

International Humanitarian Law After Kosovo: Is *Lex Lata* Sufficient?

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This presentation will build on the earlier discussion of relevant international humanitarian law principles as they relate to what happened in Kosovo. My approach will be a functional one: did the generally recognized combat rules of international humanitarian law function during the conflict? Were they complied with? Did they prove to be adequate for the Kosovo intervention type of armed conflict? Is there a need for a *de lege ferenda* discussion on rules protecting the civilian population in interventionist types of conflicts? These are the issues I would like to address.

The Additional Protocol I of 1977¹ has codified three somewhat overlapping principles of customary law in the field of targeting and the protection of civilians: the principle of distinction, the principle of proportionality and the principle of feasible precautions. The principle of distinction is closely linked to the definition of military objectives. In fact, the principle would be meaningless if it were not substantiated by a set of norms clearly indicating where the line should be drawn between protected civilian lives and objects on the one hand, and legitimate military objectives on the other. This issue should be addressed first since much of the criticism directed against NATO's methods of warfare in Kosovo was based on the perception that many of the attacks

1. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, June 8, 1977, 1125 U.N.T.S. 3, DOCUMENTS ON THE LAWS OF WAR 422 (A. Roberts and R. Guelff eds., 3d. ed. 2000) [hereinafter Protocol I].

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were directed against people, houses and materiel that were protected under international humanitarian law.

Another focal point of criticism, both during and after the conflict, was the extent of damage caused incidentally by attacks against military objectives—the issue of collateral damage. This issue, as an element of the overarching principles of proportionality and feasible precautions, will be discussed later in this paper.

Distinction

The principle that a distinction shall always be made in military operations between protected and non-protected values is found in Article 48 of Protocol I. It includes the following language: “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish . . . and accordingly shall direct their operations only against military objectives.” During the Kosovo air campaign, NATO complied with this principle in the sense that it attempted to attack only objectives that it perceived to be of a military nature. In other words, NATO tried to distinguish.

Basically, a violation of the principle of distinction implies action *mala fide*, an intentional disregard for civilian values (e.g., attacks of terror against civilians) or a reckless disregard for such values (e.g., attacks of a nature to strike military objectives and civilians without distinction). The latter aspect—the prohibition against indiscriminate attacks—is covered by Article 51 (4) of Protocol I. This prohibition flows from the principle of distinction and could include both intentional violations and reckless behavior. The Gulf War offers some examples on *mala fide* behavior in this respect. Saddam Hussein was not sensitive to the prohibition of Article 51(4), outlawing, *inter alia*, attacks “which employ a method or means of combat which cannot be directed at a specific military objective.” Iraq fired SCUD missiles into Saudi Arabian and Israeli territory, well knowing that these missiles could hit military targets only through sheer luck. Clearly, NATO did not act in this way during the Kosovo conflict. Nevertheless, the media reporting that came out of Belgrade gave the impression that NATO was not in compliance with the prohibition against indiscriminate attacks. The alleged compliance or collateral damage problems that were at issue were not linked to the principle of distinction as such, but rather to the definition of military objectives.

Definition of Military Objectives

As has been stated already, the definition of military objectives is a corollary to the principle of distinction. Article 52(2) of Protocol I states that:

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an *effective contribution* to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a *definite military advantage*.²

Thus, the requirements of “effective contribution” and “definite military advantage” are of crucial importance. As the ICRC Commentary to Protocol I points out: “Whenever these two elements are simultaneously present, there is a military objective in the sense of the Protocol.”³ Together the two elements seem to produce quite a strict rule. However, the current interpretation of the rule is not so strict. It includes the right to attack objectives that have a *potential* of being militarily useful at some point in the future. This does not explicitly follow from the text, although the ICRC Commentary has indicated that the phrase “objects which by their nature, location, purpose or use” should be given the following interpretation: “The criterion of *purpose* is concerned with the intended future use of an object, while that of *use* is concerned with its present function.”⁴ This may be true, but even so the quoted phrase is subordinate to the proviso that the objects so defined shall “make” (in the present tense) “an effective contribution to military action,” and it is further required that their destruction “offers” (in the present tense) “a definite military advantage.” The Protocol’s definition of military objectives has often been perceived as a codification of traditional customary law applied during World War II and earlier. This perception is probably correct, but it brings with it this flexible and future-oriented interpretation of legitimate military targets that does not explicitly follow from the text of Article 52(2).

