

Introduction

After every clash of arms, it is important to review the actual application of the laws of armed conflict, especially the *jus in bello*. The NATO campaign in Kosovo is no exception and, as allied forces were accused of having committed various violations of the law of armed conflict, examining what happened in Kosovo is particularly valuable. While the Prosecutor for the International Criminal Tribunal for the former Yugoslavia conducted a preliminary inquiry into NATO's actions and concluded that there was insufficient evidence to conduct a formal investigation, there remained significant concerns in the international community over the lawfulness of NATO's actions. Moreover, even if NATO did comply with the laws of armed conflict, are those laws properly suited for today's high-technology battlefield and do they encourage the maintenance of international peace and security? These issues warranted examination by scholars in the fields of both ethics and international law.

For over one hundred years, the United States Naval War College has committed itself to combining a scholarly understanding of the laws of war with an appreciation for and insight into the perspective of the warfighter—the one who must apply those laws to the battlefield. As such, the Naval War College was uniquely suited to convene an array of scholars and practitioners to examine the legal and ethical lessons of NATO's Kosovo campaign. We are indebted to Lieutenant Andru Wall of the International Law Department faculty for the energy and enthusiasm he displayed in organizing our conference and in editing this volume of the International Law Studies (Blue Book) series. Well done!

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Introduction

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Volume 78 will serve as a standard reference work of case studies in this area, continuing the solid, scholarly tradition of the “Blue Books.” The series is published by the Naval War College and distributed throughout the world to academic institutions, libraries, and both U.S. and foreign military commands.

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Preface

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When an international group of military officers, judges, political scientists, philosophers, historians and lawyers gathered at the United States Naval War College in early August 2001 to discuss the legal and ethical lessons to be learned from NATO's Kosovo campaign, no one could have imagined the horrific attacks that would take place in the United States just one month later. Much of the discussion centered on whether Operation Allied Force represented a new kind of war—what many term humanitarian intervention—or simply an aberration with limited lessons for the future. Some suggested that Kosovo was nothing like the battlefields of the future would be, and so the lessons to be gleaned would be of limited use.

There is no question that the global war on terrorism that the United States and its allies throughout the world are actively engaged in at the time of this writing is dramatically different from Operation Allied Force. Most significantly, the war on terrorism is a conflict fought primarily against non-State actors and the States that aid, harbor, or support them, while the war over Kosovo was more traditionally fought against a sovereign State. Some scholars mused over whether humanitarian intervention wasn't really war at all, yet it was, classically stated, a matter of politics by another means. A group of sovereign States (NATO) used military force in order to impose their political will (the cessation of the oppression of Kosovar Albanians) on another sovereign State (Serbia).

The goal of the colloquium was to examine how the law of armed conflict should be applied in modern warfare—focusing not just on the law, but also the crucial operational perspective of the warfighter. As Judge James E. Baker pointed out during his keynote luncheon address, the law of armed conflict is

Preface

not for the specialist, it is not for the lawyer; it must be capable of application at the tactical level by the most junior of military personnel.¹ As Professor Dolzer's wisely cautions: "We are living through a period of fundamental changes in the laws of armed conflict, and it is important that the implication of all these changes are thought through in a broad debate where the requirements of criminal law are discussed, where the realities of military conduct are taken into account and where not only the noble humanitarian aspirations in an isolated sense are highlighted."²

The theme of the colloquium and, thus, this volume, is simply that while the politics and the modalities of force employed in Kosovo may have been unique, the legal and ethical lessons to be learned are applicable to any international armed conflict. So what are the *jus in bello* lessons to be learned from Operation Allied Force? First, the law of armed conflict applies to any clash of arms between two or more States. Secondly, only military objectives may be lawfully targeted and they are defined within the temporal context of the given conflict. Thirdly, the principle of proportionality prohibits excessive collateral damage, yet the law does not impose absolute rules regarding implementation of weapons and tactics. Fourthly, despite the proliferation of treaties on the law of armed conflict, customary international law will continue to define major elements and interpretations of the law of armed conflict. Thus, it is essential that the development and determination of customary international law be properly understood and the continuing relevance of state practice be fully appreciated.

