

## The Laws of War After Kosovo

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The 1999 Kosovo War between NATO members and the Federal Republic of Yugoslavia confirmed the importance of issues relating to the laws of war in contemporary conflicts, especially in coalition operations. It also exposed some problems in that body of law. A central issue in the war was the minimizing of civilian casualties. The NATO leadership recognized from the start that this was of major importance, for two main reasons: because the war was being fought with a stated purpose of protecting the inhabitants of Kosovo and also because international opinion would not have tolerated a war on civilians.<sup>1</sup> An underlying question raised by the war is thus the extent to which international legal considerations and institutions can assist in protecting the civilian.

The title of this paper calls for explanation. The terms “the laws of war” (*ius in bello*) and “international humanitarian law” are for most purposes interchangeable. They refer to the same body of law. Both terms are used in this paper. For most purposes I prefer the first of these terms, “laws of war” being older and simpler, and recognizing as it does that war is the central area of concern. However, the second term, “international humanitarian law,” sometimes with the suffix “applicable in armed conflicts,” is increasingly used in international diplomacy. In some usages, this term can also encompass relevant parts of the international law of human rights. The term may be particularly appropriate in reference to a situation (such as applied in Kosovo before March 24, 1999) in which there is no international armed conflict and only a

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1. The importance of minimizing civilian casualties is stressed in the memoirs of the Supreme Allied Commander Europe during the period of the Kosovo War. See WESLEY CLARK, *WAGING MODERN WAR* 438–40 (2001).

small-scale civil war, but there is systematic government repression of part of its own population. Whichever term one uses, the fact remains that the scope of this body of law has significantly expanded in the past sixty years to encompass the law on crimes against humanity and on genocide as well as the laws and customs of international armed conflict; and that in the past decade this body of law has been increasingly viewed as at least partially applicable in conflicts which are partly or completely non-international in character.

### **Eight questions**

This survey concentrates on the following eight questions which (a) arose in connection with the Kosovo War, and (b) also touch on matters which are likely to affect the way in which the law is viewed, influences events, and develops further in the future:

1. How did developments in the written laws of war which occurred in the 1990s, and the increasing international concern with implementation of the law, affect the framework within which international responses to civil wars, including in Kosovo, took place?

2. Is there now a stronger link than before between *jus in bello* and *jus ad bellum*? In particular, what are the implications of the fact that sometimes, as in Kosovo, violations of international humanitarian norms by a belligerent in an internal conflict provide part of the rationale for external military intervention?

3. If military action is embarked upon for proclaimed humanitarian purposes by a large alliance or coalition, is there a logic whereby it is carried out by low-risk, remote control methods? In particular, is the oxymoron, humanitarian war, particularly likely to take the form of bombing; and what *jus in bello* problems arise from reliance on air power?

4. Is there tension between (a) the NATO/US strategic doctrine which aims at putting pressure on the adversary's government, and not just its armed forces, and (b) the implicit assumption of the laws of war that the adversary's armed forces are the main legitimate object of attack? If so, how can this tension be addressed?

5. What lessons are to be learned from the fact that the NATO operations were subject to the jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY)? In particular, does the consideration of the NATO bombing campaign that was conducted under the auspices of the ICTY Prosecutor suggest that the NATO campaign was conducted largely in accord with member States' obligations under the laws of war?

6. Did the war confirm that there can be many forms of non-belligerence which differ significantly from neutrality as traditionally conceived in the laws of war?

7. Did the war expose deficiencies or omissions in the existing codifications of the laws of war? In particular, is there a need for further codification? And what are the main subject-areas that might require such codification?

8. What, if anything, might need to be done about the paradox that the United States is simultaneously a principal upholder of the obligation of States to observe the laws of war and a non-party to several important agreements on the subject?

These questions are certainly not the only important *jus in bello* ones to arise. A number of specific issues and controversies, such as the naval operations in the Adriatic and the bombing of the TV station in Belgrade, cannot be covered here in the detail they deserve.

These eight questions have to be seen against a larger background of changes in the conduct of international politics in the 1990s, and increasing international preoccupation with the problem of civil wars and with the implementation of the laws of war. These changes had a significant effect on the fact, and the form, of NATO involvement in Kosovo.

### **Changes in the conduct of international politics**

In the 1990s four factors, none of them entirely new, reinforced the tendency of international bodies and foreign powers to get involved in wars, including particularly civil wars, and also to apply pressure for implementation of the laws of war by belligerents.

*Firstly*, most conflict since the end of the Cold War has had the character of civil wars, though often with international involvements on one or more sides. Since such wars cause appalling and often highly visible suffering, as well as threatening international stability in the regions in which they occur, there has been an evident need to ensure the application of certain rules of restraint in such wars.

*Secondly*, many contemporary wars have a particular tendency to engage the interests of outside powers because they threaten to create huge refugee flows with which our not-very-liberal societies are unwilling to cope. Whether it is northern Iraq, Bosnia, Kosovo or East Timor, an unholy alliance of humanitarianism and illiberalism makes intervention within the State undergoing conflict a possible, even imperiously necessary, option.

*Thirdly*, there has been a growing awareness that crimes committed by States have been among the most serious of the twentieth century. The international preoccupation with restitution for a wide range of State misdeeds is evidence of this.

*Fourthly*, it is widely accepted that the post-Cold War international order has to be based on values other than, or additional to, mutual respect among sovereign States. Human rights and humanitarian norms are core parts of any such system of values. It is thus very difficult for States to ignore massive violations of fundamental norms.

### **The challenge of implementation**

The main challenge facing the laws of war today is not devising new rules—though some are needed. It is implementation of the rules that exist, and of the underlying idea of moderation in the conduct of armed conflict. Unquestionably, the preoccupation with implementation is widely shared among those who have worked in the field of the laws of war; it has had a profound effect on policy and on treaty-making in this field; and it has been reflected in a number of UN reports and in certain actions of the UN Security Council.

“Implementation” is taken to encompass (1) the normal measures taken by States, and by international bodies including the International Committee of the Red Cross (ICRC) and the United Nations, to ensure that populations and armed forces are aware of the laws of war and carry out their terms; (2) the actions taken by outside bodies, including States and international organizations, in response to systematic violations of the laws of war. My focus is mainly on this second and more difficult category, which encompasses the *enforcement* of the laws of war, but is not limited to coercive measures.

The concern with implementation should not be taken to imply support for the commonly expressed view that existing implementation is lamentable or even non-existent. In the 1999 Kosovo War there was much effective implementation. This was not only on the NATO side, but also in some instances on the Federal Republic of Yugoslavia (FRY) side. For example, in the talks at

the conclusion of the war the FRY military provided extensive and accurate information about the location of minefields.<sup>2</sup> The central challenge is both to improve patterns of implementation, and to further develop means of coping with gross violations.

### *Changes in the Laws of War in the 1990s*

In the decade before the war on Kosovo, there had been two striking developments in the laws of war: a tendency to make more explicit and detailed the application of the laws of war to conflicts with a partly or wholly non-international character; and a range of specific measures to improve mechanisms of implementation. Both of these developments affected the United States and NATO response to the events in Kosovo. Up to March 24, 1999 the Kosovo problem had largely the character of State repression by the Yugoslav authorities and civil war. It might thus have been perceived as a largely internal problem, about which the rest of the world should not worry. The fact that Kosovo did not escape the attention of outside powers and bodies owes something to the development of the law.

#### **Changes in the written law**

In the laws of war, as they developed from the mid-nineteenth century to the Second World War, implementation was traditionally not treated as a major topic in its own right. The general assumption, reflected in certain early agreements on the laws of war (e.g., the 1899 and 1907 Hague Conventions) was that civilized States could be relied on to ensure that their own armed forces would act in a disciplined, restrained and professional manner. That idea was called into question by the events of the twentieth century. When the State that was supposed to take action was the very one whose armed forces had committed the alleged offenses, the idea of purely national jurisdiction seemed optimistic; and when the State itself was committed to a criminal

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2. Information from General Rupert Smith, Deputy Supreme Allied Commander Europe, June 25–27, 1999. See also the UN Mine Action Programme website, [www.mineaction.org](http://www.mineaction.org). Its report on Kosovo of September 2001 (available at the Mine Action website) showed that the Yugoslav Army handed over 620 records of minefields in Kosovo, principally but not exclusively on the Albanian and Macedonian borders. According to the final annual report on the UN Interim Administration in Kosovo Mine Action Programme, covering the period to December 15, 2001, the 620 records did not include mines laid by Ministry of Interior Police Units, or paramilitary groups. *UNMIK Mine Action Programme Annual Report – 2001* (December 2001) ¶ 10 (available at the Mine Action website).

policy, it was absurd. That is why since 1945 there has been a definite movement towards a system of international criminal law affecting the activities of States and armed forces.

