International Law Studies - Volume 78
Legal and Ethical Lessons of NATO's Kosovo Campaign
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Coalition Warfare and Differing Legal Obligations of Coalition Members Under International Humanitarian Law

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Wars were fought by alliances or "coalitions," both before and at Waterloo. Indeed, coalition warfare has been a dominant theme of armed conflict in the 19th and 20th centuries and is represented at the end of the last millennium in Operation Allied Force. It is, however, a more recent development that coalition partners do not necessarily operate separately and in clearly distinct segments of the theater or battlefield. Today's coalitions "inter-operate" so closely that it may be difficult, if not impossible, for adversaries and outsiders, such as the International Committee of the Red Cross (ICRC) that seek to monitor the observance of obligations under international humanitarian law, to identify who did what and to whom.

Admittedly, the coalition partners have (almost) a clear understanding of such matters. Moreover a participating State would, due to the pressure from a public at home which demands answers, either admit to its own wrongdoing, deny responsibility and point out the responsible party, or make a plausible denial of responsibility without putting the blame on any specific State or actor. If the coalition consists of democracies, that process should make it easier to place the blame within a relatively short period of time. Theoretically, however, one cannot leave out the possibility that the coalition may manage to build a wall of denial or silence.

Increasing the problems further, the various members of a coalition waging war might have differing legal obligations under the law of armed conflict;

obligations which are treaty-based. Some coalitions might be more homogeneous in this respect, others less so. The coalition conducting Operation Allied Force was certainly more homogenous, even if not all participating members were contracting parties to the 1977 Additional Protocol I the 1949 Geneva Conventions, than the coalition which is currently providing troops for the Kosovo International Security Force (KFOR).

At the end of the day Protocol I may not be the biggest problem. What about the 1980 UN Conventional Weapons Convention and its Protocols? Or the 1997 Ottawa Convention on anti-personnel mines? The diversity of respective obligations arising from these conventions might be much greater in a coalition of over 30 States than with regard to Protocol I.

Can there be differing legal standards for various members of a given coalition? Could the commander-in-chief (CINC) of such a coalition ask (or even order) those force-providing States not parties to the restricting treaties to undertake actions which violate those treaties, while all the others live up to their treaty obligations? Does it make a difference if the coalition is a "UN force" or at least authorized by the Security Council to use force? Are there other reasons why the strictest legal standard should govern a coalition war because the coalition derives the legality of its use of force from being a regional arrangement, or from its humanitarian purpose? Or because reprisals of the other side would be indiscriminate? And to whom would possible internationally wrongful acts be attributed? To the coalition if it is an international organization, to all members of the coalition or only to the flag State?

This paper will discuss all these questions using NATO's Kosovo campaign as an example, which includes the air campaign of Operation Allied Force, as well as KFOR, the ground force authorized by the UN Security Council to use force, if necessary. There can be no doubt that the whole of the law of armed conflicts applies to the air campaign, although NATO spokesmen avoided calling it a "war" and insisted that it was a "humanitarian action." I will attempt to treat the questions under a somewhat broader perspective, because there will be other (and different) coalitions in the future, and the same rules will probably apply to all of them; as would, by the way, customary international law rules emerging out of Operation Allied Force.

The Factual Setting

Examples of the diversity of obligations during the Kosovo campaign include: France, the United States and Turkey were not parties to Protocol I; Turkey is not a party to the UN Conventional Weapons Convention or any of

its Protocols; Russia (as was the former Soviet Union) is not a party to Protocols II and IV, nor is Poland; Yugoslavia and all its former Republics are not parties to Protocols II and V with the exception of Bosnia, which is a party to Protocol II; and the United States is not a party to Protocol IV. One could go on naming other force-providing States among the over 30 contributing to KFOR and the various choices they have made with respect to ratifying the Conventional Weapons Convention and its protocols.

It is also a fact that for probably different reasons foreign offices and defense ministries carefully compared armed forces manuals. However, as the second KFOR Commander confirmed,[1] while rules of engagement contained numerous restrictions premised on grounds of domestic law, none expressly refer to obligations under international humanitarian law. General Clark, who served as Supreme Allied Commander Europe, reports that while there was resistance among NATO States when he tried to get additional targets approved, the rationale did not include "we can't do it because some of us are bound by Protocol I."[2] Nonetheless, the legal restraints of Protocol I were observed, even if they found no expression at the CINC-level.

Has Protocol I Become Customary International Law?

Differing treaty obligations of members of a coalition would not pose a problem if a treaty such as Protocol I has become customary international law. No one, however, has thus far maintained that the UN Conventional Weapons Convention and its Protocols, or the 1997 Ottawa Convention, have become binding upon non-parties.[3] It is widely accepted in international law that, as Article 38 of the Vienna Convention on the Law of Treaties confirms, treaty obligations and customary law obligations may coincide, because the treaty codifies already existing customary law, or because new customary international law is generated in the aftermath of a treaty.

It is appropriate to dwell for a moment on the process of creating customary international law. As stated in Article 38 (1) (b) of the Statute for the International Court of Justice (ICJ), such law requires both custom and the subjective element of following this custom because one is so obliged by law—*opinio iuris*. In this respect, it is interesting to note the practice of the same court in the

1. Personal interview; *cf. also* GENERAL KLAUS REINHARDT, KFOR - STREITKRÄFTE FUR DEN FRIEDEN (2001).
2. WESLEY CLARK, WAGING MODERN WAR 201 (2001).
3. The dubious process of instant customary international law will thus not be investigated here.