The Applicability of the Law of Armed Conflict

1. The existence of an international armed conflict

While there was some debate contemporaneous with the Kosovo campaign over whether "humanitarian intervention" triggered the applicability of the law of armed conflict, Professor Christopher Greenwood abruptly answers the question without qualification: while there is no definition of international armed conflict in any law of armed conflict treaty, it is agreed to be a factual determination based on the existence of actual hostilities between two or more States.³ This is irrespective of a declaration of war and of the justification for the hostilities. An international armed conflict "exists from the first

1. Baker, *infra*, at 9.

2. Dolzer, *infra*, at 358.

3. Greenwood, *infra*, at 39.

moment after an exchange of fire” between two States.⁴ *Opinio juris* supports this, as NATO certainly believed the law of armed conflict was fully applicable and defined and incorporated the legal limits on the use of force within the NATO rules of engagement.⁵

2. The internationalization of an internal armed conflict

The more challenging question is whether intervention by outside States (e.g., NATO) on behalf of an organized armed group within a State (e.g., the Kosovo Liberation Army) “internationalizes” the conflict between that group and the State it is in conflict with (e.g., Serbia). Professor Greenwood argues that it does “only if there is a clear relationship between the non-governmental party to the conflict and one of the States party to the international conflict.”⁶ In the present case, there was not a sufficient link between the KLA and NATO to internationalize the conflict between the KLA and Serbia.⁷ As such, the members of the KLA were not entitled to combatant immunity nor were they entitled to prisoner of war status if captured.

3. The interdiction of maritime shipping

The issue of whether NATO could lawfully intercept and divert neutral vessels carrying strategic commodities was a political question more than a legal one. The “customary law of armed conflict still permits a State engaged in an international armed conflict to prevent strategic commodities such as oil from reaching its opponent by sea, even if carried by neutral flagged vessels.”⁸ The law of neutrality was not abolished by the UN Charter, but belligerent rights still permit warring States to interdict shipping—even that from neutral States.⁹ While not disputing the continuing viability of customary belligerent rights, Professors Greenwood and Bring urge caution in applying them in the post-UN Charter era.¹⁰ NATO chose not to interdict shipping bound for Serbia, not because doing so would have been illegal, but because certain political

4. Shearer, *infra*, at 76.

5. Miller, *infra*, at 109.

6. Greenwood, *infra*, at 45.

7. Greenwood, *infra*, at 44–6; Ronzitti, *infra*, at 114.

8. Greenwood, *infra*, at 56. *See also* Walker, *infra*, at 92 and discussion comments by Professor Wolff H. Von Heinegg at 127–8.

9. Ronzitti, *infra*, at 117–8.

10. *See* Discussion, *infra*, at 127–30.

leaders within the alliance were “trying to damp down expectations of the level of violence” that would be applied.¹¹

4. Is it the law of armed conflict or international humanitarian law?

Professor Stein acknowledges the confusion created by “re-naming the ‘laws of war’ or ‘law of armed conflict’ as ‘international humanitarian law’ thus blurring the distinction between ‘humanitarian’ and ‘human rights’ law.”¹² For Colonel Graham this “renaming” indicates that some people think that elements of human rights law are included in the law of armed conflict—a troubling proposition for those who have to advise military commanders on their legal obligations given that human rights law is much less well-defined than the law of armed conflict.¹³ The US military prefers the term “law of armed conflict” as its obligations are better understood and because, as a matter of policy, the US military applies the law of armed conflict to all military operations regardless of their characterization.

Professors Bothe and Green, among others, engaged in a lively debate over whether humanitarian law, or the law of armed conflict, is *lex specialis vis-à-vis* human rights law.¹⁴ A *lex specialis* implies the existence of a *lex generalis*. However, because many human rights treaties do not apply during armed conflicts, it is incorrect to label human rights law a *lex generalis* and the law of armed conflict a *lex specialis*. They are two separate bodies of international law with, at times and depending on the treaties a State is party to, overlapping jurisdiction.

The drafters of Protocol I and other more recent law of armed conflict treaties did draw from the realm of human rights law and incorporated certain human rights concepts into the law of armed conflict. What must remain clear is that these concepts are then implemented from the standpoint of the law of armed conflict. Where there is overlapping jurisdiction and the actions of a military commander are subject to review under both human rights law and the law of armed conflict, then the greater specificity of the latter must be determinative.