2. Emphasis added.

3. COMMENTARY ON THE ADDITIONAL PROTOCOLS of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 635 (Y. Sandoz, C. Swinarski and B. Zimmerman eds., 1987) [hereinafter ICRC COMMENTARY].

4. *Id.* at 636, ¶ 2022. See also Anthony Rogers who accepts the ICRC view that “purpose” means future intended use of an object. He adds, however, “[i]t is hard to think of an example or a case where ‘purpose’ will be the deciding factor, especially given the limitation of ‘in the circumstances ruling at the time’.” A.P.V. ROGERS, LAW ON THE BATTLEFIELD 35–36 (1996).

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The future-oriented approach was clearly manifested during the Kosovo crisis. At a NATO press conference on March 26, 1999, it was said that the armed attacks were directed against the adversary's "ability to coordinate his military forces in the field, his ability to attack innocent civilians" and "his ability to command and control his military forces."⁵ This liberal view on what constitutes legitimate military objectives was as typical for the NATO air campaign as it was typical for World War II. In Kosovo it tended to include a large number of dual-use targets, i.e., objects which besides their ordinary civilian use had a military potential. A few of these targets were controversial as to their military potential and it was sometimes argued that they were not to be considered as legitimate military objectives.

The requirements of "effective contribution" and "definite military advantage" have to be met no less with regard to attacks against dual-use or dual-purpose objects. Typical dual-use objects are transportation systems like roads, bridges and railway lines, oil and other power installations, and communication installations like radio, television, telephone and telegraph stations. Although it is clear that broadcasting facilities could have a military function, NATO's bombing on April 23, 1999 of the Serb Radio and Television Station (RTS) in Belgrade seems difficult to justify under the circumstances ruling at the time. The Serb media was hardly—to quote from the Report to the ICTY Prosecutor—"the nerve system that keeps a war-monger in power and thus perpetuates the war effort" nor was it "used to incite crimes, as in Rwanda."⁶ Any or both of these things could of course have materialized later, but at the time of the attack on April 23, when 10–17 civilians were killed, the military nature of the RTS was in some doubt. At a press conference on April 27, NATO officials justified the attack with the need to disrupt and degrade the Yugoslav command, control and communications (C3) network. The argumentation was partly of a general nature: "everything is wired in through dual use. Most of the commercial system serves the military and the military system can be put to use for the commercial system."⁷ It was not clear, in concrete

5. Emphasis added. See www.nato.int/kosovo/press/p990326a.htm.

6. Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, 39 INTERNATIONAL LEGAL MATERIALS, ¶ 55 (2000), reprinted herein as Appendix A [hereinafter Report to the Prosecutor]. Cf. also the comment by William Fenrick that it is "highly debatable that the media in the FRY, which was state-controlled to a degree, constituted a legitimate military objective even if it was re-labeled as a propaganda source. To be a military objective, it must be more than a symbol of the regime." William Fenrick, *Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia*, 12 EUROPEAN JOURNAL OF INTERNATIONAL LAW 497 (2001).