"de-emphasising of material practice as a constitutive element combined with the tendency to "count" the articulation of a rule twice, so to speak, not only as an expression *opinio juris* but also as State practice itself."[4]

In the *Nicaragua* case, the International Court of Justice (ICJ) disregarded the view of some lawyers[5] as to the non-relevance of General Assembly resolutions in the process of evolving customary international law, when it referred to non-binding resolutions as evidence of this kind of law.[6] The question of who's practice is relevant in the formation of customary law is central in this process. The ICJ stated in its *North Sea Continental Shelf* case[7] that the practice of non-parties is essential in the development of this law. With treaties of universal acceptance like the 1949 Geneva Conventions,[8] and to a lesser extent the Additional Protocols of 1977,[9] there are only a few States left to create this kind of custom and *opinio iuris*. This Baxter paradox[10] has, however, not been seen as blocking the evolution of customary law, as exemplified by the above-mentioned decisions of the Court. The focus has instead shifted to the activities of both the parties and the non-parties, considering a wide range of sources as evidence for both custom and *opinio iuris*. With a distinct unwillingness to focus solely on what the belligerents actually do, which is probably bound up with a policy of enhancing the protection of noncombatants and combatants alike, the ICJ, and lately as well the International Criminal Tribunal for the former Yugoslavia (ICTY),[11] have decided to direct their focus at other sources of "evidence" for the necessary custom and *opinio iuris*. Amongst these, the number of ratifications to international treaties and the dictates of military manuals have been referred to in order to

4. Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles*, 12 AUSTRALIAN YEAR BOOK OF INTERNATIONAL LAW 82, 96 (1992).
5. E.g, Gaetano Arangio-Ruiz, *The Normative Role of the General Assembly of the United Nations and the Development of Principles of Friendly Relations*, 137 RECUEIL DES COURS 431 (1972).
6. Military and Paramilitary Activities (Nicar. v. U.S.) 1986 I.C.J. 99–100 (June 27) [hereinafter Nicaragua case]. Though, as stated by Wolfke,"[t]he evaluation of the sufficiency of such evidence must, however, always be carried out 'with all due caution,' especially as far as the evidentiary value of non-binding resolutions is concerned." Karol Wolfke, CUSTOM IN PRESENT INTERNATIONAL LAW 152 (2d ed. 1993).
7. North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.) 1969 I.C.J. 43 (Feb. 20).
8. According to a search of the official ICRC website (http://www.icrc.org) on October 18 2001, there are 189 Parties to the 1949 Geneva Conventions.
9. There are 159 Parties to Additional Protocol I and 151 Parties to Additional Protocol II. *Id.*
10. Richard Baxter, *Treaties and Custom*, 129 RECUEIL DES COURS 27, 73 (1970).
11. Prosecutor v. Tadic, Appeal on Jurisdiction, Case No. IT-94-1-AR72 (Oct. 2, 1995), *reprinted in* 35 INTERNATIONAL LEGAL MATERIALS 32, 55 (1996).

ascertain what States consider to be binding on themselves.[12]

Customary international law may also emerge from treaties because a great number of identical bilateral treaties establish a widespread *opinio iuris*, or because a multilateral treaty has been ratified by the overwhelming majority of States. Thus, quite a number of authors conclude from the fact that the Geneva Conventions of 1949 have been ratified by more States than virtually any other convention (the Convention on the Right of the Child being one of the rare exceptions[13]) that a great number of their rules have become recognized as customary rules, even as *ius cogens*. In some instances this might be the result of occasional confusion provoked by renaming the "law of war" or "law of armed conflict" as "international humanitarian law," thus blurring the distinction between "humanitarian" and "human rights" law.[14] Common Article 3 to the four Geneva Conventions, which does constitute a kind of human rights provision, might have contributed to that confusion, since, as the ICJ held in the *Nicaragua* case, it reflects "elementary considerations of humanity"[15] and constitutes "the minimum yardstick"[16] for armed conflict. And again in the *Nuclear Weapons* advisory opinion, the ICJ pronounced that:

> [A] great many rules of humanitarian law in armed conflict are so fundamental to the respect of the human person . . . that . . . these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.[17]

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12. *Id.*, and Report on the follow-up to the International Conference for the Protection of War Victims, 26th International Conference of the Red Cross and Red Crescent, Commission I, Item 2, Doc 95/c.I/2/2, at 7–8 (1995).
13. Mention should as well be made of the Constitution of the Universal Postal Union and the Constitution of the International Telecommunication Union, both of which have 189 parties, as stated on their homepages http://www.itu.int and http://www.upu.int, respectively.
14. Dietrich Schindler, *Significance of the Geneva Conventions for the Contemporary World*, 81 INTERNATIONAL REVIEW OF THE RED CROSS 717 (1999). The process is well described by Meron, who states that "the recognition of norms based in international human rights as customary may affect the intepretation and even the status of the parallel norms in instruments of international humanitarian law through a sort of osmosis or application by analogy." THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY INTERNATIONAL LAW 68, (1989).
15. Nicaragua case, *supra* note 6, at 104.
16. *Id.*
17. Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 1996 I.C.J. 257, ¶ 99 (July 8).

The International Tribunal for the former Yugoslavia joined the ICJ in this view in the *Tadic* case.[18] The question remains, however, whether this is of much help in determining whether all the provisions of Protocol I, and in particular those that might not have been properly observed in Operation Allied Force, are intransgressible principles of customary international law.

The gap between those coalition partners who have ratified Protocol I, and those who have not, might not be as wide as it seems, since, for example, the US Air Force's Intelligence Targeting Guide has incorporated almost verbatim many relevant articles from the Protocol.[19] It is of interest here to note that its Attachment 4.2.2 on military objects is—almost to the letter—a restatement of Protocol I, Article 52(2). Attachment 4.3.1.2 on precautions and proportionality does not mention the trinity of "excessive," "concrete," and "direct," though these are mentioned in US Army Judge Advocate General's School's Operational Law Handbook 2002,[20] as well as in the US Army's Field Manual 27-10.[21] The Handbook states that "[t]he U.S. considers these provisions customary international law." Admittedly, this statement indicates only that the US recognizes its *own* interpretation of these principles/rules as part of customary international law.[22]

As mentioned above, the pronouncement of a rule in a national manual of a non-party to a treaty has special relevance in the process of establishing customary international law, notwithstanding the assertion in *United States v. List et al*.[23] The fact that the entries are motivated by more than just legal considerations does not seem to limit their legal significance.[24]

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18. Tadic case, *supra* note 11, ¶¶ 96–137.

