

The Applicability of International Humanitarian Law and the Law of Neutrality to the Kosovo Campaign

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The purpose of this paper¹ is to examine the applicability of international humanitarian law and the law of neutrality to Operation Allied Force, the NATO campaign over Kosovo in 1999. The paper is thus chiefly about *jus in bello* (which is treated here as synonymous with the law of armed conflict and international humanitarian law), not about *jus ad bellum*. It is not intended, therefore, to enter into the controversy regarding the legality of the decision to resort to force over Kosovo or the long-running debate over whether contemporary international law recognizes a right of humanitarian intervention in the face of large scale violations of human rights. The present writer has already made clear in other publications his view that a right of humanitarian intervention (albeit one of a strictly limited character) exists in

1. This paper has been revised since the colloquium in order to take account of points made by a number of commentators in the immensely valuable discussion periods, although the responsibility for the views here expressed remain mine alone. I have also taken the opportunity to take account of the decision of the European Court of Human Rights in *Bankovic v. Belgium and Others* delivered on December 19, 2001 since that decision is directly concerned with the Kosovo conflict. Conflicts occurring since Kosovo are not discussed here.

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international law and that the conditions for the exercise of that right were present in Kosovo in 1999,² although that view is by no means universal.³

That, however, is a debate for another occasion. For present purposes, it is sufficient—but also necessary—to note three points regarding the legal justification advanced by the NATO States for their resort to force, since these points have a bearing on the application of international humanitarian law and the law of neutrality during the campaign.

First, the Kosovo campaign was one in which some actions against the Federal Republic of Yugoslavia (FRY) were undertaken pursuant to a mandate from the United Nations Security Council, while others were taken by the

2. See Christopher Greenwood, *Evidence to the House of Commons Foreign Affairs Committee*, Foreign Affairs Committee Fourth Report, 1999-2000, HC Paper 28-II, p. 137, reprinted in 49 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 926 (2000), and *Humanitarian Intervention: the Case of Kosovo*, 10 FINNISH YEAR BOOK OF INTERNATIONAL LAW (forthcoming).

3. Amongst the literature on the subject, which reflects the very different positions taken by a wide range of international lawyers, see the evidence given by Ian Brownlie, Christine Chinkin and Vaughan Lowe to the Foreign Affairs Committee of the United Kingdom House of Commons, *supra* note 2, reprinted in 49 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 876-943 (2000); Louis Henkin, Ruth Wedgwood, Jonathan Charney, Christine Chinkin, Richard Falk, Thomas Franck and W. Michael Reisman, *Editorial Comments: NATO's Kosovo Intervention*, 93 AMERICAN JOURNAL OF INTERNATIONAL LAW 824-878 (1999); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1 (1999); Antonio Cassese, *Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 23 (1999) and *A Follow-Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis*, *id.*, at 791; Nico Krisch, *Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council*, 3 YEARBOOK OF UNITED NATIONS LAW 59 (1999); Dino Kritsiotis, *The Kosovo Crisis and NATO's Application of Armed Force Against the Federal Republic of Yugoslavia*, 49 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 330 (2000); Steven Blockmans, *Moving into UNChartered Waters: An Emerging Right of Unilateral Intervention?*, 12 LEIDEN JOURNAL OF INTERNATIONAL LAW 759 (1999); and Francesco Francioni, *Of War, Humanity and Justice: International Law After Kosovo*, 4 YEARBOOK OF UNITED NATIONS LAW 107 (2000). The Kosovo crisis has also attracted an unusual number of studies by official and semi-official bodies. These include the report of the Foreign Affairs Committee of the United Kingdom House of Commons, HOUSE OF COMMONS PAPER (1999-2000) NO. 28-I together with the response by the United Kingdom Government at COMMAND PAPERS 4825 (August 2000); the report of the Advisory Council on International Affairs and the Advisory Committee on Issues of Public International Law of the Netherlands Government, Report No. 13 (April 2000), available at <http://www.aiv-advice.nl> (reviewed by Ige Dekker in 6 JOURNAL OF CONFLICT AND SECURITY LAW 115 (2001)); the report of the Danish Institute of International Affairs, *Humanitarian Intervention: Legal and Political Aspects* (1999); and the Kosovo Report published by the Independent International Commission on Kosovo (2000).

NATO States on their own initiative. The Security Council had imposed an arms embargo on the FRY when it adopted Resolution 1160 in 1998, a year before the NATO military action commenced. After the cessation of the bombing campaign on June 10, 1999, the Council adopted Resolution 1244, which provided the legal basis for ground forces led by NATO and known as KFOR, to enter Kosovo and assume responsibility for the security situation there, to the exclusion of the armed forces and paramilitary police of the FRY. The bombing campaign itself, however, was not authorized by the Council. Although that campaign was undertaken by NATO in support of goals identified by the Security Council in Resolutions 1160, 1199 and 1203 (all of which contained provisions which were legally binding upon all States, including the FRY), none of those resolutions authorized military action. Unlike the situation in the 1990–91 Gulf conflict, therefore, Operation Allied Force was not a case of enforcement action taken with the authority of the Security Council. A distinction must accordingly be drawn between the bombing campaign which occurred between March 24, 1999 and June 10, 1999, on the one hand, and the military presence in Kosovo thereafter. As will be seen, this distinction is of some importance in considering the law applicable to military operations after June 10, 1999.

Secondly, while some members of NATO were more forthright on this matter than were others, the only substantial justification advanced for the decision to resort to military action was that such action was justified as a response to the humanitarian situation which had been created in Kosovo in the immediate run-up to the commencement of Operation Allied Force on March 24, 1999. For example, the United Kingdom's Permanent Representative to the United Nations told the Security Council, on the day that the military operation commenced, that:

The action being taken is legal. It is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe. Under present circumstances in Kosovo, there is convincing evidence that such a catastrophe is imminent. Renewed acts of repression by the authorities of the Federal Republic of Yugoslavia would cause further loss of civilian life and would lead to displacement of the civilian population on a large scale and in hostile conditions.

Every means short of force has been tried to avert this situation. In these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable. The force

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now proposed is directed exclusively to averting a humanitarian catastrophe, and is the minimum judged necessary for that purpose.⁴

The emphasis on the limited purpose for which force was being employed and the reference, inherent in that statement, to the requirement that the force used should be proportionate to that goal has led some commentators to argue that the application of international humanitarian law in the NATO operation should have been different from that required of States engaged in a “normal” armed conflict. That argument is considered later in this paper.

Finally, it needs to be remembered that, while the *jus ad bellum* and the *jus in bello* are separate bodies of law (a fact which has important legal consequences), for military action by a State to be lawful, it must comply with both bodies of law. The Gulf conflict of 1990–91 may be used as an illustration. Iraq’s invasion of Kuwait was the clearest possible violation of the *jus ad bellum*. It followed that the subsequent occupation of Kuwait and the Iraqi resistance to the coalition campaign to liberate Kuwait were also a violation of the *jus ad bellum*, even though some aspects of Iraq’s behavior (e.g., some of the property requisitions which occurred or the missile attacks on the Dahrn airbase) complied with the *jus in bello*.⁵ Thus, Iraq’s liability to make reparation in accordance with the provisions of Security Council Resolution 687 for the consequences of its unlawful invasion is not confined to damages caused by acts unlawful under the *jus in bello*.

In this context, it has to be recognized that there was considerable controversy about the legal justification advanced by the NATO States for their resort to force against the FRY. That controversy about the application of the *jus ad bellum* may have affected the way in which certain issues regarding the *jus in bello* and, in particular, the law of neutrality were perceived. Specifically, it may have affected the approach of various governments to the question whether the NATO States would have been entitled to impose an embargo on

4. U.N. Doc. S/PV.3988, at 12. See also the views expressed in the same debate by the Permanent Representatives of the United States of America (4-5), Canada (6) and the Netherlands (8). In the cases concerning *Legality of Use of Force* brought by the FRY against ten of the NATO States in the International Court of Justice, Belgium advanced the same justification for military action; see Oral Pleadings of Belgium (*Yugo. v. Belg.*), 1999 I.C.J. CR/99/15, available at <http://www.icj-cij.org/icjwww/idocket/iybe/iybeframe.htm>. The other respondent States did not address this issue during that phase of the case.

5. For a discussion of these issues, see Christopher Greenwood, *New World Order or Old? The Invasion of Kuwait and the Rule of Law*, 55 MODERN LAW REVIEW 153–178 (1992) and the articles cited at note 38, *infra*.

shipments of oil and other supplies to the FRY, even where those supplies were carried in ships flying the flags of States not involved in the conflict.