As far as treaties are concerned, the old pattern of treating implementation casually began to change significantly after the Second World War. The 1948 Genocide Convention authorized and indeed exhorted parties to take action against offenders, including rulers and public officials; and it authorized action through the UN. The four 1949 Geneva Conventions called for: (1) universal jurisdiction as regards grave breaches, and (2) "Protecting Powers" to ensure implementation of certain parts of the agreements in wartime. However, the implementation systems specified in these treaties concluded in 1948 and 1949 have not been used much in the intervening years.

The 1977 Geneva Protocol I<sup>3</sup> included some provisions attempting to break the impasse. In particular, in accordance with the terms of its Article 90, the "International Humanitarian Fact-Finding Commission" was set up in 1991. Yet this too has not worked. Not a single one of the numerous problems in the decade of its existence has been referred to it. In this, as in many other ways, the actual forms of implementation that have been developed have been different from what was envisaged in treaties.

In short, the law developed before the 1990s had relatively few provisions regarding implementation, and those that existed were not effective. This does not mean that there was no implementation—many States did a capable job of developing a culture of law observance within their own armed forces. However, the war crimes and crimes against humanity of the 1990s exposed the weakness of the implementation "system."

Similarly, laws of war agreements concluded before the 1990s said relatively little about civil war. The treaty provisions explicitly applicable in civil wars were notoriously modest (being essentially Common Article 3 of the 1949 Geneva Conventions and 1977 Geneva Protocol II), and were especially weak on matters of implementation.

In the 1990s, States and international bodies made further attempts to address questions of implementation and enforcement. Eight new legally binding international documents in the area of the laws of war broadly defined were adopted by the UN Security Council or by States at international conferences. Only one of these new agreements (the 1995 Protocol on Blinding Laser

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3. Protocol Additional (I) to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflict, June 8, 1977, 1125 U.N.T.S. 3, DOCUMENTS ON THE LAW OF WAR 422 (Adam Roberts and Richard Guelff eds., 3d ed. 2000) [hereinafter Protocol I].

Weapons) does not deal extensively with implementation and enforcement, or with the problem of civil war.<sup>4</sup> The other seven new international instruments, all of which do address these issues, are:

1. The *1993 Statute of the International Criminal Tribunal for the former Yugoslavia*. Adopted by the UN Security Council in 1993.
2. The *1994 Statute of the International Criminal Tribunal for Rwanda*. Adopted by the UN Security Council in 1994.
3. The *1994 Convention on the Safety of UN and Associated Personnel*. This is not part of the laws of war as such, but closely related. It contains extensive provision for prosecution or extradition of offenders.
4. The *1996 Amended Protocol II on Landmines to the 1980 UN Convention on Certain Conventional Weapons*. This requires each party to take legislative and other measures against violations “by persons or on territory under its jurisdiction or control.”
5. The *1997 Ottawa Landmines Convention*. This contains extensive provisions on transparency, compliance and dispute settlement.
6. The *1998 Rome Statute of the International Criminal Court* (entered into force July 1, 2002).
7. The *1999 Second Hague Protocol for the Protection of Cultural Property in Armed Conflict* (not yet in force). This was concluded and opened for signature during the Kosovo War, but had been negotiated and agreed well before. It contains numerous provisions regarding implementation and enforcement not just of the Second Protocol itself, but also of the Convention and the first Protocol (both of which had been concluded in 1954).

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4. I exclude from this total documents of an essentially advisory character, such as the 1994 ICRC/UNGA Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict, included in the UN Secretary-General's report of 19 August 1994 to the UN General Assembly. See U.N. Doc. A/49/323 (1994).

All seven documents have two critically important features in common. *First*, they contain some provisions that go beyond the old idea of essentially national implementation by the authorities of individual States. *Second*, they have formal application in wholly or partly non-international armed conflicts.

**An unresolved problem: internationalized civil war**

Most wars are much more confused in character than the simple dichotomous definition of war, as being either international or non-international, would suggest. Frequently, as in past eras, the civil wars of our time have had international dimensions: troops and command structures from outside powers have often played major roles on one or more sides. In many cases a more accurate short description of the conflict would be “internationalized civil war”, although this is not a recognized category in the laws of war.

As far as the laws of war are concerned, one unhappy result of having largely separate bodies of law applying to different aspects of the conflict is that courts, especially ICTY, have had to devote enormous efforts to determining the character of the conflict in Bosnia as it arose in particular times, places and events. The wars in Bosnia and Croatia were among many which have had partly international and partly internal aspects. There must in principle be a case for applying the whole of the body of the laws of war even to armed conflicts that are substantially non-international in character, and some recent developments in the law do point in that direction. However, as far as Kosovo is concerned, the question of the character of the conflict is not especially difficult. Before March 24, 1999 it was mainly or entirely a non-international armed conflict, occurring within the territory of the Federal Republic of Yugoslavia. After that date there was, superimposed on that conflict, an international armed conflict between the NATO powers and the FRY.

**The UN Security Council's involvement**

In the 1990s the UN Security Council assumed a major role in attempting to ensure implementation of the laws of war, including investigation and punishment of certain violations. This role was not entirely new. For example, already during the Iran-Iraq War (1980–88) the Security Council had authorized the main official investigation into the use of chemical weapons.

In the conflicts of the 1990s the UN Security Council addressed issues relating to the implementation of international humanitarian law in at least five cases: Bosnia and Herzegovina (1992–5); Somalia (1992); Rwanda (1994); Sierra Leone (1997–2000); and Kosovo (1998–9). In addition to attacks on civilians and other similar violations, a major issue at stake in some of these

cases was the refusal of parties to permit delivery of humanitarian aid—which is certainly a problem relating to the laws of war, but could also be considered a violation of other norms and agreements.

In all these cases in the 1990s the Security Council went beyond appeals to observe norms, and called for action. There were always several different stated purposes for UN-authorized action or the threat thereof, but observance of humanitarian law was one of them. The actions taken by the Council included not only the establishment of the international criminal tribunals for Yugoslavia and Rwanda, but also action of a more direct kind. Some of the cases of UN-authorized military action, and some cases of UN-imposed economic sanctions, were partly based on claims that the target State had violated fundamental norms of humanitarian law.

These forms of action under UN Security Council auspices posed problems. As regards military action, in most of these five crises a principal problem for the UN was the difficulty of finding outside forces willing to act in situations perceived to be dangerous. The failures of the UN, and of States, to act in time in respect of the crises in Rwanda in 1994 and Srebrenica in 1995 are clear examples. The enthusiasm for implementing humanitarian norms ran into the rock of national interests. In respect of Kosovo the problem was different: the main difficulty was in getting agreement in principle in the Security Council that force should be used at all in response to the unfolding crisis. This was because, more than in any of the other five cases, any military action to stop ongoing atrocities in Kosovo involved violating the sovereignty of a functioning sovereign State, Yugoslavia.

### *Links Between Jus in Bello and Jus ad Bellum*

One consequence of the developments of the 1990s has been the strengthening of the idea that a systematic pattern of violations of the basic humanitarian norms of international humanitarian law may justify acts of military intervention. Although there were many pre-echoes of this in the nineteenth and twentieth centuries, the apparent strengthening of this link between *jus ad bellum* and *jus in bello* represents a momentous and controversial change in the terms of international debate.

The long-standing and important principle that the law relating to resort to war (*jus ad bellum*) is a separate and distinct subject from the law relating to conduct in war (*jus in bello*) remains valid and important. However, there have always been causal links between these distinct bodies of law. One such link is that aspect of the idea of proportionality that deals with the proportionality of

a military response to the original grievance. The developing practice of military action as a response to violations of the law of war is another important link. Quite simply, massive violations of *jus in bello* by a belligerent can help to legitimize certain threats and uses of force by outside powers intervening to stop the violations.

In an effort to get an offending State to observe rules of restraint, the first response of outside powers may be the threat, rather than the actuality, of force. The use of pressure against States, for example in order to make them accept an intervention force, as was attempted in Kosovo and done in East Timor in 1999, raises a problem. Traditionally, international law and international lawyers have been suspicious of agreements negotiated under duress. If the host government has only given consent under extreme pressure, is its consent valid? The experience of the post-1990 period shows how necessary pressure can be to achieve international objectives, and how hard it is to eliminate certain aspects of power politics.