19. TARGETING DIVISION, HEADQUARTERS 497 INTELLIGENCE GROUP, AIR INTELLIGENCE AGENCY, USAF INTELLIGENCE TARGETING GUIDE (Air Force Pamphlet 14-210), Feb 1, 1998, *available at* http://www.fas.org/irp/doddir/usaf/afpam14-210/.

20. INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL'S SCHOOL, OPERATIONAL LAW HANDBOOK 9 (2002), *available at* http://www.jagcnet.army.mil/CLAMO-Public.

21. HEADQUARTERS, DEPARTMENT OF THE ARMY, THE LAW OF LAND WARFARE (Department of the Army Field Manual 27-10) para. 41 (1956), *available at* http://www.adtdl.army.mil/cgi-bin/atdl.dll/fm/27-10/Ch1.htm.

22. OPERATIONAL LAW HANDBOOK, *supra* note 20, at 9.

23. U.S. v List et al. [The Hostage case] (1948), Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, vol. 11 (1950), 1230 at 1237. See as well Theodor Meron, *The Geneva Conventions as Customary Law,* 81 AMERICAN JOURNAL OF INTERNATIONAL LAW 361 (1987).

24. Compare this with the ICJ's accceptance of statements made by State representatives in international fora as constitutive of *opinio iuris*, although these statements are motived by a wide range of different reasons, I.C.J. Report 1986 at 98–108, ¶¶ 187–205.

But even if national military manuals may increasingly be looked at as important evidence of customary international law, this will only be of limited help such as, for example, regarding the status of collateral damage.

The problem here is whether those provisions of Protocol I that came into focus during Operation Allied Force are eligible for consideration as customary law, given that terms like "military significance," "definite military advantage," and "effective contribution to military action" are not defined, not even by non-exhaustive examples as for "indiscriminate attacks?" If one takes only the declaration made by Germany and the United Kingdom, according to which "the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack as a whole and not only from isolated or particular parts of the attack,"[25] what then is the meaning or interpretation that could become customary law for non-parties? Could it be that non-parties have to observe stricter obligations than those who have ratified Protocol I, but with admissible and accepted reservations or declarations? As stated by Baxter, "[i]t would be paradoxical in the extreme if a non-party were to be regarded as bound unqualifiedly by the obligations of the conventions, while a party might limit its duties by the entry of reservations."[26]

It could be argued that there would not be any significant problems binding non-parties to the same extent as far as the States having made reservations are bound. The understanding that collateral casualties are both legal and unavoidable, as long as they are below a certain threshold, would thus stand. Admittedly, only a few of the parties to Protocol I have made the above-mentioned reservations. A case could thus be made for binding the non-parties to a stricter code, i.e., what the parties without a reservation are bound by, as long as customary international law can be established.

Both alternatives, however, incorporate a degree of uncertainty as regards the precise limits of the obligations, as the proportionality principle "creates serious difficulties in practice, since it necessarily remains loosely defined and is subject to subjective assessment and balancing. In the framework of the required evaluation, the actors enjoy a considerable margin of appreciation."[27] It may be correct to say that the fundamental principles repeatedly mentioned

25. *See* DOCUMENTS ON THE LAWS OF WAR 505 and 511, respectively (Adam Roberts & Richard Guelff eds., 3d ed. 2000). Similar statements were made by Australia, Belgium, Canada, Italy, the Netherlands, New Zealand and Spain. *Id.* at 500–509.

26. Richard Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRITISH YEARBOOK OF INTERNATIONAL LAW 285 (1965–66).

27. Stefan Oeter, *Methods and Means of Combat*, *in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 178–9 (Dieter Fleck ed., 1995). See *id.* for further references.

by the ICJ, the basic distinction between civilians and combatants, the prohibition against directly attacking civilians, and the rule of proportionality, are customary international law. But it is very doubtful whether the same can be said about all the other provisions of Protocol I—in particular those dealing with collateral damage.[28]

If Protocol I is not, at least not as a whole, customary international law, differing legal standards for various members of a given coalition remain—even leaving aside other restrictions on weapons and means of warfare. But there might be other reasons why the same standard of legal obligations should apply to such a coalition.

Does "same standard" always mean "maximum standard" in the sense of a "most favored nation clause?" The answer probably depends upon if and to what extent the reciprocity principle is (still) applicable to the international humanitarian law as it certainly was to the traditional law of war. Article 96 of Protocol I provides that parties to a conflict which are bound by the Protocol remain so bound vis-à-vis adverse parties also bound thereby, even if one or more allied or adverse parties are not party to the Protocol. Consequently, States bound by the Protocol participating in a coalition which includes States not party thereto, are not relieved of their Protocol I obligations. But it has been said that, because Iraq has not accepted Protocol I, those States in the opposition coalition during the Gulf War which were bound by that Protocol, were not directly obliged to apply it, whatever "directly" means in that context.[29] I will come back to the reciprocity problem later with respect to reprisals.

A Single (Maximum) Standard for "UN Forces"?

For quite some time it has been debated whether UN forces were not only morally, but legally bound to respect the existing humanitarian law, even if some or all of the force-providing States were not. But before addressing that issue, a few words should be devoted to the differentiation of forces operating under a United Nations mandate. Since no standing UN force has been established under UN Charter Articles 43 and 45, the UN has had to rely on

28. For a comprehensive analysis of the customary status of the Additional Protocols, see Christopher Greenwood, *Customary Law Status of the 1977 Additional Protocols*, *in* HUMANITARIAN LAW OF ARMED CONFLICT, CHALLENGES AHEAD 93 (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991).