This paper will first consider the applicability of international humanitarian law to Operation Allied Force before examining certain general issues regarding the manner in which that law had to be applied in the Kosovo campaign. The question whether persons captured during the operation were prisoners of war within the Third Geneva Convention will be addressed next, followed by discussion of the issue of a naval embargo and the law of neutrality. The legal regime applicable to KFOR operations in Kosovo since June 10, 1999 will be briefly considered before closing with a discussion of the various judicial proceedings relating to the conduct of the Kosovo conflict. Questions of targeting and proportionality are considered only in passing, as these are the subject of other papers in the present volume.⁶

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1. The Existence of an Armed Conflict between the NATO States and the FRY

The first question to consider is whether international humanitarian law was applicable to Operation Allied Force. Though much discussed at the time, there is less to this question than meets the eye. The answer—which can be given without qualification—is that international humanitarian law was fully applicable from the moment that Operation Allied Force began on March 24, 1999 until the cessation of hostilities on June 10, 1999. Throughout that period an international armed conflict existed between the FRY on the one hand and the NATO States on the other.

There is no definition of an international armed conflict in any of the treaties on international humanitarian law. It is agreed, however, that the concept is a factual one based on the existence of actual hostilities between two or more States, even if those hostilities are at a low level and of short duration. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) has stated that an “armed conflict exists whenever there is a resort to armed force between States.”⁷ That test was undoubtedly satisfied in the case of Operation Allied Force. The fact that no declaration of war was made was, of course, irrelevant to the applicability of international humanitarian law

6. See the papers by Professors Bothe and Dinstein and Lieutenant Colonel Montgomery on targeting and by Professors Bring and Murphy on collateral damage.

7. Prosecutor v. Tadic, Jurisdiction, 105 INTERNATIONAL LAW REPORTS 453, ¶ 70 (1997). See also COMMENTARY ON GENEVA CONVENTION III 23 (Jean Pictet ed., 1960).

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to that conflict. It is well established that it is the fact of armed conflict between two or more States, not the formality of a declaration of war (which has been almost unknown since 1945) which triggers the application of that law.⁸

Nor does it make any difference to the applicability of international humanitarian law that the decision to resort to force was taken by the North Atlantic Council, the governing body of NATO, or that the military conduct of the campaign was in the hands of the Supreme Allied Commander Europe (SACEUR) and the NATO military authorities, who acted in consultation with the NATO Secretary-General under the authority given them by the North Atlantic Council. While NATO is an international organization which possesses a legal personality separate from those of its members, that separate personality does not affect the applicability of international humanitarian law to the armed forces of any member State which implements a NATO decision.⁹ That fact was expressly recognized both by NATO and the member States during Operation Allied Force. Thus, the North Atlantic Council's authorization to SACEUR and the military authorities expressly required that operations were to be conducted in accordance with international humanitarian law. Similarly, the United Kingdom Government stated that "action by our forces is in strict conformity with international humanitarian law, including the 1949 Geneva Conventions and their Additional Protocols."¹⁰ Other NATO governments adopted a similar position.

The fact that NATO acted for humanitarian reasons, so that the legal justification offered for the decision to resort to force was different from the reliance on self-defense or Security Council authorization which has been characteristic of most armed conflicts since 1945, is also irrelevant to the applicability of international humanitarian law. The principle that international humanitarian law

8. See Christopher Greenwood, *The Concept of War in International Law*, 36 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 283 (1987). US forces are specifically required to comply with international humanitarian law in any armed conflict, irrespective of its formal characterization; see Department of Defense, DoD Law of War Program, DoD Directive 5100.77, Dec. 9, 1998 and ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 290-1 (A.R. Thomas and James Duncan eds., 1999) (Vol. 73, US Naval War College International Law Studies).

9. Whether it affects the issue of State responsibility for a violation of those rules is currently under consideration in the proceedings in the International Court of Justice and the European Court of Human Rights discussed later in this paper. No one, however, has suggested that armed forces operating under NATO command and control are not subject to customary international humanitarian law and the treaty provisions binding upon the State concerned.

10. Answer to a Parliamentary question on May 18, 1999 by Baroness Symons, Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, 70 BRITISH YEAR BOOK OF INTERNATIONAL LAW 605 (1999).

applies equally to both sides of a conflict irrespective of the reasons for resort to force or its legality is one of the best established principles of the *jus in bello*.¹¹

It follows that the humanitarian law of international armed conflicts was applicable throughout the period March 24, 1999 to June 10, 1999 to the hostilities between the NATO States and the FRY. Two questions, however, require further consideration.

2. The Status of the FRY as a Party to the Geneva Conventions and Protocol I

The first question concerns the applicability of the 1949 Geneva Conventions and Protocol I of 1977.¹² This question arises because of the peculiar status of the FRY at the relevant time. The FRY was one of the States which emerged from the former Socialist Federal Republic of Yugoslavia (SFRY) when that State collapsed in 1991–92. Of the six republics which had made up the SFRY, four—Bosnia-Herzegovina, Croatia, Macedonia and Slovenia—had declared their independence between June 1991 and May 1992 and had, in due course, been recognized and admitted as members of the United Nations. The two remaining republics, Serbia and Montenegro, formed the FRY. The Government of the FRY from its foundation until the overthrow of Slobodan Milosevic in 2000 considered the FRY to be the continuation of the old SFRY (just as the Russian Federation was the continuation of the USSR) and not a successor State. It therefore maintained that the FRY continued the SFRY’s membership in all international organizations and

11. See, e.g., the decision of the United States Military Tribunal in *United States v. List*, 8 LAW REPORTS OF TRIALS OF WAR CRIMINALS 1234, 1247. See also Protocol I to the 1949 Geneva Conventions, the Preamble to which states that “the provisions of the Geneva Conventions . . . and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the parties to the conflict.” Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Conflicts, Jun. 8, 1977, 1125 U.N.T.S. 3, DOCUMENTS ON THE LAWS OF WAR 422 (Adam Roberts & Richard Guelff eds., 3d ed. 2000) [hereinafter Protocol I].

12. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, DOCUMENTS ON THE LAWS OF WAR *supra* note 11, at 197 [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, *id.* at 222 [hereinafter Geneva II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, *id.* at 244 [hereinafter Geneva III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, *id.* at 301 [hereinafter Geneva IV]. Protocol I, *supra* note 11.

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that all treaties concluded by the SFRY, including the Geneva Conventions and Protocol I, continued to apply to the FRY without any need for an act of succession. Accordingly, whereas the other States which emerged from the SFRY each made a declaration of succession to the Conventions and Protocols, the FRY did not.

The FRY's claim to be the continuation of the SFRY was not, however, accepted by the rest of the international community. Thus, the Arbitration Commission of the Peace Conference for the Former Yugoslavia (known as "the Badinter Commission" after the name of its Chairman, Judge Robert Badinter of the French Constitutional Court) rejected the FRY's claim and gave the opinion that the States which emerged from the SFRY were all successor States, none of which had any special claim to continue the personality of the old State.¹³ The United Nations Security Council and General Assembly also rejected the FRY's claim and stated that it should apply for membership of the United Nations.¹⁴ The then Government of the FRY, however, adhered to its position that it continued the personality of the SFRY and thus continued to be bound by, and to have the benefit of, all of the latter's treaty obligations. Thus, in the cases brought against it in the International Court of Justice by Bosnia-Herzegovina and Croatia for alleged violations of the Genocide Convention, it did not contest that it was bound by that Convention.¹⁵ The FRY took the same position in the cases which it brought against ten NATO States in 1999.¹⁶

The change of government in the FRY in 2000 brought a complete reversal of this position. The post-Milosevic government accepted that the FRY was a new State, one of five successors to the SFRY. In October 2000 it applied for,

13. Opinions 9 and 10, 92 INTERNATIONAL LAW REPORTS 203, 206 (1998); 31 INTERNATIONAL LEGAL MATERIALS 1488 (1998). See Michael Wood, *Participation of Former Yugoslav States in the United Nations and in Multilateral Treaties*, 1 YEARBOOK OF UNITED NATIONS LAW 231 (1997).

14. S.C. Res. 757 (May 30, 1992), U.N. Doc. S/RES/757 (1992); S.C. Res. 777 (Sep. 19, 1992), U.N. Doc. S/RES/777 (1992); S.C. Res. 821 (Apr. 28, 1993), U.N. Doc. S/RES/821 (1993); and G.A. Res. 47/1 (Sep. 22, 1992), U.N. Doc. A/RES/47/1 (1992).

15. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.) 1996 I.C.J. 595 (Preliminary Objections) and 1997 I.C.J. 243 (Counter-claims); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Yugo.), available on the ICJ website at <http://www.icj-cij.org>. At the time this was written, the Court had not held hearings on the merits of the Bosnian case or taken any substantive decision in the Croatian case.

16. See *infra* note 56 and accompanying text.

and was admitted to, membership of the United Nations.¹⁷ On March 8, 2001, the new government deposited an instrument of accession to the Genocide Convention, which became effective ninety days later in accordance with Article XIII of the Convention. By the same instrument, the FRY entered a reservation to Article IX (the provision which confers jurisdiction on the International Court of Justice). The FRY subsequently applied to the International Court under Article 61 of the Court's Statute to re-open the jurisdiction phase of the *Bosnia* case on the grounds that the FRY had not been bound by the Genocide Convention at the relevant times and had never been bound by Article IX.¹⁸ At the time of writing, the Court had not taken any decision regarding this application.