The change in the landscape, whereby humanitarian outrages serve in practice as a basis for threatening or using force, has not been universally recognized. This is not surprising, particularly as the whole issue poses difficult dilemmas for humanitarian workers and organizations. In some cases in the 1990s, the violations of *jus in bello* that contributed to decisions to intervene included assaults on aid workers and convoys. Any suggestion that humanitarian workers and organizations may play some part in triggering military actions challenges their deep (and in some cases legally based) commitment to impartiality and neutrality. Almost all humanitarian workers and organizations are in a state of denial about the extent to which they, and the principles and laws for which they stand, have played a part in initiating military action.

Where, following a pattern of violations, military action has been with the authorization of the UN Security Council, and/or has had the consent (however reluctant) of the host State, there has not generally been a strong objection to it in principle. These conditions were present, for example, in Bosnia in 1995 and in East Timor in September 1999. However, where these conditions were not present, as in Kosovo in March-June 1999, military intervention has been strongly contested by major and minor powers.

In respect of Kosovo, before the NATO military action there had been several UN resolutions which, in addition to many other elements, noted the violations of international humanitarian law there. For example, a long resolution on Kosovo passed by the General Assembly in December 1998 criticized the Yugoslav authorities for a variety of unacceptable practices, including violations of Common Article 3 of the 1949 Geneva Conventions, and the

1977 Protocol II; deplored the killing of humanitarian aid workers; and required the Yugoslav authorities to allow investigators from the International Criminal Tribunal access to examine alleged atrocities against civilians.<sup>5</sup> The Security Council resolutions on Kosovo also addressed these issues. A resolution in March 1998 condemned “the use of excessive force by Serbian police forces against civilians and peaceful demonstrators.”<sup>6</sup> In September 1998 the Council expressed concern at “the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav Army,” and at “reports of increasing violations of human rights and of international humanitarian law,” going on to call for a cessation of such acts.<sup>7</sup> This resolution, notably tough in tone, followed a first-hand presentation made to the UN Security Council by a senior representative of the United Nations High Commissioner for Refugees (UNHCR) on September 11, 1998. The next resolution, passed in October 1998, also referred repeatedly to humanitarian issues.<sup>8</sup> The failure of the Yugoslav authorities to comply with these resolutions was a key consideration in the decisions of NATO countries to resort to the use of military force, as they did on March 24, 1999. When President Clinton addressed the nation on that day, in a key link in his argument he asked Americans: “Imagine what would happen if we and our allies instead decided just to look the other way, as these people were massacred on NATO’s doorstep.”<sup>9</sup>

To draw attention to the connection between issues related to violations of the laws of war, and the decisions of outside countries to intervene, is not to say that there is a simple and clear doctrinal or legal link. There is not now, nor is there likely to be, a generally recognized “right” of humanitarian intervention. Such interventions may occasionally be necessary, but to suggest that they are a general “right” implies that it is possible to adjudicate in a general way between the undoubted and still important non-intervention rule on the one hand, and the demands of humanitarian considerations on the other. Any decision on forcible intervention must involve a balancing of considerations in the face of unique and urgent circumstances, not the assertion of a general right.

To suggest that there is no general right of humanitarian intervention is not to say that certain uses of force for humanitarian ends are necessarily illegal

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5. G.A. Res. 53/164 (Dec. 8, 1998), U.N. Doc. A/RES/53/164 (1998).

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

7. S.C. Res. 1199 (Sep. 23, 1998), U.N. Doc. S/RES/1199 (1998).

8. S.C. Res. 1203 (Oct. 24, 1998), U.N. Doc. S/RES/1203 (1998).

9. *THE KOSOVO CONFLICT AND INTERNATIONAL LAW: AN ANALYTICAL DOCUMENTATION 1974–1999*, at 416 (Heike Krieger ed., 2001).

under international law; nor is it to assert that certain uses of force are simply beyond the scope of international law. Rather, it is to suggest that in respect of each intervention there are important, relevant but alas competing legal principles which have to be balanced against each other; and a great deal depends on the particular facts and legal considerations that relate to that particular case.

Since the Kosovo War there have been attempts to develop a “right” of humanitarian intervention by such figures as UK Prime Minister Tony Blair in his speech in Chicago on April 22, 1999; UN Secretary-General Kofi Annan in his UN report of September 8, 1999; a number of speakers in the UN General Assembly in 1999; the then Canadian Foreign Minister Lloyd Axworthy in a lecture in New York on February 10, 2000; and the then UK Foreign Secretary Robin Cook in a speech in London on July 19, 2000. Yet there is absolutely no sign of international agreement on their propositions. Moreover, the US government has never wanted a doctrine in this area that might tie its hands.

The attempt to develop a general doctrine could actually do harm to the cause of humanitarian intervention: such an attempt can imply that the legitimacy of each case of intervention is dependent on the existence of a general right. Since that right does not exist, the legitimacy of individual actions may, if anything, be reduced. Because pursuit of a defined legal right is doomed to fail, and the conditions giving rise to humanitarian intervention will not disappear, the situation is likely to remain untidy. It probably ought to do so.

The recognition of a link between *jus in bello* and *jus ad bellum* falls far short of any general recognition of a right of humanitarian intervention.<sup>10</sup> What has emerged from the experiences of the 1990s is a pattern of acquiescence by significant numbers of States in respect of some interventions with stated humanitarian purposes. However, there has also been strong opposition by States to particular interventions, and even stronger opposition to the granting of a general right. The distinctly uneven pattern of acquiescence is not the same thing as the recognition of a right.

The fact that an intervention may be motivated by humanitarian considerations, including a concern to stop violations of human rights and humanitarian norms, does not in any way affect the equal application of the laws of war in any resulting hostilities. During the Kosovo war there was no suggestion from any party that the United States and its allies were entitled to ignore any

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10. See Adam Roberts, *The So-Called “Right” Of Humanitarian Intervention*, 3 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 3–51 (2002).

aspects of *jus in bello* because they were engaged in what they saw as a high moral cause.<sup>11</sup> If anything, the logic was rather that the humanitarian elements in the stated reasons for resort to war particularly obliged the NATO members to observe the rules of war.

The Kosovo War confirmed another connection between *jus in bello* and *jus ad bellum*. In the Kosovo War, as in a number of other recent conflicts, the public's perception of the legitimacy of the operation as a whole appeared to depend in significant measure on a public understanding that the war was being fought in a disciplined and restrained manner, and in accordance with international norms. Some of the worst moments for NATO in the entire campaign were when NATO appeared to be falling short of this standard. Support for the war could easily have evaporated if there had been more incidents such as the bombing of refugee convoys.

### *Bombing as a Default Form of Humanitarian War*

Bombing from the air formed a key part of the Western response to at least three humanitarian crises of the 1990s: (1) in northern and southern Iraq since 1991, as a means of maintaining "no-fly-zones," enabling refugees to return home, and limiting the activities of the Iraqi armed forces; (2) in Bosnia in 1995, especially in the form of NATO's Operation Deliberate Force, following the Bosnian Serbs' brutal massacre at Srebrenica and their renewed assault on Sarajevo; and (3) in 1999, in the war over Kosovo.

One underlying reason for reliance on air power in such cases is the reluctance of the populations and governments of Western democracies to take substantial risks, for example by using ground forces in a combat role, in what were perceived to be distant humanitarian causes. This reluctance is understandable but may at times jeopardize the effectiveness of operations. In the 1999 war it was disadvantageous to NATO, and to the inhabitants of Kosovo, that Milosevic was not confronted with a more convincing threat of land operations in the province.