5. Is there a link between the *jus ad bellum* and the *jus in bello*?

It is a well-established maxim that the law of armed conflict applies equally to both sides of a conflict, although some have argued that there may be a relationship between the degree of force that may be used and the “purpose for

11. See the comments by Professor Greenwood, *infra*, at 127.

12. Stein, *infra*, at 319.

13. Graham, *infra*, at 381.

14. See Discussion, *infra*, at 392–6.

which force is permitted under the *jus ad bellum*.”¹⁵ Professor Bothe agrees that the “*jus ad bellum* and *jus in bello* have to be kept separate” because the equality of the parties is an essential precondition to the objective application of the law of armed conflict, however, he proffers the caveat that “[m]ilitary advantage . . . is a contextual notion.”¹⁶ This, to Professor Von Heinegg, amounts to simply paying “lip service” to the principle that the two bodies of law are separate.¹⁷ He counters that “the overall aim that led one of the parties to an armed conflict to resort to the use of armed force is irrelevant when it comes to the question whether certain objects effectively contribute to military action of the adversary or whether their neutralization offers a definite military advantage.”¹⁸

Professor Greenwood emphatically rejects the “heresy” that NATO’s humanitarian motives entitled it to greater latitude in choosing targets and the “rival heresy” that “because the campaign was fought for a humanitarian objective, international humanitarian law has to be interpreted as imposing upon NATO more extensive restrictions than would otherwise have been the case.”¹⁹ Both these “heretical” views “involve an unjustified muddling of *jus ad bellum* and *jus in bello* issues in a way which is contrary to principle and unsupported by authority.”²⁰

“The law of armed conflict does not ask for motives, political aims, or the legality of the first use of force,” Professor Von Heinegg states: “[i]t takes as a fact that the *jus ad bellum* has failed to function properly.”²¹ Any time consideration of the *jus ad bellum* plays a role in the *jus in bello*, the latter is weakened.²² Even if violations of the *jus in bello* can justify intervention as some have argued, that remains a matter of the *jus ad bellum* and the *jus in bello* remains equally binding on both parties in any resulting hostilities.²³

Nevertheless, Professor Bothe identifies this as the “fundamental issue: how far does the context of the military operation have an impact on the notion of military advantage?”²⁴ In this regard, Professor Müllerson points out

15. Greenwood, *infra*, at 52.

16. Bothe, *infra*, at 186.

17. Von Heinegg, *infra*, at 205.

18. *Id.*

19. Greenwood, *infra*, at 48–9.

20. Greenwood, *infra*, at 53.

21. Von Heinegg, *infra*, at 206.

22. See comments by Professor Von Heinegg, *infra*, at 221.

23. See Robertson, *infra*, at 457; see also, Roberts, *infra*, at 409–13. Professor Roberts states: “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.” *Id.* at 410.

24. See Discussion, *infra*, at 216.

Preface

that the International Court of Justice in its advisory opinion on Nuclear Weapons “created a novelty distinguishing between ‘an extreme circumstance of self-defense, in which the very survival of a State would be at stake’ and other circumstances.”²⁵ This implies that “a wrong done in light of *jus ad bellum* has an impact on the *jus in bello*” applicable in the resulting conflict, because an aggressor would not be entitled to argue that it was acting under such “extreme circumstance of self-defense.”²⁶

Notwithstanding the ICJ’s advisory opinion, “it remains certain that all parties have to equally abide by the requirements of *jus in bello*” and in “that sense these branches of the law are separate.”²⁷ If there is a “bridge between the two branches of international law” it “is the requirement of adequacy” because “an act justified by the necessity of humanitarian intervention must be limited by that necessity and kept clearly within it.”²⁸ In the final analysis, it is important to distinguish between political or moral reasons for applying a “maximum standard” of compliance with the law of armed conflict, and a legal obligation to do so.²⁹

Targeting Military Objectives

1. Defining military objectives

Perhaps the most fundamental principle of the law of armed conflict is that of distinction. Professor Michael Bothe traces the development of the principle of distinction from Jean Jacques Rousseau’s conception of the sovereign’s war. War is between States and their rulers, not their peoples, thus conflict should be limited to combatants and military objectives.³⁰ Article 52(2) of Protocol I contains the “binding definition of military objective:”³¹