The FRY had, however, been treated throughout the Kosovo conflict as a party to the Geneva Conventions and Protocols both by other States (including the NATO States) and by the ICRC, which sent a formal note to the FRY and the NATO member States on March 24, 1999 reminding them of their obligations under the Geneva Conventions.¹⁹

On October 16, 2001, the new government of the FRY deposited with the Swiss Federal Government a declaration regarding the Geneva Conventions and Protocols. In contrast to the position taken by the new government with regard to the Genocide Convention, however, this declaration was an instrument of succession, not accession. Moreover, it was expressly made retrospective, stating that it took effect as from April 27, 1992. Any element of doubt which might therefore have arisen regarding the status of the FRY as a party to the Geneva Conventions and Protocols is therefore removed. The new government had earlier deposited instruments of succession to a large number of multilateral conventions.

Accordingly, the Geneva Conventions were applicable to all the States involved in the conflict, while Protocol I applied as between the FRY and those NATO States which were parties to it (all of them except France, Turkey and

17. S.C. Res. 1326 (Oct. 31, 2000), U.N. Doc. S/RES/1326 (2000); G.S. Res. 55/12 (Nov. 1, 2000), U.N. Doc. A/RES/55/12 (2000).

18. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Yugo.*), Application for Revision of Judgment of 11 July 1996 (23 April 2001), available at <http://www.icj-cij.org>.

19. ICRC Press Release 99/15, Mar. 24, 1999, available at http://www.icrc.org/eng/news_by_date.

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the United States of America).²⁰ The customary law of armed conflict was also applicable.

3. The Relationship between NATO and the KLA/UCK

The second question concerns the extent to which the hostilities between the FRY and the Kosovo Liberation Army (KLA or UCK) were governed by international humanitarian law. There is little doubt that, even before the start of Operation Allied Force, an armed conflict existed in Kosovo between the FRY and the KLA/UCK. The possibility that such a conflict might exist was impliedly recognized by the Security Council as early as March 1998, when it urged the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY) “to begin gathering information relating to the violence in Kosovo that may fall within its jurisdiction.”²¹ Since the Tribunal’s jurisdiction is largely confined to crimes committed in armed conflict,²² this invitation appears to have proceeded on the basis that, at least, an armed conflict might already exist. The events of early 1999 also strongly suggested that an armed conflict existed within Kosovo.²³

At least until March 24, 1999, that conflict was of a non-international character, since it consisted of “protracted armed violence between governmental

20. France became a party to Protocol I in 2001. Peter Kovacs, *Intervention armée des forces de l’OTAN au Kosovo*, 82 INTERNATIONAL REVIEW OF THE RED CROSS 103 (2000), argues that the United States had agreed to comply with Protocol I and was therefore bound by it. This argument is unconvincing. It confuses the willingness (and, indeed, the obligation) of the United States to apply the rules of customary international law codified in some of the provisions of Protocol I with a declaration of readiness to apply the entire Protocol as such. The United States has never agreed to apply all of the provisions of Protocol I.

21. S.C. Res. 1160 ¶ 17 (Mar. 31, 1998), U.N. Doc. S/RES/1160 (1998).

22. The existence of an armed conflict is an inherent feature of grave breaches (Article 2 of the Tribunal’s Statute) and war crimes (Article 3); it is also expressly required as a condition for jurisdiction over crimes against humanity (Article 5). Only genocide (Article 4) can be prosecuted in the Tribunal without the need to demonstrate the existence of an armed conflict. The ICTY was created by the United Nations Security Council in Resolution 827 (May 25, 1993), U.N. Doc. S/RES/827 (1993). The ICTY Statute and the Secretary-General’s Commentaries are contained in the Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (May 3, 1993), U.N. Doc. S/25704, reprinted in 32 INTERNATIONAL LEGAL MATERIALS 1163, 1192 (1993).

23. See the indictment against Slobodan Milosevic and others issued by the Prosecutor on May 22, 1999 and confirmed by Judge Hunt on May 24, 1999 (IT-99-37-I). Note also the ICRC statement of January 18, 1999 regarding the massacre at Racak, which called on “both sides to comply with international humanitarian law and to spare those not, or no longer, involved in the fighting.” ICRC Press Release 99/04, Jan. 18, 1999, available at the ICRC website, *supra* note 19.

authorities and organized armed groups . . . within a State.”²⁴ As such, it was governed by the provisions of common Article 3 and the customary law applicable to non-international conflicts.²⁵ Although the KLA/UCK has at times claimed to be a national liberation movement, so that its struggle for self-determination would constitute an international armed conflict under Article 1(4) of Protocol I, that claim has not been accepted by the international community.²⁶

The question is whether the intervention of NATO on March 24, 1999 “internationalized” that conflict, so that all the hostilities became subject to the law applicable to international armed conflicts considered above. The ICTY has recognized, in its two decisions in the *Tadic* case,²⁷ that an international armed conflict can co-exist alongside a non-international one and that the latter will be internationalized only if there is a clear relationship between the non-governmental party to that conflict and one of the States party to the international conflict. While the reasoning of the Appeals Chamber on the nature of that relationship is open to criticism, the requirement that some kind of relationship exist is surely right—the mere fact that a conflict between States comes into being alongside a conflict within one of those States cannot, in and of itself, be sufficient to make the law of international armed conflicts applicable to the latter. At least until the end of May 1999, however, NATO kept its distance from the KLA/UCK and even after that time it is far from clear that the relations between them were sufficiently close for the conflict

24. The definition of a non-international armed conflict given by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in *Tadic*, *supra* note 7, ¶ 70.

25. It is more doubtful whether Protocol II applied. Until the closing stages of the fighting, it is unclear whether the KLA/UCK exercised sufficient control over a defined area of territory to meet the requirements of Article 1(1) of Protocol II. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Jun. 8, 1977, 1125 U.N.T.S. 609, DOCUMENTS ON THE LAWS OF WAR, *supra* note 11, at 483 [hereinafter Protocol II].

26. It is noticeable, for example, that none of the NATO States argued that the KLA/UCK was a national liberation movement or that the population of Kosovo had a right to self-determination, nor is such a view reflected in the various UN Security Council resolutions regarding Kosovo. The Prosecutor has not charged Slobodan Milosevic with grave breaches under Article 2 of the ICTY Statute—the only offense within the jurisdiction of the Tribunal which can only be committed in an international armed conflict (*Tadic*, *supra* note 7)—in respect of Kosovo, even though some of the incidents in Kosovo in early 1999 (such as the massacre of forty-five villagers at Racak on January 15, 1999 (U.N. Doc. S/PRST/1999/2)) would appear to have qualified as a grave breach had there been an international conflict.

27. Prosecutor v. *Tadic* (Jurisdiction) (2 October 1995), 105 INTERNATIONAL LAW REVIEW 419 (1997); Prosecutor v. *Tadic* (Merits), 38 INTERNATIONAL LEGAL MATERIALS 1518 (1999).

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between the KLA/UCK and the FRY to be regarded as part of the international armed conflict, rather than a separate internal conflict governed by a different set of rules.²⁸

Application of International Humanitarian Law in the Kosovo Conflict

The preceding discussion leads to the conclusion that the law of international armed conflicts (both the customary law and that contained in the relevant treaties) was applicable to the Kosovo conflict. Since it is a well established principle that international humanitarian law applies equally to both sides in a conflict, irrespective of the lawfulness of the resort to force or the purpose for which force is used, it should follow that there was nothing special about the application of international humanitarian law in the Kosovo campaign.²⁹

That means, in particular, that the two main principles of targeting—distinction and proportionality—were applicable throughout. While these principles are discussed in greater detail in other papers in the present volume, it is useful to recall the way in which they are formulated in Protocol I, which is generally regarded as stating the customary law on the subject. The principle of distinction is evident throughout Articles 48 to 58 of the Protocol but three provisions are particularly important:

Article 48

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

Article 51(2)

The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

28. On the subject of prisoners captured by the KLA and handed over to NATO forces, see *infra* this paper.

29. The principle of equal application is clearly stated in the *List* case, *supra* note 11, and was more recently reaffirmed in the Preamble to Protocol I, *supra* note 11.

Article 52(2)

Attacks shall be strictly limited to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

The principle of proportionality is succinctly stated in Article 51(5)(b), which prohibits “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

Two very different schools of thought have suggested that the purpose of the NATO intervention and the unusual character of the conflict meant that the rules of international humanitarian law—and, in particular, these rules of distinction and proportionality—were to be applied in a manner different from that in other recent conflicts such as the 1990–91 hostilities in the Gulf.

The purpose for which NATO employed force—to halt the attacks on the Kosovars and to reverse the effects of ethnic cleansing in Kosovo—has already been considered. The unusual character of the conflict may be said to have manifested itself in two ways. First, for most of the period of Operation Allied Force, the ability of the NATO States directly to influence events on the ground in Kosovo was very limited. With no ground forces available for immediate deployment, they were obliged to rely on air power and their ability to strike effectively at the FRY forces engaged in the process of ethnic cleansing in Kosovo was limited, at least until the closing stages of the conflict. Instead, their strategy was to attack targets throughout much of the FRY in order to bring about a change of policy on the part of the FRY government.