Bombing as such has never been, and is not now, violative of the laws of war, but in practice it has frequently risked violating norms requiring force to

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11. This was confirmed in the discussion of the committee established by the Prosecutor of the International Criminal Tribunal for the former Yugoslavia to review NATO actions in Yugoslavia. See Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, ¶¶ 30–4, 39 INTERNATIONAL LEGAL MATERIALS 1257, 1265–6 (2000), reprinted herein as Appendix A [hereinafter Report to the Prosecutor].

be directed at military targets and to be used discriminately. The increased accuracy of certain air-delivered weapons in several recent conflicts, including the 1991 Gulf War, has indicated that certain uses of air power may be, or have the capacity to become, compatible with the existing rules about targeting and discrimination. This was one conclusion of the detailed UK House of Commons Foreign Affairs Committee report on Kosovo. It noted that this was the first armed conflict in which the United Kingdom had engaged since it ratified Protocol I in 1998; and after considering the main areas of controversy surrounding the bombing it concluded: "On the evidence available to us, we believe that NATO showed considerable care to comply with the 1977 Protocol and avoid civilian casualties."<sup>12</sup>

However, the use of air power in this war posed certain problems. Some of these were more political than legal: the controlled use of air power is an option available to very few States, and it naturally causes both fear and resentment. Some of the problems were technical, but have a major impact on evaluations of the lawfulness of particular uses of air power. As the Kosovo war demonstrated, even in the electronic age air power suffers from certain striking limitations, and it has a natural tendency to lead to unintended damage.

The 1999 Kosovo War began in an atmosphere of arrogant and ignorant illusions among Western decision-makers about the capacity of bombing to protect the inhabitants of Kosovo and/or to bring about a change in Serbian policy in a matter of days. In the end, the bombing could only succeed as a campaign of long-drawn-out coercive pressure, in which other elements were also involved.

The Kosovo War exposed certain limitations in the capacity of bombing to achieve results. Most notably, bombing was not at all effective in providing protection or relief from Serb attacks, for the hard-pressed Kosovars. The initiation of the bombing campaign was followed by an intensification of those attacks, leading to huge numbers of people fleeing from their homes. In his address on March 24 President Clinton did warn that Yugoslavia "could decide to intensify its assault on Kosovo."<sup>13</sup> However, the apparent belief of many Western policy-makers that NATO military action would deter Milosevic from further atrocities against the Kosovars was one of the most shocking

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12. House of Commons Foreign Affairs Committee, Fourth Report, *Kosovo*, vol. I, *Report and Proceedings of the Committee*, HC 28-I, May 2000, ¶¶ 145, 157.

13. President Clinton, Address to the Nation, March 24, 1999. Text in *THE KOSOVO CONFLICT AND INTERNATIONAL LAW* 415–6 (Heike Krieger, ed.) (Cambridge International Documents Series, Volume 11).

lapses of the crisis.<sup>14</sup> One reason why the bombing failed to stop the ethnic cleansing is that it had very limited effects on movable military targets. A suppressed USAF investigation is reported to have showed that NATO forces verifiably destroyed just fourteen Serb tanks in Kosovo, eighteen armored personnel carriers, and twenty artillery pieces. As Tim Garton Ash has commented: “Even if the real figures are higher than that, it is an indisputable fact that ethnic cleansing increased under the bombing.”<sup>15</sup> It is probably true that bombing did inhibit the mobility of Serb armor, but that is a modest achievement especially in a context in which heavy armor was not necessary for the effective pursuit of ethnic cleansing.

Partly because of its stated humanitarian purpose, the Kosovo air campaign involved many elements of restraint, including in target selection, in efforts to ensure the accuracy of bombing, and in the evident willingness to abandon sorties because of concerns about potential civilian casualties. Yet the case confirms that such bombing can cause direct damage to civilians and to non-military installations and activities in several distinct ways.

- *Unintended damage caused by bombing from high altitude.* It has been frequently asserted that the problems of damage to civilians and civilian property were made worse by NATO aircraft generally flying at a safe altitude. The potentially disastrous consequences of flying at altitude are obvious: in attacks on railway bridges, the time an air-to-ground guided weapon takes to get to the target may also be the time a passenger train takes to get onto the bridge; and in attacks on road convoys, it may be impossible at 15,000 feet to be sure that the convoy does not contain, or even consist largely of, the very civilians who are supposedly being protected. Both of these things happened in the Kosovo War, and many died as a result. Yet there may also be certain advantages in attack aircraft operating from relative safety: not just that the aircrew are safer, but also that they have more time in which to acquire targets and make decisions, can afford to make a second pass over a target if they are in doubt, and may feel less urgency about getting rid of whatever explosives they are carrying so that they can rush back to safety.

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14. At a press conference on March 25, 1999, despite her recognition that there could be “a flood of new refugees,” Secretary of State Madeleine Albright was notably optimistic on the capacity of air strikes to deter or prevent Milosevic from inflicting further horrors on the Kosovar people. See *THE KOSOVO CONFLICT AND INTERNATIONAL LAW*, *id.*, at 416 and 418.

15. Timothy Garton Ash, *Kosovo: Was it Worth It?*, *NEW YORK REVIEW OF BOOKS*, Sept. 21, 2000, at 58–9. The US Air Force report he cites was publicized in *NEWSWEEK*, May 15, 2000.

- *Pressure to attack fixed targets.* A major problem in Kosovo was that, because it proved relatively easy to conceal military units and movable equipment from attacks from the air, and to fabricate dummies, there was especially strong pressure on the NATO alliance to attack large fixed targets. In many cases (bridges, power stations, buildings of various types, the broadcasting station in Belgrade) these were dual-use targets which had major civilian as well as military functions.
- *Changing functions of buildings.* Even if targets are believed to be purely military and are hit accurately, as with the Amariya bunker in Baghdad in 1991 or the Chinese Embassy in Belgrade in 1999, their function proved in the event to be different from what the targeteers had believed.
- *Long-term effects of certain weapons on the civilian population.* Trying to inhibit the adversary's military movements by the use of cluster bombs and similar weapons can have a long-term adverse effect on the civilian population and on international military personnel who may be present in the territory following the end of hostilities. (The question of cluster bombs is considered further below.)

In some cases the damage to civilians or civilian objects may be completely unintended. However, in other cases (especially against certain dual-use targets) the damage may be seen by military planners as contributing to the overall goal of wearing down the adversary's will to carry on with the struggle.

Behind these problems lay a deeper and more intractable one. If the prime function of a bombing campaign is to bring about a capitulation by the government of the country, what happens when the bombing starts to run out of military targets, and seems unable to force a change of policy on the part of the target government? In such circumstances, there is bound to be heavy pressure to continue with the bombing and to direct it at targets which are doubtful or plainly illegal under the laws of war.

A particular challenge posed by the development of precision-guided munitions is that it is harder than in earlier eras to deny that there was a specific intention to hit whatever object was hit. As a result, armed forces and individuals may be more likely than before to be held responsible for specific acts of destruction. This development could have a considerable effect on how destruction is viewed by the public in allied, neutral or adversary States. It could also, at least potentially, create additional grounds for conducting inquiries, investigations and prosecutions, whether by the internal disciplinary mechanisms of States and armed forces, or by international criminal tribunals.

The exact combination of factors that led Milosevic to back down on June 3, 1999 is not yet known with any certainty. There are three obvious factors:

the bombing; the prospect of invasion of Kosovo by NATO land forces; and the isolation of Yugoslavia, especially with the abandonment of Milosevic by his last significant potential ally, Russia. General Clark considers that it was the combination of these three factors that led to the Milosevic surrender.<sup>16</sup> The indictment of Milosevic by ICTY announced on May 27, 1999, discussed further below, may also have contributed to the ending of the war. How these and other factors are evaluated will heavily influence any overall verdict on the lessons to be drawn from the Kosovo War, and on the importance, or the limitations, of the laws of war. As to the effect of bombing, my own provisional evaluation is that even though certain initial assumptions about how quickly a bombing campaign might achieve results were mistaken, that does not prove that the actual bombing, and the threat of more, were not important. They were. The most difficult question this raises so far as the laws of war are concerned is the following: did attacks on dual-use targets, and/or a perceived threat of further attacks directed at civilians and civilian objects, play a major part in the Yugoslav decision of June 3?<sup>17</sup>

In conclusion, a lesson of the bombing in the Kosovo War is that, while air power undoubtedly achieved significant results, its use involved serious problems. It did not perform particularly well against what might have been considered a relatively straightforward target, namely an army which was reliant on heavy armor and operated on at least partly conventional lines.<sup>18</sup> It was slow to achieve results even against a State debilitated by years of war and poor economic performance. It would be hazardous to assume that a similar air campaign would necessarily be the appropriate course in the context of another urgent humanitarian or other crisis. It appears that a systematic campaign of bombing was not a serious option when the East Timor crisis was at its gravest in September 1999.

### *NATO Strategic Doctrine*

NATO's conduct in the 1999 Kosovo War confirms that there is continuing tension between certain contemporary strategic doctrines and the implicit vision of war contained in the laws of war. Over recent decades the United

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16. CLARK, *supra* note 1, at 410–11.