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

25. Müllerson, *infra*, at 443.

26. Müllerson, *infra*, at 444.

27. Müllerson, *infra*, at 445.

28. Müllerson, *infra*, at 452–3.

29. Stein, *infra*, at 326–7.

30. Bothe, *infra*, at 173–4.

31. Dinstein, *infra*, at 140.

While there should “be no doubt” that this definition “corresponds to existing principles as reflected in customary law and simply clarifies them,” some of the clarifications could be “open to different interpretations of the scope of the obligations imposed on the attacker” and, thus, “incompatible with a consideration of the provision as fully reflecting customary international law.”³² Judge Pocar offers as examples of imprecise clarifications the expressions “effective contribution to military action” and “definite military advantage.”³³

“The difficulty of the Article 52(2) definition” of military objective, Professor Bothe writes, “is its general character” particularly with respect to “dual-use objects.”³⁴ Professor Dinstein is “not enamored” by the phrase “dual use” and argues that legally the fact that an object may have both a military use and a civilian use does “not alter its singular and unequivocal status as a military objective.”³⁵

Professor Bothe asks how “the general principle of distinction” can be rendered “more concrete in order to have secure standards for targeting” and then agrees that an illustrative list of military objectives could be a possible solution.³⁶ Professor Dinstein proffers that “only a composite definition—combining an abstract statement with a non-exhaustive catalogue of illustrations—can effectively avoid vagueness, on the one hand, and inability to anticipate future scenarios, on the other.”³⁷ The likelihood of States ever reaching agreement on such a list, however useful, is doubtful. Given what Professor Dinstein himself identifies as the “temporal framework” within which military objectives are defined—what may be legitimately attacked at one time may not be at another time—a list could include objects which by their “nature” are military objectives, but would not likely include the myriad of objects that become military objectives by their location, purpose or use.³⁸

2. Presuming civilian purpose

While the general definition of military objective contained in Article 52(2) of Protocol I can be considered customary international law, it is doubtful that the same can be said about the requirement to assume civilian purpose

32. Pocar, *infra*, at 348.

33. *Id.*

34. Bothe, *infra*, at 177.

35. See comments by Professor Dinstein in the Discussion, *infra*, at 218–9.

36. Bothe, *infra*, at 177.

37. Dinstein, *infra*, at 142 (footnote omitted).

38. Dinstein, *infra*, at 144; see also Von Heinegg, *infra*, at 204.

Preface

contained in Article 52(3).³⁹ This was an issue that was much debated during the drafting process and some argue that it “may reflect a ‘[r]efusal to recognize the realities of combat’ in some situations.”⁴⁰ Professor Dinsetin points out, however, that the presumption only arises in cases of doubt regarding the civilian purpose. “The degree of doubt that has to exist prior to the emergence of the (rebuttable) presumption is by no means clear. But surely that doubt has to exist in the mind of the attacker, based upon ‘the circumstances ruling at the time.’”⁴¹

3. Effects-based targeting

The target selection and review process in Operational Allied Force was premised on “effects based targeting,” which articulates a desired objective, then seeks to identify “specific links, nodes, or objects” that, if attacked, will achieve the objective.⁴² Judge Baker warned of “the impending collision among the law of armed conflict, the doctrine of effects-based targeting, and a shared desire to limit collateral casualties and consequences to the fullest extent possible.”⁴³ The focus of the collaborative targeting sessions seems to validate Judge Baker’s fears, as they “revolved around three issues: 1) the linkage to military effects—the key to obtaining legal approval, 2) the collateral damage estimate, and 3) the unintended civilian casualty estimate.”⁴⁴ “[E]ffects-based targeting and the law of armed conflict may be on a collision course” with respect to critical infrastructure, particularly factories owned by supporters of regimes that could be quickly converted to military use.⁴⁵ A focus on desired effects could lead military commanders to target certain objects for effect, rather than because of their “effective contribution to military action.”

4. Presidential review of targets

Contrary to popular belief, the president of the United States did not review and approve all targets, but rather a “smaller subset” of the 200–300

39. Bring, *infra*, at 261; Pocar, *infra*, at 348.

40. Dinsetin, *infra*, at 149 quoting W. Hays Parks, *Air War and the Laws of War*, 32 AIR FORCE LAW REVIEW 1, 137 (1990).

