 102–03 (1987). See generally Vienna Convention on the Law of Treaties, May 23, 1969, arts. 53, 64, 1155 U.N.T.S. 331, 345, 347; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4, 19, 514–17 (5th ed. 1998); T. ELIAS, THE MODERN LAW OF TREATIES 177–87 (1974); 1 OPPENHEIM'S INTERNATIONAL LAW §§ 2, 642, 653 (Robert Jennings & Arthur Watts eds., 8th ed. 1992); RESTATEMENT (THIRD), *supra*, §§ 102 r.n.6, 323 cmt. b, 331(2), 338(2); THE CHARTER OF THE UNITED NATIONS 1118–19 (Bruno Simma ed., 1994); IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 17–18, 85–87, 94–95, 160, 184–85, 218–26, 246 (2d ed. 1984) (Vienna Convention, *supra* is progressive development); GRIGORII I. TUNKIN, THEORY OF INTERNATIONAL LAW 98 (William E. Butler trans., 1974); Levan Alexidze, *Legal Nature of Jus Cogens in Contemporary International Law*, 172 RECUEIL DES COURS 219, 262–63 (1981); John Hazard, *Soviet Tactics in International Lawmaking*, 7 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 9, 25–29 (1977); Eduardo Jimenez de Arechaga, *International Law in the Past Third of a Century*, 159 RECUEIL DES COURS 1, 64–69 (1978); George Walker, *Integration and Disintegration in Europe: Reordering the Treaty Map of the Continent*, 6 THE TRANSNATIONAL LAWYER 1, 60, 63 (1993); Mark Weisburd, *The Emptiness of the Concept of Jus Cogens, As Illustrated by the War in Bosnia-Herzegovina*, 17 MICHIGAN JOURNAL OF INTERNATIONAL LAW 1 (1995). For UN Charter Article 103 analysis, see generally LELAND GOODRICH ET AL., CHARTER OF THE UNITED NATIONS 614–17 (3d ed. 1969); THE CHARTER OF THE UNITED NATIONS, *supra* at 1116–25; W. Reisman, *The Constitutional Crisis in the United Nations*, 87 AMERICAN JOURNAL OF INTERNATIONAL LAW 83 (1993).

6. Non-mandatory UN resolutions include General Assembly resolutions and Council resolutions recommending action. Assembly or Council recommendations passed pursuant to UN Charter Articles 10–11, 13–14 and Chapters VI–VII are non-mandatory, although they may strengthen preexisting customary and treaty norms recited in them. SYDNEY BAILEY & SAM DAWES, THE PROCEDURE OF THE UN SECURITY COUNCIL ch. 1.5 (3d ed. 1998); BROWNLIE, *supra* note 5, at 14–15, 694; JORGE CASTENEDA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS ch. 3 (Alba Amoia trans., 1969); GOODRICH ET AL., *supra* note 5, at 126, 144, 290–314; 1 OPPENHEIM, *supra* note 5, § 16, at 47–49; RESTATEMENT (THIRD), *supra* note 5, § 103(2)(d), cmt. c, r.n.2; THE CHARTER OF THE UNITED NATIONS, *supra* note 5, at 284, 407–18, 605–36, 652.

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operation is not a conflict between States in the traditional sense of war, the law of armed conflict should govern in these situations. If UN resolution-governed operations grow in number and complexity and intensity of conflict, an ultimate result may be a parallel body of law that should be, and hopefully will be, the same as the law of armed conflict for war.

Humanitarian intervention under Operation Allied Force stood on footing similar to the latter situations. The campaign was not war in the classical sense, although there are reports the United Kingdom's Prime Minister and maybe others characterized later phases of the NATO campaign as war. Participants, whether the collectively intervening States or the affected State, should have applied the law of armed conflict as in the case of UN resolution-authorized actions. No Council decision governed the Allied Force situation with respect to humanitarian intervention. Humanitarian law issues covered by, e.g., the 1949 Geneva Conventions, stand in a special place.<sup>7</sup> The same principles of applying the law of armed conflict and neutrality law should govern during collective humanitarian interventions operating under state of necessity principles.

Standards of necessity and proportionality in self-defense situations may be different from law of armed conflict standards of necessity and proportionality for attacks during traditional armed conflict. What is necessary or proportional for a self-defense response may not be necessary or proportional in an armed conflict situation. The reverse is also true; what is necessary or proportional under the law of armed conflict for attacks may not be necessary or proportional in a self-defense context. The same is true for humanitarian intervention pursuant to state of necessity. What is necessary or proportional for humanitarian intervention may not be necessary or proportional in a self-defense or law of armed conflict situation, and what is necessary or proportional in a self-defense or law of armed conflict situation may not be necessary or proportional in attacks incident to a particular humanitarian intervention. Depending on the scope of the intervention and the timing of attacks (immediately after a decision to intervene is made as distinguished from attacks made well into a campaign), the law of self-defense or the law of armed conflict may be examined as guides.

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7. See *infra* this paper.

There are some per se forbidden targets, e.g., cultural property unless used for military purposes.<sup>8</sup> Under the law of armed conflict, there are some methods of warfare, e.g., no first use of poison gas,<sup>9</sup> that are per se indiscriminate under the law of armed conflict. These targets or methods and means of warfare, forbidden under the law of armed conflict, should also be followed in humanitarian intervention operations under state of necessity.

Decision makers should only be held accountable for what is known, or reasonably should have been known, at the time a decision to attack is made. Hindsight can be 20/20; decisions at the time may be clouded with the fog of war.<sup>10</sup> Declarations of understanding by countries party to Protocol I<sup>11</sup> to the

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8. See generally, e.g., Convention for Protection of Cultural Property in Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter Cultural Property Convention]; Protocol for Protection of Cultural Property in Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 358; Second Protocol to Hague Convention of 1954 for Protection of Cultural Property in Event of Armed Conflict, Mar. 26, 1999, art. 1(f), 38 INTERNATIONAL LEGAL MATERIALS 769 (1999) [hereinafter Second Protocol]; Treaty on Protection of Artistic & Scientific Institutions & Historic Monuments, Apr. 15, 1935, 49 Stat. 3267, 167 L.N.T.S. 290; JIRI TOMAN, THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT (1996); GEORGE WALKER, THE TANKER WAR, 1980–88: LAW AND POLICY 507–11 (2000) (Vol. 74, US Naval War College International Law Studies).