Secondly, while the FRY’s anti-aircraft defenses continued to attack NATO aircraft throughout the conflict, the FRY did not attack the territory of any of the NATO States, nor, apart from the capture of a US patrol on the border between the FRY and Macedonia, did it conduct any operations against NATO forces anywhere outside the FRY. The result was that the conflict was exceptionally one-sided—in contrast, for example, to the Gulf conflict, where Iraq launched missile attacks against Saudi Arabia and other coalition States, as well as against Israel.

The purpose for which NATO resorted to force and these unusual characteristics of the conflict have led to two very different theories, each of which suggests a departure from the normal principles of the law of armed conflict

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and each of which, in this writer's view, is a heresy which demands emphatic rejection.

The first of these heresies is that NATO's motives and the manner in which it was obliged to fight the conflict permitted it a greater latitude in choosing the targets which it would attack than would otherwise be the case. In particular, since the purpose of the bombing campaign was not to defeat the FRY armed forces (in the normal sense of that term, i.e., by successfully engaging them in battle) but to produce a change of policy on the part of the FRY Government, objects whose destruction was particularly likely to increase the pressure on the FRY Government were legitimate targets in this conflict irrespective of whether they fell within the definition of military objectives codified in Article 52(2) of Protocol I. An important part of this thesis is that attacks carried out in order to undermine support amongst the enemy civilian population for the policy of its government would be lawful.

Tempting though such an approach may be, it is difficult to reconcile with contemporary international humanitarian law. As demonstrated above, the principle that the enemy civilian population and individual civilians are not themselves legitimate targets is now clearly established in that law.³⁰ Moreover, the definition of a military objective requires both that the object in question make an effective contribution to the enemy's *military* action and that the destruction or damage of the object offers a definite *military* advantage to the State whose forces attack it.³¹ Nothing in any of the treaties on the law of armed conflict or the practice of States suggests that a State's motives or the fact that it seeks to procure a change in its adversary's policy rather than that adversary's total defeat can expand the range of targets which is lawfully open to it. It follows that an object does not become a target simply because of its political significance or the effect which its destruction is likely to have on civilian morale and support for a hostile government. Only something which meets the criteria of a military objective laid down by international humanitarian law may lawfully be attacked.

That does not mean that the political effect (including the effect on enemy morale) of attacking a particular target cannot legitimately be taken into consideration. Provided that the target constitutes a military objective and the

30. See, e.g., the provision to that effect in Protocol I, Articles 48, 50 and 51(2), *supra* note 11, and the statement in ¶ 8.1.2 of Naval Doctrine Command, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (NWP 1-14M/MCWP 5-2.1/COMDTPUB P5800.1) (1995), reprinted in the ANNOTATED SUPPLEMENT, *supra* note 8, at 403.

31. Protocol I, Article 52(2), *supra* note 11, at 450; COMMANDER'S HANDBOOK, *supra* note 30, ¶ 8.1.1 (the wording of which is slightly different).

principle of proportionality contained in humanitarian law is respected,³² it is entirely legitimate to seek to undermine the will of and support for the enemy's government. But the desire to achieve that goal cannot convert into a lawful target something which does not otherwise meet those criteria. It is noteworthy that none of the NATO governments suggested otherwise.³³

The rival heresy is that, because the campaign was fought for a humanitarian objective, international humanitarian law has to be interpreted as imposing upon NATO more extensive restrictions than would otherwise have been the case. Such an approach is apparent in the report of the Independent International Commission on Kosovo (an unofficial body of non-governmental commentators established at the initiative of the Prime Minister of Sweden). As part of what it describes as a "Framework for Principled Humanitarian Intervention," the Report proposes that in cases of humanitarian intervention "there must be even stricter adherence to the laws of war and international humanitarian law than in standard military operations."³⁴

This suggestion (which is admittedly made *de lege ferenda*) is open to criticism on at least three grounds. First, there is something distinctly woolly-minded about the whole idea. The Report does not appear to suggest that the rules of international humanitarian law applicable to a force engaging in humanitarian intervention should differ from those applicable to forces engaged in other military operations, but rather that those rules should be more strictly applied. Yet the idea that the law can prescribe the same rules for all types of military operations but require a higher standard of adherence in some cases than in others is untenable. International humanitarian law requires that, whenever it applies, it should be complied with. One violation may, of course, be less serious than another and, as a matter of fact, one force may have a better record of compliance than another. It is, however, illogical and contrary to principle to say that the law requires one party to comply with all of the rules which are binding upon it but requires another party—albeit bound by all of the same rules—to comply only with some, or to comply with all but to a lesser degree. In reality what the Commission is proposing is that different—and stricter—rules should apply to a State which resorts to force by way

32. See Protocol I, Article 51(5)(b), *supra* note 11, at 448–9; COMMANDER'S HANDBOOK, *supra* note 30, ¶ 8.1.2.1.

33. See also the article by James Burger, *International Humanitarian Law and the Kosovo Crisis: Lessons Learned or to be Learned*, 82 INTERNATIONAL REVIEW OF THE RED CROSS 129, 131–2 (2000).

34. INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT 195 (2000); see also page 179.

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of humanitarian intervention than to one which resorts to force for any other purpose. But the Commission's proposal begs many questions about which rules are involved and what degree of modification might be involved.

Secondly, whichever way the Commission's suggestion is put, it would have the effect of driving a coach and horses through the principle that international humanitarian law applies equally to both sides in any conflict, without regard to the cause which they espouse or the legality of their action under the *jus ad bellum*. A State whose forces were resisting humanitarian intervention by another State or group of States would, presumably, be required to comply with the normal rules of international humanitarian law (or to display the normally required degree of adherence). It would therefore be entitled to a greater degree of latitude than its opponent. The implications of the Commission's proposal in this respect are concealed by the unusual circumstances of the Kosovo conflict. As has already been noted, the FRY did not respond by force against the NATO States (other than by the use of anti-aircraft fire) and did not attack the NATO States themselves. It would be naive, however, to assume that the same conditions will necessarily apply in any future humanitarian intervention. Indeed, had NATO proceeded to a ground campaign, it would not have been the case in the Kosovo conflict, as the FRY could, and almost certainly would, have put up a strenuous resistance to NATO ground forces.

Thirdly, the effect of the Commission's suggestion would be that international humanitarian law would impose greater constraints on a State engaging in humanitarian intervention than on a State which acted in self-defense or even one which invaded a neighbor in clear violation of Article 2(4) of the United Nations Charter. It is not immediately obvious why an aggressor should be subject to less rigorous rules in respect, for example, of targeting than a State which intervenes to prevent genocide or other large-scale violations of human rights.

A more sophisticated suggestion is canvassed by Professor Bothe in a critique of the Report to the Prosecutor.³⁵ After examining the Report's findings regarding the NATO campaign, Professor Bothe states:

Both in relation to the question of the definition of the military objective and in relation to the proportionality principle, the report fails to raise yet another fundamental question. Do traditional considerations of military necessity and

35. Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 39 INTERNATIONAL LEGAL MATERIALS 1257 (2000), *reprinted* herein as Appendix A [hereinafter Report to the Prosecutor]. The Report is discussed *infra* this paper.

military advantage have a legitimate place in a conflict the declared purpose of which is a humanitarian one, namely to promote the cause of human rights? The thought would deserve further consideration that in such a conflict, more severe restraints would be imposed on the choice of military targets and of the balancing test applied for the purposes of the proportionality principle than in a 'normal' armed conflict.³⁶

The reasoning which seems to underlie this proposal can be summarized as follows: humanitarian intervention, in so far as it justifies military action at all, does so only for strictly limited purposes. It follows that only military action which serves those limited purposes is legitimate and the traditional considerations of military advantage and military necessity must be adapted (and circumscribed) accordingly. In effect, it requires reading the definition of a military objective codified in Article 52(2) of Protocol I and the statement of the proportionality principle in Article 51(5)(b) as though they referred to a *legitimate* military advantage.

Professor Bothe's approach³⁷ avoids the first objection raised in relation to the Kosovo Commission proposals but it still falls foul of the other two objections and must therefore be rejected. As soon as one qualifies the concept of military advantage (or military necessity) by reference to considerations of legitimacy drawn from the purpose for which a party resorts to force, the *jus ad bellum* and the *jus in bello* become inextricably mixed and the principle of equal application of international humanitarian law is fatally compromised. If a State, whose resort to force is in *jus ad bellum* terms lawful only for strictly limited purposes, violates the *jus in bello* whenever it attacks a target whose destruction will not contribute to the achievement of those purposes, it follows that a State whose resort to force is unlawful under the *jus ad bellum* will violate the *jus in bello* whenever it targets anything. Yet that is precisely the argument which was advanced and comprehensively rejected both in the trials at the end of World War Two and in the negotiation of Protocol I.