41. Dinsetin, *infra*, at 150.

42. Montgomery, *infra*, at 190.

43. Baker, *infra*, at 8.

44. Montgomery, *infra*, at 193.

45. Baker, *infra*, at 16.

targets that were reviewed by the National Security Council.⁴⁶ Traditional military objectives were approved in theater, while military industrial, electric power grid, critical infrastructure, and targets with a high likelihood of collateral damage were reviewed by the Pentagon. Of these, maybe ten targets were submitted for presidential review every four to five days.⁴⁷

Nevertheless, General Short believes there was too much involvement by civilians in the targeting process. He argues that because targets were chosen by civilians rather than by military officers, NATO “bombed targets that were frankly inappropriate for bringing Milosevic to the table.”⁴⁸ General Short asks “whose responsibility should targeting be?” Answering his own question, he asserts that the president should restrict himself to selecting target sets and leave it to “professional military officers” to select individual targets in accordance with the strategic guidance and the law of armed conflict.⁴⁹

5. Targeting the will of the people

The morale of the population and of the political decision-makers is not a contribution to ‘military action.’ Thus, the advantage of softening the adversary’s will to resist is not a ‘military’ one and, thus, cannot be used as a legitimization for any targeting decision. If it were otherwise, it would be too easy to legitimize military action which uses bombing just as a psychological weapon—and there are other words for this.⁵⁰

NATO did not target the will of the civilian population, but neither was it so naive as to fail to see that there are valid military objectives that can be targeted, a peripheral result of which will be to make the civilian population unhappy with their leadership for choosing a course of action that allowed this to happen.⁵¹ NATO did seek to impose “discomfort” on the civilian population, but this was secondary to targeting lawful military objectives.⁵²

46. Baker, *infra*, at 13.

47. Dalton, *infra*, at 201.

48. Short, *infra*, at 20.

49. Short, *infra*, at 20. For more on this “‘normal’ theory of civil-military relations” and the relationship between military leaders and political leaders during times of war, see ELIOT A. COHEN, *SUPREME COMMAND: SOLDIERS, STATESMEN, AND LEADERSHIP IN WARTIME* (Free Press 2002).

50. Bothe, *infra*, at 180.

51. See Short, *infra*, at 29–30.

52. Miller, *infra*, at 110.

Collateral Damage and the Principle of Proportionality

1. The principle of proportionality

The principle of proportionality, while codified for the first time in Article 51(5)(b) of Protocol I, is one of the core principles of the customary law of armed conflict. While the Protocol I formulation of proportionality may have included specifications that cannot be found in prior declarations of the principle, these “specifications are aimed at clarifying the scope . . . rather than at adding new elements that would lead to the modification of their contents or effects.”⁵³ Simply put, the principle of proportionality prohibits attacks that cause injury to civilians or damage to civilian objects “which is excessive in relation to the concrete and direct military advantage anticipated.”⁵⁴

The principle of proportionality rests on the presumption that the attacker is complying with the principle of distinction, thus implicitly acknowledging that some collateral damage is unavoidable.⁵⁵ Yet many fail to recognize or acknowledge this simple fact. Professor Dinstein argues that they make the mistake of confusing extensive with excessive: “injury/damage to noncombatants can be exceedingly extensive without being excessive, simply because the military advantage anticipated is of paramount importance.”⁵⁶

“[S]ome have used Kosovo to advance a legal view that the law of armed conflict virtually prohibits collateral casualties. This is an honorable and worthy aspiration, but not the law. Nor should it be the law, or the tyrants of the world will operate with impunity.”⁵⁷ Professor Dinstein reminds us that “[o]ne has to constantly bear in mind that war is war; not a chess game. There is always a price-tag in human suffering.”⁵⁸ Rather than focusing on the unrealistic goal of eliminating civilian casualties, the goal should be on their mitigation—understanding their inevitability and the reality of mistakes, “accidents and just sheer bad luck.”⁵⁹

The principle of proportionality was “the guiding principle of paramount importance” for US forces during Operation Allied Force.⁶⁰ “Concern for collateral damage drove us to an extraordinary degree,” General Short states,

53. Pocar, *infra*, at 346.

54. Protocol I, Article 51(5)(b).

55. Bring, *infra*, at 262–3.

56. See Discussion, *infra*, at 215.

57. Baker, *infra*, at 17.

58. See Discussion, *infra*, at 219.

59. *Id.*

60. Miller, *infra*, at 308–9.

“and it will drive the next generation of warriors even more so, because whereas I see this as an extraordinary failure, the leadership within the NATO senior administrations would say this was indeed an extraordinary success.”⁶¹ General Short emphasizes that NATO did its “very, very best to limit collateral damage” but “[e]very time we failed in that effort, the reaction by political leaders was hysterical.”⁶² The political leadership of NATO could not stand collateral damage and “they did not understand war. They thought it was a video game, and that no one ever dies. . . . Did you ever see anyone die in the films from the Gulf War? I never did. I just saw crosshairs on a target in downtown Baghdad, and then it blew up.”⁶³