7. Report to the Prosecutor, Appendix A, ¶ 72.

terms, the degree to which the attack against the RTS was militarily useful. The ICRC Commentary states with regard to Article 52(2) of Protocol I that the destruction in question:

[M]ust offer a *definite military advantage* in the circumstances ruling at the time. In other words, it is not legitimate to launch an attack that only offers potential or indeterminate advantages. Those ordering or executing the attack must have sufficient information available to take this requirement into account; in case of doubt, the safety of the civilian population, which is the aim of the Protocol, must be taken into consideration.⁸

Another dual-use discussion during and after the Kosovo bombings focused on whether or not different bridges in Serbia that were attacked by missiles really made an effective contribution to military action. NATO spokesmen have said that bridges and roads were used to send military forces into Kosovo and that those put on the target lists had been thoroughly screened and found militarily useful. Some bridges may have been selected because they were conduits for communication cables.⁹ Nevertheless, in order for the attacks to be lawful the objects in question had to make—in each instance—an “effective contribution to military action.” Was this really the case in Kosovo? Human Rights Watch reported in February 2000 that seven of the bridges that were attacked had no military functions at the time and could not be classified as military targets.¹⁰

With regard to dual-purpose objects, Article 52(3) of Protocol I adds the following to the definition of military objectives: “In case of doubt whether an object which is normally dedicated to civilian purposes . . . is being used to make an effective contribution to military action, it shall be presumed not to be so used.” In other words, in case of doubt there is a presumption of civilian status. It is more than doubtful whether NATO always complied with this rule of doubt or principle of presumption. On the other hand, it is also doubtful whether this rule of doubt has the status of customary law and thus is binding for non-parties to the Protocol.

8. ICRC COMMENTARY, *supra* note 3, at 636.

9. HUMAN RIGHTS WATCH, CIVILIAN DEATHS IN THE NATO AIR CAMPAIGN 10–11 (2000), available at <http://www.hrw.org/reports/2000/nato/>.

10. *Id.* at 1.

Proportionality and Collateral Damage

A general impression conveyed by the media during the Kosovo crisis was that there was a lot of collateral damage. Amnesty International's report on Kosovo of June 2000 is titled "Collateral Damage or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force." Amnesty International believed that in the course of the operation "civilian deaths could have been significantly reduced if NATO forces had fully adhered to the laws of war."¹¹ Some collateral damage—even extensive damage in certain case—is permitted under the principle of proportionality, but the proportionality issue was not discussed as such in relation to the media coverage at the time. The impression of unnecessary civilian losses during the spring of 1999 has to be tested against the frequent (but occasionally politically biased) accusations that NATO was not acting in compliance with basic international humanitarian law principles.

The principle of proportionality flows from the prohibition against indiscriminate attacks. In fact, in Protocol I it is presented as a part of that prohibition. Article 51(5)(b) prohibits "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." Although the term "proportionality" is not used, the text clearly conveys a proportionality message. The principle expressed here is arguably a codification of traditional customary law. In this context the concept of "collateral damage" is always referred to, although that terminology is not used either in the Protocol. The language of Article 51 focuses on what may be called "incidental damage," a certain amount of which is legally accepted as it is unintended and perhaps unavoidable in the circumstances at the time.

Another way of describing the principle of proportionality is to start with a presumption that the attacker is complying with the principle of distinction. In fact, the principle of proportionality rests on that presumption. So, even when military planners make sure that an attack is directed against a military objective, the commanders must avoid an attack where the military advantage cannot outweigh the civilian damage that can be expected from the attack. In

11. AMNESTY INTERNATIONAL, NATO/FEDERAL REPUBLIC OF YUGOSLAVIA, "COLLATERAL DAMAGE" OR UNLAWFUL KILLINGS? VIOLATIONS OF THE LAWS OF WAR BY NATO DURING OPERATION ALLIED FORCE 29 (2000), available at http://www.amnesty.org/ailib/intcam/kosovo/docs/natorep_all.doc.

other words, decision-makers should ensure that civilian casualties should not be disproportionate in relation to the military advantage anticipated.

Although the principle of distinction was complied with during the NATO campaign over Kosovo, it is submitted that this was perhaps not always the case with regard to the principle of proportionality. In comparison, the proportionality requirements were not always complied with during the Gulf War, e.g., when coalition attacks deprived Iraqi hospitals of electricity and generated adverse cumulative effects on civilians in those hospitals. Proportionality assessments are difficult to accomplish. To the extent things went wrong in Kosovo, these things may be easier to grasp and discuss under a heading of “the principle of feasible precautions,” rather than under the principle of proportionality.