The difficulties, both practical and theoretical, of such an approach are obvious when one asks what standards would have been applicable to attacks by the FRY on targets in the NATO States had such attacks been carried out during the Kosovo conflict. The FRY was plainly not acting by way of humanitarian intervention. Would its actions therefore have been judged by

36. Michael Bothe, *The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on the Report to the Prosecutor of the ICTY*, 12 EUROPEAN JOURNAL OF INTERNATIONAL LAW 531, 535 (2001).

37. See the papers by Professors Bothe and Bring in the present volume.

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reference to the modified *jus in bello* considered to apply to a humanitarian intervention or would they have been subject to the *jus in bello* applicable in a “normal” armed conflict? Neither answer would be at all satisfactory, for the first treats the FRY as engaged in an activity which was entirely alien to it while the second would mean that the FRY would enjoy greater latitude in targeting than the NATO States for no apparent reason. It is only because the circumstances of the Kosovo conflict were such that the FRY was not, in practice, able to attack the NATO States that these difficulties were obscured.

That is not to say that the legal basis for resort to force has no bearing on the manner in which that force may be used. As the statement by the United Kingdom Representative, quoted in Part I above, makes clear, the force used in humanitarian intervention has to be necessary in order to achieve the goal of ending (or preventing) the humanitarian emergency. In other words, the purpose for which force is permitted under the *jus ad bellum*—in the case of Kosovo, a humanitarian purpose—limits the degree of force which may be used. However, this recognition of the relationship between the degree of force used and the goal to be achieved is different from the suggestion advanced by Professor Bothe in two important respects.

First, considerations of necessity and proportionality here operate as part of the *jus ad bellum*, not the *jus in bello*. This is much more than a theoretical distinction and has important practical consequences. It leaves intact the *jus in bello* definition of what constitutes a military objective and such concepts as military necessity and proportionality for the purposes of Article 51(5)(b). The proportionality limitation in the *jus ad bellum* measures the use of force *as a whole* against the yardstick of what is proportionate to the *overall* goal to be achieved; it does not require analysis of each individual attack by reference to that overall goal. Moreover, the limits of the *jus ad bellum*, unlike those of the *jus in bello*, do not carry with them the possibility of criminal sanctions for individual servicemen. Secondly, a requirement that the force used must be proportionate to the goal to be achieved is not confined to humanitarian intervention. Proportionality in this sense is also a requirement of the law of self-defense.³⁸

38. See, e.g., the decision of the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 194 (June 27); this principle was common ground between the United States of America and Nicaragua. For further discussion of the principle of proportionality in self-defense and its relationship to the *jus in bello*, see Christopher Greenwood, *The Relationship Between Jus ad Bellum and Jus in Bello*, 9 REVIEW OF INTERNATIONAL STUDIES 221–34 (1983) and *Self-Defence and the Conduct of International Armed Conflict*, in *INTERNATIONAL LAW AT A TIME OF PERPLEXITY* 273–88 (Yoram Dinstein ed., 1989).

Both of the “heretical” views considered here are the product of understandable (though largely contradictory) concerns but they involve an unjustified muddling of *jus ad bellum* and *jus in bello* issues in a way which is contrary to principle and unsupported by authority. In this writer’s view, the true position can be stated very simply: the NATO States and the FRY were bound to comply with the relevant rules of international humanitarian law in this conflict, as they would have been in any other—nothing more or less.

Prisoners of War

Issues concerning prisoners of war arose in two contexts during the Kosovo conflict. First, three US soldiers serving with the multinational peacekeeping force in the Former Yugoslav Republic of Macedonia (FYROM) were captured by FRY forces on March 31, 1999. Secondly, two members of the FRY forces captured by the KLA/UCK were subsequently handed over to United States forces who held them for a short period. Both cases gave rise to a degree of confusion about the status of the prisoners, which is surprising in view of the clarity of the Third Geneva Convention. In both cases the status of those concerned as prisoners of war entitled to the full protection of the Convention should never have been in doubt.

At the time of their capture, the three US soldiers were serving in a multinational peacekeeping force in the FYROM. That force had originally been a United Nations one (UN Preventative Deployment Force (UNPREDEP)) but in February 1999 the People’s Republic of China had vetoed the Security Council resolution required to renew the mandate of UNPREDEP, because of the FYROM’s diplomatic links with Taiwan. The contingents which had composed UNPREDEP had remained in the FYROM at the request of its government and had reconstituted themselves as a multinational force outside United Nations control. At the time of their capture, the three US soldiers were not involved in the military operations against the FRY and were conducting a patrol as part of the multinational force’s operations. There was some doubt as to whether at the time of their capture they had inadvertently strayed into the FRY or whether they were captured in the territory of the FYROM.

Neither their membership in the multinational force nor the place of their capture, however, affects their status. Under Article 4A(1) of the Third Convention, members of the armed forces of a party to the conflict who have “fallen into the power of the enemy” automatically have the status of prisoners of war. The three US servicemen were undoubtedly members of the US armed

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forces and the United States was clearly a party to an armed conflict with the FRY at the time of their capture. Moreover, it is difficult to think of words more apt to describe what happened to the three than that they had “fallen into the power of the enemy.” Nothing in the Convention, or the subsequent practice in its interpretation leaves any room for excluding them on the ground that they were not involved in the conflict itself or that they were members of a non-United Nations peacekeeping force.

Nor would their status be affected by the fact that they were captured in the FYROM. Whether the FYROM was, strictly speaking, a neutral State is a controversial question but even if it was, the place of their capture does not affect the applicability of the Convention. If the FYROM was properly regarded as a neutral State, then the FRY incursion into its territory which resulted in the capture of the three would have been unlawful but the status of prisoner of war is made contingent on the fact of being in the hands of an enemy, not the legality of the means by which that was accomplished.

In these circumstances, it is surprising and disturbing that there was ever any doubt about the status of the three captured soldiers. James Burger has commented that “[s]ome persons thought initially that it would be better to assert that the captured soldiers were illegal detainees, allowing the United States to demand their immediate release, rather than waiting until the end of active hostilities”³⁹ but that the United States instead took the position that the men were prisoners of war, which he describes as “the right decision.” It was certainly that but the point needs to be emphasized that the status of the three as prisoners of war was an automatic consequence of the fact that they met the requirements of the Convention, not the result of a policy choice. The status of a detainee as a prisoner of war is not something dependent upon the choice of either his or her own State or the detaining power. The initial uncertainty may have contributed to the refusal by the FRY to allow access by the ICRC to the three until more than three weeks after their capture, a clear breach of the Convention.⁴⁰

In passing, it should be noted that, had the force in which the three men been serving remained a United Nations peacekeeping force, then the answer would probably have been different. In principle, when a national unit is assigned to the United Nations for a mission under United Nations command—i.e., a “blue beret” operation—the members of the unit are, for the

39. Burger, *supra* note 33, at 136.

40. ICRC Press Releases 99/21, Apr. 23, 1999 (protesting lack of access) and 99/25, Apr. 27, 1999 (recording a visit by the ICRC to the three men) available at ICRC website, *supra* note 19.

duration of their assignment and at least as long as they do not act outside the scope of the United Nations mandate (e.g., by engaging in surveillance activities unauthorized by the United Nations), to be considered as United Nations personnel, not members of the armed forces of their own State. In those circumstances, they would be protected by the provisions of the Convention on the Safety of United Nations and Associated Personnel of 1994, assuming that the States concerned were parties, or the Convention on Privileges and Immunities of 1946.

The position of the FRY soldiers captured by the KLA/UCK is also straightforward, at least once they came into the custody of the United States. Assuming that, at the time of their capture, the conflict between the KLA/UCK and the FRY was still an internal conflict (a matter considered above), the captured soldiers did not become prisoners of war when they fell into the hands of the KLA/UCK, as that status does not apply to prisoners in internal conflicts. Nevertheless, once they were transferred to the custody of a State which was engaged in an international armed conflict against their own State, they fulfilled the requirements of Article 4A(1) of the Third Convention and were thus entitled to treatment as prisoners of war. It appears that they were treated as such throughout the time they were held by the United States and access by the ICRC was allowed in accordance with the Convention.⁴¹

The Naval Embargo

By contrast, the naval operations against the FRY gave rise to more serious legal questions. The focus of discussion was the proposal—in fact never implemented—that the considerable naval forces available in the Adriatic should prevent shipments of oil to the FRY, even where the oil was being carried by ships flying the flag of States not involved in the conflict. There was obviously no obstacle in international law to the NATO States preventing ships flying their own flags from engaging in this trade.⁴² Nor was there any such obstacle where the flag State, though not a member of NATO, consented to NATO warships intercepting its vessels, as a number of States did. The question which gave rise to difficulty was whether NATO could lawfully intercept and

41. See ICRC Press Releases 99/20, Apr. 18, 1999 and 99/29, May 18, 1999; available at ICRC website, *supra* note 19.

42. Whether the national laws of the States concerned permitted such action is another matter and one which falls outside the scope of this study.

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divert ships flying the flag of a neutral State which did not consent to such action, such as Russian merchant ships.