2. Responsibility for civilian casualties

There is a very real danger in misplacing responsibility for civilian casualties. It is wrong to place “the entire responsibility for civilian casualties on the party to the conflict that has the least control over them.”⁶⁴ As an example, Mr Parks argues that civilians “killed within an obvious military objective” should not be counted as “collateral civilian casualties.”⁶⁵ To count them as such “would only encourage increased civilian presence in a military objective in order to make its attack prohibitive in terms of collateral civilian casualties.”⁶⁶ In the same sense, placing too many targets off-limits because of the presence of human shields would create the perverse effect of rewarding the use of human shields.

3. The use of precision-guided munitions

Contrary to the arguments made by some, there is no obligation, in customary international law or treaty law, to use precision-guided munitions in attacks on urban areas.⁶⁷ Such a rule would be “dysfunctional” and a far better standard would be “to rely on the judgment of the commander.”⁶⁸ Nowhere in the law of armed conflict is there a requirement to use specific weapons, rather there is a legal standard of reasonableness that remains constant. A doctor in a developing country has the same legal standard of care as a doctor in a

61. Short, *infra*, at 24.

62. Short, *infra*, at 23.

63. *Id.*

64. Parks, *infra*, at 288.

65. Parks, *infra*, at 291.

66. *Id.*

67. Murphy, *infra*, 231–43.

68. Murphy, *infra*, 241.

developed country, but the doctor in the developed country may be expected to perform more tests or expend more resources in order to properly treat his patient. Mr Sandoz argues that this is an apt analogy to apply in analyzing the reasonableness of a military commander's choice of weapons.⁶⁹ Yet one wonders whether this isn't a false analogy. The doctor has no choice in whether to treat his patient, yet the military commander always has a choice in whether to target a particular military objective. If the commander does not have the technological capability to attack the target without causing disproportionate damage, then the law of armed conflict prohibits him from attacking it. Thus the law simultaneously protects civilians and provides an incentive for the acquisition of technology that increases the commanders freedom of action.

4. Flying above 15,000 feet

Collateral damage concerns must be balanced against “the risk that you are asking your pilots to take.”⁷⁰ Professor Murphy noted that NATO's “decision to engage in high-altitude bombing did not by itself constitute a violation of the law of armed conflict.”⁷¹ Colonel Sorenson is more blunt: it “sells newspapers, airtime and interviews, but the facts just simply aren't there to suggest that by keeping our pilots at 15,000 feet to protect them that we were engaging in basically carpet bombing.”⁷²

5. The environment

For those States that are party to Protocol I without reservation to Articles 35 and 56, causing damage to the environment is a war crime only if it reaches “the triple cumulative threshold” of being “widespread, long-term and severe.”⁷³ Professor Bothe suggests that a lower threshold could be reached if the “collateral environmental damage was excessive in relation to a military advantage anticipated.”⁷⁴ However, Professor Von Heinegg counters that customary international law would still not consider wanton destruction of the environment a prosecutable war crime.⁷⁵ Judge Pocar agrees noting that the provisions have “no clear precedent in customary law.”⁷⁶

69. Sandoz, *infra*, at 278.

70. Short, *infra*, at 22.

71. Murphy, *infra*, at 249.

72. See Discussion, *infra*, at 310.

73. Bothe, *infra*, at 181–3.

74. *Id.*

75. Von Heinegg, *infra*, at 204.

76. Pocar, *infra*, at 348–9.

6. Collateral damage and future conflicts

Professor Bring asserts that NATO's "no-body bags policy . . . implies that the lives of your own pilots are worth more than the lives of the innocent civilians on the ground."⁷⁷ Yet Professor Adam Roberts cautions that this desire to protect one's own servicemen was "entirely understandable" and, looking at the speeches made by NATO leaders prior to the start of the air campaign, it was not presumed going in to be a "no body bags war."⁷⁸ Those who argue that NATO should have accepted an increase risk to their military service members lose sight of the goals of democracy to stop democide, genocide, and aggressive war. "The reality," Professor John Norton Moore points out, is that we want to achieve those goals "as rapidly as we possibly can at the lowest cost to all involved."⁷⁹ By arguing that democracies must be willing to accept greater risks to their personnel, proponents of humanitarian goals may in fact raise barriers in a manner that would lead to increased suffering.