9. Protocol for Prohibition of Use in War of Asphyxiating, Poisonous or Other Gases, & of Bacteriological Methods of Warfare, June 17, 1965, & US Reservation, 26 U.S.T. 571, 94 L.N.T.S. 65. See also ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶¶ 10.3–10.4.2 (A. Thomas & J. Duncan eds., 1999) (Vol. 73., US Naval War College International Law Studies).

10. CARL VON CLAUSEWITZ, ON WAR 117–21 (Michael Howard & Peter Paret ed. & trans., 1976).

11. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, & Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

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1949 Geneva Conventions state that for civilians' protection in Article 51,<sup>12</sup> protection of civilian objects in Article 52,<sup>13</sup> and precautions to be taken in attacks, stated in Article 57,<sup>14</sup> a commander should be liable based on that commander's assessment of information available at the relevant time, i.e., when a

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12. Protocol I, *id.*, art. 51, 1125 U.N.T.S. 26. Articles 51(2) and 51(5) prohibitions on attacks on civilians, absent other considerations, e.g., civilians who take up arms, restate customary law. MICHAEL BOTHE ET AL., *NEW RULES FOR VICTIMS OF ARMED CONFLICT* 299 & n.3 (1982); SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA ¶ 39 (Louise Doswald-Beck ed., 1995); ANNOTATED SUPPLEMENT, *supra* note 9, ¶ 6.2.3.2; 1 JEAN PICTET, *THE GENEVA CONVENTIONS OF 12 AUGUST 1949*, at 224–29 (1952); CLAUDE PILLOUD ET AL., *COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949*, at 618, 623–26 (1987); JULIUS STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 684–732 (1959); Michael Matheson, *Remarks*, in *Session One: The United States' Position on the Relation of Customary International Law to the 1977 Protocols Additional to the Geneva Conventions*, in Symposium, *The Sixth Annual American Red Cross - Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 423, 426 (1987); William Schmidt, *The Protection of Victims of International Armed Conflicts: Protocol I Additional to the Geneva Conventions*, 24 AIR FORCE LAW REVIEW 225–32 (1984); Waldemar Solf, *Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I*, 1 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 130–31 (1986).

13. Article 52 states a general customary norm, except its Article 52(1) prohibition on reprisals against civilians, upon which commentators divide. *See generally* BOTHE ET AL., *supra* note 12, at 320–27; C. COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* §§ 510–11, 524–25, 528–29 (6th rev. ed. 1967); ANNOTATED SUPPLEMENT, *supra* note 9, ¶¶ 6.2.3 & n.36, 6.2.3.2, 8.1.1 & n.9, 8.1.2 & n.12 (noting U.S. position that Protocol I Article 52(1) “creates new law”); 2 D. O'CONNELL, *THE INTERNATIONAL LAW OF THE SEA* 1105–06 (I. Shearer ed., 1984); 4 PICTET, *supra* note 12, at 131 (1958); PILLOUD ET AL., *supra* note 12, at 630–38; Matheson, *supra* note 12, at 426; Horace B. Robertson, Jr., *The Principle of the Military Objective in the Law of Armed Conflict*, in *THE LAW OF MILITARY OPERATIONS: LIBER AMICORUM PROFESSOR JACK GRUNAWALT* 197 (Michael Schmitt ed., 1998) (Vol. 72, US Naval War College International Law Studies); Solf, *supra* note 12, at 131. Frank Russo, Jr., *Targeting Theory in the Law of Naval Warfare*, 30 NAVAL LAW REVIEW 1, 17 n.36 (1992) rejects applying Protocol I Article 52(2) to naval warfare.

14. *See also* ANNOTATED SUPPLEMENT, *supra* note 9, ¶¶ 8.1-8.1.2.1; BOTHE ET AL., *supra* note 12, at 359–69; PILLOUD ET AL., *supra* note 12, at 678–89. Rules of distinction, necessity and proportionality, with the concomitant risk of collateral damage inherent in any attack, recited in Article 57, generally restate customary norms. *See supra* note 12.

decision is made.<sup>15</sup> Two 1980 Conventional Weapons Convention<sup>16</sup> protocols have similar terms, i.e., a commander is only bound by information available when a decision to attack is made.<sup>17</sup> The Second Protocol to the 1954 Hague Cultural Property Convention also recites this principle.<sup>18</sup>

Protocol I, with its understandings, and the Conventional Weapons Convention protocols are on their way to acceptance among States.<sup>19</sup> These treaties' common statement, in text or declarations, that commanders are held

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15. Declaration of Belgium, May 20, 1986, *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 706, 707 (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988); Declaration of Italy, Feb. 27, 1986, *reprinted in id.* at 712; Declaration of the Netherlands, June 26, 1977, *reprinted in id.* at 713, 714; Declaration of the United Kingdom, Dec. 12, 1977, *reprinted in id.* at 717.

16. Convention on Prohibitions or Restrictions on Use of Certain Conventional Weapons Which May Be Deemed Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, T.I.A.S. No. ———, 1342 U.N.T.S. 137 [hereinafter Conventional Weapons Convention].