Feasible Precautions

The principle of feasible precautions requires that military commanders plan their attacks in such a way that constant care is taken to spare the civilian population, civilians and civilian objects. A summary of Article 57(2) of Protocol I has to focus on the following requirements that were all of special relevance during the Kosovo operation:

Those who plan or decide upon an attack shall:

- (1) do everything feasible to verify that the objectives to be attacked are military objectives;
- (2) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event minimizing, incidental loss of civilian life;
- (3) refrain from deciding to launch an attack that may be expected to cause such incidental loss, which would be excessive in relation to the concrete and direct military advantage anticipated;
- (4) suspend an attack if it becomes apparent that it may be expected to cause incidental loss of civilian life, damage to civilian objects, or a combination thereof, “which would be excessive in relation to the concrete and direct military advantage anticipated;” and
- (5) in addition, “effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.”

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Since there were a number of mistakes in targeting in Kosovo, the principle of feasible precautions seems to be the one most clearly deviated from during the air campaign. The mistakes included the two air strikes hitting a train on the Grdelica bridge in southern Serbia on April 12; an attack on vehicles in a convoy of refugees near Djakovica in Kosovo on April 14; an attack south of Belgrade on April 28 hitting a residential area instead of army barracks; an attack against the Lusana Bridge north of Pristina on May 1 hitting a civilian bus; a cluster bomb attack against the Nis airfield on May 7 hitting a market place and a hospital; and the attack on the Chinese Embassy in Belgrade on May 8. In the case of the Embassy, NATO used inaccurate intelligence information and believed that it was attacking the Federal Directorate of Supply and Procurement for the Yugoslav Army. Further cases where there may have been a lack of necessary precautions are the bombing of the village of Korisa in Kosovo on May 13, the attack on the Varvarin bridge in Serbia on May 30, and the attack against military barracks in Surdulica on May 30 in which a hospital was struck. In all these attacks there were civilian casualties.¹²

When evaluating these and other mistakes in targeting, however, they must be related not only to the number of civilian casualties, but also to the total number of air strikes, and to the military efficiency of these strikes. In that regard, between March 24 and June 9, 1999, 10,484 strike sorties were flown by NATO aircraft and 23,614 munitions were released. No NATO casualties were reported arising out of these strikes. The damage caused to the Yugoslav forces in Kosovo alone was reported to include 181 tanks, 317 armored personnel carriers, 600 military vehicles and 857 artillery and mortar pieces.¹³

When in February 2000 Human Rights Watch published its report "Civilian Deaths in the NATO Air Campaign," it became clear that about 500 civilian lives were lost as a consequence of the campaign, a much higher figure than NATO had previously admitted. By comparison, the numbers of civilian deaths given by the authorities in Belgrade varied between 1,200 and 5,000. Even the lower number of 500 civilian deaths raises questions of efficiency with regard to precautionary measures. It could also be argued that, even if 500 civilian casualties is not a high figure for an international armed conflict lasting about three months, it is arguably too high a figure for a military operation with humanitarian motives; for an operation that many would classify as a "humanitarian intervention."

12. See the case studies in *id.* at 33–74.

13. NATO Press Conference held on 16 September 1999.

The Human Rights Watch report claimed that the casualties had occurred during 90 separate occasions, and that 50% of the victims died in circumstances where the identification of targets as military was questionable. Controversial cases included the attacks on the New Belgrade heating plant and the Serb TV and Radio Station (RTS) in Belgrade. With regard to the latter, it has already been indicated that no assessments seem to have been made to clarify to what extent the RTS dual-use facility actually was contributing to the Yugoslav military effort. An indirect early warning of the attack seems to have been communicated to the authorities in Belgrade, but since the attack did not occur shortly thereafter, the warning was not effective. Civilian employees working the night shift, who had emptied the building at an earlier point in time, had during the night of the attack returned to the building.¹⁴ In this case, it seems far from clear that NATO, in accordance with Article 57(2)(c), communicated an “effective advance warning.”