The problem was, in part, of a political, rather than a legal, character. There was an understandable desire on the part of NATO not to risk an escalation of the conflict or further to embitter their relations with Russia. A further political complication was that the FRY's only port, Bar, was in Montenegro, not Serbia. Throughout the conflict, the Government of Montenegro sought to distance itself to the greatest extent possible from the actions of the FRY Federal Government and the Government of Serbia. While Montenegro, as part of the FRY, could not be regarded as a neutral in the legal sense of the term, it nevertheless sought something akin to a neutral status in political terms. NATO, although it bombed some targets in Montenegro, wished to bolster the position of the Montenegro Government and thus to minimize military action against Montenegro.

By contrast, international law appeared to present few problems. Although the matter is not entirely free of controversy, the general view is that the customary international law of armed conflict still permits a State engaged in an international armed conflict to prevent strategic commodities such as oil from reaching its opponent by sea, even if carried in neutral flagged vessels. The majority view is that that can be done either by the imposition of a blockade⁴³ or by less drastic measures of visit, search and capture designed to prevent the flow of contraband to an enemy.⁴⁴ Since the NATO States were engaged in an armed conflict with the FRY, the imposition of an oil embargo (with or without a general blockade) would, in principle, have been compatible with the *jus in bello*.

It would, however, be wrong to dismiss the doubts about the proposed embargo as having no legal basis. Two different legal issues need to be considered. First, in order to be lawful an oil embargo would have had to comply not only with the *jus in bello* but also with the *jus ad bellum*. A blockade of Saudi Arabia by the Iraqi navy (had that been possible) during the 1990–91 Gulf conflict might well have complied with the requirements of the *jus in bello* but it would nevertheless have been unlawful, because the entire Iraqi resort to force contravened the *jus ad bellum*. The need to comply with the *jus ad bellum* is particularly important when the measures in question are taken against

43. See, e.g., COMMANDER'S HANDBOOK, *supra* note 30, ¶ 7.7; SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA ¶¶ 93–104 (Louise Doswald-Beck ed., 1995).

44. COMMANDER'S HANDBOOK, *supra* note 30, ¶ 7.4.1; SAN REMO MANUAL, *supra* note 43, ¶¶ 146–152.

neutral States. An oil embargo of the FRY would have involved enforcing restrictions on the exercise by the shipping of neutral States of the normal rights of freedom of navigation under international law. Accordingly, while it is necessary to show that those restrictions were compatible with the *jus in bello*, it is not sufficient to do so; they must also be within the limits of the *jus ad bellum*.

The uncertainty about the possible imposition of an oil embargo was therefore, for many, the reflection of their uncertainty about whether NATO had a solid legal justification for resorting to force at all. In addition, even if international law does recognize a right to use force by way of humanitarian intervention, it is still necessary to ask whether that extends to the exercise of belligerent rights over the shipping of neutral States. As was made clear earlier in this paper, the present writer is firmly of the view that there is a right of humanitarian intervention in an extreme case. Moreover, if international law permits States to use force in such a case against the State responsible for the humanitarian crisis, then it is logical that it should also permit the taking of action which is both necessary and proportionate against neutral shipping to prevent that State from acquiring supplies needed to continue its human rights abuses or resist attempts to prevent them. But it is in considerations of this kind, and not just in references to the traditional rights of belligerents at sea, that the justification for an oil embargo needed to be found.

Secondly, both the *jus ad bellum* and the *jus in bello* require that action taken against neutral shipping be necessary and proportionate. In view of the limited port facilities at Bar, the difficulty of moving oil from the port to the rest of the FRY and the relative ease with which the NATO States could have disrupted links between Bar and the rest of the FRY, it is questionable whether interference with neutral shipping was really necessary on the facts of the case.

The Military Presence in Kosovo after June 10, 1999

On June 10, 1999 the NATO airstrikes were suspended and active hostilities came to an end. The FRY Government accepted the principles on a settlement presented to it by the European Union envoy, Mr Ahtisaari, and the Russian Federation envoy, Mr Chernomyrdin, on June 2, 1999, themselves based on an earlier set of principles laid down by the G-8 foreign ministers.⁴⁵ On June 9, 1999, a military technical agreement was concluded between NATO and FRY commanders. United Nations Security Council Resolution

45. Annexes 1 and 2 to S.C. Res. 1244 (June 10, 1999), U.N. Doc. S/RES/1244 (1999).

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1244, adopted under Chapter VII of the Charter on June 10, 1999 approved these steps. The resolution went on, in paragraph 7, to authorize “member States and relevant international organizations to establish the international security presence in Kosovo . . . with all necessary means to fulfill its responsibilities.” The responsibilities of KFOR, as the security presence became known, were set out in paragraph 9 of the resolution as follows:

- (a) Deterring renewed hostilities, maintaining and where necessary enforcing a ceasefire, and ensuring the withdrawal and preventing the return into Kosovo of Federal and Republic military, police and paramilitary forces, except as provided in point 6 of annex 2;
- (b) Demilitarising the Kosovo Liberation Army (KLA) and other armed Kosovo Albanian groups;
- (c) Establishing a secure environment in which refugees and displaced persons can return home in safety, the international civil presence can operate, a transitional administration can be established, and humanitarian aid can be delivered;
- (d) Ensuring public safety and order until the international civil presence can take responsibility for this task;
- (e) Supervising demining until the international civil presence can, as appropriate, take over responsibility for this task;
- (f) Supporting, as appropriate, and coordinating closely with the work of the international civil presence;
- (g) Conducting border monitoring duties as required;
- (h) Ensuring the protection and freedom of movement of itself, the international civil presence, and other international organisations.

Although NATO was not expressly mentioned, the reference in paragraph 7 to “relevant international organizations” was clearly intended to mean NATO and KFOR was, from the start, largely NATO-led. While KFOR derived its legal authority from the Security Council, it was not a United Nations force and was not subject to United Nations command and control.

By contrast, the international civil presence, UNMIK, was a United Nations body, created and controlled by the United Nations. It is worthwhile noting UNMIK’s terms of reference. Paragraph 10 of Resolution 1244 authorized the United Nations Secretary-General, with the assistance of relevant international organizations (a reference not confined to NATO) to establish a civil presence:

[I]n order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.

Under paragraph 11, the responsibilities given to the international civil presence were:

- (a) Promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords (S/1999/648);
- (b) Performing basic civilian administrative functions where and as long as required;
- (c) Organising and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections;
- (d) Transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo's local provisional institutions and other peace-building activities;
- (e) Facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords (S/1999/648);
- (f) In a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement;
- (g) Supporting the reconstruction of key infrastructure and other economic reconstruction;
- (h) Supporting, in coordination with international humanitarian organisations, humanitarian and disaster relief aid;
- (i) Maintaining civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo;
- (j) Protecting and promoting human rights;
- (k) Assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo.

Resolution 1244 (1999) is of the utmost importance. By using its powers under Chapter VII of the Charter to create a civilian administration for

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Kosovo and to authorize an international military presence there, the Security Council ensured that Kosovo did not fall under a regime which was subject to the law of belligerent occupation. Whatever the doubts regarding the applicability of international humanitarian law to United Nations military operations generally,⁴⁶ the United Nations is not bound by the basic framework of the law of belligerent occupation (in particular, the duty codified in Article 43 of the Hague Regulations on Land Warfare to respect “unless absolutely prevented” the law in force in the occupied territory) where it establishes a new administration for a territory after a conflict. To hold otherwise would place a wholly unreasonable fetter on the power of the Council to provide for political change in territories such as Kosovo and East Timor. Resolution 1244 has to be seen as an exercise of that power and the legal regime governing both the security and civil presences is derived primarily from that Resolution, not from the law of belligerent occupation.⁴⁷ That said, individual principles of the law of belligerent occupation, such as those requiring humane treatment of detainees, would be applicable.

International Proceedings Relating to the Kosovo Conflict

One of the unusual features of the Kosovo conflict was the extent to which the military operations became the subject of scrutiny by international courts and tribunals. Three different tribunals have considered different aspects of the Kosovo conflict (and, at the time of writing, proceedings were continuing in two of them). While space does not permit a detailed analysis of these proceedings, it is nonetheless important briefly to consider each of them.

1. The International Criminal Tribunal for the former Yugoslavia

International humanitarian law has long expressly provided for its enforcement through criminal proceedings against individuals. Nevertheless, while the grave breaches machinery established by the Geneva Conventions and

46. On which, see the *Observance by United Nations forces of international humanitarian law*, Secretary-General's Bulletin, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999), reprinted in 2 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 563 (1999); Christopher Greenwood, *International Humanitarian Law and United Nations Military Operations*, 1 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 3-34 (1998).

47. For a contrary view, see John Cerone, *Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo*, 12 EUROPEAN JOURNAL OF INTERNATIONAL LAW 469 (2001).

Protocol I⁴⁸ requires States to take action in cases of grave breaches and to bring offenders to justice irrespective of nationality, proceedings of this kind have in fact been almost unknown. In the case of Kosovo, however, there was already in existence an international tribunal able to exercise criminal jurisdiction. The ICTY, which was established by United Nations Security Council Resolution 827 (1993), had “the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”⁴⁹ Although drawn up with the conflicts in Bosnia-Herzegovina and Croatia in the early 1990’s in mind, the Statute was not limited to those conflicts and was clearly applicable to events in Kosovo (as the Security Council recognized in Resolutions 1160 and 1199 (1998)).