17. Protocol on Prohibitions or Restrictions on Use of Mines, Booby Traps & Other Devices, Oct. 10, 1980, art. 2(4), 1342 U.N.T.S. 168 (Protocol II (Mines)); as amended, May 3, 1996, art. 2(6), 35 INTERNATIONAL LEGAL MATERIALS 1206, 1209 (1996) (Amended Protocol II); Protocol on Prohibitions or Restrictions on Use of Incendiary Weapons (Protocol III), Oct. 10, 1980, art. 1(3), 1342 U.N.T.S. 171, 172. The United States has ratified the Convention and Protocols I and II (Mines) *supra*; Protocol III is not in force for the United States. United States Department of State, Treaties in Force 478–79 (2000) [hereinafter TIF]. Amended Protocol II, Protocol III and Protocol IV on Blinding Laser Weapons, May 3, 1995, 35 INTERNATIONAL LEGAL MATERIALS 1218 (1996) are now before the US Senate. Marian Leich, *Contemporary Practice of the United States Relating to International Law*, 91 AMERICAN JOURNAL OF INTERNATIONAL LAW 325 (1997). Protocol IV and Protocol on Non-Detectable Fragments (Protocol I), Oct. 10, 1980, 1342 U.N.T.S. 168, do not have these provisions. Protocol II (Mines) and III commentators say little about these provisions; they state the obvious. See Burrus Carnahan, *The Law of Land Warfare: Protocol II to the United Nations Convention on Certain Conventional Weapons*, 105 MILITARY LAW REVIEW 73 (1984); W. Fenrick, Comment, *New Developments in the Law Concerning the Use of Conventional Weapons in Armed Conflict*, 19 CANADIAN YEAR BOOK OF INTERNATIONAL LAW 229 (1981); Howard Levie, *Prohibitions and Restrictions on the Use of Conventional Weapons*, 68 ST. JOHN'S LAW REVIEW 643 (1994); J. Roach, *Certain Conventional Weapons Convention: Arms Control or Humanitarian Law?*, 105 MILITARY LAW REVIEW 1 (1984); William Schmidt, *The Conventional Weapons Convention: Implications for the American Soldier*, 24 AIR FORCE LAW REVIEW 279 (1984).

18. Second Protocol, *supra* note 8, art. 1(f). Second Protocol is not in force; 10 States are party, and 101 have ratified the Hague Cultural Property Convention, *supra* note 8. International Committee of the Red Cross website as of March 24, 2002, *available at* [http://www.icrc.org/eng/party\\_gc](http://www.icrc.org/eng/party_gc).

19. 159 States are party to Protocol I, but not the United States. See International Committee of the Red Cross website, *supra* note 18. International Committee of the Red Cross website, *id.*, listed 88 States as parties to the Conventional Weapons Convention, *supra* note 16; 79 for Protocol II (Mines), 63 for Amended Protocol II, 81 for Protocol III, *supra* note 17, as of March 24, 2002.

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accountable based on information they have at the time for determining whether attacks are necessary and proportional has become a nearly universal norm. The San Remo Manual recognizes it as the naval warfare standard.<sup>20</sup> It can be said with fair confidence that this is the *jus in bello* customary standard. It is also the standard for self-defense situations. It was the standard for Allied Force.

Collective action after a decision to intervene raises problems of consensus on action within a campaign. Even as collective self-defense situations may raise scope and definitional problems (i.e., whether anticipatory self-defense is admissible in the Charter era, what are proportional and necessary responses), and the same kinds of issues can surface in the law of armed conflict under collective action situations, analogous problems will arise during collective humanitarian intervention under state of necessity. What are proper targets? Is the proposed attack necessary and proportional? These issues arose with respect to targeting during Allied Force and were resolved, like the decision to mount the campaign, by consensus among the 19 NATO member States.

One issue, perhaps for Operation Allied Force and certainly for the future, is how far consensus decision making should penetrate into operational matters. To take an extreme example from a hypothetical ground campaign, must a NATO squad leader seek a necessity and proportionality determination all the way up the chain of command to take a particular building, with almost assured damage to it? US commentators and military commanders have decried the “rudder orders” approach to military command and control; is there a collective consensus decision version of it? Should there be one? How does a rudder orders policy, or the opposite of letting field and at sea commanders and perhaps lower echelon commanders decide, affect accountability under international law if things go wrong?

#### ***B. NATO’s Right to Conduct Maritime Interdiction as Part of Allied Force***

NATO considered but did not implement visit and search of ships that may have carried goods to the SFRY through Adriatic Sea ports. Nothing in the law of state of necessity or the law of armed conflict forbade these kinds of operations if they had been ordered.

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20. SAN REMO MANUAL, *supra* note 12, ¶ 46(b) & Commentary 46.3. See also BEN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 90 (1983); MYRES MCDUGAL & FLORENTINO FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 220 (1961).

### 1. NATO Naval Assets Available; Naval Operations during Allied Force

There were no naval engagements at or under the sea connected with Allied Force; some apparently had been projected.<sup>21</sup> But, as the following indicates, naval forces had a role:

NATO forces provided defense and logistics support [undoubtedly including sealift after the campaign,] for the alliance forces deployed in Italy, Albania, and . . . Yugoslavia; . . . and carried out naval operations in the Adriatic Sea. The latter included, at one time, aircraft carriers, submarines, and surface ships from four nations, all operating within the same confined space.<sup>22</sup>

These vessels included the US Navy's *USS Kitty Hawk* and *USS Theodore Roosevelt* battle groups and UK Royal Navy units, including a missile-launching submarine.<sup>23</sup> When Allied Force began the *USS Enterprise* battle group was in the Persian Gulf; there was no other battle group within bombing range of Serbia.<sup>24</sup> In late March 1999, incident to sponsoring a Security Council resolution condemning Operation Allied Force and conversations with Yugoslavia, Russia sent several naval vessels to the Mediterranean where they could enter the Adriatic. This caused tension between NATO and Russia, leading to worries that the SFRY might get information on NATO flight operations from these ships.<sup>25</sup> The *Roosevelt* battle group arrived April 5, the first in the area since mid-March.<sup>26</sup> There is no record of NATO-Russian maritime confrontations. There is also no report of blue-water NATO-SFRY naval confrontations.<sup>27</sup>

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21. General Wesley Clark, while Supreme Allied Commander Europe (SACEUR), spoke to the Yugoslav Chief of Staff [by telephone] at least once during the campaign, warning him that if he sent any of his navy out into the Adriatic it would be sunk. WESLEY CLARK, *WAGING MODERN WAR* 184 (2001); MICHAEL IGNATIEFF, *VIRTUAL WAR: KOSOVO AND BEYOND* 137 (2000).

22. United States Department of Defense, Report to Congress: Kosovo/Operation Allied Force After-Action Report xiv (Jan. 31, 2000) [hereinafter After-Action Report]; *but see id.* at 41 (little reliance on sealift).