The RTS case signifies a mix of intentional damage (the building) and collateral damage (the 10 or more civilian casualties). Like in some of the other cases that resulted in civilian casualties, it is not clear whether there was compliance with the precautions in attack required by Article 57. There seem to be enough dubious cases to warrant a conclusion that violations of international humanitarian law precautionary standards did in fact take place.

The Moral Dimension: “Ready to Kill But Not to Die”

In London, the Foreign Secretary admitted during the Kosovo conflict that only a small number of the aircraft available to NATO had a precision-bombing capability. In Kosovo, as in the Gulf War, events have shown that even with smart bombs and missiles, air attacks do result in unplanned damage and loss of civilian life. High-tech developments increase the possibilities for successful target discrimination and better protection of the civilian population,

14. According to the committee which prepared the Report to the Prosecutor,

[I]t would . . . appear that some Yugoslav officials may have expected that the building was about to be struck. . . . Although knowledge on the part of Yugoslav officials of the impending attack would not divest NATO of its obligation to forewarn civilians under Article 57(2), it may nevertheless imply that the Yugoslav authorities may be partially responsible for the civilian casualties resulting from the attack and may suggest that the advance notice given by NATO may have in fact been sufficient under the circumstances.

Report to the Prosecutor, Appendix A, ¶ 77. The latter part of this statement seems far from uncontroversial.

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but individual civilians will never know whether this phenomenon will in fact protect them.

In Kosovo, the risk of unwanted damage increased due to the minimum altitude of 15,000 feet at which NATO aircraft operated most of the time. It has been argued that by setting this 15,000 feet level NATO politicians managed to avoid aircrew casualties, but in so doing, were transferring the risks to the civilian population. However, the British Ministry of Defence has stated that some aircraft “operated down to 6,000 feet when target identification or a weapons delivery profile required it.”¹⁵ Nevertheless, “the no-body-bags policy” posed and poses a moral dilemma. It implies that the lives of your own pilots are worth more than the lives of the innocent civilians on the ground, since the acceptance of some collateral damage relates to the “others”, while the aim of “zero-casualty warfare” only relates to “yourself.” The discrepancy is troublesome and indicates that future humanitarian interventions or peace-enforcement actions should rely also on low flying aircraft to make possible genuine target identification—and arguably also ground troops—if that is necessary in order to protect the civilian population. One expert on the law of the battlefield has written that in taking care to protect civilians, “soldiers must accept some element of risk to themselves.”¹⁶ He notes that the law is unclear as to what degree of care is required of a soldier and what degree of risk he must take—“Everything depends on the target, the urgency of the moment, the available technology and so on.”¹⁷

In the autumn 1999 issue of the Canadian International Journal Mr. Paul Robinson of Toronto wrote an article with a sensational heading: “Ready to kill but not to die.”¹⁸ The author was of course referring to the NATO strategy in Kosovo. Robinson made the point that in high-tech, standoff warfare there is no chivalry, no military honor. In Kosovo NATO pilots did not see the people they were fighting. This type of warfare, it was argued, is problematical not only from a humanitarian but also from a security point of view. Its clinical character results in a temptation to resort to military force in international crises. It lowers the threshold for military force as such. Although this conclusion does not seem to be empirically sound, the broader argument raises the question whether existing international humanitarian law is appropriate for

15. LORD ROBERTSON, *KOSOVO: AN ACCOUNT OF THE CRISIS* (1999).

16. A.P.U. Rogers, *Zero-casualty warfare*, 82 *INTERNATIONAL REVIEW OF THE RED CROSS* 165, 177 (2000).

17. *Id.*

18. Paul Robinson, ‘*Ready to kill but not to die*’: NATO strategy in Kosovo, 54 *INTERNATIONAL JOURNAL* 671 (1999).

dealing with high-tech warfare. An increased use of standoff weapons is not to the advantage of civilians. The solution is not a prohibition of such weapons, but rather a reconsideration of the parameters for modern warfare as it affects civilians.