29. Christopher Greenwood, *Historical Developments and Legal Basis*, *in* HANDBOOK OF HUMANITARIAN LAW, *supra* note 27, at 26.

coalitions of the willing whenever it decided armed force was needed.[30] In only one instance did such a coalition of the willing operate under anything resembling UN command and control.[31] These Chapter VII actions have in general been carried out under UN authority—through the mandate itself—but under no tangible UN control. Such was the case with Operation Desert Storm in 1991. State practice seemed to be founded on the idea that armed forces acting under Chapter VII are not bound by the Geneva Conventions or other treaty-based international humanitarian law, as they act for the UN rather than as State actors bound by those rules.[32]

The doctrine has, on the other hand, often claimed binding effect of international humanitarian law in these situations.[33] This claim is often based on the obligation of parties to the 1949 Geneva Conventions to ensure observance of these rules in all situations.[34] It can also be said to be presumed by the adoption of the 1994 Convention on the Safety of United Nations and Associated Personnel, which in its Article 2(2) excludes its application to missions authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which *the laws of international armed conflicts applies*."[35]

30. The regime regulating UN authorized peace-keeping forces will not be examined here.

31. The US-led coalition forces in Korea during 1950–53.

32. Michael Hoffman, *Peace-enforcement actions and humanitarian law: Emerging rules for "interventional armed conflict"*, 82 INTERNATIONAL REVIEW OF THE RED CROSS 193 (2000).

33. E.g., LESLIE GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 319 (1993). Seyersted stated that "[n]one of the States participationg in the United Nations action in Korea maintained during that action that it was not governed by the general laws of war, on the contrary, they acted on the assumption that it was." FINN SEYERSTED, UNITED NATIONS FORCES IN THE LAW OF PEACE AND WAR 204 (1966). The binding effect of international customary law seems furthermore to follow from UN Charter Article 103, which seems to allow the UN obligations to supersede other obligations only when these other obligations result from treaties. *But see* Paul Szasz, *UN Forces and International Humanitarian Law*, *in* INTERNATIONAL LAW ACROSS THE SPECTRUM OF CONFLICT: ESSAYS IN HONOUR OF PROFESSOR L.C. GREEN ON THE OCCASION OF HIS EIGHTIETH BIRTHDAY 513 (Michael Schmitt ed., 2000) (Vol. 75, U.S. Naval War College International Law Studies). This in itself leaves open the question of how the UN can be bound by the treaty obligations of international humanitarian law that do not (yet) have a customary status.

34. Common Article 1 to all four Conventions. *See e.g.*, Greenwood, *supra* note 29, at 46.

35. Emphasis provided by the present author. The main problem with respect to the determination of which law is to apply to UN missions is considered by Greenwood to relate to those situations where the mission is neither an enforcement mission which undertakes military actions resembling an armed conflict, nor a peacekeeping mission which strives to act neutrally. Christopher Greenwood, *International Law and the Conduct of Military Operation: Stocktaking at the Start of a New Millennium*, *in* INTERNATIONAL LAW ACROSS THE SPECTRUM OF CONFLICT, *supra* note 33, at 192.

The UN Secretary-General's Bulletin on the "Observance by United Nations forces of international humanitarian law" of August 6, 1999,[36] provides only partial answers. First of all, the Bulletin is restricted to forces conducting operations under UN command and control,[37] which is, as stated above, the exception rather than the rule. What about forces under national or NATO command, authorized, as KFOR, "to monitor and ensure compliance with this [the Military Technical] Agreement and to respond promptly to any violations and restore compliance, using military force if required"?[38] Secondly, the Bulletin is said not to replace the national laws by which military personnel remain bound throughout the operation.[39] What if the army, air force, navy or marine corps manuals of States which are not a party to some or most of the treaties on humanitarian law allow for actions and operations prohibited under those treaties? Are the manuals to prevail? Because this Section seems to be included in order to ensure that obligations resting on parties that are more far reaching than those flowing from the Bulletin's provisions will not be abrogated from, the object thus being the application of as much international humanitarian law as possible to the relevant force, it is therefore submitted that such manuals cannot validly derogate from the obligations under the Bulletin.

The substantive Sections 5 to 9 of the Bulletin combine fundamental principles that might be classified as customary law with rules prohibiting or restricting the use of certain weapons, rules which are hardly customary law.[40] This raises the question as to whether the Secretary-General can issue rules and regulations for the conduct of State-deployed forces on UN missions if some of the provisions rely on treaties that have not been ratified by all States participating in Chapter VII or peacekeeping operations?[41] Some authors

36. 38 INTERNATIONAL LEGAL MATERIALS 1659 (1999) [hereinafter Bulletin].
37. *Id.*, Section 1.
38. The Military Technical Agreement Between the International Security Force ("KFOR") and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, Appendix B(4), *available at* http://www.nato.int/kfor/resources/documents/mta.htm.
39. Bulletin, *supra* note 36, Section 2.
40. See especially Bulletin, *id.*, Section 6.
41. Hoffman, *supra* note 32, at 201.

seem to claim so when focusing on the Secretary-General's function as "commander-in-chief" of operations carried out under UN authority and command—which currently includes only peacekeeping operations.[42] It should be pointed out here that in those situations where a coalition has been authorized by the UN, but has not been obliged to operate under its control/command, a right for the Secretary-General to instruct the force does not exist, which is presumed by the exclusion of missions outside "United Nations command and control" from the Bulletin's applicability.[43]

A solution could be seen in the status-of-forces agreements mentioned in Section 3, which are treaties by themselves and which are designed to ensure that the force will conduct its operations with full respect for the principles and rules of the general conventions applicable to the conduct of military personnel. But then, also under Section 3, the obligation to respect such principles and rules is applicable even in the absence of a status-of-forces agreement. And, finally, the Guidance has serious lacunae, not least because it is silent on military occupation and KFOR is an occupation force *par excellence*.