23. *Id.* at 92; North Atlantic Council, Statement on Kosovo, Apr. 23, 1999, reprinted in IVO DAALDER & MICHAEL O'HANLON, *WINNING UGLY: NATO'S WAR TO SAVE KOSOVO* 104 (2000). The *Roosevelt* battlegroup had been in the Adriatic; it had been sent to the Persian Gulf in March 1999 as the Kosovo crisis deepened. Clark, *supra* note 21, at 240, 421.

24. DAALDER & O'HANLON, *supra* note 23, at 103.

25. CLARK, *supra* note 21, at 212; DAALDER & O'HANLON, *supra* note 23, at 127.

26. DAALDER & O'HANLON, *supra* note 23, at 231.

27. The SFRY had been warned of the risks. *See supra* note 21.

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Although NATO land-based aircraft (for the United States, US Air Force and US Marine shore-based aircraft) predominantly conducted strike operations, “Navy carrier-based aircraft, Marine . . . sea-based strike aircraft and cruise-missile equipped ships and submarines played a significant role.”<sup>28</sup> Navy electronic warfare aircraft, operating off the carriers, protected NATO aircraft from attack by Yugoslav air defenses. These aircraft were the only US platforms able to use electronic jamming to suppress enemy air defenses. Naval aircraft also launched air defense suppression support for strike aircraft.<sup>29</sup> The Navy flew unmanned aerial vehicles (UAVs) to identify Yugoslav naval vessels, survey potential landing areas for Marines if amphibious landings were ordered, and to target coastal defense radar sites. Navy F-14 aircraft with the Tactical Air Reconnaissance Pod System identified targets; Navy maritime patrol aircraft made significant intelligence, surveillance and reconnaissance (ISR) collection contributions.<sup>30</sup> Although never used for at-sea interdiction, these assets were available to contribute to that effort, besides warships in the Adriatic.

There were differences of opinion at NATO headquarters after the 1999 NATO summit on the possibility of boarding ships in the Adriatic “to enforce the maritime blockade of Yugoslavia. . . .”<sup>31</sup> Oil reached Serbia through Montenegro’s port of Bar; the “stop and search” regime would have aimed to halt this. However, there was concern over provoking Russia, Serbia’s principal oil supplier.<sup>32</sup> This was reflected at national levels. In the Danish parliament, e.g.,

[a] minor controversy arose over the possible contribution to a naval blockade and the modes of its implementation. Not only was this blockade probably a violation of international law; it also [was seen to entail] risks of a direct confrontation with the Russian Navy. As a compromise it was decided (by NATO) to enforce the blockade only with . . . countries . . . parties to the [prior] sanctions regime, on which basis Denmark decided . . . to participate.

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28. After-Action Report, *supra* note 22, at 55, 79, 92–3.

29. *Id.* at 66–7.

30. *Id.* at 57–8.

31. Nicola Butler, *NATO: From Collective Defence to Peace Enforcement*, in *KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION* 279 (Albrecht Schnabel & Ramesh Thakur eds., 2000) [hereinafter *KOSOVO AND THE CHALLENGE*]. See also *Continued NATO Air-Strikes on Yugoslavia*, 45 *Keesing’s Record of World Events* 42901 (1999) [hereinafter 45 *Keesing*].

32. *Continued NATO Air-Strikes on Yugoslavia*, *supra* note 31, at 42901.

Denmark promised a corvette from July 1999 onwards, but the conflict ended first. Later its navy contributed a mine-clearing vessel and a minelayer to clear NATO munitions dumped in the Adriatic.<sup>33</sup> Poland was not “asked to participate in the maritime blockade against Yugoslavia.”<sup>34</sup>

After the Alliance pledged to impose a binding naval embargo in its April statement, European Union (EU) foreign ministers met April 26 and proposed an embargo, to begin April 30, to cut off oil shipments to the SFRY, coming primarily from Italy and Greece. The EU ministers also approved economic measures targeting Milosevic and his family and closing loopholes halting export credits and investment flows to the SFRY previously agreed in 1998. A statement offered support to Montenegro and pledged EU upgrade of EU relations with Albania and Macedonia through association agreements.<sup>35</sup> The naval embargo

became a somewhat hollow promise . . . when NATO decided it would not physically enforce [it] through a blockade at Montenegro’s two main ports, Bar and Kotor Bay. But all was not lost. It did go into effect and was joined by a number of non-EU and non-NATO countries. . . . [T]he voluntary “visit and search” scheme at least had the benefit of preventing profiteers using ships flagged in cooperating countries from shipping oil into Montenegro.

NATO also used its influence and NATO SFOR troops in Bosnia-Herzegovina to cut off oil coming from there to the SFRY.<sup>36</sup>

## 2. Proposed NATO Naval Interdiction during Allied Force: A Lawful Option

There were two principles concerning any projected naval interdiction during Allied Force. First, would vessel interdiction, considered with other aspects of Operation Allied Force, i.e., the aerial bombing campaign, have been a necessary and proportional part of the campaign when the overall goal of collective humanitarian intervention under state of necessity was taken into

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33. Bjorn Moller, *The Nordic Countries: Whither the West’s Conscience?*, in *KOSOVO AND THE CHALLENGE*, *supra* note 31, at 156.

34. Peter Talas & Laszlo Valki, *The New Entrants: Hungary, Poland, and the Czech Republic*, in *KOSOVO AND THE CHALLENGE*, *supra* note 31, at 207.

35. They encouraged EU members not to organize sports events with SFRY participation. DAALDER & O’HANLON, *supra* note 23, at 146; *Continued NATO Air-Strikes on Yugoslavia*, *supra* note 31, at 42901.