Professor Murphy closes his paper on collateral damage with the prescient observation that future wars will increasingly see a "'happy congruence' between the needs of military efficiency and the avoidance of unnecessary injury to civilian persons or property"; however, "the protections the law of armed conflict affords to civilian persons and property are likely to be less and less effective in practice. This is because the technologically weaker States, as well as terrorists or other non-governmental actors, may increasingly conclude that they must attack the civilian population of the enemy State to offset the latter's great advantage in firepower."⁸⁰

Customary International Law and the Law of Armed Conflict

1. The Martens Clause

The Martens Clause, which was codified in the 1899 and 1907 Hague conventions as well as the 1977 Additional Protocol I, recognizes the importance of customary international law to the law of armed conflict. It reads:

Until a more complete code of the laws of war is issued, the high contracting parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages

77. Bring, *infra*, at 266.

78. Discussion, *infra*, at 304–5.

79. Discussion, *infra*, at 303.

80. Murphy, *infra*, at 254–5.

Preface

established between civilized nations, from the laws of humanity and the requirements of the public conscience.⁸¹

“The Martens Clause,” Professor Shearer writes, “is a powerful reminder that in situations of armed conflict, of whatever kind, there is never a total gap in the law, never a situation in which there cannot be an appeal to law in order to mitigate the horror and the suffering.”⁸² The powerful rhetoric invoking the dictates of the public conscience should not be misunderstood as creating a new source of customary international law, but rather as a safeguard thereof. Anytime one discusses the application of the laws of armed conflict to new, or perceived new, types of conflicts, it must never be forgotten that there is at the very least customary law that regulates the application of military force.

Professor Dolzer notes that much of the “humanitarian law community” emphasizes the “principles of humanity and . . . dictates of public conscience” aspect of the Martens Clause, while the military tends to be primarily concerned with the customary practice provision.⁸³ This is understandable as customary practice tends to be more easily defined, which is of primary importance when potential criminal liability is at stake. The two approaches should converge, however, upon the realization that the Martens Clause encourages the view that customary international law is based not just on battlefield practice, but rather on *opinio juris*—battlefield practice combined with a concurrent belief that it is lawful. It is upon the State’s subjective belief in the legality of its actions that “the principles of humanity and dictates of public conscience” weigh most heavily. In any event, no tribunal has ever trumped customary law by resting an opinion on the “dictates of the public conscience.”

2. The formulation of customary international law

Following the North Sea Continental Shelf case and the Nicaragua case, “there is no doubt that for a rule to exist as a norm of customary international law both its recognition as a legal obligation by States and the latter’s conduct which is consistent with the rule are required.”⁸⁴ The “cannon of principles laid down in Article 38 of the Statute of the International Court of Justice” are as applicable to the law of armed conflict as they are to other areas of public

81. Preamble, Convention (II) with Respect to the Laws and Customs of War on Land, July 29, 1899, U.S.T.S. 403, 32 Stat. 1803, 1 Bevans 247.

82. Shearer, *infra*, at 72.

83. Dolzer, *infra*, at 356.

84. Pocar, *infra*, at 340 (footnote omitted).

international law.⁸⁵ Thus, “[w]idespread practice and corresponding *opinio juris* will be required for the formulation of customary law, with or without parallel treaty law.”⁸⁶

The importance of State practice cannot be overstated as this is the first of the three components of customary law listed in the Martens Clause.⁸⁷ However, equally important is the corresponding *opinio juris*. On this point it must be noted that many of the steps taken by the United States during Operation Allied Force to limit collateral damage were taken because they *could* be taken, not because there was any sense of a legal obligation to do so. Thus, these actions provide little in the way of clarifying customary international law.⁸⁸ The “positivist approach” taken by the Permanent Court of International Justice in the Lotus case, which argues that “restrictions on the practice of States cannot be presumed,” may be “particularly well-suited to issues of the law of armed conflict, which, by their very nature, implicate the vital interests of States.”⁸⁹

Professor Stein observes that the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia (ICTY) have looked beyond traditional sources for “evidence” of customary international law, which the ICTY said could include “the number of ratifications to international treaties and the dictates of military manuals.”⁹⁰ However, a “long list of signatories” has very little to do with determining State practice in the area of the law of armed conflict because the “vast majority of signatories of Protocol I are at best interested observers—bystanders if you will—when it comes to the actual application of the law of armed conflict in combat situations.”⁹¹