One obvious way to bind the forces operating under a UN mandate to the highest level of international humanitarian law would be to mandate such compliance in the Security Council resolutions which authorize the use of force in the first place. This way, contributing States which are non-parties to the relevant treaties would be obliged to act in accordance with these treaties for the purpose of the specific mission. On the other hand, such a policy could effectively undermine the interest of these States in participating in UN missions, thus leading to a shortage of voluntary forces.[44]

It remains more or less a gut feeling that UN or UN-authorized forces should abide by all existing principles and rules of international humanitarian law. The legal foundation of such an obligation—as well as the legal status of the Secretary-General's Bulletin—is still open to debate.

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42. Szasz, *supra* note 33, at 519. As UN Force Protection (UNPROFOR) I and II in the former Yugoslavia have shown, enforcement actions can become necessary even in the course of peacekeeping operations.

43. Bulletin, *supra* note 36, Preamble.

44. The Security Council could as well decide to relieve the participating members of their humanitarian treaty obligations through UN Charter Article 103, though it is submitted here that this is only a theoretical possibility.

A Single (Maximum) Standard for "Coalitions"?

There are, as we have witnessed in Operation Allied Force, coalitions that have no UN authorization whatsoever. The legality of such operations will not be the subject of this paper. Rather, the focus here is whether the fact alone that States form a coalition for the joint use of force oblige them to apply a single maximum standard in humanitarian law? In general, a State does not lose or gain rights and obligations when it operates together with other States as opposed to undertaking operations alone. Some arguments in favor of such an obligation are, however, conceivable. NATO drew some legitimacy (if not legality) for Allied Force from the fact that the UN Security Council was veto-blocked, unable to do what common sense and the humanitarian agenda of present day politics and law expected,[45] and that the regional arrangement (NATO) had to step in; that this was not the use of force by a single State for selfish purposes, but the use of force by a coalition of like-minded, democratic, law-abiding States for a good purpose, a "small UN." This might, or might not, overcome the missing UN mandate and might end up setting a problematic precedent, but since it is at least not entirely clear whether even UN forces have to apply a maximum standard of humanitarian law, being a coalition alone does not seem to be a convincing argument in that respect.

More compelling could be the argument that the coalition used force for humanitarian purposes, that its very purpose was to end gross violations of human rights.[46] The fact that NATO was intervening in the name of human rights implied a perhaps heavier moral burden to respect the rules of humanitarian law, but did it also imply a legal obligation to do so? Would the same reasoning apply if a coalition is not intervening in the name of human rights, but participating in collective self-defense?

In the specific case of NATO's Operation Allied Force, one motive for respecting a high standard of humanitarian law was certainly to avoid the loss of the support of even a single ally, and NATO's unanimity rule in targeting decisions also guaranteed that the concerns of each member were taken seriously. It also has been reported from the Gulf War that the Royal Air Force

45. Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1 (1999).
46. V. Kröning, *Kosovo and International Humanitarian Law*, *in* Forum: HUMANITÄRES VÖLKERRECHT - INFORMATIONSSCHRIFTEN HEFT1/2000, at 45 (2000).

refused at least twice to bomb targets given it by American commanders because the risk of collateral damage was too high.[47]

A policy argument that would still have some importance is the need to streamline the planning structure of a coalition of forces. Thus, it is preferable to have only one set of rules upon which to formulate plans, and since the parties with the most comprehensive legal bindings cannot derogate from their obligations, unless these bindings are dependent upon reciprocity and the other party is not bound, the maximum level should be chosen.

But the strongest incentive for a coalition to apply the maximum standard, if it is also the one applied by the other side, is, I believe, still "positive reciprocity" and the risk of reprisals. Quite a few argue that since the law of war has been transformed into a human rights oriented law, belligerent reprisals are prohibited and reciprocity has therefore lost its relevance.[48] This may be correct to a certain extent for the Geneva Conventions and Protocols, which expressly prohibit reprisals against civilians, wounded, prisoners of war, indispensable objects, the natural environment and installations containing dangerous objects, etc.[49] Hostile forces, however, still may become the object of reprisals. But beyond "Geneva Law," there is the UN Conventional Weapons Convention and its Protocols. An adversary might not want, or might not be able, to distinguish between coalition partners if it decides to respond to the use of a prohibited weapon in the same manner.

Responsibility

Another reason, finally, for applying a single (maximum) standard of international humanitarian law in a given coalition might be responsibility for possible internationally wrongful acts. To whom will non-compliance with humanitarian law rules, which bind some but not all in a coalition, be attributed?

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47. H.L.Debs, Vol. 600, col. 907, May 6, 1999, as mentioned in Peter Rowe, *Kosovo 1999: The Air Campaign—Have the Provisions of Additional Protocol I Withstood the Test?*, 82 INTERNATIONAL REVIEW OF THE RED CROSS 158 n.41 (2000). It should here be mentioned that one of the reasons for the US to limit the amount of States participating in the attacks on the Taliban regime in Afganistan in the fall of 2001 seems to be "the lesson US military planners took from Nato's bombing campaign in Kosovo in 1999 [which] was that a large alliance complicates and delays the choice of objectives" as stated in the FINANCIAL TIMES (London), Sep. 22/23, 2001, at 1.

48. Schindler, *supra* note 14, at 725.

49. Articles 46, 47, 13 and 33 of the 1949 Geneva Conventions I, II, III and IV, respectively, and Articles 20 and 41–56 of Protocol I.

To the "coalition" if it is, as in the case of NATO, an international organization? To all members of the coalition or only to the respective flag State?