36. DAALDER & O’HANLON, *supra* note 23, at 146.

account? If the response is Yes (and the record suggests this), the second principle is that under the view that parties to a humanitarian intervention should follow the law of armed conflict for these operations,<sup>37</sup> NATO could have imposed vessel interdiction, visit and search, and capture or diversion, subject to the usual law of armed conflict rules and limitations.<sup>38</sup>

Blockade was an option discussed outside NATO circles, probably reflecting media and others' confusion between blockade and interdiction. If NATO wanted to establish a blockade, traditional rules—notice of start and end, grace period, area, impartiality, effectiveness, limitation to belligerents' coasts and ports and other requirements or limitations<sup>39</sup>—would have been required under law of armed conflict standards after an affirmative answer to the first question on blockade's place in necessity and proportionality, etc., for Allied

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37. See *supra* Part A.

38. See generally Convention for Amelioration of Wounded, Sick & Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 31, 6 U.S.T. 3217, 3226, 3230, 3234, 75 U.N.T.S. at 85, 92–96 [hereinafter Second Convention]; Convention Concerning Rights & Duties of Neutral Powers in Naval War (Hague XIII), Oct. 18, 1907, 36 Stat. 2415; Convention Relative to Certain Restrictions with Regard to Exercise of the Right of Capture in Naval War (Hague XI), Oct. 18, 1907, *id.* 2396; Convention for Adaptation to Maritime Warfare of Principles of the Geneva Convention (Hague X), Oct. 18, 1907, art. 4, *id.* 2371, 2384; Hague Cultural Property Convention, *supra* note 8, art. 14(2), 249 U.N.T.S. at 252; Convention on Maritime Neutrality, Feb. 20, 1928, 47 Stat. 1989, 135 L.N.T.S. 187; Commission of Jurists, Hague Rules of Air Warfare, Dec. 1922 - Feb. 1923, arts. 49–50, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 15, at 207, 215 [hereinafter Hague Air Rules]; International Law Association Committee on Maritime Neutrality, *Final Report: Helsinki Principles on Maritime Neutrality*, *reprinted in* International Law Association, Report of the Sixty-Eighth Conference Held at Taipei, Taiwan, Republic of China 497, Principles 1.4, 2.1–2.4, 5.2.1–5.2.9 (1998) [hereinafter Helsinki Principles]; Institute of International Law, The Laws of Naval Warfare Concerning the Relations Between Belligerents, Aug. 9, 1913, art. 41, *reprinted in id.* at 857, 864 [hereinafter Oxford Naval Manual]; ANNOTATED SUPPLEMENT, *supra* note 9, ¶¶ 7.6–7.6.2, 7.10–7.10.2; 2 PICTET, *supra* note 12, at 181–84 (1960); SAN REMO MANUAL, *supra* note 12, ¶¶ 112–34; WALKER, *supra* note 8, at 357–64.

39. See generally Hague XI, *supra* note 38, art. 1, 36 Stat. at 2408; Declaration Concerning Maritime Law, Apr. 16, 1856, ¶ 4, 115 Consol. T.S. 1, 3; Declaration Concerning Laws of Naval War (Declaration of London), Feb. 26, 1909, Annex, arts. 1–21, 208 Consol. T.S. 338, 341, 343–44, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 15, at 843, 846–47, never in force; Hague Air Rules, *supra* note 38, art. 53(i), *id.* at 215; Helsinki Principles, *supra* note 38, Principles 5.2.10, 5.3; BOTHE ET AL., *supra* note 12, at 432–39, 694–97; ANNOTATED SUPPLEMENT, *supra* note 9, ¶¶ 7.7–7.7.5; Oxford Naval Manual, *supra* note 38, arts. 30, 53, 92, at 862, 866, 872; 4 PICTET, *supra* note 13, at 309–12, 318–24; PILLOUD ET AL., *supra* note 12, at 812–36, 1476–81; SAN REMO MANUAL, *supra* note 12, ¶¶ 93–104; WALKER, *supra* note 8, at 389–94.

Force's overall goals for intervention which laid primary stress on humanitarian intervention.<sup>40</sup> Any blockade imposed during Operation Allied Force would not have been a "pacific blockade," i.e., a blockade imposed on an adversary's coasts during time of peace, generally thought to be unlawful under the Charter.<sup>41</sup>

### C. Captured Armed Forces Members' Entitlement to Prisoner of War Status

SFRY forces took three NATO ground service personnel into custody during Allied Force, perhaps kidnapping them across the Macedonia border. The three suffered beatings at the hands of their captors.<sup>42</sup> Two downed NATO pilots risked capture before NATO rescued them.<sup>43</sup> NATO forces later took SFRY army personnel into custody after moving into Kosovo. On May 16, 1999 President Clinton authorized releasing two SFRY force members the Kosovo Liberation Army (KLA) captured in April.<sup>44</sup> Although the record is not clear, it is likely that the SFRY captured members of the KLA and that the KLA captured other SFRY armed forces members.

40. See generally North Atlantic Council, *Statement on Kosovo*, Apr. 23, 1999, reprinted in DAALDER & O'HANLON, *supra* note 23, at 262 (2000); NATO Secretary-General Javier Solana, *Statement by NATO Secretary General*, Mar. 23, 1999, 45 Keesing, *supra* note 31, at 42847; After-Action Report, *supra* note 22, at 10; *supra* notes 31–36 and accompanying text.

41. 2 O'CONNELL, *supra* note 13, at 1157–58, citing UN Charter Article 2(4); ANTHONY D'AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* 43–46 (1987) (same, listing rules for permissible blockades); WALKER, *supra* note 8, at 389; *but see* COLOMBOS, *supra* note 13, §§ 484–88B; 2 LASSA OPPENHEIM, *INTERNATIONAL LAW* §§ 44–49, 52b–52e, 52l (Hersch Lauterpacht ed., 7th ed. 1952); U.S. Department of the Navy, *Law of Naval Warfare: NWIP 10-2*, ¶ 632a n.26 (1955 through Change 6, 1974). UN Charter Article 42 authorizes the Security Council to impose a blockade. See also GOODRICH ET AL., *supra* note 5, at 314–17; THE CHARTER OF THE UNITED NATIONS, *supra* note 5, at 629–36. ANNOTATED SUPPLEMENT, *supra* note 9, ¶ 7.7.2.1 n.131 correctly says, "It is not possible to say whether, or to what extent, a U.N. blockade would be governed by the traditional rules." See also The Charter of the United Nations, *supra* at 632. This is an example of how a Council decision can trump LOAC treaty rules. UN Charter arts. 25, 48, 103. See *supra* note 5 and accompanying text.