The attacks by the FRY armed forces and police on the majority community in Kosovo led to the indictment, on May 22, 1999, by the ICTY Prosecutor of the then FRY President, Slobodan Milosevic, and a number of other prominent political and military figures on charges of war crimes and crimes against humanity.⁵⁰ While this indictment was dismissed as a political gesture by Milosevic at the time, the new government of the FRY surrendered him to the custody of the Tribunal in 2001. At the time of writing, Milosevic was standing trial on these and other charges.

The Prosecutor also considered that the ICTY had jurisdiction over any serious violations of humanitarian law which might have occurred in the NATO air campaign. Although her stance in this regard attracted some criticism in political circles, it was plainly correct. The ICTY’s jurisdiction under Article 1 of its Statute is confined to the territory of the former Yugoslavia but it is not limited to offenses committed there by Yugoslavs and clearly extends to offenses by NATO personnel. The Prosecutor established a committee to inquire into various allegations that NATO forces had violated international humanitarian law and to advise whether there was “a sufficient basis to proceed with an investigation into some or all of the allegations or into other incidents related to the NATO bombing.”⁵¹ The committee concluded

48. See Geneva I (Article 49), Geneva II (Article 50), Geneva III (Article 129), and Geneva IV (Article 146), *supra* note 12. See also Protocol I (Article 85), *supra* note 11.

49. Statute of the Tribunal, Article 1, *supra* note 22.

50. The indictment is *available on* the ICTY website at <http://www.un.org/icty/indictment/english/mil-ii990524e.htm>. On May 24, 1999, Judge Hunt confirmed the indictment, Case No. IT-99-37-I.

51. Report to the Prosecutor, Appendix A, ¶ 3.

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that no investigation should be commenced.⁵² The Prosecutor accepted that recommendation and told the Security Council that:

[T]here is no basis for opening an investigation into any of those allegations or into other incidents related to the NATO bombing. Although some mistakes were made by NATO, I am very satisfied that there was no deliberate targeting of civilians or of unlawful military targets by NATO during the bombing campaign.⁵³

The committee's report and the conclusions drawn by the Prosecutor have attracted much criticism. Most of that criticism has come from those who wanted to see charges brought against members of the NATO armed forces and who accused the committee of adopting too lenient a stance in its appraisal of the NATO actions.⁵⁴ More surprisingly, however, others have criticized the committee for subjecting decisions taken in the heat of the moment and sometimes in conditions of considerable danger to too close and detached a scrutiny.⁵⁵ In the opinion of this writer, both criticisms are misconceived. The report suggests neither undue leniency nor an excessive dose of hindsight. While scrutiny of military decisions with a view to prosecution is never a comfortable experience for those who might be the subject of charges, it is what the Geneva Conventions and Protocol I envisage and what has been applied to non-NATO defendants by the ICTY for several years. What the report shows is that armed forces today cannot expect to be immune from the kind of legal scrutiny—seeking to apply rules which have long been binding on all States—which has become commonplace in other walks of life. It also shows that a body like the committee established by the Prosecutor of the ICTY is capable of applying those rules in a fair and sensible manner.

2. The International Court of Justice

The NATO air campaign was also the subject of proceedings instituted by the FRY before the International Court of Justice against ten of the NATO

52. *Id.*, ¶ 91.

53. United Nations Security Council 4150th Meeting; S/PV.4150, at 3, col. 1.

54. See, e.g., Paolo Benvenuti, *The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia*, 12 EUROPEAN JOURNAL OF INTERNATIONAL LAW 503 (2001) and, for more moderate criticism, see the article by Professor Bothe, *supra* note 36.

55. See the Commentary by Judith Miller in the present volume.

States while the campaign was in progress.⁵⁶ The FRY maintained both that the NATO resort to force was a violation of the principles of *jus ad bellum* enshrined in the United Nations Charter and that the conduct of the campaign violated obligations contained in a wide variety of treaties ranging from the Geneva Conventions to the Convention on Navigation on the River Danube. In each case the FRY sought provisional measures in the form of an order that the respondent State should immediately cease military action against the FRY pending the hearing of the merits. In order to obtain provisional measures, however, an applicant must demonstrate the existence of a *prima facie* basis for jurisdiction on the merits. The Court held, by large majorities, that the FRY had failed to satisfy this threshold requirement.

The result is scarcely surprising. None of the treaties which were the basis for the FRY's substantive claim contain provisions conferring jurisdiction on the International Court and the two bases for jurisdiction advanced by the FRY⁵⁷—Article IX of the Genocide Convention of 1948 (which was invoked against all the respondents) and Article 36(2) of the Statute of the Court, the so-called “Optional Clause” (which was invoked against six out of the ten)—were rightly rejected by the Court.

Even assuming that the FRY was a party to the Genocide Convention, a position which it has subsequently repudiated, Article IX manifestly offered no basis for jurisdiction against Spain and the United States of America, both of which had entered reservations rejecting the application of that provision when they became party to the Convention. Moreover, Article IX confers jurisdiction only with regard to a dispute “relating to the interpretation,

56. Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom and the United States of America. The Orders of the Court refusing the FRY's request for provisional measures of protection and ordering the removal of the cases against Spain and the United States of America from the Court's list are each reported under the title *Case concerning Legality of Use of Force*, 1999 I.C.J. 124 (Belgium), 259 (Canada), 363 (France), 422 (Germany), 481 (Italy), 542 (the Netherlands), 656 (Portugal), 761 (Spain), 826 (United Kingdom) and 916 (United States of America). At the time of writing, the cases against the respondents, other than Spain and the United States of America, were still before the Court. The eight remaining respondents have all objected to the jurisdiction of the Court and the admissibility of the applications. The writer acted as counsel for the United Kingdom in these proceedings; the present paper represents his personal views.

57. In the cases against Belgium and the Netherlands, the FRY also attempted at a late stage to rely upon a bilateral treaty. The Court held that this treaty had been invoked too late in the proceedings; see, e.g., *Case concerning Legality of Use of Force* (FRY v. Belgium), 1999 I.C.J. 124 (Jun. 2) (Order—Request for the Indication of Provisional Measures), ¶ 44.

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application or fulfillment” of the Genocide Convention. Not surprisingly, the Court held that:

[T]he essential characteristic [of genocide] is the intended destruction of a ‘national, ethnical, racial or religious group’ (*Application of the Convention on the Prevention and Punishment of Genocide, Provisional Measures Order of 13 September 1993*, ICJ Reports 1993, p. 345, para. 42); . . . the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention; and . . . in the opinion of the Court, it does not appear at the present stage of the proceedings that the bombings which form the subject of the Yugoslav Application ‘indeed entail the element of intent, towards a group as such, required by [Article II]’ (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports, 1996 (I), p. 240, para. 26).⁵⁸

In effect, the FRY was seeking to use Article IX of the Genocide Convention as a device to establish jurisdiction over complaints relating to quite different agreements. The FRY’s interpretation of the Genocide Convention would have entailed watering down the crime of genocide to the point that it was deprived of its separate identity as the most serious of international crimes.

The other provision relied on by the FRY—Article 36(2) of the Statute of the Court—could afford jurisdiction only in the event that both the FRY and the respondent State in question had each made a valid declaration accepting the Court’s jurisdiction under that provision and the dispute fell within the scope of both declarations. The FRY had purported to make a declaration under Article 36(2) on April 25, 1999 (a month after the commencement of the NATO campaign and three days before the FRY filed its applications against the respondent States). It then sought to rely upon that declaration as a basis for jurisdiction in the proceedings against those respondent States which had extant declarations under Article 36(2) (Belgium, Canada, the Netherlands, Portugal, Spain and the United Kingdom).

In view of the dispute regarding the status of the FRY, the question immediately arose whether the FRY declaration was valid. If, as the Security Council and the General Assembly had decided,⁵⁹ the respondent States claimed and the FRY has now accepted, the FRY was not at the relevant time a member of the United Nations, then it was not a party to the Statute of the Court and could not have made a valid declaration under Article 36(2) of that

58. *Id.*, ¶ 40.

59. *See supra* note 14.

Statute. The Court, however, understandably chose not to decide that question in provisional measures proceedings when there were other, more obvious, reasons for holding that there was no basis for jurisdiction. In the cases against Spain and the United Kingdom, Article 36(2) of the Statute could not have provided a basis for jurisdiction, because those two States had accepted the jurisdiction of the Court only as between themselves and another State which had made a similar declaration not less than one year earlier. The FRY's declaration, even if valid, plainly did not fulfill that requirement.