17. For a challenging argument that the NATO bombing was a key factor in leading to the decision to back down, and that one element was a belief that the bombing would become less discriminate if Milosevic did not settle, see Stephen Hosmer, *The Conflict Over Kosovo: Why Milosevic Decided to Settle When He Did*, RAND Report MR-1351-AF, at 91–107 (2001).

18. See Clark's lugubrious comment on this in CLARK, *supra* note 1, at 412.

States and NATO have developed a conception of how force can be applied which involves putting military pressure not just on the armed forces of the adversary State, but on its government. Such an approach was evident in some official thinking about nuclear deterrence and strategic doctrine generally vis-à-vis the Soviet Union. It has also been evident in the conduct of certain operations in which NATO members have been involved, including aspects of the bombing campaign against Iraq in early 1991 as well as the Kosovo War eight years later.

The NATO approach is in tension with one underlying principle of the laws of war, as famously expressed in the 1868 St. Petersburg Declaration, “that the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy.” Actually the laws of war as they have developed in the intervening years are not so restrictive as the words of the St. Petersburg Declaration might imply. In particular, they by no means exclude the application of military force against aspects of the adversary’s war-making capacity and system of government. In the Kosovo campaign, the targets of operations clearly had to encompass all those taking an active part in ethnic cleansing, even if they were only police.

There is much to be said in favor of attacks against government targets. Such attacks may reach the individuals most directly responsible for the situation which has led to war. They may save lives among the adversary’s armed forces, many of who will be essentially innocent individuals conscripted into the front line. They may shorten the duration of hostilities. However, there are also problems with attacks aimed at government targets. The very government whose actions caused a war may also be the only body that can end it, in which case its continued existence is vital. Attacks against government targets may have severe effects on the civilian population, and may indeed involve attacks on people or objects that are non-military in character. There is much scope for debate as to whether, for example, the homes and families of government ministers are legitimate military targets.

The key question of what is a military objective, addressed most extensively in certain provisions of Protocol I, may merit re-examination. Numerous States, including many NATO members, had already long before the Kosovo War made declarations or reservations regarding some of these provisions. NATO members, including non-parties to Protocol I such as the United States, may now need to address the question of how their conceptions of war relate to the limits on targeting that are specified in the laws of war. It may be doubted whether such an exercise would lead to specific revisions to the written laws of war, or to the reservations to Protocol I made by NATO States, but

it might suggest some criteria for handling the tensions between NATO doctrine and the laws of war.

### *International Tribunals: ICTY*

The conduct of hostilities by NATO in the Kosovo War became the subject of consideration by no less than three international courts and tribunals: the International Criminal Tribunal for the former Yugoslavia, the International Court of Justice (ICJ), and the European Court of Human Rights (ECHR). Although the ICJ case, brought by Yugoslavia, revolved mainly around matters of *jus ad bellum*, it did also involve claims concerning breaches of international humanitarian law. This ICJ case is ongoing, and demonstrates, sadly, that legal processes sometimes proceed at a pace far slower than war. The ECHR case was brought against all seventeen European NATO states by six Yugoslav citizens complaining about the bombing of the TV station in Belgrade by NATO forces on April 23, 1999, in which sixteen people were killed and another sixteen seriously injured. In its decision of December 12, 2001 the ECHR ruled that there was no jurisdictional link between the persons who were victims of the bombing and the seventeen NATO states, and therefore the application was inadmissible.

In contrast to the limited part played by ICJ and ECHR, ICTY had a number of important roles in connection with the Kosovo War. It played a significant part during the build-up of the crisis, principally through its entirely proper and widely supported insistence on recording details of atrocities in Kosovo. In March 1998 the Prosecutor, Louise Arbour, affirmed that ICTY's jurisdiction "is ongoing and covers the recent violence in Kosovo."<sup>19</sup> A defining moment occurred on January 18, 1999, when the Prosecutor applied for entry to Kosovo in order to "investigate the reported atrocities at Racak," but was refused. This hardened views in NATO member States that no political settlement would work unless it allowed for the deployment of a substantial NATO-led force. Even during the hostilities, ICTY investigators were active outside Kosovo in collecting evidence of crimes by the Yugoslav forces in the province.<sup>20</sup>

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19. Text of ICTY Prosecutor's statement of March 10, 1998 is in *THE KOSOVO CONFLICT AND INTERNATIONAL LAW*, *supra* note 13, at 515.

20. For a useful account, see particularly David Gowan (formerly UK War Crimes Coordinator at the Foreign and Commonwealth Office, London), *Kosovo: The British Government and ICTY*, 13 *LEIDEN JOURNAL OF INTERNATIONAL LAW* 913–29 (2000).

The announcement on May 24, 1999 of the indictment of Slobodan Milosevic, President of the Federal Republic of Yugoslavia, and four colleagues further illustrated the way in which ICTY's role was unavoidably caught up in political and military events.<sup>21</sup> Milosevic was indicted in respect of the conduct of Yugoslav forces in Kosovo during the war there in 1998-9. In this particular case, despite speculation to the contrary, the indictment may have contributed to the willingness of Milosevic to make the concessions necessary for a settlement, as he did early in June 1999. The ICTY indictment, as General Clark has argued, may have hardened European resolve to continue with the struggle.<sup>22</sup> It is also possible that it compelled Milosevic to focus on reaching a settlement while he still had a functioning State around him which could protect him from arrest and trial; and it may also have shocked him into an erroneous belief that he could escape from the threat of trial by cutting a deal with NATO.<sup>23</sup> If he did entertain any such hope, he was to be disappointed. On June 28, 2001 Milosevic, by this time the former President, was extradited to The Hague to face trial, which began on February 12, 2002. This first-ever extradition of a former head of State to face trial before an international criminal tribunal is an important precedent.

The ICTY's most unusual role, its consideration of NATO actions, was particularly controversial in the United States. In 1999 the United States, having been campaigning diplomatically against the projected International Criminal Court for the previous six months on the grounds that the actions of US forces should not be subject to a foreign prosecutor and tribunal, chose to wage war in the one part of the world where ongoing war was subject to such a tribunal. The ICTY, the establishment of which the United States had actively promoted in 1993, has much stronger powers of independent investigation and prosecution than are provided for the projected International Criminal Court under the terms of the 1998 Rome Statute.<sup>24</sup>

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21. For texts of the key documents relating to the indictment of Milosevic, see *THE KOSOVO CONFLICT AND INTERNATIONAL LAW*, *supra* note 13, at 516-29.

22. CLARK, *supra* note 1, at 327-8, where it is confirmed that the Pentagon and White House were not happy with the ICTY Prosecutor's decision to issue the indictment.

23. This is argued by James Gow of King's College, London in *THE SERBIAN PROJECT AND ITS ADVERSARIES: A STRATEGY OF WAR CRIMES* (2002).

24. Compare the uncomplicated provisions on jurisdiction, investigation and prosecution in Articles 1 and 18 of the 1993 ICTY Statute, U.N. Doc. S/25704, May 3, 1993, available at [http://www.un.org/icty/basic/statut/stat2000\\_con.htm](http://www.un.org/icty/basic/statut/stat2000_con.htm), with the much more heavily qualified provisions on the same subjects in the 1998 Rome Statute, U.N. Doc. A/CONF/183/9, July 17, 1998 available at <http://www.un.org/law/icc/statute/romefra.htm>.

On May 14, 1999, while hostilities in the Kosovo War were ongoing, the ICTY Prosecutor established a committee to assess the numerous allegations made against the NATO bombing campaign and the material accompanying them. It prepared an interim report which was presented to the Prosecutor on December 6, 1999. On February 1, 2000 the Prosecutor stated that there was no evidence that NATO's bombing campaign had violated international treaties on the conduct of war. The committee investigating the NATO campaign then prepared a detailed final report, published in June 2000, discussing the numerous facts and issues involved. It provided evidence for the conclusion that as a result of the NATO bombing approximately 495 civilians were killed and 820 wounded in documented instances. It recommended that "neither an in-depth investigation related to the bombing campaign as a whole nor investigations related to specific incidents are justified. In all cases, either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offences." The Report's final recommendation was that "no investigation be commenced by the OTP [Office of the Prosecutor] in relation to the NATO bombing campaign or incidents occurring during the campaign."<sup>25</sup> On June 2, 2000 the ICTY Prosecutor, Carla del Ponte, stated in her address to the UN Security Council that she would not open a criminal investigation into any aspect of NATO's bombing campaign, and this was confirmed eleven days later in a statement issued by the Office of the Prosecutor.<sup>26</sup>

The Report to the Prosecutor had many limitations, and the reactions to it showed how difficult it is to get justice done, and seen to be done, when controversial issues of war, peace and national pride are at stake. ICTY's consideration of the bombing campaign ran into two depressingly predictable lines of political criticism. First, some initial US reactions suggested a sense of outrage that any prosecutor anywhere would even contemplate the possibility of investigating a US-led military action. Because of this outrage, there was little sign that ICTY's decision not to launch any criminal investigation caused any easing of US concerns about the proposed International Criminal Court. Secondly, some reactions by countries and individuals critical of the NATO campaign suggested that the ICTY was hardly impartial, not least because NATO member States had played a significant part in creating it, financing it, and

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25. Report to the Prosecutor, Appendix A, ¶¶ 53, 90, 91.