42. Reverend Jesse Jackson, US President Bill Clinton's friend, was involved in negotiating their release; there had been fears the detainees would be held hostage. CLARK, *supra* note 21, at 229, 286–87; DAALDER & O'HANLON, *supra* note 23, at 119, 146; *Continued NATO Air-Strikes Against Yugoslavia*, *supra* note 31, at 42957; *Continued NATO Air-Strikes on Yugoslavia*, *supra* note 31, at 42900.

43. CLARK, *supra* note 21, at 214–18, 274.

44. *Id.* at 286; DAALDER & O'HANLON, *supra* note 23, at 146, 233.

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These personnel were entitled to those parts of the 1949 Geneva Conventions, other applicable humanitarian law treaties, and customary law or general principles of law governing them, absent a Security Council decision to the contrary.<sup>45</sup> (There was none.)

### 1. NATO-SFRY Aspects of Allied Force

First, as between NATO and the SFRY, the 1949 Geneva Conventions applied. Although Operation Allied Force was not a war in the traditional sense, Common Article 2 declares their provisions apply to “other” international armed conflicts. For example, the Third Convention, establishing prisoner of war treatment standards, provides in part in Article 2:

In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

[It] shall also apply to all cases of partial or total occupation of the territory of a . . . Party, even if the said occupation meets with no armed resistance.

Although one . . . Power . . . in the conflict may not be a Party to the . . . Convention, the Powers that are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.<sup>46</sup>

The SFRY and all NATO States were parties to the 1949 Conventions before the SFRY’s dissolution.<sup>47</sup> Although there was no official record of the SFRY’s having accepted and applied the Conventions in accordance with

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45. UN CHARTER arts. 25, 48, 103. See *supra* note 5 and accompanying text.

46. Convention Relative to Treatment of Prisoners of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135, 136 (hereinafter Third Convention). See also Convention for Amelioration of Condition of Wounded & Sick in Armed Forces in the Field, Aug. 12, 1949, art. 2, 6 U.S.T. 3114, 3116, 75 U.N.T.S. 31, 32 (hereinafter First Convention); Second Convention, *supra* note 38, art. 2, *id.* at 3220, 75 U.N.T.S. at 86; Convention Relative to Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3516, 3518, 75 U.N.T.S. 287, 288 (hereinafter Fourth Convention)

47. TIF, *supra* note 17, at 330, 450–52.

Article 2 before or during the NATO campaign, after Allied Force ended, the SFRY accepted them retroactive to 1992 on October 16, 2001.<sup>48</sup> Nevertheless, treaty succession principles,<sup>49</sup> even if the SFRY and other States had formal acceptance of the former country's treaties under review at the time of Allied Force,<sup>50</sup> may have bound the SFRY during the NATO campaign. The SFRY was also bound to the extent the Conventions restated custom or general principles of law.<sup>51</sup> The general view is that much, but maybe not all, of the Third Convention restates customary rules or general principles of law.<sup>52</sup> Therefore, it bound the SFRY and NATO to that extent as custom or general principles. The Third Convention also has a Martens clause; even denunciation of the Convention "shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience."<sup>53</sup> The clause may reflect a general principle of law or custom.<sup>54</sup> If so, the SFRY was bound to apply principles of humanity for detainees' treatment, even if not bound by the Conventions as treaty law.

Not all States party to NATO-SFRY aspects of Allied Force, e.g., the United States, were parties to 1977 Protocol I to the 1949 Conventions. The

48. International Committee of the Red Cross website, *supra* note 18. See also Christopher Greenwood, *The Applicability of International Humanitarian Law and the Law of Neutrality to the Kosovo Campaign* in the present volume. When this paper was researched and delivered in June 2001, the SFRY's acceptance had not been deposited. The ensuing and sometimes convoluted discussion based on treaty succession principles and the Conventions and Protocols as restating custom or general principles of law demonstrates the importance of the Conventions and Protocols as treaty law.

49. See generally Symposium, *State Succession in the Former Soviet Union and in Eastern Europe*, 33 VIRGINIA JOURNAL OF INTERNATIONAL LAW 253 (1993); Walker, *supra* note 5.

50. TIF, *supra* note 17, at 330, 450–52.

51. Today 189 States are party to the four 1949 Geneva Conventions. International Committee of the Red Cross website, *supra* note 18. This suggests that many if not all of their provisions represent customary norms. BROWNIE, *supra* note 5, at 5; RESTATEMENT (THIRD), *supra* note 5, § 102 cmts. f, i; 1 OPPENHEIM *supra* note 5, § 10, at 28, 31; George Walker, *Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said*, 31 CORNELL INTERNATIONAL LAW JOURNAL 321, 367–68 (1998); THE LAW OF MILITARY OPERATIONS, *supra* note 13, at 391–92. See also ANNOTATED SUPPLEMENT, *supra* note 9, ¶¶ 8.5.1.1, 8.5.1.4–8.5.1.5, 11.2–11.3.

52. See ANNOTATED SUPPLEMENT, *supra* note 9, ¶¶ 11.4, 11.7–11.7.4; *supra* note 51.

53. Third Convention, *supra* note 46, art. 142, 6 U.S.T. at 3424, 75 U.N.T.S. at 242. See also 1 PICTET, *supra* note 12, at 411–13; 2 *id.*, *supra* note 38, at 281–83; 3 *id.*, *supra* note 12, at 647–48 (1960); 4 *id.*, *supra* note 13, at 624–26.

54. BOTHE ET AL., *supra* note 12, at 44. See also I.C.J. Statute, art. 38(1); RESTATEMENT (THIRD), *supra* note 5, §§ 102–03.