The Court's reason for holding that Article 36(2) did not afford a basis for jurisdiction in the cases against Belgium, Canada, the Netherlands and Portugal is of more general interest. The FRY declaration accepted the jurisdiction of the Court as between the FRY and other States with Article 36(2) declarations "in all disputes arising or which may arise after the signature of the present declaration [i.e., after April 25, 1999], with regard to the situations or facts subsequent to this signature."⁶⁰ The Court held that the dispute which the FRY wished to bring before the Court had arisen before April 25, 1999. That was clear from the terms of the FRY applications, which referred primarily to events before that date, and from the debates in the Security Council on March 24 and 26, 1999 in which the legality of the NATO action was the subject of extensive discussion. The Court rejected the suggestion that the air campaign could be sliced up like salami, so that each air raid gave rise to a fresh dispute. The decision is not a technical one. The temporal reservation in the FRY's declaration was carefully drafted to ensure that no proceedings could be brought against the FRY in respect of the abuses in Kosovo which had led to the NATO campaign. It was entirely in accordance with precedent and principle that the FRY was not allowed, in the words of the old saying, "to have its cake and eat it too."

The International Court proceedings are, nevertheless, an important reminder that military action can be the subject of scrutiny by the International Court not merely after the action has ended but while it is in progress. Provisional measures proceedings can be brought before the Court in a comparatively short time and the Court has now held that an order for provisional measures is legally binding.⁶¹ Since it cannot be assumed that there will always be a jurisdictional ground for dismissing a request for provisional measures in

60. The full text of the FRY declaration is quoted in Order in the case against Belgium, *supra* note 57, ¶ 23.

61. LaGrand Case (Germany v. United States of America), 40 INTERNATIONAL LEGAL MATERIALS 1069 (2001) (Judgment of June 27, 2001).

such a case, the possibility clearly exists that States involved in ongoing military operations might be forced to defend them before the Court in such proceedings. The stakes, in such an event, could be very high indeed. Moreover, the Court's findings were, for the most part, provisional and, at the time of writing, the proceedings against all of the respondent States except for Spain and the United States of America remained on the Court's list.

3. The European Court of Human Rights

The third proceedings were in the European Court of Human Rights. The case of *Bankovic v. Belgium* concerned the attack on the building in Belgrade housing the studios of *Radio Televizije Srbije* (RTS).⁶² That building was hit in an air raid on April 23, 1999. Sixteen people were killed and sixteen injured. The application was brought by one of those injured and relatives of some of those killed against the seventeen NATO States which were also parties to the European Convention on Human Rights (i.e., all of the NATO States except Canada and the United States). The applicants alleged that the attack had violated the right to life, under Article 2 of the Convention, and the right to freedom of expression, under Article 10, of those killed or injured. They maintained that the respondent States were responsible for those violations even though they had occurred outside the territory of any of them (and, indeed, in the territory of a State not party to the European Convention). In arguing that the Convention was not confined to events occurring on the territory of the States parties, the applicants relied on the decisions in *Loizidou v. Turkey*, in which the European Court had held Turkey responsible for violations of the Convention occurring in the north of Cyprus where large numbers of Turkish forces have been stationed since 1974 and in which the Court found that Turkey exercised effective control.⁶³ In addition they argued that the respondents were responsible for the alleged violations irrespective of which State's forces had actually carried out the attack, because they contended that NATO operated on the basis that any NATO State could have

62. The decision of the Grand Chamber of the Court on December 12, 2001 (*Bankovic et al. v. Belgium et al.*) 11 BUTTERWORTHS HUMAN RIGHTS CASES 435 (2002) is also available at the website of the Court, <http://www.echr.coe.int>. The present writer was counsel for the United Kingdom in those proceedings; this paper represents his personal views.

63. *Loizidou v. Turkey* (Preliminary Objections), 103 INTERNATIONAL LAW REPORTS 622 (1995); *Loizidou v. Turkey* (Merits), 108 INTERNATIONAL LAW REPORTS 443 (1996). These decisions were confirmed by the Court's decision in *Cyprus v. Turkey* (10 May 2001), available on the Court's website, *supra* note 62.

vetoed the decision to attack the RTS building.⁶⁴ In doing so, they highlighted the whole issue of the geographical extent of the European Convention and its applicability to operations involving the armed forces of States party to the Convention which occur outside the territory of those States.

The case also raised important questions about the relationship between the principles of international humanitarian law and international human rights law. The applicants contended that human rights law and international humanitarian law were not mutually exclusive and denied that military operations in an international armed conflict were governed solely by humanitarian law.⁶⁵ The first argument of the applicants was that the legality of the attack on the RTS building had to be assessed by reference to provisions of the European Convention, quite independently of whether that attack complied with international humanitarian law, although they also contended, in the alternative, that the Convention in effect incorporated the principles of humanitarian law, so that the Convention would have been violated if the attack on the RTS building had been in breach of international humanitarian law.

These are arguments of very considerable breadth which, had they been accepted, would radically have altered the legal framework within which military operations have to be conducted. A Grand Chamber of the Court,⁶⁶ however, rejected the applicants' arguments and unanimously declared the application inadmissible. The Grand Chamber accepted the respondents' argument that the case fell outside the scope of the Convention. Article 1 of the Convention defines that scope by providing that "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." The Court held that this provision reflected a largely (though not exclusively) territorial concept of jurisdiction and that it was only in exceptional cases that persons outside the territory of one of the High Contracting Parties would be considered as falling within the jurisdiction of that Party. The Court contrasted Article 1 of the European Convention with common Article 1 of the Geneva Conventions,

64. Benvenuti, *supra* note 54, at 526–9, broadly supports these propositions.

65. They relied in part on the report of the Inter-American Commission of Human Rights in *Coard et al. v. United States of America*, Case 10, 951 (Sept. 29, 1999) 9 BUTTERWORTHS HUMAN RIGHTS CASES 150 (2001), which considered that the detention by United States forces of persons captured in the Grenada operation was subject to the American Convention on Human Rights. Available at <http://www.cidh.oas.org/annualrep/99eng/merits/unitedstates10.95.htm>.

66. While most cases in the Court are heard by a Chamber of seven judges, the Chamber originally constituted to hear *Bankovic* relinquished jurisdiction to the Grand Chamber of seventeen judges because of the importance of the issues raised by the case.

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under which “the High Contracting Parties undertake to respect and ensure respect for the present Convention in all circumstances.” The parties to the Geneva Conventions were expressly required to respect the Conventions in all their military operations and could be held responsible for any failure on the part of their forces anywhere in the world to observe those Conventions. By contrast, Article 1 of the European Convention was clearly narrower and imposed responsibility only in respect of treatment of a person who was within the jurisdiction of the State concerned at the relevant time. The Court held that a person was not to be treated as falling within the jurisdiction of a State merely because he or she was affected by the military operations of that State’s forces.

The *Bankovic* judgment removed the possibility that military operations by the European members of NATO would henceforth be measured not only against the yardstick of international humanitarian law but also by reference to the very different standards of the European Convention on Human Rights. Indeed, had the applicants’ arguments been accepted it would not only have been NATO that would have been affected. Coalition military operations in the Gulf and United Nations operations in, for example, East Timor would also presumably have come within the purview of the European Court and the provisions of a regional human rights treaty would have been superimposed on the requirements of international humanitarian law. The Court did not reverse its earlier decisions in the Cyprus cases, but it noted that the circumstances in Cyprus were unusual in that both Cyprus and Turkey were parties to the European Convention so that the inhabitants of northern Cyprus should not be deprived of the benefits of the Convention by reason of the changes brought about by the Turkish intervention of 1974. It remains to be seen what attitude the Court would take in a case where armed forces of a party to the European Convention occupied territory of a non-Convention country.

Conclusions

The Kosovo conflict raised important questions about the *jus in bello* in addition to the difficult issues of the *jus ad bellum* which have already attracted so much attention. Indeed, in one sense the former group of questions are more important, because they may have a wider impact. Although, for the reasons given above, the Kosovo conflict was unusual in certain respects (notably its asymmetric character), many of the lessons learned should be relevant to future conflicts.

The following conclusions seem warranted:

1. International humanitarian law applies to a conflict between two or more States irrespective of what that conflict is called or the cause for which force is used; the use of force by way of humanitarian intervention is no different in this respect from the use of force for other purposes.
2. While the *jus ad bellum* requires that the use of force be proportionate to the goals which the State or States using force are permitted to pursue, that does not mean that the *jus in bello* principles on such issues as targeting are to be interpreted or applied differently and it should never be used as an excuse to undermine the principle of the equal application of the *jus in bello*.
3. Members of the armed forces of a party to an international conflict who find themselves in the power of the enemy are prisoners of war, irrespective of the purpose for which the conflict is waged, whether prisoner of war status is claimed on their behalf or how or where they were captured.
4. It might have been lawful for the NATO States to have imposed an oil embargo on the FRY but the legal issues involved went beyond a simple application of the law of neutrality.
5. The KFOR and UNMIK presence in Kosovo pursuant to Security Council Resolution 1244 (1999) was not governed by the law of belligerent occupation.
6. Scrutiny by international courts and tribunals of military operations was a fact of life even before the establishment of the International Criminal Court. The approach of the three tribunals which considered the conduct of the Kosovo conflict suggests that much of the concern which has been expressed on this subject is misplaced.