A. Responsibility of international organizations in general

It seems to be widely accepted today that the rules of State responsibility can be applied *mutatis mutandis* to intergovernmental organizations having a legal capacity of their own in international law. One relevant principle that applies here is that nobody should be able to evade liability or responsibility by transferring activities to a separate legal entity which he has co-founded and which operates in pursuit of his own goals and under his influence in the organs of that entity. This, again in principle, entails that an international organization is responsible for its internationally wrongful acts in the same way as would be its member States had they acted individually instead as of members of the organization.[50]

The attribution of responsibility to international organizations has been justified on several grounds. With the major role of international organizations in contemporary international relations, the international community could not tolerate a situation in which such active actors in the global system could violate binding international norms without bearing the consequences; otherwise the basic aims of international responsibility (i.e., deterrence and provision of remedies) would be undermined.[51] Others base their reasoning for attributing responsibility to international organizations on their international legal personality, which entails rights and obligations, one of the obligations being international responsibility in certain cases.[52] Again others hold that the same "general principles of law" that are the basis of State responsibility apply also to international organizations which, being subjects of international law, are governed by identical principles.[53] Since treaties or agreements which explicitly establish the responsibility of international organizations are scarce,[54]

50. *See Werner Meng, Internationale Organisationen im völkerrechtlichen Deliktsrecht* 45, 324–57 ZIETSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 324 *et seq* (1985) and MOSHE HIRSCH, THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS TOWARD THIRD PARTIES: SOME BASIC PRINCIPLES *passim* (1995).

51. *See* HIRSCH, *supra* note 50, at 8.

52. *See* Konrad Ginther, *International Organizations, Responsibility*, *in* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1336 *et seq* (Rudolph Bernhardt ed., 1995).

53. *See* Mahnoush Arsanjani, *Claims Against International Organizations*, 7 YALE JOURNAL OF WORLD PUBLIC ORDER 131 (1981).

54. *See* Convention on International Liability for Damages Caused by Space Objects, *Jan. 29, 1972*, 18 U.S.T. 2410, 610 U.N.T.S. 205, and the United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/conf.62/122, *reprinted in* 21 INTERNATIONAL LEGAL MATERIALS 1261–1354 (1982).

the principle that international organizations may be held internationally responsible for their acts is mostly classified as being part of international customary law. But practice in this field is also rare and, furthermore, not consistent, since "responsibility" and "liability" are not always clearly distinguished.[55]

A number of preconditions seem to be unanimously required for the responsibility of international organizations, the first one being that the organization has legal personality, i.e., a legal capacity of its own. There is little doubt that the member States of an international organization in most cases have accepted that legal status by either founding the organization or by joining it later on. But what about third States? The majority opinion still appears to be that international organizations have legal capacity with respect to third States only if those third States have recognized the organization, either explicitly or implicitly through establishing diplomatic relations or entering into treaties with the organization.[56] One might add that an implicit recognition could also be found if a third State raises claims against an international organization.

Another precondition is that the act that caused damage is attributable[57] to the international organization. Likewise, in this respect, it does not seem to be decisive whether the act was within the power, function or mandate of the organization, or rather constituted an *ultra vires* act;[58] rather, it is necessary that the international organization had "effective control" over the act. One of the notable shortcomings of international organizations, in comparison with States, lies in their limited resources.[59] Most international organizations lack personnel, means, and in particular troops to administer large-scale operations. The practical solution that has been found is that the organization "borrows" the necessary resources from its member States.[60] The question that then arises is who shall bear international responsibility, i.e., who has command and control, the organization or the "sending State?"

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55. The International Law Commission makes a distinction, using "responsibility" for cases involving a breach of obligations and "liability" in connection with activities which have caused damage, but are otherwise lawful. *See* HIRSCH, *supra* note 50, at 7 n.34.

56. But see IGNAZ SEIDL-HOHENVELDERN & GERHARD LOIBL, RECHT DER INTERNATIONALEN ORGANISATIONEN 90 *et seq.* (2000).

57. KNUT IPSEN, VÖLKERRECHT 573 (1999).

58. *See* HIRSCH, *supra* note 50, at 88 *et seq.*

59. *See* Torsten Stein, *Decentralized International Law Enforcement: The Changing Role of the State as Law Enforcement Agent*, *in* ALLOCATION OF LAW ENFORCEMENT AUTHORITY IN THE INTERNATIONAL SYSTEM 107 *et seq.* (Jost Delbrück ed., 1995).

60. *See* HIRSCH, *supra* note 50, at 66 *et seq.*

A slightly different question is who will bear responsibility if the organization directs or "orders" its members to implement a decision of the organization. The crucial factor for the determination of responsibility for the implementing act is the measure of discretion left to the members.[61]

B. Is NATO responsible?

If a precondition for the responsibility of international organizations is that they have legal personality with regard to the claimant third party, the fulfillment of that condition vis-à-vis Yugoslavia can by no means be taken for granted. There is no evidence that Yugoslavia, as a non-aligned State, ever formally recognized NATO as a subject of international law. And Yugoslavia remained excluded from the vast and rapidly developing net of NATO's cooperation agreements with Central and Eastern European countries (North Atlantic Cooperation Council and Partnership for Peace).[62] Yugoslavia has not, in any event not yet, raised claims arising out of Operation Allied Force against NATO, but instead—before the ICJ—against NATO's member States.[63] This is certainly also due to the fact that NATO is neither a possible respondent before the ICJ, nor a possible defendant before the International Criminal Tribunal for the former Yugoslavia (ICTY). Only States can be parties to a legal dispute before the ICJ, and the Yugoslavia Tribunal' s jurisdiction is limited to the individual criminal responsibility of those who have committed grave breaches against international humanitarian law.[64] Proceedings have also been introduced before the European Court of Human Rights.[65]

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61. *See id.* at 82.