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former Yugoslavia was,<sup>55</sup> but this is subject to treaty succession principles and other considerations as to whether the SFRY was bound in 1999.<sup>56</sup> To the extent the Protocol's terms relating to prisoners of war<sup>57</sup> reflected custom or general principles,<sup>58</sup> they bound States involved in Allied Force, including NATO countries and the SFRY. Protocol I also has a Martens clause: "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."<sup>59</sup> The clause may reflect a general principle of law or custom;<sup>60</sup> if so, like the analysis applied to its Third Convention counterpart,<sup>61</sup> the SFRY was required to treat its prisoners of war with humanity even if Protocol I did not apply as treaty law.

The same principles apply to the 1907 Hague IV Regulations relating to prisoners of war, insofar as they reflected custom.<sup>62</sup> Yugoslavia was not a formal party to them, but, e.g., the Regulations' provision forbidding killing or wounding those who have laid down arms, or who no longer have means of

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55. *Signatures, Ratifications and Accessions Concerning the Protocols I and II Additional to the Geneva Conventions, 1977*, in THE LAWS OF ARMED CONFLICT, *supra* note 15, at 703. The SFRY accepted Protocol I, *supra* note 11, on October 16, 2001, retroactive to 1992, but was also bound by customary and general principles norms stated in Protocol I. As in the case of the 1949 Conventions, the ensuing and sometimes convoluted discussion based on treaty succession principles and the Protocol as restating custom or general principles of law demonstrates the importance of Protocol I as treaty law. See *supra* note 48 and accompanying text.

56. TIF, *supra* note 17, at 330; Symposium, *State Succession*, *supra* note 48; Walker, *supra* note 5.

57. Protocol I, *supra* note 11, arts. 8–11, 1125 U.N.T.S. at 10–12, 22–24. See also ANNOTATED SUPPLEMENT, *supra* note 9, ¶¶ 11.4, 11.7; BOTHE ET AL., *supra* note 12, at 82–116, 216–62; PILLOUD ET AL., *supra* note 12, at 107–63, 473–559.

58. See *supra* notes 5, 11–15, 19, 53 and accompanying text.

59. Protocol I, *supra* note 11, art. 1(2), 1125 U.N.T.S. at 7. See also *supra* note 53 and accompanying text.

60. See *supra* note 54 and accompanying text.

61. See *supra* notes 53–54 and accompanying text.

62. BROWNLIE, *supra* note 5, at 5; RESTATEMENT (THIRD), *supra* note 5, § 102 cmts. f, i; 1 OPPENHEIM, *supra* note 5, § 10, at 28, 31; Walker, *supra* note 51, 31, *supra* note 13, CORNELL INTERNATIONAL LAW JOURNAL at 367–68; THE LAW OF MILITARY OPERATIONS at 391–92.

defense,<sup>63</sup> bound the SFRY and NATO States as a customary norm.<sup>64</sup> The Third 1949 Convention and Protocol I are complementary to the extent that they do not supersede the 1907 Hague IV Regulations.<sup>65</sup> Moreover, Hague IV's preamble, and its 1899 predecessor's preamble include Martens clauses.<sup>66</sup> To the extent these clauses reflect custom or a general principle of law,<sup>67</sup> the SFRY was bound to apply principles of humanity in its custody of prisoners of war whether the Hague treaties were binding as treaty law or not.

## 2. The SFRY-KLA Aspects of Allied Force

Common Article 3 to the 1949 Geneva Conventions establishes minimum criteria for armed conflicts that are not of an international nature; e.g., the Second Convention relating to prisoners of war says:

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63. Hague Convention (IV) Respecting Laws & Customs of War on Land, Oct. 18, 1907, Regulations, art. 23(c).

64. ANNOTATED SUPPLEMENT, *supra* note 9, ¶ 11.4. See also Protocol I, *supra* note 11, arts. 40–41, 1125 U.N.T.S. at 22; BOTHE ET AL., *supra* note 12, at 216–24; PILLOUD ET AL., *supra* note 12, at 473–91; SAN REMO MANUAL, *supra* note 12, ¶ 47(i), cmt. 47.56; Horace B. Robertson, Jr., *The Obligation to Accept Surrender*, in READINGS FROM THE NAVAL WAR COLLEGE REVIEW ch. 40 (John Moore & Robert Turner eds., 1994) (Vol. 68, US Naval War College International Law Studies); *supra* note 62 and accompanying text. Serbia was a party, but the Ottoman Empire, predecessor State to modern Turkey, a NATO member, and some areas today within the SFRY, only signed 1899 Hague Convention II with Respect to Laws & Customs of War on Land, July 29, 1899, 32 Stat. 1803 (hereinafter 1899 Hague II), Regulations, art. 23(c), 32 Stat. at 1811, 1817, identical with Hague IV, *supra* note 62, Regulations, art. 23(c), 36 *id.* at 2301–02, which Montenegro, Serbia and the Ottoman Empire signed but did not ratify. Austria-Hungary, a predecessor State to parts of the SFRY and its successor States and Hungary, a NATO member, was party to the 1899 and 1907 Conventions. See *Convention of 1899, Convention of 1907: Signatures, Ratifications and Accessions*, in THE LAWS OF ARMED CONFLICTS, *supra* note 15, at 94–98. There is a circuitous argument that the SFRY, constituted as it was in 1999, was bound by treaty succession principles as well as custom. See generally Symposium, *State Succession*, *supra* note 49; Walker, *supra* note 5. The same kind of issues might plague analysis within NATO because of, e.g., Canada's status as a NATO member; Canada had a different status a century ago within the British Empire. TIF, *supra* note 17, at 455 does not list Canada, Montenegro, Serbia or Yugoslavia but does list Turkey as Hague IV parties; 1899 Hague II is not listed.

65. Third Convention, *supra* note 46, art. 135, 6 U.S.T. at 3422, 75 U.N.T.S. at 240; Protocol I, *supra* note 11, art. 96, 1125 U.N.T.S. at 46. See also BOTHE ET AL., *supra* note 12, at 554–57; 3 PICTET, *supra* note 53, at 636–40; PILLOUD ET AL., *supra* note 12, at 1084–92

66. Hague IV, *supra* note 63, preamble, 36 Stat. at 2277–80; 1899 Hague II, *supra* note 64, preamble, 32 *id.* at 1803–05. See also *supra* notes 53, 59 and accompanying text.