26. ICTY Press Release PR/PIS/510e of June 13, 2000.

arresting indicted individuals. In this view, ICTY could not realistically have embarked on prosecutions of NATO personnel.

In addition to such political criticisms, the Report to the Prosecutor was vulnerable on other grounds. It was criticized by some international lawyers as being insufficiently rigorous in its consideration of NATO actions and decision-making, especially as regards the balancing of military advantage and civilian damage.<sup>27</sup> Even to those, like myself, who do not quarrel with its overall recommendation, some parts of its analysis call for comment. On the question of damage to the environment it makes the common mistake of assuming that the only relevant provisions in treaty law are those provisions of Protocol I, namely Articles 35(3) and 55, which specifically mention the word “environment.”<sup>28</sup> On the question of what is a military objective, it states (probably correctly) that Protocol I, Article 52, is “generally accepted as part of customary law,” but nowhere mentions the declarations made in respect of that article by many States, including NATO members.<sup>29</sup> On the question of the scale and gravity of offence that brings an action within ICTY’s remit, the Report says remarkably little. Indeed, the Report implies, in the concluding passage quoted above, that the reasons for not pursuing any investigation were a lack of clarity of the law, or a lack of sufficient evidence. The fundamental reason why ICTY could not act in this matter, not fully expressed in the conclusions, was that the alleged NATO offenses, because of considerations of scale, gravity and absence of criminal intent, did not pass the threshold that would have brought them into the court’s remit. Despite such flaws, the committee performed a service by openly addressing a number of difficult issues raised by the NATO bombing campaign, and demonstrating that, although NATO decisions and actions were within ICTY’s jurisdiction, there were serious grounds for doubt as to whether any of them was such as to merit further investigation and possible prosecution.

Ultimately ICTY’s most important role in relation to Kosovo, as well as to other parts of the former Yugoslavia, may be by holding particular individuals

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27. See particularly Michael Bothe, *The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY*, 12 EUROPEAN JOURNAL OF INTERNATIONAL LAW 531–5 (2001) and Natalino Ronzitti, *Is the Non Liquet of the Final Report by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia Acceptable?*, 82 INTERNATIONAL REVIEW OF THE RED CROSS 1017–28 (2000).

28. Report to the Prosecutor, Appendix A, ¶¶ 14–25. For discussion of the other parts of the laws of war that bear on damage to the environment, see my chapters in the two works on the environment mentioned in note 34 *infra*.

29. Report to the Prosecutor, Appendix A, ¶¶ 35–47. On the declarations re Protocol I, Article 42, see DOCUMENTS ON THE LAWS OF WAR, *supra* note 3, at 500–11.

guilty of some of the terrible crimes associated with ethnic cleansing. Only by establishing individual guilt in this way can the idea of collective guilt be effectively challenged.<sup>30</sup>

### *Variety of Forms of Non-belligerence and Neutrality*

The campaign confirmed the lesson of numerous wars of the twentieth century that non-participation in war can assume many forms much more subtle and complex than the impartial neutrality spelled out in certain laws of war agreements. Two developments of the Kosovo crisis and war stand out—one typical, the other exceptional. First, in this war various non-belligerent States took part in the ongoing UN economic sanctions against the Federal Republic of Yugoslavia, and some offered some other elements of support for the NATO operations. These events thus confirmed the lesson of many other conflicts in the twentieth century, that the traditional law of neutrality, with its emphasis on impartiality, is far from covering all circumstances and cases. Secondly, one part of the Federal Republic of Yugoslavia, namely Montenegro, pursued a policy close to neutrality during the NATO bombing campaign. From the outset of hostilities NATO policy-makers recognized this remarkable, perhaps even unprecedented, state of affairs, and acted accordingly.<sup>31</sup> This is further evidence that the law's neat classification of States into belligerents and neutrals can be confounded by messy realities; and that the reasons for moderation in war extend far beyond *jus in bello*.

These developments show that life (in the form of conduct during war) is richer than art (in the form of legal agreements). However, they do not show that there is an urgent need to modify art to reflect the complexities of life. Neither of these developments threw up serious practical problems—certainly not those of the kind that could attract a general legal answer. In particular, it would be a brave person who dared to assert, as a matter of general right, that the component parts of a federal State should be free to declare their neutrality, especially in a war in which the parent State is under direct assault from outside. What these developments do show is that law can only provide a

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30. A point made forcefully by Chris Patten, European Commissioner for External Affairs, in a speech to the International Crisis Group, Brussels, July 10, 2001. He credited the idea to President Stipe Mesic of Croatia.

31. See the passages praising Montenegro's independent stance and warning Serbia not to change it, which were made in US Secretary of State Madeleine Albright's press conference on Kosovo, Washington DC, March 25, 1999 in *THE KOSOVO CONFLICT AND INTERNATIONAL LAW*, *supra* note 13, at 417, 419.

partial framework for the conduct of States and individuals during war: unique situations which defy tidy legal categorization frequently occur.

### *New Codifications*

Certain issues raised in recent wars, including the Kosovo War, have been perceived by some as pointing to lacunae in the existing law. Three major controversies arising from the Kosovo War, and which might point to the need for new codification, concerned the environmental effects of war generally, and two related issues, depleted uranium and cluster bombs.<sup>32</sup>

#### **Environmental effects of war**

This is a complex area, on which existing treaty law offers general principles as well as a number of relevant rules. The best available short summary of the legal framework on this subject is the 1994 ICRC/UN General Assembly document “Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict.”<sup>33</sup> In studies of the subject there has been a broad consensus against the idea of trying to negotiate a new treaty on the protection of the environment in war.<sup>34</sup>

Many NATO actions in the Kosovo War led to expressions of concern on environmental grounds. The actions that were most questioned included the destruction of bridges causing blockage of major rivers; attacks on power stations having serious knock-on effects on water supplies, etc.; other attacks on the infrastructure of Serbia; and the use of depleted uranium and cluster bombs, discussed separately below.

There were prompt and careful investigations of certain key issues. A study conducted under the auspices of the United Nations Environment Programme in 1999 concluded a key part of its study: “There is no evidence of an ecological catastrophe for the Danube as a result of the air strikes during the Kosovo conflict.” It went on to say, however, that there were “some

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32. All three issues were discussed in the Report to the Prosecutor, Appendix A, ¶¶ 14–27.

33. U.N. Doc. A/49/323 of 19 August 1994, at 49–53. Text in DOCUMENTS ON THE LAWS OF WAR, *supra* note 3, at 609–14.

34. See especially the two main general works on the subject: PROTECTION OF THE ENVIRONMENT DURING ARMED CONFLICT (Richard Grunawalt, John King and Ronald McClain eds., 1996) (Vol. 69, US Naval War College, International Law Studies) and THE ENVIRONMENTAL CONSEQUENCES OF WAR: LEGAL, ECONOMIC AND SCIENTIFIC PERSPECTIVES (Jay Austin and Carl Bruch eds., 2000). In the latter, see especially Carl Bruch and Jay Austin, *Epilogue: The Kosovo Conflict: A Case Study of Unresolved Issues*, at 647–64. This lays out certain general issues usefully.

serious hot spots where contamination by hazardous substances released during the air strikes poses risks for human health and the aquatic environment.” It also stressed that there was long-term chronic pollution of the Danube due to factors other than the war.<sup>35</sup> The report was overwhelmingly concerned with describing the situation and proposing remedial action: it did not discuss existing or possible future international legal regimes governing environmental destruction in war. The Chairman of the Task Force that prepared the report stated that the exercise “marked the first time that an environmental impact assessment had been made of any war, though the UN did look at the effects of oil well fires after the Gulf War with Iraq.”<sup>36</sup>

For the future, while no grand general treaty on the environmental effects of war is remotely probable, it seems likely that the practice of evaluating actual cases, coupled with demands for remedial action, will continue.