Did Protocol I Mean Anything in Kosovo?

International humanitarian law as it related to the Kosovo crisis was discussed in the March 2000 issue of the *International Review of the Red Cross*. A perspective *de lege ferenda* was put forward in an article by Peter Rowe, Professor of Law at the University of Lancaster. Rowe first put the question of whether in fact the constraints of modern IHL influenced NATO behavior during the conflict. The subtitle of his article is: "Have the provisions of Additional Protocol I withstood the test?"¹⁹ Rowe's position is that Protocol I did not add anything to the protection of the civilian population beyond the customary law protection that was already applicable before 1977. He concludes that the Protocol had little impact or influence upon the decisions of the air campaign—that "all the detailed rules so carefully drafted in 1977 were of little consequence."²⁰ In his view, the objects that military commanders for military reasons wished to attack were attacked. There was nothing more to it.

If this argumentation is intended to imply that modern international law played no part in the crisis, it should be refuted. International humanitarian law clearly influenced decision-makers in Kosovo. Moreover, Additional Protocol I contributed to the role that law played in decision-making. During the conflict, as during the Gulf War, legal advice was sought and considered. In both cases it was extremely important, for political and public image reasons, to be seen as acting in conformity with international law. The opposite would imply a political cost and setback that had to be avoided at a time when political support was essential. During the Gulf War General Schwarzkopf was adamant that "we didn't want any war crimes on our hands."²¹ The same feeling obviously dominated NATO thinking in the spring of 1999. Protocol I, although it has not been ratified by all NATO States (not by the United States, France and Turkey at the time; France is now a party), has contributed much to the awareness of IHL standards in military and political circles. The United

19. Peter Rowe, *Kosovo 1999: The air campaign*, 82 *INTERNATIONAL REVIEW OF THE RED CROSS* 147 (2000).

20. *Id.* at 159.

21. NORMAN SCHWARZKOPF, *IT DOESN'T TAKE A HERO* 465 (1992).

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States position is that many of the rules of Protocol I are applicable as customary law. Moreover, the non-governmental organizations and informed public opinion are very much aware of the IHL standards. They continuously monitor relevant situations—and the politicians know it. Thus, it was in the self-interest of NATO to involve its legal advisers in the planning and targeting process.

The US military lawyer James Burger has written in the same March issue of the *International Review of the Red Cross* the following: “While there may be disagreement over the application of the rules by commentators who write about it after the event, there can be no doubt that full consideration was given, as required by the laws of armed conflict, to the advice of legal counsel and the application of the rules.”²² We can probably safely conclude that in Kosovo there was a greater respect for humanitarian normative restraints than would have been the case had the adoption of Protocol I never taken place.

The Weakness of Protocol I and the Need for Reform

The Protocol only offers weak protection for civilians. Here one could easily agree with Peter Rowe, when he argues that the Protocol, when it comes to the test, is very weak in determining what may and what may not be attacked. “It is when civilians are most likely to be placed in danger that Protocol I, designed to protect them, shows its faults.”²³ One reason for this is that the Protocol sets the dividing line between legal and illegal attacks on the basis of military expectations before the attack is commenced. As Rowe states: “At this stage of military operations those planning the attack are at their most optimistic and civilians are at most risk.”²⁴ This criticism mainly relates to the principle of proportionality and the acceptance of collateral damage. An even more important flaw with the Protocol, in this writer’s view, is the wide interpretations of legitimate military objectives that the Protocol harbors. This interpretation flows only indirectly from the text of Article 52, but rather through a perception that the Protocol has codified a liberal customary law regime. The effect is an increased risk of extensive collateral damage.