67. See *supra* notes 54, 60 and accompanying text.

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In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place . . . with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity; in particular, humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees . . . recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

. . . .

Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of [this] . . . Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.<sup>68</sup>

If Allied Force was not an international armed conflict with respect to KLA-SFRY confrontations but would be within the Common Article 3

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68. Third Convention, *supra* note 46, art. 3, 6 U.S.T. at 3319, 75 U.N.T.S. at 136. *See also* First Convention, *supra* note 46, art. 3, *id.* at 3116, 75 U.N.T.S. at 32; Second Convention, *supra* note 38, art. 3, *id.* at 3220, 75 U.N.T.S. at 86; Fourth Convention, *supra* note 46, art. 3, *id.* at 3518, 75 U.N.T.S. at 288; 1 PICTET, *supra* note 12, at 38–61; 2 *id.*, *supra* note 38, at 33–38; 3 *id.*, *supra* note 53, at 28–44; 4 *id.*, *supra* note 13, at 26–44.

definition, its standards applied to those taken into custody, e.g., KLA members the SFRY captured, or SFRY armed forces members the KLA captured.

It is doubtful whether the SFRY and the KLA negotiated Article 3 special arrangements. Article 3 recites minimum standards; other provisions of the Third Convention reciting customary law may also have applied to these persons. Protocol II, applying to non-international conflicts as a supplement to the Third Convention,<sup>69</sup> lists additional protections.<sup>70</sup> The former Yugoslavia was a Protocol II party subject to a declaration,<sup>71</sup> but this is also subject to treaty succession principles and other considerations as to whether the SFRY was bound in 1999.<sup>72</sup> To the extent Protocol II standards recited custom,<sup>73</sup> the SFRY and the KLA were bound. The SFRY and the KLA were also bound by the Martens clause principle (“in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience”) stated in Protocol II,<sup>74</sup> even if they were not bound under Protocol II or other formal treaty rules.

### Conclusions

Operation Allied Force’s legitimacy under international law is, as US sports commentators would say, a close call. Because of its history, intervention, like

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69. Protocol Additional (II) to Geneva Conventions of 12 August 1949, & Relating to Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 1, 1125 U.N.T.S. 609, 611 [hereinafter Protocol II]. See also BOTHE ET AL., *supra* note 12, at 604–08, 623–29; PILLOUD ET AL., *supra* note 12, at 1319–36, 1343–46.

70. Protocol II, *supra* note 69, arts. 4–11, 1125 U.N.T.S. at 612–15. See also BOTHE ET AL., *supra* note 12, at 640–64; PILLOUD ET AL., *supra* note 12, at 1368–1436.

71. *Signatures*, *supra* note 55, at 703, 718.

72. TIF, *supra* note 17, at 330; Symposium, *State Succession*, *supra* note 49; Walker, *supra* note 5. The SFRY accepted Protocol II, *supra* note 69, on October 16, 2001, retroactive to 1992, but was also bound by customary and general principles norms stated in Protocol II. As in the case of the 1949 Conventions, the ensuing and sometimes convoluted discussion based on treaty succession principles and the Protocol as restating custom or general principles of law demonstrates the importance of Protocol II as treaty law. See *supra* note 48 and accompanying text.

73. See *supra* notes 62–64 and accompanying text.

74. Protocol II, *supra* note 69, preamble, 1125 U.N.T.S. at 611, which does not add “established custom” as in other Martens clauses, because of the relative newness of law applying to non-international armed conflicts, although time since 1977 may argue for including that norm as well. See also BOTHE ET AL., *supra* note 12, at 44, 620; PILLOUD ET AL., *supra* note 12, at 1341–42; *supra* notes 53–54, 59–61, 66–67 and accompanying text.

war, is a loaded word for many States or commentators and in many contexts. Today, in the UN Charter era, intervention in some contexts may be less lawful than it was before 1945, given Charter provisions on sovereignty, territorial integrity and the political independence of States. On the other hand, the growing body of the law of human rights, also recognized in the Charter, and humanitarian law, recognized by UN organizations' resolutions, within the world arena must be considered. Under the perhaps (and hopefully) unique circumstances of Kosovo, the NATO campaign was legitimate under principles of collective humanitarian intervention under state of necessity.

With regard to the application of the law of armed conflict, as an operation involving the use of force, Allied Force certainly met the threshold of Common Article 2 of the 1949 Geneva Conventions. Therefore NATO was obligated to conduct its campaign in accordance with the standards of that body of law. Additionally, state of necessity principles mandated that NATO operations, to be considered legitimate, must have been undertaken only when necessary and proportional to Operation Allied Force's overall goal of protecting the Albanian Kosovars from the depredations of Serbian forces. Under law of armed conflict standards and consistent with that objective, NATO, although choosing to implement only voluntary measures, could have conducted traditional visit and search ship interdiction operations to halt the shipment of oil to the SFRY. On the issue of the status of captured NATO and SFRY military personnel, the Third Convention was binding as either treaty or customary law on both sides; thus captured personnel were entitled to prisoner of war status. The situation with regard to KLA personnel is more complex. If the KLA-SFRY conflict is viewed as an international armed conflict, then captured KLA personnel would also be prisoners of war and entitled to the protections of the Third Convention. If, however, that conflict is considered to be non-international in nature, then detained KLA personnel would be subject to the more general protective standards of Common Article 3.

Intervention to protect indigenous nationals such as occurred in 1999 in the SFRY creates two distinct legal issues for the international community. First, is the intervention itself lawful? I believe that long-accepted state of necessity principles would apply and that interventions that meet state of necessity criteria are legitimate. This will limit humanitarian interventions to the most immediate and egregious situations when no reasonable alternative to intervention exists. Second, what law applies to the use of military force during humanitarian interventions? Except in the most extraordinary circumstances (none of which I can currently envision), it must be the law of armed conflict applicable to international armed conflicts. It is that body of law to

*George Walker*

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which military forces train, and it is that body of law that provides the greatest protections to both combatants and noncombatants. Any lesser standard risks inflicting greater harm than the good sought to be accomplished.