### Depleted uranium

The military value of depleted uranium (DU) shells in piercing heavy armor is proven. At the same time the very mention of the word “uranium” arouses considerable public anxiety. The use of DU in the Kosovo War, and the various issues that it raised, was not well handled by NATO spokespersons either during or after the war.<sup>37</sup>

The greatest controversy in NATO member States concerned fears that exposure to DU might have been a cause of subsequent cases of cancer among their own troops. In this connection there were criticisms of official policy towards NATO/KFOR troops involved in operations in Kosovo after the end of the bombing campaign. This is not strictly speaking a laws of war issue, as it involves relations between governments and their own troops. Some member States, including the UK, were inconsistent in the briefings given to their own

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35. UNEP/UNCHS BALKANS TASK FORCE, *THE KOSOVO CONFLICT: CONSEQUENCES FOR THE ENVIRONMENT AND HUMAN SETTLEMENTS* 60–1 (1999), available at <http://www.grid.unep.ch/btf/final/index.html>.

36. Pekka Haavisto, former Finnish Environment and Development Cooperation Minister and Chair of the UNEP/UNCHS Balkans Task Force, presenting the report at a press conference in Stockholm on October 14, 1999. Frances Williams, Christopher Brown-Humes and Neil Buckley, *NATO “hindered” Kosovo inquiry*, *FINANCIAL TIMES* (London), Oct. 15, 1999, at 30.

37. After the war, NATO spokesmen were reluctant to say anything about DU, and even cast doubt on whether it had been used at all. The UNEP/UNCHS Balkans Task Force, in its 1999 report, commented on the lack of information from NATO. See *THE KOSOVO CONFLICT*, *supra* note 35, at 61–2. The task force chairman, in his presentation on October 14, 1999, elaborated on these complaints. See *NATO “hindered” Kosovo inquiry*, *supra* note 36, at 30.

troops serving in Kosovo about possible hazards, and also about subsequent health screening.<sup>38</sup>

As far as *jus in bello* is concerned, the main issues raised are the possible effects of DU on adversary troops and third parties, both during and after an armed conflict. In particular, the use of DU involves a matter with which the laws of war have long dealt: the adverse effect that remnants of war may have, including on innocent civilians, long after hostilities are over. The scientific evidence about possible health effects of DU is still inconclusive, and the ICRC has been notably cautious in its statements on the matter. In view of DU's exceptionally slow rate of radioactive decay it is far from certain whether any worry should focus on its radioactivity. Grounds for concern which seem more likely to have a strong scientific basis are (a) evidence of impurities including much more highly radioactive isotopes of uranium; and (b) the possible toxicity of DU, though this is far from established. Such concerns will be increased by reports of pollution of groundwater in Kosovo. Careful scientific investigation of the effects of DU must be the first priority. Since there is at present no international consensus on its effects or on the desirability of putting legal controls on it, DU will not be a promising subject for negotiation until there has been a fuller scientific investigation.

### **Cluster bombs**

The explosive remnants of war, a problem of long standing which has traditionally been a subject of concern in the laws of war, proved to be a serious problem in the aftermath of the Kosovo War. Cluster bombs formed one part of that problem. These weapons, which are meant to explode on impact and/or to deactivate themselves after a specific period, can cause particularly severe problems when they fail to do so. In the year after the NATO bombing campaign ended in June 1999, at least 50 people in Kosovo were killed and 101 injured by unexploded bomblets. Over 15,000 unexploded bomblets were left in Kosovo, and NATO was criticized for failing to provide sufficient information on where cluster bombs were dropped. Cluster bombs killed or maimed five times more Kosovar children than landmines. Peter Herby, head of the Red Cross anti-mines unit, said: "Anti-personnel landmines were doing what they were meant to do, but were not being used properly. Cluster bombs are causing this problem because they're not doing what they were designed to

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38. Michael Smith and Nigel Bunyan, *Soldiers will be screened for uranium exposure*, THE DAILY TELEGRAPH (London), Jan. 9, 2001; Nicholas Watt and Richard Norton-Taylor, *Troops not told of shells' toxic risk*, THE GUARDIAN (London), Feb. 8, 2001, at 8.

do, so it's a bit more difficult to argue on humanitarian grounds.”<sup>39</sup> Despite this difficulty, the use of cluster bombs could usefully be addressed within a laws of war framework: the harm they can do to innocents is hardly in dispute, and although complete prohibition is unlikely, means to reduce the threat they pose to civilians and others should be investigated.

### *The United States and Certain Laws of War Agreements*

#### **US non-participation in key treaties**

Despite its conspicuous role in certain acts of enforcement of the laws of war, the United States is not a party to several important treaties on the laws of war. Its notorious difficulties in accepting international treaties produced the strange result that it took the United States forty years to ratify the 1948 Genocide Convention. The United States is still not formally a party to the following agreements.

- *The 1954 Hague Cultural Property Convention*. Parties: 103. (The United States signed in 1954, but it has not been ratified.)
- *The 1977 Geneva Protocols I & II on International and Non-international Armed Conflicts*. Parties: 159 and 152 respectively. (The United States signed both on December 12, 1977, but has not ratified either one.)
- *The 1980 Protocol III on Incendiary Weapons*. Parties: 81.
- *The 1995 Protocol IV on Blinding Laser Weapons*. Parties: 63.
- *The 1997 Ottawa Convention on Anti-personnel Land-mines*. Parties: 124.
- *The 1998 Statute of the International Criminal Court*. Parties: 75. (The United States signed on December 31, 2000, but has not ratified it. In May 2002 the United States informed the Depositary that it did not

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39. Peter Capella, *Nato bombs “still killing” in Kosovo*, THE GUARDIAN (London), Sept. 6, 2000, at 14, commenting on a Red Cross report first issued in September 2000. A revised version of this report is INTERNATIONAL COMMITTEE OF THE RED CROSS, CLUSTER BOMBS AND LANDMINES IN KOSOVO: EXPLOSIVE REMNANTS OF WAR (2001). I have also relied here on the annual reports of the UN Mine Action Coordination Centre (MACC) in Pristina, available at [www.mineaction.org](http://www.mineaction.org). The final annual report on the UN Interim Administration in Kosovo Mine Action Programme, covering the period to December 15, 2001, stated that it “has successfully completed its objectives, and the problems associated with land mines, cluster munitions and other items of unexploded ordnance in Kosovo have virtually been eliminated.” (¶ 4.) Over 47,000 devices were cleared. (¶ 9.) Nonetheless, there continued to be concerns about a remaining threat from unexploded cluster bomblets in Kosovo, with further finds being reported, e.g., by Richard Lloyd, Director of Landmine Action, London.

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intend to become a party to the treaty and accordingly has no legal obligations arising from its signature.)<sup>40</sup>

It would be wrong to view the US's or any other State's non-participation in a treaty as in itself a failure. There are some questionable provisions in some treaties in this area. Although a non-party, the United States takes at least some of these accords more seriously than some States that are parties. The reasons for US non-participation go far beyond the obduracy of one single elderly Senator, and call for careful analysis rather than uncomprehending condemnation. In some cases they are based on serious arguments.

Indeed, there may be a price for like-minded States taking the lead in negotiation of particular treaties, as happened in the case of the Ottawa land-mines convention. The price is that States which are partially or wholly outside the consensus, and have particular problems which need to be addressed, feel sidelined. This also happened at the Rome conference in 1998. Add a prohibition on reservations—as was done with the Ottawa and Rome treaties—and there is a recipe for non-participation even by States, such as the United States, which have a serious record of supporting the general thrust of these projects.

Of the above agreements, the one most directly relevant to the NATO operations in the Kosovo War was the Protocol I. At the time of the Kosovo War, all NATO States were parties except the United States, Turkey and France.<sup>41</sup> Although the Protocol was in force between many NATO members and the FRY (which, too, was a party to Protocol I), in formal legal terms the United States was not so bound. This unevenness in the formal participation in a key treaty could in principle have posed many problems in the conduct of the Kosovo operations. In practice the fact that three NATO members were not at that time parties to Protocol I does not appear to have been a problem. This was mainly because the United States had long accepted that it would observe a high proportion of the Protocol's provisions, either because they

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40. Information as of July 1, 2002 from ICRC, UN and UNESCO websites, *available at* [www.icrc.org](http://www.icrc.org), [www.un.org](http://www.un.org), and [www.unesco.org](http://www.unesco.org), respectively.