With regard to Kosovo it has already been indicated that collateral damage was a serious problem, but that the problem was not so much related to

22. James Burger, *International humanitarian law and the Kosovo crisis: Lessons learned or to be learned*, 82 *INTERNATIONAL REVIEW OF THE RED CROSS* 129 (2000).

23. Rowe, *supra* note 19, at 160.

24. *Id.*

violations of IHL standards as it was to the flexible interpretation of the definition of military objectives. Should a reform of IHL be considered to address these matters, one point of departure would be that Additional Protocol I should stand as it is. A revision of the Protocol is neither realistic nor necessary. There is another way to approach the problem.

Suggestions De Lege Ferenda

Rowe suggests a new additional protocol to the 1980 Conventional Weapons Convention. Such an additional protocol would be adapted to the use of air-delivered “smart” weapons and it would introduce the same restrictions on such weapons as now exist with regard to air-delivered incendiary weapons. The relevant formulation would then read as follows:

It is prohibited to make any military objective located within a concentration of civilians the object of attack, except when such military objective is clearly separated from the concentration of civilians, and all feasible precautions are taken with a view to limiting the effects of the attack to the military objective and to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.²⁵

The suggested text almost copies the 1980 restrictions on incendiaries.²⁶ It would be a *lex specialis* for mainly air warfare, overriding the balancing act of the principle of proportionality, a principle that has its main application in air warfare. According to such a *lex specialis*—and rethinking air warfare in history—no buildings in Berlin, Baghdad or Belgrade could be attacked. It is difficult to believe that States would be willing to accept an erosion of the principle of proportionality and give up their military freedom of assessing military advantage against civilian damage. Protocol I has established a sort of balance between military necessity and proportionality and also between proportionality and feasible precautions. It does not seem realistic to expect that States would be willing to renounce the advantages of that approach.

Another problem with the text suggested by Rowe is that it is envisaged as a protocol additional to the 1980 Weapons Convention, although the text only

25. *Id.* at 162.

26. *Cf.* Article 2(3), Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons, annexed to the Convention on Prohibition or Restriction on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137, DOCUMENTS ON THE LAWS OF WAR, *supra* note 1, at 533.

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covers *methods* and not *means* of warfare. It does not (like the other Protocols attached to the Weapons Convention) refer to a specific weapon category, although it may indirectly focus on air-delivered “smart” weapons.

On the other hand, one could imagine another solution. The Independent International Commission on Kosovo has suggested the drafting of an additional protocol III to the Geneva Conventions.²⁷ Such a protocol would not detract from or compete with Protocol I, because the new protocol would have another scope of application. It would be limited to conflicts of an interventionist nature where the intervening side is a coalition enforcing a mandate against a militarily inferior party to the conflict. The coalition would not be fighting for its national security, vital interests or political survival, but for the purpose of limited crisis management. The new protocol would be limited to peace-enforcement operations conducted on behalf of the international community, or other interventions within the framework of regional crisis management, whether they are labeled humanitarian or not. It is important to state that such a new protocol would not address the *jus ad bellum* legality of humanitarian or other interventions (it would not introduce a “Just War” doctrine); it would stick to the traditional IHL method of describing a scope of application based on factual circumstances. In this case the scope of application would be linked to the limited nature of the international armed conflict. Should the State under attack plead self-defense and respond with counter-attacks, thus escalating the level of armed conflict, the limited scope of application of the new protocol would no longer describe the situation accurately and Protocol I would become applicable. In line with this thinking Michael Hoffman, the American Red Cross Officer for International Humanitarian Law, has suggested that we may witness emerging rules for “interventional armed conflict,” for example in peace enforcement operations, whether authorized by the UN Security Council or conducted otherwise by regional organizations.²⁸

The UK Secretary of State for Defence said about the Kosovo air campaign on March 25, 1999 that “This is not a war, it is an operation designed to prevent what everybody recognizes is about to be a humanitarian catastrophe: ethnic cleansing, savagery. . . . That is what we are in there to prevent, that