62. For details, see NORTH ATLANTIC TREATY ORGANIZATION, NATO HANDBOOK 43 *et seq.* (1995).

63. For details, see Peter Bekker, International Decisions, *Legality of Use of Force - International Court of Justice, June 2, 1999,* 93 AMERICAN JOURNAL OF INTERNATIONAL LAW 928 (1999).

64. Nevertheless, in May 1999, the chief prosecutor for the ICTY established a committee to examine and assess charges that NATO's conduct of the air campaign violated the laws of war. On June 2, 2000, the ICTY prosecutor reported to the UN Security Council that, based on the committee's report, she found that there was no basis to open a criminal investigation into any aspect of the NATO campaign. Although NATO had made some mistakes, the prosecutor determined that NATO had not deliberately targeted civilians. For details, see Sean Murphy, Contemporary Practice of the United States Relating to International Law, *NATO Air Campaign Against Serbia and the Laws of War*, 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 690 (2000).

65. Application No. 5220/99 (Bankovic and others—Belgium, Czech Republic, Denmark, France, Gemany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Turkey and United Kingdom). The applicants alleged violations of Articles 1, 2, 10 and 13 of the Convention. The application has been communicated to the respondent States and transferred to the Grand Chamber of the Court (see Information Note No. 24 on the case-law of the Court, November 2000). The Court held hearings on the admissibility on October 25, 2001.

Another question would be whether NATO acted within the framework of its functions and powers, both defined and fixed in the North Atlantic Treaty,[66] since some writers maintain that an international organization's responsibility presupposes that the organization has acted according to its statute. Here, again, the answer is not that easy. The main purpose of the North Atlantic Treaty is "to safeguard the freedom, common heritage and civilization of their (the parties) peoples. . . ."[67] There is nothing in the NATO Treaty to suggest that another of NATO's purposes is to protect human rights through the use of force "out of area," as was the case with Operation Allied Force. To be able to say that this too is one of NATO's purposes, one will have to add the "New Strategic Concept"[68] adopted during the Washington summit in April 1999, to the existing Treaty, although it is not a formal amendment of the Treaty, duly ratified in each member State. In its "New Strategic Concept" NATO pledges to fulfill "non-Article 5 missions" in case of a crisis outside the NATO Treaty area. Although the new concept is a political, not a legal commitment, one could not say that Operation Allied Force has been an *ultra vires* act of one of NATO's organs. All NATO member States agreed, otherwise the operation would not have taken place. But NATO looked more like an instrument than the author of or the driving force behind the operation.

Be that as it may, the next question is whether the alleged violations of international law would be attributable to NATO, because the relevant rules of international law are binding also on NATO, and because NATO had "effective control" over the act that could subsequently be qualified as internationally wrongful. Is NATO bound by the 1977 Additional Protocols even though not all of its members are? The relevant question here is "targeting." NATO has been accused of having selected targets for air strikes that were not, or at least not strictly, military targets (bridges, power stations, radio and TV

66. North Atlantic Treaty, Apr. 24, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

67. See paragraph 2 of the preambula. *Id.*

68. Bulletin des Presse- und Informationsamtes der Bundesregierung Nr. 24 vom 3.5.1999, 222 *et seq. See also* Eckart Klein & Stefanie Schmahl, *Die neue NATO-Strategie und ihre völkerrechtlichen und verfassungsrechtlichen Implikationen*, 35 RECHT UND POLITIK 198 (1999).

stations). Most of these targets certainly served both military and civilian uses, and attacking dual-use objects is not necessarily unlawful, provided that they meet the definition of military objectives in Article 52, paragraph 2 of Protocol I, that the principle of proportionality is observed, and that collateral damage is minimized.[69] But did the television studios make an effective contribution to Serbian military action and did the attacks offer a definite military advantage? If they were targeted merely because they were spreading propaganda to the civilian population, it appears at least doubtful whether their destruction offered a definite military advantage.[70]

If these attacks were in breach of Protocol I, did NATO have "effective control?" The targeting procedure was as follows: NATO's military planners identified and requested specific targets. These targets were or were not approved by the permanent representatives of the member States, sometimes after consulting with their respective governments. If only one Representative cast a negative vote, the target was not attacked. If the target was approved, the task force received an order to attack. Every air force contingent had its own "national commander in theater" and the pilots received their mission orders from him. The national commander could, in theory, decide not to attack a specific target because he was of the opinion that it was not a military objective. Does this discretion of member States' authorities to implement or not a decision of the organization remove the organization's responsibility? In reality the commander gave the order, because he knew that his government had approved the target and because the target could be classified as a dual-use object. So the decision was in fact taken at the NATO level, and NATO, provided that all other preconditions were fulfilled, could be responsible for "illegal" targeting.

The last category of possible internationally wrongful acts are what one might call "pilot errors." A number of such errors were reported and some had to do with the fact that for reasons of "force protection" NATO had decided to execute the missions from a very high altitude. One pilot attacked what he thought was a Serbian military convoy; it turned out to be a convoy of refugees. Another pilot attacked a bridge (certainly a dual-use object) at the very moment at which a civilian train entered the bridge. Both bridge and train were destroyed. It is not clear whether the pilot had the possibility to break off

69. *See* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 239, 276 (2000).

70. *See* George Aldrich, *Yugoslavia's Television Studios as Military Objectives*, 1 INTERNATIONAL LAW FORUM 149–50 (1999).

the attack. If these and other attacks constituted violations of the humanitarian law applicable in armed conflicts, did NATO—given the chain of command—have "effective control?" Even if this should be so, NATO does not possess one mode of reparation that might be required in such a case:[71] disciplinary and penal jurisdiction remain with the force-providing State.

C. The responsibility of NATO's member States

Responsibility of member States for "their" international organizations actions can be direct, if it turns out that the organization itself is for one or another reason not responsible in a situation in which the members acted through the organization. Responsibility can also be concurrent, with the consequence that a third party which is the victim of an internationally wrongful act can choose whether to seek redress from the organization or its members. Responsibility of the member States can be secondary in cases in which the organization is primarily responsible, but, for example, lacks the necessary funds to pay compensation.