On the issue of the precedential value of international case law, Judge Pocar writes:

[I]t has to be stressed that previous decisions of international courts cannot be relied on as having the authority of precedents in order to establish a principle of law. The current structure of the international community, which clearly lacks a hierarchical judicial system, does not allow consideration of judicial precedent as a distinct source of law. Therefore, prior case law may only constitute evidence of a customary rule in that it may reflect the existence of *opinio juris*

85. Dolzer, *infra*, at 353.

86. Dolzer, *infra*, at 354.

87. Graham, *infra*, at 384.

88. See Parks, *infra*, at 281–2.

89. Murphy, *infra*, at 235.

90. Stein, *infra*, at 318–9.

91. Graham, *infra*, at 383.

Preface

and international practice, but cannot be regarded per se as having precedential authority in international criminal jurisdiction.⁹²

Finally, the traditional rules protecting the persistent objector still allow a State to protect itself from a developing norm it finds objectionable.⁹³

3. The customary nature of provisions of Protocol I

It is “undisputed” that Protocol I in part reaffirms and clarifies customary international law and in part develops that law.⁹⁴ “For the first part [its] rules bind all States, for the second only the State parties to the Protocols are bound.”⁹⁵ The “fundamental principles” of “distinction between civilians and combatants, the prohibition against directly attacking civilians, and the rule of proportionality, are customary international law,” Professor Stein writes, but “it is very doubtful whether the same can be said about other provisions of Protocol I—in particular those dealing with collateral damage.”⁹⁶

Three points are important to this debate: 1) the status of a particular provision in Protocol I (whether it is new law or customary international law) may change with time, 2) if the provision is customary international law, it is customary international law that is binding “not the treaty provision as such” and 3) the codification process necessarily involves new or more precise elements which must themselves be distinguished from the customary principle.⁹⁷ In the final analysis, “there is a trend in the increasing number of ratifications and some case law in some international tribunals” towards recognition of Protocol I as customary law; however, there is also significant State practice involving the “major actors” that prevents consideration of many provisions of Protocol I as customary international law.⁹⁸

Reasonableness and Implementation of the Law of Armed Conflict

It has become a popular mantra for commentators to decry the perceived increasing influence of lawyers over the planning and execution of military operations. Yet, “[w]hether actors like it or not, Kosovo may serve as a harbinger

92. Pocar, *infra*, at 342.

93. Dolzer, *infra*, at 354.

94. Pocar, *infra*, at 338–9.

95. Sandoz, *infra*, at 273.

96. Stein, *infra*, at 321–2.

97. Pocar, *infra*, at 338–9.

98. See comments by Judge Pocar, Discussion, *infra*, at 389–90.

of the manner in which specific US military actions—down to the tactical sortie—will receive legal scrutiny, from non-governmental organizations, ad hoc tribunals, and the International Criminal Court.”⁹⁹ The concern, however, is not so much that military operations are subject to legal review, but what standard will be applied in evaluating the wartime actions of military commanders? Is it that of the reasonable man or the reasonable military commander? As Professor Green wryly observes, a “reasonable man is the man on a downtown bus; that is not the reasonable soldier.”¹⁰⁰ Reasonableness during times of armed conflict must be judged through the eyes of the man involved in that armed conflict.

A particular challenge arises in the context of proportionality, the determination of which often gives rise to a “clash between the military and humanitarian ‘value genres’.”¹⁰¹ Can a “reasonable civilian” ever properly determine military necessity and proportionality? Professor Bothe thinks they could with proper training, but Professor Green is less confident that civilian judges could ever appreciate “the circumstances that were prevailing at the time that led to the soldier’s actions.”¹⁰² This, of course, raises the issue of whether civilian judges should try military cases. Professor Ronzitti offers a solution by distinguishing between wartime crimes that are battlefield crimes (war crimes) and those that are not (crimes against humanity and genocide). He suggests that special chambers be established to hear the former.¹⁰³

Conclusion

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99. Baker, *infra*, at 15.

100. Discussion, *infra*, at 212.

101. Murphy, *infra*, at 247 (footnote omitted).

102. Discussion, *infra*, at 211–2.

103. *Id.* at 212.

Preface

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