27. THE INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT, 5, 31, 165–66 (2000).

28. Michael Hoffman, *Peace-enforcement actions and humanitarian law: Emerging rules for “interventional armed conflict,”* 82 INTERNATIONAL REVIEW OF THE RED CROSS 193, 200–203 (2000).

is not war, it is a humanitarian objective very clearly defined as such.”²⁹ Nevertheless, NATO relied on the traditional law of war developed for inter-State armed conflict during the air campaign, including the definition of military objectives and the rules on targeting, proportionality and collateral damage linked to that definition. The liberal definition of military objectives and the generous acceptance of collateral damage are part of a legal regime that envisages a full-scale war. The Geneva Conventions and Additional Protocol I were drafted against the background of World War II and partly with a possible clash between NATO and the Warsaw Pact in mind.

International humanitarian law is built upon a balance between acceptance of military interests on the one hand and humanitarian concerns on the other. NATO’s “no-body-bag policy” showed that this balance was upset in the Kosovo conflict’s limited type of war. NATO could use the liberal definition of military objectives—thus benefiting from the rules favorable to the military interest—while at the same time attacking from such altitudes that humanitarian concerns could not be met. This problem could be addressed in a new protocol for interventional types of conflict, through a sharpening of the definition of military objectives. One could require that only those objectives be attacked which *are* making an effective contribution to military action, or which imminently are about to make such a contribution.³⁰ A requirement of imminence should be added, somewhat along the lines of the famous *Caroline* case. This would protect a number of dual-use objects and increase the protection of the civilian population.

Such a sharpening of the definition of legitimate military objectives would have its consequences with regard to the implementation of the principles of proportionality and feasible precautions. A stricter application of these two principles will follow from a more strict definition of military objectives. A stricter application of the principle of proportionality would somewhat reduce the problem of collateral damage flowing from that principle. The concepts of proportionality and feasible precautions would not themselves need to be sharpened. They would stand as they are today—in all types of international armed conflict. However, in interventionist conflicts a better balance with regard to precautionary measures would result from the suggested change; i.e.,

29. Quoted in Hoffman, *id.* at 195.

30. Cf. the ICRC Commentary to Article 51(5)(b) of Additional Protocol I that the military advantage “should be substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded.” ICRC COMMENTARY, *supra* note 3, ¶ 2209.

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precautionary measures would, as intended by the drafters of Protocol I, genuinely protect civilians on the ground, and not only the attackers flying high.

Although the above suggestion is the main *de lege ferenda* thrust of this paper, it should be mentioned that a further additional protocol could be imagined—a protocol attached to the 1980 Weapons Convention that would explicitly prohibit the use of cluster bombs. This type of multiple sub-munitions affected the civilian population in Kosovo and Serbia on several occasions, often more so than the intended military targets. A protocol on multiple weapons was in fact debated, in the years 1977 – 1980, as a follow-up to Additional Protocols I and II for inclusion in the 1980 Conventional Weapons Convention. But time was not ripe for it then, during the Cold War, and the situation does not seem to have changed that much today. Or has it? During the Kosovo air campaign, after alarming media reports about civilian casualties caused by cluster bombs, some decision-makers reconsidered things. The NATO attack targeted on the Nis airfield on May 7 went wrong. The cluster bomb container opened right away after release from the aircraft, instead of opening over the airfield. As a consequence it projected the sub-munitions into the city of Nis. Following the media coverage of this incident there was a decision by the White House to prohibit the further use of cluster bombs during the conflict. However, this was a unilateral US decision. The British command in London did not follow suit and more cluster bombs were dropped on targets in Serbia and Kosovo in the spring of 1999.

Whether States in the future may in fact be willing to forgo weapons of the cluster bomb type in interventionist types of conflicts is not clear. Further thinking on this issue of means of warfare could perhaps usefully be channeled into the kind of discussion I have tried to promote in this paper, a discussion on the possibilities of increased protections for civilians in conflicts of a limited nature.