This is not the place to discuss in detail the distribution of responsibility between international organizations and its member States.[72] It is, however, beyond doubt that member States would be responsible if, for general reasons, NATO should not be responsible at all. A so-called "negative conflict" would not be acceptable, i.e., that both sides, the organization and its members, point fingers at one another. It seems equally beyond doubt that, should it be their turn, all NATO member States are responsible for the decision to use force against Yugoslavia; it was a unanimous decision of all member States. The same is true for "targeting" decisions, which also, as has been shown above, required unanimity. But not all member States took part in Operation Allied Force. Iceland, for example, does not maintain armed forces at all.[73] And not all of the NATO member States who do maintain an air force participated.

The situation becomes even more complicated by the fact that not all member States have accepted the same treaty obligations. The United States, whose air force flew most of the missions, has not ratified Protocol I under

71. *See* Protocol I, art. 87(3).

72. See in this respect MATTHIAS HARTWIG, DIE HAFTUNG DER MITGLIEDSTAATEN FÜR INTERNATIONALE ORGANISATIONEN *passim* (1993), and HIRSCH, *supra* note 50, at 96 *et seq.* *See also* C.F. Amerasinghe, *Liability to Third Parties of Member States of International Organizations: Practice, Principle and Judicial Precedent*, 85 AMERICAN JOURNAL OF INTERNATIONAL LAW 259–280 (1991).

73. Iceland is a respondent in the application pending before the European Court of Human Rights (see *supra* note 65).

which targeting decisions, as well as decisions taken by pilots during their mission, appear to be at least problematic. The same was true for France and Turkey. Are those member States who approved the targets and are bound by Protocol I, responsible, but not the nation that eventually attacked these targets because it is not a party to the Protocol? Does NATO have to disclose who attacked which target?[74] Can, at the end of the day, only those States carry responsibility that have accepted the jurisdiction of the ICJ and could, therefore, be sued there?[75]

The only reasonable solution seems to be that all NATO member States are responsible for any internationally wrongful acts committed during Operation Allied Force. NATO as such is not recognized by the possible claimant (Yugoslavia). NATO is not an organization that has been created "to do business" with third States and which third States have accepted as such. NATO is not the "international tin council."[76] Therefore, the concept that has been developed in international law for the sole responsibility of international organizations, and which has borrowed much from national commercial law,[77] does not really fit NATO. NATO's budget could certainly not accommodate all claims for pecuniary compensation.[78] If it comes to individual wrongful decisions made by pilots, other NATO States could, of course, invoke the flag-State principle, but they should consider that NATO will also in the future have to rely on a few actors for common operations. If those who agree "to do the job" will afterwards be left alone to face responsibility on account of possible internationally wrongful acts, their readiness will disappear. Although, for these reasons, joint responsibility advocates strongly for a common standard, the concept of responsibility under international law as such does

74. Amnesty International concluded that NATO's command structure appears to contribute to confusion over legal responsibility and recommended that NATO clarify its chain of command so that there are clear lines of responsibility, known within and outside the organization, for each State and each individual involved in military operations conducted under its aegis (*cf*. Murphy, *supra* note 64, at 692).

75. The ICJ has dismissed, *inter alia*, Yugoslavia's claims against the United States for lack of jurisdiction (*see* Bekker, *supra* note 63). *See also* Nicholas Alexander, *Airstrikes and Environmental Damage: Can the United States Be Held Liable for Operation Allied Force?*, 11 COLORADO JOURNAL OF INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 471 (2000).

76. *See* HARTWIG, *supra* note 72, at 307 *et seq*. and Amerasinghe, *supra* note 72.

77. *See* MENG, *supra* note 50.

78. Financing 85% of the costs for making the Danube again navigable has been estimated by the European Union as requiring 22 Million Euro (Agence Europe No. 7724 of 25 May 2000, at 11).

not legally mandate a single (maximum) legal standard for all members of a coalition in case of differing individual legal obligations.[79]

Conclusion

It is, for practical as well as legal purposes, preferable that the same (maximum) legal standard of obligations under international humanitarian law apply to all members of a given coalition, provided that the other side is bound to obey the same rules. To the extent that treaty-based rules of humanitarian law are at the same time regarded as declaratory of custom, the uniformity of the legal standard is guaranteed, but it is doubtful whether this would reach much beyond the most fundamental principles. In those instances when humanitarian law obligations arise only from treaties, other possible reasons for why a coalition should apply the same (maximum) standard do not individually seem to be compelling, although perhaps taken together, they may be.

A solution for future coalitions could be found in the idea which underlies Article 96(2) and also 96(3) of Protocol I: status-of-forces agreements as well as rules of engagement should provide that the maximum standard of obligations of one or more members of a coalition applies to all its members during a given conflict. Members of a coalition who so wish may make it clear that they do not intend, by accepting the maximum standard, to contribute to the emergence of additional customary law, but that they accept and apply the relevant rules only for coalition purposes. Such an ad hoc solution might be more helpful than a possible "third protocol" to the Geneva conventions on rules applicable to coalition warfare. Such a protocol would be only another treaty, with few ratifications at the beginning and probably not in force for a long time, and would give rise later to the old question whether and when it might become part of customary law.

79. For more on this topic by the present author, see Torsten Stein, *Kosovo and the International Community. The Attribution of Possible Internationally Wrongful Acts: Responsibility of NATO or of its Member States, in* KOSOVO AND THE INTERNATIONAL COMMUNITY 181 *et seq* (C. Tomuschat ed., 2002).

* I am very much indebted to Magne Frostad, a doctoral student who served in the Norwegian Judge Advocate's Corps, for his great support in finalizing this paper.