41. France acceded to Protocol I on April 11, 2001.

represented customary law, or because it had been decided to apply them as a matter of policy, especially in view of the reality of coalition warfare.<sup>42</sup>

Of the treaties to which the United States is not a party, probably the most politically neuralgic is not the Protocol I (sensitive as that issue continues to be) but the 1998 Rome Statute of the International Criminal Court. The opposition of the United States to this treaty, marking a reversal of its earlier support for the general idea of such a court, reflects the fundamental American concern that US forces deployed in a wide range of situations globally might face unfounded or politically motivated prosecutions, over which the United States would have no control. The detailed terms of the Rome Statute contain certain safeguards against such an eventuality.<sup>43</sup> Because of these provisions, I am tempted to say that the United States is suffering from a case of “prosecution mania.” However, in Washington DC the fear of such prosecutions was and is real. One of many US areas of concern is that in its conduct of military operations the United States might decide to attack “dual-use” targets in a country, as it did in the Kosovo War, and then face an enthusiastic prosecutor who might view this as an illegal attack on civilian objects.

Certain political and military hazards may flow from US non-participation in the Rome Statute. The US voice on certain key issues may well be muffled. In the future, US complaints about violations of the laws of war by its adversaries, and demands for the arrest of certain war criminals, may be weakened by the US refusal to accept even the potential application of international judicial procedures under the ICC to any US forces. However, the most serious consequence of US non-participation will be for the power of the court itself. Without US participation, there are bound to be questions about whether the ICC will have sufficient power to operate effectively.

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42. A succinct exposition of US policy on the application of Protocols I and II is in the US Army’s Judge Advocate General’s School’s OPERATIONAL LAW HANDBOOK 2002, at ch. 2, pp. 4–5, and ch. 11, pp. 13–15 (Jeanne Meyer and Brian Bill eds., 2002), available at the Judge Advocate General’s School’s website at <http://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf>.

43. Among the provisions of the Rome Statute offering safeguards: Article 8 on war crimes, which requires that they be “committed as part of a plan or policy or as part of a large-scale commission of such crimes.” Certain safeguards in the case of “second track jurisdiction” (i.e., where the matter has not come to the ICC from the UN Security Council): Article 16, enabling the Security Council to require the ICC to defer an investigation or prosecution; Article 17, providing that a case is inadmissible where a State is genuinely carrying out investigation or prosecution itself; and Article 18, enabling a State party to request the ICC to defer an investigation if such State is pursuing the same matter, although such deferral is left to the ICC’s decision.

This pattern of US non-participation in existing treaties is, at least for this observer, worrying. Other States which have a record of foreign military activity, including the United Kingdom, manage to be parties to many more of these agreements, and have been less nervous about the possibility, remote as it may be, of seeing the actions of their forces being actually or potentially submitted to the not always tender mercies of foreign prosecutors and courts.<sup>44</sup> When a State such as the United States that on occasion acts as a principal guarantor of implementation of humanitarian norms itself avoids being subject to many of those norms through the regular mechanism of treaty ratification, it invites criticism.

### **Impact of legal norms in US-led combat operations**

Whatever the US fears, the actual impact of international legal norms on US conduct of operations has often been positive. Commitment to the laws of war has contributed to the post-Vietnam rehabilitation of the US armed forces. In both the 1991 Gulf War and the 1999 war over Kosovo, the United States, though not a party to Protocol I, observed many of its provisions—whether because of their customary law status, because it was policy to support them anyway, or because of a need to harmonize targeting and other matters with allies. The experience of these wars suggested that most of these provisions represented a useful set of guidelines for professional conduct.

### **Conclusions**

After a war, there is a need to evaluate how well belligerents observe the rules of war; and there is also a need to evaluate how appropriate or otherwise the law is to the ever-changing circumstances and forms of armed conflict.

The NATO role in the 1999 Kosovo War was in some respects remarkably successful, and did enable the overwhelming majority of people who had fled from their homes to return. However, before too many lessons are drawn from this success, it must be emphasized that it had many exceptional features, as well as some that are more typical of the new types of conflict. There is probably a danger, as Mark Twain would have put it, of seeing more wisdom in it than is there. A war in which one side had no casualties is exceptional, and hardly likely to be repeated. Equally, it is hardly typical of modern conflict for

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44. The United Kingdom completed a key part of the Rome Statute ratification process on May 10, 2001, when the House of Commons passed the ICC Bill. Its ratification was registered with the depositary on October 4, 2001.

Western armed forces to find themselves in combat against a disciplined armed force under an organized State. With these caveats, the following conclusions are offered.

1. To a large extent NATO did succeed in the aim of avoiding damage to civilians, and the events of the war largely confirm the value and viability of the soldier/civilian distinction that is so central in the laws of war.

2. However, the war caused the death of about 495 civilians, had a huge impact on civilians in both Kosovo and Serbia, and involved extensive destruction of “dual-use” targets. It is possible that the threat of further societal destruction in Serbia played some part in the Serbian decision to capitulate: if this is correct, then it follows that the requirement of victory, and the need to observe the laws of war, could have been in considerable tension with each other. NATO strategic doctrine, in so far as it concentrates on attacking the adversary’s governmental structure, can involve problems in relation to the laws of war. The question of what is a legitimate objective, addressed principally in Article 52 of 1977 Geneva Protocol I, remains a difficult one, and a subject of contestation.

3. Reliance on air power as a means of implementing an action for fundamentally humanitarian purposes raised difficult moral questions. It also proved to be something of a gamble, both because it could not protect the victims in the short term, and because many other factors were required to bring about the Milosevic capitulation. The sense that the campaign had been a close-run thing, and the product of a unique set of circumstances, contributed to a feeling in many countries that it was unlikely to be repeated.

4. Implementation of the laws of war, and humanitarian norms more generally, had a particularly high profile not only in the course of this war, but also in its beginnings and its ending. The importance of ensuring observance of international humanitarian norms contributed to the factors leading up to the initiation of the NATO military campaign. The indictment of Milosevic on May 27, 1999 may have played some part in the Yugoslav leader’s decision to accept the eventual settlement.

5. Whether this war will prove to have some deterrent function in respect of potential future violations of fundamental humanitarian norms remains to be seen. It did not stop Indonesian forces from engaging in mass killings in East Timor in September 1999; though it may have given credibility to the efforts subsequently made under UN auspices to stop the killings.

6. Among the many difficult laws of war issues raised by the war, perhaps the most urgent is the explosive remnants of war, and in particular cluster

bombs. On depleted uranium, more knowledge of its impact on health is needed before that issue can be usefully addressed in the laws of war.

7. It remains an odd although not completely inexplicable paradox that the United States, which has played the key part in developing a use of air warfare that is reasonably consistent with key principles and provisions of the laws of war, is outside so many parts of the treaty regime of the laws of war. This situation calls for careful analysis, not shrill condemnation. After the experience of Kosovo, the US government could usefully re-examine the treaties to which it is not party, to see if it can bring itself more into line with a treaty regime which it has, in large measure, not merely observed but also found useful, not least in the 1999 Kosovo War. Unfortunately there has been a tendency in the United States to react negatively and defensively to the reasonably judicious ICTY review of the NATO bombing campaign; and this tendency has reinforced the US government's resistance to becoming a party to certain laws of war treaties, including the ICC Statute.

8. The Kosovo War, and the role of the laws of war in it, evoked different perceptions in different parts of the world. Some perceived the war favorably as a case of NATO coming to the aid of an oppressed population which happened to be predominantly Muslim, and maintaining certain limits in its conduct of military operations. However others viewed these events much more critically, as one further proof that the armed forces of northern countries, especially of course the United States, have established such a monopoly on the battlefield that the only effective response to their presumed dominance becomes an asymmetric one, including terrorist attacks. In this view, to the extent that the laws of war are considered at all, they are deemed to suit the north more than the south. Such a perception may be rooted in a naive and probably incorrect view of the results that are presumed to flow from terrorist attacks and other unlawful acts, but it appears to be held by many. Partly because of such perceptions, the effective US/NATO conduct of operations in the Kosovo War, in a manner deeply influenced by laws of war considerations, may paradoxically fail to discourage certain groups from conduct in which such considerations are alien.